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AFTER *KIOBEL*: AN "ESSENTIAL STEP" TO DISPLACING THE PRESUMPTION AGAINST EXTRATERRITORIALITY

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ABSTRACT

For thirty-three years, victims of international human rights abuses relied primarily upon the Alien Tort Statute to redress their injuries in U.S. courts. In an unexpected move, the Supreme Court in Kiobel v. Royal Dutch Petroleum *invoked the presumption against extraterritoriality to upend the deeply entrenched interpretation that the statute applied to claims composed of entirely foreign conduct and foreign parties. Prior to the holding in* Kiobel, *one federal court went so far as to hold that the Alien Tort Statute applied exclusively to extraterritorial claims. After* Kiobel, *courts, scholars, attorneys, commentators, and human rights activists are unsure whether or to what extent the Alien Tort Statute applies to extraterritorial human rights abuses at all. This Comment argues that the Alien Tort Statute does still apply to extraterritorial human rights abuses and provides a specific explanation of the extent of its future application.*

The Kiobel *Court concluded its opinion with mysterious dicta discussing hypothetical future claims brought under the Alien Tort Statute and introduced a brand new displacement standard for determining whether those future claims overcome the presumption against extraterritoriality. Immediately following the decision, scholars and commentators pointed to this standard as the best roadmap to applying the Alien Tort Statute to future extraterritorial claims. However, no one knows precisely how to understand it or apply it. Indeed, all three of* Kiobel*'s concurrences made a point to recognize that the displacement standard fails to provide a clear roadmap for future claims. In the short period of time since the opinion was released, only one scholarly article has waded into the murky waters to make an attempt at it. Even there, the discussion was merely one section of a larger paper, and thus left important questions unanswered. Meanwhile, human rights attorneys embroiled in litigation and federal courts trying to reach well-reasoned decisions are stuck having to wrestle with the enigmatic standard without much guidance.*

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This is the first paper entirely devoted to unraveling the mystery of the displacement standard and its application to future international human rights litigation. Moreover, it is the first time anyone has attempted to provide a robust analysis of the Kiobel *Court's citation to* Morrison *in support of the displacement standard. It also provides an innovative solution grounded in well-established Supreme Court precedent for human rights attorneys and activists to consider when filing extraterritorial human rights claims in U.S. courts, while also supplying much needed guidance for federal courts pondering how to apply the displacement standard. The interpretation and application of the displacement standard will determine not only whether the Alien Tort Statute remains relevant for international human rights litigation, but, for the many victims of international human rights abuses in countries with undeveloped legal systems, it may also ultimately determine whether they have access to a remedy at all.*

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INTRODUCTION

IN *Kiobel v. Royal Dutch Petroleum Co.*, Nigerian nationals sued Dutch and British corporations under the Alien Tort Statute (ATS) for violating the law of nations, alleging that the corporations aided and abetted Nigerian military and police forces in, among other things, murdering, raping, and beating members of certain Nigerian villages.[1] The United States Supreme Court framed the issue as whether the ATS applied to claims made up of conduct occurring entirely outside the territory of the United States.[2] In reaching its decision, the Court held that the presumption against the extraterritorial application of U.S. laws (the presumption) applied to claims arising under the ATS and nothing in the statute rebutted that presumption.[3] Therefore, it affirmed the dismissal of the claim.[4] Before concluding its opinion, however, the Supreme Court included dictum addressing potential future ATS claims under different circumstances.[5] It explained that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application"[6] (the displacement standard).

The holding in *Kiobel* severely undermined the ATS's role as the predominate vehicle for litigating international human rights abuses in U.S. courts.[7] It reversed a thirty-three-year history of courts applying the ATS to extraterritorial law-of-nations violations involving entirely foreign conduct and foreign parties.[8] Nevertheless, there remains a distinct—yet wholly undetermined—possibility that certain victims of international human rights abuses may still be able to use the ATS to redress their injuries in U.S. courts.[9] The displacement standard creates the potential

1. 133 S. Ct. 1659, 1662–63 (2013).
2. *Id.* at 1662.
3. *Id.* at 1669.
4. *Id.*
5. *See id.*
6. *Id.* (citing Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 266-73 (2010)).
7. *See, e.g.*, Rich Samp, *Supreme Court Observations: Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation*, FORBES (Apr. 18, 2013, 10:51 AM), http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/.
8. *See* Samp, *supra* note 7.
9. Oona Hathaway, *Kiobel Commentary: The Door Remains Open for "Foreign Squared" Cases*, SCOTUSBLOG (Apr 18, 2013, 4:27 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/.

for a future extraterritorial application of the statute to a limited and unknown class of cases.[10] To date, only one scholarly article has attempted to provide a coherent legal framework for identifying those cases.[11] The question, however, deserves much more attention because its resolution will help determine the extent to which victims of human rights abuses abroad can continue to rely on the ATS to gain access to U.S. courts.[12]

All three concurrences in *Kiobel* acknowledged that the displacement standard fails to provide a clear roadmap for future extraterritorial ATS claims.[13] Justice Kennedy, in his brief concurrence, pointed out that "[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]."[14] Justice Alito, joined by Justice Thomas, explained that the displacement standard "obviously leaves much unanswered."[15] Finally, Justice Breyer, concurring in judgment and joined by Justices Ginsburg, Sotomayor, and Kagan, criticized the majority opinion for "offer[ing] only limited help in deciding . . . 'under what circumstances the [ATS] allows courts to recognize [an extraterritorial claim].'"[16] According to Justice Breyer, although "[the majority] makes clear that a statutory claim might sometimes 'touch and concern the territory of the United States . . . with sufficient force to displace the presumption[,]' [i]t leaves for another day the determination of just when the presumption against extraterritoriality might be 'overcome.'"[17]

With both judges and practitioners in mind, this paper attempts to provide a workable solution that coheres with Supreme Court precedent by answering two fundamental questions surrounding the displacement standard: (1) what does the citation to *Morrison v. National Australian Bank Ltd.*[18] reveal about its criteria, and (2) what type of claim will satisfy that criteria? As to the first question, I argue that the displacement standard is nothing more than *Morrison*'s focus-based analysis with an extra element added to it: sufficient force. The Court added sufficient force to the analysis so that it could limit the potentially broad extraterritorial outcomes of applying the focus-based analysis to a strictly jurisdictional statute. I then

10. *See, e.g.*, Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. (forthcoming 2014) (manuscript at 34–36) (on file with author); Hathaway, *supra* note 9.

11. *See* Colangelo, *supra* note 10, at 4–5. Although there are blog posts discussing the language, so far this is the only scholarly article attempting to explain the Court's meaning and proposing a workable framework for future extraterritorial ATS claims.

12. As discussed in Part IV of this paper, it may still be possible for victims of human rights abuses abroad to access U.S. Courts through a territorial application of the ATS by pursuing accessorial liability. This option, however, would not require displacing the presumption because the presumption is in place to protect against improper extraterritorial application. There is no presumption to displace when the application is territorial.

13. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (Kennedy, J., concurring); *id.* at 1669–70 (Alito, J., concurring); *id.* at 1673 (Breyer, J., concurring).

14. *Id.* at 1669 (Kennedy, J., concurring).

15. *Id.* (Alito, J., concurring).

16. *Id.* at 1673 (Breyer, J., concurring) (citation omitted).

17. *Id.*

18. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 264–73 (2010).

argue that the Court likely had domestic conduct in mind when it included this limitation. As to the second question, I argue that application of a well-settled legal doctrine—which I call the "essential step doctrine"—to certain domestic conduct connected to an extraterritorial claim is a viable method to displace the presumption.

I begin, in Part I, by discussing the simultaneous modern development of the ATS's application to extraterritorial claims and the rise of the modern presumption against extraterritoriality. Then, in Part II, I examine the collision of the ATS and the presumption in *Kiobel*, which ultimately produced the displacement standard. I also discuss how lower courts have applied the displacement standard. In part III, I make an argument for what the displacement standard means in light of the Supreme Court's citation to *Morrison*. Finally, in Part IV, I argue that application of the essential step doctrine should work to displace the presumption, allowing courts to adjudicate certain extraterritorial claims arising under the ATS. I then recognize a similarity between these claims and accessorial liability, but proceed to explain important differences between the two.

I. A BRIEF HISTORY OF THE ATS & THE PRESUMPTION AGAINST EXTRATERRITORIALITY

In the years leading up to *Kiobel v. Royal Dutch Petroleum*, lower courts were regularly applying the ATS to extraterritorial claims.[19] This made the ATS the primary vehicle for litigating international human rights abuses within the United States.[20] During that same time period, however, the Supreme Court began cementing a strong presumption against extraterritoriality into its jurisprudence.[21] This section briefly discusses the history of both developments.

A. PRE-*KIOBEL* APPLICATION OF THE ATS TO EXTRATERRITORIAL CLAIMS

In 1789, the first Congress enacted the ATS as part of the Judiciary Act.[22] The ATS provided that "new federal district courts 'shall also have cognizance . . . 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.'"[23] Over the years, the language of the ATS has experienced a few modifications,[24] and its current form reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[25]

The ATS was used on two separate occasions shortly after its enact-

19. *See infra* note 35 and accompanying text.
20. *See infra* note 34 and accompanying text.
21. *See infra* notes 41–47 and accompanying text.
22. *Kiobel*, 133 S. Ct. at 1663.
23. Sosa v. Alvarez-Machain, 542 U.S. 692, 712–13 (2004) (quoting Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77).
24. *Sosa*, 542 U.S. at 713 n.10.
25. 28 U.S.C. § 1350 (2012).

ment.[26] For the next 167 years, however, it went virtually unnoticed.[27] Although resurfacing in a 1960 Second Circuit case,[28] it officially reentered the spotlight in 1980.[29] In *Filartiga v. Pena-Irala*, Paraguayan citizens filed an ATS suit in the Eastern District of New York against the former Inspector General of Police in Asuncion, Paraguay, for kidnapping and then torturing their son to death in Paraguay.[30] The district court dismissed the case on jurisdictional grounds.[31] On appeal, the application of the ATS was squarely before the Second Circuit.[32] The Second Circuit reversed the district court, holding that the ATS granted federal courts jurisdiction to hear the case because official torture violates the law of nations.[33] This holding "paved the way for international human rights litigation in U.S. courts."[34]

For the next thirty-three years, courts across the nation appeared to accept the Second Circuit's interpretation and applied the ATS to extraterritorial conduct.[35] A few years before *Kiobel* was decided, one district court went so far as to declare that the ATS applied *only* to conduct occurring outside the territorial boundaries of the United States.[36] That court explained that "the expanded role for the ATS has always been understood as covering torts committed abroad. As a result, the [c]ourt ha[d] not found a single post-*Filartiga* case addressing claims arising out of domestic conduct."[37] Relying on this impression, it dismissed the ATS claim before the court because the conduct occurred within the territorial boundaries of the United States.[38] On appeal, the Second Circuit suggested that the district court got it wrong, but expressly refused to address the issue because it could decide the case on other grounds.[39] In a footnote, however, it recognized that the Supreme Court was currently addressing the jurisdictional reach of the ATS in *Kiobel v. Royal Dutch*

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

27. *See id.* ("[T]he ATS was invoked twice in the late 18th century, but then only once more over the next 167 years.").

28. Khedivial Line, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49, 51–52 (2d Cir. 1960).

29. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004); *see also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 588 (2002).

30. Filartiga v. Pena-Irala, 630 F.2d 876, 878–79 (2d Cir. 1980).

31. *Id.* at 880.

32. *Id.*

33. *Id.* at 878.

34. Bradley, *supra* note 29, at 589.

35. *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 747 (9th Cir. 2011) *cert. granted, judgment vacated sub nom.* Rio Tinto PLC v. Sarei, 133 S. Ct. 1995 (2013); Garcia v. Chapman, 911 F. Supp. 2d 1222, 1239 (S.D. Fla. 2012); Lizarbe v. Rondon, 642 F. Supp. 2d 473, 492 (D. Md. 2009) *aff'd in part, appeal dismissed in part on other grounds sub nom.* Ochoa Lizarbe v. Rivera Rondon, 402 F. App'x 834 (4th Cir. 2010); Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 686 (S.D. Tex. 2009); Chavez v. Carranza, 413 F. Supp. 2d 891, 898–99 (W.D. Tenn. 2005); Xuncax v. Gramajo, 886 F. Supp. 162, 169, 193 (D. Mass. 1995); Krishanthi v. Rajaratnam, 09-CV-05395 DMC-JAD, 2010 WL 3429529, at *1, *11 (D.N.J. Aug. 26, 2010).

36. Velez v. Sanchez, 754 F. Supp. 2d 488, 496–97 (E.D.N.Y. 2010) *aff'd in part, vacated in part on other grounds,* 693 F.3d 308 (2d Cir. 2012).

37. *Id.* at 496.

38. *Id.* at 497–98.

39. *See* Velez v. Sanchez, 693 F.3d 308, 318 (2d Cir. 2012).

Petroleum Co.[40]

B. Pre-*Kiobel* Development of the Presumption Against Extraterritoriality

Almost a decade after the Second Circuit reinvigorated the ATS and applied it to the extraterritorial conduct of foreign defendants, the Supreme Court invoked a long-standing tool of statutory construction to deny the extraterritorial application of Title VII of the Civil Rights Act of 1964.[41] In *E.E.O.C. v. Arabian American Oil Co.* (Aramco), the Court explained that "[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[42] The purpose behind the rule is "to protect against unintended clashes between our laws and those of other nations which could result in international discord."[43] As a result, the Court declared, "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality," and statutes do not apply extraterritorially "unless there is 'the affirmative intention of the Congress clearly expressed.'"[44]

The application of the presumption in *Aramco* began to reverse the pervading trend of the lower courts, which became "increasingly willing to apply federal statutes" to extraterritorial conduct.[45] It was also a departure from the Court's extraterritorial jurisprudence applied to the Sherman Act.[46] Following *Aramco*, the Court has continued to apply the presumption,[47] reinforcing its central place in extraterritorial jurisdiction jurisprudence.

Aramco's formulation of the presumption—including the requirement of a clear expression of intent to rebut it[48]—can be traced back to *Foley Bros., Inc. v. Filardo*, decided in 1949.[49] However, in *Steele v. Bulova*

40. *Id.* at 318 n.6.
41. *See* E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 258–59 (1991).
42. *Id.* at 248.
43. *Id.*
44. *Id.*
45. *See* Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. Chi. L. Rev. 657, 694 (2013).
46. *Cf.* Hartford Fire Ins. Co. v. California, 509 US 764, 814 (1993) (Scalia, J., dissenting) (noting that "[t]he Sherman act contains similar 'boilerplate language [to Aramco],' and if the question were not governed by precedent, it would be worth considering whether that presumption controls the outcome here." However, "it is now well established that the Sherman Act applies extraterritorially.").
47. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013); Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2881 (2010); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173 (1993); *see also* Nelson, *supra* note 45, at 714.
48. In *Morrison*, the Court clarified that the "clear statement rule" is not restricted to "a requirement that a statute say 'this law applies abroad,'" but rather permits courts to consider the context of the statute as well. *Morrison*, 130 S. Ct. at 2883.
49. *See* Foley Bros., Inc. v. Filardo, 336 US 281, 285 (1949); *see also* E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (relying substantially on *Foley Bros.* to articulate the presumption); Nelson, *supra* note 45, at 720 ("As we have seen, that formulation of the canon dates back to Foley Bros.").

Watch Co., just three years after *Foley Bros.* was decided, the Supreme Court applied the Lanham Act to foreign conduct without a clear expression that the statute should apply extraterritorially.[50] The issue in *Steele* was whether a "United States District Court has jurisdiction to award relief to an American corporation against acts of trade-mark infringement and unfair competition consummated in a foreign country by a citizen and resident of the United States."[51] To be sure, in *Steele*, the Court identified the presumption and even pointed to statutory language evincing "broad jurisdictional grant" to regulate "'all commerce which may lawfully be regulated by Congress.'"[52] However, it never said that Congress clearly expressed intent for the Lanham Act to apply extraterritorially.[53] Instead, the Court held that the *domestic* conduct was sufficient to fall within the jurisdictional grant of the statute, thus enabling the Court to award relief for the infringing conduct consummated *abroad*.[54]

The Supreme Court emphasized two important facts. One was that the finished products filtered into the United States.[55] Consequently, the "competing goods could well reflect adversely on Bulova Watch Company's trade reputation in markets cultivated by advertising here as well as abroad."[56] The other fact was that the component parts for the products displaying the infringing marks were purchased in the United States.[57] The Court went on to explain that it did not "deem material" that the infringing conduct occurred in Mexico, or that the conduct within the United States, "when viewed in isolation[,] d[id] not violate any of our laws."[58] What mattered was that the domestic conduct was an "essential step[ ] in the course of business consummated abroad; acts legal in themselves lose that character when they become part of an unlawful scheme."[59] Given these facts, the Court applied the Lanham Act extraterritorially.[60]

Steele was not overruled by *Aramco*'s reinvigoration of the presumption. Instead, *Aramco* expressly approved of *Steele*.[61] It explained that *Steele* reached its conclusion in light of the broad legislative intent to regulate the deceptive use of marks connected to all commerce lawfully regulated by Congress and "the fact that the allegedly unlawful conduct had some effects within the United States."[62] As mentioned above, one of those effects was the purchase of component parts within the United States, which became unlawful in the same way a domestic infringement

50. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 285–86 (1952).
51. *Id.* at 281.
52. *See id.* at 285–87.
53. *See id.* at 286–87.
54. *See id.*
55. *See id.* at 286.
56. *Id.*
57. *See id.*
58. *Id.* at 287.
59. *Id.*
60. *See id.* at 286.
61. *See* E.E.O.C. v. Arabian Am. Oil Co., 449 U.S. 244, 252 (1991).
62. *Id.*

would be unlawful because it was one of the "essential steps" to the ultimate consummation of the infringement abroad.[63] In light of these facts in *Steele*, the Court in *Aramco* declared that the "statute was properly interpreted as applying abroad."[64]

In 2010, the Supreme Court decided its most recent pre-*Kiobel* case involving application of the presumption—*Morrison v. National Australian Bank Ltd.*[65] In *Morrison*, the Court decided whether the anti-fraud provision "of the Securities and Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."[66] The case involved an Australian bank (the Bank) that traded its stocks on the Australian Stock Exchange Limited and Australian investors (the Investors) alleging that the Bank defrauded them by making materially false statements and manipulating financial models.[67] The Bank owned a mortgage servicer headquartered in Florida, and from 1998–2001 the Bank's public documents "touted the success" of the mortgage service and its officers "did the same in public statements."[68] However, between July and September of 2001, the Bank wrote down the value of the mortgage servicer's assets by over $2 billion.[69] The Investors purchased shares in the Bank in 2000 and 2001, and after the write-down they sued the Bank in the Southern District of New York, alleging, among other things, violations of § 10(b) of the Securities and Exchange Act of 1934.[70]

The Supreme Court affirmed the dismissal of the lawsuit because the statute did not express a clear intent to apply extraterritorially,[71] and the conduct relevant to the statute's focus did not occur within the United States.[72] As to the latter issue, the Investors argued that the Bank manipulated the mortgage servicer's financial models and made misleading public statements in Florida.[73] Thus, according to the Investors, although the shares were bought on the Australian Exchange Market, the statute should be applied domestically because the deceptive conduct occurred in the United States.[74] The Court rejected this interpretation of the statute, explaining that the presumption against extraterritoriality cannot be overcome just because there is some domestic conduct related to the claim.[75] Instead, the domestic conduct must be part of the "focus of congressional concern."[76] The Court concluded "that the focus of the Ex-

63. *See Steele*, 344 U.S. at 287.
64. *Arabian Am. Oil Co.*, 499 U.S. at 252.
65. 561 U.S. 247 (2010).
66. *Id.* at 250.
67. *Id.* at 251.
68. *Id.* at 251-52.
69. *Id.* at 252.
70. *Id.*
71. *Id.* at 254-65.
72. *Id.* at 266-69.
73. *Id.* at 266.
74. *Id.*
75. *Id.*
76. *Id.* (quotation marks omitted).

change Act is not upon the place where the deception originated, but upon the purchases and sales of securities in the United States."[77] That is, the statute regulates only deceptive conduct connected to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[78] Furthermore, the Court also rejected the argument that the Exchange Act applies to domestic conduct affecting exchanges or transactions abroad because "[t]he probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application it would have addressed the subject of conflicts with foreign laws and procedures."[79]

Finally, the Court devoted an entire section of its opinion to reject a "'significant and material conduct' test" for transnational securities fraud proposed by the Solicitor General.[80] The test would extend the reach of the Exchange Act to foreign conduct "when the fraud involves significant conduct in the United States that is material to the fraud's success."[81] The Court rejected this test because it found no textual support for it, observed adverse consequences of adopting the test, and disagreed with Second Circuit case law applying the test.[82]

During this discussion the Court reaffirmed *Steele v. Bulova Watch Co.* in a footnote.[83] In footnote eleven, the Court addressed a number of cases the Solicitor General cited in its briefs to support applying non-extraterritorial statutes whenever any (not just focus-based) domestic conduct affected consequences abroad.[84] One of those cases was *Steele*.[85] The Court rejected the interpretation of *Steele* as supporting the Solicitor General's argument.[86] Citing *Aramco* for support, it briefly recognized, without any other explanation, that *Steele* interpreted the Lanham Act . . . to have "extraterritorial effect."[87]

After dispensing with the Solicitor General's arguments, the Court summarized its holding. It explained that the statute only punished deception connected to the purchase or sale of securities listed on the American stock exchange or the purchase or sale of securities within the

77. *Id.*

78. *Id.* It is interesting to note that the Court went out of its way to show that the Congressional focus of the "transactions in other securities" was domestic. *Id.* at 267. This appears to be unnecessary in light of its holding that the presumption against extraterritoriality applied to the statute. *See id.* at 266. Concluding that the presumption applied and that there was no clear intent to rebut it should have been enough for the court to classify any focus of the statute as domestic. To hold otherwise admits the absurd possibility that the statute focuses on foreign activity but extraterritorial application is barred by the presumption.

79. *Id.* at 267.

80. *Id.* at 269-73.

81. *Id.* at 270.

82. *Id.* at 269–72.

83. *See id.* at 271 n.11.

84. *Id.*

85. *See id.*

86. *See id.*

87. *Id.*

United States (i.e., connected to the focus of the statute).[88] The securities involved in *Morrison*, however, were listed on a foreign exchange, "and all aspects of the purchases complained of . . . occurred outside the United States."[89] Therefore, the Investors failed to state a claim.[90]

II. THE COLLISION OF THE ATS & THE PRESUMPTION AGAINST EXTRATERRITORIALITY IN *KIOBEL V. ROYAL DUTCH PETROLEUM CO.*

The modern development of the ATS and the presumption collided in *Kiobel v. Royal Dutch Petroleum Co.*[91] As discussed above, prior to *Kiobel*, lower courts generally had no problem applying the ATS to extraterritorial claims.[92] However, the Supreme Court upended this interpretation in *Kiobel*.

A. A New "Displacement" Standard for Extraterritorial Application of the ATS

In *Kiobel*, the Supreme Court applied the presumption to a claim arising under the ATS and concluded that the ATS did not communicate intent to rebut the presumption.[93] Therefore, the Court held that the ATS did not authorize adjudication of an extraterritorial claim alleging that British, Dutch, and Nigerian companies violated the law of nations in Nigeria.[94] At the outset, the Court recognized a challenge to applying the presumption to the ATS: the presumption was typically applied to "an Act of Congress regulating conduct," but "[t]he ATS, on the other hand, [was] 'strictly jurisdictional.'"[95] To apply the presumption to the ATS, then, the Court had to make an exception to its typical approach.[96]

The exception crafted by the Court was motivated by the policy concerns underlying the presumption. It pointed to the presumption's underlying principles and interpreted those principles as "constrain[ing] courts considering causes of action that may be brought under the ATS."[97] The Court, quoting *Aramco*, explained that the presumption "'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'"[98] Prior precedent was in agreement that the ATS magnifies the potential for judicial interference in foreign affairs because it requires courts to interpret the law of nations, which "raise[s] risks of adverse foreign policy consequences."[99]

88. *Id.* at 273.
89. *Id.*
90. *Id.*
91. 133 S. Ct. 1659 (2013).
92. *See supra* note 35 and accompanying text.
93. *Kiobel*, 133 S. Ct. at 1669.
94. *See id.*
95. *Id.* at 1664 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004)).
96. *See id.*
97. *Id.* at 1664.
98. *Id.* (quoting E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).
99. *Id.*

According to the Court, this concern was "all the more pressing when the question [was] whether a cause of action under the ATS reaches conduct within the territory of another sovereign."[100] Given this backdrop, the Court concluded that the presumption constrained the ATS.[101]

The rest of the opinion addressed whether the text, history, or purpose of the ATS rebut the presumption by expressing "a clear indication of extraterritoriality."[102] The Court concluded that they do not.[103] Finding no clear intent that the ATS should apply extraterritorially, the Court held that "nothing in the statute rebuts that presumption . . . and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred."[104]

After reaching its conclusion, however, the Court included a mysterious paragraph explaining how future ATS claims might displace the presumption. First, it pointed out that under the facts in *Kiobel*, "all the relevant conduct took place outside the United States."[105] Then it went on to contrast these facts with hypothetical "claims [that] touch and concern the territory of the United States," explaining that these claims will displace the presumption if they touch and concern U.S. territory with "sufficient force."[106] To support this new displacement standard, it cited to *Morrison v. National Australian Bank Ltd.*[107] Specifically, it cited to the portions of *Morrison* discussing the focus-based analysis, which the Supreme Court used to determine whether certain domestic conduct was sufficient to overcome the presumption against extraterritoriality.[108] Finally, it concluded that "it would reach too far to say that mere corporate presence suffices."[109]

B. Lower Courts Interpret the Displacement Standard to Require Domestic Conduct

The Second Circuit addressed *Kiobel's* displacement standard shortly after *Kiobel* was decided.[110] In *Balintulo v. Daimler*, it explained that under *Kiobel*, the presumption barred all claims where all the relevant conduct occurred in the territory of another country.[111] It viewed the extraterritorial conduct as dispositive.[112] Armed with this understanding of *Kiobel*, the Second Circuit interpreted the displacement standard as a bright-line rule: ATS claims are barred by the presumption unless rele-

100. *Id.* at 1665.
101. *Id.*
102. *Id.* (internal quotation marks omitted).
103. *Id.* at 1669.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *See id.* (citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266-73 (2010)).
109. *Id.*; *see also* Daimler AG v. Bauman, 134 S. Ct. 746, 762–63 (2014).
110. *See* Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2013).
111. *Id.* at 189.
112. *Id.* at 191.

vant conduct occurs within the United States—no exceptions.[113]

The Second Circuit rejected the contention that *Kiobel* adopted a "new presumption" for the ATS when it wrote the displacement standard.[114] Specifically, it rejected the argument that the Supreme Court implied that "corporate citizenship" might displace the presumption when it made the statement that "mere corporate presence" would not suffice.[115] The court explained its conclusion by emphasizing *Kiobel*'s repeated focus on the foreign conduct in the case, and then rejected distinctions based on the defendant's citizenship as irrelevant.[116] Moreover, in a footnote, the court reinforced its conclusion by highlighting its compatibility with the historical focus of the presumption, explaining that "the presumption of extraterritoriality traditionally has 'focused on the site of the conduct, not the identity of the defendant.'"[117] The Second Circuit also dismissed the petitioner's argument that a compelling American interest was enough to displace the presumption, explaining that this argument "miss[ed] the mark" because it did not satisfy the clear indication requirement necessary to rebut the presumption.[118]

The three other federal courts to address claims involving American defendants reached conclusions consistent with the Second Circuit. In *Al Shimari v. CACI Premier Technology, Inc.*, the Fourth Circuit explained that the "ATS claims connection to the territory of the United States and [the defendant's] *relevant conduct in the United States* require a different result than that reached in *Kiobel*."[119] Similarly, in *Sexual Minorities Uganda v. Lively*, the District of Massachusetts held that the claim displaced the presumption because the "offensive conduct [was] alleged to have occurred, in substantial part, within this country."[120] Whereas, in *Giraldo v. Drummond Co.*, the Northern District of Alabama held that the claim could not displace the presumption because the torts occurred abroad.[121]

113. *See id.* at 190 ("[I]f all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*."); *see also* Al Shimari v. CACI Premier Tech., Inc., No. 13-1937 2014 WL 2922840, at *10 (4th Cir. June 30, 2014) ("[T]he Second Circuit construed the Court's 'touch and concern' language as imparting the exercise of jurisdiction only 'when some of the relevant conduct occurs in the United States.'").

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

115. *Id.* at 189.

116. *Id.* at 189–90.

117. *Id.* at 190 n.24 (quoting Doe v. Exxon Mobil Corp., 654 F.3d 11, 74–76 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

118. *Id.* at 191.

119. No. 13-1937, 2014 WL 2922840, at *10 (4th Cir. June 3, 2014).

120. Sexual Minorities Uganda v. Lively, 12-CV-30051-MAP, 2013 WL 4130756, at *2 (D. Mass. Aug. 14, 2013).

121. *See* Giraldo v. Drummond Co., Inc., No. 2:09-CV-1041-RDP, 2013 WL 3873960, at *8 (N.D. Ala. Jul. 25, 2013).

III. INTERPRETING THE DISPLACEMENT STANDARD IN LIGHT OF MORRISON V. NATIONAL AUSTRALIAN BANK LTD.

In *Kiobel*, the Supreme Court said that the presumption would be displaced whenever "claims touch and concern the territory of the United States . . . with sufficient force."[122] To support this statement, the Court cited to *Morrison*.[123] My interpretation of *Kiobel*'s displacement standard rests upon the premise that it should be interpreted in light of this citation to *Morrison*. Accordingly, I will begin by explaining how the portion of *Morrison* that the *Kiobel* Court cited relates to the displacement standard. Then I will interpret the displacement standard in a manner consistent with this relationship.

A. THE DISPLACEMENT STANDARD REQUIRES MORRISON'S FOCUS-BASED ANALYSIS

In the portion of *Morrison* the *Kiobel* Court cited to support the displacement standard, the Supreme Court had already determined that the presumption barred the extraterritorial application of the Exchange Act.[124] Nevertheless, it entertained the possibility that domestic conduct related to the § 10(b) claim might be sufficient to apply the statute anyway.[125] It explained that not just any contacts with the United States will trigger the enforcement of a statute barred by the presumption, thus causing the presumption to "retreat."[126] Instead, the domestic contacts necessary to make the presumption retreat need to fall within the focus of the statute.[127] The Court concluded that the focus of the Exchange Act concerned the regulation of the purchase or sale of securities on American exchanges or the purchase or sale of other securities within the United States.[128] Thus, even though the Court had already determined that the presumption applied to the statute, it held that the statute might still be enforced if securities were purchased or sold on American exchanges or purchased or sold domestically.[129] The securities, however, were traded on foreign markets and "all aspects of the purchases" occurred abroad; therefore, the Court held that the domestic conduct could not overcome the presumption.[130]

To fully understand how this portion of the opinion coheres with the displacement standard—which operates as a mechanism to dislodge the

122. *Kiobel*, 133 S. Ct. at 1669.
123. *Id.* (citing to Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 265-73 (2010)).
124. *See Morrison*, 561 U.S. at 265-73.
125. *Id.* at 266-67.
126. *Id.* at 266 ("For it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.").
127. *See id.*
128. *Id.* at 273.
129. *See id.*
130. *Id.*

presumption and apply the ATS to extraterritorial claims—it is important to recognize what the Court did *not* say in *Morrison*. It did *not* say that the Court could apply § 10(b) of the Exchange Act when domestic transactions occur *because* this would be a *purely* domestic application of the law.[131] It made no comment about what circumstances would result in a purely domestic application of § 10(b).[132] Rather, it simply said that it could enforce § 10(b) when domestic conduct consists of domestic securities transactions or securities transactions on American exchanges because the statute focuses on regulating those particular types of transactions.[133] Thus, it was simply saying it could enforce the statute if conduct to the claim fell within the statute's focus.

At this point, it is important to also recognize that, unlike its reference to the securities transactions, the Court never said that the *deceptive* conduct necessary for a § 10(b) claim had to also occur domestically. In fact, it said that the statute was unconcerned with the location of the deception, despite also recognizing that the statute punished deceptive conduct.[134] Thus, it would not be inconsistent with *Morrison* to say that § 10(b) could apply extraterritorially to foreign deceptive conduct so long as the transactions occurred domestically or on American exchanges.[135] This would amount to nothing more than "punish[ing] deceptive conduct . . . 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'"[136]

It is apparent, then, that a potential result of the focus-based analysis in *Morrison* is consistent with a potential result of the displacement standard in *Kiobel*: extraterritoriality. In both *Morrison* and *Kiobel*, there was a presumption already in place because there was foreign conduct involved with the claim and no clear intent to rebut the presumption.[137] Nevertheless, in *Morrison*, the Supreme Court engaged in an extra analysis to determine if it could still apply the statute based on the type of domestic contacts involved.[138] Since the Court never limited the applica-

131. *See id.* at 266–73. *But see* Colangelo, *supra* note 10, at 32, for an argument that *Morrison*'s focus-based analysis seeks to apply the law domestically.

132. *See Morrison*, 561 U.S. at 266–73. The only time the Court mentioned the possibility of a domestic application was when it recited the petitioners' argument that they were only trying to apply § 10(b) domestically. *Id.* at 266. The Court, however, appeared to recharacterize the petitioners' argument. First, it appeared to disagree with how petitioners' framed the issues by explaining that petitioners' argument was "less an answer to the presumption against extraterritorial application than it [was] an assertion . . . that that presumption here (as often) is not self-evidently dispositive." *Id.* at 266. Then, it went on to describe the relevant issue as whether or not domestic conduct could cause the presumption to retreat—which presumably permits an extraterritorial application—instead of asking if it was a domestic application of the statute, a circumstance in which the presumption would not be triggered in the first place. *Id.*

133. *Id.* at 266.

134. *Id.*

135. *See id.*

136. *See id.*

137. *Compare id.* at 266 *with* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

138. *See Morrison*, 561 U.S. at 266–73.

tion under this analysis to a domestic application,[139] the Court did not foreclose the possibility that the analysis might result in an extraterritorial application of the statute if, for example, the deceptive conduct occurred abroad and securities were purchased domestically or on American exchanges.[140] Similarly, in *Kiobel*, the Supreme Court identified a circumstance in which certain domestic contacts would displace the presumption and thus permit the Court to apply the statute to extraterritorial claims.[141] This clear parallel between *Kiobel* and *Morrison* makes sense of why the Court would cite to *Morrison* to support the displacement standard in *Kiobel*.

An important difference between the two cases, however, is the exact language each uses to describe the domestic contacts necessary to overcome the presumption. *Morrison* identified the necessary domestic contacts as "conduct" that fits within the "focus" of the statute.[142] *Kiobel*, on the other hand, said that "claims" must touch and concern the United States with "sufficient force."[143] However, since *Kiobel* cited to *Morrison*'s focus-based analysis to support the displacement standard, the displacement standard should be interpreted in a way that is compatible with the focus-based analysis in *Morrison*. Interpreting the displacement standard in this light reveals that for a claim to touch and concern the United States with sufficient force to displace the presumption, it is at least necessary for domestic contacts to fall within the focus of the ATS.

At least one federal district court, in the Northern District of Alabama, has explained the requirements of *Kiobel*'s displacement standard in a manner consistent with this interpretation.[144] Relying on *Kiobel*'s citation to *Morrison*, the court explained that "where a complaint alleges activity in both foreign and domestic spheres, an *extraterritorial application of a statute* arises *only* if the event on which the statute *focuses* did not occur abroad."[145] Thus, the court made clear that where there are domestic and foreign events involved in a claim, the ATS could apply extraterritorially if the domestic events fall within its focus. Given the facts before it, however, the court was unable to apply the ATS to the extraterritorial claim. It held, among other things, that the focus of the ATS was the tortious conduct violating the law of nations, and that the tort occurred abroad; therefore, the presumption barred the claim.[146]

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139. *See supra* notes 131–33 and accompanying text.

140. *See supra* notes 134–36 and accompanying text. It is worth noting that *Kiobel*'s citation to *Morrison* to support the possibility of displacing the presumption, and thus applying the ATS to extraterritorial claims, appears to signal that *Morrison*'s focus-based analysis is consistent with extraterritoriality.

141. *See Kiobel*, 561 U.S. at 266.

142. *See Morrison*, 130 S. Ct. at 2884.

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

144. Giraldo v. Drummond Co., Inc., No. 2:09-CV-1041-RDP, 2013 WL 3873960, at *8 (N.D. Ala. Jul. 25, 2013).

145. *Id.* (emphasis added in part, original in part).

146. *Id.*

B. The Focus of the ATS is the Claims It Authorizes

Having established that the displacement standard *at least* requires domestic conduct to fall within the focus of the ATS in order to trigger extraterritoriality, an obvious question arises: what is the focus of the ATS? The Supreme Court has never directly answered this question, but it has provided the tools to do so. The answer lies, again, in the Court's citation to *Morrison*'s focus-based analysis. Therefore, the method used in *Morrison* to discern the Exchange Act's focus is the most appropriate means of discovering the focus of the ATS. However, the Court in *Kiobel* appears to provide a strong hint as to the answer at the beginning of its opinion. It said that the ATS is a "strictly jurisdictional" statute—it does not simply regulate conduct, as § 10(b) did in *Morrison*; it instead authorizes federal courts to recognize certain claims:[147] torts committed against aliens in violation of the law of nations or a treaty signed by the United States.[148] The methods used in *Morrison* reveal that this is precisely what the focus of the ATS is, that is, the focus of the ATS is the entire claim it authorizes federal courts to recognize.

The Supreme Court in *Morrison* defined the "focus" of a statute as both the "congressional concern" and the "objects of the statute's solicitude."[149] To discern the congressional and statutory concern of the Exchange Act, the Court examined its text and context. For example, it examined the prologue of the Exchange Act to identify its "object" and §§ 30(a) and (b) to show the statute's emphasis on the location of transactions.[150] As additional evidence of the statute's focus, the Court pointed out that the Securities Act—"enacted by the same Congress as the Exchange Act, and forming part of the same comprehensive reputation of securities trading"—contained the same focus.[151]

As mentioned above, the Supreme Court in *Kiobel* identified the text of the ATS as strictly jurisdictional, which means it strictly authorizes federal courts to hear a particular claim.[152] This is further supported by the ATS's location within the Judiciary Act of 1789: it is part of the section specifically authorizing federal district courts to recognize various claims.[153] Based on the text and context of the statute, then, it is clear that the focus of the ATS is the claim it authorizes federal district courts to recognize.[154] This makes sense of why the Court in *Kiobel* chose to use

147. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013).
148. 28 U.S.C. § 1350 (2012).
149. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266-67 (2010).
150. *Id.* at 267–68.
151. *Id.* at 268.
152. *See supra* note 147 and accompanying text.
153. *See* 28 U.S.C. §§ 1330–69 (2012).
154. *But see* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1670 (2013) (Alito, J., concurring) ("The Court's decision in Sosa v. Alvarez–Machain, makes clear that when the ATS was enacted, 'congressional concern' was '"focus[ed]"' on the 'three principal offenses against the law of nations' that had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. . . . In other words, *only conduct* that satisfies Sosa's requirements of definiteness and acceptance among civilized

the word "claim" to identify what must touch and concern the United States to displace the presumption.[155]

C. "CLAIM" MEANS MORE THAN CONDUCT

This discovery brings us to an important question underlying the displacement standard: what does the Court mean by "claim"? There are two important pieces of evidence showing that the Court in *Kiobel* used the word "claim" to mean all the facts necessary to state a claim, not just the conduct.

First, the Supreme Court specifically used the word "claim" instead of "conduct" when it described what was necessary to displace the presumption.[156] If all the Court meant was conduct needed to occur within the United States, it could have easily said so. Indeed, immediately before the displacement standard, it used the word "conduct" to describe what took place outside the United States in *Kiobel*.[157] The Court then followed this description by using the word "claim" to describe what must touch and concern the United States.[158] A likely explanation for why the Court chose to use the word "claim" in a sentence immediately following another sentence in which it chose to use the word "conduct" is that the Court meant something other than conduct.

Second, a "claim," by definition, is not limited to just conduct. *Black's Law Dictionary* defines a claim as "[t]he aggregate of operative facts giving rise to a right enforceable by a court."[159] A right enforceable by a court requires facts showing the relevant conduct, defendant, and plaintiff regulated by the statute. Conduct alone does not give rise to an enforceable right by a court if the plaintiffs or defendants do not fall within the class of people regulated by the statute. For example, under the ATS, the plaintiff must not only be injured by the defendant's use of tortious conduct in violation of the law of nations, but the plaintiff must also be an "alien."[160] Then, and only then, do the facts constitute a right enforceable by the federal courts under the ATS. Thus, it is clear that the facts required to state a claim require more than merely showing conduct regulated by the statute. And when the Supreme Court chose to use the word "claim" instead of "conduct," this is what it communicated.

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nations can be said to have been 'the "focus" of congressional concern' when Congress enacted the ATS.") (internal citations omitted) (emphasis added).

155. *See id.* at 1669.

156. *See id.*

157. *See id.*

158. *See id.*

159. BLACK'S LAW DICTIONARY 281 (9th ed. 2009); *see also* Al Shimari v. CACI Premier Tech., Inc., No. 13-1937, 2014 WL 2922840, at *8 (4th Cir. June 30, 2014).

160. 28 U.S.C. § 1350 (2012).

D. The Supreme Court Imposed an Extra Requirement of Sufficient Force to Prevent a "Craven Watchdog"

As established above, by citing to *Morrison*, the Court in *Kiobel* instructs that displacement of the presumption occurs when—at the very least—domestic conduct fits within the focus of the statute. The focus of the ATS is likely claims constituting torts against aliens in violation of the law of nations. And claims consist of facts—such as the identity of the defendant—necessary to enforce a legal right.

Together, these facts explain *most* of *Kiobel*'s displacement standard. They do not, however, explain the "sufficient force" requirement. This requirement cannot be understood until one considers the potential consequence of applying the focus-based analysis to the ATS without the "sufficient force" requirement and compares that consequence to the presumption's prowess as a watchdog. In *Morrison*, the Court identified certain conduct as the focus of the Exchange Act—domestic securities transactions—and then limited application of the statute to situations in which that focus-based conduct occurred.[161] Application of *Morrison*'s focus-based analysis to the ATS, however, would not be limited to just conduct. Instead, because the focus of the ATS is the claims it authorizes, it would involve all of the *facts* necessary to state a claim. And because the presumption applies to the claim, which is the focus of the statute, the focus would be limited to the *domestic* facts of the claim. Thus, the focus-based analysis would be satisfied whenever there were domestic facts necessary to state a claim for tortious conduct against an alien in violation of the law of nations. This is an important distinction that opens the focus-based analysis up to interpretations capable of producing results not contemplated by the Court in *Morrison*. For example, a court might decide that the focus-based requirement is satisfied so long as the claim involves *some* domestic facts. Stated another way, it would permit extraterritorial application of the ATS whenever claims arising under it touched and concerned the United States—which is an exact restatement of the displacement standard without the sufficient force requirement.[162] This could occur whenever the defendant was a U.S citizen or maintained a strong corporate presence, even though all of the conduct occurred abroad.

I propose that the Supreme Court added the "sufficient force" requirement in response to this potentially expansive consequence of applying the focus-based analysis to a jurisdictional statute. Such an application would eviscerate the Court's admonition in *Morrison* that not just any domestic activity relevant to the claim is sufficient to cause the presumption to "retreat[ ] to its kennel."[163] It turns the presumption into a "cra-

161. Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247, 266 (2010).

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

163. *See Morrison*, 561 U.S. at 266; *cf. Al Shimari v. CACI Int'l, Inc.*, 951 F.Supp.2d 857, 868 (E.D. Va. 2013), *rev'd* on other grounds, No. 13-1937, 2014 WL 2922840 (4th Cir. June 30, 2014) ("It is no small distinction that the Court's explanation [in *Morrison*] involved

ven watchdog."[164] Anticipating this problem, I think the Court preemptively adjusted the application of the focus-based analysis to the ATS.

Adjusting the application of *Morrison* to avoid an overly broad extraterritorial application of the ATS is consistent with the Court's adjustment of the presumption's application at the beginning of its opinion in *Kiobel*. The Court went out of its way to prevent unhindered extraterritorial application of the ATS by applying the presumption to the claims it authorized,[165] even though in *Morrison* the Court made clear that the presumption did not impact the Exchange Act's jurisdictional provision.[166] Similarly, I think the Court adjusted *Morrison*'s focus-based requirements to prevent an overly broad extraterritorial application of the ATS by requiring sufficient force. With this additional requirement, the Court finalized its displacement standard.

E. Sufficient Force Requires Domestic Conduct

If the Court added the sufficient force requirement to avoid the possibility of turning the presumption into a craven watchdog, a good starting point to determine what sufficient force requires is the presumption itself. The presumption has traditionally only concerned itself with the location of the relevant conduct.[167] Therefore, the most relevant fact to determine whether the presumption should retreat is the location of the conduct. The presumption would be a craven watchdog indeed if its protection against the impermissible extraterritorial application of statutes was rendered impotent by the location of something it should not be concerned about.

Accordingly, the one time the Supreme Court considered the possibility of the presumption's retreat, in *Morrison*, the focus of the statute related to the *location of conduct*.[168] On the other hand, the Court showed no concern for the defendant's domestic presence.[169] It would make sense, then, for the Court in *Kiobel* to correct the expansive effects of applying the focus-based analysis to claims under the ATS by reducing those effects to something similar to what it permitted in *Morrison*: domestic conduct falling within the focus of the statute. Indeed, this is another possible reason why *Kiobel* cited to *Morrison* to support the displacement standard.

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statutes that regulated conduct, while the ATS is purely jurisdictional . . . with a potentially unlimited scope.").

164. *See Morrison*, 561 U.S. at 266.

165. *See Kiobel*, 133 S. Ct. at 1664–65.

166. *See Morrison*, 561 U.S. at 272; *see also* Anthony J. Colangelo, *Kiobel Insta-Symposium: Kiobel Contradicts Morrison*, Opinion Juris (May 10, 2013, 9:00 AM), http://opiniojuris.org/2013/05/10/kiobel-insta-symposium-kiobel-contradicts-morrison/.

167. Balintulo v. Daimler AG, 727 F.3d 174, 190 n.24 (2d Cir. 2013).

168. *See Morrison*, 561 U.S. at 266.

169. *See id.* at 266-73.

This conclusion is consistent with both the Supreme Court's opinion in *Kiobel* and the post-*Kiobel* cases addressing ATS claims involving American defendants. The Second Circuit has observed that the Court in *Kiobel* was concerned *exclusively* with the location of the defendant's conduct; it did not consider this to be just "one prong of a multi-factor test."[170] The Supreme Court framed its inquiry this way, repeated the importance of the conduct's location eight separate times within the opinion,[171] and then concluded that it could not displace the presumption and apply the ATS because "all the relevant conduct took place outside the United States."[172] And shortly thereafter, concerned about expansive extraterritorial application of the ATS, it warned that "it would reach too far to say that mere corporate presence suffices" to displace the presumption.[173] In light of these facts, the Second Circuit concluded that, despite facts showing an American defendant, the presumption could not be displaced because all relevant conduct occurred abroad.[174] Moreover, as mentioned above, and consistent with the Second Circuit, of the three other Federal courts to have addressed extraterritorial ATS claims involving American defendants, the two that applied the ATS placed great significance on the domestic conduct involved.[175]

Given the above analysis, the most likely answer to what the Supreme Court meant by sufficient force is domestic conduct relevant to the claim. In sum, a straightforward application of *Morrison*'s focus-based analysis cited to by *Kiobel* would potentially turn the presumption into a craven watchdog by causing it to retreat to its kennel whenever domestic facts are part of the claim. Thus, to ensure that the presumption remains an effective watchdog among the lower courts, the Supreme Court limited the type of domestic facts capable of making the presumption retreat (i.e., limited the scope of the focus); the relevant facts need to possess sufficient force. The presumption's traditional concern with the location of the conduct but not the identity or location of the defendant indicates that the location of conduct is the relevant fact when considering the presumption's retreat. This is consistent with the Court's opinion in *Morrison*, and its emphasis on the location of the conduct in reaching its decision in *Kiobel* coupled with its express rejection of the defendant's presence being sufficient to displace the presumption. Therefore, it is reasonable to conclude that when the Court limited the facts capable of causing the presumption to retreat, it limited those facts to domestic conduct. This conclusion is further supported by the significance post-*Kiobel* courts have placed on the location of relevant conduct when considering ATS claims involving American defendants.

170. *See Balintulo*, 727 F.3d at 189–91.
171. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664–67 (2013).
172. *See id.* at 1669.
173. *See id.*
174. *See Balintulo*, 727 F.3d at 192.
175. *See supra* notes 119–20 and accompanying text.

IV. AN "ESSENTIAL STEP" TO DISPLACING THE PRESUMPTION AGAINST EXTRATERRITORIALITY

Interpreting *Kiobel* in light of *Morrison*, therefore, provides the legal framework to begin answering what is required to displace the presumption. It is clear that the displacement standard requires domestic conduct relevant to the claim.[176] However, not all the conduct can occur domestically because this would produce a territorial claim rather than an extraterritorial claim.[177] Thus, when the Court contemplated the force sufficient to displace the presumption, it must have had in mind a situation in which part of the relevant conduct occurred abroad and part of it occurred domestically. For instance, in a direct liability claim, this would require part of the tortious conduct to occur abroad and part of it to occur domestically.

This presents an odd set of facts that at first glance appears to be so obscure that it renders any hope of displacing the presumption useless. I argue, however, that the essential step doctrine, used by the Supreme Court in *Steele v. Bulova Watch Co.*, provides a workable solution.[178] It allows courts to rely on a well-settled legal doctrine to identify domestic conduct that is factually part of the tortious conduct responsible for the violation of the law of nations abroad. Once this domestic conduct is identified by the essential step doctrine, courts can rely on that conduct as sufficient force to displace the presumption and apply the ATS to the extraterritorial claim.

A. The "Essential Step Doctrine" Permits Application of the ATS to Certain Extraterritorial Claims Connected to Domestic Conduct

When a defendant commits conduct within the United States that is an essential step in a scheme to consummate conduct abroad giving rise to a claim under the ATS, the essential step doctrine should be invoked to show that the claim touches and concerns the United States with sufficient force to displace the presumption. As explained by the Supreme Court in *Steele*, the essential step doctrine is a legal doctrine that has the effect of making lawful acts unlawful when they form part of a larger scheme to commit an unlawful act.[179] The Court used the doctrine to help

176. Even if the reader does not find the foregoing discussion in Part III convincing, it is clear that lower courts are interpreting the displacement standard to require domestic conduct. *See supra* notes 111–13, 119–20. This portion of the paper applies directly to that requirement, and does not depend on the foregoing explanation for why this is the correct interpretation. Thus, it should not be dismissed merely because the reader disagrees with Part III.

177. The Supreme Court had in mind an extraterritorial claim when it included the displacement standard: the presumption against extraterritoriality had been triggered and the Court recognized that certain conduct would "displace" that presumption. *See Kiobel*, 133 S. Ct. at 1669.

178. *See supra* note 59 and accompanying text.

179. *See id.*

explain why the Lanham Act applied extraterritorially,[180] and the extraterritorial application of the Lanham Act in *Steele* has been repeatedly affirmed by the Court.[181] The doctrine's relevance to extraterritorial conduct has proven to be trans-substantive—just ten years after *Steele*, the Supreme Court applied the doctrine to bring extraterritorial conduct within the scope of the Sherman Act.[182] Indeed, the Court, citing to *Steele* for support, described the doctrine as a "well[-]settled" part of its jurisprudence.[183] Lower courts have continued to apply the doctrine to bring conduct within the scope of various state and federal laws.[184]

Although the Court in *Steele* did not take the time to explain why innocent conduct became unlawful, the likely explanation is that the court was treating each step taken in the scheme as a component part of the unlawful conduct brought about by the scheme. As a result, the lawful conduct became unlawful because it was viewed by the Court as a factual part of the conduct the statute prohibits. Thus, in *Steele*, the domestic purchases became unlawful because the Court viewed them, *as a matter of fact*, as part of the foreign infringement for which they were purchased—i.e., they were viewed as part of the conduct prohibited by the Lanham Act. This explanation is supported by a relatively recent federal district court opinion discussing the doctrine's application to prohibited conspiracies under the Sherman Act. In 2004, the U.S. District Court for the District of Columbia provided the following explanation of the doctrine by quoting an early Supreme Court opinion that preceded *Steele*: "'if [innocent acts] are part of the sum of the acts which are relied upon to effectuate the conspiracy which the [Sherman Act] forbids, they come within its prohibition.'"[185] That is to say, acts essential to the consummation of the prohibited conduct are unlawful because they are component parts of the prohibited conduct.

This factual consequence produced by the essential step doctrine's application should cause certain domestic conduct involved in ATS claims to possess sufficient force to displace the presumption. The effect of its

180. *See id.*

181. *See supra* notes 62–64, 86–87, and accompanying text.

182. *See* Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962) (citing numerous Supreme Court cases, including *Steele*, to support the doctrine's application to the Sherman Act, and explaining that the essential step doctrine permits antitrust liability to still attach to transactions with the Canadian government even though the sale was legal under Canadian law).

183. *Id.* ("It is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme.") (citing to Steele v. Bulova Watch Co., among other cases).

184. United States v. Jackson, 33 F.3d 866, 871 (7th Cir. 1994) (conspiracy to defraud the U.S.); Brunswick Corp. v. Vineberg, 370 F.2d 605, 612 (5th Cir. 1967) (tortious interference with contract); IHS Dialysis Inc. v. Davita, Inc., 12 CIV. 2468 ER, 2013 WL 1309737, at *7 (S.D.N.Y. Mar. 31, 2013) (anti-competitive conduct under the Sherman Act); Jones v. Coughlin, 665 F. Supp. 1040, 1046 (S.D.N.Y. 1987) (civil rights violations involving tortious conduct); United States v. City of Parma, Ohio, 494 F. Supp. 1049, 1055 (N.D. Ohio 1980) (racial discrimination under the Fair Housing Act).

185. Jung v. Ass'n of Am. Med. Colleges, 300 F. Supp. 2d 119, 160–61 (D.D.C. 2004) (quoting Am. Tobacco Co. v. United States, 328 U.S. 781, 809 (1946)).

application to direct liability claims is to make the defendant's domestic essential step in a scheme to commit a foreign tort in violation of the law of nations factually part of the final step completing the tortious conduct abroad.[186] This effect produces the scenario the Supreme Court must have had in mind when it wrote the displacement standard. As discussed above, the Court most likely requires relevant domestic conduct to satisfy the sufficient force requirement and the displacement standard was intended as a means to apply the ATS extraterritorially.[187] The only compatible scenario for a direct liability claim is one in which part of the tortious conduct occurs domestically and part of the tortious conduct occurs abroad. As just discussed, the essential step doctrine is capable of producing this exact scenario. Therefore, through application of the essential step doctrine, domestic conduct constituting an essential step in a scheme that violated the law of nations abroad should qualify as sufficient force to displace the presumption, enabling a court to apply the ATS to the extraterritorial claim arising from that law-of-nations violation.

A few examples of when the essential step doctrine might become useful for ATS claims can be illustrated by examining variations of the *Filartiga* facts:[188] when a defendant kidnaps an alien in the U.S. and then tortures him abroad; when a defendant purchases or manufactures all the component parts within the U.S. for devices used to torture aliens abroad; when a defendant plans and manages from within the U.S. the kidnap and torture of an alien abroad; or when a corporate defendant within the U.S. hires employees domestically and then encourages those employees to torture an alien abroad. Indeed, the only post-*Kiobel* ATS claims to displace the presumption involved similar facts. In *Al Shimari v. CACI Premier Tech., Inc.*, the employees of the corporate defendant were hired "in the United States" and their "managers located in the United States were aware of reports of misconduct abroad, attempted to 'cover up' the misconduct, and 'implicitly, if not expressly, encouraged' it."[189] Similarly, in *Sexual Minorities Uganda v. Lively*, the defendant "plann[ed] and manag[ed] a campaign of repression in Uganda from the United States."[190] The court found this conduct "analogous to a terrorist designing and manufacturing a bomb in this country, which he then mails

186. *Cf. Coughlin*, 665 F. Supp. at 1046 (explaining that non-tortious conduct can become tortious when it is linked to tortious conduct through the essential step doctrine).

187. *See* the introduction to Part IV.

188. *See supra* note 30 and accompanying text. Although *Filartiga* applied only to "official" torture perpetrated by state actors, and the Torture Victim Protection Act (TVPA) codified this cause of action, the modern law of nations has been understood to include acts of torture committed by private individuals in furtherance of genocide or war crimes. *See* Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995); *see also* Romero v. Drummond Co., Inc., 552 F.3d 1303, 1316 (11th Cir. 2008). Moreover, despite the statutory cause of action now available under the TVPA for "official" torture, a plaintiff alleging official torture can still bring a cause of action under the ATS as a distinct claim. *See Romero*, 552 F.3d at 1316.

189. No. 13-1937, 2014 WL 2922840, at *10 (4th Cir. June 30, 2014).

190. 960 F. Supp. 2d 304, 322 (D. Mass. 2013).

to Uganda with the intent that it explode there."[191]

B. Similarities and Differences with Accessorial Liability

The district court in *Sexual Minorities*, however, did not conclude that the defendant was liable for the actual "repression," but instead was liable for the independent international law violation of aiding and abetting the repression.[192] Aiding and abetting claims, and perhaps conspiracy claims, have the potential to overlap with direct liability claims actionable through the essential step doctrine.[193] However, liability for domestic aiding and abetting or conspiracy connected to the tortious conduct is distinct in three important respects from attaching liability for the tortious conduct through the essential step doctrine.

First, and most importantly for purposes of this paper, the defendant will be liable for the independent domestic conduct of aiding and abetting or conspiracy; she will not be directly liable for the extraterritorial tortious conduct,[194] as she would be under the essential step doctrine. This results in a domestic application of the ATS because the court is punishing the domestic aiding and abetting or conspiracy conduct as an independent cause of action under the ATS.[195] As a result, *Kiobel*'s displacement standard should not come into play.

Second, both aiding and abetting and conspiracy claims require two actors coordinating to achieve a common objective.[196] The essential step doctrine, however, can be triggered when there is only one actor engaging in two separate, but related acts.[197] At least three of the four *Filartiga*-based examples above described circumstances where one actor triggered the application of the essential step doctrine to a claim under the ATS: (1) when a defendant kidnaps an alien in the U.S. and tortures him abroad; (2) when a defendant purchases or manufactures all the component parts within the U.S. for torture devices used abroad; and (3) when a corporate defendant within the U.S. hires domestically and then encourages its employees to torture aliens abroad.

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191. *Id.*

192. *See id.* at 330.

193. Moreover, as mentioned above, the essential step doctrine can also be employed to show that lawful conduct became part of an unlawful conspiracy. *See supra* note 185 and accompanying text. There is no reason this should not extend to aiding and abetting as well. However, this is not what I mean when I say that the essential step doctrine may overlap with aiding and abetting or conspiracy. I mean conduct standing alone that would satisfy the elements of accessorial liability may also be sufficient to attach to the corresponding direct liability claim through the essential step doctrine. *See Sexual Minorities* discussed above for an example of this type of conduct.

194. *See* Cabello v. Fernandez-Larius, 402 F.3d 1148, 1158 (2005) (discussing direct and indirect liability as two separate claims under the ATS).

195. *See id.* at 1157-58; Liu Bo Shan v. China Const. Bank Corp., 421 F. App'x 89, 93 (2d Cir. 2011).

196. *See, e.g.*, *Cabello*, 402 F.3d at 1158–59 (11th Cir. 2005).

197. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 287 (1952) (defendant engaged in both the domestic purchase of component parts constituting the essential step and the foreign trademark infringement for which those parts were used).

Finally, there is an important difference associated with the culpability attached to each claim. The difference between liability as an aider and abettor or conspirator and liability through the essential step doctrine is that the former is indirect liability and the latter is direct liability—e.g., the difference between being held liable as an accessory of torture and being held liable for committing torture.[198] It is likely, however, that accessorial liability under the ATS is equivalent to the principal's liability.[199] Thus, this distinction might be a distinction without a difference to those plaintiffs only concerned with monetary compensation. However, it may make a difference to other plaintiffs who believe the defendant is directly responsible for the tortious conduct and that the moral culpability publicly attached to perpetrating the actual tortious conduct is greater than the moral culpability publicly attached to assisting in that conduct.[200] For example, as described above, a defendant who, from within the U.S., helps manage the kidnap and torture of an alien abroad would likely fit within this category. In these instances, the plaintiff should consider using the essential step doctrine to displace the presumption and apply the ATS to the extraterritorial claim rather than the domestic accessorial claim.

In sum, liability through the essential step doctrine contrasts with accessorial liability by providing an opportunity to satisfy *Kiobel*'s displacement standard, while also avoiding the disadvantages of secondary liability. Defendants can be held liable for extraterritorial tortious conduct without an accessory-principal relationship; and even when relying on that relationship, defendants can still be held liable for perpetrating the tortious conduct instead of merely as an accessory to it. However, it does come with its own disadvantage: it has never been used in connection with an ATS claim; whereas, aiding and abetting liability under the ATS has been accepted by all the circuit courts that have considered it,[201] and conspiracy claims have been recognized under customary international law for select crimes.[202] Nevertheless, the essential step doctrine is a well-settled doctrine that the Supreme Court has used across subject

198. *See Cabello*, 402 F.3d at 1158–59.

199. *See* Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute,* 47 ARIZ. L. REV. 805, 822–23 (2005) ("In civil actions, persons aiding and abetting as accessories were treated the same as principals in cases decided shortly before or after passage of the ATS").

200. *Cf.* Joshua Dressler, *Reforming Complicity Law: Trivial Assistance As A Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 428 (2008) ("American accomplice law . . . treats the accomplice in terms of guilt and, potentially, punishment, as if she were the perpetrator, even when her culpability is often less than that of the perpetrator . . . .).

201. Sexual Minorities Uganda v. Lively, 12-CV-30051-MAP, 2013 WL 4130756, at *11 (D. Mass. Aug. 14, 2013).

202. Liu Bo Shan v. China Constr. Bank Corp., 421 F. App'x 89, 94 n.6 (2d Cir. 2011). Given this history, it is worth pointing out that, if the domestic conduct cannot be directly connected to the foreign tortious conduct through the essential step doctrine, it might be possible for victims of human rights abuses abroad to still use the ATS to access U.S. Courts by using the essential step doctrine to connect the domestic conduct to foreign aiding and abetting or conspiracy related to the claim. *See supra* note 185.

matters to help apply statutes extraterritorially.[203] It should apply with equal force to ATS claims.

CONCLUSION

Although *Kiobel* severely restricts the ATS's application to extraterritorial claims, and thus the ATS's usefulness as a vehicle for international human rights litigation, it does not eliminate it entirely. The future of the ATS's extraterritorial application depends on the interpretation of *Kiobel*'s displacement standard. The displacement standard in *Kiobel* should be interpreted in light of the entire paragraph in which it is found, including the citation to *Morrison*'s focus-based analysis. This approach reveals that the displacement standard is likely a recitation of the focus-based analysis as applied to the ATS, but with an additional element of sufficient force to prevent the presumption from becoming a craven watchdog. The essential step doctrine—a well-settled legal doctrine that the Supreme Court has used in connection with extraterritorial claims—provides a small window of opportunity to satisfy the displacement standard and apply the ATS to claims alleging extraterritorial law-of-nations violations. Practitioners and courts should consider this doctrine when determining the merits of future ATS claims that include domestic conduct connected to tortious conduct abroad.

203. *See supra* notes 180 and 182, and accompanying text.