

4-26-2018

The Road Beyond *Kiobel*: The Fifth Circuit's Decision in *Adhikari v. Kellogg Brown & Root, Inc.* and its Implications for the Alien Tort Statute

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Recommended Citation

Vasundhara Prasad, *The Road Beyond Kiobel: The Fifth Circuit's Decision in Adhikari v. Kellogg Brown & Root, Inc. and its Implications for the Alien Tort Statute*, 59 B.C.L. Rev. E. Supp. 369 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss9/21>

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THE ROAD BEYOND *KIOBEL*: THE FIFTH CIRCUIT'S DECISION IN *ADHIKARI v. KELLOGG BROWN & ROOT, INC.* AND ITS IMPLICATIONS FOR THE ALIEN TORT STATUTE

Abstract: On January 3, 2017, in *Adhikari v. Kellogg Brown & Root, Inc.*, the U.S. Court of Appeals for the Fifth Circuit held that the Alien Tort Statute (“ATS”) did not provide jurisdiction for claims brought against a U.S. military contractor for torts committed in Iraq. In foreclosing plaintiffs’ claims, the Fifth Circuit held that the presumption against the ATS’s extraterritorial application barred claims for injuries occurring outside the United States’ territory. In so ruling, the court created a circuit split with the Fourth Circuit, which in *Al Shimari v. CACI Premier Technology, Inc.* held that the ATS provided jurisdiction for claims brought against a U.S. government contractor for torts committed in Iraq. This Comment argues that the Fifth Circuit adopted a restrictive approach to the meaning of the Supreme Court’s “touch and concern” language in *Kiobel v. Royal Dutch Petroleum Co.* and engaged in a rigid application of the Supreme Court’s “focus” test from *Morrison v. National Australia Bank Ltd.* The Fifth Circuit’s holding betrays the purpose of the ATS and is inconsistent with the Supreme Court’s ATS jurisprudence.

INTRODUCTION

The Alien Tort Statute (“ATS”), enacted by the First Congress in 1789, provides federal district courts with original jurisdiction over any civil action brought by an alien for a tort committed, both inside and outside the United States’ territory, in violation of the law of nations.¹ In 2013, the United States

¹ 28 U.S.C. § 1350 (2012). The actual language of the ATS provides: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” *Id.* This language has changed slightly since the enactment of the statute, although it remains substantively the same: in its original form, the ATS provided that “[the District Courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789). The word jurisdiction in this definition was derived from the Latin *jus* or *juris* plus *dicere*, which translates in English to “to speak the law.” *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980) (explaining that because a case arises under the laws of the United States for Article III purposes if it is either grounded upon statutes enacted by Congress or upon U.S. common law and because the law of nations became a part of U.S. common law when the Constitution was adopted, the enactment of the ATS was therefore authorized by Article III of the U.S. Constitution); Anthony J.

Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.* significantly limited the scope of the ATS and the potential claims that could be brought under it.² The Court in *Kiobel* held that the ATS did not apply extraterritorially, i.e., the statute did not provide jurisdiction for violations of the law of nations committed outside the territory of the United States.³

The Court in *Kiobel*, however, went on to enunciate a novel “touch and concern” test that courts could use to overcome the ATS’s presumption against extraterritorial application.⁴ In a few sentences at the end of its decision, the Court explained that certain claims may “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.”⁵ This new standard has prompted much uncertainty as to its proper interpretation.⁶

After *Kiobel*, the “touch and concern” standard has been applied by five circuits and dozens of district courts.⁷ These courts have principally disagreed on how to approach the “touch and concern” inquiry and what factors to take

Colangelo, *What Is Extraterritorial Jurisdiction?* 99 CORNELL L. REV (Large and small caps). 1303, 1310 (2014).

² See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013) (concluding that the presumption against the extraterritorial application of a statute passed by Congress applied to claims under the ATS and that nothing in the plain language of the statute barred that presumption).

³ *Id.* The law of nations is the body of law that teaches us about the rights existing between nations or states, and the duties corresponding to those rights. EMMERICH DE Vattel, LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, at iii–v (6th ed. 1844). The various sources of the law of nations are the following: (1) text writers of authority, like famous jurists and code-writers from around the world; (2) treaties between nations symbolizing peace, alliance and commerce, and demonstrating changes to pre-existing international norms; (3) marine ordinances of nations prescribing rules for maritime war, and proclamations and guidance issued to the various branches of the government or to the citizens of the state at large; (4) the adjudication of international tribunals; (5) diplomatic correspondence representing the views of leaders, as well as the written opinions of jurists that serve as advice to their own leaders; and, (6) the history of the wars, negotiations, and peace treaties relating to the interactions between nations. See HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 22, 24–25, 29, 31 (5th ed. 1916).

⁴ *Kiobel*, 569 U.S. at 124–25. The Court did not define the term “touch and concern,” which led to much confusion among the lower courts as to what kind of claims could sufficiently “touch and concern” the territory of the United States so as to displace the ATS’s presumption against extraterritoriality. See *id.*

⁵ *Id.* (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266–73 (2010)).

⁶ See *id.* at 125–26. (Alito, J., concurring) (recognizing that the Court’s formulation of the “touch and concern” test leaves open many ambiguities); *Tymoshenko v. Firtash*, No. 11-CV-2794 (KMW), 2013 WL 4564646, at *4 (S.D. N.Y. Aug. 28, 2013) (noting that the Supreme Court did not provide much guidance regarding what is necessary to satisfy *Kiobel*’s “touch and concern” standard).

⁷ See *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017); *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014); *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2^d Cir. 2014); *Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185 (11th Cir. 2014); *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014). See generally *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75 (D.D.C. 2014); *Firtash*, 2013 WL 4564646.

into account when determining the “focus” of the ATS.⁸ This Comment argues that the Fifth Circuit in 2017 in *Adhikari v. Kellogg Brown & Root, Inc.*, was too formulaic in its approach to interpreting the Supreme Court’s guidance in *Kiobel* on what claims could overcome the ATS’s presumption against extraterritorial application.⁹ Part I of this Comment discusses the legislative history of the ATS and the Supreme Court’s analysis in *Kiobel* and in its 2010 decision, *Morrison v. National Australia Bank Ltd.*¹⁰ Part II of this Comment discusses the Fifth Circuit’s interpretation of *Kiobel*’s “touch and concern” test and *Morrison*’s “focus” test.¹¹ Part III of this Comment argues that the Fifth Circuit was short-sighted in its approach to determining the true “focus” of plaintiffs’ ATS claims, and that this decision has severe implications for not only American foreign policy, but also for the future of the ATS.¹²

I. THE ROAD TO *KIOBEL*: LEGISLATIVE HISTORY OF THE ALIEN TORT STATUTE

Section A of this Part presents an overview of the history of the ATS and its earlier interpretations by the Supreme Court.¹³ Section B examines in detail a seminal case within the ATS Jurisprudence, *Kiobel*, which established the “touch and concern” test.¹⁴ Section C outlines two other recent decisions from the Supreme Court, *Morrison* and the 2016 decision, *RJR Nabisco, Inc. v. European Community*, and explains the way in which the Court has evolved its

⁸ See *Morrison*, 561 U.S. at 266. Although the Supreme Court did not explicitly define the term “focus” in *Morrison*, it explained that the “focus” of a statute could be found by determining what alleged tortious conduct was the “focus of congressional concern” when the statute was enacted, i.e., what conduct did Congress seek to prohibit by the adoption of this statute. *Id.*; see also *Mastafa*, 770 F.3d at 189 (disagreeing with the idea that a defendant’s American citizenship is important for the jurisdictional analysis under the ATS because the Supreme Court made clear in *Kiobel* that only the defendant’s conduct was relevant to determining the “focus” of the ATS); *Al Shimari*, 758 F.3d at 520, 530–31 (advocating for a broad, fact-based inquiry that takes into account all pertinent facts underlying a plaintiff’s claim, including but not limited to, the defendant’s citizenship or corporate presence in the United States; whether Congress intended that the case be heard in the U.S. federal courts; important American foreign policy interests implicated by the nature of the defendant’s conduct; the nationality of the defendant’s employees; and, the “focus” of the plaintiff’s claims); *Mwani v. Laden*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (looking at both defendants’ U.S.-based conduct, as well as the intended effect of the conduct in the United States in conducting the “touch and concern” jurisdictional analysis for an ATS claim against Osama bin Laden and al-Qaeda stemming from the bombing of the U.S. Embassy in Nairobi).

⁹ See *infra* notes 13–112 and accompanying text.

¹⁰ See *infra* notes 13–39 and accompanying text.

¹¹ See *infra* notes 40–83 and accompanying text.

¹² See *infra* notes 84–112 and accompanying text.

¹³ See *infra* notes 16–22 and accompanying text.

¹⁴ See *infra* notes 23–31 and accompanying text.

analysis of the “focus” test to determine what circumstances are sufficient to displace the ATS’s presumption against extraterritorial application.¹⁵

A. *The History of Alien Tort Statute Jurisprudence*

The ATS was passed by the First Congress as part of the Judiciary Act of 1789, and provides federal district courts with original jurisdiction over any civil action brought by an alien for a tort committed in violation of the law of nations.¹⁶ The jurisdictional grant of the ATS, at the time of its enactment, was limited to providing a cause of action for only three violations of international law—piracy, violations of safe conduct, and offenses against ambassadors.¹⁷ Courts have since recognized, however, that the statute provides jurisdiction

¹⁵ See *infra* notes 32–39 and accompanying text.

¹⁶ U.S. CONST. art. III, § 1; 28 U.S.C. § 1350; Judiciary Act of 1789, ch. 20, §§ 2–4, 1 Stat. 73, 73–75 (1789); see *Kiobel*, 569 U.S. at 114 (noting that the ATS was passed as part of the Judiciary Act of 1789); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719–20 (2004) (explaining that it is not likely that the First Congress passed the ATS without meaning for it to have a practical effect; in fact, it is likely that the First Congress intended the ATS to provide jurisdiction for a limited number of torts in violation of international law); John B. Bellinger III, Legal Advisor to U.S. Sec’y of State, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, Speech at the 2008 Jonathan I. Charney Lecture in International Law, in 42 VAND. J. TRANSNAT’L L. 1, 3 (2009) (explaining that the First Congress, by passing the ATS, likely intended to provide recourse for crimes committed by American citizens against foreign officials within the territory of the United States); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 465 (1989) (noting that the ATS, by providing access to the federal courts, minimized the chance of justice being denied to alien parties when sued in state courts where state judges were less likely to be sensitive about national concerns). There are two general theories about the ATS’s origins: the citizenship view and the specific tort view. Kedar S. Bhatia, Comment, *Reconsidering the Purely Jurisdictional View of the Alien Tort Statute*, 27 EMORY INT’L L. REV. 447, 453 (2013). Under the first view, it is believed that the ATS was designed to give aliens a forum to litigate torts committed by citizens of the United States against aliens within the borders of the United States. *Id.* Under the second view, it is believed that the ATS was designed to serve as a cause of action for only a small set of specific torts. *Id.* at 454. The Supreme Court eventually adopted this view in *Sosa*, when it concluded that the ATS only allowed claims for torts that Sir William Blackstone identified as the principal violations of the law of nations: piracy, violations of safe conduct, and disputes regarding ambassadors. *Sosa*, 542 U.S. at 724; Bhatia, *supra*, at 454. For the three primary offenses against the law of nations that Blackstone identified, see 4 WILLIAM BLACKSTONE, COMMENTARIES *68.

¹⁷ See *Sosa*, 542 U.S. at 724 (concluding that the jurisdictional grant of the ATS is based on the understanding that the common law would provide a cause of action for a limited number of violations of the law of nations, and that the First Congress probably had in mind only three such violations at the time of the ATS’s enactment—piracy, violations of safe conduct, and offenses against ambassadors); see also Carlee M. Hobbs, Note, *The Conflict Between the Alien Tort Statute Litigation and Foreign Amnesty Laws*, 43 VAND. J. TRANSNAT’L L. 505, 508 (2010). *But see* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 836 (2006) (arguing that the authors of the Judiciary Act meant to include only matters of safe conduct and not claims related to piracy or ambassadors).

for additional violations that are both accepted by the modern civilized world and are defined with a specificity comparable to the three original violations.¹⁸

The ATS lay dormant for almost two centuries following its enactment.¹⁹ It was revived in 1980 when the Second Circuit breathed new life into it in *Filartiga v. Pena-Irala* by holding that torture by a state official was a violation of international human rights law, and thus, the law of nations.²⁰ The standards set by *Filartiga* eventually became the foundation of the modern-day ATS doctrine.²¹ *Filartiga* opened up a new field of human rights litigation, and

¹⁸ See *Sosa*, 542 U.S. at 732 (explaining that federal courts should not recognize private claims under federal common law for violations of any international law norm unless they are equally definite and accepted among civilized nations as the historical paradigms prevalent when the original ATS was enacted). The *Sosa* Court implicitly denounced the notion that an international law violation cognizable under the ATS had to be “shockingly egregious” or invoke “universal abhorrence.” See *id.* Instead, the Court left open the possibility that a successful claim under the ATS could be brought for international law violations that are well-defined and well-accepted, such as genocide or torture, but don’t shock the conscience in the same way. Bhatia, *supra* note 16, at 471; see *Sosa*, 542 U.S. at 737.

¹⁹ See *Sosa*, 542 U.S. at 712 (noting that the ATS only allowed for federal jurisdiction in one case over a 170-year period); see also Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 588 n.5 (2002) (listing thirteen cases from 1793 to 1980 in which a party unsuccessfully attempted to use the ATS as a basis for jurisdiction); Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 1, 4 n.15 (1985) (listing twenty-one published decisions prior to *Filartiga*, in which a plaintiff invoked the ATS as a basis for jurisdiction). The ATS was only upheld as a basis for jurisdiction in two reported cases prior to 1980. Bradley, *supra*, at 588; Randall, *supra*, at 5. The two cases upholding jurisdiction, *Adra v. Clift*, 195 F. Supp. 857, 865 (D. Md. 1961), and *Bolchos v. Darrel*, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1607), were almost one hundred years apart.

²⁰ See 630 F.2d at 880; Developments in the Law, *Extraterritoriality*, 124 HARV. L. REV. 1226, 1229 (2011) (noting that the decision in *Filartiga* transformed the ATS into providing jurisdiction for human rights violations committed abroad, but the decision in *Sosa* limited this jurisdiction to causes of action that are “specific, obligatory, and universally accepted” by international law). In *Filartiga*, two citizens of Paraguay, Dr. Joel Filártiga and his daughter, filed a federal court action against Américo Noberto Peña-Irala (“Peña”), another Paraguayan citizen, for the wrongful death of Dr. Filártiga’s son, Joelito. *Filartiga*, 630 F.2d at 878–79. The Filártigas alleged that Joelito had been kidnapped and tortured to death by the Inspector General of Police in Paraguay, in retaliation for Dr. Filártiga’s political activities and beliefs. *Id.* at 878. The Second Circuit determined that the ATS provided federal subject matter jurisdiction over Peña. *Id.* at 887. The court reasoned that the ATS provides federal subject matter jurisdiction whenever an alien sues for a tort committed in violation of the law of nations. *Id.*; see *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (citing *Filartiga*, 630 F.2d at 887) (noting that *Filartiga* established that the ATS confers jurisdiction only when three conditions are satisfied: (1) a foreign national sues (2) for a tort (3) committed in violation of the law of nations). In arriving at its decision, the court extensively analyzed whether the Filártigas had alleged a violation of the law of nations. See *Filartiga*, 630 F.2d at 880–86 (explaining that because the Filártigas had not alleged that the torts — (wrongful death and torture)—arose directly under any treaty of the United States, the court must first determine as a threshold matter whether the torts violate the law of nations). The court stated that the law of nations could be determined by consulting the work of jurists, by following the general practice of nations, or by interpreting judicial decisions enforcing these laws. *Id.* at 880.

²¹ *Filartiga*, 630 F.2d at 887. One of the first decisions interpreting the ATS post-*Filartiga* was *Kadic*. Mohamed Chehab, *Finding Uniformity Amidst Chaos: A Common Approach to Kiobel’s “Touch and Concern” Standard*, 93 U. DETROIT MERCY L. REV. 119, 123 (2016); see *Kadic*, 70 F.3d at 236. In *Kadic*, the Second Circuit answered a novel question of whether the law of nations only

the ATS quickly became the most often-used litigation route for victims of human rights abuses around the world.²²

B. *Kiobel's "Touch and Concern" Test*

In 2013, in *Kiobel*, the question before the Supreme Court was whether the ATS extends to torts that are committed abroad—in other words, if the ATS applies extraterritorially.²³ All nine Justices agreed on the narrow holding that where there is a foreign plaintiff, a foreign defendant, and all the relevant conduct took place outside the United States, the ATS did not provide relief for alleged violations of the law of nations.²⁴ The Court's decision relied primarily on the presumption against extraterritorial application of a federal statute, i.e., when the text of a statute gives no clear indication of an extraterritorial application, it has none.²⁵ The Court reiterated that this presumption against extraterritoriality reflects the longstanding principle in American law that unless a contrary intent appears, all legislation passed by the United States Congress is

applied to state actors, or whether it also applied to the conduct of private actors. *Kadic*, 70 F.3d. at 236. The Second Circuit concluded that the law of nations did extend to persons acting as private individuals, and an example of this would be the prohibition against piracy. *Id.* at 239; *see also* Chehab, *supra*, at 123.

²² *See* Chehab, *supra* note 21, at 123. After *Filartiga*, several plaintiffs filed over 150 ATS lawsuits, alleging abuses ranging from genocide to summary execution to war crimes. *See* Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749, 1751–52 (2014). The ATS was developed exclusively by several lower courts for almost two decades until 2004, when the Supreme Court in *Sosa* finally provided some guidance on the scope of the ATS, while leaving the door open for further litigation. *Id.*; *see* Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, 64 DUKE L.J. 1023, 1051 (2015). In the early years following *Filartiga*, federal courts within the United States assumed jurisdiction on cases involving egregious human rights violations that were still relatively uncontroversial because they tended to involve private individuals affiliated with state actors no longer in power. Young, *supra*, at 1051–52. Beginning in the late 1990s, however, the focus of the human rights litigators changed and plaintiffs then began to use the ATS to bring claims against multinational corporations committing human rights violations abroad. *Id.* at 1052.

²³ *Kiobel*, 569 U.S. at 112–13. In *Kiobel*, Nigerian nationals residing in the United States sued Dutch, British, and Nigerian corporations in the United States District Court for the Southern District of New York under the ATS, alleging that the corporations aided and abetted the Nigerian government in violently suppressing demonstrators who were protesting the environmental effects of oil exploration. *Id.* at 113–14; *see also* Lyle Denniston, *Kiobel To Be Expanded and Reargued*, SCOTUSBLOG (Mar. 5, 2012, 2:01 PM), <http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/> [<http://perma.cc/PR4V-T7K5>] (discussing the Supreme Court's order to the lawyers on both sides in *Kiobel* to come back with an expanded argument on the scope of the ATS).

²⁴ *Kiobel*, 569 U.S. at 124–25. Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined; Justice Kennedy filed a concurring opinion; Justice Alito filed a concurring opinion in which Justice Thomas joined; and Justice Breyer filed an opinion concurring in the judgment, but not in the opinion, in which Justices Ginsburg, Sotomayor, and Kagan joined. *Id.*

²⁵ *Id.* at 115 (quoting *Morrison*, 561 U.S. at 255).

meant to apply only within the territorial jurisdiction of the United States.²⁶ Following this rationale, the Court in *Kiobel* held that there was no indication that the ATS was passed to make the federal district courts in the United States a preferred venue to litigate cases involving violations of the law of nations.²⁷ The Court, however, went on to explain that regardless of its holding, one could imagine a set of circumstances wherein certain claims “touch[ed] and concern[ed]” the territory of the United States with “sufficient force” to displace the ATS’s presumption against extraterritorial application.²⁸ Although the Court did not provide much guidance on what those circumstances may be or even what it meant to “touch and concern” the territory of the United States, it did leave open the possibility for the extraterritorial application of the ATS in some limited circumstances.²⁹

After the *Kiobel* decision, some lower courts dismissed a plaintiff’s claims under the ATS if all alleged tortious conduct occurred abroad.³⁰ Other

²⁶ *Id.* The presumption against extraterritoriality provides that all laws passed by Congress are meant to only apply within the territory of the United States, unless Congress explicitly intends otherwise. Note, *Clarifying Kiobel’s “Touch and Concern” Test*, 130 HARV. L. REV. 1902, 1905–06 (2017). This presumption not only ensures that American courts do not apply American law to conduct that takes place in foreign countries, but also reinforces the understanding that Congress usually only intends its laws to apply within the territory of the United States. *Id.* at 1906. Furthermore, the essence behind such a presumption is that Congress ordinarily only legislates with respect to laws that govern domestic issues, and not foreign issues. *Kiobel*, 569 U.S. at 115–16 (quoting *Morrison*, 561 U.S. at 255).

²⁷ *Kiobel*, 569 U.S. at 123. The Court reasoned that such a broad reading of the ATS could lead to potential unintended battles between the domestic laws of the United States and those of other nations, which could result in international discord and create unwelcomed judicial interference in the United States’ foreign relations and policy. *Id.* at 116–17, 123–24. Additionally, the Court noted that accepting the plaintiffs’ view would also make the inverse true—other nations could potentially be able to hale U.S. citizens into their courts for crimes committed elsewhere. *Id.* at 124–25.

²⁸ *Id.* at 124–25. Although the Court did not provide much guidance on the “touch and concern” language, it did opine that mere corporate presence within the United States was not proof enough that claims against those corporations “touch[ed] and concern[ed]” the territory of the United States with “sufficient force” to displace the presumption against extraterritoriality. *Id.* at 125; see also *Doe v. Drummond*, 782 F.3d 576, 594 (11th Cir. 2015) cert. denied, 136 S. Ct. 1168 (2016) (explaining that *Kiobel* itself supports the proposition that the corporate status of a defendant might not be dispositive to whether a claim “touch[es] and concern[s]” the territory of the United States because the Court, after stating the test, announced that if corporate presence was the only thing connecting the claim to the territory of the United States, it might not be enough).

²⁹ See *Kiobel*, 569 U.S. at 124–25.

³⁰ See *Giraldo v. Drummond Co.*, No. 09-CV-1041, 2013 WL 3873960, *5, 8 (N.D. Ala. July 25, 2013), *aff’d sub nom. Doe v. Drummond*, 782 F.3d 576 (11th Cir. 2015) (rejecting the plaintiffs’ argument that because Drummond’s CEO made the decision to provide material support to the paramilitary group in Colombia at the company’s headquarters in Alabama—and thus within the United States—the ATS’s presumption against extraterritorial application had been overcome). The Eleventh Circuit subsequently affirmed this decision, stating that the presumption against extraterritoriality will be displaced only if the claims are “focus[ed]” in the United States and sufficient relevant conduct occurs within the territory of the United States. See *Drummond*, 782 F.3d at 592; see also *Balintulo v. Daimler AG*, 727 F.3d 174, 192 (2d Cir. 2013) (concluding that the ATS does not permit claims based on conduct that took place entirely outside the territory of the United States).

courts, however, began to develop a post-*Kiobel* jurisprudence that considered more than just the location of the conduct to decide whether a plaintiff's circumstances and claims "touch[ed] and concern[ed]" the territory of the United States with "sufficient force" to displace the ATS's presumption against extraterritorial application.³¹

C. Morrison "Focus" Test and RJR Nabisco

In *Kiobel*, after enunciating the "touch and concern" test for rebutting the ATS's presumption against extraterritoriality, the Supreme Court cited to its 2010 decision in *Morrison*.³² In *Morrison*, the Court held that when considering whether a case involves a domestic application of a statute, a court must only determine whether the conduct that is the "focus of congressional concern" occurred within the territory of the United States.³³ The Court reasoned that a statute did not provide relief for alleged tortious conduct occurring within the territory of the United States if it never sought to regulate that conduct.³⁴

³¹ See, e.g., *Al Shimari*, 758 F.3d at 520–21 (advocating for a broad, fact-based inquiry that takes into account all pertinent facts underlying a plaintiff's claim to determine the "focus" of the plaintiff's claims); *Mwani*, 947 F. Supp. 2d at 5 (finding that the 1998 bombing outside the United States Embassy in Nairobi "touch[ed] and concern[ed]" the United States with "sufficient force" to displace the presumption against extraterritorial application of the ATS).

³² *Kiobel*, 569 U.S. at 124–25; see *Morrison*, 561 U.S. at 273 (concluding that the ATS's presumption against extraterritoriality still applied when there were no securities listed on a domestic exchange, and all purchases complained by petitioners took place outside the territory of the United States).

³³ *Morrison*, 561 U.S. at 266. The "focus of congressional concern," is generally understood to mean the specific conduct that Congress intended to outlaw with the passage of the statute or the purpose behind the passage of the statute. See *id.* In *Morrison*, the Court found that the "focus of congressional concern" behind the passage of the Securities Exchange Act of 1934 ("Exchange Act") was on the purchases and sale of securities registered on domestic exchanges, i.e., Congress did not intend for the statute to apply to transactions on foreign exchanges. *Id.* In *Morrison*, the plaintiffs brought suit under § 10(b) of the Exchange Act based on alleged misrepresentations made in connection with the sales and purchases of securities registered on foreign exchanges, even though some of the misrepresentations had taken place within the territory of the United States. *Id.* at 251–53. After holding that the presumption against extraterritoriality applied to § 10(b) of the Exchange Act, the Court engaged in a separate inquiry to determine whether the complaint involved a permissible domestic application of the statute when it alleged that some of the misrepresentations were made in the United States. *Id.* at 266. The Court's separate inquiry considered the statute's "focus." *Id.* The Court ruled that the statute "focus" was not on the location where the misrepresentations originated, but on whether the sales and purchases of securities were made on domestic exchanges within the territory of the United States. *Id.* It concluded that because the statute was focused on domestic securities transactions and the plaintiffs' alleged domestic activity consisted only of misrepresentations made in connection with a foreign transaction, plaintiffs had failed to show a permissible domestic application of the statute. *Id.* at 266–67.

³⁴ *Id.* at 266–67. In *Morrison*, the Court explained that securities transactions on the domestic exchange was the "focus" of § 10(b) of the Exchange Act because Congress intended to regulate only those transactions and because it intended to protect only the parties or prospective parties to those transactions. *Id.* Because this case did not involve any securities listed on domestic exchanges, § 10(b) of the Exchange Act could not provide any relief to the petitioners. *Id.* at 273.

Kiobel's citation to *Morrison* contributed to some confusion in the lower courts as to whether it was essential to determine the "focus" of the ATS every time a court was faced with a domestic application of the statute.³⁵ In 2016, the Supreme Court's decision in *RJR Nabisco* appeared to resolve this conflict when it explained that courts must conduct the "focus" analysis along with the "touch and concern" analysis when deciding whether the case involved a domestic application of the ATS.³⁶ The Court explained that if the conduct relevant to the ATS's "focus" took place within the territory of the United States, the case was not barred by the ATS's presumption against extraterritoriality.³⁷ If the conduct relevant to the "focus" of the ATS occurred outside the territory of the United States, however, the ATS could not provide jurisdiction for the case to be heard in federal courts in the United States, regardless of any other conduct that might have occurred within the territory of the United States.³⁸ The Court, however, did not provide any guidance on how lower courts could determine the "focus" of the ATS, or what facts they could or could not take into account when making that determination.³⁹

II. THE FIFTH CIRCUIT AND THE QUESTION OF WHAT IT MEANS TO "TOUCH AND CONCERN" THE TERRITORY OF THE UNITED STATES

Section A of this Part presents the factual and procedural details of the Fifth Circuit case, *Adhikari v. Kellogg Brown & Root, Inc.*⁴⁰ Section B examines in detail how the Fifth Circuit in *Adhikari* determined that the "touch and

³⁵ See, e.g., *Drummond*, 782 F.3d at 592 holding that *Kiobel* demands the application of *Morrison*'s "focus" test); *Mastafa*, 770 F.3d at 183 (same); *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) (holding that *Kiobel* had not advocated for the adoption of *Morrison*'s "focus test" because it deliberately used the words "touch and concern" to enunciate the circumstances that could rebut the ATS's presumption against extraterritoriality); *Al Shimari*, 758 F.3d at 520–21 (declining to adopt the "focus" test because *Kiobel* held that the plaintiff's claims, rather than the alleged tortious conduct, must "touch and concern" the territory of the United States with adequate force to displace the presumption against extraterritoriality, and thus, courts must not pick and choose facts, but rather acknowledge all the pertinent facts that give rise to the plaintiff's ATS claims).

³⁶ See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). Even though *RJR Nabisco* involved the extraterritorial application of certain Racketeering Influenced and Corrupt Organization Act provisions, the Court provided guidance regarding the extraterritorial application of domestic statutes in general, including the ATS. *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *id.*; Edward T. Swaine, *Kiobel and Extraterritoriality: Here, (Not) There, (Not Even) Everywhere*, 69 OKLA. L. REV. 23, 43 (2016) (noting how different courts have taken different approaches to quantify the level of relevant conduct in the United States necessary to overcome the ATS's presumption against extraterritoriality). Compare *Adhikari*, 845 F.3d at 195 (applying a narrow "touch and concern" inquiry), with *Al Shimari*, 758 F.3d at 530–31 (advocating for a broad, fact-based inquiry that takes into account all pertinent facts underlying a Plaintiff's claim to determine the "focus" of the plaintiff's claims).

⁴⁰ See *infra* notes 43–56 and accompanying text.

concern test” from *Kiobel v. Royal Dutch Petroleum Co.* only allowed domestic conduct to displace the ATS’s presumption against extraterritoriality.⁴¹ Section C outlines the approach taken by the dissenters in *Adhikari* and explains how this approach is similar to the approach taken by the Fourth Circuit in *Al Shimari v. CACI Premier Technology, Inc.*⁴²

*A. A Sad Tale of Human Trafficking and Forced Labor:
The Case Before the Fifth Circuit in Adhikari*

In 2017, *Adhikari* was brought to the Fifth Circuit by Buddi Prasad Gurung (“Gurung”) and the surviving family members of eleven other men (the “Deceased Plaintiffs”) (collectively, “Plaintiffs”).⁴³ In 2004, Plaintiffs were recruited to work at a high-end hotel in Amman, Jordan by a Nepali recruiting company.⁴⁴ When they arrived in Jordan, they were told however that they were instead being sent to work at Al Asad, an American military base located just north of Ramadi, Iraq.⁴⁵ Despite their objections, Daoud and Partners (“Daoud”), a subsidiary of the U.S. military contractor, Kellogg Brown & Root, Inc. (“KBR”) put the Plaintiffs in an unprotected fleet of seventeen automobiles going from Amman, Jordan to Al Asad in Iraq.⁴⁶ As they were ap-

⁴¹ See *infra* notes 57–76 and accompanying text.

⁴² See *infra* notes 77–83 and accompanying text.

⁴³ *Adhikari v. Kellogg Brown & Root, Inc.*, 994 F. Supp. 2d 831, 833 (S.D. Texas 2014). The Deceased Plaintiffs were Prakash Adhikari, Ramesh Khadka, Lalan Koiri, Mangal Limbu, Jeet Magar, Gyanendra Shrestha, Budham Sudi, Manoj Thakur, Sanjay Thakur, Bishnu Thapa, and Jhok Bahadur Thapa. *Id.* All of the plaintiffs were citizens of Nepal. *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 190 (5th Cir. 2017).

⁴⁴ *Adhikari*, 994 F. Supp. 2d at 833. The Nepali recruiting company was called Moonlight Consultant Pvt. Ltd. *Id.* Some of the men were told that they would be working in an American military camp, which they assumed was in the United States, and thus, Jordan would just be a brief halt before they would be taken to the United States. *Id.* The men were also told by the recruiting company in Nepal that they would not be taken to dangerous locations, and that if they ever found themselves in a dangerous situation, they would be sent back home to Nepal at the employer’s expense. *Id.*

⁴⁵ *Id.* After the Plaintiffs and Gurung were recruited in Nepal and brought to Amman, Jordan, they were handed over to another corporation called Morning Star for Recruitment and Manpower Supply (“Morning Star”), which was a Jordanian job brokerage company operating in Amman. *Id.* Morning Star took care of the men when they arrived in Amman, Jordan and started preparing for them to travel to Iraq. *Id.* Morning Star then handed over the Deceased Plaintiffs and Gurung to Daoud and Partners, a subcontractor of Kellogg Brown & Root, Inc., who forced the men to give up their passports, leaving them with no means of escape. *Id.* at 833–34. Following this, many of the men expressed their desire to return home, but they were unable to do anything about it because of the amount of debt their families had undertaken to get them these jobs. *Id.* at 834.

⁴⁶ *Id.* at 834. Daoud and Partners is a subcontractor of Defendant Kellogg Brown and Root, Inc.; Kellogg Brown & Root Services, Inc.; KBR, Inc.; KBR Holdings, LLC; Kellogg Brown & Root LLC; KBR Technical Services, Inc.; Kellogg Brown & Root International, Inc.; Service Employees International, Inc.; and Overseas Administration Services, Ltd. (collectively, “KBR”). KBR served as a contractor with the United States military to perform specific duties at Al Asad, a United States military facility in Iraq. *Adhikari v. Daoud & Partners*, No. CIV. 09-1237, 2013 WL 4511354, at *1 (S.D. Tex., Aug 23, 2013).

proaching Al Asad, two cars containing the Deceased Plaintiffs were stopped by members of an Iraqi insurgent group, the Ansar al-Sunna Army.⁴⁷ These men told the drivers of those two cars to leave the Deceased Plaintiffs at the checkpoint to Al Asad and assured them that the American soldiers would come get them from the military base very soon.⁴⁸ This turned out to be a lie, however, and the Iraqi insurgents shortly thereafter posted a statement on the internet announcing to the world that they had captured the Deceased Plaintiffs.⁴⁹ A few days later, international media outlets broadcasted a video of the Iraqi insurgents beheading one of the Deceased Plaintiffs and shooting the other men in the backs of their heads.⁵⁰

Unlike the Deceased Plaintiffs, Gurung was fortunate that the Iraqi insurgents did not stop the car that he was travelling in.⁵¹ Once Gurung arrived at Al Asad, he was immediately put to work as a warehouse loader/unloader.⁵² When Gurung heard about the deaths of the Deceased Plaintiffs, however, he expressed his desire to leave Iraq and go back home to Nepal but both Daoud and KBR unequivocally denied his request.⁵³ Gurung was eventually permitted to return to Nepal after spending fifteen months at Al Asad, during which he frequently experienced combat-like dangerous situations without protection from the U.S. military.⁵⁴

In 2008, Gurung and the Deceased Plaintiffs, through their surviving family members, filed suit against Daoud and KBR, alleging several claims, including one under the ATS.⁵⁵ The district court dismissed Plaintiffs' claims

⁴⁷ *Adhikari*, 994 F. Supp. 2d at 834. Ansar al-Sunna is an outgrowth of Ansar al-Islam (Defenders of Islam), a group with ties to Iran and which U.S. administration officials have linked to Al-Qaeda. *Jaish Ansar-al-Sunna*, GLOBALSECURITY.ORG (Nov. 7, 2011), <https://www.globalsecurity.org/military/world/para/ansar-al-sunna.htm> [<http://perma.cc/97X5-PCYK>].

⁴⁸ *Adhikari*, 994 F. Supp. 2d at 834.

⁴⁹ *Id.* Many of the family members of the Deceased Plaintiffs saw the images broadcast on Nepali television. *Id.* In the video, the Plaintiffs described their trip to Iraq and explained that they had first been “kept as captives in Jordan,” and then forced to go to Iraq. *Id.* One of the men in the video said, “I do not know when I will die, today or tomorrow.” *Id.*

⁵⁰ *Id.* Unfortunately, the family members of the Deceased Plaintiffs saw the execution video as it was being broadcasted live by international media outlets. *Id.* Despite these killings, the family members were never able to recover the bodies of the Deceased Plaintiffs. *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* KBR is a multinational corporation with its principal place of business in Houston, Texas. *Adhikari*, 2013 WL 4511354, at *1. Gurung was informed by both Daoud and KBR that he was not allowed to leave Iraq until he was done with his work at Al Asad. *Adhikari*, 994 F. Supp. 2d at 834.

⁵⁴ *Adhikari*, 994 F. Supp. 2d at 834.

⁵⁵ *Id.* at 834–35. Plaintiffs asserted claims under the Trafficking Victims Protection and Rehabilitation Act (“TVPRO”), the Racketeering Influenced and Corrupt Organization Act (“RICO”) and the ATS, and also brought common law negligence claims. *Id.*

under the ATS, and Plaintiffs appealed that decision to the Fifth Circuit Court of Appeals.⁵⁶

B. The Fifth Circuit Decides That Kiobel's "Touch And Concern" Test Allows Only Domestic Conduct Sufficient to Violate an International Law Norm to Permit an Extraterritorial Application of the ATS

The Fifth Circuit began its analysis by explaining the presumption against extraterritoriality and the two-step inquiry that determines its application to a federal statute.⁵⁷ At step one, the court must determine whether the presumption against extraterritoriality has been invalidated by the plain language of the statute; and if not, at step two, the court must determine whether the facts of the case before it involve a domestic application of the statute.⁵⁸

The Fifth Circuit acknowledged that the Supreme Court in *Kiobel* had already determined at step one that the presumption against extraterritoriality barred claims brought under the ATS.⁵⁹ Thus, it was necessary for the Fifth Circuit to proceed to step two of the analysis and determine whether the facts alleged by plaintiffs allowed for a domestic application of the ATS.⁶⁰ The parties in *Adhikari* were conflicted over the meaning of *Kiobel's* "touch and concern" language and how to square it with *Morrison's* "focus" inquiry.⁶¹ The

⁵⁶ *Adhikari*, 845 F.3d at 191. In November 2009, the district court granted KBR's motion to dismiss the common-law claims, but denied KBR's motion as to the TVPRA and ATS claims. *Id.* Following this, KBR filed a motion for summary judgment on Plaintiffs' ATS claims, which the district court granted in part and denied in part. *Id.* The district court dismissed Plaintiffs' claims under the ATS due to the recently released Supreme Court decision in *Kiobel*, but chose to deny the dismissal of Plaintiffs' claims under the TVPRA. *Id.* KBR then filed an interlocutory appeal of the district court's decision on the TVPRA claim, which the district court then decided to reconsider. *Id.* The district court then reversed its decision and dismissed the TVPRA claim. *Id.* This prompted the Plaintiffs to file motions for rehearing on the district court's TVPRA and ATS rulings, but the district court denied these motions as well. *Id.* The Plaintiffs then appealed this decision to the Fifth Circuit Court of Appeals. *Id.*

⁵⁷ *Id.* at 192 (explaining that the presumption against extraterritoriality is grounded in the understanding that a federal law is only meant to apply within the territory of the United States, unless Congress explicitly intends otherwise).

⁵⁸ *Id.*; see also *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). If the words of the statute do not directly rebut the statute's presumption against extraterritoriality, then the statute does not have an extraterritorial application at step one. *Id.* If a statute does not pass step one, however, it does not mean that the statute can never apply extraterritorially as it might still pass step two, i.e., the case might warrant a domestic application of the statute. *Id.*

⁵⁹ *Adhikari*, 845 F.3d at 193.

⁶⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013) (explaining that ATS claims were barred due to the presumption against extraterritoriality); *Adhikari*, 845 F.3d at 192. The Fifth Circuit adopted the *Kiobel* Court's analysis on step one of this inquiry, and proceeded to step two noting that the *Kiobel* Court had not excluded the possibility that the ATS could create jurisdiction for claims that "touch and concern" the United States with "sufficient force" to vacate the ATS's presumption against extraterritoriality. *Kiobel*, 569 U.S. at 124–25; *Adhikari*, 845 F.3d at 192.

⁶¹ *Adhikari*, 845 F.3d at 194; see *Kiobel*, 569 U.S. at 124–25; *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010). Plaintiffs in *Adhikari* suggested that *Kiobel's* "touch and concern" test

Fifth Circuit, however, explained that at step two, when determining whether the facts of the case involve a domestic application of the ATS, it was essential to first determine the “focus” of the ATS, and then evaluate whether that conduct that Congress intended to regulate by passing the ATS “touch[ed] and concern[ed]” the territory of the United States.⁶² To determine the “focus” of the ATS, the Fifth Circuit only cared about two inquiries: first, whether the tortious conduct alleged by Plaintiffs constituted a violation of the law of nations; and, second, whether this tortious conduct occurred within the territory of the United States.⁶³ Plaintiffs in *Adhikari* argued not only that KBR’s alleged tortious conduct constituted a violation of the law of nations, but also that the conduct occurred both at Al Asad, which as a U.S. military camp was arguably under the control of the United States, and directly within the territory of the United States.⁶⁴

Plaintiffs first argued that KBR’s conduct at Al Asad, particularly in relation to Gurung’s claim that he was subjected to forced labor there, qualified as a violation of the law of nations.⁶⁵ Thus, since Al Asad, by virtue of being an

superseded *Morrison*’s “focus” test. *Adhikari*, 845 F.3d at 193; see also *Kiobel*, 569 U.S. at 124–25; *Morrison*, 561 U.S. at 266. The *Kiobel* Court, given the facts before it, had no reason to explore how lower courts should evaluate claims involving domestic conduct that would prompt a domestic application of the ATS, and thus, it had not provided any guidance to the lower courts on how to evaluate the “touch and concern” language. See *Kiobel*, 569 U.S. at 124–25; *Adhikari*, 845 F.3d at 194. The Fifth Circuit in *Adhikari*, however, reasoned that *RJR Nabisco* had made it clear that both *Kiobel* and *Morrison* were viable precedents to determining the domestic application of the ATS. *Adhikari*, 845 F.3d at 194; see *RJR Nabisco*, 136 S. Ct. at 2101.

⁶² *Morrison*, 561 U.S. at 266–67 (explaining that the “focus” of a statute is generally understood to mean the specific conduct that Congress intended to outlaw with the passage of the statute or the purpose behind the passage of the statute); *Adhikari*, 845 F.3d at 194; see *Kiobel*, 569 U.S. at 124–25. See generally *Doe v. Drummond*, 782 F.3d 576, 592 (11th Cir. 2015) (taking the middle road in considering both *Kiobel*’s standards and *Morrison*’s “focus” test to determine whether the claim and the relevant conduct were both sufficiently centered in the United States to rebut the presumption against extraterritoriality and allow jurisdiction); *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) (holding that the *Kiobel* Court did not intend to incorporate *Morrison*’s “focus” test, which aligns with the position advocated by the Plaintiffs in *Adhikari*).

⁶³ *Adhikari*, 845 F.3d at 195. The Fifth Circuit distinguished between conduct underlying the claims alleged by the Plaintiffs and conduct that was relevant to the statute’s “focus.” *Id.* at 194. The court explained that whether the ATS applies domestically is determined by the location of the conduct relevant to the statute’s focus. *Id.* at 197. The court found that the ATS’s focus is the tort or the wrong committed in violation of the law of nations. *Id.*; see 28 U.S.C. § 1350. (2012). If that tort or wrong was committed in a foreign country, however, the case involved an impermissible extraterritorial application of the statute, regardless of any other related conduct that might have taken place within the territory of the United States. *Adhikari*, 845 F.3d at 197.

⁶⁴ *Adhikari*, 845 F.3d at 197. Plaintiffs alleged that KBR violated the law of nations by conspiring to traffic laborers from Nepal and subjecting them to harsh conditions at Al Asad. *Id.* Given that these allegations occurred in Nepal, Jordan, and Iraq, the Fifth Circuit quickly dismissed them, as none of that conduct could support a domestic application of the ATS. *Id.*

⁶⁵ See *id.* at 195. Plaintiffs claimed that KBR’s conduct at Al Asad was particularly relevant to Gurung’s claim that he was subject to forced labor on the military base and often put in dangerous situations with no protection. *Id.* Plaintiffs also contended that KBR’s conduct at Al Asad was rele-

active U.S. military base, was under the jurisdiction of the United States, KBR's illegal conduct on the base should be actionable under the ATS.⁶⁶ Notwithstanding Gurung's claim of forced labor, KBR argued instead that this was a matter of *de jure* sovereignty, i.e., Al Asad was not a U.S. territory because it was physically located in Iraq, a sovereign nation, and thus, was under the control of Iraq; therefore, even if the tortious conduct alleged by plaintiffs violated the law of nations, it could still not give rise to an actionable claim under the ATS since the conduct took place in Iraq.⁶⁷ The Fifth Circuit agreed with KBR and held that Plaintiffs had not met their burden to prove that the United States exercised control over Al Asad to such a degree and in such a manner that it could be characterized as a territory of the United States.⁶⁸ Thus, KBR's alleged illegal conduct against plaintiffs at Al Asad occurred within the jurisdiction of Iraq and not the United States, and that conduct could not qualify as domestic conduct relevant for the purposes of Plaintiffs' ATS claims.⁶⁹

Plaintiffs next argument was that KBR wired money to Daoud using banks based in New York City, and that the employees of KBR based in Houston, Texas, were aware of the allegations of human trafficking at Al Asad, but were deliberately indifferent to them, and in some cases, even sought to cover them up.⁷⁰ This conduct certainly took place within the territory of the United States, but according to the Plaintiffs, also constituted as a violation of the law of nations.⁷¹ The Fifth Circuit, however, held that this conduct—providing financial support and being aware but indifferent to the allegations of human rights violations taking place at Al Asad—did not violate the law of nations,

vant to the fact that the Deceased Plaintiffs had been subjected to international human trafficking. *Id.* The Fifth Circuit acknowledged that the district court below had found that there was a genuine dispute of material fact as to whether KBR knew that it was contracting with trafficked laborers during that time. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 195–96. KBR's argument, if found to have merit, would defeat Plaintiffs' characterization of Al Asad as a U.S. territory, thus rendering the alleged conduct of KBR at Al Asad non-domestic for the purposes of Plaintiffs' ATS claims. *See id.* The Plaintiffs, in response, however, cited the Supreme Court's decision in 2004 in *Rasul v. Bush*, which suggested that a functional inquiry may be applicable in these situations. 542 U.S. 466, 470–75 (2004) (holding that the federal habeas statute applied to persons detained at the United States Naval Base at Guantanamo Bay because the United States exercised complete jurisdiction and control over it); *Adhikari*, 845 F.3d at 195–96. The Fifth Circuit found, however, that the Supreme Court intended to limit its holding in *Rasul* to the habeas context. *Adhikari*, 845 F.3d at 196; *see Rasul*, 542 U.S. at 470–75.

⁶⁸ *Adhikari*, 845 F.3d at 197. The Fifth Circuit explained that for a military base to qualify as a U.S. territory, it was essential for the United States to intend to exercise control over that military base on a permanent basis. *Id.* In this case, the United States' use of Al Asad as a military base began in 2003 at the start of the Iraq War, and ended eight years later in 2011. *Id.* Given that the United States military did not have any intentions to stay at Al Asad permanently, the Fifth Circuit found that the military base did not qualify as a territory of the United States. *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

and therefore, it did not matter that this conduct took place within the territory of the United States.⁷² The Fifth Circuit reiterated that only a tort or a wrong committed in violation of the law of nations could be considered when determining the “focus” of the ATS.⁷³ Here, because the torts committed in violation of the laws of nations—human trafficking and forced labor—occurred in a foreign country, the court was not allowed to consider any other conduct that may arguably have taken place within the territory of the United States.⁷⁴ In sum, the Fifth Circuit found that none of the alleged tortious conduct on the part of either KBR or Daoud at Al Asad or within the territory of the United States was sufficient to displace the ATS’s presumption against extraterritoriality.⁷⁵ Therefore, the Fifth Circuit affirmed the district court’s decision to dismiss all of Plaintiffs’ claims under the ATS.⁷⁶

C. The Dissenting Justices in Adhikari Argue for an Approach Similar to the Fourth Circuit’s Approach in Al-Shimari

In 2014, in *Al Shimari*, the Fourth Circuit held that the claim brought against a Virginia-based military contractor by former detainees of the Abu Ghraib detention center in Iraq for abuse and torture “touch[ed] and concern[ed]” the territory of the United States with “sufficient force” to receive jurisdiction under the ATS.⁷⁷ The Fourth Circuit noted that the Supreme Court in *Kiobel* had explained that the plaintiffs’ claims must “touch and concern” the territory of the United States with adequate force to displace the ATS’s presumption against extraterritoriality and not necessarily the alleged tortious conduct.⁷⁸ This meant that the court was required to consider more than just the tortious conduct that violated the law of nations and the location of that conduct.⁷⁹ Applying this fact-based inquiry that took into account all the pertinent allegations made by the plaintiffs, the Fourth Circuit rejected the idea that just because the alleged torture occurred in Iraq and not in the United States,

⁷² *See id.*

⁷³ *Id.* The Fifth Circuit explained that the “focus” of the ATS was on conduct that violates international law, and if that conduct took place in a foreign territory, then the ATS did not apply even though there might have been other related conduct that occurred within the territory of the United States. *Id.*

⁷⁴ *Id.* at 197–98. The Fifth Circuit also found that Plaintiffs had failed to show that there existed a clear link between KBR’s alleged financial transactions with Daoud and the Plaintiffs’ alleged international law violations. *Id.* at 198. Similarly, Plaintiffs’ contention that KBR’s Texas-based employees may have known about the allegations against Daoud or KBR overseas was not enough to find that those employees were directly complicit in violating the law of nations. *Id.*

⁷⁵ *See id.* at 195–98.

⁷⁶ *See id.* at 195–98, 207.

⁷⁷ *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 520 (4th Cir. 2014).

⁷⁸ *Id.* at 527; *see Kiobel*, 569 U.S. at 124–25.

⁷⁹ *Al Shimari*, 758 F.3d at 527; *see Kiobel*, 569 U.S. at 124–25.

the plaintiffs' claim should be subjected to the same outcome as the plaintiffs' claims in *Kiobel*.⁸⁰

This same approach of using a fact-based inquiry to determine whether Plaintiffs' claims sufficiently "touch[ed] and concern[ed]" the territory of the United States was also advocated by the dissenting opinion in *Adhikari*.⁸¹ Circuit Judge James E. Graves, Jr. wrote a dissent to the majority's opinion, which he believed had effectively rendered *Kiobel's* "touch and concern" standard meaningless.⁸² Although he conceded that the "focus" inquiry did rest on the alleged tortious conduct that violated international law, he advocated that the inquiry should involve consideration of all pertinent facts underlying the Plaintiffs' ATS claims, and not just the alleged tortious conduct and the location of that conduct.⁸³

III. THE FIFTH CIRCUIT'S APPLICATION OF *KIOBEL'S* "TOUCH AND CONCERN" STANDARD AND *MORRISON'S* "FOCUS" STANDARD IS UNNECESSARILY RESTRICTIVE AND INCONSISTENT WITH THE SUPREME COURT'S ATS JURISPRUDENCE

Section A of this Part argues that the Fifth Circuit in *Adhikari v. Kellogg Brown & Root, Inc.* conducted a very limited inquiry into the "focus" of the Alien Tort Statute ("ATS") by only examining the location of KBR's alleged tortious conduct, and not doing a broad fact-based inquiry into all the relevant

⁸⁰ *Al Shimari*, 758 F.3d at 528. The Fourth Circuit applied a fact-based analysis and noted that plaintiffs' allegations of torture were committed by American citizens, employed by an American corporation (CACI), whose corporate headquarters were in Fairfax County, Virginia. *Id.* The court also noted that the alleged tortious conduct in Iraq occurred at a U.S. military facility operated by United States government personnel; the employees who allegedly participated in the acts were hired by CACI in the United States to fulfill the terms of a contract between the United States Department of the Interior and CACI; and that the contract had been issued by a government office in Arizona. *Id.* at 528–29. Weighing these factors, the *Al Shimari* court unanimously held that the plaintiffs' claims "touch[ed] and concern[ed]" the territory of the United States with "sufficient force" to displace the presumption against extraterritorial application of the ATS. *Id.* at 530.

⁸¹ See *Adhikari*, 845 F.3d at 207–210 (Graves, J., concurring in part and dissenting in part).

⁸² *Id.* at 208.

⁸³ *Id.* at 209. Judge Graves was critical of the fact that the majority in *Adhikari* paid no heed to the identity and citizenship of the defendant, KBR, a U.S. corporation. *Id.* at 209–10. He also noted that the majority was incorrect in dismissing the fact that KBR was financially supporting Daoud using American banks, and that the employees of KBR located in Houston, Texas were aware of KBR and Daoud's questionable operations in Iraq, and had yet chosen to do nothing about it at all. *Id.* at 211–14. Finally, Judge Graves argued that the ATS was passed by the First Congress in response to the concerns it had about foreign relations. *Id.* at 210. Given that the statute's purpose was to provide a forum for plaintiffs to litigate human rights abuses occurring abroad, Judge Graves believed that the majority's decision implicated both domestic and foreign interests of the United States, especially given that the alleged tortious conduct here took place on a U.S. military camp in Iraq. *Id.* at 211. He explained that although these policy considerations might not be dispositive to the extraterritorial application of the ATS in this case, it was still important for the Fifth Circuit to take them into account when determining the "focus" of the ATS. *Id.*

facts that gave rise to the Plaintiffs' claims.⁸⁴ Section B argues that the Fifth Circuit's application of the *Kiobel v. Royal Dutch Petroleum Co.* "touch and concern" test and the *Morrison v. National Australia Bank Ltd.* "focus" analysis in *Adhikari* undermines American foreign policy.⁸⁵

A. The Fifth Circuit in Adhikari Conducted a Very Limited Inquiry into the "Focus" of the ATS by Only Examining the Defendant's Alleged Tortious Conduct in the United States

The basic disagreement regarding *Kiobel's* "touch and concern" standard revolves around which facts should be taken into account when determining whether the ATS's presumption against extraterritoriality has been displaced.⁸⁶ The position advocated by the Fifth Circuit in *Adhikari* looks only to conduct that is in violation of international law and the location of that conduct.⁸⁷ In contrast, the approach advanced by the Fourth Circuit in *Al Shimari v. CACI Premier Technology, Inc.* calls for a broad, fact-based inquiry that takes into account all pertinent facts underlying a plaintiff's claim, including but not limited to, the defendant's citizenship or presence in the United States, whether Congress intended that the action be heard in the United States' courts, important American foreign policy interests triggered by the nature of a defend-

⁸⁴ See *infra* notes 86–99 and accompanying text.

⁸⁵ See *infra* notes 100–112 and accompanying text.

⁸⁶ See Swaine, *supra* note 39, at 43 (noting how different courts have taken different approaches to quantify the level of relevant conduct in the United States necessary to overcome the ATS's presumption against extraterritoriality). Compare *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 195 (5th Cir. 2017) (applying a narrow "touch and concern" inquiry), with *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530–31 (4th Cir. 2014) (advocating for a broad, fact-based inquiry that considers all pertinent facts underlying a plaintiff's claim to determine the "focus" of the plaintiff's claims).

⁸⁷ *Adhikari*, 845 F.3d at 195. In this scenario, if a court finds that all relevant conduct related to the plaintiffs' ATS claim occurred within the United States, there would be no issue about the ATS's extraterritorial application; however, if a court finds that none of the relevant conduct occurred within the United States, it is likely that the plaintiffs' claims will be barred entirely under the ATS. See Swaine, *supra* note 39, at 42 (noting that the extremes of what level of conduct is relevant to displace the presumption against extraterritoriality is easy to address). Justice Alito, in his concurring opinion in *Kiobel v. Royal Dutch Petroleum Co.*, said that the conduct occurring within the territory of the United States must on its own be sufficient to establish a claim under the ATS, thereby making any conduct that took place outside the United States essentially irrelevant to the inquiry. See 569 U.S. 108, 126 (2013) (Alito, J., concurring). Justice Alito's approach, however, would not only completely disregard any tortious activity happening in a foreign nation regardless of whether the claims "touch[ed] and concern[ed]" the territory of the United States, but also subvert piracy claims on the high seas—one of the original international law violations considered by the First Congress when enacting the ATS—that technically do not fall within the physical territory of the United States. See Swaine, *supra* note 39, at 43 (explaining that even if all piracy claims were allowed to proceed under the ATS, it would be out of line to suggest that any analogous crimes would be entirely excluded from the scope of the statute).

ant's conduct, the nationality of the defendant's employees, and the "focus" of the plaintiff's claims.⁸⁸

The Fifth Circuit in *Adhikari* should have adopted and applied the approach taken by the Fourth Circuit in *Al Shimari* and taken note of the fact that KBR is a U.S. corporation, domiciled within the territory of the United States, when determining whether Plaintiffs' claims "touche[ed] and concern[ed]" the U.S. territory.⁸⁹ Furthermore, it should have taken into account the evidence put forth by Plaintiffs of U.S.-based conduct by KBR that illustrated its participation in this transnational trafficking scheme.⁹⁰ Specifically, the Fifth Circuit should have considered the evidence that KBR was wiring money to Daoud from the United States through banks located in New York.⁹¹ This kind of financial support was made possible due to the subcontract signed between KBR and Daoud, which was done in the presence of KBR's employees based in Houston, Texas.⁹² The Fifth Circuit was short-sighted to find that none of this evidence showed a direct link between KBR's U.S. operations and the alleged international law violations taking place at the hands of KBR's subcontractor, Daoud, based in Al Asad.⁹³ After all, it is not too much of a stretch to infer that providing financial support to a group engaged in human rights violations,

⁸⁸ See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 529–31 (4th Cir. 2014). With respect to the "focus" approach, the Eleventh Circuit has seemingly taken the view that the extraterritorial presumption will not be overcome if the relevant conduct alleged is not sufficiently "focused within the United States." *Baloco v. Drummond*, 767 F.3d 1229, 1236–38 (11th Cir. 2014). This approach, however, misconstrues the *Kiobel* decision. *Id.* Although the location of the relevant conduct may be one consideration with respect to the "touch and concern" inquiry, it alone is not dispositive. See *Al Shimari*, 758 F.3d at 530–31. Some other lower courts have also cited facts about the parties—such as the U.S. nationality of the defendant, or its domicile or residency in the United States—to determine whether the claims "touch and concern" the United States or, alternatively, bear on the "focus" of the ATS. See, e.g., *Mujica v. AirScan Inc.*, 771 F.3d 594 (9th Cir. 2014) (noting that a defendant's citizenship and corporate relationship with the United States could be one factor that might "touch and concern" the territory of the United States with adequate force to displace the ATS's presumption against extraterritoriality); *Doe v. Drummond*, 782 F.3d 576, 596 (11th Cir. 2015) (finding that the citizenship or corporate status of the defendant is relevant to the "touch and concern" inquiry set forth in *Kiobel*); *Doe I v. Exxon Mobil Corp.*, No. 01-1357(RCL), 2015 WL 5042118, at *7 (D.D.C. July 6, 2015) (holding that corporate citizenship alone was not enough for ATS jurisdiction). But see *Warfaa v. Ali*, 811 F.3d 653, 660–61 (4th Cir. 2016) (noting that nothing in this case involved Americans, the American government or any events concerning the United States, but also suggesting that just because the defendant happens to be located in the United States does not mean that it should be a factor to be considered for the purpose of ATS); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 188 (2d Cir. 2014) (disagreeing with the contention that a defendant's U.S. citizenship has any relevance to the jurisdictional analysis).

⁸⁹ See *Adhikari*, 845 F.3d at 209 (Graves, J., dissenting) (pointing out the majority's failure to consider the U.S. corporate status of KBR); *Al Shimari*, 758 F.3d at 528.

⁹⁰ See *Adhikari*, 845 F.3d at 211–12 (Graves, J., dissenting) (pointing out the majority's failure to acknowledge and give credit to Plaintiffs' evidence that KBR's U.S.-based conduct implicated it under the ATS).

⁹¹ *Id.* at 212.

⁹² *Id.*

⁹³ *Id.*

both human trafficking and forced labor, in the Middle East makes one complicit in the successful operation of that scheme.⁹⁴

The Fifth Circuit also refused to consider the evidence put forth by Plaintiffs that implicated the U.S.-based employees who allegedly knew about the actions of Daoud and KBR at Al Asad, but chose to turn a blind eye towards it.⁹⁵ The district court in *Adhikari* did note in a footnote that Plaintiffs' most harmful evidence was the fact that one of KBR's U.S.-based employees terminated a consultant based at Al Asad after he complained about Daoud's actions on the military base against laborers such as Gurung.⁹⁶ This was in fact not the only complaint of abuses at Al Asad that reached KBR's U.S.-based employees, and thus, it is very dubious to think that these employees were not aware of what was going on at Al Asad.⁹⁷ By affirming the district court's decision to dismiss Plaintiffs' claims under the ATS, the Fifth Circuit failed to consider that a reasonable jury could have possibly found that KBR's U.S.-based employees knew about these human rights abuses taking place at Al Asad, but either willfully ignored them or, in some cases, actively sought to cover up on behalf of the key perpetrator, Daoud.⁹⁸ Consequently, the decision by the Fifth Circuit not to consider any of this additional evidence in determining whether Plaintiffs' claims "touch[ed] and concern[ed]" the U.S. territory was premature and against the weight of ATS jurisprudence thus far.⁹⁹

B. The Fifth Circuit's Application of Kiobel's "Touch And Concern" Standard and Morrison's "Focus" Standard in Adhikari Undermines U.S. Foreign Policy

The most pressing concern about the Fifth Circuit's near-sightedness in *Adhikari* is the foreign policy ramifications of a decision that declines to hold accountable perpetrators of crimes in violation of international law.¹⁰⁰ These

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See *Adhikari v. Daoud & Partners*, 95 F. Supp. 3d 1013, 1021 n. 4 (S.D. Tex. 2015), *aff'd sub nom. Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017), *cert. denied*, No. 16-1461, 2017 WL 2463601 (U.S. Oct. 2, 2017). Plaintiffs' most incriminating piece of evidence against KBR was a decision by a U.S.-based employee of KBR to remove a consultant from Al Asad after he complained of the violations being committed by Daoud at Al Asad against the laborers recruited to work on the military camp. *Adhikari*, 95 F. Supp. 3d at 1021 n. 4. It must be noted, however, that this evidence was undercut by the fact that the same U.S.-based employee, after removing the consultant from Al Asad, requested that initiation of an investigation into the complaints. *Id.*

⁹⁷ See *Adhikari*, 95 F. Supp. 3d at 1021 n. 4. The district court also noted that KBR in Houston had received other complaints from a U.S. Marine stationed at Al Asad regarding the treatment of workers on-site. *Id.*; see *Adhikari*, 845 F.3d at 213 (Graves, J., dissenting).

⁹⁸ See *Adhikari*, 845 F.3d at 213 (Graves, J., dissenting).

⁹⁹ See *id.* at 210–13.

¹⁰⁰ See *id.* at 207–210 (discussing how the majority was incorrect to summarily dismiss the foreign policy implications of its decision).

foreign policy concerns are particularly troubling when KBR's conduct points a clear finger at the United States military.¹⁰¹ KBR was one of the largest military contractors operating in Iraq, and the Fifth Circuit's failure to provide the Plaintiffs with a forum to bring forth their claims of human trafficking and forced labor overseas undermines American policy against such practices.¹⁰²

Military contractors are critical for the success of the U.S. military, and because their work is so intertwined with that of the military itself, they are often perceived as an extension of the military.¹⁰³ Given the evolving nature of warfare and the political motivation within the United States to outsource all nonessential military functions to private contractors, military subcontractors have been used in greater numbers in recent years.¹⁰⁴ In the case of Plaintiffs in *Adhikari*, the men were recruited from Nepal under the false pretense that they would be employed in hotels in Amman, Jordan, but in reality, their brokers always knew that these men were eventually contracted to work, against their will, in the U.S. military bases in Iraq.¹⁰⁵ Given the close relationship between KBR, Daoud, and the U.S. military, the Fifth Circuit's decision in *Adhikari* is highly damaging to U.S. military interests and to the safety of military operations across the world.¹⁰⁶

¹⁰¹ See *id.* at 211.

¹⁰² See *id.*; see also United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319. Just a few years before the incident in *Adhikari*, the United States signed and ratified a treaty that asked all signatories to hold their citizens responsible for human trafficking. United Nations, United Nations Convention Against Transnational Organized Crime, Vol. 2346, No. A-39574 (2008), <https://treaties.un.org/doc/Publication/UNTS/Volume%202346/v2346.pdf> [<http://perma.cc/L8NQ-9B65>] (explaining the obligations of the United States as signatory to the treaty); OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 19 (2006), <http://www.state.gov/documents/organization/66086.pdf> [<http://perma.cc/2X8H-6Q4P>] (summarizing the Department of Defense's investigation and response to labor trafficking in Iraq).

¹⁰³ *Adhikari*, 845 F.3d at 211.

¹⁰⁴ Amy Kathryn Brown, *Baghdad Bound: Forced Labor of Third-Country Nationals in Iraq*, 60 RUTGERS L. REV. 737, 746 (noting that although the Vietnam War only involved the participation of about 9,000 civilians, the recent Balkan Wars of the 1990s involved close to 12,000 contractor employees, which surprisingly outnumbered the number of military personnel on the ground). The United States' invasion of Iraq provided for several lucrative opportunities for military subcontractors. *Id.* at 748 (illustrating Halliburton as an example and explaining that despite reports of mismanagement, Halliburton received more than \$4 billion in contract work from the Department of Defense in 2003). In fact, as of 2006, Halliburton's then-subsi-dary KBR had outsourced most of its \$12 billion contract with the U.S. military in Iraq to many subcontractors that were based in countries that were already struggling to contain human rights abuses, including human trafficking, within their own borders. *Id.*; Cam Simpson, *Iraq War Contractors Ordered to End Abuses*, CHI. TRIB., Apr. 24, 2006, at 3 (explaining that KBR had outsourced most of the U.S. military work in Iraq to sub-contractors in the Middle East, and that about 70% of the people employed were non-American citizens hired from outside Iraq).

¹⁰⁵ See *Adhikari*, 845 F.3d at 190–93 (reciting facts of the case).

¹⁰⁶ See *id.* at 210–13 (Graves, J., dissenting) (noting that the majority fails to understand the implications of not holding U.S. military contractors liable for human rights abuses abroad).

The majority in *Adhikari* summarily dismissed any and all concerns about the foreign policy ramifications of their decision.¹⁰⁷ Their reasoning, however, not only completely frustrates the purpose for which the ATS was enacted, it also makes the statute somewhat superfluous given the current international political climate.¹⁰⁸ At the time that the ATS was passed, the First Congress only imagined three violations of international law that, in their opinion, would ever require redress under the ATS—piracy, violations of safe conduct, and offenses against ambassadors.¹⁰⁹ Although courts today have expanded this list to include contemporary violations of international law, the decision in *Adhikari* appears to not understand the sophisticated nature of transnational crime today.¹¹⁰ Most modern-day violations of international law, like we saw in *Adhikari* and *Al Shimari*, are perpetrated through a coordinated and concerted effort made by several players across the world, including those who recruit, those who finance,

¹⁰⁷ See *id.* at 198 (majority opinion) (explaining that the presumption against extraterritoriality applies regardless of any risk of conflict between the American statute and a foreign law).

¹⁰⁸ See *id.* (explaining that contractors provide crucial support to the U.S. military at many active war zones, so much so that they are often considered to just be an extension of the U.S. military itself); see also Anthony J. Bellia Jr & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 515 (2011) (explaining that by passing the ATS, the First Congress ensured that aliens would have at least one forum to litigate their claims for violation of international law).

¹⁰⁹ See Judiciary Act of 1789, ch. 20, §§ 2–4, 1 Stat. 73, 73–75; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) (explaining that the jurisdictional grant of the ATS was initially limited to only three violations of international law—piracy, violations of safe conduct, and offenses against ambassadors). It is true that the ATS was initially adopted by the First Congress to make sure that the United States upheld its commitment to the law of nations. Bellia & Clark, *supra* note 108, at 515. At the time that the ATS was passed, sovereign nations were required to provide redress to plaintiffs that had been subjected to tortious conduct in at least three circumstances: first, when the violation occurred on domestic soil; second, when a citizen of that nation was responsible for perpetrating the violation; and third, when the wrongdoer sought to escape liability within the territory of the nation. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (AM. LAW INST. 1987) (“Subject to [the reasonableness requirement of] § 403, a state has jurisdiction to prescribe law with respect to (1) (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory; (2) the activities, interests, status, or relations of its nationals outside as well as within its territory”). It was understood that a failure to provide recourse in any of the above-mentioned circumstances implicated the nation as an accomplice in the violation. See Bellia & Clark, *supra* note 108, at 475 (explaining that a nation was responsible for providing redress from injuries caused by its citizens against foreigners).

¹¹⁰ 28 U.S.C. § 1350 (2012); Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77. The original language of the ATS provided that “[the District Courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77. This kind of reasoning is incorrect because the First Congress, by choosing to adopt the language, “all causes where an alien sues for a tort only in violation of the law of nations,” intended to have the ATS encompass all kinds of intentional harm inflicted on an alien that would be in violation of international law. See Bellia & Clark, *supra* note 108, at 543 (explaining that this broader reading of the ATS more correctly represents what the First Congress intended regarding the applicability of the ATS).

and those who turn a blind eye toward the abuse.¹¹¹ Consequently, the Fifth Circuit's approach in *Adhikari* puts severe limits on the future of the ATS, especially if courts continue to advocate for the understanding that the ATS was never meant to apply to a modern subset of torts committed by a modern and sophisticated set of perpetrators in violation of the law of nations.¹¹²

CONCLUSION

The Fifth Circuit's approach in *Adhikari* to *Kiobel*'s "touch and concern" test was incorrect in its limited inquiry into the "focus" of the ATS. In this case, the Plaintiffs' allegations implicated the United States and its military. Despite that, the Fifth Circuit engaged in a formulaic application of the Supreme Court's ATS jurisprudence thus far, without acknowledging the policy implications of such a decision on American foreign relations and the United States' standing in the world. The court should not have overlooked that the defendant, KBR, was an American corporation domiciled within the United States. Nor should it have ignored the fact that KBR and Daoud were receiving funds through wire transfers from New York-based banks, and that KBR's employees in Houston, Texas were aware of the human rights abuses taking place under KBR's watch at Al Asad. The Fifth Circuit's decision is contrary to the expectations of the First Congress and jeopardizes the future of the ATS.

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Preferred Cite: Vasundhara Prasad, Comment, *The Road Beyond Kiobel: The Fifth Circuit's Decision in Adhikari v. Kellogg Brown & Root, Inc. and its Implications for the Alien Tort Statute*, 59 B.C. L. REV. E. SUPP. 369 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss6/369>.

¹¹¹ See *Adhikari*, 845 F.3d at 190–93 (reciting facts of the case); *Al Shimari*, 758 F.3d at 520.

¹¹² See Bellia & Clark, *supra* note 108, at 552 (noting that the ATS was passed to provide redress to aliens injured at the hands of Americans, and thus, satisfy America's obligations under international law).