The Alien Tort Statute and U.S. Extraterritorial Jurisdiction: Legal and Economic Corporate Governance Implications Beyond *Al Shimari v. CACI Int'l*

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"*No man can tame a tiger into a kitten by stroking it.*"
– Dick Cheney

"*A small man builds cages for everyone he knows . . .* "
– Hafez

Introduction & Purpose: Corporate Accountability & Human Rights

After the fallout of Abu Ghraib, graphic accounts of torturous activities recognized as violating human rights circulated in international media outlets, conveying to the world the abuses committed by American military personnel, contractors, and associates.[1] This past April marked twenty years since the first explicit photographs and disconcerting details publicly surfaced.[2] Over the years, several cases against those responsible for these abuses have been brought on behalf of the victims in international and foreign courts; however, few cases have been brought in U.S. courts.[3]

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1. *See* Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST (May 21, 2004, 1:00 AM), https://www.washingtonpost.com/archive/politics/2004/05/21/new-details-of-prison-abuse-emerge/7346e4cb-47f8-42ab-8897-38a021a1bd0c/.

2. *See Ten Years of Abu Ghraib*, THE NEW YORKER (Apr. 28, 2014), https://www.newyorker.com/news/news-desk/ten-years-of-abu-ghraib.

3. CAROLYN PATTY BLUM ET AL., PROSECUTING ABUSES OF DETAINEES IN U.S. COUNTERTERRORISM OPERATIONS 33 (2009). *See also* Reed Brody, *The Road to Abu Ghraib*, HUMAN RIGHTS WATCH 27–28 (Junee 8, 2004), https://www.hrw.org/report/2004/06/09/road-abu-ghraib; *Justice for Abu Ghraib: Historic Trial in Al Shimari v. CACI (2024)*, CENTER FOR CONST. RTS. (Mar. 29, 2019),

Sovereign immunity rarely applies to private actors,[4] and companies may need to respond to mechanisms of legal accountability. Numerous instances of human rights shortcomings by U.S. corporations are well-documented.[5]

The focus on human rights law is critical, yet historically, the emphasis has been on state actors and political factions as the main perpetrators of human rights abuses.[6] However, as mentioned, what about corporate entities—particularly multinational corporations? Due to their significant resources and organizational structures, they are well endowed to participate in human rights violations.[7] These corporations are increasingly implicated in human rights abuses. [8] In the context of corporate governance, issues of human rights are gaining prominence in boardroom discussions and shareholder meetings.[9] The impetus for businesses to conduct human rights due diligence is rooted in the U.N. Guiding Principles on Business and Human Rights and the Organisation for Economic Co-operation and Development's ("OECD") Guidelines for Multinational Enterprises on Responsible Business Conduct.[10] Endorsed by the U.N. Human Rights

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https://ccrjustice.org/abu-ghraib-trial. *See generally Torture, War Crimes, & Militarism Cases*, CENTER FOR CONST. RTS., https://ccrjustice.org/home/what-we-do/issues/torture-war-crimes-militarism (last visited Mar. 6, 2024).

4. *But see* Raymond Biagini et al., *Fifth Circuit Reaffirms Breadth of Yearsley Immunity for Government Contractors*, COVINGTON: INSIDE GOV'T CONTRACTS (July 21, 2021), https://www.insidegovernmentcontracts.com/2021/07/fifth-circuit-reaffirms-breadth-of-yearsley-immunity-for-government-contractors ("[Government] contractors can enjoy a broad immunity from third-party liabilities—known as 'derivative sovereign immunity,' or '*Yearsley* immunity.'").

5. *See* Rachel Chambers & Jena Martin, *Reimagining Corporate Accountability: Moving Beyond Human Rights Due Diligence*, 18 N.Y.U. J.L. & BUS. 773, 783 (2022).

6. *See, e.g.*, Amnesty International Report 2022/23: The state of the world's human Rights, AMNESTY INT'L 14–16 (Mar. 27, 2023), https://www.amnesty.org/en/documents/pol10/5670/2023/en/; Douglass Cassel, *A Framework of Norms: International Human-Rights Law and Sovereignty*, 22 HARV. INT'L R. 60, 60 (2001); Jack Donnelly, *State Sovereignty and International Human Rights*, 28 ETHICS & INT'L AFFS. 225, 225 (2014).

7. *See* GWYNNE L. SKINNER, TRANSNATIONAL CORPORATIONS, AND HUMAN RIGHTS: OVERCOMING BARRIERS TO JUDICIAL REMEDY 1 (2020); *see also* HUMAN RIGHTS LITIGATION AGAINST MULTINATIONALS IN PRACTICE, at v (Richard Meeran & Jahan Meeran eds., 2021) [hereinafter Human Rights Litigation].

8. Human Rights Litigation, *supra* note 7, at v–viii.

9. *See* Jena Martin, *Business and Human Rights: What's the Board Got to Do with It?*, U. ILL. L. REV. 959, 997–98 (2013).

10. U.N. Hum. Hum. Rts. Off. of the High Comm'r, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 13–14, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter Guiding Principles on Business and Human Rights], https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf; Org. for Econ. Co-operation and Dev., OECD Guidelines for

Council in 2011, the U.N. Guiding Principles set forth the expectation for corporations to honor human rights and conduct due diligence to detect, prevent, address, and report any human rights abuses they might be involved in or associated with.[11] This shift highlights the necessary evolving nature of international law and the potential role such legal mechanisms may hold in keeping corporate entities accountable.

Environmental, social, and governance ("ESG") concerns in corporations encompass how the public assesses whether a company's actions align with international norms, especially outside the scope of well-established domestic laws.[12] The Uyghur Forced Labor Prevention Act is a pertinent example of ESG in action, signaling a renewed effort to hold corporations accountable beyond domestic jurisdictions.[13] While some commentators argue that the mechanisms available for accountability for corporate human rights abuses may have declined since the 2000s, [14] this perspective is not uncontested, and indeed, other legislative measures have emerged and grown in strength—including the Trafficking Victims Protection Act of 2000,[15] European due diligence laws,[16] the California Transparency in Supply Chain Act,[17] and numerous state procurement laws.[18] These developments underscore a diversifying landscape of legal frameworks aimed at combating human rights abuses that go beyond treaty-making.

Using civil law for finding redress for corporate international human rights abuses remains somewhat difficult, yet not uncommon

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Multinational Enterprises on Responsible Business Conduct (June 8, 2023), https://doi.org/10.1787/81f92357-en.

11. Guiding Principles on Business and Human Rights *supra* note 10.

12. *See* Paloma Muñoz Quick, *Bridging the Human Rights Gap in ESG*, BUS. FOR SOCIAL RESP. (May 22, 2022), https://www.bsr.org/en/blog/bridging-the-human-rights-gap-in-esg.

13. *Uyghur Human Rights Policy Act of 2020 (S.3744)*, UYGHUR HUM. RTS. PROJECT, https://uhrp.org/bill-summary/uyghur-human-rights-policy-act-of-2020-s-3744/ (last visited Oct. 20, 2024).

14. *See* Charity Ryerson et al., *Seeking Justice: The State of Transnational Corporate Accountability*, 132 YALE L.J. FORUM 787 (2022).

15. *See Human Trafficking: Key Legislation*, U.S. DEP'T OF JUST., https://www.justice.gov/humantrafficking/key-legislation (last updated Aug. 23, 2023).

16. *See* European Parliament Press Release, Due Diligence: MEPs Adopt Rules for Firms on Human Rights and Environment (Apr. 24, 2024).

17. *See* Cal. Civ. Code § 1714.43 (2012).

18. *See, e.g.*, *Laws & Rules Governing State Purchasing & Contracting*, MINN. DEP'T OF ADMIN., https://mn.gov/admin/osp/about-us/state-government/procuregoodsandgeneralservices/authority-for-local-purchasing/laws-rules.jsp (last visited Oct. 20, 2024).

(e.g., in the 1990s Holocaust survivors filed class actions in American federal courts against banks, seeking compensation for the damages they suffered as slave labors more than fifty years prior).[19] The use of tort law rather than using a direct pecuniary directive or focusing on criminal law as a regulatory tool is particularly noteworthy. Tort law stands out as a crucial avenue for justice, often being the final means through which litigators and victims can assert control in contrast to other government-controlled mechanisms.[20] Yet, as noted in this analysis, in the international context, U.S. courts have shown reluctance to apply this stringent control over corporations.[21] This hesitancy indicates a need for a re-evaluation of the tools and approaches used to enforce corporate responsibility in human rights matters and a re-assessment of modern private international law.

As of the date of this publication, *Al Shimari v. CACI* [22] is an ongoing federal lawsuit, brought by a team at the Center for Constitutional Rights ("CCR") on behalf of four Abu Ghraib torture victims against the American military contractor,[23] CACI International Incorporated, also known as CACI Premier Technology, Inc., and affiliate entities ("CACI").[24] The plaintiffs assert that the military security contractor "participated in illegal conduct, including torture, at the Abu Ghraib prison in Iraq," where the firm was hired by the United States Department of Defense.[25] The four clients represented by CCR were non-American prisoners who experienced inhumane *interrogative techniques* under the custody of CACI personnel in a foreign setting.[26]

Utilizing the Alien Tort Statute ("ATS"),[27] plaintiffs are using a

19. *See* Michael Thad Allen, *The Limits of Lex Americana: The Holocaust Restitution Litigation as a Cul-De-Sac of International Human-Rights Law*, 17 WIDENER L. REV. 1, 1 (2011).

20. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 870 (1998).

21. *See* Alreem Kamal, *The Alien Tort Statute & the Contemporary International Legal Order: Is the Retention of the Presumption Against Extraterritoriality Justified?*, 54 N.Y.U. J. INT'L L. & POL. 1089, 1092 (2022).

22. Al Shimari v. CACI Premier Tech., Inc., 684 F. Supp. 3d 481 (E.D. Va. 2023).

23. *Al Shimari, et al. v. CACI*, CTR. FOR CONST. RTS. [hereinafter Center for Constitutional Rights], https://ccrjustice.org/AlShimari (last modified Aug. 15, 2024) (explaining that the team includes Katherine Gallagher, Baher Azmy, Leah Todd, Aliya Hana Hussain, and co-counsel Patterson Belknap Webb & Tyler LLP along with Shereef Akeel of Akeel & Valentine, PLC, representing clients Suhail Najim Abdullah Al Shimari, Salah Hasan Nusaif Al-Ejaili, and Asa'ad Hamza Hanfoosh Zuba'e).

24. Al Shimari, 684 F. Supp. 3d at 485; *see also* Center for Constitutional Rights, *supra* note 23.

25. Center for Constitutional Rights, *supra* note 23.

26. *See id*.

27. 28 U.S.C. § 1350.

private recourse of accountability, and as with many quasi-extraterritorial legal norms, reshaping how U.S. multinational entities engage with foreign nationals abroad.[28] However, *Al Shimari* must face U.S. courts' recent presumption against extraterritoriality, and the ATS's effective gradual erosion by U.S. courts, particularly the Supreme Court—which has limited the statute's use for foreign plaintiffs seeking justice for human rights abuses outside the United States.[29] That said, this case occurs in parallel to *Doe I v. Cisco Systems*;[30] which in July of 2023, marked a significant moment for the ATS in the Ninth Circuit—where Judge Marsha Berzon's panel opinion may revitalize the ATS regarding human rights litigation, pending an application for rehearing and *en banc* consideration as well as "likely Supreme Court review."[31]

Ultimately, a favorable ruling for the plaintiffs in *Al Shimari* and *Cisco Systems* may encourage extended jurisdiction for U.S. Courts regarding human rights violations abroad yet in a limited manner, (i.e., pave the way for further human rights cases against domestic companies accused of being complicit in abuses abroad). This decision would challenge the constricted trend characterizing the applicability of the ATS. This will at least pause the erosion of ATS applicability. In turn, institutionalization via extraterritorial jurisdiction establishes guarantees in the international anarchic system (a trend observed with private international law in response to the globalization of commerce in the Western world) and incentivizes cooperation for upholding certain norms—due to the notion of gained enforceability.[32]

In private international law, contracts and treaties develop because there are long-run economic and business interests in solidifying processes of accountability.[33] This may be done by increasing the courts' jurisdiction or not accepting sovereign

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28. *See generally* CAROLE BASRI, CORPORATE COMPLIANCE 717–18 (2017).

29. Clara Petch, Note, *What Remains of the Alien Tort Statute after* Nestlé USA, Inc. v. Doe*?*, 42 NW. J. INT'L L. & BUS. 397, 408–09 (2022).

30. Doe I v. Cisco Sys., Inc., 73 F.4th 700, 708–09 (9th Cir. 2023) (illustrating the cases focus on allegations by Falun Gong practitioners against Cisco Systems for aiding CCP human rights abuses in China, including forced organ transfers, by providing surveillance technology to target them, potentially heralding a resurgence of the ATS's role in combating such violations).

31. Samuel Estreicher, *Ninth Circuit Panel Recognizes U.S. Corporate Accessorial Liability Under Alien Tort Statute and Torture Act*, N.Y. L.J. ONLINE (Nov. 6, 2023), https://plus.lexis.com/api/permalink/0e177c38-0daa-4057-99a4-8a834551b04e/?context=1530671.

32. *See generally* SKINNER ET AL. *supra* note 7, at 3–4.

33. *See* David P. Stewart, *Private International Law, the Rule of Law, and Economic Development*, 56 VILL. L. REV. 607, 607, 610–11, 622–23 (2011).

immunity.[34] Here, most international economic and legal scholars agree that a "Parerto-optimal welfare gain that can be made in a move from an absolute doctrine of sovereign immunity to a restricted doctrine," in which case, then, there may be cooperative economic benefits from established avenues of enforceability.[35] Avenues of international enforceability depend on clarifying the status of those detained and recognizing the practical limitations of international regulatory mechanisms. The status of the ATS is particularly relevant currently given (1) the contrasting pattern of increased European extraterritorial application of laws,[36] (2) the increased interest in how companies address ESG matters,[37] and the (3) recent domestic push on laws such as those holding companies responsible for certain supply chain practices in Western China—as seen with the Uyghur Act, as previously mentioned.[38]

Roadmap: ATS Historical Context, International Trends, and the *Al Shimari v. CACI* Case Analysis

This note is divided into four overall parts. To continue with the academic dialogue regarding the ATS, the first part (Part I) deals with the historical overview and case law of the ATS, while contrasting the development of extraterritoriality in the United States with that abroad (particularly, Europe). More specifically, the first part is divided into two subparts—Subpart A provides a comprehensive background and historical legal overview of the ATS and Subpart B discusses the international trend, particularly in Europe, in extending legal mechanisms to hold corporations accountable beyond their borders, unlike the United States—which, again, was once at the forefront of extending jurisdiction in the 1980s and 1990s.[39]

The second part (Part II) focuses more closely on the repercussions relevant to *Al Shimari v. CACI* and presents an economic analysis of the case and of having a functioning enforcement mechanism (via a resuscitated ATS) while analyzing different consequential schemas possible given the different trajectories of the

34. *See* Robert Wai, *The Commercial Activity Exception to Sovereign Immunity and the Boundaries of Contemporary International Legalism*, *in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 214 (Craig Scott ed., 2001) [hereinafter *Torture as Tort*].

35. *Id.* at 213, 233.

36. Human Rights Litigation, *supra* note 7, at 61–62.

37. Muñoz Quick, *supra* note 12, para. 10.

38. *Uyghur Human Rights Policy Act of 2020 (S.3744)*, *supra* note 13.

39. Human Rights Litigation, *supra* note 7; *see also* MARIA MONNHEIMER, DUE DILIGENCE OBLIGATIONS IN INTERNATIONAL HUMAN RIGHTS LAW 7 (2021).

court may follow in its final ruling. Beginning with the analytical component of this exercise (i.e., Part II, Subpart A), the note presents an analysis of how the *Al Shimari v. CACI* case fits into the current landscape of the ATS. In this section, the potential ramifications of three possible outcomes are outlined, namely, the demise of ATS, the continuation of specific ATS applications, or the possibility of pushing against the limitations set by prior cases, effectively challenging prior precedent (setting up a new enforcement regime).

Finally, Subpart B of Part II focuses on the economic and regulatory implications of how the ATS is ultimately operationalized. This part discusses how to analyze the case using the idea of capturing negative externalities, differing with each outcome, and provides insights into the regulatory reality that these situations may impose. This should encompass a comprehensive examination of how each outcome affects businesses, accountability, and the global legal landscape. This section is organized as follows: the first component constructs an economic analysis of the case; the second component explores the economics of the institutionalization of human rights claims via extraterritorial jurisdiction (i.e., regulatory development); and finally, summarizes the costs associated with each possible outcome.

I. BACKGROUND: HISTORICAL OVERVIEW OF THE ATS, & THE EVIDENT EROSION OF THE STATUTE

A. HISTORICAL OVERVIEW OF THE ATS, & THE EVIDENT EROSION OF THE STATUTE

Within United States federal jurisprudence, the ATS remained a largely dormant instrument for nearly two centuries, with its jurisdiction being invoked in less than two dozen cases before 1980.[40] A maritime remnant of the 18th century,[41] the ATS grants federal district courts jurisdiction over "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."[42] In the earliest forms of ATS litigation, cases mostly dealt with foreign plaintiffs suing foreign natural persons in the United States, with a few international cases.[43] The present-day

40. Petch, *supra* note 29, at 400, 408.

41. *See* Kamal, *supra* note 21, at 1091–92.

42. 28 USC § 1350.

43. *See generally* 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, 53–59 (1985).

emergence of the ATS occurred in the Second Circuit's landmark decision in *Filartiga v. Pena-Irala*,[44] where Paraguayan plaintiffs successfully brought a suit against a former Paraguayan official for the torture and murder of a family member in Asunción, asserting a violation of the "law of nations," (i.e., legal norms recognized between states).[45] This pivotal case, by acknowledging the prohibition of torture under international law, established the ATS as a foundational basis for claims brought by aliens for torts committed in violation of international law, thereby catalyzing a wave of international human rights litigation in U.S. courts over the subsequent two decades.[46]

The post-*Filartiga* discourse predominantly framed the ATS as a tool for debating the domestic legal response to international human rights violations.[47] However, George Mason University Professor, Kenneth Randall, argued—at the time—that the ATS was not merely a 'human rights statute' but a federal jurisdictional statute—grounded in the founders' intent, which extended federal oversight to certain alien tort claims related to foreign relations, and prescribed jurisdiction to a "municipal" tort coupled with a "breach of international law" or U.S. treaty obligations.[48] Yet, this exact focus on *internationality* and the surge in ATS litigation kindled concerns over potential judicial interference in foreign relations.[49] U.S. courts, most recently, have now held a presumption against extraterritoriality, with many asserting that the ATS, and similar statutes, lack extraterritorial application unless explicitly indicated by Congress.[50] Such judicial caution is driven by concerns about unintended foreign policy consequences, as highlighted in the *EEOC v. Arabian Am. Oil Co.*[51] decision, where ultimately "the Judiciary . . . [should] not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."[52] Particularly in the context of interpreting the ATS, the deference to

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

45. *Id.* at 887.

46. EMMANUEL K. NARTEY, ACCOUNTABILITY AND CORPORATE HUMAN RIGHTS VIOLATIONS IN TORT AND INTERNATIONAL LAW 64 (2021); *see generally* Kamal, *supra* note 21.

47. *See* Randall, *supra* note 43, at 55–59.

48. *Id.*

49. Kamal, *supra* note 21, at 1090.

50. Brian Sableman, *Ending Alien Tort Statute Exceptionalism: Corporate Liability in the Wake of Jesner v. Arab Bank and Implications for U.S. Private Military Contractors*, 63 ST. LOUIS U. L.J. 349, 354 (2019).

51. E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

52. Hassan M. Ahmad, *The Jurisdictional Vacuum: Transnational Corporate Human Rights Claims in Common Law Home States*, 70 AM. J. COMPAR. L. 227, 263 (2022).

legislative clarity in the U.S. contrasts with the more proactive stance seen in some European jurisdictions.[53]

In *Sosa v. Alvarez-Machain*,[54] the Supreme Court decided that the ATS remained as a statute that provided purely jurisdictional clarification and did not itself create an automatic cause of action—at least regarding some wrongs under international law (as these wrongs must converge with existing analogous domestic causes of action).[55] In this case—involving a Mexican doctor suing a U.S. agent for his abduction and arbitrary detention—the court delineated the ATS as a jurisdictional statute, not a vehicle for shaping substantive law, intended to have immediate practical effect, and limited to a modest number of international law violations capable of personal liability.[56] This decision underscored the nuanced and evolving interpretation of the ATS's role in the landscape of international law and human rights within the U.S. legal system. A main critic of the ATS and University of Chicago law professor, Curtis Bradley, argues that this decision also fundamentally limited the intent of the ATS, establishing that extraterritorial jurisdiction is allowable for only the most egregious international crimes implicating American "values."[57] Ultimately, the court in *Sosa* held that the ATS was only intended to give Federal courts jurisdiction over certain issues of customary international law, as "the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time: offenses against ambassadors, violation of safe conducts, and piracy." [58]

As written, the "ATS does not indicate any constraints on the kinds of defendants that may be sued,"[59] yet the Supreme Court's presumption against extraterritoriality formulated a limitation in this respect, particularly when considering corporate entities. In *Kiobel v. Royal Dutch Petroleum Co.*,[60] the Court affirmed this strong presumption against extraterritoriality and established that causes of action must also apply to or be informed by the American domestic

53. *See generally* MONNHEIMER, *supra* note 39.

54. Sosa v. Alvarez-Machain, 542 U.S. 692, 694 (2004).

55. *See* Sableman, *supra* note 50, at 352–53.

56. *Id.*; *see* Sableman, *supra* note 50, at 352–53.

57. *See* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE US LEGAL SYSTEM 175–238 (3d ed. 2020).

58. *Sosa*, 542 U.S. at 694.

59. Petch, *supra* note 29, at 402.

60. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

Federal Tort Claims Act [61] and *directly* concern the United States.[62] In *Kiobel*, the strong presumption against extraterritoriality seems to stem from the principle that the ATS is grounded in international law norms that are "specific, universal, and obligatory."[63] The ATS jurisdiction extends only to violations of such norms, which do not include—according to the Second Circuit—corporate liability for human rights abuses under customary international law, as allegedly corporate liability has not been universally recognized or accepted among nations.[64] This absence of a consensus on corporate liability in international relations leads to the conclusion that claims against corporations under the ATS lack subject matter jurisdiction, skirting this 'touch and concern' mandate.[65] This left a vague notion as to what activity—defined to be extending from corporate liability or not—might be deemed relevant for the United States and limited the applicable 'effects' to occur within domestic territory. The Second Circuit of the U.S. Court of Appeals noted that ATS suits are generally only applicable to foreign defendants for conduct occurring outside the United States when customary international law is not silent on the specific issue.[66] Ultimately, the court questioned if, under the ATS, domestic law governs the entire question as to whether a corporate defendant is civilly liable in the international realm.[67]

Sosa never truly resolved the issue of how corporate liability should be understood under the ATS.[68] Advocates opposing corporate liability claim that the decision in *Sosa* mandates a specific inclusion of corporations under international law for liability concerning the norm in question, while plaintiffs argue that *Sosa* merely calls for an assessment of whether the norm applies to private entities at large, rather than explicitly to corporations to be considered traditional international law.[69] In a Seventh Circuit decision, *Flomo v. Firestone Natural Rubber Co., LLC*, involving child laborers' claims that labor

61. *Id.* at 124–25; *see* 28 U.S.C. §§ 2671-2680 (governing how individuals can file claims and seek compensation from the U.S. government for injuries or damages caused by the negligence or wrongful acts of federal employees while performing their official duties, with the presumption of a domestic sense of jurisdiction).

62. Center for Constitutional Rights, *supra* note 23.

63. *Kiobel*, 569 U.S. at 117 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

64. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148–49 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013).

65. *Id.* at 149.

66. *Id.* at 126.

67. Petch, *supra* note 29, at 402.

68. Sasha W. Boutilier, *Statutory Analogy and Liability of American Corporations Under the Alien Tort Statute*, 14 N.Y.U. J.L. & LIBERTY 264, 279–80 (2020).

69. *Id.*

practices on a Liberian rubber plantation violate international norms, Judge Eric Posner recognized the problem of *Sosa*, as "[t]he issue of corporate liability under the Alien Tort Statute seems to have been left open in an enigmatic footnote."[70] Judge Posner concluded there was an inadequate basis to infer that Firestone Natural Rubber violated customary international law in using child labor, yet Posner nonetheless accepted the plaintiffs' argument that corporate liability could exist under the ATS where "violations are directed, encouraged, or condoned at the corporate defendant's *decisionmaking* level."[71] This issue of corporate liability would be discussed in the most recent case *Jesner v. Arab Bank*,[72] where the court found that foreign corporations cannot be sued under the ATS, yet American entities (including corporations) aboard are (in theory) not limited by this decision.[73] In this case—involving 6,000 foreign nationals who accused the Jordanian Arab Bank of financing terrorism that harmed their relatives—the Supreme Court, in a closely split 5-4 decision, concluded that the ATS's language did not extend to allowing foreign corporations as defendants in such suits.[74] In this decision, Justice Kennedy opined that corporate liability "did not meet *Sosa's* standard of resembling a specific, universal, and obligatory norm of international law."[75]

Another limitation for the ATS was the 2021 case *Nestle USA, Inc. v. Doe*.[76] that Six Malian nationals, former child slaves who worked on cocoa farms, sued Nestlé and Cargill in U.S. Courts.[77] The plaintiffs argued that these U.S.-based companies aided and abetted the forced child labor in Ivorian cocoa farms by providing resources to the farms in exchange for cocoa.[78] The plaintiffs contended that these companies "knew or should have known" about the child slavery given the sophistication of their supply chain management tools.[79] The Ninth Circuit found the defendants' major U.S.-based operational decisions relevant under the ATS, applying the framework from *RJR Nabisco v. European Community*[80] a test surging out of the uncertainty

70. Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1017 (7th Cir. 2011).
71. *Id.* at 1020–21, 1024 (emphasis added). 1023.
72. Jesner v. Arab Bank, PLC., 138 S. Ct. 1386 (2018).
73. Sableman, *supra* note 50, at 356–57.
74. *Jesner*, 138 S. Ct. at 1394, 1407.
75. Petch, *supra* note 29, at 402.
76. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).
77. *Id.* at 1933.
78. *Id.* at 1935.
79. *Id.* at 1935.
80. RJR Nabisco v. European Community, 579 U.S. 325, 337 (2016) (requiring that the ATS should be analyzed as involving a two-step process where a court first

caused by *Kiobel*.[81] The Supreme Court, in an 8-1 decision, reversed, holding that because almost all conduct aiding the slavery occurred outside the U.S., general corporate activity (i.e., issuing management directives) in the U.S. was insufficient for ATS claims.[82] The Supreme Court reasoned that "mere corporate presence and general corporate activity in the United States do[es] not establish a sufficient connection to a law of nations violation."[83] The Court's decision left unanswered questions about whether domestic corporations can be sued under the ATS completely. The Court's analysis, aligning with *Sosa's* framework,[84] emphasized that actionable international legal norms must be specific, universal, and obligatory, and that conduct relevant to the ATS must have a strong "domestic nexus."[85] While *Nestlé* clarified some aspects of the ATS's application, particularly in relation to the ATS's range of applicability and in defining who the pertinent corporate defendants may be, the decision continues to leave significant areas of ambiguity, notably in the context of corporate responsibility for violations of international law.

Since the reinvigoration of the ATS over four decades ago in *Filartiga*, U.S. courts have adopted a more restrained approach to ATS jurisdiction, as evident in the *Nestlé* case. Although the ATS still formally allows suits, especially against domestic parties, the practical effect of these decisions is that the reach of the statute has been significantly curtailed due to concerns over extraterritoriality and the foreign policy implications. While the Supreme Court has not explicitly barred suits against foreign individuals, the trend of litigation indicates that there are substantial hurdles to suing a foreign individual due to the presumption against extraterritoriality. Despite doctrinal possibilities for ATS claims, the current trajectory of case law suggests that the Supreme Court might close these avenues for suit if the Court was given the chance.[86] Despite this lay presumption that the ATS is effectively dead,[87] there are still those who view

determines if the statute explicitly indicates extraterritorial application, and, if not, then assesses whether the conduct relevant to the statute's focus occurred within the United States, allowing for a permissible domestic application).

81. Petch, *supra* note 29, at 403–04.

82. *Id.* at 405.

83. Petch, *supra* note 29, at 408.

84. *Id.* at 408.

85. *Id.* at 408.

86. Beth Stephens, *The Rise and Fall of the Alien Tort Statute*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 46, 46 (Edward Elgar Publ'g, 2020).

87. *See, e.g.*, Petch, *supra* note 29, at 420;Christopher Ewell, Oona A. Hathaway, & Ellen Nohle, *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205, 1277–78 (2021).

pending litigation, such as *Al Shimari v. CACI* and *Doe I v. Cisco Systems*, as a test for the limited applicability of the statute.[88] However, this ATS claim against private military contractors may face uncertain prospects, especially considering a conservative-leaning federal judiciary that might be inclined to narrow ATS precedent or overturn it all together.[89]

Plaintiffs seeking redress for overseas human rights abuses might turn to other statutes such as the Torture Victim Protection Act of 1991[90] and the Trafficking Victims Reauthorization Act,[91] allowing a broader form of exterritoriality.[92] Plaintiffs could also pursue claims in state or foreign courts, as the U.S. judicial landscape evolves in its approach to international human rights violations.[93] Yet many of these "international regulatory levers" in the United States also face challenges underscoring the importance of corporate accountability in U.S. courts.[94] As the U.S. extraterritorial enforcement diminishes, the rest of the Western liberal democratic hegemony is actively installing means of redress within their domestic legal systems that expand beyond their jurisdictional borders.[95]

B. DIMINISHED U.S. EXTRATERRITORIAL ENFORCEMENT AND A SURGE OF FOREIGN-LED EFFORTS

Legal systems around the modern world remain the last receptacles for true national sovereignty, exercising the power to include and exclude.[96] Courts now hold a strong presumption against extraterritoriality within U.S. common law.[97] Even as nations open

88. *See* Sableman, *supra* note 50, at 367–69

89. *See id*, at 356.

90. 28 U.S.C. § 1350, *amended by* Pub. L. 102–256, 106 Stat. 73 (amended 1992).

91. 18 U.S.C. §§ 1595(a), 1596, 1581, 1583.

92. *See generally* Rachel Chambers & Jena Martin, *United States: Potential Paths Forward after the Demise of the Alien Tort Statute, in* CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX: KEY LEGAL DEVELOPMENTS IN SELECTED JURISDICTIONS 351 (Ekaterina Aristova & Ugljesa Grusic eds., 2022); *Id.*

93. *See generally* Chambers & Martin, *United States: Potential Paths Forward after the Demise of the Alien Tort Statute*, *supra* note 92.

94. *See id*. at 359; BRADLEY, *supra* note 57, at 202; Maryum Jordan, *Utilizing Foreign Legal Assistance Actions to Promote Corporate Accountability for Human-Rights Abuses*, 132 YALE L.J.F. 844, 850 (2022).

95. *See generally* Kamal, *supra* note 21, at 1097–98; MONNHEIMER, *supra* note 39, at 276–77; Chambers & Martin, *Reimagining Corporate Accountability*, *supra* note 5, at 777–78.

96. *See* CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5–15 (George Schwab trans., 2005).

97. *See* Kamal, *supra* note 21, at 1090; *see also* William S. Dodge, *Understanding*

trade and interact with one another at a higher degree, most international economic activity remains protected by treaties or contracts (assigning arbitration rights within a predetermined legal systems).[98] The United States, at times, and more recently, has been hesitant to extend its court's domestic jurisdiction into the global arena.[99] This presumption is characterized in a comment made by Justice Holmes in the early nineteenth century, who noted that:

> [T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done . . . .[This] would lead, in a case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.[100]

As the plaintiffs in *Al Shimari* attempt to establish the right to bring the case on behalf of alien victims tortured abroad in a domestic court against a corporate actor, this part focuses on interpreting the historical context of extraterritoriality and reviewing the trend for non-U.S. jurisdiction to apply such an expanded notion of extraterritoriality. This legal question remains the primary thorn within the case itself, and therefore, correspondingly, there can be no final judgment within this analysis, only a limited recommendation given the inherent legal ambiguities.

Before diving into *Al Shimari*, again, this part attempts to address a two main issues. First, what does the presumption against jurisdiction extraterritoriality mean within the context of U.S. courts? And, second, why does this negative presumption persist while other jurisdictions have the opposite presumption?[101] The court's inclination against extraterritoriality stems from three main factors: many courts abroad hold the *jus cogens* presupposition in international law of limited domestic jurisdiction, extraterritorial jurisdiction is consistent with domestic conflict-of-laws rules, and this judicial policy protects the legitimacy of domestic laws that might conflict with foreign laws.[102] Correspondingly, federal, and lower courts, generally apply the traditional conceptualization of

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the Presumption Against Extraterritoriality, 16 BERKELEY J. INT'L L. 85, 125 (1998).

98. *Torture as Tort*, *supra* note 35, at 229–239.

99. *See generally* Petch, *supra* note 29.

100. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356–57 (1909).

101. *See generally* Ryerson et al., *supra* note 14, 794–804.

102. Dodge, *supra* note 97, at 90.

presumption against extraterritoriality when dealing with cases related to the Federal Labor Statutes (Title VII), the Foreign Sovereign Immunities Act, the Federal Tort Claims Statute, and the Immigration and Nationality Act.[103]

Before fully examining the role of U.S. jurisprudence regarding human rights in the international arena, the following will quickly digress to consider extraterritoriality as it relates to the proliferation of international trade and commerce. Courts only deviate from the traditional presumption against extraterritorial jurisdiction when doing so benefits domestic business interests over foreign business interests.[104] This pushes the boundaries of exterritorial jurisdiction outward to include American entities in a multi-national stage.[105] In the last few decades, courts have tended to accept cases that included parties or entities whose activity concerned and affected the United States (articulated further in the *Kiobel* as the "touch and concern" mandate).[106] Courts managed to extend U.S. trademark law internationally with *Steele v. Bulova Watch Co.*[107] and hold foreign companies operating abroad accountable with the Sherman Antitrust Act[108] in both *United States v. Aluminum Co. of America*[109] and *Hartford Fire Ins. Co. v. California*.[110] Additionally, U.S. businesses create foreign contracts under subsidiaries abroad, or foreign companies form contracts under subsidiaries in U.S. territories to acquire legal protections. [111] Present-day free-trade treaties also include sections dictating and establishing formal mechanisms of arbitration and legal authority.[112] Despite courts' increased jurisdiction, these presumptions against extraterritoriality are maintained in the commercial sense, as courts do not impose American law on transactions outside national boundaries concerning non-U.S. entities—even if the secondary parties affected include U.S.

103. 42 U.S.C. § 2000e-1 to -17;28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d),1602–1; 28 U.S.C. §§ 2671–80; 8 U.S.C. §§ 1101–1537.

104. *See* Dodge, *supra* note 97, at 118.

105. *Id.*

106. Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 124–25 (2013).

107. Steele v. Bulova Watch Co., 344 U.S. 280, 285–86 (1952).

108. 15 U.S.C. §§ 1–7.

109. United States v. Aluminum Co. of America, 148 F.2d 416, 444–45 (2d Cir. 1945).

110. Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 769–70 (1993).

111. *See generally* Eric Engle, *U.S. Corporate Liability for Torts of (Foreign) Subsidiaries*, 23 CORP. COUNS. REV. 1, 2–3 (2004).

112. *Torture as Tort*, *supra* note 35, at 234. *See also* KIMBERLY CLAUSING, OPEN: THE PROGRESSIVE CASE FOR FREE TRADE, IMMIGRATION, AND GLOBAL CAPITAL (2019).

entities.[113]

Beyond the United States, the concept of extraterritorial jurisdiction in holding corporations accountable for human rights and environmental violations is gaining ground, with significant developments in European legislation and policy. A landmark in this arena is the French Law on Duty of Care, introduced in 2017, which represents a novel use of the active personality principle.[114] This law mandates French corporations to establish vigilance plans that identify and mitigate environmental and human rights risks.[115] This duty extends not only to corporate operations but also to the company's subsidiaries and even closely connected companies.[116] This move, aiming to prevent corporations from evading responsibility by hiding behind the corporate veil, faced intense parliamentary debate, but was ultimately passed, despite concerns about its impact on France's competitive ability.[117] The French *Conseil Constitutionnel* upheld the law, emphasizing the legal responsibilities between parent companies and their subsidiaries.[118] The law's implications were first tested in 2019 when French petroleum giant TotalEnergies SE faced claims related to its 'vigilance' plan in Uganda.[119] The broader impact of the French model, which carefully avoids direct regulation of foreign corporate entities to circumvent interference with other states' affairs, remains to be seen.[120] The law sets a procedural obligation for parent companies, focusing on due diligence rather than direct involvement in human rights violations.[121] The OECD Guidelines' National Contact Points further elucidates the due diligence obligations, suggesting a higher standard of care for subsidiaries than suppliers while also respecting corporate decision-making in complex situations.[122]

At the European Union level, approaches to corporate regulation have been more cautious. The EU Directive 2014/95/EU, introduced in 2014, mandates large corporations report on environmental and human rights risks, including those in supply and subcontracting chains.[123] The EU Flagship Initiative on the Garment Sector has

113. *See* Ryerson et al., *supra* note 14, 805–06.
114. MONNHEIMER, *supra* note 39, at 309.
115. Ryerson et al., *supra* note 14 at 797.
116. *See* Ryerson et al., *supra* note 14, at 5–797.
117. MONNHEIMER, *supra* note 39, at 309–12.
118. *Id.* at 310.
119. *Id.* at 311; *see also* Ryerson et al., *supra* note 14, at 797.
120. MONNHEIMER, *supra* note 39, at 309–12.
121. *See id.* at 311.
122. Ryerson et al., *supra* note 14, at 795.
123. *See* MONNHEIMER, *supra* note 39, at 315.

proposed binding due diligence obligations across corporate supply chains. The European Parliament and Council's agreement on corporate sustainability due diligence ("the CS3D Directive") in December 2023 marks a landmark shift in corporate accountability, requiring companies to incorporate human rights and environmental considerations into their management systems, setting the foundation for a future-oriented economy.[124] These EU initiatives signify a shift towards well-established obligations in the human rights context.[125]

In terms of national legislation in Europe affecting corporate activity, the U.K.'s Modern Slavery Act of 2015 and Germany's Supply Chain Act are other examples of domestic legislation addressing human rights issues, focusing on modern slavery and human trafficking.[126] These laws, however, do not encompass other human rights violations like genocide or war crimes.[127] Additionally, other European countries are discussing broader, legally binding regulations on extraterritorial corporate conduct, taking cues from the French model.[128] For instance, Germany's Green Party proposed environmental and human rights due diligence obligations for corporations, and similar discussions are underway in Switzerland.[129] Canada may be one of the most salient examples of extraterritoriality within a similar ATS context. In the landmark 2020 decision of *Nevsun Resources Ltd. v. Araya*,[130] the Supreme Court of Canada addressed the issue of a Canadian corporation's alleged breaches of customary international law in Eritrea.[131] By a narrow 5-4 majority, the Court established that violations of human rights could be pursued under Canadian tort law.[132] This ruling signifies a notable deviation from jurisdictions that require specific legislation that allows for international human rights norms to be actionable.[133] In Canada, this decision enables litigants to directly invoke breaches of transnational human rights abuses in legal actions against Canadian

124. European Parliament Press Release, Corporate Due Diligence Rules Agreed to Safeguard Human Rights and Environment (Dec. 14, 2023, 09:08 AM) https://www.europarl.europa.eu/news/en/press-room/20231205IPR15689/corporate-due-diligence-rules-agreed-to-safeguard-human-rights-and-environment.

125. MONNHEIMER, *supra* note 39, at 315–17.

126. *See* Ryerson et al., *supra* note 14, at 7–8.

127. MONNHEIMER, *supra* note 39, at 314–19.

128. *See* MONNHEIMER, *supra* note 39, and Ryerson et al., *supra* note 14.

129. MONNHEIMER, *supra* note 39, at 317–18.

130. Nevsun Res. Ltd. v. Araya, 1 S.C.R. 166 (Can. 2020).

131. Ryerson et al., *supra* note 14, at 801.

132. *Id.* at 801–02.

133. *Id.* at 802.

corporations.[134]

In the European context, efforts to hold companies liable for human rights violations have seen notable advancements, yet these initiatives remain limited in scope.[135] Again, this contrasts with the U.S. approach, where the presumption against extraterritoriality significantly curtails the jurisdictional reach of courts in transnational human rights cases.[136] However, even in Europe where due diligence laws are emerging, the focus has predominantly been on corporate activities within supply chains rather than a broader sweep of corporate human rights obligations.[137] The U.S.'s stronger presumption against extraterritoriality, compared to other parts of the Western world, is influenced by select, vocal members of the judiciary who hold the unique judicial philosophy that prioritizes a clear legislative direction in extending U.S. law beyond its borders, particularly in matters with potential foreign policy implications.[138] This approach reflects a cautious balance between judicial interpretation and respect for the roles of the legislative and executive branches in foreign affairs,[139] limiting the reach of U.S. courts in transnational human rights litigation involving corporate actors.[140]

Regarding public and criminal law, the international system does allow for limited jurisdictional control concerning violations of human rights via the United Nations Charter, the Geneva Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the creation of the International Criminal Court, and the International Court of Justice.[141] However, international organizations lack the sovereign legitimacy and credibility to be effective.[142] Given the unresolved corporate accountability issue, this analysis focuses on the possible extraterritorial jurisdiction of U.S. law specifically via the principles of *erga omens* and *jus cogens* norms.[143] In the context of the ATS and *Al Shimari v. CACI,* as mentioned in

134. *Id.* at 801–02.

135. *See id.* at 794.

136. *See id*. at 790.

137. *See generally* Ryerson et al., *supra* note 14, at 793, 795–800.

138. Dodge, *supra* note 97, at 90–99.

139. *Id* at 120.

140. *Id* at 111.

141. E. M. Hafner-Burton & K. Tsutsui. *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44(4) J. PEACE RSCH., 407, 408–25 (2007).

142. *Id.* at 422–23.

143. *See generally* MONNHEIMER, *supra* note 39 (explaining to what extent the concept of human rights due diligence obligations could be adequately applied to extraterritorial constellations).

subpart A, with the Second Circuit's 1980 decision in *Filártiga*, damages were awarded to a non-American legal resident for harm suffered outside the country from a non-American. Despite thirty years of case law, many questions about the ATS remain unanswered relating to the relationship between criminal law and tort in an international context. Tort disputes can be abstracted from geography in a way that criminal cases cannot, making universal jurisdiction a more compelling institution in tort law rather than in criminal law.[144] The following part discusses the implications of *Al Shimari v. CACI* on the ATS.

II. ANALYSIS: *AL SHIMARI* AND THE ATS IN THE PRESENT CONTEXT AND ECONOMIC CONSEQUENCES

A. ASSESSING THE IMPLICATIONS OF AL SHIMARI ON ATS JURISPRUDENCE

In *Al Shimari*, the plaintiffs allege that CACI directed and participated in heinous acts of torture at Abu Ghraib prison in Iraq from 2003 to 2004.[145] The plaintiffs, who were detained and subsequently released without charges, endured severe physical and mental trauma due to torture inflicted on them by CACI employees and government co-conspirators.[146] Originally, the litigation initially encompassed CACI as well as L-3 Services Incorporated and former employees ('civilian interrogators'),[147] but it has proceeded solely against CACI since 2008.[148] The plaintiffs seek compensatory and punitive damages for a range of atrocities, including torture, sexual assault, and intentional infliction of emotional distress. The case began in 2008, when it was transferred to the Eastern District of Virginia[149] from the U.S. District Court for Ohio.[150] The ensuing years saw the case oscillate within the appellate system, notably in the

144. Beth Stephens, *State Law Claims: The Next Phase of Human Rights Litigation*, 108 AM. SOC'Y INT'L L. PROC. 442, 442 (2014).

145. *See* Center for Constitutional Rights, *supra* note 23.

146. *Id.*

147. *Id*.

148. *See* Ivan Watson, *Abu Ghraib Torture Lawsuits Name U.S. Workers*, NPR (Jun. 30, 2008, 4:00 PM), https://www.npr.org/2008/06/30/92043800/abu-ghraib-torture-lawsuits-name-u-s-workers; Michele Norris and Ivan Watson, *Abu Ghraib Torture Lawsuits Name U.S. Workers* (Jun 30. 2008, 4:00 PM), https://www.npr.org/transcripts/92043800.

149. Al Shimari v. CACI Premier Tech, Inc., 758 F.3d 516, 523 (4th Cir. 2014) (stating that the plaintiff's action was transferred into the Eastern District of Virginia in August 2008).

150. Center for Constitutional Rights, *supra* note 23.

Fourth Circuit Court of Appeals.[151] Here, key rulings in 2016 and 2018, especially post-*Jesner*, maintained the viability of suing U.S. corporations under the ATS, despite limitations on foreign corporations.[152] Significant dates in the lawsuit's trajectory include the Supreme Court's denial of CACI's petition for certiorari on June 28, 2021, and the pivotal July 23, 2021 motion by CACI to dismiss the case based on the Supreme Court's *Nestlé* decision.[153] This motion aimed to leverage the "touch and concern" test established in the earlier *Kiobel* decision.[154] However, the Court's decision on July 31, 2023, to deny CACI's motions to dismiss,[155] and the subsequent appeals, reflect the complexity in the ongoing legal battle in understating how to reconcile the overwhelming presumption against exterritoriality with upholding human rights in a global, corporate context.[156] This case against a Virginia-based (i.e., domestic) company meets the stringent criteria imposed by the ATS, adhering to the *Kiobel* mandate and *Nestlé* limitations by directly linking the corporate decisions made within the United States to the lack of oversight leading to certain egregious activities conducted abroad, involving U.S. employees in acts universally recognized as violations of international law against torture. On May 2, 2024, following recent proceedings, Judge Brinkema declared a mistrial due to a deadlocked jury, with a retrial scheduled to begin in late October of 2024.[157] If *Al Shimari* fails to find recourse under the ATS despite these conditions, this will significantly challenge the statute's effectiveness and its capacity to address

151. *See* Al Shimari v. CACI Premier Tech. Int'l, Inc., 657 F. Supp. 2d 700 (E.D. Va. 2009); Al Shimari v. CACI Premier Tech Int'l, 658 F.3d 413, (4th Cir. 2011); Al Shimari v. CACI Premier Tech Int'l, Inc., 679 F.3d 205 (4th Cir. 2012); Al Shimari v. CACI Premier Tech., Inc., 951 F. Supp. 2d 857, 858 (E.D. Va. 2013); Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014); Al Shimari v. CACI Premier Tech., Inc., 300 F. Supp. 3d 758 (E.D. Va. 2018).

152. *Compare* Al Shimari v. CACI Premier Tech., Inc., 840 F.3d 147, 153, 160 n.8 (4th Cir. 2016) (describing an earlier iteration of the case where the court they found the district court had jurisdiction over the ATS claims and vacated a judgment dismissing those claims, as well as stating that the ATS claims will be justiciable), *and* Al Shimari v. CACI Premier Tech., Inc., 300 F. Supp. 3d 758, 782 (E.D. Va. 2018) (holding that the plaintiffs appropriately stated a claim under the ATS), *with* Jesner v. Arab Bank, PLC., 138 S. Ct. 1386, 1389, 1408 (2018) (affirming a lower court judgment that foreign corporations cannot be sued under the ATS because corporate liability for violations of international law must be determined by the political branches of the government.).

153. Center for Constitutional Rights, *supra* note 23.

154. *See* Al Shimari v. CACI Premier Tech., Inc., 684 F. Supp. 3d 481, 491 (E.D. Va. 2023) ("Kiobel's 'touch and concern' test is 'dead . . . .'").

155. Al Shimari v. CACI Premier Tech., Inc., 684 F.Supp.3d 481 (E.D. Va. July 31, 2023).

156. *See* Center for Constitutional Rights, *supra* note 23.

157. *Id.*

corporate complicity in human rights abuses on a global scale.

The plaintiffs rely on two assertions within tort liability—intentional acts and nonintentional, or negligent, acts.[158] As this is a civil case, the plaintiffs articulate the torture experienced by the four Iraqi nationals in noncriminal terms by implicating the lack of 'consideration' or 'concern' for the victims on the part of CACI and associated military personnel.[159] This differs from public, or criminal law, where the offense remains a violation to the whole of society, represented by the state in question.[160] The distinction between intentional and nonintentional activity is significant, due to the propensity U.S. courts hold in awarding punitive damages in cases where intentional tort is established.[161] The plaintiffs assert that CACI deliberately abused and misused certain "interrogation techniques" and, in doing so, committed acts of torture in the process to extract information from military personnel for the Department of Defense.[162] These acts inflicted harm beyond the accepted normative limit when holding detainees.[163] Although this analysis ignores the personal and ulterior motives of those involved, there is still the risk of authoritarian practices or justifications for abusive behavior emerging in such situations.[164] The need for information to facilitate a successful military operation in Iraq remained the primary justification expressed by the United States in the aftermath of the Abu Ghraib scandal.[165] Regarding the component of negligence, CACI's supervising operatives and military commanders were not checking if prison employees followed the delineated, 'legal,' methods of

158. Al Shimari v. CACI Premier Tech., Inc., 684 F. Supp. 3d 481, 486 (E.D. Va. July 31, 2023).

159. *See* Center for Constitutional Rights, *supra* note 23.

160. *See* Albert Levitt, *Some Societal Aspects of the Criminal Law*, 13 J. AM. INST. CRIM. L. & CRIMINOLOGY 90, 90 (1922).

161. *See* Jeffrey E. Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non-Conveniens*, 40 CORNELL INT'L L.J. 749, 750 n.1, 771 n.169 (2007) (stating that foreign litigants are attracted to U.S.US courts for various reasons, specifically the existence of punitive damages in U.S. courts that many foreign systems do not have the option for.).

162. *See* Complaint with Jury Demand at 4–8, Al-Shimari v. Dugan, et al., No. 2:08-cv-637 (S.D. Ohio June 30, 2008), https://docs.justia.com/cases/federal/district-courts/virginia/vaedce/1:2008cv00827/232957/2.

163. *See id*. at 4–6.

164. *See generally* NARTEY, *supra* note 46 (discussing the ATS at multiple points throughout the book and its relationship to torture victims and other victims of human rights violations).

165. *See Factsheet: Torture at Abu Ghraib and Al Shimari v. CACI,* CTR. FOR CONST. RTS, (Mar. 28, 2024), https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-torture-abu-ghraib-and-al-shimari-v.

information extraction.[166] Therefore, in addition to intentional tort liability on the part of the prison operatives, the company's supervising structure may be vicariously liable for aiding and abetting or conspiracy—and this is where the current legal hook lies (as the plaintiffs are focusing on what happened domestically by the U.S. company).[167]

In the context of *Al Shimari,* this note considers several outcomes. While the case is set for trial, if appealed, the court may once again revisit the issue of exterritoriality and throw out the case over the traditional presumption against extraterritoriality, particularly in a corporate setting, and for not meeting the *Kiobel* dual mandate reconceptualization of extraterritoriality (which is doubtful), or for not satisfying the "domestic nexus" notion as limited by *Nestlé*.[168] Yet, again, the plaintiffs are functioning within the limitations of how the ATS is currently perceived by the Supreme Court—which effectively uses a two-step framework to determine a statute's extraterritorial application, initially presuming domestic-only applicability unless clearly indicated otherwise and examining if the conduct in question occurred within the United States.[169] Even with this limitation, this establishes a precedent for U.S. courts, effectively finding that aiding and abetting liability within domestic soil is a viable cause of action under the ATS, as demonstrated by the Ninth Circuit decision in *Cisco Systems*.[170] This latter prospect institutionalizes a mechanism for human rights accountability (if the cases meet the very limited requirements), increasing the potential costs of committing human rights abuse for violators and U.S.-based entities.[171] Such a ruling would counteract the erosion of the ATS and preserve a limited avenue for imposing tort liability on certain corporations, diverging from established regulatory frameworks.[172]

The legal ramifications of this case warrant careful consideration. If the victims find no recourse under the ATS, the statute may become

166. *See* Memorandum Order at 3, 64, Al Shimari v. CACI Premier Tech., Inc., No. 1:08cv827 (E.D. Va. Mar. 18, 2009).

167. Al Shimari v. CACI Premier Tech., Inc., 108CV827LMBJFA, 2023 WL 5181611, at *498 (E.D. Va. July 31, 2023).

168. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021).

169. *Id.* at 1936.

170. *U.S. Litigation Risk from Rights Violations Abroad*, JONES DAY (Aug. 1, 2023), https://www.jonesday.com/en/insights/2023/08/us-litigation-risk-from-rights-violations-abroad.

171. *See* Petch, *supra* note 29, at 420 (explaining that precedent provides an important framework for reestablishing the jurisdictional scope of the ATS).

172. See *supra* Part I, Subpart A for a detailed discussion on the current erosion of the ATS and its established framework.

obsolete by limiting a means to encourage accountability. One could view the ATS's effectiveness as significantly weakened in the wake of the *Nestlé* case,[173] a reality that would be further reinforced if *Al Shimari* is dismissed—highlighting the strong presumption against extraterritoriality; however, while diminished in scope for aiding human rights victims, the statute would not be completely nullified, as this would overlook the value and impact of cases previously brought under the ATS. Ironically, while the judiciary's primary concern is to refrain from legislating through the interpretation of laws, in sidelining the ATS, they effectively negate a law intended for corporate accountability.[174] The decision in this case will not only shape the legal landscape of corporate human rights accountability but also influence the economic dynamics that underpin blatant human rights violations beyond the regulatory reach of the United States and Europe.[175]

As mentioned in Part I, the present judicial landscape for ATS-based claims is both complex and constrained. Initially, the ATS's scope for naming defendants has undergone significant refinement. Post-*Jesner*, foreign corporations are exempt from ATS suits. Suits against foreign states fall under the Foreign Sovereign Immunities Act.[176] However, the U.S. Supreme Court has not explicitly barred foreign legal persons from ATS claims, nor U.S. corporate actors.[177] This leaves room for cases like *Al Shimari*, where U.S. corporations are implicated in international law violations on foreign soil and may have aiders and abettors on domestic soil.[178] Moreover, the ATS's causes of action are subject to stringent scrutiny. *Sosa's* framework mandates that violations must be specific, universal, and obligatory.[179] This scrutiny filters the range of viable ATS claims, a significant factor in cases like *Al Shimari,* where claims of war crimes and torture must align with these rigorous standards.[180] The potential for ATS suits against domestic corporations, especially those with foreign

173. *See supra* text accompanying notes 75–81.

174. *See* Chambers & Martin, *supra* note 5, at 776.

175. Human Rights Litigation, *supra* note 8, at 22.

176. 28 U.S.C. §§ 1602–01.

177. *See* Sosa v. Alvarez, 542 U.S. 692 (2004); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018); Nestlé USA, Inc. V. Doe, 141 S. Ct. 1931 (2021).

178. Beth Van Schaack, *Nestle & Cargill v. Doe Series: No Safe Harbor for Enablers of Child Slavery—Secondary Liability and the ATS*, JUST SECURITY (Dec. 17, 2020), https://www.justsecurity.org/73550/nestle-cargill-v-doe-series-no-safe-harbor-for-enablers-of-child-slavery-secondary-liability-and-the-ats/.

179. Petch, *supra* note 29, at 402.

180. *Id.*

subsidiaries, remains a pertinent issue. The *Nestlé* case suggests that domestic corporations can be ATS defendants.[181] Cases like *Al Shimari* could thus hinge on the nature of corporate relationships and operations spanning domestic and international boundaries.[182] Additionally, aiding, and interfering claims under the ATS—though not directly addressed in *Nestlé*—remain a viable avenue. This aspect is particularly relevant for *Al Shimari*, where aiding and abetting in international law violations could be central. However, the success of such claims depends on their alignment with U.S. interests and policy considerations as articulated by the judiciary.[183]

A loss for the plaintiffs in *Al Shimari v. CACI* results in victims bearing precautionary costs in situations where there is some probability for torture, while torturers abuse without incurring significant costs—aside from logistical, procedural, or social burdens.[184] Therefore, CACI, if implicated, will most likely participate in a future torturous activity if there is no punitive accountability for the supposed benefits explained previously in this text (i.e., national security intelligence, emergencies, etc.).[185] If U.S. courts allow for these claims to hold legitimacy under the ATS—assuming CACI did participate in human rights violations—punitive damages would be necessary to prevent future abuses of torture, placing the burden of precaution on the defendant. Given that torture remains an activity modern society pursues to eradicate, compensatory damages, legitimized by the court, establish the cost of abuse in pecuniary terms, which tautologically equal the benefit received by the abuser.[186] At this juncture, there are tradeoffs, and there are economic consequences faced by U.S. entities if a limited ATS approach is followed, given that foreign entities are not covered by the ATS. Transaction costs should be increased for unwanted behavior, as well as damages paid by corporations.[187] If the case is heard by a jury, the Court must rule punitive damages for the plaintiff to prevent future

181. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1942 (2021) ("The real problem with this lawsuit and others like it thus isn't whether the defendant happens to be a corporation.").

182. Center for Constitutional Rights, *supra* note 23.

183. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1404 (2018) ("[F]oreign-policy implications require the courts to draw a careful balance in defining the scope of actions under the ATS.").

184. *See generally* DARIUS REJALI, TORTURE AND DEMOCRACY 450–53 (2007).

185. *Id.* at 474–48 (2007).

186. *Id.*

187. *See* Oliver E. Williamson, *Transaction Cost Economics*, 1 HANDBOOK INDUST. ORG. 135, 139 (1989) ("Transaction cost economics pairs the assumption of bounded rationality with a self-interest-seeking assumption that makes allowance for guile.").

torture by placing a greater adverse incentive, costing more than the supposed benefits.[188] The Court would cement the ability of non-citizens to enjoy the inherent rights and privileges relating to personhood protected in the Constitution when interacting with U.S. entities abroad.[189] Domestic tort law would converge with international norms, and act as one more layer protecting the Western 'liberal' hegemony. A favorable outcome in *Al Shimari* can allow ATS to remain viable, and guarantee access to many more victims.

Ultimately, if *Al Shimari* fails, the costs will be borne by the victims, while companies may continue to disregard the negative externalities perpetuated by their international operations and unregulated supply chains—apart from any logistical, procedural, reputational, or social costs. Given the lack of a strong international regulatory environment, there are few punitive mechanisms to hold companies accountable for the theoretical 'benefits,' such as reduced costs from operating outside the formalized regulatory regimes present in many Western democracies).[190] As the social optimum remains human rights accountability, the corporations must take precautions and bear the costs of regulatory alignment, especially if forced through liability.

B. ECONOMIC IMPLICATIONS: MICROECONOMIC & MACROECONOMIC PERSPECTIVES

Utilizing an economic perspective, the reasons, or incentives, behind certain corporate behavior are exposed—including both the costs and benefits. This section explores these incentives and briefly touches on the effects of having different regimes of liability. If courts assume contributive or comparative negligence in tort cases involving torture, parties affected will take precautionary steps by distancing themselves from the perpetrators, rendering detainees uncooperative, arguably lessening the ability for the concerned state or their respective proxies to obtain information via other non-exploitive means.[191] This may also create a perverse incentive for victims' associates to respond with violent retributive acts.[192] Concerning *Al Shimari*, the detainees at the Abu Ghraib prison, if cooperative, may have produced more reliable information had CACI

188. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 875 (1998).

189. SKINNER ET. AL., *supra* note 7, at 23–25.

190. *See generally Torture as Tort*, *supra* note 34.

191. *Id.* at 213, 234.

192. REJALI, *supra* note 184, at 446–78.

or the military not tortured them, as these exploitive coercive actions often lead to inaccurate information.[193] Additionally, as implied, human rights abuse generates negative externalities that extend beyond altruistic concerns, such as the harm suffered by victims, to include the devaluation of human dignity, global security concerns, and domestic torturer *de-legitimization*.[194] Since torturers do not internalize the front of these externalities (besides the logistical and procedural costs) in an anarchic system, the supposed benefits from torture act as the mobilizing incentive.[195] The following analysis digresses into conceptualizing the market reactions before explaining the benefits of institutionalization, or court-sanctioned jurisdictional enforceability.

In the realm of corporate engagement with potential human rights abuses, macroeconomic considerations are critical. They often necessitate a nuanced understanding of how immediate shareholder interests may, at times, overshadow the need for companies to integrate potential risks into their long-term strategic planning.[196] If truly operationalized, ATS could function not only as a tool for holding violators accountable but also as a financial deterrent, imposing tangible costs on entities found in violation of the law. Furthermore, this legal clarity underscores the importance of creating a level playing field, illustrating how ethical companies are disadvantaged when competing against those engaging in unethical practices, such as the use of child labor.[197] This concept is reinforced by *Flomo v. Firestone*, which highlights the broader implications of such practices on fair business competition specifically on the issue of child labor claims.[198] Within the common law-based U.S. legal system, the concept of damages within tort law acts as a dissuasive mechanism against negligent behavior—beyond the mechanisms afforded in criminal law.[199] Acting as a potential reputational cost multiplier as well, ATS litigation—by facilitating the accountability of corporate entities, whether foreign or U.S.-based—adds a layer of risk to engaging in activities linked to human rights violations, thereby incentivizing the development of compliance systems to mitigate these risks.[200] The

193. *Id.*

194. *See generally* NARTEY, *supra* note 46, at 38–54.

195. REJALI, *supra* note 184, at 446–78.

196. Darin Christensen & David K. Hausmann, *Measuring the Economic Effect of Alien Tort Statute Liability*, 32 J.L., ECON., & ORG. 794, 794–795 (2016).

197. *Id.* at 809.

198. Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1021 (7th Cir. 2011).

199. Polinsky & Shavell, *supra* note 188, at 873,

200. *See generally* Brief of Small and Mid-Size Cocoa and Chocolate Companies as Amici Curiae in Support of Respondents, Nestle USA, Inc., v. John Doe, et al. 593 U.S.

exemption of foreign companies from ATS liabilities raises questions about the comparative impact on their financial bottom lines versus U.S. companies that remain subject to ATS jurisdiction.[201] This disparity underscores the significance of the ATS as a regulatory mechanism, as illustrated in cases like *Al Shimari*, where the potential liability of a private entity like CACI if found culpable, should lead to considerable pecuniary obligations and consequences.

Regarding the measurable effects of a weakened ATS, a recent analysis by UCLA political scientist, Darin Christensen, and UC Berkley Law professor, David Hausman, examines the impact of the Supreme Court's decision in *Kiobel* on stock returns for companies previously sued under the ATS.[202] The study focuses on six companies directly involved in ATS litigation, and it hypothesizes that these companies would benefit from the *Kiobel* ruling.[203] The study reveals that the average Cumulative Abnormal Return (CAR) was marginally higher for these companies compared to others not involved in ATS cases (i.e., not involved in ATS includes litigation and/nor settlement proceedings).[204] For instance, Royal Dutch Shell's stock price rose by 5% within 11 days of the *Kiobel* ruling, and Rio Tinto's stock increased by 3% in the same period.[205] However, Atlas Pipeline Partners, a U.S.-based company not implicated in ATS suits, showed negligible stock price movement, aligning with expectations.[206] Further analysis suggests that firms with subsidiaries in countries with poor human rights records experienced higher CARs, particularly for companies based outside the United States.[207] Regression analysis supported this finding, indicating that foreign firms operating in countries with worse human rights records enjoyed more substantial boosts in stock prices post-*Kiobel*.[208] U.S.-based firms—who potentially were potentially still subject to the ATS—did not see the same rise of CAR.[209] The study suggests that the *Kiobel* decision had a noticeable economic impact, particularly benefiting foreign companies with operations in countries with poor human rights records.[210] The ATS previously imposed a higher cost of doing business in such

628 (2021),) 2020 WL 6291304.

201. *Torture as Tort*, *supra* note 34, at 215–16.
202. *See* Christensen & Hausmann, *supra* note 196.
203. *Id.* at 809.
204. *Id.* at 798–804.
205. *Id.* at 804–06.
206. *Id.* at 805.
207. *Id.* at 809.
208. *Id.* at 807.
209. *Id.* at 809.
210. *Id.* at 809.

environments, a cost which the *Kiobel* ruling reduced for foreign companies.[211] This divergence in valuation between U.S. and foreign firms in adverse human rights settings underscores the economic significance of jurisdictional rules and the real monetary consequences of an expanded ATS (or the dangers of an ineffective ATS). While companies benefit from lessened litigation, these negative externalities are then borne by society.

In *Al Shimari*, the court should render punitive damages for the victims.[212] The incentives held by CACI operatives to commit the violations would be eliminated by a substantially large penalty. By imposing a large enough punitive penalty, the private contractor is possibly deterred from facilitating similar, future services to the Department of Defense.[213] More importantly, the costs incurred by CACI are likely passed on to recurring clients, including the Department of Defense, the Central Intelligence Agency, and other government agencies.[214] This will either cause more oversight in dealing with detainees or establish torture as an 'in-house' activity for the agencies involved. Regarding supervisors' negligence, if liability is found and the court renders compensatory damages, CACI would structurally reorganize and take precautions in hiring, training, and facilitating employees in a responsible position.[215] Beyond recent security sector reforms and international agreements and codes such as the Montreux Document, International Code of Conduct for Private Security Service Providers, and the Voluntary Principles on Security and Human Rights, the private security industry may be liable for violations and possibly deterred from contracting their 'interrogation experts' and procedures out to the government, as they their 'service' becomes a human rights violation.[216] As victims are not generally liable for their detention and torture, assigning all the liability, or strict liability to the perpetrator remains the most rational course of action regarding the costs of precaution.

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211. *Id.*

212. *See, e.g.*, Polinsky & Shavell, *supra* note 188, at 954(arguing that punitive damages are to be awarded if a tortfeasor has a chance of escaping liability for the harm caused and that the amount of punitive damages should be the actual damages multiplied by a factor representing the chance of escaping liability).

213. *See* Center for Constitutional Rights, *supra* note 23.

214. *See id.*

215. *See* SKINNER, *supra* note 7, at 71.

216. *See generally* Nelleke Van Amstel & Tilman Rodenhäuser, *The Montreux Documents and the International Code of Conduct: Understanding the Relationship between International Initiatives to Regulate the Global Private Security Industry* 1–3 (2016), https://www.montreuxdocument.org/pdf/DCAF-PPPs-Series-Paper_The-MD-and-ICoC-Understanding-the-Relationship.pdf.

Now this analysis turns into a macroeconomic lens. Assistant Attorney General under the Bush administration, Jack Goldsmith, and University of Chicago law professor, Eric Posner, "argue that modern human rights treaties have not significantly affected the level of human rights protection," as the present externality regime allocation often results in "either under-protection or over-abuse of human rights."[217] A market approach attempts to reallocate incentives by trading sovereignty or immunity for pecuniary or nonpecuniary awards.[218] In other words, violating actors are incentivized by aid or political favors offered by those respectively affected or by their corresponding support networks.[219] States may trade immunity and offer abusers within their borders to other countries that want to adjudicate these abusing parties.[220] In this conceived trade, victims' identities remain contingent on the informative and representational value assigned by torturers and automatically lose any value of inherent personhood.[221] These transactions undermine the 'liberal' foundations of the individual (often posited as for the greater good of society) and remain exploited for ease of trade.[222] These transactions appear nonsensical, but consider the following three examples:

1. *State A* tortures prisoners of *State B*, therefore *State B* compensates *State A* in foreign aid to terminate the torturous activity;

2. *State A* tortures its citizens, therefore human rights organizations pressure or negotiate with *State A* to terminate torturous activity;

3. *State A* shelters *Group C,* who tortures, therefore *State B* compensates *State A* in foreign aid to extricate offenders to try them in *State B's* courts.

When transaction costs are minimal and information is perfect, well-defined definitions of human rights are thought to be enough to solve externality problems, "because anyone who is negatively

217. JoonBeom Pae, Note, *Sovereignty, Power, and Human Rights Treaties: An Economic Analysis*, 5 Nw. J. INT'L HUM. RTS. 71, 77, 89 (2006).

218. *Id.* at 77–80.

219. *Id.*

220. *Id.* at 78.

221. *Id.* at 79.

222. *See id.* at 93–94.

affected can negotiate with the externality producers."[223] When international interactions are conceptualized as a functioning market, state, and non-state actors "trade their sovereignty for other benefits."[224] However, there are many problems with the market-based solution. The market solution implies that human rights cannot be fully eliminated, as abusers might find torture as an indispensable beneficial interrogation or coercive tactic.[225] Second, this market case might work well with transactions among states, who hold more bargaining power and resources.[226] Yet, non-state actors often do not hold a bargaining advantage to negotiate successfully against states or their proxies.[227] In *Al Shimari,* how could the detainees (or their support networks, including human rights organizations) negotiate with the U.S. government and CACI in preventing torture? How can society accept marketing the value of a detainee—in the process, stripping one individual of any semblance of humanity for the sake of others? Can simple arithmetic serve as a rationalization for dehumanizing some for the sake of many?[228]

Institutionalization of human rights norms is only "justified only when the benefits exceed the costs of institutionalization."[229] If society recognizes human rights as indispensable and unnegotiable, the benefits of holding abusers accountable through the jurisdiction of domestic courts are greater than institutionalization via extraterritorial jurisdiction.[230] Institutionalization requires states to contribute sufficient political and economic resources to run a 'monopolized' system of enforcement.[231] Additionally, the potential benefits of institutionalization "include the lower cost of defining human rights abuses, the lower cost of defending autonomy, and the economy of scale achieved by monopolization."[232] The costs associated with "defining what constitutes a human rights abuse decrease when a monopolized judicial body" establish the definition with preexisting international peremptory norms and domestic

223. *Id.* at 78.
224. *Id.*
225. *Id.* at 85.
226. *Id.*
227. *Id.*
228. *See* Luigi Corrias, *Crimes against humanity, dehumanization and rehumanization: Reading the case of Duch with Hannah Arendt*, 29 CANADIAN J.L. & JURIS. 351–52 (2016).
229. Pae, *supra* note 217, at 74; *see also* Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 TRANSNAT'L LEGAL THEORY 347, 374–95. (2011).
230. Pae, *supra* note 217, at 86.
231. *Id.* at 93.
232. *Id*. at 91.

guarantees without the need to negotiate.[233] Victims, who don't hold negotiating power (and are stripped of any platform at the moment of abuse), acquire a mechanism for recourse against their perpetrators. More importantly, "a monopolized judicial body makes the liability rule available, and *ex-ante* definitions of human rights can be sometimes avoided."[234] Courts who hear human rights abuses may foment more enforceability via the economies of scale mechanism—more cases may decrease trial costs as expertise and specialization are gained.[235] Therefore, a favorable ruling in *Al Shimari* might allow for precedent encouraging extended jurisdiction for U.S. Courts regarding human rights violations abroad and promulgate similar cases to come forward to be heard.

As mentioned before, institutionalization via extraterritorial jurisdiction establishes guarantees in the international anarchic system, and the notion of gained enforceability can form incentives for cooperation in upholding certain norms or activities.[236] In the previous discussion of international commercial activity, mechanisms guaranteeing cooperation are created via special arbitration contracts or extending domestic legal norms into the international sphere.[237] In other words, "non-controversial cooperative benefits are claimed to arise because it is in the long-run interests of state actors to waive or exclude immunity [(increase domestic extraterritorial jurisdiction)] to encourage contracting by private parties for purposes such as international lending to states."[238] The same argument holds for non-commercial activity, such as human rights protection. Predictable enforcement of rules allows state and non-state actors to make credible commitments against torture. The most fundamental economic rationale for the extraterritorial jurisdiction is that there "is a cooperative, Pareto-optimal welfare gain that can be made in a move from an absolute doctrine of sovereign immunity to a restrictive doctrine" (**Figure 1**).[239] This efficiency gain supposedly arises from the ability of parties to rely on judicial enforcement of transactional agreements and human rights liability.[240]

U.S. Courts must establish jurisdiction for mechanisms facilitating the transfer of future precaution to abusers via the

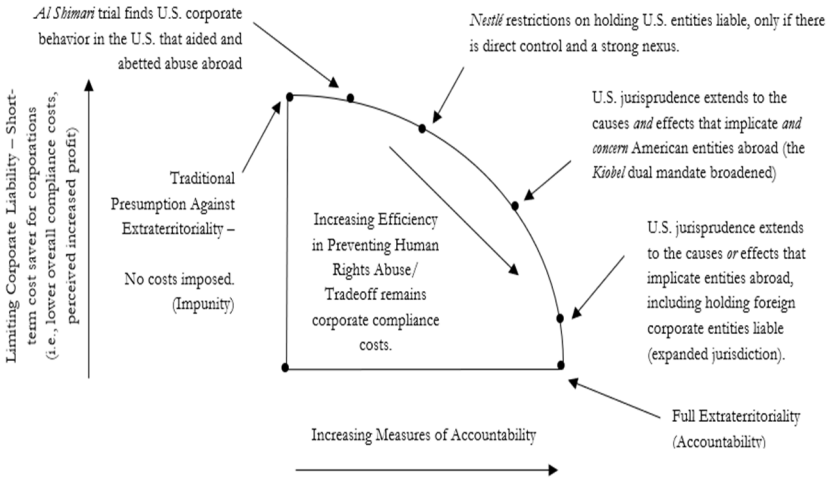
233. *Id.*
234. *Id*.
235. *Id.*
236. *See generally* Watt, *supra* note 229.
237. *Torture as Tort*, *supra* note 34, at 219.
238. *Id.* at 233.
239. *Id.*
240. *Id.*

appropriate means established by this analysis by imposing high long-term transaction costs (via punitive measures). The figure below examines the welfare gain that is made from territorial sovereignty to extraterritoriality if the Pareto-social optimum is defined as the establishment of extended court authority for subsequent enforceability. In this spectrum of institutionalization, there are trade-offs between immunity, or the benefits presumably held if any extraterritorial notion is denied by the courts, versus full extraterritoriality. The tradeoff for this social optimum is the higher short-term compliance costs that corporate entities would need to incorporate in their business model, and thus, potentially lower short-term valuations in capital markets. Between the extremes are the conceptualizations of extraterritoriality, shifting accordingly in the degree of 'allowed' extraterritorial jurisdiction. The traditional presumption against extraterritoriality (where torture occurs without any repercussions outside of U.S. soil) may shift to the regime where American jurisprudence extends to the causes and effects that implicate U.S. entities abroad (the *Kiobel* dual mandate) or may shift to the regime where U.S. jurisprudence extends to the causes *or* effects that implicate any entity (foreign or otherwise) abroad (expanded jurisdiction). Regarding *Al Shimari*, a favorable decision for the victims would fall at the second point from pure impunity, as CACI is a domestic entity that presumably harmed foreign victims abroad via corporate actors' decisions on U.S. soil. If *Al Shimari* were to be appealed and the court ultimately throws out the case in questioning once more in the application of exterritoriality, then the ATS would be effectively hindered, and in this analysis, there would be no social efficiency gain (i.e., complete impunity).

Ideally, given that human rights should be enforced no matter the citizenship of the victim and jurisdictional limitation, the courts would adopt a decision that would allow for full extraterritorial jurisdiction via the ATS (recognizing non-citizens as persons able to bring claims).[241] Unfortunately, due to the risk of U.S. corporate short-term shareholder maximization interests along with the presumption against extraterritoriality, U.S. courts effectively limit the ATS.[242] Ultimately, if there is a move from territorial sovereignty to extraterritoriality, this transition favors social optimum regarding the proliferation of human rights violations (i.e., fewer violations) rather than corporate welfare in the short run by skirting this mechanism of accountability.

241. Kamal, *supra* note 21, at 1089–90.
242. *See id.*

Figure 1. Pareto Efficiency Curve of Extraterritorial Jurisdiction Expansion for U.S. Courts.



Al Shimari presents a crucial juncture in understanding the interplay between macroeconomic factors and legal frameworks in addressing corporate engagement in human rights abuses. This case not only highlights the direct implications of torture on victims but also underscores the broader ramifications such as the dissemination of unreliable information, the potential for retaliatory violence, and the degradation of global security. The ATS, as a financial and regulatory deterrent, plays a pivotal role in shaping corporate behavior, especially in scenarios where human rights abuses might otherwise be considered economically advantageous. On a macroeconomic side, the differential impact of the ATS on U.S. versus foreign corporations reveals a nuanced dynamic where foreign firms benefitted post-*Kiobel* due to reduced litigation risks. This outcome demonstrates the market's response to legal decisions by showing the economic significance of jurisdictional rules in global human rights practices. Additionally, the outcome of this case could set a precedent for future human rights litigation, impacting corporate risk assessment, and potentially lead to more comprehensive compliance systems to avoid violations.[243] The decision reached in *Al Shimari* will not only have legal implications but will also send a strong message

243. *See generally* BARSI, *supra* note 28.

about the value placed on human rights in the face of economic interests. As such, *Al Shimari* stands as a critical test of the effectiveness of the ATS in holding corporations accountable and deterring human rights abuses on a global scale.

Conclusion

Al Shimari represents a critical juncture, where the prevailing skepticism towards extraterritorial jurisdiction casts a long shadow over the prospects of justice for victims of egregious abuses. The resolution of *Al Shimari*, along with similar cases like *Cisco Systems* in the next few months, will be instrumental in either reaffirming or significantly diminishing the role of the ATS in the broader context of U.S.-led global human rights advocacy. The outcome will not only reflect the challenges in balancing national jurisdictional boundaries and corporate short-term interests with transnational human rights obligations but will also underscore current judicial attitudes towards extraterritoriality in shaping the trajectory of international human rights enforcement.

Nevertheless, there remains a glimmer of hope for the pursuit of justice under the ATS, as the legislative landscape shows signs of evolution.[244] In May 2022, a minor development occurred with the introduction of the Alien Tort Statute Clarification Act ("ATSCA") by Senator Dick Durbin and Senator Sherrod Brown. [245] The proposed Act seeks to amend the ATS by adding a new provision that explicitly extends extraterritorial jurisdiction to cases where the defendant is a U.S. national, a lawful permanent resident, or is physically present in the United States, regardless of nationality.[246] This amendment signifies a pivotal shift, explicitly affirming that individuals subject to U.S. personal jurisdiction cannot evade accountability for human rights violations committed abroad.[247] The implications of the ATSCA are profound—potentially negating the competitive edge enjoyed by corporations that engage in human rights abuses over those that adhere to human rights norms.[248] The Act may align with Biden's objectives for U.S. foreign policy and economic interests, promoting a more equitable and accountable global business environment.[249] In

244. Petch, *supra* note 29, at 420–21.

245. Alien Tort Statute Clarification Act, S. 4155, 117th Cong. (2022).

246. Petch, *supra* note 29 at 420–21.

247. *Id.*

248. *Id.* at 421.

249. Press Release, Antony J. Blinken, Sec'y of State, A Foreign Policy for the American People (Mar 3, 2021), https://www.state.gov/a-foreign-policy-for-the-

the meantime , plaintiffs and human rights advocates may have to navigate alternative legal pathways for redress and accountability, including leveraging statutes with explicit extraterritorial reach, such as the Torture Victim Protection Act—which allows for federal action against individual perpetrators of torture—and the Trafficking Victims Protection Reauthorization Act—addressing slavery and human trafficking.[250] However, these statutes have their limitations, and may not extend to corporate entities, nor address a full spectrum of human rights.[251]

Ultimately, a favorable ruling for the plaintiffs in *Al Shimari* might allow for precedent in encouraging more litigation regarding human rights violations abroad, institutionalizing enforcement via the courts, and revitalizing the ATS. Otherwise, exclusivity becomes a tool of subjugation. U.S. courts maintain an artificial boundary between those who are recognized to access remedies and those who are not even recognized as viable subjects. If the United States pretends to hold invaluable the liberal notions related to the promulgation of human rights, U.S. jurisprudence must act by recognizing the rights of those affected by U.S. entities aboard. No actor in contemporary American society should participate in activities that subvert the fundamental notions enshrined within the nation's progressive project. Particularly in the context of today's war on terrorism, a lack of judicial accountability undermines liberal democracy and threatens not only the citizen but also the mere individual.[252] Courts must hold CACI responsible for committing torturous acts and impose punitive damages to discourage future cases of torture committed abroad in the hands of U.S. entities. Human rights violations must not be met with impunity—no matter the territory, actor, and corporate incentive involved.

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250. 18 U.S.C. §§ 1595(a), 1596, 1581, 1583.

251. MONNHEIMER, *supra* note 39, at 314–19.

252. Guillermo O'Donnell, *The Quality of Democracy: Why the Rule of Law Matters*, 15 J. DEMOCRACY 32 (2004).