

The Evidence of Things Not Seen: Divining Balancing Factors from *Kiobel*'s “Touch and Concern” Test

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*The long awaited Supreme Court decision in *Kiobel v. Royal Dutch Petroleum* raised the bar for human rights plaintiffs seeking redress under the Alien Tort Statute (“ATS”), a statute which provides jurisdiction in U.S. district courts for foreign nationals alleging a tort in violation of customary international law. Prior to *Kiobel*, the typical ATS case alleged atrocities against corporate actors based upon events that occurred largely, if not entirely, outside of the United States. In *Kiobel*, however, the Supreme Court held that the presumption against extraterritoriality applied to the ATS and that this presumption precludes claims brought pursuant to the statute unless they “touch and concern” the United States sufficiently to overcome the presumption. The Court, though, did not define “touch and concern,” implicitly inviting lower courts to do so.*

*This Article suggests that courts determine that a claim touches and concerns the United States pursuant to a multifactor balancing test drawn from inferences in the *Kiobel* majority opinion, stated preferences in Justice Breyer’s concurring opinion, and international jurisdictional norms more broadly. Despite *Kiobel*’s arrival, judges, advocates, and litigants now await clarification on the meaning of its “touch and concern” test. This Article endeavors to provide a cogent and practical interpretation.*

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INTRODUCTION

The second of the certified questions was straightforward: “[W]hether and under what circumstances courts may recognize a cause of action under the [Alien Tort Statute (“ATS”)], for violations of the law of nations occurring within the territory of a sovereign other than the United States.”¹ But, in answering that question in *Kiobel v. Royal Dutch Petroleum Co.*,² the Supreme Court largely demurred, leaving the teeming masses to wonder precisely “under what circumstances” the ATS applies to extraterritorial harm.³ The ATS states, *in toto*, “[t]he

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

2. There, several Nigerians sued Royal Dutch Petroleum Co., a Dutch corporation, Shell Transport and Trading Company, P.L.C., a British corporation, and Shell Petroleum Development Company of Nigeria, Ltd. (“SPDC”), a Nigerian corporation, in the U.S. District Court for the Southern District of New York, asserting jurisdiction under the ATS, for, allegedly, aiding and abetting the Nigerian government in killing, raping, torturing, and otherwise abusing residents of Nigeria’s Ogoniland, a region near the Niger Delta. *Id.* at 1662–63. The plaintiffs contended that the defendants’ actions were in response to protests in that region against the SPDC for environmental degradation. *Id.* at 1662. The plaintiffs further alleged that the defendants provided the government with the means to accomplish the attacks, including compensation, transportation, and food. *Id.* at 1662–63. The district court dismissed claims based upon allegations that did not seem to be customary international law violations but did not dismiss all claims. *Id.* at 1663. On appeal, the U.S. Court of Appeals for the Second Circuit dismissed plaintiffs’ complaint in its entirety on the ground that corporations cannot be sued pursuant to the ATS. *Id.* (citing *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010)).

3. *Id.* at 1663; *Tymoshenko v. Firtash*, No. 11-CV-2794 (KMW), 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013) (noting that “the Court failed to provide guidance regarding what is necessary to satisfy the ‘touch and concern’ standard”).

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.”⁴ The public receives little guidance in knowing that this statute only applies to foreign conduct if the claim that emerges from the conduct “touch[es] and concern[s]”⁵ the United States “with sufficient force to displace the presumption against extraterritorial[ity],”⁶ as the Court opined in a coda.⁷ The Court did not define this “touch and concern” test⁸ but implicitly invited lower courts to do so.⁹ It did suggest, however, that if “relevant conduct”¹⁰ concerning the claim brought pursuant to the ATS took place in the United States, that conduct would satisfy the touch and concern test.¹¹ The Court, however, did not define relevant conduct.

This Article submits that courts should use a multifactor balancing test to determine whether a claim touches and concerns the United States. The proposed factors—drawn from inferences in the *Kiobel*

4. 28 U.S.C. § 1350 (2014). The ATS was enacted in 1789 as a part of the First Judiciary Act to provide jurisdiction over the customary international law violations then recognized; for example, “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Kiobel*, 133 S. Ct. at 1666 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004)); see Curtis A. Bradley, *State Action and Corporate Human Rights Liability*, 85 NOTRE DAME L. REV. 1823, 1823–25 (2010).

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

6. *Id.* The presumption against extraterritoriality is a canon of statutory construction. *Id.* at 1664. It means simply that if the relevant statute does not clearly speak to its extraterritorial application, “it has none.” *Id.* (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)). In *Kiobel*, the Supreme Court observed that “[t]he presumption against extraterritoriality guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.” *Id.* at 1669.

7. *Id.*

8. See *id.* at 1669 (Kennedy, J., concurring) (“Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the [Torture Victim Protection Act (“TVPA”)] nor by the reasoning and holding of today’s case; and in those disputes *the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.*” (emphasis added)); *id.* (Alito, J., concurring) (“This formulation obviously leaves much unanswered”); *id.* at 1673 (Breyer, J., concurring) (The Court “leaves for another day the determination of just when the presumption against extraterritoriality might be ‘overcome.’” (quoting *id.* at 1666)); Sarah H. Cleveland, *The Kiobel Presumption and Extraterritoriality*, 52 COLUM. J. TRANSNAT’L L. 8, 20 (2013) (“Returning now to that final paragraph of the majority opinion, we again ask what that test requires.”); David H. Moore, *Kiobel and the New Battle Over Congressional Intent*, in AGORA: REFLECTIONS ON KIOBEL e-9, e-10 (Am. Soc’y of Int’l Law ed., 2014) (“It will take time to flesh out what it means to ‘touch and concern the territory of the United States . . . with sufficient force.’”); Ralph G. Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 AM. J. INT’L L. 841, 842 (2013) (stating *Kiobel* “gives precious little guidance to the lower courts as they struggle to determine which allegations will overcome the new presumption and which will not”).

9. One commentator has observed that this uncertainty “will likely result in far fewer [ATS] cases being pursued in U.S. federal courts.” Andrew Sanger, *Corporations and Transnational Litigation: Comparing Kiobel with the Jurisprudence of English Courts*, in AGORA: REFLECTIONS ON KIOBEL, *supra* note 8, at e-23, e-24.

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

11. *Id.*

majority opinion, suggestions from Justice Breyer's concurring opinion that expressly contemplate international jurisdictional norms, and international jurisdictional norms more broadly—are:

1. the location of the alleged law of nations violation;
2. the location of other alleged relevant conduct;
3. the nationality of the defendant;
4. the demands of international comity;
5. the likelihood that denial of subject matter jurisdiction could reasonably result in the United States harboring a human rights violator; and
6. any other American national interest that supports the recognition of ATS subject matter jurisdiction.

This Article seeks to provide a cogent and practical test to determine when the ATS applies to extraterritorial conduct.

The ATS is, at least operatively, a human rights statute.¹² Whether one deems its proper application domestic, extraterritorial, or both, it is undeniable that, at its drafting, Congress had “‘foreign matters’ in mind.”¹³ Those matters concerned, in part, violations of customary international law, that body of law recognized today as a source for international human rights standards.¹⁴ Congress has at no time acted to limit or annul the statute.¹⁵ While, in *Kiobel*, the Court delimited the activity that the statute reaches, it did nothing to alter the extant understanding of the statute's purpose: “to provide compensation for those injured by today's pirates.”¹⁶ What remains is the only statute of its kind in the country (and, indeed, the world) because it has the potential to provide an “alien” with a civil remedy from a U.S. court based upon a variety of customary international law violations committed by a foreign

12. *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 843 (9th Cir. 2008) (en banc) (observing that the ATS is a “statute that provides jurisdiction in United States courts for violations of international human rights norms that are specific, universal, and obligatory”) (citation omitted); *see also Balintulo v. Daimler AG*, 727 F.3d 174, 179 (2d Cir. 2013) (noting that the ATS is “a statute, passed in 1789, that was rediscovered and revitalized by the courts in recent decades to permit aliens to sue for alleged serious violations of human rights occurring abroad”); Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 601 (2013) (noting that “the ATS . . . has become the main engine for transnational human rights litigation in the United States”).

13. *Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring). It seems unquestionable that this is the case given the impulse behind Congress's enactment of the statute—concern about providing legal redress to foreigners harmed in the United States and concomitant concern about foreign policy implications in the event of congressional inaction. *See id.* at 1666.

14. *See* William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 22 (2007) (recognizing that over time “new rules of customary international law emerged in areas like human rights”).

15. *Kiobel*, 133 S. Ct. at 1677 (Breyer, J., concurring) (“Congress . . . has not sought to limit the statute's jurisdictional or substantive reach.”).

16. *Id.* at 1673 (stating that the ATS's “basic purpose” is to “compensat[e] those who have suffered harm at the hands of, for example, torturers or other modern pirates”).

national and occurring in the territory of a sovereign other than the United States.¹⁷

This Article proposes that courts give full force to the statute's terms as permitted by *Kiobel*, and not reactively assume even that a "foreign-cubed" case (a case with solely foreign plaintiffs and defendants and injury in a foreign country) cannot itself have sufficient U.S. features to displace the presumption against extraterritoriality.¹⁸ Such an approach would be consistent with international jurisdictional norms, which Justice Breyer, at least, professed a desire to uphold. International jurisdictional norms recognize the propriety of courts exercising prescriptive jurisdiction,¹⁹ subject to reasonableness,²⁰ in a variety of

17. Pierre N. Leval, *The Long Arm of International Law*, FOREIGN AFF., Mar.–Apr. 2013, at 16, 16 ("The ATS offers victims of abuse a rare tool in their fight for justice; the United States remains the only country in the world to entertain such lawsuits."); see also Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*, 107 AM. J. INT'L L. 852, 854–55 (2013) (discussing the similarities and differences between the ATS and relevant European law, including the Brussels I Regulation, which allows for the bringing of a tort suit by a non-national against European Union ("EU") companies, provided that the events that gave rise to the tort occurred on EU soil). While somewhat similar to the ATS, the TVPA, the companion statute to the ATS, provides a cause of action for an individual against an individual acting "under actual or apparent authority, or color of law, of any foreign nation," only for extrajudicial killing and torture. 28 U.S.C. § 1350 note (2014). The ATS has broader application. See *infra* pp. 478–79. The claim brought pursuant to the ATS, however, must satisfy *Sosa*'s requirement that the relevant customary international law be specific and universally respected. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 732 (2004).

18. See Jonathan Hafetz, *Human Rights Litigation and the National Interest: Kiobel's Application of the Presumption Against Extraterritoriality to the Alien Tort Statute*, 28 MD. J. INT'L L. 107, 108 (2013) ("ATS litigation can promote U.S. interests even in 'foreign-cubed cases,' where both parties are foreign nationals and the alleged wrongful conduct takes place abroad."); David L. Sloss, *Kiobel and Extraterritoriality: A Rule Without a Rationale*, 28 MD. J. INT'L L. 241, 244 (2013) ("[T]he universality principle authorizes states to exercise jurisdiction extraterritorially in cases like *Kiobel*. Therefore, insofar as the Supreme Court wants to preclude application of the ATS to foreign-cubed cases, it cannot legitimately invoke an international law rationale to justify that outcome."); see also Ralph G. Steinhardt, *Kiobel and the Multiple Futures of Corporate Liability for Human Rights Violations*, 28 MD. J. INT'L L. 1, 23 (2013) ("Foreign-cubed cases against corporations that fit the *Kiobel* mold are barred, but the Court's analysis . . . suggest[s] that foreign-cubed actions against individual human beings—as in *Filártiga v. Pena-Irala* and [*In re Estate of Marcos Human Rights Litigation*—survive. . . . [T]hey are after all safe haven cases, in which the defendant commits abuses abroad and then comes to the United States and remains."). But see Vivian Grosswald Curran & David Sloss, *Reviving Human Rights Litigation After Kiobel*, 107 AM. J. INT'L L. 858, 858 (2013) ("[T]he Court's decision apparently sounds the death knell for 'foreign-cubed' human rights claims under the ATS—that is, cases in which foreign defendants committed human rights abuses against foreign plaintiffs in foreign countries."); Justine Nolan et al., *Beyond Kiobel: Alternative Remedies for Sustained Human Rights Protection*, in AGORA: REFLECTIONS ON KIOBEL, *supra* note 8, at e-48, e-49 ("Absent affirmative support by the U.S. government, or a clearer expression of legislative intent by the U.S. Congress, most U.S. courts are likely to be reluctant to provide a judicial remedy in foreign-cubed cases."); John F. Savarese & George T. Conway III, *The Impact of Kiobel Curtailing the Extraterritorial Scope of the Alien Tort Statute*, WALL ST. LAW., July 2013, at 3 ("In its recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, . . . the Supreme Court put an abrupt and categorical end to foreign-cubed ATS litigation . . .").

19. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987).

20. *Id.* § 403.

circumstances, including when: conduct occurs in a State's territory,²¹ "the status of persons, or interests in things" in a State's territory are at issue,²² conduct occurs outside a State's territory and "has or is intended to have substantial effect within [the State's] territory,"²³ matters concerning a State's nationals (both outside and inside the State's territory) are at issue,²⁴ and conduct occurs outside the State's territory by a foreign national but "is directed against the security of the [S]tate or against a limited class of other [S]tate interests."²⁵

The Supreme Court granted certiorari to the *Kiobel* plaintiffs to answer, at least initially, the single question of corporate liability under the ATS.²⁶ That the Court decided not to expressly answer the question when it granted certiorari to do precisely that,²⁷ but implied the existence of corporate liability, suggests that the Court tacitly provided its answer.²⁸ This, of course, is good news for those concerned about allegations of corporate human rights abuses across the globe and who look to the ATS as a means to sue corporate tortfeasors. Given the Court's implicit recognition of corporate liability under the ATS (or at least its choice not to state that there is no such liability), this Article assumes that such liability exists and bases its arguments on corporate (as opposed to individual) conduct.²⁹

21. *Id.* § 402(1)(a).

22. *Id.* § 402(1)(b).

23. *Id.* § 402(1)(c).

24. *Id.* § 402(2).

25. *Id.* § 402(3).

26. After oral argument on this question, the Supreme Court took the unusual step of ordering additional briefing and reargument by the parties on the issue of the extraterritorial application of the ATS. The Court ultimately rendered its decision solely on this latter question. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013).

27. *Tymoshenko v. Firtash*, No. 11-CV-2794 (KMW), 2013 WL 4564646, at *3 (S.D.N.Y. Aug. 28, 2013) (noting that "the majority opinion did not address the issue of corporate liability under the ATS") (citation omitted).

28. The Court suggested that some corporate behavior or status is sufficient to rebut the presumption against extraterritorial application of the ATS. *Kiobel*, 133 S. Ct. at 1669 (opining that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices") (emphasis added); see *Doe v. Nestle*, 738 F.3d 1048, 1049 (9th Cir. 2013) (finding, post-*Kiobel*, that "corporations can face liability for claims brought under the Alien Tort Statute"); Steinhardt, *supra* note 8, at 844 (noting that the Court's silence on the issue of corporate liability, after extensive briefing on the subject, suggests that "*Kiobel* offers no authority for any broad rethinking of ATS litigation against corporate defendants in general"; and recognizing that "the majority's specification that 'mere corporate presence is not enough' would be superfluous if corporations were, in principle, immune from ATS liability"); Wuerth, *supra* note 12, at 609 (observing that "[t]he Court did not directly address the question on which it originally granted certiorari—corporate liability under the ATS—but the opinions arguably assume the validity of ATS suits against corporations"); see also Anupam Chander, *Unshackling Foreign Corporations: Kiobel's Unexpected Legacy*, 107 AM. J. INT'L L. 829, 829 (assuming the application of the ATS, post-*Kiobel*, to American corporations and far less so foreign corporations, and finding that "American corporations are simply far more likely to satisfy [the "touch and concern" test] than foreign corporations").

29. This Author believes, however, that the proposed test applies equally to individuals.

It is important to see *Kiobel*, especially inclusive of the corporate liability question, against the backdrop of events that are happening in the business and human rights communities globally. In 2005, U.N. Secretary General Kofi Annan tapped Harvard Law Professor John Ruggie to research the relationship between business and human rights abuse.³⁰ Pursuant to his appointment as Special Representative of the Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises, Professor Ruggie issued the Guiding Principles on Business and Human Rights: Implementing the United Nations' "Respect, Protect and Remedy Framework" (Guiding Principles).³¹ Those principles, presented within three "pillars," speak to the responsibilities of states and corporations. The pillars are: (1) The State Duty to Protect Human Rights; (2) The Corporate Responsibility to Respect Human Rights; and (3) Access to Remedy.³² The Guiding Principles have received widespread commendation and acceptance by stakeholders, including national governments, civil society, and businesses themselves.³³ It is the third pillar—Access to Remedy—that the ATS, even after *Kiobel*, has the capacity to vindicate.³⁴

30. See Press Release, Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005). Additionally, in 2011, the United Nations Human Rights Council created an entity entitled the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (Working Group). See Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, 17th Sess., July 6, 2011, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011). The Working Group consists of five international human rights experts and is charged with, among other tasks, ensuring the widespread distribution and implementation of the Guiding Principles. *Working Group on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. HUM. RTS., OFFICE OF THE HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> (last visited Feb. 2, 2015).

31. See generally Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) (presenting and discussing all thirty-one principles). For further reading, see JOHN GERARD RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* (2013) and Jena Martin Amerson, "The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective, 17 *FORDHAM J. CORP. & FIN. L.* 871 (2012).

32. U.N. Human Rights Council, Office of the High Comm'r, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, iii, U.N. Doc. HR/PUB/11/04 (2011).

33. The interest in the Guiding Principles is so substantial that at the second U.N. Forum on Business and Human Rights in Geneva, Switzerland, in December 2013, there were approximately 1,500 participants from over 100 countries, and all societal sectors—government, civil society, and business. See *2013 United Nations Forum on Business and Human Rights*, U.N. HUM. RTS. COUNCIL, <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2013ForumonBusinessandHumanRights.aspx> (last visited Feb. 2, 2015); see also *STATE NATIONAL ACTION PLANS*, U.N. HUM. RTS. COUNCIL, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Feb. 2, 2015) (providing links to several "State National Action Plans" related to business and human rights). Many

Professor Ruggie also issued survey results on “the scope and patterns of alleged . . . human rights abuses.”³⁵ These results are key, given the difficulty in approximating the extent and nature of the perceived problem of corporate human rights abuse.³⁶ In his report, he

stakeholders have also accepted “The Ten Principles,” regarding business and human rights, promulgated by the U.N. Global Compact, an organization supported by the U.N. General Assembly. *See General Assembly Resolutions*, U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/AboutTheGC/Government_Support/general_assembly_resolutions.html (last visited Feb. 2, 2015); *The Ten Principles*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Feb. 2, 2015).

34. Some commentators, however, find the practical application of the Guiding Principles unclear. *See* Nolan, *supra* note 18, at e-50 (“While the U.N. Guiding Principles on Business and Human Rights both affirm that companies have a responsibility to respect rights and call on governments and companies to develop meaningful remedies when rights are violated, a lack of clarity or consensus still exists about what these concepts mean in practice.”).

35. *See* Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse* at 1, U.N. Doc. A/HRC/8/5/Add.2 (May 23, 2008) (addendum to Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008)) [hereinafter *Ruggie Addendum*].

36. The problem of corporate human rights abuses, however, is thought to be so great that, beyond the work of the U.N., governmental, nongovernmental, and commercial entities have devoted energy, resources, and imagination to its understanding and prevention. For example, the U.S. government has instituted new corporate reporting requirements to address concerns about the impacts that businesses have on human rights. The Dodd-Frank Wall Street Reform and Consumer Protection Act required the Securities and Exchange Commission to issue a rule mandating that companies whose products require the use of certain minerals in their manufacture—including tantalum, tin, gold, and tungsten—publicly disclose whether they procured these minerals from the Democratic Republic of the Congo (“DRC”) or one of several adjoining countries. *See* Dodd-Frank Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213–2218 (2010) (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C. (2014)). Ostensibly, the purpose of the rule is to prevent the funding of armed conflict and/or human rights abuses in the DRC and adjoining countries by limiting the purchase of minerals from entities that might use the payments to fund conflict and/or human rights atrocities. The thought seems to be that by shining a light on the procurement of these so-called “conflict minerals,” companies will purchase fewer of them. *See* 156 CONG. REC. S3817 (daily ed. May 17, 2010) (statement of Sen. Chris Dodd). *But see* Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd-Frank Act’s Corporate Governance Disclosure Won’t Solve a Human Rights Crisis*, 25 REGENT U. L. REV. 351 (2013) (discussing possible unintended consequences of the conflict minerals rule). The rule went into effect on January 1, 2013, and companies were set to issue the first of such reports on May 31, 2014. *See* 17 C.F.R. §§ 240, 249b (2014). There are also countless nongovernmental organizations devoted to the issue of business and human rights. *See, e.g., Business and Human Rights*, AMNESTY INT’L, <http://www.amnesty.org/en/business-and-human-rights> (last visited Feb. 2, 2015); *Business and Human Rights*, HUM. RTS. WATCH, <http://www.hrw.org/topic/business> (last visited Feb. 2, 2015); *Demand Corporate Accountability*, AMAZON WATCH, <http://amazonwatch.org/work/corporate-accountability> (last visited Feb. 2, 2015); *Current Cases*, CTR. FOR CONST. RTS., <http://ccrjustice.org/current-cases> (last visited Feb. 2, 2015); *Cases, CTR. FOR JUST. & ACCOUNTABILITY*, <http://cja.org/article.php?list=type&type=5> (last visited Feb. 2, 2015); *Corporate Accountability*, EARTHRIGHTS INT’L, <http://www.earthrights.org/legal/corporate-accountability> (last visited Feb. 2, 2015); *Our Work*, INT’L LAB. RTS. F., <http://www.laborrights.org/our-work> (last visited Feb. 2, 2015); *What We Do*, INT’L RTS. ADVOC., <http://www.iradvocates.org/what-we-do> (last visited Feb. 2, 2015); *Challenging Corporations*, RAINFOREST ACTION NETWORK, <http://ran.org/challenging->

reviewed 320 cases (reported over a roughly three-year period) of alleged corporate human rights abuses and noted that these allegations emerged from “all industry sectors” and spanned the globe.³⁷ According to his review, these cases “connected alleged abuses to over 250 firms, ranging from small suppliers to Fortune Global 500 companies, to State-owned enterprises and their subsidiaries.”³⁸ Professor Ruggie observed that corporations were alleged to be “directly” responsible for approximately sixty percent of the human rights abuses³⁹—meaning that the corporation’s “own actions or omissions were alleged to cause the abuse”⁴⁰ with “no degree or a very minimal degree of separation between company actions and alleged abuses.”⁴¹ Additionally, he observed that corporations were alleged to be “indirectly”⁴² responsible for approximately forty percent of the abuses,⁴³ meaning that the corporation “contribute[d] to or benefit[ted] from the abuses of third parties.”⁴⁴ Professor Ruggie noted that this indirect involvement can take multiple forms, including “[s]tate clearing of land for corporate use that

corporations (last visited Feb. 2, 2015). Further, numerous multinational corporations have themselves instituted corporate social responsibility programs to prevent human rights abuses. These programs take many forms, including but not limited to, creating codes of conduct with a specific focus on human rights, providing employee human rights awareness training, undertaking social impact assessments, and creating supplier guidelines. See *Shell Code of Conduct*, SHELL GLOBAL, <http://www.shell.com/global/aboutshell/who-we-are/our-values/code-of-conduct.html> (last visited Feb. 2, 2015); *Respecting Human Rights*, EXXONMOBIL, http://www.exxonmobil.com/Corporate/community_rights_respect.aspx (last visited Feb. 2, 2015); *Social Impact Assessments*, OCCIDENTAL PETROLEUM CORP., <http://www.oxy.com/sr/HumanRights/Pages/SocialImpactAssessments.aspx> (last visited Feb. 2, 2015); *Supplier Guiding Principles*, COCA-COLA CO., <http://www.coca-colacompany.com/our-company/supplier-guiding-principles> (last visited Feb. 2, 2015); *Guidelines*, DAIMLER AG, <http://www.daimler.com/company/corporate-governance/guidelines> (last visited Feb. 2, 2015); *Good Business*, HERSHEY CO., <http://www.thehersheycompany.com/social-responsibility/sharedgoodness/goodbusiness> (last visited Feb. 2, 2015); see also *Company Policy Statements on Human Rights*, BUS. & HUM. RTS. RES. CTR., <http://business-humanrights.org/en/company-policy-statements-on-human-rights> (last visited Feb. 2, 2015) (providing links to hundreds of corporate policy statements that expressly mention “human rights”).

37. *Ruggie Addendum*, *supra* note 35, at 2, 9 (including industry sectors such as, “extractive; financial services; food and beverage; heavy manufacturing, infrastructure and utilities; information technology, electronics and telecommunications; pharmaceutical and chemical; retail and consumer products; and a residual category (other)”). To determine the rights to be protected, Professor Ruggie stated that he consulted the following conventions: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Labor Organization Conventions. *Id.* at 2.

38. *Id.* at 9.

39. *Id.* at 4.

40. *Id.* at 11.

41. *Id.*

42. Most ATS cases concern indirect corporate involvement in human rights abuses. See Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 63 (2008) (“The problem of accomplice liability most often arises in ATS cases brought against corporations for their alleged complicity in international law violations perpetrated by foreign governments, because corporations rarely engage in conduct such as torture, rape, and summary execution directly.”).

43. *Ruggie Addendum*, *supra* note 35, at 4.

44. *Id.*

violates indigenous rights in the process,”⁴⁵ “corporate finance of projects with records of abuse,”⁴⁶ and purchasing supplies from a human rights abuser.⁴⁷

The review divided the allegations into instances where labor rights were impacted and those where nonlabor rights were impacted.⁴⁸ Of the former, the allegations included the failure to respect the “abolition of slavery and forced labor” and the “abolition of child labor.”⁴⁹ Of the latter, the allegations included the failure to respect the “right to life, liberty and the security of the person” and “freedom from torture or cruel, inhuman or degrading treatment.”⁵⁰ The vast majority of these allegations concerned events that occurred outside of the United States.⁵¹

These allegations are the “stuff” of ATS claims. Indeed, plaintiffs likely began to avail themselves of the ATS in the 1990s, rather than using perhaps the more obvious alternative, state tort law, because: (1) they could secure subject matter jurisdiction for “foreign-cubed” cases;⁵² (2) before *Sosa v. Alvarez-Machain*,⁵³ and to some degree after, they could use the ATS to provide both subject matter jurisdiction *and* a cause of action;⁵⁴ (3) they could benefit from the statute’s perceived ten-

45. *Id.* at 11.

46. *Id.*

47. *Id.*

48. *Id.* at 12–13.

49. *Id.* at 2.

50. *Id.* at 3.

51. *Id.* at 9–10; *see also* Keitner, *supra* note 42, at 74 n.57 (“[T]he vast majority of ATS cases involve conduct that took place overseas.”).

52. *See, e.g.,* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (making no issue of the foreign-cubedness of the ATS claim, which involved Mexican parties and an alleged tort that occurred in Mexico); *In re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994) (finding ATS jurisdiction where the parties were Philippines citizens and the alleged tort occurred in that country); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (finding ATS jurisdiction where the parties were Paraguayan citizens and the alleged tort occurred in that country).

53. The significance of *Sosa* is manifold: (1) it clarified that the ATS is solely a jurisdictional statute and does not provide a cause of action, *Sosa*, 542 U.S. at 712–13, 724; (2) at the same time, it acknowledged that the causes of action that the ATS should recognize are judge-made, for example, federal common law, *id.* at 724, 729; (3) it stated that this federal common law must derive from customary international law, *id.* at 729–30; and (4) it provided a framework for courts to use when determining the customary international law that they should recognize at common law, *id.* at 731–32. To wit, as noted above, it states that courts should recognize customary international law that is specific and universally respected. *Id.* at 725, 732.

54. *See* *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1262 (11th Cir. 2009) (“In *Sosa*, the Supreme Court confirmed the ATS is not only a jurisdictional statute; the ATS also empowers federal courts to entertain ‘a very limited category’ of claims” (quoting *Sosa*, 542 U.S. at 712) (citing *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246 (11th Cir. 2005))), abrogated on other grounds by *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012); Anton Metlitsky, *The Alien Tort Statute, Separation of Powers, and the Limits of Federal-Common-Law Causes of Action*, 52 COLUM. J. TRANSNAT’L L. 53, 54 (2013) (“[T]he lower courts generally held the view that the ATS provided private plaintiffs a right of action to enforce certain norms of international law that were incorporated into federal common law.”).

year limitation period;⁵⁵ and (4) they could take advantage of the social pressure against the defendant attendant with a claim of a human rights violation.⁵⁶ While today, post-*Kiobel*, it is clear that the ATS is unavailable for a foreign-cubed case unless the claim touches and concerns the United States and does not provide a cause of action,⁵⁷ the statute remains a potentially useful tool for plaintiffs because of the assumed lengthy statute of limitations and the social pressure applied to an ATS defendant. Additionally, the alternative to seeking jurisdiction under the statute—state common law—carries with it inherent obstacles.⁵⁸ Were plaintiffs forced to forsake ATS claims⁵⁹ for state

55. See *Jean v. Dorelien*, 431 F.3d 776, 778 (11th Cir. 2005) (concluding that “[u]nder the TVPA and the ATCA, Plaintiffs have ten years from the date the cause of action arose to bring suit for torture, extrajudicial killing and other torts committed in violation of the law of nations or a treaty of the United States” (citations omitted)); *Jesner v. Arab Bank, PLC*, No. 06-cv-3869, 2009 WL 4663865, at *3 (E.D.N.Y. May 1, 2009) (citing *Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002)) (concluding that the statute of limitations for the ATS is ten years); *Arce v. Garcia*, 400 F.3d 1340, 1345–46 (11th Cir. 2005) (same); *Javier H. v. Garcia-Botello*, 239 F.R.D. 342, 346 (W.D.N.Y. 2006) (same); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 118–19 (D.D.C. 2003) (same); *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 386 (E.D.N.Y. 2002) (same).

56. See Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 725 (2012) (“[I]t seems that the real value of an ATS case is that it transforms a tort case into a human-rights case.”); Leval, *supra* note 17, at 16 (“At the very least, keeping courts open to civil suits about human rights can bring solace and compensation to victims. More important, these suits draw global attention to atrocities, and in so doing perhaps deter would-be abusers.”); Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*, 107 AM. J. INT’L L. 846, 850–51 (2013) (recognizing that many cases outside the United States do not style human rights abuse claims as such, but rather as a claim of negligence or breach of contract and that this change in nomenclature “diminishes the potential significance of the clear statement in the Guiding Principles that corporations (and not just states) may be liable for violating human rights”).

57. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (noting that “all the relevant conduct took place outside the United States” but also that the presumption against the extraterritorial application of the ATS can be displaced if the ATS claim touches and concerns the United States “with sufficient force to displace the presumption”). *Id.* at 1663 (“The statute provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action.”).

58. It is true, though, that if plaintiffs bring their claims under state law, they will not be burdened with: (1) whether a corporation can be sued under the statute; (2) whether the facts of the case sufficiently touch and concern the United States as to displace the presumption against extraterritoriality; (3) whether the alleged tort violates the law of nations; or (4) whether the alleged law of nations violation satisfies *Sosa*. Professor Hoffman is surely correct when he writes that “it is clear that any further narrowing of the extraterritorial scope of the ATS after *Kiobel* will shift litigation to state courts or to federal courts based on diversity or other bases of federal subject matter jurisdiction.” Paul L. Hoffman, *Kiobel v. Royal Dutch Petroleum Co.: First Impressions*, 52 COLUM. J. TRANSNAT’L L. 28, 51 (2013). Dean Austen Parrish, however, observes the “folly” of filing would-be ATS actions in state court. See Austen L. Parrish, *Kiobel, Unilateralism and the Retreat from Extraterritoriality*, 28 MD. J. INT’L L. 208, 240 (2013) (“[E]mploying a state law strategy is unlikely to meaningfully advance human rights. These cases face tremendous hurdles to success. While the presumption against extraterritoriality may not apply, courts will rightly be reluctant to adjudicate foreign claims for abuses occurring abroad to which the state has no interest.”).

59. See Peter Henner, *When Is a Corporation a Person? When It Wants To Be. Will Kiobel End Alien Tort Statute Litigation?*, 12 WYO. L. REV. 303, 304 (2012) (“The claims in *Kiobel* are typical of

common law claims,⁶⁰ they would likely lose the liberal ten-year statute of limitation (most probably for something far shorter⁶¹) and any benefit they might have accrued as a result of framing their claim as a human rights violation. Plaintiffs might also subject themselves to powerful preemption arguments⁶² and compelling *forum non conveniens* motions.⁶³ Given these concerns and the allegations that plaintiffs typically present,⁶⁴ it is important to elucidate the continued vitality of the ATS. This Article endeavors to do that by divining balancing factors from *Kiobel's* touch and concern test.⁶⁵

Part I analyzes several decisions rendered post-*Kiobel*, focusing on the way that the courts interpreted, if at all, the Supreme Court's touch and concern language. Part II suggests a multifactor balancing test derived from intimations in the *Kiobel* majority opinion; stated preferences by Justice Breyer in his concurring opinion, premised, in part, on international jurisdictional norms; and international jurisdictional norms broadly, to determine when a defendant's conduct has touched and concerned the United States with sufficient force to displace the presumption against extraterritoriality. Part III demonstrates how the proposed test interacts with *Morrison v. National Australia Bank, Ltd.*, in which the Supreme Court opined that the presumption against

many ATS cases where plaintiffs allege that a multinational corporation, operating in a country outside of the United States, has aided and abetted a repressive government in brutally suppressing opposition to government policy.”); David He, Note, *Beyond Securities Fraud: The Territorial Reach of U.S. Laws After Morrison v. N.A.B.*, 2013 COLUM. BUS. L. REV. 148, 190–91 (2013) (citations omitted) (“The typical ATS claims brought against individuals often involve instances of torture, arbitrary and prolonged arrests, murders and executions, and genocide and other crimes against humanity.”).

60. Svetlana Meyerzon Nagiel, Note, *An Overlooked Gateway to Victim Compensation: How States Can Provide a Forum for Human Rights Claims*, 46 COLUM. J. TRANSNAT'L L. 133, 155–59 (2007) (observing that some plaintiffs bring human rights claims pursuant to state statute and the state common law, including breach of contract, negligence, negligence per se, aiding and abetting and vicarious liability).

61. See 50 STATE STATUTORY SURVEYS: CIVIL LAWS: CIVIL PROCEDURE: CIVIL STATUTES OF LIMITATION, 0020 SURVEYS I (West 2007).

62. See Childress, *supra* note 56, at 749–50.

63. See generally Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157 (2012).

64. See He, *supra* note 59, at 190–91.

65. Indeed, such a test might make ATS litigation more fruitful for plaintiffs than it has been to date, as it would provide the beginnings of a framework for litigating the cases. See Moore, *supra* note 8, at e-18 (noting that “[h]uman rights litigation under the ATS has been largely symbolic and has rarely led to liability”); Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 175 (2004) (observing that many ATS cases have failed pursuant to sovereign immunity, political question, and statute of limitation and sufficiency of claim challenges); Samuel Moyn, *Why the Court Was Right About the Alien Tort Statute*, FOREIGN AFF. (May 2, 2013), <http://www.foreignaffairs.com/articles/139359/samuel-moyn/why-the-court-was-right-about-the-alien-tort-statute> (recognizing that “[t]he ATS never proved that useful in advancing the cause of global human rights”).

extraterritoriality applies to federal statutes unless the statute clearly indicates otherwise and that those statutes only contemplate the conduct or the relationship that is the *focus* of the statute and not ancillary activity.⁶⁶ The Article concludes by underscoring the opportunity created by *Kiobel* to craft a balancing test that brings clarity to the kinds of claims that the ATS can reach.

I. POST-*KIOBEL* CASES

At this writing, a few dozen federal courts have spoken substantively to the extraterritorial reach of the ATS since *Kiobel*.⁶⁷ These courts fall roughly into one of the following camps: those that read *Kiobel* to require that the law of nations violation occur in the United States in order to displace the presumption against extraterritoriality (These courts view the law of nations violation as the direct—and, indeed, ultimate—injury and do not hold that a predicate act giving rise to the direct injury could itself constitute a law of nations violation.); those that read the case to require that only relevant conduct (as distinguished from the law of nations violation) occur in the United States in order to displace the presumption; those that read the case to allow U.S. citizenship (or residency) to displace the presumption; those that read the case to disallow U.S. citizenship to displace the

66. See generally *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

67. See, e.g., *Al Shimari v. CACI Premier Tech., Inc. (Al Shimari II)*, 758 F.3d 516 (4th Cir. 2014); *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014); *Chowdhury v. Worldtel Bangl. Holding, Ltd.*, 746 F.3d 42 (2d Cir. 2014); *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013); *Muntslag v. D'ieteren, S.A.*, No. 12-cv-07038 (TPG), 2013 WL 2150686 (S.D.N.Y. May 17, 2013); *Mwani v. Laden*, 947 F. Supp. 2d 1 (D.D.C. 2013); *Ahmed-Al-Khalifa v. Salvation Army*, No. 13-cv-289-WS, 2013 WL 2432947 (N.D. Fla. June 3, 2013); *Fotso v. Rep. of Cameroon*, No. 12CV1415-TC, 2013 WL 3006338 (D. Ore. June 11, 2013); *Mwangi v. Bush*, No. 12-373-KKC, 2013 WL 3155018 (E.D. Ky. June 18, 2013); *Al Shimari v. CACI Int'l, Inc. (Al Shimari I)*, 951 F. Supp. 2d 857 (E.D. Va. 2013); *Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48 (D.D.C. 2013); *Ahmed-Al-Khalifa v. Obama*, No. 13-cv-49-MW/GRJ, 2013 WL 3797287 (N.D. Fla. July 19, 2013); *Giraldo v. Drummond Co.*, No. 09-CV-1041-RDP, 2013 WL 3873960 (N.D. Ala. July 25, 2013); *Hua Chen v. Honghui Shi*, No. 09Civ8920(RJS), 2013 WL 3963735 (S.D.N.Y. Aug. 1, 2013); *Ahmed-Al-Khalifa v. Fed. Republic of Nigeria*, No. 13-cv-172-RS-GRJ, 2013 WL 3991961 (N.D. Fla. Aug. 2, 2013); *Ahmed v. Comm'r for Educ. Lagos State*, No. 13-cv-00050-MP-GRJ, 2013 WL 4001194 (N.D. Fla. Aug. 6, 2013); *Ahmed-Al-Khalifa v. Al-Assad*, No. 13-cv-48-RV-GRJ, 2013 WL 4401831 (N.D. Fla. Aug. 13, 2013); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013); *Ahmed v. Magan*, No. 10-cv-00342, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013); *Kaplan v. Cent. Bank of Islamic Republic of Iran*, 961 F. Supp. 2d 185 (D.D.C. 2013); *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2013 WL 4511354 (S.D. Tex. Aug. 23, 2013); *Muntslag v. Beerens*, No. 12-cv-07168(TPG), 2013 WL 4519669 (S.D.N.Y. Aug. 26, 2013); *Tymoshenko v. Firtash*, No. 11-CV-2794(KMW), 2013 WL 4564646 (S.D.N.Y. Aug. 28, 2013); *Chen Gang v. Zhao Zhizhen*, No. 04CV1146RNC, 2013 WL 5313411 (D. Conn. Sept. 20, 2013); *Dacer v. Estrada*, No. C 10-04165 WHA, 2013 WL 5978101 (N.D. Cal. Nov. 8, 2013); *In re S. Afr. Apartheid Litig.*, Nos. 02MDL1499(SAS), 02Civ4712(SAS), Civ6218(SAS), Civ1024(SAS), 03Civ4524(SAS), 2013 WL 6813877 (S.D.N.Y. Dec. 26, 2013).

presumption; and those that read the case to acknowledge that only Congress can displace a statute's presumption against extraterritoriality.

The disparate conclusions of these courts show the need for a coherent test to determine when the presumption against the extraterritorial application of a statute should be displaced. Indeed, the district court in *Al Shimari v. CACI International, Inc. (Al Shimari I)* opined that “it is unclear to the Court *how* to apply the ‘touch and concern’ inquiry to a purely jurisdictional statute such as the ATS.”⁶⁸ Below is a discussion of a few post-*Kiobel* cases that are remarkable for their interpretation, or lack thereof, of the touch and concern test.

As of this writing, three circuit courts have interpreted *Kiobel* through considered written opinions⁶⁹—the U.S. Court of Appeals for the Second Circuit,⁷⁰ the U.S. Court of Appeals for the Fourth Circuit,⁷¹ and the U.S. Court of Appeals for the Eleventh Circuit.⁷² In three of the four cases decided, the courts dismissed the ATS claims on the ground that no relevant conduct occurred in the United States. This Article begins with a discussion of *Cardona v. Chiquita Brands International, Inc.*, which jars in its failure to respond, even in small part, to the Supreme Court's implied call for courts to consider whether a plaintiff's ATS allegations touch and concern the United States.

In *Cardona*, the plaintiffs alleged that Chiquita, a U.S.-based banana producer, funded Colombian terrorists who violated the law of nations.⁷³ They further alleged that “Chiquita participated in a campaign of torture and murder in Colombia by reviewing, approving, and concealing a scheme of payments and weapons shipments to Colombian terrorist organizations, all from their corporate offices in the territory of the United States.”⁷⁴

Without attempting to define “relevant conduct,” opine on the contours of the “touch and concern” test, or even discuss the plaintiffs' allegations of Chiquita's domestic conduct, the court dismissed the case, stating: “All the relevant conduct in our case took place outside the

68. *Al Shimari I*, 951 F. Supp. 2d at 867 (emphasis added). By this, the court seemed to make two valid points: (1) there is no extant touch and concern test; and (2) to apply such a test, which necessarily speaks to the merits of a plaintiff's claim, seems awkward, if not inappropriate, for a jurisdictional analysis.

69. In light of *Kiobel*, an en banc U.S. Court of Appeals for the Ninth Circuit summarily affirmed the dismissal of *Sarei v. Rio Tinto, PLC*, a case brought by former and current residents of Papua New Guinea against a British corporation, for crimes against humanity, amongst other atrocities, all occurring in Papua New Guinea. 722 F.3d 1109 (9th Cir. 2013).

70. *Balintulo*, 727 F.3d 174; *Chowdhury*, 746 F.3d 42.

71. *Al Shimari II*, 758 F.3d 516.

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

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

74. *Id.*

United States.”⁷⁵ The court seemed to consider only direct harm—that which the plaintiffs alleged to have occurred in Colombia—to be the kind of harm cognizable by the ATS. It stated that “[t]here is no allegation that any torture occurred on U.S. territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force.”⁷⁶ Had the court heeded *Kiobel’s* call it would have considered the plaintiffs’ numerous allegations of Chiquita’s domestic activity in furtherance of a foreign result and determined whether this activity constituted relevant conduct. It would have then, based on these allegations, determined whether the plaintiffs’ ATS claim touched and concerned the United States with the requisite force to displace the presumption and provided the reasons therefore.

Additionally, the court never attributed any significance to the fact that Chiquita is a U.S.-based corporation. This is due, perhaps, to the court’s contention that there is no evidence that Congress intended U.S. nationality to displace the presumption.⁷⁷ However the Supreme Court arguably permitted this very consideration by way of the touch and concern test. In addition, the court never contemplated the related possibility of the United States providing safe harbor to an alleged aider and abettor of torture.⁷⁸ This may be a result of the court’s apparent view that torture is not a customary international law violation—unless perhaps committed by a government—so neither would be its aiding and abetting,⁷⁹ and the court’s strict and sole allegiance to the question of the location of the direct harm as dispositive of ATS jurisdiction.⁸⁰ These omissions, though, ignore what it likely means for a claim to touch and concern the United States.

Somewhat similarly, in *Balintulo v. Daimler AG*, a case brought by South Africans, involving allegations against numerous multinational

75. *Id.* at 1189 (majority opinion).

76. *Id.* at 1191. Additionally, the court suggested that torture is not a law of nations violation and therefore, may not be cognizable under the ATS. *Id.* at 1190 (“It is not nearly so clear, as our dissenting colleague believes, that acts described as ‘torture’ come within the jurisdiction created by the statute over ‘a tort only, committed in violation of the law of nations or a treaty of the United States.’”). This determination ignores powerful evidence to the contrary. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1674 (2013) (Breyer, J., dissenting) (discussing the torture-based ATS claims in *Filartiga* and *In re Marcos Human Rights Litigation* and stating that “in *Sosa* we referred to both cases with approval, suggesting that the ATS allowed a claim for relief in such circumstances”).

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

78. *Id.*

79. *Id.* at 1190.

80. See *id.* at 1189–90 (“Any tort here, whether styled as *torture* or under some other theory, occurred outside the territorial jurisdiction of the United States. The ATS contains nothing to rebut the presumption against extraterritoriality.” (emphasis added)); *id.* at 1191 (“There is no allegation that any torture occurred on U.S. territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force.”).

corporations for aiding and abetting torture and murder in South Africa during its apartheid era, the court concluded that the plaintiffs' complaint did not allege that any relevant conduct that formed the basis of their ATS claim occurred in the United States, as required by *Kiobel*.⁸¹ Further, the court rejected plaintiffs' notion (borrowed, the court suggested, from Justice Breyer),⁸² that corporate citizenship in the United States is sufficient to ground an ATS claim.⁸³

The court may have, however, overread *Kiobel* by focusing solely on relevant conduct. While in *Kiobel* the Supreme Court stated that none of the relevant conduct occurred in the United States, it did not state that *only* relevant conduct need be considered to determine whether an ATS claim sufficiently touches and concerns the United States. Indeed, the Court did not identify *in any way* the conduct, status, or relationship that can touch and concern the United States with sufficient force to displace the presumption against extraterritoriality. The Court only suggested that relevant conduct must occur in the United States, by noting that such conduct was absent in the case before it, and that "mere corporate presence" is insufficient to displace the presumption.⁸⁴ If the Court, though, was leaving it to the lower courts to determine the meaning of "touch and concern," the Second Circuit, like the Eleventh Circuit, has spoken: it does not mean corporate citizenship.

What seemed dispositive for the court was the allegation that the relevant conduct occurred in a sovereign other than the United States. Indeed, the court stated that lower courts are bound by the rule that the ATS does not apply if the relevant conduct occurs outside of the United States and "are without authority to 'reinterpret' the Court's binding precedent in light of *irrelevant factual distinctions*, such as the citizenship of the defendants."⁸⁵ Such a conclusion, in part, rejects the opportunity to fully engage the question of the ATS's reach, inclusive of determining *why* corporate citizenship is insufficient to displace the presumption, if that is indeed the view of the court.

Moreover, and perhaps more concerning, is the Second Circuit's assertion that for an ATS claim to lie, the law of nations violation—not merely relevant conduct—must occur in the United States.⁸⁶ This is the

81. *Balintulo v. Daimler AG*, 727 F.3d 174, 188 (2d Cir. 2013).

82. *Id.* at 189.

83. *Id.*

84. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). The mentioning of corporate "presence," however, may suggest a willingness on the part of the Court to deem some variety of presence, perhaps even citizenship, sufficient to displace the presumption. *See infra* pp. 472–75, 479–80.

85. *Balintulo*, 727 F. 3d at 190 (emphasis added) (citations omitted).

86. Sometimes the court seemed to equivocate on this point, *see id.* at 189–92, but reading the opinion as a whole, it appears that the court believes that the "violation of the law of nations" is the "relevant conduct" that must occur in the United States. *See generally id.*; *see also* Julian Ku, *Goodbye ATS? U.S. Appeals Court Dismisses South African Apartheid ATS Case and Rejects*

view of Justice Alito;⁸⁷ it is not the stated view of the Supreme Court majority. But, as discussed above, in *Kiobel*, the Court never defined “relevant conduct,”⁸⁸ just as it never defined “touch and concern.” There is room in this vacuum for a definition of touch and concern that includes relevant conduct, ranging from conduct that is material to a customary international law violation to the customary international law violation itself, given the significance placed on the location of all material conduct at international law.⁸⁹ There is also room in this vacuum for a touch and concern test that includes corporate citizenship, given the significance placed on nationality at international law.⁹⁰

Likewise, in *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, a citizen of Bangladesh filed an action alleging torture, pursuant to the ATS, against another citizen of Bangladesh and a Bangladeshi corporation, in the U.S. District Court for the Eastern District of New York. The district court found that the plaintiff had established jurisdiction pursuant to the ATS and the jury later found both the individual and the corporate defendant liable for torture.⁹¹ These proceedings occurred prior to the Supreme Court’s decision in *Kiobel*. On appeal, the Second Circuit, in a decision issued after *Kiobel*, vacated the judgment, concluding that: (1) ATS liability could not lie against either defendant because all of the events at issue occurred in Bangladesh and the ATS does not apply to extraterritorial conduct; and

Narrow Reading of Kiobel, OPINIO JURIS (Aug. 22, 2013), <http://opiniojuris.org/2013/08/22/goodbye-ats-u-s-appeals-court-dismisses-south-african-apartheid-ats-case-and-rejects-narrow-reading-of-kiobel> (“If *Balintulo* is followed, the era of ATS lawsuits in the U.S. is coming to an end.”).

87. See *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring). In his opinion, Justice Alito (joined by Justice Thomas) stated: “[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations.” The U.S. District Court for the Northern District of Alabama followed Justice Alito’s approach in *Giraldo v. Drummond Co.*, a case brought by Colombian citizens, involving allegations of torture and murder, against Alabama-based Drummond Coal Co. and its affiliates. No. 09-CV-1041-RDP, 2013 WL 3873960 (N.D. Ala. July 25, 2013). The *Drummond* court stated that “the most logical and unstrained reading of *Kiobel*” requires the ATS to apply extraterritorially only “if the event on which the statute focuses [the law of nations violation] did not occur abroad.” *Id.* at *8. According to the court, this is “the seismic shift that *Kiobel* has caused.” *Id.* at *1 (emphasis added). The *Kiobel* majority opinion, however, simply does not go this far. See *Kiobel*, 133 S. Ct. at 1669. That opinion does not require the domestic conduct to itself constitute the law of nations violation.

88. Certainly the Court never conflated “law of nations violation” and “relevant conduct,” as the Second Circuit seems to do.

89. The majority opinion in *Kiobel* credibly lends itself to a reading that the presumption against extraterritoriality can be overcome even if the law of nations violation occurs abroad, provided that the claim in some way touches and concerns the United States. See generally *Kiobel*, 133 S. Ct. 1659.

90. See *infra* pp. 473–76.

91. *Chowdhury v. Worldtel Bangl. Holding, Ltd.*, 746 F.3d 42, 47 (2d Cir. 2014).

(2) in the Second Circuit, ATS liability cannot lie against a corporation.⁹² The court did not apply a touch and concern test of any kind. Moreover, it did not consider any fact or factor that was even akin to a touch and concern analysis. The court simply employed *Kiobel* to the end of vacating the judgment on the ground that the events at issue occurred abroad.

A coherent and nuanced touch and concern test would require courts to engage the possibility that circumstances exist to displace the presumption against extraterritoriality. Without the existence and application of such a test, there is no reason for a court to consider the location of all of the relevant conduct, the nationality of the defendant, or other worthy issues, such as whether international comity demands recognition of ATS jurisdiction (as opposed to the converse), whether there is a risk of the United States harboring a human rights violator if ATS jurisdiction is not recognized, and whether the conduct at issue undermines some other important American national interest.⁹³ These latter considerations differ from considerations of the location of the relevant conduct and the defendant's nationality, which align neatly with the international jurisdictional norms of territoriality and nationality. The latter considerations become especially important when a court, like that in *Chowdhury*, is presented with allegations that the United States is neither the location of the relevant conduct nor the country of citizenship of the defendants.

By considerable contrast to *Chiquita*, *Balintulo*, and *Chowdhury*, in *Al Shimari II*, the U.S. Court of Appeals for the Fourth Circuit concluded that *Kiobel* requires a "fact-based inquiry"⁹⁴ to determine whether the presumption against the extraterritorial application of the ATS should be displaced. Pursuant to such an inquiry, the court determined that the plaintiffs' claims sufficiently touched and concerned the United States as to displace the presumption. There, Iraqi citizens sued a U.S. government contractor, alleging that they had been tortured by the contractor's employees while detained at the infamous Abu Ghraib prison in Iraq. The district court concluded that it had no "ATS jurisdiction over Plaintiffs' claims because the acts giving rise to their tort claims occurred exclusively in Iraq, a foreign sovereign."⁹⁵ This holding, the court opined, was consistent with the presumption against extraterritorial application of the ATS.⁹⁶ In crafting essentially a separation of powers argument, the district court further concluded that it possessed no institutional capacity to displace the presumption,

92. Indeed it was the Second Circuit's decision in *Kiobel*, concluding that there was no corporate liability under the ATS, that the Supreme Court was originally disposed to review. *See supra* p. 447.

93. *See Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring); *see also infra* pp. 465-67, 482-83.

94. *Al Shimari II, Inc.*, 758 F.3d 516, 520 (4th Cir. 2014).

95. *Al Shimari I*, 951 F. Supp. 2d 857, 858 (E.D. Va. 2013).

96. *Id.*

observing that the Supreme Court, in *Kiobel*, impliedly stated that Congress alone can determine when conduct sufficiently touches and concerns the United States to dislodge the presumption against extraterritoriality.⁹⁷ Moreover, the court dismissed the idea that *Kiobel* even suggested that courts consider the facts of individual cases to determine whether the relevant conduct touches and concerns the United States, calling the plaintiffs' contentions to the contrary "demonstrably flawed."⁹⁸

In vacating the district court's decision, the Fourth Circuit stated that "the clear implication of the [Supreme] Court's 'touch and concern' language is that courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory."⁹⁹ Pursuant to this reading of *Kiobel*, the court considered the plaintiffs' allegations, noting their U.S. features, including: the execution of the contract between the U.S. government and the government contractor in the United States; the contractor's incorporation in the United States; the commission of torture by U.S. citizens; the occurrence of the torture "at a military facility operated by United States government personnel"¹⁰⁰; the "tacit approval"¹⁰¹ of the torture, "attempt[] to 'cover up' the misconduct"¹⁰² and, at a minimum, "implicit[] . . . encourage[ment]" of the torture by "CACI's managers in the United States."¹⁰³ The court also interpreted congressional intent to indicate a desire to provide judicial access to aliens and bring U.S. citizens who had committed torture outside of the United States to justice.¹⁰⁴ The court thus considered a panoply of allegations, including those concerning CACI's activity in the United States, to determine that the plaintiffs' torture claims sufficiently touched and concerned the United States to displace the presumption against extraterritoriality.¹⁰⁵

97. *Id.* at 866 ("The Supreme Court makes clear that the presumption against extraterritoriality is rebuttable by legislative act, not judicial decision"). The court opined that "[n]owhere in the *Kiobel* decision does the Court explicitly state or even suggest that the facts of a case should or could, under certain circumstances, inform a court's judgment about whether the presumption is sufficiently rebutted and thus displaced." *Id.* at 867. The Supreme Court's "touch and concern" language, however, seems to refer to the fact-finding of other courts as the means for determining whether a claim has a sufficient domestic connection. See *infra* Part II.

98. *Al Shimari I*, 951 F. Supp. 2d at 867.

99. *Al Shimari II*, 758 F.3d at 528.

100. *Id.*

101. *Id.* at 531.

102. *Id.* at 529.

103. *Id.* at 531.

104. *Id.*

105. The court noted that when, for example, a case contains a claim alleging that the relevant contract was "executed by a United States corporation with the United States government . . . it is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory." *Id.* at 528.

Similarly, in *Sexual Minorities Uganda v. Lively*,¹⁰⁶ a case brought by a Uganda-based organization against a U.S. citizen, alleging, amongst other things, crimes against humanity based upon the persecution of persons because of their sexual orientation and/or gender identity, the court stated that the presumption against extraterritoriality was displaced because the defendant was a U.S. citizen and U.S. resident, and a substantial part of his alleged wrongful conduct occurred in the United States.¹⁰⁷ Most critically, the court stated, “[t]he fact that the impact of Defendant’s conduct was felt in Uganda cannot deprive Plaintiff of a claim.”¹⁰⁸ The court opined that the “[d]efendant’s alleged actions in planning and managing a campaign of repression in Uganda from the United States are analogous to a terrorist designing and manufacturing a bomb in this country, which he then mails to Uganda with the intent that it explode there.”¹⁰⁹ Observing that public policy supports recognizing ATS claims where the defendant committed acts in the United States but the injury occurred abroad, the court opined that the law of nations requires that a country make its citizens answer to claims by foreigners.¹¹⁰ Further, the court asserted that the failure of courts to recognize these claims could result in the very foreign policy quagmire sought to be avoided by limiting the claims recognized by the ATS—fear of retaliation by other sovereigns.¹¹¹

By recognizing the legal significance of the defendant’s alleged conduct in the United States, the courts in *Al Shimari II* and *Lively* simultaneously, if tacitly, advanced two key tenets: (1) ATS jurisdiction can be premised on a claim of aiding and abetting a customary international law violation, even if the aiding and abetting occurs in the United States and the direct injury occurs abroad; and (2) aiding and abetting a customary international law violation is itself a customary international law violation.¹¹² Additionally, the courts’ consideration of the defendants’ citizenship as a relevant factor when determining whether a claim touches and concerns the United States suggests that while “mere corporate presence” is not enough to satisfy the touch and

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

107. *Id.* at 310.

108. *Id.* at 321–22.

109. *Id.* at 322.

110. *Id.* at 323 (“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 his home state.” (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 783 (D.C. Cir.1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985))).

111. *Id.* at 322–23.

112. See Keitner, *supra* note 42, at 79 (observing that “aiding and abetting an international law violation itself violates international law”). See generally *Al Shimari II*, 758 F.3d 516 (4th Cir. 2014); *Lively*, 960 F. Supp. 2d 304; *infra* Part II.C.

concern test, corporate *citizenship* might be relevant to this determination.¹¹³ The courts, then, leapt into the space left by *Kiobel* and determined that the touch and concern test could be satisfied pursuant to multiple, if not singular, United States features.¹¹⁴

Somewhat similarly, in *Ahmed v. Magan*,¹¹⁵ a case brought by one Somali citizen against another, alleging arbitrary detention, torture, and cruel, inhuman, and degrading treatment, the magistrate judge concluded that the plaintiff overcame the presumption against extraterritoriality, even though this was a foreign-cubed case, because the defendant had become a U.S. resident.¹¹⁶ The magistrate reasoned that because the defendant was enjoying the “protections of U.S. law”¹¹⁷ he should also “be subject to the jurisdiction of the courts.”¹¹⁸ This conclusion aligns with (although is not identical to) Justice Breyer’s contention that the presumption should be displaced if the defendant is “an American national.”¹¹⁹ The court, however, deemed the presumption displaced by an even looser relationship between the defendant and the United States.¹²⁰ The district court accepted the magistrate’s Report and Recommendation and also began to answer the question of what satisfies *Kiobel*’s touch and concern test.¹²¹

The above discussion shows that courts are plainly unclear about how to determine whether a claim touches and concerns the United States, let alone when it has done so sufficiently to displace the presumption against extraterritoriality. Courts have considered solely the location of the law of nations violation and solely the location of the relevant conduct (to be distinguished from the law of nations violation); counted and discounted U.S. citizenship; and rejected wholesale the notion that courts have a role in determining when the presumption can be displaced. A multifactor test, drawn from *Kiobel* and international jurisdictional norms, could provide a clear and predictable approach to aid courts in determining whether the ATS’s presumption against extraterritoriality should be displaced.

113. *Al Shimari II*, 758 F.3d at 528–29; *Lively*, 960 F. Supp. 2d at 322.

114. *Al Shimari II*, 758 F.3d at 529–30; *Lively*, 960 F. Supp. 2d at 323–24.

115. *Ahmed v. Magan*, No. 10-CV-00342, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013).

116. *Id.* at *1–2.

117. *Id.* at *2.

118. *Id.*

119. *See supra* Part I and note 76.

120. The court deemed the presumption displaced even though the defendant was only a U.S. resident and not a U.S. national.

121. Magistrate Judge Mark R. Abel entered final judgment against the defendant and awarded the plaintiff five million dollars in compensatory damages and ten million dollars in punitive damages. *Magan*, 2013 WL 4479077 at *7. The court held that the defendant had, at any rate, waived its ATS-based defense. *Id.*

II. DIVINING BALANCING FACTORS FROM *KIOBEL*'S "TOUCH AND CONCERN" TEST

In frustratingly few words, the Supreme Court, in *Kiobel*, intimated how plaintiffs might establish an ATS claim based, in part, on extraterritorial conduct.¹²² The Court stated:

On these facts, all the relevant conduct took place 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. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.¹²³

Appearing at the end of the opinion, this language provides ATS plaintiffs with an "out" that seems almost irreconcilable with the Court's prior attenuated discussion about the imperative of applying a statute to domestic conduct only, unless something *in the statute* compels otherwise.¹²⁴ Here, the Court suggested a way to rebut the presumption against extraterritoriality applied to the ATS that is, arguably, external to the statute.

Justice Breyer opined, though, in his concurring opinion, that he would dispense entirely with the presumption against extraterritoriality as a relevant canon of statutory interpretation for purposes of the ATS.¹²⁵ Instead, he would seek guidance from "international jurisdictional norms"¹²⁶ but recognize "jurisdiction only where distinct American interests are at issue."¹²⁷ In his view, the ATS:

[P]rovides jurisdiction where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, 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.¹²⁸

122. Professor Cleveland correctly notes that this is the "most important part of the majority opinion." Cleveland, *supra* note 8, at 9. She also importantly observes that "the opinion states that it is 'the claim' that must touch and concern the United States, *not* 'the conduct.' In other words, the concerns underlying the presumption would allow for considerations not limited to the locus of *conduct*." *Id.* at 21. (emphasis in original).

123. *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669 (2013) (emphasis added) (citation omitted).

124. See *id.* at 1661 ("[W]hen a statute gives no clear indication of an extraterritorial application, it has none" (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010))); *id.* at 1669 ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.").

125. *Id.* at 1671-72 (Breyer, J., concurring).

126. *Id.* at 1673.

127. *Id.* at 1674.

128. *Id.*

It is discussion about the latter consideration—preventing the United States from becoming a safe harbor for a torturer or their ilk—that formed much of Justice Breyer’s concurrence. This concern acknowledges the requirement, at least to Justice Breyer, that there be an available court for litigating human rights claims, and the leadership role of the United States in creating and preserving this space.¹²⁹

However, while Justice Breyer’s concern is clear, his three-pronged test is less so. It is unclear whether this first prong contemplates solely the direct injury to the plaintiff or also the predicate acts that gave rise to the direct injury,¹³⁰ ratification of the direct injury, ratification of the predicate acts, etc.¹³¹ Likewise, it is unclear whether the second prong refers to individuals as well as corporations.

It is clear, however, that prongs one and two do not contemplate a foreign-cubed case. While theoretically prong three could embrace a foreign-cubed case—given that the conduct in that case could substantially and adversely affect an important American national interest; for example, providing forced laborers with access to a remedy¹³² or bringing to justice a material supporter of genocide¹³³—Justice Breyer did not deem the conduct alleged in *Kiobel*, including

129. Indeed, Justice Breyer quoted *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), stating: “[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.” *Id.* at 1671 (quoting *Sosa*, 542 U.S. at 732) (internal citation omitted). Invocation of this part of *Sosa* reifies the notion that Justice Breyer recognizes the role that the ATS can play in holding to account human rights abusers.

130. One cannot merely assume that Justice Breyer means both direct and indirect harm by this prong—despite the fact that he invoked section 402 of the *Restatement (Third) of Foreign Relations*, which advances the idea that territorial jurisdiction be based on both direct and indirect activity—given that he accorded no legal significance to the fact that the *Kiobel* plaintiffs accused the defendants of indirect liability and not direct liability. Indeed, he seemed to consider this allegation as further evidence of the propriety of *not* finding that the plaintiffs’ claims sufficiently touched and concerned the United States. *See Kiobel*, 133 S. Ct. at 1678 (“The plaintiffs are not United States nationals but nationals of other nations. The conduct at issue took place abroad. And the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so.”).

131. As the discussion about the post-*Kiobel* cases shows, it is important to disaggregate what a court must consider when determining whether a claim touches and concerns the United States to ensure that a court consider all information relevant to that inquiry. *See supra* Part I.

132. The United States is a signatory to the U.N. Charter, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, which promote freedom, justice, and self-determination for all. *See generally* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 112; Universal Declaration of Human Rights, G.A. Res. 217 (III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); U.N. Charter.

133. *See* 18 U.S.C. § 1091 (2014) (criminalizing genocide and recognizing jurisdiction over a perpetrator of genocide even if the genocide is not committed in the United States and the perpetrator is not a U.S. national, provided that the perpetrator is a permanent legal resident of the United States, “a stateless person whose habitual residence is in the United States,” or simply “present in the United States”).

aiding and abetting torture and other crimes against humanity, sufficient to warrant a finding of ATS jurisdiction, calling into serious question the allegations that could satisfy this prong.

In the Torture Victim Protection Act (“TVPA”), the companion statute to the ATS, Congress created a cause of action for torture to be brought by and against “individuals.”¹³⁴ Courts have interpreted this right of action as belonging to both U.S. and foreign nationals.¹³⁵ Consequently, the TVPA is a clear example of the United States’ interest in providing victims of torture with access to a remedy. Moreover, the United States is a signatory to human rights agreements that forbid many of the very events alleged in *Kiobel*, including the Convention Against Torture, the U.N. Charter, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.¹³⁶ The TVPA was, in fact, passed “to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights.”¹³⁷ One would think the TVPA and these agreements sufficient evidence of U.S. interest in providing access to a remedy for torture. Failure to recognize ATS jurisdiction over a claim that includes aiding and abetting torture, even if committed by foreign nationals, would seem to undermine that interest. Perhaps under Justice Breyer’s third prong, the defendant or the tort must have some direct connection to the United States, for example, satisfaction of prong one or two, such that the defendant could more directly affect an “important American national interest” (in other words, such that the United States would be implicated, in some more meaningful way, by the defendant’s actions).¹³⁸

Justice Breyer’s last prong is also vague because it contains limited guidance as to the categories of American national interests that the ATS should protect. Moreover, Justice Breyer gave no guidance as to how and when to determine whether the defendant’s effect on such an interest is “substantial” or “adverse.” (Again, the aiding and abetting torture allegation of the *Kiobel* plaintiffs did not, according to Justice Breyer, rise to the level of “substantially and adversely affect[ing] an important American national interest.”¹³⁹) Neither did he speak to the kind of “residence” in the United States that might give rise to safe

134. See *supra* note 17 and accompanying text.

135. See *Baloco v. Drummond Co.*, 640 F.3d 1338, 1346 (11th Cir. 2011); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263–64 (11th Cir. 2009), abrogated on other grounds by *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012); see also *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003).

136. See *supra* note 132 and accompanying text.

137. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73.

138. See *Wuerth*, *supra* note 12, at 611–12 (observing that the defendants’ U.S. office was insufficient to satisfy Justice Breyer’s test).

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

harbor concerns. He does suggest that the United States could become a safe harbor for today's pirates if there is no civil or criminal liability attached to their behavior.¹⁴⁰ But given the existence of other sources of liability for torts that occur on American soil and torts committed by American nationals (for example, state law claims and the TVPA) and for related crimes (for example, assault, battery, and conspiracy), Justice Breyer's safe harbor argument, without qualification, may never be a credible basis for exercising ATS jurisdiction over an alleged customary international law violation.

Whatever questions these offerings raise, they do nonetheless provide some of the anatomy for a broader touch and concern test. Importantly, they underscore the primacy of "international jurisdictional norms" in determining when U.S. courts should exercise jurisdiction over customary international law claims. Indeed, an appropriate touch and concern test would not only contemplate but promote these norms. This Article seeks to do that by suggesting a test that considers, subject to reasonableness,¹⁴¹ territorial and national jurisdiction, two principles well established at international law.

The proposed test has six factors. The first three factors align with these jurisdictional principles. Each of these factors, however, must be balanced against each of the last three factors of the test—which generally, although not exclusively, concern policy—for a court to determine whether an ATS claim sufficiently touches and concerns the United States to displace the presumption against extraterritoriality. The factors are:

1. The location of the alleged law of nations violation;
2. The location of other alleged relevant conduct;
3. The nationality of the defendant;¹⁴²
4. The demands of international comity;
5. The likelihood that ATS jurisdiction denial could result in United States harboring a human rights violator; and

140. *Id.*

141. Despite grounds for the exercise of each type of jurisdiction, a court must refrain from exercising jurisdiction if it would be unreasonable to do so. To determine reasonableness, a court must consider all relevant factors, including, but not limited to: the link between the activity and the regulating state; nationality, residence, or economic activity in the regulating state; justified expectations; significance of the regulation internationally; consistency with international tradition; and another state's competing regulatory interests. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1987).

142. This Article proposes alternative language to that in Justice Breyer's first two prongs. The language chosen seeks to avoid the barrier to finding that the conduct at issue has touched and concerned the United States because the law of nations violation or other relevant conduct did not occur in the United States or the defendant is not a U.S. citizen. The proposed language might allow the factors to operate more freely as one of several factors to consider when determining whether the presumption should be displaced.

6. Any other American national interest that supports the recognition of subject matter jurisdiction.¹⁴³

If the alleged law of nations violation or other relevant conduct occurred in the United States, then barring a countervailing weight (for example, international comity demands and unreasonableness), a court would likely deem the plaintiff's claim, pursuant to the territorial jurisdiction principle, sufficient to displace the presumption. The same would be true if the defendant is a U.S. national, pursuant to the nationality jurisdiction principle.

In some instances a court's disposition of the proposed touch and concern test will be more fraught politically, if not analytically. This will especially be the case if the alleged law of nations violation or other relevant conduct did not occur in the United States and the defendant is not a U.S. national—in other words, in a foreign-cubed case. Nonetheless, requiring courts to genuinely grapple with the propriety of exercising jurisdiction over this type of case is one of the goals of the proposed test. Presented with these facts, courts should engage in a refined analysis of the last three factors to determine whether the application of one of them alone, or in combination with one or more additional factors, warrants displacing the presumption.

The possibilities for satisfying the proposed test, and thus displacing the presumption, are numerous—for example, alleged law of nations violation in the United States by a U.S. national with no compelling counterargument; other alleged relevant conduct in the United States plus a safe harbor argument, and no compelling counterargument; no alleged domestic tort or U.S. nationality, but allegations of heinous acts invoking the compelling American national interest in recognizing universal jurisdiction.¹⁴⁴ Likewise plentiful are the possibilities for finding the test unmet, and thus maintaining the presumption—for example, failure of all factors; no alleged domestic conduct, no U.S. nationality, and no compelling American national interest; other alleged relevant conduct in the United States but compelling international

143. By contrast, Professor Steinhardt suggested that the touch and concern inquiry not,

turn[] . . . on the territoriality of the wrong or the citizenship of the defendant but on . . . the nature of the breach; statements of interest . . . ; the exhaustion of local remedies . . . ; . . . the act of state doctrine and the political question doctrine; whether a federal court is a forum of necessity or *forum non conveniens*, and the links of the plaintiff to the United States.

Steinhardt, *supra* note 8, at 843.

144. See Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 150–51 (2006) (“Unlike other bases of jurisdiction in international law, universal jurisdiction requires no territorial or national nexus to the alleged act or actors over which a state legitimately may claim legal authority. Universal jurisdiction instead is based entirely on the commission of certain ‘universal crimes.’” (citations omitted)); see *infra* Part II.F.

comity demands. A coherent touch and concern test can provide courts with a matrix for answering the challenging question of the ATS's extraterritorial reach. A consideration of each test factor is below.

A. THE LOCATION OF THE ALLEGED LAW OF NATIONS VIOLATION

According to the *Restatement (Third) of Foreign Relations*, a State has jurisdiction over “conduct that, wholly or in substantial part, takes place within its territory.”¹⁴⁵ This principle of “territorial jurisdiction” codifies, in essence, the natural assumption that, as an attribute of sovereignty, a territory would have cognizance over events that take place within its borders. It is no stretch, then, for a court to deem a claim as sufficiently touching and concerning the United States, for ATS purposes, if the claim arises in the United States where U.S. courts are predisposed to recognize territorial jurisdiction, assuming no compelling countervailing factors or unreasonableness.

Pursuant to this factor, not just any claim will do; the claim must consist of a law of nations violation. Moreover, the law of nations at issue must satisfy *Sosa*'s requirement of specificity and universal acceptance.¹⁴⁶ This factor most readily contemplates claims of direct harm suffered by the plaintiff or the plaintiff's decedent at the hands of the defendant.¹⁴⁷ The claims that often result from this kind of harm are torture and extrajudicial killing, well-established law of nations violations that meet the *Sosa* standard.¹⁴⁸ If these claims are premised on conduct in the United States, they would, given the territorial jurisdiction principle, sufficiently touch and concern the United States to warrant ATS jurisdiction.

This factor might also be used, though, to determine whether behavior that gave rise to the direct harm (but did not constitute it) could still touch and concern the United States with sufficient force to displace the statute. For example, a plaintiff might allege that the defendant aided and abetted the direct harm and that the alleged aiding and abetting itself constituted a law of nations violation. Indeed, this aiding and

145. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)(a) (1987).

146. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); see *supra* note 53.

147. As a practical matter, the overwhelming majority of direct injuries in ATS cases will likely occur on foreign soil and, indeed, in a developing country. See *supra* note 51 and accompanying text; see also Penny M. Venetis, *The Broad Jurisprudential Significance of Sosa v. Alvarez-Machain: An Honest Assessment of the Role of Federal Judges and Why Customary International Law Can Be More Effective than Constitutional Law for Redressing Serious Abuses*, 21 TEMP. POL. & CIV. RTS. L. REV. 41, 45–46 (2011) (observing the prevalence of ATS cases that occur abroad and concern solely foreign actors).

148. See *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005) (regarding torture and extrajudicial killing); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1153–54 (E.D. Cal. 2004) (regarding extrajudicial killing).

abetting claim may be the only claim that the plaintiff brings pursuant to the ATS.¹⁴⁹

Aiding and abetting claims brought under the ATS are common because they reflect some of the alleged behavior of corporate tortfeasors.¹⁵⁰ However, there is a question of whether aiding and abetting a customary international law violation is itself a customary international law violation subject to civil jurisdiction.¹⁵¹ There are other uncertainties in the law about the proper treatment of the aiding and abetting claim under the ATS.¹⁵² As a result, to evaluate such a claim under this factor, a court would have to determine: whether aiding and abetting claims are themselves customary international law violations subject to civil redress; whether they must satisfy *Sosa*¹⁵³ (and, if they do, whether the claims satisfy the criteria); and the proper *mens rea* for this claim and whether the plaintiff has alleged it.¹⁵⁴ If a court deems aiding and abetting cognizable under the ATS and the plaintiff properly states the claim, this should significantly advance the plaintiff's touch and concern argument, particularly if the aiding and abetting occurred in the United States.¹⁵⁵

As discussed above, Justice Alito would read the presumption against extraterritoriality to mean that the ATS provides jurisdiction *only* for a law of nations violation that meets the *Sosa* standard and occurs in the United States (as opposed to other conduct relevant to the law of nations violation that occurs in the United States).¹⁵⁶ While

149. See also Keitner, *supra* note 42, at 102 (“Although accomplice liability does in some sense depend upon wrongdoing by the principal, it can be adjudicated independent of the principal’s liability.”).

150. See Introduction, *supra*.

151. See Ingrid Wuerth, *The Alien Tort Statute and the Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1949 (2010) (observing that “aiding and abetting liability is well established in international law in the *criminal* context, but not necessarily the civil” (emphasis in original)). Further, at least one commentator believes that aiding and abetting liability may not even be available pursuant to the ATS given that the ATS provides jurisdiction for torts in “violation of the law of nations” and not for torts that aid and abet this violation. See Bradley, *supra* note 4, at 1834. Professor Bradley also opines that Congress, in a criminal statute enacted during the time of the ATS’s enactment, demonstrated that it knew how to expressly provide for jurisdiction over aiding and abetting liability claims and that it did not so provide in the ATS strongly suggests that Congress did not intend for the ATS to confer jurisdiction over this kind of liability. See *id.*

152. See Wuerth, *supra* note 12, at 602–03.

153. See Wuerth, *supra* note 151, at 1947 (observing that aiding and abetting claims satisfy *Sosa*).

154. See *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 320 (D. Mass. 2013) (in noting the propriety of bringing an aiding and abetting claim pursuant to the ATS, the court also recognized the intercircuit split on the proper *mens rea* for aiding and abetting liability under customary international law).

155. See Hoffman, *supra* note 58, at 46 (“Human rights violations committed extraterritorially at the direction of actors within U.S. territory will likely overcome the presumption.”).

156. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (Alito, J., concurring). If Justice Alito refers only to direct injury, then his interpretation is troubling for two key reasons: (1) many ATS defendants do not commit wholesale human rights abuses in the United States (they know better

deeming aiding and abetting a customary international law violation sufficient to ground ATS jurisdiction may not have been what Justice Alito had in mind (because this would not require the direct injury to occur in the United States), it may satisfy his test—that the law of nations violation occur in the United States.¹⁵⁷ A court should consider whether any conduct short of a law of nations violation suffices to touch and concern the United States pursuant to the next factor.

B. THE LOCATION OF OTHER ALLEGED RELEVANT CONDUCT

This factor takes into account the location of conduct that may not constitute the alleged law of nations violation itself, but is nonetheless material to the occurrence of the violation, furthers the violation, ratifies the violation, etc.¹⁵⁸ Such conduct might include a variety of activities that give rise to the ultimate harm, such as planning, ordering, financing, or providing other substantial assistance.¹⁵⁹ Any of the above conduct in the United States could, pursuant to the territorial jurisdiction principle, result in displacement of the presumption against extraterritoriality.¹⁶⁰ Courts would have to determine whether the claim before them contains the quantum of domestic conduct that warrants this displacement and if the exercise of jurisdiction would be reasonable.

The simple reality—as the Ruggie Report reveals—is that corporate human rights abuses abound¹⁶¹ and many of the victims of these abuses accuse corporations of planning, ordering, encouraging, or providing material support for a law of nations violation from the United States, sometimes with intent to cause the law of nations violation to occur abroad.¹⁶² The victims frequently bring their claims pursuant to the

than to do that); and (2) failure to legally recognize the predicate acts to the harm potentially shields an entire category of malfeasance from legal liability.

157. It is unclear whether, pursuant to Justice Alito's approach, the ATS would reach domestic and extraterritorial conduct if the ultimate harm and customary international law violation occurred in the United States but the predicate acts giving rise to the harm occurred abroad. There is nothing, though, about his framework that seems to deny this exercise of ATS jurisdiction.

158. See Wuerth, *supra* note 12, at 608 (noting that the Court's "touch and concern" language might mean that "something less than domestic conduct that violates international law under the *Sosa* test" could satisfy the test (emphasis in original)).

159. *Id.*; see also Roger Alford, Kiobel *Insta-Symposium: Degrees of Territoriality*, OPINION JURIS (Apr. 22, 2013, 9:56 AM), <http://opiniojuris.org/2013/04/22/kiobel-insta-symposium-degrees-of-territoriality> (providing an expansive list of activities that might satisfy the touch and concern test, including "execution," "cross-border conduct," "planning and authorization," "design and testing," "training," "construction," "contracting," "financing and money transfers," "electronic communications," "unlawful gains," and "extraterritorial territory").

160. A court might consider aiding and abetting claims pursuant to this factor if it concludes that aiding and abetting a customary international law violation is not itself a customary international law violation.

161. See *supra* pp. 450–52.

162. See *supra* pp. 450–52.

ATS.¹⁶³ This factor provides an opportunity for courts to evaluate *all* of the conduct that is relevant to the claim brought under the ATS (other than the law of nations violation itself), determine where it occurred, and ultimately conclude whether, on balance and subject to reasonableness, it suffices to displace the presumption.

C. THE NATIONALITY OF THE DEFENDANT

Justice Breyer would consider whether “the defendant is an American national” to help determine whether the conduct at issue touched and concerned the United States sufficient to displace the presumption.¹⁶⁴ For reasons discussed below, this Article supports this notion but clarifies that this factor applies to both the corporate and the individual defendant.¹⁶⁵ Whether juridical or natural, “an American national” has perhaps the strongest possible tie to the United States.¹⁶⁶ Consequently any claim against U.S. nationals must, by virtue of identity, touch and concern the United States.¹⁶⁷

Exercising jurisdiction based upon nationality would also align with an international jurisdictional norm, which contemplates jurisdiction over a national’s activities whether they occur inside or outside the State. The United States has codified the exercise of this jurisdiction in the Foreign Corrupt Practices Act,¹⁶⁸ pursuant to which the United States

¹⁶³. See BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS, 309 (2d rev. ed. 2008).

¹⁶⁴. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671 (Breyer, J., concurring); see also Oona Hathaway, *Kiobel Commentary: The Door Remains Open to “Foreign Squared” Cases*, SCOTUS BLOG (Apr. 18, 2013, 4:27 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases> (stating that post-*Kiobel* there may be “renewed focus of ATS litigation on U.S. corporations” (emphasis added)).

¹⁶⁵. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987). See generally *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)* 1970 I.C.J. 3 (Feb. 5). But see *Balintulo v. Daimler AG*, 727 F.3d 174, 190, n.24 (2d Cir. 2013) (“Nothing in the Court’s reasoning in *Kiobel* suggests that the rule of law it applied somehow depends on a defendant’s citizenship. Indeed, the presumption of extraterritoriality traditionally has ‘focused on the site of the conduct, not the identity of the defendant.’” (citations omitted) (quoting *Doe v. Exxon Mobil Corp.*, 654 F.3d 111, 74–76 (D.C. Cir. 2011) (Kavanaugh, J., dissenting))).

¹⁶⁶. Moreover, as Professor Hoffman notes, the Supreme Court “will struggle to distinguish a future case involving extraterritorial international law violations committed by U.S. citizens from the [Attorney General William] Bradford opinion, one of the few historical records discussing causes of action cognizable under the ATS and finding the acts of U.S. citizens on foreign sovereign territory among them.” Hoffman, *supra* note 58, at 45.

¹⁶⁷. Additionally, finding the touch and concern question satisfied on the basis of U.S. citizenship avoids international comity concerns. See *id.* Further, as Professor Hoffman writes: “The United States has an indisputable right under international law to apply such norms to its own citizens no matter where the offending acts occurred. Indeed, the United States may have a duty to do so.” *Id.*; See also Cleveland, *supra* note 8, at 23 (noting that “offenses committed by U.S. citizens against foreign nationals (who are the only valid plaintiffs under the ATS) would fall squarely within the state responsibility view of the purposes of the ATS”).

¹⁶⁸. 15 U.S.C. § 78dd-1 (2014).

can exercise jurisdiction over a U.S. national for activities that allegedly occurred abroad. This statute, in part, prohibits a “United States person”¹⁶⁹ from using “the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to”¹⁷⁰ a foreign official to induce that foreign official to act in her official capacity.¹⁷¹

Additionally, the nationality of the U.S. corporation is especially important to the touch and concern question because the U.S. corporation: (1) relies on the protection of U.S. laws;¹⁷² (2) resides in a country that is obliged, pursuant to international law, to provide alleged victims of human rights abuses with access to a remedy;¹⁷³ and (3) resides in a country that has in recent years committed itself to the vision of the Guiding Principles,¹⁷⁴ which expressly advocate providing victims of corporate human rights abuses with access to a remedy. For all of these reasons, if the defendant is a U.S. corporation, that fact should weigh strongly in favor of satisfying the touch and concern question and, thus, displacing the presumption against extraterritoriality.

This factor also advances the Court’s apparent requirement that the corporate presence in the United States be significant in order to dislodge the presumption, given that in *Kiobel* the Court rejected “mere corporate presence” in the United States as sufficient to do so.¹⁷⁵ By this

169. *Id.* § 78dd-1(g)(2) (defining “United States person” as “a national of the United States . . . or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof”).

170. *Id.* § 78dd-2(a).

171. *Id.* § 78dd-2(a)(1).

172. *See* *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (“[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations . . .”).

173. The United States became a signatory to the International Covenant on Civil and Political Rights (“ICCPR”) in 1992. The ICCPR speaks to the civil and political rights of “all members of the human family,” International Covenant on Civil and Political Rights Preamble, Dec. 16, 1966, 999 U.N.T.S. 171, and expressly requires that the treaty’s signatories provide persons who claim a violation of their rights access to a remedy. *See id.* at art. 2 (“Each State Party . . . undertakes: (a) To ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy . . . (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent . . . authorities . . . and to develop the possibilities of judicial remedy . . .”).

174. Daniel Baer, Deputy Assistant Sec’y of State for Democracy, Human Rights and Labor, General Statement, Address Before the Human Rights Council (June 16, 2011), *transcript available at* <http://www.humanrights.gov/2011/06/16/businesses-and-transnational-corporations-have-a-responsibility-to-respect-human-rights> (“The United States would like to . . . express our support and commitment to working to make the vision of the Guiding Principles a reality where it matters most—on the ground for people and businesses.”).

175. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). Justice Breyer agreed with the majority’s view and made clear that achieving the requisite level of corporate presence was not as simple as gaining general jurisdiction. *Id.* at 1678

language, the Court seems to be discussing corporate size and corporate ties. The Court's language reflects a concern about the foreign corporation that has opened an office in the United States for limited purposes—for example, to provide a registered agent for service of process. This argument is furthered by the fact that the defendants in *Kiobel* were foreign corporations. The Court perhaps was commenting as much on the reality of that case as on the norm that should be followed in future ATS cases.¹⁷⁶ Conversely, a defendant that is incorporated in the United States and operates therein as a going concern seems to be something other than “merely present.”¹⁷⁷ The Court's “mere corporate presence” language may well require a relationship between a corporation and the United States that is more explicitly linked—that of national to country.¹⁷⁸

The proposed touch and concern test should not fail, however, if the defendant is not a U.S. citizen. The plaintiff's case simply would not be advanced based upon this factor. Any one or more of the other factors, on balance, could satisfy the test.

D. THE DEMANDS OF INTERNATIONAL COMITY

In recent jurisprudence—*Sosa*, *Kiobel*, and *Daimler AG v. Bauman*—the Supreme Court has evinced an overarching concern about possible intrusion into another sovereign's activities if U.S. courts were to recognize ATS jurisdiction.¹⁷⁹ This factor appeals to that preoccupation. It also comports with international jurisdictional norms, as it would require a court to consider the interests of foreign sovereigns¹⁸⁰ and the executive branch as grounds for recognizing or denying ATS jurisdiction, subject to reasonableness.

As with factors one through three, this factor should operate freely so that a court might truly measure whether it weighs in favor of ATS jurisdiction denial. Without this factor—framed in these terms—there is the risk of courts drawing the line of permissible federal judicial activity

(Breyer, J., concurring). Moreover, the Justice opined that the corporate presence must be sufficiently great that failure to provide a human rights liability scheme could result in the United States harboring a human rights violator. *Id.*; see also Wuerth, *supra* note 12, at 612 (“The facts of *Kiobel* did not satisfy Justice Breyer's test, however, as the defendants' only connection to the United States was a New York office owned by an affiliated company that helped attract capital investors.”).

176. The sentence “[c]orporations are often present in many countries,” *Kiobel*, 133 S. Ct. at 1669, also begs explanation. Again, though, the Court seemed to be focused on companies that are not “at home,” whether foreign corporations that are operating in the United States or U.S. corporations that are operating abroad.

177. See *supra* note 169 and accompanying text; *supra* pp. 473–74.

178. One could interpret this statement, however, to mean that no corporate presence, regardless of size, suffices alone to displace the presumption.

179. See generally *Kiobel*, 133 S. Ct. 1659.

180. RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 403(2)(g)–(h), 403(3) (1987).

too near. So, instead of reacting precipitously when entertaining a matter with significant foreign connections, courts should fully engage the questions of competing foreign interests and foreign affairs intervention. To do this, courts should not assume the existence of an international comity issue, warranting ATS claim dismissal, merely because the claim at issue is foreign-cubed or foreign-squared (a foreign plaintiff and a foreign defendant or a tort that occurred in a foreign country).¹⁸¹ It also means evaluating the propriety of ATS jurisdiction pursuant to the other proposed factors—irrespective of possible international comity issues—especially those that seek to determine whether the denial of jurisdiction could reasonably result in the United States harboring a human rights violator, and whether there exists an important American national interest that should be vindicated. The result of these inquiries could warrant overriding any international comity concerns.

Imagine a case brought in the United States, pursuant to the ATS, by former child soldiers, citizens of another country, against a foreign corporation for aiding and abetting a foreign paramilitary group in torturing the children. The paramilitary group funds its activities through the sale of “conflict minerals.” The activities of this paramilitary group are condemned globally and the conflict violates international law. All relevant events occurred abroad. The country where the events occurred does not want the U.S. court to recognize jurisdiction. This country would deem the rejection of ATS jurisdiction an exercise of international comity.

This request notwithstanding, one American national interest perhaps should give the court pause: The United States opposes even indirect financial support of those engaged in illegal conflicts, as evidenced by the new Securities and Exchange Commission conflict minerals rules.¹⁸² This factor would allow a court to balance this interest against that of the foreign country¹⁸³ before summarily denying ATS jurisdiction on international comity grounds.¹⁸⁴

U.S. courts should certainly give all due deference to a foreign government—especially that of the country where the direct harm occurred and possibly that of the defendant’s resident country—if it requests that U.S. courts deny ATS jurisdiction.¹⁸⁵ However, it is

181. As fairly recent cases reveal, international comity may demand recognition of ATS jurisdiction. *See generally* *Jota v. Texaco Inc.*, 157 F.3d 153 (2d Cir. 1998); *Mamani v. Berzaín*, Nos. 07-22459-CIV, 08-21063-CIV, 2014 WL 2069491 (S.D. Fla. May 20, 2014).

182. *See* 17 CFR § 240.13p-1 (2012); *supra* note 36 and accompanying text.

183. A court could also evaluate a circumstance such as the one presented under the last factor, concerning the protection of American national interests.

184. A U.S. court might choose to recognize jurisdiction pursuant to this factor if the country requesting abstention cannot itself provide the plaintiffs with access to a remedy.

185. There are, of course, other very practical issues which courts must address when determining the propriety of invoking international comity as a ground for rejecting ATS jurisdiction, including determining the status of the person who is best poised to make the international comity argument on

conceivable that the interests of the United States and the objecting foreign country would conflict. In that instance, protection of the American national interest should prevail, despite the comity demands. This is especially the case where one or more of the other factors denominated above (or an allegation of a universal offense, such as genocide, slavery, piracy, and war crimes¹⁸⁶) suggests that the United States recognize ATS jurisdiction.¹⁸⁷

E. LIKELIHOOD THAT ATS JURISDICTION DENIAL COULD RESULT IN THE UNITED STATES HARBORING A HUMAN RIGHTS VIOLATOR

Congress passed the ATS, in part, to provide jurisdiction over pirates,¹⁸⁸ those persons who act everywhere but should be at home nowhere. The ATS provided a means for ensuring that pirates would not be at home in the United States as they might be haled into a U.S. court and held accountable for their actions.¹⁸⁹ This safe harbor concern persists today, as Justice Breyer opined in *Kiobel*.¹⁹⁰

As noted above, Justice Breyer suggested that ATS jurisdiction lie where “the defendant’s 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.”¹⁹¹ This Article suggests that whether the defendants’ conduct substantially and adversely affects an important American national interest and whether the choice not to recognize ATS jurisdiction could result in providing safe harbor to a human rights violator be considered separately to encourage a discussion on each issue. This Subpart discusses what a court should contemplate when determining whether the denial of ATS jurisdiction could reasonably result in the United States harboring a human rights violator. (The next

behalf of foreign interests—a foreign government representative? If so, which? A party to the suit? A trade association? Scholars? Whom?

186. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1987).

187. Additionally, failure of the United States to recognize ATS jurisdiction could, in some instances, create the very international strife that it seeks to avoid by invoking international comity, as the court in *Lively* observed. See *supra* pp. 461–62; Marco Basile, *The Long View on Kiobel: A Muted Victory for International Legal Norms in the United States?*, in AGORA: REFLECTIONS ON KIOBEL, *supra* note 8, at e-13, e-17 (“[D]eclining to adjudicate a case involving an international issue can affect foreign relations as much as hearing the case.” (citing Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES MAG., Sept. 28, 2008, at MM50)).

188. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring); *supra* note 4 and accompanying text.

189. See *Sosa*, 542 U.S. at 732 (finding that pirates are an enemy of all mankind); *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring) (finding that “[i]nternational norms have long included a duty not to permit a nation to become a safe harbor for pirates (or their equivalent)”) (citations omitted).

190. *Kiobel*, 133 S. Ct. at 1671–73 (Breyer, J. concurring).

191. *Id.* at 1674.

Subpart will discuss other reasons, consistent with American national priorities, why a U.S. court might recognize ATS jurisdiction.) Further, this Subpart contends that the availability of alternative civil liability be considered only where federal courts and federal law are concerned. This Subpart also suggests that the availability of criminal liability not be considered at all.

Any of the following in the United States should trigger a court's inquiry concerning "harboring": citizenship, nationality, incorporation, residency, or significant corporate presence.¹⁹² If "harbor" means to provide shelter,¹⁹³ then citizenship, nationality, incorporation, and legal permanent residency are proper considerations because they essentially mean that the "home" (or at least *a* home) of the citizen, national, corporation, or resident at issue is the United States.¹⁹⁴

Further, to evaluate whether denial of ATS jurisdiction could result in the United States harboring a corporate human rights violator, assuming that the corporate defendant is not a U.S. national, a court must first consider whether the corporate presence at issue is significant. To wit, a court must determine either that the presence is so unremarkable that failure to exercise ATS jurisdiction could not reasonably result in the United States harboring a human rights violator, or the converse. A court could measure significance by evaluating the following factors: (1) corporate headquarters in the United States; (2) the amount of annual revenue, in raw dollars, derived from the U.S. market; (3) the number of employees in the United States; (4) the number of offices in the United States; (5) the benefits, including tax breaks, received by virtue of operating in the United States; and (6) the use of the United States' legal system, including the filing of civil suits. Evaluating these factors, none of which is necessarily dispositive, should assist a court in determining whether the corporation is more than "merely present" in the United States and, if so, whether the extent of that presence could reasonably result in the United States harboring a human rights violator if a court does not recognize ATS jurisdiction. Considering these factors, amongst others, would prevent a court's peremptory conclusion that a corporation does not have the requisite U.S. presence to displace the presumption.

In determining whether the failure to recognize ATS jurisdiction would result in a safe harbor issue, a court should not consider the possible causes of action or jurisdictional grounds available to the plaintiff in state courts, as such a requirement would impose an undue

192. See Cleveland, *supra* note 8, at 24, on the variety of circumstances that might give rise to "safe harbor" concerns ("Justice Breyer's category at a minimum would capture such persons who later remain in the United States for a sufficient period to suggest that the country is a safe harbor.")

193. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 529 (10th ed. 1994) (defining harbor).

194. This would be true even if the corporation at issue has a presence in another country.

burden on the court, and one of the purposes of the ATS is to provide federal jurisdiction for torts that are customary international law violations.¹⁹⁵ So, even if the plaintiff could bring a state common law claim in federal or state court, such an option would arguably defeat the goal of the ATS. A court should, however, determine whether the plaintiff could bring another federal human rights claim against the defendant based upon another source of federal jurisdiction. Nonetheless, out of a sense of fairness and respect for the plaintiff's privilege as the master of their complaint, courts should only compare causes of action where the plaintiff can sue the same defendant sued pursuant to the ATS.

The most obvious statutory alternative to the customary international law claims recognized by the ATS is the TVPA—a plaintiff would allege jurisdiction over a TVPA claim pursuant to the federal question jurisdiction statute, 28 U.S.C. § 1331.¹⁹⁶ The TVPA provides a right of action for an individual, a legal representative, or other rightful legal claimant against another individual for torture and/or extrajudicial killing committed “under actual or apparent authority, or color of law, of any foreign nation.”¹⁹⁷ If, pursuant to the ATS, the plaintiff sued a natural person for a customary international law violation that required a showing of state action, and the plaintiff's claims could credibly be refashioned as claims of torture and/or extrajudicial killing, the possibility of a TVPA claim might warrant denial of ATS jurisdiction.

While there is overlapping focus between the ATS and the TVPA, there are also critical distinctions that may result in a claim under the TVPA being a poor substitute for one under the ATS. For example, under the TVPA, a plaintiff can only sue a natural person.¹⁹⁸ Accordingly, under this statute, the plaintiff would be precluded from suing a corporation.¹⁹⁹ Additionally, as just noted, TVPA claims are limited to torture and extrajudicial killing. Generally acceptable ATS claims, by contrast, include and extend beyond torture and extrajudicial killing to genocide, slavery, war crimes, and crimes against humanity.²⁰⁰ Moreover,

195. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (noting “the wisdom of the First Congress in vesting jurisdiction over [torts in violation of the law of nations] in the federal district courts through the Alien Tort Statute” and that “[q]uestions of this nature are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the courts of the fifty states”).

196. 28 U.S.C. § 1350 note (2014).

197. *Id.* § 1350(2)(a).

198. *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1705 (2012).

199. Even if the plaintiff were to sue an individual corporate agent, the plaintiff's actual recovery in meritorious cases would likely be limited and the deterrence value of bringing a human rights abuse claim against a corporation dulled.

200. See AM. SOC'Y OF INT'L LAW, *BENCHBOOK ON INTERNATIONAL LAW*, pp. III.E-13–14 nn.42–49 (Dianne Marie Amann ed., 2014) for a comprehensive list of relevant cases.

the plaintiff must prove state action for all TVPA claims,²⁰¹ a significant hurdle²⁰² that the plaintiff need not surmount with all ATS claims.²⁰³ Therefore, if a plaintiff sued a corporation for a customary international law violation pursuant to the ATS, a court should consider the TVPA claim inapposite as another source of federal law. This is the kind of consideration that a court should make before denying ATS jurisdiction on the theory that the plaintiff could bring another federal human rights claim.

Finally, a court should not consider the possibility of criminal liability for the defendants based upon the instant facts, as criminal liability does not have the capacity to compensate the plaintiff in the way that civil liability can and in the way that tort law in the United States not only allows, but promotes.²⁰⁴ In sum, information considered pursuant to this factor could weigh in favor of satisfying the touch and concern test if a court concludes that denial of ATS jurisdiction would result in the United States harboring a human rights violator.

F. ANY OTHER AMERICAN NATIONAL INTEREST THAT SUPPORTS RECOGNITION OF ATS JURISDICTION

By stating that protection of “an important American national interest”²⁰⁵ might warrant recognition of ATS jurisdiction, Justice Breyer seemed to offer flexibility to courts confronted with the question of ATS jurisdiction but not the facts that would otherwise support this jurisdiction, such as domestic conduct or the defendant’s U.S. nationality. This Article agrees that courts should consider the national interest for the purpose of judicial flexibility, but expressly proposes that in the exercise of this flexibility, courts contemplate the propriety of ATS jurisdiction as a vehicle for “defin[ing] and prescrib[ing] 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”²⁰⁶ without regard to the requirements of territorial or nationality jurisdiction.²⁰⁷

201. § 1350 note.

202. *See generally* Bradley, *supra* note 4.

203. Several courts have concluded that some ATS claims, for example, genocide, war crimes, forced labor, aircraft hijacking, do not require state action. *See generally* AM. SOC’Y OF INT’L LAW, *supra* note 200.

204. *See* DAN B. DOBBS, THE LAW OF TORTS 2 (2000) (“Tort law is primarily intended to redress legally recognized harms by rendering a judgment against the wrongdoer. This award is usually a money award called ‘damages,’ and it is usually intended as a kind of compensation for the harm suffered.”).

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

206. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1987).

207. *See* Wuerth, *supra* note 12, at 618. This factor would allow courts to find ATS jurisdiction even where no relevant conduct, per se, occurred on U.S. soil (and the defendant is not a U.S.

Pursuant to its potential accommodation of universal jurisdiction, this factor might also provide the victims of universally condemned acts with their only possible remedy. Because many of these victims ultimately gain political asylum in the United States, proper application of this factor may require that courts more carefully weigh whether the claims are entitled to ATS jurisdiction.

The Supreme Court, in fact, seems willing to treat plaintiffs and defendants differently, for ATS purposes, even when both first develop a connection with the United States *after* the occurrence of the events that gave rise to the tort. In *Kiobel*, the Court stated: “Following the alleged atrocities, petitioners moved to the United States where they have been granted political asylum and now reside as legal residents.”²⁰⁸ Despite acknowledging this very significant contact with the United States and the reason for granting asylum, the Court made no issue of it when evaluating whether plaintiffs’ claims sufficiently touched and concerned the United States. In his concurrence, Justice Breyer treated these facts no differently, opining that “the parties and relevant conduct lack sufficient ties to the United States for the ATS to provide jurisdiction.”²⁰⁹ Conversely, in *Kiobel*, the Court approved the exercise of ATS jurisdiction in *Filartiga v. Pena-Irala*²¹⁰ and *In re Estate of Marcos Human Rights Litigation*,²¹¹ suggesting that because, in each case, the defendant had moved to the United States after the occurrence of the tort in question and the allegations against them were of heinous acts, the United States had an interest in not providing a safe haven for them.²¹²

This disparate treatment is somewhat curious given that a plaintiff who has received asylum in the United States after a tortious event in their country—and perhaps because of the tortious event—cannot mount a claim against the defendant in their home country. While these facts would not transform a case with no “relevant conduct” in the United States into its opposite, they might warrant a finding of subject matter jurisdiction given the legal relationship between the plaintiff and the United States and the larger goal of furthering the American national interest of providing a victim of an act that is universally condemned with access to a remedy.²¹³ This factor would allow a court to consider

national). Pursuant to this factor, the location of the relevant conduct, in other words, might be inconsequential to the question of ATS jurisdiction.

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

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

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

211. *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1468 (9th Cir. 1994).

212. *See Kiobel*, 133 S. Ct. at 1675 (Breyer, J., concurring).

213. *See* McCorquodale, *supra* note 56, at 846 (noting that the Guiding Principles require states to provide access to remedy “especially where claimants ‘cannot access [their] home State courts

allegations, perhaps not theretofore considered, to determine whether a significant American national interest could be advanced by the exercise of ATS jurisdiction.

III. INTERACTION WITH *MORRISON*

In *Morrison*²¹⁴ the Supreme Court held that the presumption against extraterritoriality applied to federal statutes.²¹⁵ As a consequence, federal statutes apply only to domestic conduct unless they contain clear evidence otherwise.²¹⁶ However, courts answering the question of a statute's extraterritorial application should determine whether the conduct or relationship that was the *focus* of the statute occurred in the United States. If it did, this would suffice to displace the presumption.²¹⁷ If these conclusions provided the sole guidance for the ATS plaintiff with claims containing material foreign features, that plaintiff might have a limited chance of recovery. In *Kiobel*, however, the Court seemed to relax the restriction of the presumption against extraterritoriality by suggesting, if not outright creating, the touch and concern test, thus allowing plaintiffs to displace the presumption if the claims contain allegations sufficiently tied to the United States. This potentially enables plaintiffs to litigate ATS claims with more significant foreign attributes.

The proposed test provides a mechanism, pursuant to the relative license granted by *Kiobel*, through which courts can find jurisdiction under the ATS, despite the potential limitations imposed in *Morrison*. The test generally aligns with *Morrison* in its effort to determine *whether* the domestic conduct or relationship at issue is the focus of the statute.²¹⁸ It also operates more broadly to consider whether the instant claim connects, in some other material way, to the statute's focus.²¹⁹ As noted

regardless of the merits of the claim" (alteration in original) (quoting U.N. HUMAN RIGHTS COUNCIL, *supra* note 32)).

214. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

215. *Id.* at 254–56. The Court also explained that the question of the presumption's applicability goes to the merits of the case and not jurisdiction. *See id.* at 254 (“[T]o ask what conduct [a statute] reaches is to ask what conduct [a statute] prohibits, which is a merits question. Subject matter jurisdiction, by contrast, ‘refers to a tribunal’s’ ‘power to hear a case.’”). The notion of applying the presumption against extraterritoriality to a jurisdictional statute like the ATS has been disquieting, post-*Kiobel*, to say the least. *See* Anthony J. Colangelo, *Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT’L L. 65, 66 (2013); Hafetz, *supra* note 18, at 110–11; Steinhardt, *supra* note 8, at 841–42.

216. *Morrison*, 561 U.S. at 255.

217. *Id.* at 266.

218. Justice Alito emphasized the importance of this standard in *Kiobel*, noting that “only conduct that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations can be said to have been ‘the focus of congressional concern,’ when Congress enacted the ATS.” *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (2013) (Alito, J., concurring).

219. Before discussing the importance of statutory focus to the question of displacing the presumption against extraterritoriality, the Supreme Court, in *Morrison*, first rejected the “conduct

above, for a plaintiff to satisfy the first factor of the proposed test, the plaintiff must allege that the entire law of nations violation occurred in the United States. As law of nations violations “are the objects of the [ATS’s] solicitude,”²²⁰ the alleged occurrence of this event in the United States would be the most domestic activity that the statute contemplates and thus, would align with *Morrison*. However, if a plaintiff cannot satisfy this factor (because the alleged law of nations violation occurred abroad) that would not, under the proposed test, doom the plaintiff’s claim, as *Kiobel* allows for a consideration of the full contours of the plaintiff’s *claim* and not simply the location of specific conduct.²²¹

Factor two of the proposed test considers whether “other relevant conduct” allegedly occurred in the United States, such that the presumption against extraterritoriality might be displaced. This factor also seeks to ascertain the existence of any domestic activity concerning the alleged law of nations violation—the focus of the ATS—and therefore also allies with *Morrison*. As with the first factor, however, should a plaintiff be unable to satisfy this factor, the plaintiff could seek to ground ATS jurisdiction pursuant to another factor or set of factors.

Factor three concerns the defendant’s nationality and would support the displacement of the presumption against the extraterritorial application of the ATS if the defendant were a U.S. national. This factor aligns with *Morrison* because the focus of the ATS is to provide U.S. courts with jurisdiction over “aliens” who allege torts in violation of the law of nations or a treaty of the United States. To do so, the statute must

and effects” test of the U.S. Court of Appeals for the Second Circuit, itself crafted to determine the extraterritorial application of a statute, § 10(b) of the Securities and Exchange Act of 1934. The test considered: (1) “whether the wrongful conduct occurred in the United States”; and (2) “whether the wrongful conduct had a substantial effect in the United States or upon United States citizens.” *Morrison*, 561 U.S. at 257. In rebuffing the test, the Court reasoned that nothing in the statute suggested or supported its use; the test was difficult to administer; and the test did not yield predictable results. *Id.* at 258–59 (citing *SEC v. Berger*, 322 F.3d 187, 19–93 (2d Cir. 2003)). The Court held that the focus of § 10(b) of the Securities and Exchange Act is not “deceptive conduct” generally but rather “deceptive conduct ‘in connection with the purchase or sale of [securities].’” *Id.* at 266–67 (emphasis added) (quoting 15 U.S.C. § 78j(b) (1934)) (citing *SEC v. Zandford*, 535 U.S. 813, 820 (2002)). Accordingly, for the presumption to be displaced the domestic conduct in question must concern “deceptive conduct ‘in connection with the purchase or sale of [securities].’” *Id.* at 266. While at first glance it might appear that the proposed factors test is the conduct and effects test by another name, it is not. The proposed test does not focus on U.S. “effects” of foreign conduct. Although this would seem to be a worthy goal and one that is consistent with international norms, it is, instead, more concerned with the location and the materiality of the conduct itself, the nationality of the defendant, and policy considerations for courts, preoccupations that reconcile with international jurisdictional norms. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(2)(a) (1987); see also *supra* pp. 467–68. The test is concerned with the effect of a denial of ATS jurisdiction if that denial could reasonably result in the United States harboring a human rights violator or denying a human rights abuse victim access to a remedy. These are not the types of effects that the Supreme Court renounced in *Morrison*.

220. *Morrison*, 561 U.S. at 267.

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

necessarily contemplate a defendant against whom the claim is to be brought, certainly including the defendant U.S. national. This factor does not perfectly align with *Morrison* because there the Court was unmoved by the U.S. nationality of some of the defendants and because it contemplates a foreign defendant. Nonetheless, it aligns with the goal of determining whether the ATS *claim* touches and concerns the United States.

Factor four concerns the demands of international comity and relates to the ATS's focus because courts can use the concept as a basis for recognizing the cause of action brought pursuant to the ATS, thereby vindicating the statute's purpose.²²² Moreover, a federal court's power to act based upon international comity demands exists outside of—and perhaps even above—the concerns raised in *Morrison*, as it emanates from courts' discretionary powers.²²³ As a result, it likely cannot, as an existential matter, conflict with the ATS's focus.

Factor five concerns safe harbor from liability and assumes the sufficiency of the underlying allegations—for example, an “alien” and a tort in violation of the law of nations, but also some jurisdictional defect, such as the foreign-cubedness of the claims. It concerns the focus of the ATS by prompting courts to question whether they may exercise jurisdiction in service of the larger goal of preventing the harboring of a human rights violator. It does not concern underlying domestic conduct. However, if U.S. courts are to seriously consider safe harbor concerns in ATS cases, limiting that consideration to only those cases where there is underlying domestic conduct that is the focus of the statute, as required by *Morrison*, would blunt the success of the undertaking from the start. Perhaps *Kiobel* would permit courts to consider safe harbor issues more expansively.

Factor six is a catch all and, like most such factors, deliberately vague; it exists solely to allow courts to realize the goal of the ATS (barring a legitimate opportunity to do so based upon one or more of the other factors). This catch all factor would allow courts, where appropriate, to exercise jurisdiction over cases in which “aliens” are complaining of a tort in violation of the law of nations, the express focus of the ATS. The proposed test engages *Morrison*'s preoccupation with domestic conduct and extends it to the limit allowed by *Kiobel*, in pursuit of the larger goal of determining whether an ATS claim touches and

222. *See supra* pp. 474–75.

223. *See also* Voigt v. Fabricut, Inc., No. 10-CV-662-TCK-TLW, 2012 WL 1190660, at *3 (N.D. Okla. Apr. 6, 2012) (observing that “[t]he international comity argument is premised on the Court's discretionary power to abstain from infringing on a foreign proceeding”); *In re* Regus Bus. Ctr. Corp., 301 B.R. 122, 129 (Bankr. S.D.N.Y. 2003) (noting the court's “inherent and discretionary power” to abstain from resolving an issue because of international comity amongst other concerns).

concerns the United States so as to displace the presumption against extraterritoriality.

CONCLUSION

Currently, the touch and concern test, as presented by the Supreme Court in *Kiobel*, offers little guidance for determining when the presumption against the extraterritorial application of the ATS might be displaced. This Article attempts to provide some direction by divining balancing factors based upon the *Kiobel* opinions and international jurisdictional norms. The proposed test operates within the lines drawn by the Supreme Court in *Morrison* and *Kiobel* together and seeks to appeal to the extant and growing international concern about providing access to a remedy for alleged corporate human rights abuse victims.
