COMMENT

SAVING THE ALIEN TORT STATUTE: HOW AMERICAN CORPORATIONS CAN BE HELD ACCOUNTABLE POST-*KIOBEL*

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I. INTRODUCTION

The First Congress of the United States passed the Alien Tort Statute (the "ATS") as part of the Judiciary Act of 1789.[1] The ATS provides that 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."[2] This statute was hardly invoked after it was passed.[3] However, in the 1980s, the ATS was reawakened in the context of international human rights violations.[4] Victims of human rights abuses used the ATS to seek legal remedy in United States courts.[5] Over the years, the ATS soon became a fairly effective tool for remedying human rights abuses.[6] However, in 2013, in *Kiobel v. Royal Dutch Petroleum Co.*, the United States Supreme Court severely limited the manner in which the ATS can

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1. 28 U.S.C. § 1350 (2014); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (2013).

2. 28 U.S.C. § 1350.

3. *Kiobel*, 133 S. Ct. at 1663 (explaining that "the ATS was invoked twice in the late 18th century, but then only once more over the next 167 years").

4. Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-*Kiobel, 102 CALIF. L. REV. 1495, 1497 (2014).

5. *Id.*

6. *See id.*

be invoked.[7] This was extremely disheartening to those victims who were trying to seek justice in United States courts.[8] However, as Justice Kennedy noted in his concurrence in *Kiobel*, "the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]."[9] One of these questions has recently evolved in the circuit courts: whether American companies or corporations can be sued under the ATS for activities occurring wholly outside the United States.[10]

This Comment will address the circuit split over the scope of the ATS with regard to American companies as defendants and ultimately argue that the ATS can be saved and still help those who have been the victims of horrendous human rights violations achieve some form of justice. This Comment will first address the judicial history of the ATS—specifically how the ATS flourished as an avenue for justice and how the ability to obtain ATS jurisdiction was slowly and severely limited by the Supreme Court. This Comment will then address one of the many questions left open by the Supreme Court: Is being an American corporation enough to overcome the presumption of extraterritoriality? Analyzing the circuit split, this Comment argues that a new test—"corporate citizenship plus"—should be used to determine whether the presumption is overcome with the touch and concern test.

II. THE REAWAKENING OF THE ALIEN TORT STATUTE

A. Filartiga v. Pena-Irala

In 1980, after two hundred years of a largely dormant ATS, Dr. Joel Filartiga and his daughter, Dolly Filartiga, used the ATS to bring a claim against Americo Norberto Pena-Irala, an inspector general of the police in Paraguay's capital, for the torture and

7. *See Kiobel*, 133 S. Ct. at 1668–69.

8. Altholz, *supra* note 4, at 1498; *see also A Giant Setback for Human Rights*, N.Y. TIMES (Apr. 17, 2013), http://www.nytimes.com/2013/04/18/opinion/the-supreme-courts-setback-for-human-rights.html?_r=0 ("The Supreme Court's conservatives dealt a major blow Wednesday to the ability of American federal courts to hold violators of international human rights accountable.").

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

10. *See, e.g.*, Doe v. Drummond, 782 F.3d 576 (11th Cir. 2015); Al Shimari v. CACI Premier Tech. Inc., 758 F.3d 516 (4th Cir. 2014); Mujica v. AirScan, Inc., 771 F.3d 580 (9th Cir. 2014) (citing *Kiobel*, 133 S. Ct. at 1664); Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185 (11th Cir. 2014); Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2013).

death of their seventeen-year-old son and brother, Joelito.[11] The Filartigas asserted that Joelito was kidnapped, tortured, and killed because Dr. Joel Filartiga was a vocal and long-time opponent of then-President Alfredo Stroessner and his government.[12] The Filartigas sought criminal action in Paraguay, but their lawyer was arrested, threatened, and disbarred without just cause.[13] In 1978, Dolly Filartiga, who had since moved to the United States, heard that Pena-Irala was also in the United States and initiated the case in the United States courts.[14]

Filartiga was the first time a court addressed the ATS in many years.[15] The issue before the Second Circuit was whether the ATS gave jurisdiction to the Filartigas' claim.[16] The Second Circuit found jurisdiction because torture by state officials of someone in custody violated the law of nations.[17] The law of nations is regarded as customary international law or norms of international law.[18] After examining several sources indicative of customary international law, the court concluded that there was a "clear and unambiguous" prohibition against torture.[19]

The court further stated in its opinion that the ATS does not give "new rights to aliens, but simply open[s] the federal courts for adjudication of the rights already recognized by international law."[20] This argument was bolstered by the court's look at the history of the statute and the Framers' intent.[21] The court interpreted the Framers' intent for the ATS as "their

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

12. *Id.* (noting that on March 29, 1976, Joelito was kidnapped and tortured to death by Americo Norberto Pena-Irala, and that same day, the police brought Dolly Filartiga to Pena-Irala's home, showed her the dead body of her brother, and effectively forced her to stay silent).

13. *Id.*

14. *Id.* at 878–79.

15. *See id.* at 887, n.21 (referencing Adra v. Clift, 195 F. Supp. 857, 865 (D. Md. 1961) (the last case before *Filartiga* to afford jurisdiction based on the ATS)).

16. *Id.* at 880.

17. *Id.*

18. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 714, 728, 730 (2004) (discussing the meaning of "law of nations").

19. *See Filartiga*, 630 F.2d at 880–85 (citing the U.N. Charter, the Universal Declaration of Human Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture, among other treaties and accords, the court found that there is an international agreement against the use of torture); *id.* at 884.

20. *Filartiga*, 630 F.2d at 887.

21. *Id.* at 885–87.

concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world."[22] In fact, Chief Justice Marshall had once written that the law of nations is also part of the law of the United States.[23] By giving jurisdiction to this type of claim, this decision ultimately opened the floodgates for a new type of litigation where victims of human rights abuses abroad could seek legal remedy in United States federal courts.[24] The Second Circuit realized the power of its decision and its importance in human rights law: "Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."[25] At the end of all the litigation, the Filartigas prevailed and won a $10.4 million judgment against Pena-Irala.[26]

B. The Growing Success of the ATS

After *Filartiga*, United States federal courts heard cases involving other human rights abuses that occurred abroad in violation of international law.[27] There were over 150 ATS cases filed alleging a violation of the law of nations.[28] For over twenty years, the ATS continued to develop without input from the United States Supreme Court.[29]

The ATS's scope and reach began to expand as well. The Second Circuit held that private actors could also be held accountable under the ATS.[30] In addition, the D.C. Circuit found

22. *Id.*

23. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815); *Filartiga*, 630 F.2d at 887.

24. *See* Altholz, *supra* note 4, at 1497 ("After Filartiga, the ATS became the most prominent vehicle for bringing legal claims in U.S. courts against state and non-state actors involved in human rights abuses committed outside the United States.").

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

26. Peter Weiss, *On the 35th Anniversary of His Death, Filartiga Lives!*, GUARDIAN (Apr. 4, 2011), http://www.theguardian.com/commentisfree/cifamerica/2011/apr/04/us-constitution-and-civil-liberties-us-supreme-court (noting that the judgment was never actually collected).

27. Altholz, *supra* note 4, at 1516.

28. Roger P. Alford, *Human Rights After* Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1095 (2014).

29. *Id.* at 1095–96.

30. Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995).

that corporations could be held liable under the ATS.[31] While human rights victims received judgments against their abusers, many of these judgments were symbolic because often the abusers did not have the funds to pay the judgments.[32] The ATS, therefore, was mostly used as a way to sue corporations, which have much deeper pockets.[33] Corporations were often sued under the ATS for aiding and abetting foreign governments in committing egregious human rights abuses.[34]

C. The Setback in Sosa

However, in 2004, the ATS reached the United States Supreme Court, and its scope suffered a serious setback.[35] In *Sosa v. Alvarez-Machain*, Humberto Alvarez-Machain brought a claim under the ATS alleging that the Drug Enforcement Administration initiated his abduction from Mexico to the United States for a criminal trial.[36] The Court found that the ATS was only a jurisdictional statute and, furthermore, only gave jurisdiction to a limited group of claims.[37] In its opinion, the Court largely relied on history to limit the ATS's reach.[38] The Court found that it was reasonable to infer that Congress intended the ATS to have a practical effect when it became law, which was to grant jurisdiction for these types of claims, and then the common law would provide a cause of action.[39] The Court also found that Congress's intent for the ATS was to punish "violation[s] of safe conducts, infringement[s] of the rights of ambassadors, and piracy."[40] The 1781 Congress urged states to provide a remedy for these three offenses in a Congressional Resolution.[41] Only one state listened and acted, which led to the inclusion of a remedy for these problems in the form of the ATS in the Judiciary Act.[42] The Court

31. Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011).
32. *See* Altholz, *supra* note 4, at 1522–23.
33. Alford, *supra* note 28, at 1095.
34. *Id.*
35. *Id.* at 1096.
36. Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004).
37. *Id.* at 712.
38. *See id.*
39. *Id.* at 724.
40. *Id.*
41. *Id.* at 716.
42. *Id.* at 717–18.

then applied this historical intent to the modern day: "Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defended with a specificity comparable to the features of the 18th-century paradigms we have recognized."[43]

The Court essentially asserted that the claims under the ATS must parallel the way the original crimes were regarded in the international community.[44] The Court laid out several reasons for doing this. First, common law had developed since 1789, and it tended to resist applying international norms.[45] Second, federal common law had undergone significant development, and essentially there was very little federal common law post-*Erie*.[46] Third, as a policy matter, the Court preferred that the legislature create private rights of action, not the courts.[47] Fourth, if the courts were to create private causes of action for violating international law, then the courts would be encroaching on the power of the executive and legislative branches.[48] Lastly, the Court determined that it did not have any congressional mandate to create new violations of the law of nations.[49] Overall, the history of the ATS and policy led the Court to limit the ATS as a jurisdictional statute for a select category of claims.

While *Sosa* limited the claims that could be brought under the ATS to those that are akin to violation of safe conducts, crimes against ambassadors, and piracy, it did not define what those crimes were.[50] After *Sosa*, courts allowed ATS claims for torture, crimes against humanity, war crimes, and extrajudicial killings, among others.[51] Eventually, the ATS made its way back to the Supreme Court, and, this time, the Justices dealt it a harsh blow.

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43. *Id.* at 725.

44. *See* William R. Castro, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L. REV. 623, 637–38 (2006).

45. *Sosa*, 542 U.S. at 697.

46. *Id.* at 726.

47. *Id.* at 727.

48. *Id.*

49. *Id.* at 728.

50. Altholz, *supra* note 4, at 1516.

51. *Id.*

III. *KIOBEL*: ADDING A HURDLE TO ATS JURISDICTION

A. From One Issue in the Second Circuit to a Different Issue in the Supreme Court

Kiobel's facts developed from the environmental harm to the land of the Ogoni people in Nigeria in the 1990s.[52] Royal Dutch Petroleum Company was exploring and producing oil in Ogoniland, which culminated in serious environmental harm to the area.[53] The Ogoni people began to protest, which provoked a government-led destruction of their people and land.[54] The Nigerian military and police attacked villages and beat, raped, and killed Ogoni people.[55] Property was destroyed and many Ogoni were arrested.[56] Royal Dutch Petroleum was involved because it caused the Nigerian government to respond to the protests in this manner[57] and provided the Nigerian government with aid to do so, including food, transportation, and compensation.[58] Nigerian nationals living in the United States sued Royal Dutch Petroleum under the ATS for aiding and abetting the Nigerian government in violating the law of nations.[59]

When *Kiobel* came before the Second Circuit, the issue was whether corporations could be sued under the ATS for violating international law.[60] The Second Circuit ruled that corporations were not liable under international law; therefore, there was no jurisdiction under the ATS.[61] A circuit split developed on the issue, which brought the case to the Supreme Court.[62] Before the Supreme Court, an unusual occurrence happened. While the case was being heard for oral argument, the Justices started to ask why they were hearing a case about a foreign event involving foreign

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

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1662–63.

58. *Id.*

59. *Id.* at 1662.

60. Kiobel v. Royal Dutch Petroleum, Co., 621 F.3d 111, 124 (2010), *aff'd*, 133 S. Ct. 1659 (2013).

61. *Id.* at 149.

62. *See* Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011) (finding that corporations could be held liable under the ATS).

plaintiffs and a foreign corporation as the defendant.[63] Consequently, the Supreme Court had the parties submit supplemental briefs on the issue of whether and under what circumstances the ATS gives jurisdiction for a claim that occurred outside of the United States.[64] The case was then reheard, and the Supreme Court issued a decision that changed the ATS in a significant manner, but not for the benefit of human rights victims.[65]

B. A New Hurdle: The Presumption of Extraterritoriality

In a relatively short opinion, the Supreme Court applied a presumption of extraterritoriality to the ATS.[66] The Court addressed whether the claim could concern conduct that happened outside of the United States.[67] In applying the presumption of extraterritoriality to the ATS, the Court exercised a form of statutory interpretation often used when there is no suggestion that the statute applies extraterritorially.[68] The Court, as in *Sosa*, once again emphasized the need for judicial restraint when there are foreign policy concerns at stake.[69] To bolster its argument, the Court used the text, history, and purposes of the ATS.[70] The Court first argued that there was nothing in the text of the ATS itself that suggested extraterritorial application.[71] Second, the Court argued that when the ATS was enacted, there were three offenses that were considered violations of the law of nations, as mentioned in the Court's opinion in *Sosa*.[72] Two of these offenses—violations of safe conduct and infringements of the rights of ambassadors—could occur without the conduct

63. *See* Altholz, *supra* note 4, at 1520.

64. *Kiobel*, 133 S. Ct. at 1663.

65. *Id.* at 1668–69.

66. *Id.* at 1664.

67. *Id.*

68. *Id.*

69. *Id.* at 1664–65.

70. *Id.* at 1665.

71. *Id.*

72. *Id.* at 1666; *see* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) ("[T]o assume 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, though we have found no basis to suspect Congress had nay examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.").

taking place abroad.[73] In addition, two instances involving violations of the law of nations that occurred prior to the enactment of the ATS occurred in the United States.[74] With piracy, the Court explained that there were fewer foreign policy consequences since every nation supported the eradication of piracy.[75] On a final note, the Court found no suggestion that the ATS was enacted in order for the United States to become a jurisdiction in which the courts would enforce international norms.[76] While the Court applied a presumption of extraterritoriality to the ATS, at the end of its opinion it suggested that the presumption could be overcome, stating: "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."[77]

C. Other Opinions

Justice Ginsburg, Justice Sotomayor, and Justice Kagan joined Justice Breyer in concurring in the judgment but disagreeing with the Court's reasoning.[78] Justice Breyer's concurring opinion is important because it laid out an approach to the ATS that did not use the presumption of extraterritoriality.[79] Instead, Justice Breyer laid out a multi-factor test to determine jurisdiction under the ATS, asking whether the alleged tort occurred in the United States, whether the defendant is American, or whether the defendant's actions substantially and adversely affected an important American interest.[80] Justice Breyer argued that this approach would coincide with the purpose and history of the statute, international law, and the Court's view in *Sosa*.[81]

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73. *Kiobel*, 133 S.Ct. at 1665.

74. *Id.* at 1665–66.

75. *Id.* at 1667 (Breyer, J., concurring) ("Pirates were fair game . . . because they generally do not operate within a jurisdiction.").

76. *Id.* at 1668.

77. *Id.* at 1669.

78. *Id.* at 1670 (Breyer, J., concurring).

79. *Id.* at 1671.

80. *Id.*

81. *Id.* at 1674–77.

IV. UNANSWERED QUESTIONS AFTER *KIOBEL*: IS BEING AN AMERICAN CORPORATION ENOUGH?

After the Court's decision in *Kiobel*, many scholars felt the ATS was dead.[82] The presumption created was a difficult burden to overcome since many of the cases that were brought under the ATS involved violations that occurred abroad.[83] However, as Justice Kennedy noted in his concurrence, there were many questions about the ATS that the Court left open.[84] The circuit courts are currently wrangling over these questions.[85] Specifically, questions remain about how to overcome the presumption of extraterritoriality and what facts are sufficient to overcome it—especially when the defendant is an American corporation. What is considered touching and concerning? What qualifies as sufficient force? Is being an American corporation enough? Does being an American corporation touch and concern the United States with sufficient force? The circuit courts are answering these questions in different ways.[86]

A. The Circuit Split

In the post-*Kiobel* era, the circuit courts have applied the presumption of extraterritoriality in various ways with regard to American corporations.[87] The Second Circuit has found a corporation's citizenship irrelevant, while the Eleventh Circuit has

82. Gwynne L. Skinner, *Beyond* Kiobel*: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-*Kiobel*) World*, 46 COLUM. HUM. RTS. L. REV. 158, 199 (2014).

83. *Id.*

84. *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring) ("In [other disputes outside the TVPA and the Court's decision] the proper implementation of the presumption against extraterritoriality application may require further elaboration and explanation.").

85. *See* Al Shimari v. CACI Premier Technology, Inc., 758 F.3d 516 (4th Cir. 2014); *see also* Doe v. Drummond Co., 782 F.3d 576 (11th Cir. 2015); Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014); Doe I v. Nestle USA, Inc., 776 F.3d 103 (9th Cir. 2014).

86. *See generally Doe*, 782 F.3d 576 (ruling that the district court's order to vacate was not an abuse of discretion, even though it would have been permissible to accept the plaintiff's ATS claim); *Mastafa*, 770 F.3d 170 (holding that domestic contacts are the most necessary key in a touch and concern analysis and that the conduct must violate international law); *Al Shimari*, 758 F.3d 516 (holding that the plaintiff's claims sufficiently touched and concerned the United States and overcame the presumption of extraterritoriality); *Doe I*, 766 F.3d 103 (declining to refine the *Kiobel* touch and concern test).

87. *See Doe*, 782 F.3d 576; *Mastafa*, 770 F.3d 170; *Al Shimari*, 758 F.3d 516; *Doe I*, 766 F.3d 103.

wavered on the issue.[88] In *Balintulo v. Daimler*, the Second Circuit analyzed jurisdiction under the ATS in light of the *Kiobel* decision.[89] The plaintiffs in *Balintulo* were victims of the apartheid in South Africa and brought a suit under the ATS against Daimler AG, Ford Motor Company, and IBM for aiding and abetting the South African government in committing violations of customary international law—including torture and extrajudicial killings—by selling cars and computers to the South African government.[90] The Second Circuit interpreted *Kiobel* in the most limiting way for the ATS,[91] finding that if the relevant conduct occurred abroad, then there was simply no jurisdiction under the ATS.[92] The court referred to what has become known as the "touch and concern" test as mere dicta.[93] The Second Circuit found that with the presumption of extraterritoriality, the only thing that matters is where the relevant conduct occurred; thus, the citizenship of the defendants or the plaintiffs is irrelevant.[94]

The Eleventh Circuit, in *Cardona v. Chiquita*, also found the citizenship of the corporate defendant to be irrelevant.[95] The plaintiffs in *Cardona* alleged that Chiquita, an American corporation, assisted paramilitary forces in Colombia with torture and other acts that resulted in injury and death.[96] In analyzing the case in light of the then-recent *Kiobel* decision, the Eleventh Circuit found that the presumption of extraterritoriality applied and that the fact that the defendant was an American corporation did not overcome the presumption.[97] The court noted that the defendant in *Kiobel* was not an American corporation but was present in the United States.[98] In so noting, the Eleventh Circuit recognized that the Supreme Court declared that corporations

88. *Compare* Balintulo v. Daimler AG, 727 F.3d 174, 189 (2nd Cir. 2013), *with* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189 (11th Cir. 2014), *and Doe*, 782 F.3d at 595.

89. *Balintulo*, 727 F.3d at 179.

90. *Id.* at 179–80.

91. *Id.* at 189, 192–93.

92. *Id.* at 189–90.

93. *Id.* at 190.

94. *Id.* at 194; *see also* Mastafa v. Chevron Corp., 770 F.3d 170, 188–89 (2d Cir. 2014) (arguing that the "full focus" of the ATS is where the relevant conduct took place).

95. Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189 (11th Cir. 2014).

96. *Id.* at 1188.

97. *Id.* at 1189.

98. *Id.*

may be present in many countries and "it would reach too far to say that mere corporate presence suffices."[99] The Eleventh Circuit acknowledged the touch and concern exception to the presumption of extraterritoriality but found that the conduct at issue occurred outside the United States; therefore, the presumption was not overcome.[100]

In *Doe v. Drummond*, the Eleventh Circuit reaffirmed its focus on where the relevant conduct took place.[101] However, the Eleventh Circuit changed its position on citizenship.[102] In its opinion, the Eleventh Circuit noted that the defendant's citizenship or corporate status is relevant but does not confer jurisdiction on its own.[103]

Conversely, the Fourth Circuit and the Ninth Circuit have found the corporate defendant's citizenship relevant, but have required additional connections to the United States to satisfy ATS jurisdiction.[104] The Fourth Circuit concluded that there was jurisdiction under the ATS in *Al-Shimari v. CACI* for a suit against an American company for activities occurring wholly outside the United States.[105] The plaintiffs in *Al-Shimari* alleged torture of foreign nationals in an Abu Ghraib Iraqi prison.[106] Several factors led the court to conclude that it had jurisdiction under the ATS, including the corporate citizenship of the defendant and the American citizenship of the plaintiffs, among others.[107]

The Ninth Circuit has indicated that it will side with the Fourth Circuit.[108] In *Doe v. Nestle*, the plaintiffs were allowed to file an amended complaint against American companies under the ATS.[109] In its order, the Ninth Circuit stated that corporations could face liability under the ATS according to current law, referring to the end of the *Kiobel* opinion that suggested that the

99. *Id.*

100. *Id.* at 1191.

101. Doe v. Drummond, 782 F.3d 576, 592 (11th Cir. 2015).

102. *Id.* at 595.

103. *Id.*

104. Al Shimari v. CACI Premier Tech. Inc., 758 F.3d 516, 530 (4th Cir. 2014); Mujica v. AirScan, Inc., 771 F.3d 580, 594 (9th Cir. 2014).

105. *Al Shimari*, 758 F.3d at 530.

106. *Id.* at 520.

107. *Id.* at 530.

108. Mujica v. AirScan, Inc., 771 F.3d 580 (9th Cir. 2014); Doe I v. Nestle USA, Inc., 738 F.3d 1048 (9th Cir. 2013).

109. *Doe I*, 738 F.3d at 1049.

presumption of extraterritoriality can be overcome.[110] In *Mujica v. AirScan, Inc.*, the Ninth Circuit noted that the fact that the defendants are United States corporations alone does not overcome the presumption.[111] Since the defendant's only connection to the United States in the case was its corporate citizenship, the ATS claims were dismissed.[112]

B. Back to the Supreme Court Again

Cardona recently reached the docket of the United States Supreme Court.[113] However, the Supreme Court denied certiorari on April 20, 2015.[114] Other related cases have petitioned for certiorari to the Supreme Court.[115] There are several very important reasons why the Supreme Court should grant certiorari on this issue soon. First, many of these human rights violations that occur abroad take place in war-torn countries, countries dominated by a corrupt government, or countries without a functioning system of justice.[116] The ATS provides a way for victims of human rights abuses to obtain justice and jurisdiction in a stable court system.[117] In essence, the stability of the United States court system at least gives victims hope for justice.[118]

Second, the *Kiobel* court gave little direction and an enormous amount of discretion to the circuit courts.[119] This resulted in varying interpretations of *Kiobel* by the circuit courts that, for the most part, were not in favor of human rights victims.[120] When it comes to American corporations, only the

110. *Id.*

111. *Mujica*, 771 F.3d at 594.

112. *Id.*

113. Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185 (11th Cir. 2014), *petition for cert. filed*, (U.S. Dec. 30, 2014) (No. 12-14898).

114. *Cardona*, 760 F.3d 1185, *cert. denied*, 135 S. Ct. 1842 (2015).

115. Doe I v. Nestle USA, Inc., 766 F.3d 1013 (9th Cir. 2014), *petition for cert. filed*, (U.S. Sept. 21, 2015) (No. 15-349); Mujica v. AirScan, Inc., 771 F.3d 580 (9th Cir. 2014), *petition for cert. filed*, (U.S. Sept. 8, 2015) (No. 15-283).

116. Skinner, *supra* note 82, at 163–64.

117. *See id.* at 265.

118. *See id.* at 172.

119. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (Kennedy, J., concurring) (noting that the majority opinion left many questions open concerning the scope of the ATS).

120. *See supra* Part IV.A.

Fourth Circuit has found jurisdiction under the ATS.[121] If American corporations are not held accountable under the ATS, then the purpose and intent of the ATS is severely frustrated. Thus, the Supreme Court should grant certiorari on this issue to resolve the circuit split. More importantly, the Supreme Court should resolve the circuit split in a way that honors the precedent set in *Kiobel*, keeps the purpose of the ATS alive, and holds American corporations accountable for their actions abroad.

V. RESOLVING THE CIRCUIT SPLIT

A. Misconstruing Kiobel

The Second Circuit, in *Balintulo*, and the Eleventh Circuit, in *Cardona*, both interpreted how the presumption of extraterritoriality functions differently,[122] but both circuits found the fact that the defendant was an American corporation irrelevant to the *Kiobel* analysis.[123] Accordingly, both circuits misinterpreted *Kiobel*.[124]

In *Balintulo*, the Second Circuit interpreted *Kiobel* as excluding all claims under the ATS that occurred outside the United States.[125] If any violation of the law of nations occurred outside the United States, the claim could not be brought under the ATS.[126] The Second Circuit noted that the *Kiobel* Court "expressly held" this, that the majority presented the question this way three times, and that the majority examined the location of the alleged conduct at least eight times in its opinion.[127] However, quantity does not overcome the fact that the majority stated at the end of its opinion that the presumption could be overcome.[128]

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

122. *See, e.g.*, Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015); Balintulo v. Daimler AG, 727 F.3d 174, 189 (2d Cir. 2013).

123. *See, e.g.*, *Al Shimari*, 758 F.3d 516.

124. *See* 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, 367 (2011); *see* Maria Theophila, *"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, 2862 (2011).

125. *Balintulo*, 727 F.3d at 189.

126. *Id.*

127. *Id.* at 189–90.

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

The language is worth repeating here: "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."[129] The Supreme Court clearly suggested that the presumption could be "displaced."[130] However, the Second Circuit mentioned, in *Balintulo*, that this was mere dicta.[131] But, how can this be dicta when the language clearly suggests that the presumption can be overcome? It is not dicta. The Supreme Court put this at the end of the majority opinion—a point of emphasis—and thereby developed a test to overcome the presumption: the presumption can be overcome if the claims (1) touch and concern the United States (2) with sufficient force.[132] The touch and concern test is a means to overcome the presumption, not mere dicta. The Second Circuit's interpretation foreclosed any claims under the ATS that occurred outside the United States, which would render most claims under the ATS invalid, thereby rendering the ATS ineffective.

In *Cardona*, the Eleventh Circuit properly interpreted *Kiobel* and found that the presumption of extraterritoriality can be overcome with the touch and concern test.[133] However, the Eleventh Circuit misconstrued corporate presence with corporate citizenship to find that corporate citizenship is irrelevant in overcoming the presumption.[134] The Eleventh Circuit argued that, in *Kiobel*, the corporations were not United States corporations but were present in the United States.[135] With regard to this, the *Kiobel* Court stated that corporations were often in many countries and that corporate presence was not enough.[136] However, the case before the Eleventh Circuit involved an American corporation headquartered and incorporated in the United States.[137] The

129. *Id.*

130. *Id.*

131. *Balintulo*, 727 F.3d at 190–91.

132. *Id.*

133. Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1191 (11th Cir. 2014) (noting that the *Kiobel* court "made it clear that such exception could occur only, if at all," when the touch and concern test was met).

134. *See id.*; *see also* Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from* Kiobel*'s "Touch and Concern" Test*, 66 HASTINGS L.J., 443, 457–58 (2015).

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

136. *Id.*

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

corporations in *Kiobel* were foreign corporations.[138] Using the reasoning concerning corporations from *Kiobel*, the Eleventh Circuit conflated corporate presence with corporate citizenship.[139] The Eleventh Circuit applied the *Kiobel* Court's reasoning that corporate presence was not enough to overcome the presumption to corporate citizenship.[140] A corporation in America, though, has greater impact on the United States than mere corporate presence. Because the Eleventh Circuit incorrectly applied *Kiobel's* discussion of corporate presence, it found that corporate citizenship should not be considered when determining whether the presumption of extraterritoriality is overcome.[141] As the dissenting judge argued, a corporation's United States headquarters and incorporation in the United States should be considered as factors that can overcome the presumption.[142]

However, in *Doe v. Drummond*, the Eleventh Circuit, while not explicitly overruling *Cardona*, noted that the corporate citizenship of the defendant was relevant because a foreign defendant was no longer being hailed into United States court and acts of United States citizens—even if they occurred outside the United States—affected other United States citizens.[143] The Eleventh Circuit's change in position further demonstrates the circuit split over issues of conduct occurring outside the United States involving a United States corporation, which the majority opinion itself recognized.[144] The Supreme Court needs to address the issue since the circuit courts are interpreting *Kiobel* in various and conflicting ways.

B. Dealing with Precedent: The Case for Keeping the Presumption

While the presumption of extraterritoriality seriously limited the use of the ATS, the *Kiobel* Court's precedent should be honored. There are two main reasons why the presumption should be retained.

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138. *Id.* at 1189.
139. *See* Doyle, *supra* note 134.
140. *Cardona*, 760 F.3d at 1189.
141. *Id.*
142. *Id.* at 1192. (Martin, J., dissenting).
143. Doe v. Drummond, 782 F.3d 576, 595 (11th Cir. 2015).
144. *Id.* at 586–92.

First, the Supreme Court is generally reluctant to overturn precedent.[145] It is unlikely that the Supreme Court would overturn *Kiobel* completely. Furthermore, the ATS can still be an effective statute with the presumption of extraterritoriality. Justice Breyer's concurrence argues that there should be no presumption of extraterritoriality.[146] He instead argues that jurisdiction under the ATS can arise from one of several factors: whether the conduct occurred in the United States, whether the defendant is American, or whether the conduct "substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."[147] While Justice Breyer argues against the presumption, these same factors can be used to overcome the presumption.[148] Thus, Justice Breyer's concurrence can still be reconciled with the presumption. Having the presumption does not foreclose ATS jurisdiction because it can be overcome.

Second, keeping the presumption prevents the federal courts from hearing foreign cases with no connection to the United States. The underlying concern in *Kiobel* that the presumption addresses is the danger of the judiciary dictating foreign policy—an area reserved for the political branches.[149] This concern also led the Court to limit the type of claims brought under the ATS in *Sosa*: "the potential implications for foreign relations . . . recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[150] In addition, the *Kiobel* Court found no indication that the ATS intended United States courts to enforce all international norms.[151] The presumption of extraterritoriality in essence functions as a gatekeeping tool for ATS claims. The presumption

145. Jeffrey A. Segal & Robert M. Howard, *How Supreme Court Justices Respond to Litigant Requests to Overturn Precedent*, 85 JUDICATURE 148, 157 (2001).

146. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring).

147. *Id.*

148. *See infra* Part V.C.

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

150. Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

151. *Kiobel*, 133 S. Ct. at 1668.

keeps out cases that are completely foreign matters and prevents the judiciary from making foreign policy—a job that is reserved for the political branches. However, the presumption should manifest in a way that does not bar all ATS claims. It should function to let in claims that involve the United States, even if the alleged conduct occurred abroad.

While the presumption of extraterritoriality should be honored as precedent, it should be overcome to allow ATS claims. The Second Circuit's characterization of the touch and concern language in *Kiobel* as dicta is incorrect.[152] The Court would not have created a presumption that would bar all claims arising under the ATS. This would render the ATS ineffective, and Congress, even the First Congress, would not pass a statute intended to have no effect.[153] Thus, the touch and concern test allows the presumption to be overcome.[154] While the *Kiobel* Court established that the presumption could be overcome using the touch and concern test, the circuit courts are grappling with how to meet this test.[155]

C. Overcoming the Presumption: Corporate Citizenship Plus

The Fourth Circuit, in *Al-Shimari*, found that the presumption can be overcome using the touch and concern test.[156] The Fourth Circuit interpreted the language in *Kiobel* concerning the touch and concern test as suggesting that the courts should consider all facts to determine whether the claims touch and concern the United States with sufficient force.[157] These facts include the parties' relationship to the claims and the parties' identities.[158] In the end, the Fourth Circuit found that a number

152. *See supra* Part V.A (explaining how the Second Circuit in *Balintulo* mischaracterized the displacement language in *Kiobel* as dicta because the Supreme Court emphasized that the presumption can be overcome); *see also Kiobel*, 133 S. Ct. at 1669.

153. Williamson v. United States, 512 U.S. 594, 614 (1994) (Kennedy, J., concurring) (explaining that there is a presumption that Congress does not pass statutes that have no or little effect).

154. *See infra* Part V.C.

155. *See* Katherine M. Davis, Comment, *I, Too, Sing America: Customary International Law for American State and Federal Courts' Post-*Kiobel *Jurisprudence, Guided by Australian and Indian Experiences*, 29 EMORY INT'L L. REV. 199, 140–41 (2014).

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

157. *Id.* at 527.

158. *Id.*

of facts led to the conclusion that the claims had jurisdiction under the ATS: (1) the corporation was American, (2) the employees were American and the claims were based on their conduct, (3) the contract with the interrogators was made in the United States, and (4) the corporation allegedly attempted to cover up the actions.[159] The Fourth Circuit found that corporate citizenship, along with other factors, overcame the presumption against extraterritoriality.[160] In addition, *Doe v. Drummond* and *Mujica v. AirScan, Inc.* suggest that corporate citizenship alone will not confer jurisdiction under the ATS.[161]

The Fourth Circuit's interpretation and application of *Kiobel* is a more effective way of interpreting the ATS. By allowing the presumption to be overcome, the ATS is still a functioning statute that can help remedy human rights abuses that occur abroad. Using *Al-Shimari* as a springboard, the proper way to determine what claims touch and concern the United States with sufficient force is through "corporate citizenship plus." Corporate citizenship plus analysis considers whether the corporation's citizenship is American and whether there is some other factor that connects the conduct to the United States in determining whether the claim touches and concerns the United States with sufficient force. In other words, if it is an American corporation and there is some other factor that connects the conduct to the United States, then the presumption against extraterritoriality is overcome. Essentially, this is what the Fourth Circuit decided in *Al-Shimari*: the Fourth Circuit found that the corporation was an American citizen and that there were other factors that connected the conduct to the United States.[162] Corporate citizenship plus, however, only requires one extra factor, in addition to corporate citizenship, that connects the conduct to the United States. This lower standard allows for more claims to receive ATS jurisdiction without disturbing the presumption of extraterritoriality. It also appeases those, such as the majority of judges on the Eleventh and Ninth Circuits, who believe that the corporation's American

159. *Id.* at 530–31.

160. *Id.*

161. Doe v. Drummond, 782 F.3d 576, 595 (11th Cir. 2015); Mujica v. AirScan, Inc., 771 F.3d 580, 594 (9th Cir. 2014).

162. *Al Shimari*, 758 F.3d at 530–31.

citizenship is not enough to overcome the presumption.[163] Corporate citizenship plus requires slightly more than mere American corporate citizenship. It requires evidence beyond corporate citizenship that links the United States and the conduct abroad.

Broken down, corporate citizenship plus analysis is the best way to determine whether a claim satisfies the touch and concern test. If the corporation's citizenship is American, then the claim touches and concerns the United States. The fact that the corporation is a United States citizen that has allegedly committed abuses abroad touches and concerns the United States. Requiring another factor that connects the conduct to the United States would satisfy whether the claim touches and concerns the United States with sufficient force. In other words, if the "plus" is satisfied, then the sufficient force part of the touch and concern test is satisfied. The "plus" part of corporate citizenship plus is intended to apply broadly and to only require one plus factor. For example, plus factors would include whether American employees of the corporation were involved in the alleged conduct and whether decisions concerning the conduct were made in the corporation in America. These facts need not be proven; alleged facts suffice, as in *Al-Shimari*, where the corporation was alleged to cover up the conduct.[164]

Using corporate citizenship plus would give ATS jurisdiction to the plaintiffs' claims in *Cardona*.[165] Chiquita is a corporation with American citizenship.[166] In addition, the plaintiffs alleged that Chiquita "participated in a campaign of torture and murder in Columbia by reviewing, approving, and concealing a scheme of payments and weapons shipments to Colombian terrorist organizations, all from their corporate offices in the territory of the United States."[167] This allegation is the plus factor. Therefore, using corporate citizenship plus, the touch and concern test is satisfied, the presumption of extraterritoriality is overcome, and the plaintiffs in *Cardona* have jurisdiction under the ATS for their claims.

163. *See Doe*, 782 F.3d at 595; *see also Mujica*, 771 F.3d at 594.

164. *Al Shimari*, 758 F.3d at 531.

165. Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189 (11th Cir. 2014).

166. *Id.*

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

Corporate citizenship plus should be the standard used to determine whether the touch and concern test is satisfied because it would reconcile precedent, policy, and history, while still allowing victims of human rights abuses to seek justice against corporations. First, corporate citizenship matters because justice requires that American corporations be held liable for illegal conduct abroad, especially in the form of human rights abuses. Second, the presumption is still applied, honoring the precedent set in *Kiobel*.[168] Third, corporate citizenship plus honors the Supreme Court's reluctance to dictate foreign policy.[169] The Supreme Court has limited the ATS twice, in *Sosa* and in *Kiobel*, partially based on the reluctance for the judiciary to interfere in foreign policy matters.[170] Corporate citizenship plus is a fact-based inquiry, leaving foreign policy matters aside. Furthermore, corporate citizenship plus keeps a purely foreign case, like *Kiobel*, out of United States courts but gives jurisdiction to cases that should be heard under the ATS. Lastly, corporate citizenship plus would keep the purpose of the ATS alive. Passed by the First Congress, the purpose of the ATS was to make the United States a strong part of the international community.[171] As noted in *Filartiga*, the Framers' intent for the ATS was "their concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world."[172] By holding American corporations accountable for human rights abuses committed abroad, the United States retains its commitment under the ATS to bring justice to those who suffered a violation of the law of nations.

VI. CONCLUSION

In this post-*Kiobel* world, the ATS can still be a way for victims of international human rights abuses to achieve justice. Many of these victims have nowhere else to go, and the United States court system can provide a stable avenue of justice. While *Kiobel* severely limited the use of the ATS, it left many questions

168. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).
169. *Id.* at 1669 (noting the danger of the judiciary dictating foreign policy).
170. *See id.* at 1668; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).
171. Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).
172. *Id.*

regarding the scope of the ATS unanswered.[173] One of these questions was whether American corporate citizenship overcomes the presumption of extraterritoriality applied in *Kiobel*. A circuit split developed on the issue,[174] and the United States Supreme Court should resolve the split in a way that is favorable to victims: corporate citizenship plus. This standard will honor the precedent set in *Kiobel* while giving jurisdiction to claims under the ATS in light of the purpose of the statute. The dissenting Judge in *Cardona* best summarized the importance of this issue:

> I do not read *Kiobel* to be an impediment to providing a remedy to civilians harmed by a decades-long campaign of terror they plainly allege to have been sponsored by an American corporation . . . By failing to enforce the ATS under these circumstances, I fear we disarm innocents against American corporations that engage in human rights violations abroad. I understand the ATS to have been deliberately crafted to avoid this regrettable result.[175]

The Supreme Court must give guidance on this issue and find that American corporations can be held accountable post-*Kiobel* because, for victims, if nothing is done, "[t]here is nowhere else they can go for justice."[176]

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

174. *See supra* Part IV.A.

175. Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1195 (11th Cir. 2014) (Martin, J., dissenting).

176. *Court Throws Out Chiquita Terror Payment Claims*, YAHOO NEWS (July 24, 2014, 5:16 PM), http://news.yahoo.com/us-court-throws-chiquita-terror-payment-claims-185023732.html#.