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The Torturers: Evaluating the Senate Select Intelligence Committee's Torture Report and Assessing the Legal Liability of "Company Y" Under the Alien Tort Statute

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EVALUATING THE SENATE SELECT
INTELLIGENCE COMMITTEE’S
TORTURE REPORT AND ASSESSING
THE LEGAL LIABILITY OF
“COMPANY Y” UNDER THE ALIEN
TORT STATUTE

David J. Satnarine*

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INTRODUCTION

In December 2014, the U.S. Senate Select Committee on Intelligence (hereinafter SSCI) released an unclassified, but heavily redacted, report on the Central Intelligence Agency's (hereinafter CIA) Interrogation and Detention Program. The details of the report revealed a concentrated effort by CIA officials and private contractors to conduct unauthorized and illegal interrogation tactics on detainees deemed to be of intelligence value. The report explains in graphic and lurid detail the enhanced interrogation techniques used by private military contractors that amount to inhumane forms of torture and abuse. Under the program, the CIA effectively outsourced its interrogation program to a private military corporation under the pseudonym 'Company Y' as CIA officials continually shuffled detainees through different "Black Sites"¹ throughout the world

¹ See Jane Mayer, *The Black Sites*, NEW YORKER, Aug. 13, 2007, at 46; Sheryl Gay Stolberg, *President Moves 14 Held in Secret to Guantanamo*, N.Y. TIMES, Sept. 7, 2006 (describing "black sites" as secret CIA installations designed to escape the reach of domestic law).

in order to evade the reach of U.S. law. This analysis seeks to argue that ‘Company Y’ is responsible for its role in the use of inhumane and tortious interrogation techniques during the CIA’s Interrogation and Detention Program under the Alien Tort Statute. Furthermore, this analysis will seek to reconcile case law in light of the Supreme Court’s decision in *Kiobel v. Royal Dutch Petroleum Co., et. al.*², and subsequent court decisions opining on the extraterritorial reach of the Alien Tort Statute. Significantly, this analysis will also answer questions left open in the *Kiobel* decision by arguing that corporate entities, such as Company Y, may be held liable in U.S. courts for violations of international law. Although the *Kiobel* decision strongly indicated that corporate liability may attach under the Alien Tort Statute (hereinafter ATS) if there is a sufficient nexus to the United States, the court ultimately left open two questions of law: (1) whether corporations could be liable for tortious conduct under the ATS, and, if so, (2) under what circumstances the ATS could apply to conduct occurring outside the geographic territory of the United States. Notably, circuit courts disagree as to whether corporate liability exists under international law, and, if it does, how to determine whether such liability results in a colorable ATS claim. Lastly, this analysis will determine the extent to which a plaintiff could hold Company Y liable for tortious conduct occurring in territories outside the United States under the ATS.

I. OPERATIONAL DEFINITIONS AND THE INTERNATIONAL PROHIBITION AGAINST TORTURE

A. Defining Customary International Law, The Law of Nations, and *jus cogens* Norms

The intersection of *jus cogens* norms, Customary Practice, and International Corporate Liability are critical to the issue of whether a private military corporation can be held liable for a violation of *jus cogens* or customary international law under the ATS. Therefore, in order to fully appreciate the breadth of this analysis, we must first operationally define some core

² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) [hereinafter *Kiobel II*].

international and domestic legal principles. The term *jus cogens* references a specific set of international norms that are so fundamental and integral to international law that a nation may not violate them under any circumstances. Unlike rules created by customary practice, a declaration or treaty will not refute the imposition of the norm upon a state. These norms are not always codified, but the Vienna Convention on the Law of Treaties ("VCLT") specifically acknowledges them. Article 52 of the VCLT defines *jus cogens* as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."³ Examples of these norms include acts such as "trade in slaves, piracy or genocide . . . [and] treaties violating human rights."⁴ Moreover, *jus cogens* violations go beyond individual liability of the perpetrator. The ILC Draft Articles on The Responsibility of States for Wrongful Conduct, as well as various international tribunals impute liability for violations of these norms upon the state itself when an "organ" of the state is the perpetrator.⁵ International Conventions codifying certain *jus cogens* such as the Torture Convention and the Genocide Convention both impose liability of these violations extraterritorially since they are not just violations of an individual, but violations against the international community as a whole.⁶

³ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), reprinted in 8 I.L.M. 679 (1969) and 63 AM. J. INT'L L. 875 (1969) (Although the United States has not ratified the Vienna Convention, the United States considers many of the treaty's provisions as customary international law).

⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentaries, Chapter III, at n. 641, in *Report of the International Law Commission on the Work of Its Fifty-third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001); see also *id.* at art. 40, ¶¶ 4-6 (citing examples of *jus cogens* norms as the prohibition of aggressive wars, slavery and the slave trade, genocide, racial discrimination and apartheid, torture, the basic rules of international humanitarian law as applied to the law of armed conflict, and the principle of self-determination).

⁵ *Id.* at art. 4(2); see also *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1985 I.C.J. 14 (June 27) [hereinafter *Nicaragua v. United States*]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Hertz v. Serb. & Mont.) (Judgment of Feb. 26, 2007) [hereinafter *Bosnia v. Serbia*]; *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶123 (Int'l Crim. Trib. for the Former Yugoslavia, July 15, 1999) [hereinafter *Prosecutor v. Tadic*].

⁶ Sévrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 NW.

Customary International Law refers to a regime of “international custom, as evidence of a general practice accepted as law” which constitutes evidence of a customary rule.⁷ Although this regime is not codified or considered as so fundamental and general to be considered a *jus cogens* norm, states adhere to these rules as a matter of *opinio juris* (belief that the rule or norm is legally binding) or *opinio necessitates* (state practice).⁸ In *The Paquete Habana*,⁹ the United States Supreme Court further defined customary law by holding that it is the “customs and usages of civilized nations” evidenced by works of jurists and commentators who have garnered significant expertise in the subject matter of international law.¹⁰ Notably, the International Court of Justice (ICJ) has held that when such a practice rises to the level of “Customary Practice,” then it is binding upon all Nation States.¹¹ Although it is difficult to ascertain a precise definition of what constitutes sufficient state practice, the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic*, provides guidance by stating

... appraising the formation of customary rules or general principles one should therefore be aware that, on the account of the inherent nature of this subject matter, reliance must be primarily placed on such elements as official pronouncements of States, military manuals and judicial decisions.¹²

These articulations of Customary International Law emphasize the difficulty in ascertaining a precise definition of at

U. J. INT'L HUM. RTS. 149 ¶¶ 13-15; *see also* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, arts. 5, 7, Dec. 10, 1984, 1456 U.N.T.S. 85 [hereinafter CAT]; Geneva Convention Relative to the Treatment of Prisoners of War, arts. 49, 50, 129, 146, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. In the U.S., the Torture Victim Protection Act is an example of national legislation providing such form of extraterritorial jurisdiction (*see infra* Section IV.B).

⁷ Mark E. Villiger, *Customary International Law and Treaties*, 3 (1985).

⁸ Art. 38(1)(b) I.C.J. Statute, June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993.

⁹ *The Paquete Habana*, 175 U.S. 677 (1900).

¹⁰ *Id.*

¹¹ *North Sea Continental Shelf Cases (Fed. Rep. of Ger. v. Neth.)*, 1968 I.C.J., ¶¶ 37-38 (Apr. 26 1968) [hereinafter *North Sea Continental Shelf Cases*].

¹² *Prosecutor v. Dusko Tadic a/k/a/ "Dule"*, Case No. IT-94-1-A, Judgment, ¶123 Int'l Crim. Trib. for the Former Yugoslavia (July 15, 1999).

what point a practice becomes binding custom.¹³ However, each of these definitions parallel a workable approach best articulated by the Restatement Third which describes customary law “as resulting from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁴ Thus, no precise timetable is set for when a custom achieves legal status; the Commentaries on the Restatement contend that a practice can often achieve customary law status within a short period of time through international acceptance of its legality.¹⁵

B. International and Domestic Prohibition Against Torture

The actions of Company Y, which with the CIA, include heinous violations of customary international law. Numerous reports by public entities and non-governmental organizations have documented the torture and abuse conducted on detainees within the CIA’s Interrogation and Detention program.¹⁶ Importantly, international condemnation of torture has been recognized since before the mid-1900’s, and formal prohibition of torture has been codified as customary international law in various international tribunals.¹⁷ Federal courts recognize the

¹³ Restatement (Third) of the Foreign Relations Law of the United States, §102, 702 (1987) (hereinafter “Restatement”).

¹⁴ Restatement § 102(2).

¹⁵ Restatement § 102 comment a; *see also*, North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.), Merits, 1969 I.C.J. 3, ¶¶ 71, 73–74 (Feb. 20).

¹⁶ This analysis includes only brief summations of the type of heinous violations inflicted upon detainees within the CIA’s Interrogation and Detention program. For a detailed account of these violations *see generally*, U.S. Senate, Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program* (S. Rept. 114-8) Washington, Government Printing Office, 2015 [hereinafter *SSCI Report*]; *see generally* Amnesty International, *USA Crimes and Impunity: Full Senate Committee Report On CIA Secret Detentions Must Be Released, And Accountability For Crimes Under International Law Ensured*, London (Apr. 2015), http://www.amnestyusa.org/sites/default/files/cia_torture_report_amr_511432_2015.pdf [hereinafter *Amnesty Int’l Report*].

¹⁷ *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights, art. 5(2), Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples’ Rights, art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5; *see also* *Nicaragua v. United States*, 1986 I.C.J. 14, 255; *Prosecutor v. Dusko Tadic a/k/a/ “Dule,”* Case No. IT-94-1-I, Decision on

international prohibition against torture and have continually reinforced its status as customary international law.¹⁸ Although corporations are not liable under the Torture Convention,¹⁹ corporations are nevertheless liable under other statutes and common law remedies for torture, as this analysis will further develop.²⁰

C. The History of the ATS and its Application in U.S. Courts

In 1789, Congress enacted Section 9 of the First Judiciary Act. This provision provided, among other things, that federal jurisdiction shall have “cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes of action where an alien sues for a tort only in violation

the Defence Motion on Jurisdiction, 65–74 (Aug. 10, 1995).

¹⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, (2004) (“[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind”) *citing* *Filartiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (torture “violates universally accepted norms of the international law of human rights); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 716 (9th Cir. 1992) (international prohibition against torture is undisputed); Restatement (Third) of the Foreign Relations Law of the United States §102, (1987) (Torture is an international crime and the prohibition against torture constitutes a *jus cogens* norm).

¹⁹ *See* *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012).

²⁰ *See, e.g.*, Universal Declaration of Human Rights, art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, S. Treaty Doc. 95-20 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] (ratified by the United States on June 8, 1992); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, S. Treaty Doc. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT] (ratified by the United States on Oct. 21, 1994); Geneva Convention Relative to the Treatment of Prisoners of War, arts. 3, 13, 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (ratified by the United States on Aug. 2, 1955); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 3, 32, 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] (ratified by the United States on Aug. 2, 1955); *see also* *Romero v. Drummond Co., Inc.* 552 F.3d 1303, 1315 (11th Cir. 2008) (finding that corporations may be liable under the ATS for torture); *Mwani v. Al Qaeda*, No. CV 99-125 (JMF), 2014 WL 4749182, at 9 (D.D.C. Sept. 25, 2014) (holding that ATS jurisdiction is “best read as having been enacted on the understanding that the common law would provide a cause of action.” Therefore, federal courts may “recognize private claims [for such violations] under federal common law”).

of the law of nations, or a treaty of the United States.”²¹ While Congress has modified this provision over time, it is presently recognized as the Alien Tort Statute (ATS).²² Although there is little legislative history available for the ATS, its inclusion in the First Judiciary Act strongly indicates that the fledgling United States sought to alleviate concerns that it would not be able to uphold its treaty obligations.²³ Prior to the 1980s, the ATS had been rarely litigated. The first two cases occurred in the late 18th century and dealt primarily with admiralty cases.²⁴ The statute was once against invoked in *O'Reilly De Camara v. Brooke*²⁵ dealing with the U.S. occupation of Cuba, but remained virtually dormant for almost one hundred years thereafter.

In 1980, the ATS was revived in *Filartiga v. Peña-Irala*.²⁶ The *Filartiga* case centered around alleged violations of international customary law that occurred overseas in the Republic of Paraguay. The plaintiff alleged that Peña-Irala, the defendant, kidnapped, tortured, and murdered her brother while he was serving as Inspector General of the Paraguayan police force in Paraguay in violation of the law of nations.²⁷ The

²¹ Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789); 28 U.S.C. § 1350

²² See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 115-17 (2d Cir. 2010) [hereinafter *Kiobel*] (noting that after its passage by the first Congress in 1789, the ATS laid largely dormant for over 170 years,” and relating the subsequent interpretation of the ATS by courts), *aff'd*, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 185 L. Ed. 2d 671, 81 U.S.L.W. 4241 (2013).

²³ *Alvarez-Machain*, 542 U.S. 692); see also 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, 13 (1985); Thomas B. Harvey, *Wrapping Themselves in the American Flag: The Alien Tort Statute, Private Military Contractors, and U.S. Foreign Relations*, 53 ST. LOUIS U. L.J. 247, 262 (2008).

²⁴ See *Moxon v. The Fanny*, 17 F. Cas. 942 (No. 9, 895) (D.C. Pa. 1793); *Bolchos v. Darrel*, 3 F. Cas 810 (D.S.C. 1795) (No. 1607).

²⁵ *O'Reilly De Camara v. Brooke*, 209 U.S. 45, 51 (1908).

²⁶ *Filartiga*, 630 F.2d 876 (2d Cir. 1980). Minor court decisions dealt with ATS claims prior to *Filartiga*, but the *Filartiga* decision became a key precedent in the evolution of the ATS. For prior application of the ATS in the 20th century, see *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978); *Huyn Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978).

²⁷ *Id.* at 878-79 (*Filartiga* alleged that Peña-Irala violated the U. N. Charter; the Universal Declaration on Human Rights; the U. N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations.); *Filartiga*, 630 F.2d 876, 879 (2d Cir. 1980).

Second Circuit concluded that the law of nations was to be interpreted as a “constantly evolving” body of law rather than a static sphere of rights.²⁸ Moreover, the court held that ATS did not create new rights, but rather conferred upon the courts the right to adjudicate “rights already recognized by international law.”²⁹ Based upon this analysis, the court concluded that torture was a violation of the law of nations, and further that the ATS conferred jurisdiction to examine violations occurring outside the territory of the United States where there was personal jurisdiction over the defendants.³⁰ *Filartiga* launched a new wave of ATS litigation in U.S. Courts and opened the door to a new wave of ATS litigation that forced numerous courts to wrestle with issues of jurisdiction, international treaties, and violations of *jus cogens* and customary international law.

In 2004, the United States Supreme Court granted certiorari to clarify the scope of the ATS.³¹ The Supreme Court held that Congress enacted the ATS to be actionable and have a “practical effect” in federal courts³², and “meant to underwrite litigation of a narrow set of common law actions derived from the law of nations.”³³ Although the type of violations actionable under the ATS are limited, “Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.”³⁴

D. The *Kiobel* Complaint and Supreme Court Decisions

The *Kiobel* decisions heavily influence the outcome of a potential ATS claim against Company Y. In *Kiobel*,³⁵ the plaintiffs filed an ATS suit against Royal Dutch Petroleum Co., Shell Transport & Trading Co., Plc, and its wholly owned

²⁸ *Id.* at 885.

²⁹ *Id.* at 886.

³⁰ *Id.*

³¹ *Alvarez-Machain*, 542 U.S. at 699.

³² *Id.* at 719.

³³ *Id.* at 721.

³⁴ *Id.* at 719.

³⁵ *Kiobel*, 621 F.3d 111.

subsidiary Shell Petroleum Development Company of Nigeria Ltd.³⁶ The plaintiffs alleged that respondents contracted with the Nigerian government to eliminate opposition to oil fields in Nigerian villages by extrajudicial killings, unlawful arrest, torture, and other violations of customary international law. The petitioners also alleged that the respondents aided and abetted the Nigerian government in committing these acts by providing logistical support to the Nigerian military, including food, transportation, and allow use of respondent's property in order for the Nigerian military to stage their attacks. The Second Circuit held that since customary international law determines the scope of liability under the ATS,³⁷ the court must also examine whether civil liability against corporations existed as customary international law. According to the second circuit, in order for a norm to become a rule of customary international law it must be "specific, universal, and obligatory."³⁸ The court dismissed the plaintiff's complaint against the corporate defendants, holding that corporate liability has not risen to the level of customary international law because there were only a few historical examples and treaties that provided for such liability.³⁹

The plaintiffs appealed to the Supreme Court on the issue of international corporate liability. However, the Supreme Court ordered briefing on whether the Alien Tort Statute applied to extraterritorial conduct beyond the jurisdiction of the United States. *Kiobel v. Royal Dutch Petroleum Co.*⁴⁰ The plaintiffs subsequently argued that jurisdiction was proper under the ATS because the respondents held corporate parents within the United States.⁴¹ In *Kiobel II*, the court held that in order for jurisdiction to arise under the Alien Tort Statute, the alleged violations must sufficiently "touch and concern" the territorial jurisdiction of the United States with sufficient force to displace the presumption against extraterritoriality.⁴² In this regard,

³⁶ *Id.* at 123.

³⁷ *Id.* at 128.

³⁸ *Id.* at 131.

³⁹ *Id.* at 145.

⁴⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) [hereinafter *Kiobel I*].

⁴¹ *Kiobel II*, 133 S. Ct. 1659.

⁴² *Id.* at 1673.

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mere corporate presence alone was not a sufficient basis for application of the Alien Tort Statute and the court dismissed the complaint.⁴³

Significantly, the *Kiobel II*, left two important questions of law unanswered. First, the Supreme Court did not definitively rule on the issue of international corporate liability and whether entities such as Company Y can be held liable for violations under the Alien Tort Statute. Secondly, the *Kiobel II* decision failed to precisely articulate under what circumstances the presumption against extraterritoriality may be displaced under the ATS. Instead, the *Kiobel II* court left for “another day the determination of just when the presumption against extraterritoriality might be overcome.”⁴⁴ This analysis seeks to affirmatively answer these two questions, and will do so in a manner that persuasively allows a claim against Company Y to be brought under the Alien Tort Statute.

II. CORPORATE LIABILITY AND KIOBEL’S SEARCH FOR ATTRIBUTING LIABILITY TO A CORPORATE DEFENDANT

“Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like.”

– *Edward Thurlow, 1st Baron Thurlow.*

The Supreme Court’s decision in *Kiobel v. Royal Dutch Petroleum Co.*,⁴⁵ [hereinafter *Kiobel II*] left open fundamental questions regarding the liability of corporations under the Alien Tort Statute [hereinafter ATS].⁴⁶ Significantly, the Supreme Court did not answer the question left open in *Kiobel v. Royal Dutch Petroleum Co.*,⁴⁷ [hereinafter *Kiobel I*] of whether corporations could be liable for violations of customary international law under the ATS. In order to hold the Central Intelligence Agency corporate contractors liable for their violations of customary law, the principle of corporate liability must be addressed. Accordingly, part III of this analysis will

⁴³ *Id.* at 1669.

⁴⁴ *Id.* at 1673. (Breyer J., concurring).

⁴⁵ *Kiobel II*, 133 S. Ct. (2013).

⁴⁶ 28 U.S.C. § 1350.

⁴⁷ *Kiobel I*, 132 S. Ct. (2012).

demonstrate that corporations could be held liable for violations of customary norms in international law under the ATS. Thus, much to the chagrin of the Lord Chancellor Thurlow, corporations may be soulless legal entities, but they are not immune from the consequences of their tortious conduct.

A. International principles holding Corporations liable for tortious acts

It is an unquestionable fact that international tribunals and courts have held corporations liable for violations of customary and *jus cogens* norms. In fact, basic principles of international law demand that corporations must be held liable for violations of the law. A fundamental bedrock of international law is that an aggrieved party has a right to an effective remedy.⁴⁸ This right is established by virtually every major human rights accord.⁴⁹ Numerous international tribunals and treaties specifically attach corporate liability for tortious conduct and the wide recognition of corporate liability has elevated this principle to the status of customary international law. The question of international corporate liability first received significant attention within the Second Circuit. In *Kiobel v. Royal Dutch Petroleum Inc.*, the Second Circuit Court of Appeals stated “no international tribunal of which we are aware has ever held a corporation liable for a violation of the law of nations.”⁵⁰ However, this assertion has been greatly criticized by scholars and other courts.

⁴⁸ *Factory At Chorzow (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 29, (Sept. 13).

⁴⁹ See UDHR, *supra* note 18, at art. 8 (“Everyone has the right to an effective remedy . . . for acts violating the fundamental rights granted him”); see also *id.* at art. 14; ICCPR, *supra* note 18, arts. 2(3), 9(5), 14(6) (ensuring remedies and compensation for wrongful convictions and imprisonment); Convention on the Elimination of All Forms of Racial Discrimination, art. 6, Mar. 7, 1966, 660 U.N.T.S. 195 (“State Parties shall assure to everyone within their jurisdiction effective protection and remedies”); see also Int’l Comm’n of Jurists, Written Statement to the Ad-Hoc Committee on the Disability Rights Convention, Need for an Effective Domestic Remedy in the Disability Rights Convention, Jan. 2005, <http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5icj.rtf>. (“The right to an effective remedy is so firmly enshrined . . . that any credible modern human rights treaty has to incorporate it.”).

⁵⁰ *Kiobel*, 621 F.3d at 132.

A number of domestic courts are vehemently critical of the assertion that international law does not proscribe corporate liability. In *Flomo v. Firestone Nat. Rubber Co., LLC*, the Seventh Circuit explicitly stated “[t]he factual premise of the majority opinion in the *Kiobel* case is incorrect.”⁵¹ Moreover, in *In re S. African Apartheid Litig.*, the district court also questioned the validity of the *Kiobel*’s assertion, and explicitly stated that “the court’s conclusion that customary international law does not recognize [corporate liability] is factually and legally incorrect.”⁵² In fact, scholars and judges point to a number of international tribunal decisions, including the very same tribunal cited by the *Kiobel* court to demonstrate that corporations are liable for customary international law and *jus cogens* violations.

In the aftermath of World War II, the international community sought to bring each perpetrator of the heinous humanitarian violations and war crimes to justice. The swift force of justice that ensued after World War II was not only directed at individuals, but also towards corporations and other financial institutions that played a part in facilitating the atrocities that occurred in Germany. While historians correctly assert that only individuals were tried at the Nuremberg Trials,⁵³ it does not follow that no corporation was ever held accountable for their role in those atrocities. For instance, in the judgments against executives of IG Farbenindustrie and Krupp, the court specifically admonished two corporations for their role in violating international law by stating:

We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German-inspired anti-Jewish laws and its subsequent detention by the Krupp firm constitute a violation of Article 48 of the Hague Regulations which requires that the laws in force in an occupied country be respected; that it was also a violation of Article 46 of the Hague Regulations

⁵¹ *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1017 (7th Cir. 2011).

⁵² *In re S. African Apartheid Litig.*, 15 F.Supp.3d 454, 464 (S.D.N.Y. Apr. 17, 2014).

⁵³ Brief Amici Curiae of Nuremberg Historians and International Lawyers in Support of Neither Party, at 10; *Kiobel I*, 132 S. Ct. 472 (2011) (arguing that Corporate officers, but not the corporation itself was tried at Nuremberg).

which provides that private property must be respected; that the Krupp firm, through defendants . . . voluntarily and without duress participated in these violations . . . and that there was no justification for such action.⁵⁴

Moreover, in *Flomo v. Firestone Nat. Rubber Co., LLC*, the court cited to the Allied Control Council Laws ordering the liquidation of assets of corporations found to assist the Nazi war crimes.⁵⁵ Consequently, the lack of corporate prosecution at Nuremberg stemmed not from a void of international law, but rather a recognition by Allied policy makers that “political and economic stability [in Germany after World War II] could only be achieved with the participation of German industry run by the same managers, regardless of culpability.”⁵⁶ In spite of this, corporate liability as customary international law is not dependent on the authority of international tribunals. Instead, the norm exists separate and apart from an adjudicator.

An anchored reliance on international tribunals to determine what actions constitute customary international law is largely untenable and contradicts the essence of customary international law. Customary International law is not defined by decisions of international tribunals, rather it exists independent of tribunals and is applied to specific facts examined by those tribunals.⁵⁷ It is significant to note that

⁵⁴ *United States v. Krupp*, IX Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1351-52 (1952).

⁵⁵ *Flomo*, 643 F.3d at 1017; In re S. African Apartheid Litig., at 465; see also Control Council Law No. 2, “Providing for the Termination and Liquidation of the Nazi Organizations,” Oct. 10, 1945, reprinted in 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 131 (1945); Control Council Law No. 9, “Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof,” Nov. 30, 1945, reprinted in 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 225, http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf (last visited Mar 13, 2015).

⁵⁶ Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1121 (2009).

⁵⁷ *Flomo*, 643 F.3d at 1017 (holding that norms and remedies for customary norms are not created by international tribunals but instead, only enforced by them); see also Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 476 (2001) (stating that “the presence of a court holding a state responsible has never been the linchpin

customary international law is not necessarily predicated on the practice *between* states, but instead, recognized as the practice *of* states.⁵⁸ Moreover, since no precise timeline is necessary for a norm to be deemed “custom,” a practice can develop into a custom in a relatively short period of time if a sufficient number of states embrace that norm as a legal responsibility.⁵⁹ The International Court of Justice has opined on this very fact, and held that the ‘widespread and representative’ adoption of a conventional/treaty rule by non-signatory states, coupled with only the passage of a ‘short period’ of time, was all that was required to transform conventional international law into customary international law.”⁶⁰ Accordingly, it is state practice and their *opinion juris* (official pronouncements) that demonstrate whether corporate liability exists as a customary norm.⁶¹

State practice and their official pronouncements demonstrate that corporate liability is a customary norm. Instructively, the United States Supreme Court held that federal courts should recognize claim “based on the present-day law of nations if those claims rest on norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.”⁶² Accordingly, the principle of corporate liability is firmly rooted in the customary norm of holding actors responsible for their violations of the law. First, virtually every legal system holds corporations liable for their actions.⁶³ In fact,

of the obligation itself.”).

⁵⁸ North Sea Continental Shelf Cases at ¶¶ 37-38; Statute of the I.C.J. art. 38; *see also* Restatement (Third) Of the Foreign Relations Law of the United States, sections 102, 702 (1987); Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, EUR. J. INT’L L. 21, 173-204, 180 (2010).

⁵⁹ Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, EUR. J. INT’L L. 21, 173-204, 180 (2010).

⁶⁰ North Sea Continental Shelf Cases at ¶ 41.

⁶¹ *See also* Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993 [hereinafter ICJ Statute] (Customary international law is the law of civilized nations).

⁶² *Alvarez-Machain*, 542 U.S. at 725 (2004) (internal citations and quotations omitted).

⁶³ *See* First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 628-29, n.20 (1983); *see also Exxon*, 654 F.3d at 53 (holding

many nations have reached further than civil liability for corporations and have adopted domestic laws that proscribe both civil and criminal liability on corporations.⁶⁴ Accordingly, the widely universal practice of corporate liability in nation states demonstrates the requisite state practice element of a customary norm. Secondly, the majority of nations have embraced international corporate liability through treaties, United Nations Resolutions, and international accords.⁶⁵ For example, numerous treaties related to environmental law and pollution specifically impose liability on corporate actors.⁶⁶ These obligations directly implicate a corporation's responsibility under a web of legally binding international responsibilities. Moreover, the widespread adoption and ratification of the various environmental treaties indicate that corporations are not exempt from liability under international law.

Even assuming *arguendo* that the ATS requires corporate liability to be established by international tribunals, a number of international tribunals have expressly held corporations liable for civil and criminal violations. In the *Barcelona Traction* case, the International Court of Justice explicitly held

that corporate liability is an essential element of "legal personhood."); *see also* The *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 38-39 (Feb. 5) (holding that the "wealth of practice" across domestic legal systems hold corporations liable for torts such as fraud or malfeasance).

⁶⁴ See Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 130 (2008) (arguing that comparative regimes of corporate liability hold corporations liable for violations of law, including through administrative regulations and civil remedies); *see also*, Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe? Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L L. 259, 283 (2012) (emphasizing the rise of criminal corporate responsibility in across the European Union and other countries); *see, e.g.*, Schweizerisches Strafgesetzbuch [StGB], CODE PENAL SUISSE [CP], CODICE PÉNAL SVIZZERO [CP] [PENAL CODE] 2003, SR 311, RS 311, art. 102 (Switz.) (Updating Switzerland's Penal Code to include Criminal Liability for Corporations).

⁶⁵ See U.N. Office of Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, ¶ 243 (2004) (discussing various international treaties and United Nations Resolutions pronouncing that corporations should be liable for tortious conduct).

⁶⁶ Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 480 (2001) (discussing several environmental treaties imposing liability on ship owners for environmental pollution).

that a corporation can be held civilly liable for their actions through a fundamental principles of international law – namely the right to an effective remedy.⁶⁷

Accordingly, the European Court of Justice has held corporations civilly liable for acts such as discrimination on the basis of nationality.⁶⁸ In the criminal context, the Special Tribunal for Lebanon (“STL”) specifically examined whether it had authority to hold a corporation liable for obstruction of justice charges pursuant to its United Nations Security Council Mandate.⁶⁹ The Lebanese International Tribunal held that “the principles of interpretation laid down in customary international. . . international standards on human rights [and] general principles of international criminal law and procedure . . . “ allowed the court to charge the corporate defendants with obstruction of justice.⁷⁰ The cumulative breadth of these decisions demonstrates that international tribunals are increasingly likely to hold corporations liable for unlawful conduct in both the civil and criminal settings. Moreover, these cases also demonstrate that the distinction between “natural” and “legal” personhood is dissolved when international courts seek to enforce remedies for international violations.

In light of the preceding, it is clear that the practice of the majority of civilized nations deems corporations liable for

⁶⁷ The Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 38-39 (Feb. 5); *Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13) (“It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation”); Velásquez-Rodríguez v. Hond., Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶¶ 62- 64 (July 21, 1989); *see also* Garrido & Baigorria v. Arg., Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 40 (Aug. 27, 1998); *accord*, Durand & Ugarte v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 89, ¶ 24 (Dec. 3, 2001) (“[A]ny violation of an international obligation carries with it the obligation to make adequate reparation.”); Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, 101.

⁶⁸ Case 36/74, Walrave v. Association Union Cycliste Internationale, 1974 E.C.R. 1405, 1419, and gender; Case 43/75, Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, 1976 E.C.R. 455, 457-63.

⁶⁹ S.C. Res. 1664, S/RES/ 1664 (Mar. 29, 2006).

⁷⁰ Special Tribunal for Lebanon, In the Case against Akhbar Beirut S.A.L. and Al-Amin (Contempt Judge), Case No. STL-14-06/I/CJ, ¶ 20 (31 Jan. 2014), <http://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06/filings-stl-14-06/3091-f0001-1406>.

unlawful conduct. Moreover, states have evidenced these legal commitments through international agreements and binding domestic law. These components demonstrate the two essential elements of a customary norm. International Tribunals have translated this norm into enforceable judgments against corporations, which imposes fines, liquidation, and regulatory action for a corporation's tortious conduct. Thus, there is ample evidence of corporate liability in customary international law.

B. Corporate Liability Under the Alien Tort Statute in Federal Common Law

While it is axiomatic that corporations can be held liable violations of customary and *jus cogens* norms, the issue of whether liability can attributed to corporations under the Alien Tort Statute is less certain. In *Kiobel I*, the Supreme Court ordered briefing on the issue of international corporate liability.⁷¹ However, in *Kiobel II*, the court affirmed the Second Circuit's dismissal of the plaintiffs' claims on other grounds.⁷² As a result, lower courts have struggled with the Supreme Court's ambiguous holdings regarding corporate liability under the ATS. In spite of this, there is significant harmony among the federal circuit courts that corporations could be held liable under the ATS. Moreover, some scholars even argue that the Supreme Court acknowledged the existence of corporate liability under the ATS when it assumed jurisdiction over the corporate defendants in *Kiobel II*. Therefore, as this analysis will posit, the near unilateral consensus among the federal circuit courts demonstrate that corporate liability can be attributed to entities, such as military corporations under the ATS.

Prior to the Supreme Court's decision in *Kiobel II*, the Seventh, Ninth, Eleventh, and D.C. Circuit Court of Appeals had each decided that corporations could be held liable for law of nations violations under the ATS. In fact, prior to *Kiobel II*, only the Second Circuit had determined that corporations were immune from liability under ATS. However, since *Kiobel II*, district courts within the Second Circuit have revisited the issue and have definitively concluded that corporations could be held

⁷¹ *Kiobel I*, 132 S. Ct. at 1738.

⁷² *Kiobel II*, 133 S. Ct. at 1668-69.

liable under the ATS. Therefore, the virtual unanimity among the courts that have addressed this issue establishes a clear rule of law that corporate defendants should be held liable for violations of customary and *jus cogens* norms.

After the Supreme Court's decision in *Sosa v. Alvarez-Machain*,⁷³ two circuit court opinions initially addressed the issue of corporate liability in international law. First, in *Romero v. Drummond Co., Inc.*,⁷⁴ the corporate defendants could be held liable under the ATS since extrajudicial killings are a violation of the law of nations.⁷⁵ Secondly, in *Flomo v. Firestone Nat. Rubber Co., LLC*, the plaintiffs alleged that Firestone Natural Rubber Company through its Liberian subsidiary that operated a rubber plantation in Liberia violated a number of customary and *jus cogens* norms, and brought an ATS suit against the U.S. parent company.⁷⁶ The *Flomo* court held that corporate liability was not precluded under the ATS because international law has recognized principles of corporate liability.⁷⁷ Moreover, the *Flomo* court argued that even assuming no international court has ever held a corporation liable for customary international law violations, there has to be a first time for a court to enforce a customary norm. To decide otherwise would eviscerate any possible future enforcement of a customary law violation.⁷⁸

Two other circuit courts also examined the issue of corporate liability issue under the ATS and reached similar conclusions on different grounds. In *Sarei v. Rio Tinto, PLC*,⁷⁹ the Ninth Circuit determined that examination of ATS claims required a two-step approach.⁸⁰ First, a court should consider each violation of international law to determine whether the violation is sufficiently "specific, universal and obligatory."⁸¹ Once a court determines that the alleged conduct violates a customary or *jus cogens* norm, federal common law allows the court to hold the

⁷³ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁷⁴ *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008).

⁷⁵ *Id.* at 1316.

⁷⁶ *Flomo*, 643 F.3d at 1017.

⁷⁷ *Id.* at 1017 (7th Cir. 2011).

⁷⁸ *Id.* at 1017.

⁷⁹ 671 F.3d 736 (9th Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 1995 (2013).

⁸⁰ *Id.* at 748.

⁸¹ *Id.*

actors and their employers responsible for the tortious conduct.⁸² From this perspective, the remedies available for violations of customary or *jus cogens* norms are found in the federal common law.⁸³ Additionally, the *Sarei* court found that not only could corporate defendants be liable for violations of customary or *jus cogens* norms, but that they could also be held liable for aiding and abetting liability through federal common law.⁸⁴ Although the *Sarei* opinion was not the first Circuit decision to directly address corporate liability under the ATS, it was the first to examine the distinction between jurisdiction and federal common law liability under the ATS.

The D.C. Circuit has also held that corporations could be liable under the ATS pursuant to federal common law. In *Doe v. Exxon Mobil Corp.*,⁸⁵ the plaintiffs alleged that foreign corporate subsidiaries of Exxon Mobil hired security forces that committed “murder, torture, sexual assault, battery and false imprisonment” against villagers in Indonesia.⁸⁶ The plaintiffs also alleged that Exxon security forces comprised of Exxon employees and members of the Indonesian military, even though Exxon management was aware that the security forces committed heinous human rights abuses in the past. Moreover, the *Doe* complaint argued that the actions of the Indonesian military could be attributed to Exxon because the soldiers were comprised of a unit dedicated to securing Exxon’s facilities in the region and were subject to command and control by Exxon employees.⁸⁷ In concluding that Exxon could be held liable under the ATS, the D.C. Circuit determined that “customary international law does not provide the rule” to determine whether corporations could be held liable under the ATS.⁸⁸

⁸² *Id.* at 751.

⁸³ *Id.* at 752; see also Efrain Staino, *Suing Private Military Contractors for Torture: How to Use the Alien Tort Statute Without Granting Sovereign Immunity-Related Defenses*, 50 SANTA CLARA L. REV. 1277, 1285 (2010) (arguing that proper application of the *Sosa* precedent requires courts to provide Federal Common Law remedies to ATS violations).

⁸⁴ *Id.*

⁸⁵ *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 50 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App’x 7 (D.C. Cir. 2013).

⁸⁶ *Id.* at 16.

⁸⁷ *Id.*

⁸⁸ *Id.* at 41.

Instead, the issue of corporate liability under the ATS is distinct from whether a violation of a customary or *jus cogens* norm occurred. Accordingly, the court must look to the federal common law to determine the remedies available for ATS violations.⁸⁹ Therefore, the *Doe* court held that since the common law at the time of the passage of the ATS recognized corporate liability, congress therefore anticipated corporate liability as a remedy for an ATS violation.⁹⁰

The Second Circuit is the only Circuit Court to reach a different conclusion than others regarding corporate liability under the ATS. Prior to the Supreme Court's ruling in *Kiobel I*, the Second Circuit initially addressed the question of corporate liability. In *Kiobel v. Royal Dutch Petroleum Co.*, the court determined that corporations could not be held liable under the ATS.⁹¹ In reaching this conclusion, the stated:

Our recognition of a norm of liability as a matter of *domestic law*, therefore, cannot create a norm of customary international law. In other words, the fact that corporations are liable as juridical persons under domestic law does not mean that they are liable under international law (and, therefore, under the ATS). Moreover, the fact that a legal norm is found in most or even all "civilized nations" does not make that norm a part of customary international law.⁹²

According to the court's argument, a corporation can only be held liable under the ATS if corporate liability is a norm of customary international law.⁹³ The court went on to conclude that international law recognized only individual liability for violations of international law, and since no corporation has ever been held liable for a violation of international law by an international tribunal, there is no customary norm of corporate liability.⁹⁴

Some courts within the second circuit have adopted the position that corporations are not liable under the ATS. For example, in *Tymoshenko v. Firtash*, the district court rejected

⁸⁹ *Id.*

⁹⁰ *Id.* at 48.

⁹¹ *Kiobel*, 621 F.3d at 118.

⁹² *Id.*

⁹³ *Id.* at 131.

⁹⁴ *Id.* at 119, 132.

the plaintiff's argument that "because the Supreme Court did not expressly foreclose corporate liability, their ATS claim against [a corporate defendant] may proceed."⁹⁵ The *Tymoshenko* Court determined that it was bound by the Second Circuit's decision in *Kiobel* regarding corporate liability under the ATS because neither the Supreme Court nor the Second Circuit has expressly decided the issue.⁹⁶ Similarly, in *Ahmad v. Christian Friends of Israeli Communities*, another district court found that corporations are not liable under the ATS based on the Second Circuit's *Kiobel* precedent.⁹⁷ However, recent district court precedents within the Second Circuit have begun to adopt the holdings of their sister circuits regarding corporate liability.⁹⁸ This development has created a growing discord within the second circuit regarding the *Kiobel* findings. As a result, subsequent Second Circuit decisions are vehemently critical of fundamental premises in *Kiobel* and have specifically refuted its findings.⁹⁹

The central holding of *Kiobel* is no longer binding within the second circuit. Other district courts within the Second Circuit have seriously questioned the fundamental reasoning of the *Kiobel* decision, and the Second Circuit Court of Appeals has indicated that its initial *Kiobel* decision is no longer binding within the Second Circuit. In *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*,¹⁰⁰ the Second Circuit remanded the issue of corporate liability under the ATS to the district court because "the Supreme Court's opinion [in *Kiobel II*] did not directly address the question of corporate liability under the ATS."¹⁰¹ While the district court is yet to make a determination in *Licci*, two other second circuit district courts have explicitly held that corporations can be held liable under the ATS in light of the *Kiobel I and II* precedents.

A number of District courts within the Second Circuit have

⁹⁵ *Tymoshenko v. Firtash*, No. 11-CIV-2794 (KMW), 2013 WL 4564646, at *3 (S.D.N.Y. Aug. 28, 2013).

⁹⁶ *Id.* at 6 n.4.

⁹⁷ *Ahmad v. Christian Friends of Israeli Cmty's.*, No. 13-CIV-3376 (JMF), 2014 WL 1796322, at *5 (S.D.N.Y. 2014).

⁹⁸ See notes 98-115 *infra* and supporting text.

⁹⁹ *Id.*

¹⁰⁰ 732 F.3d 161 (2d Cir. 2013).

¹⁰¹ *Id.* at 174.

been reluctant to embrace the Circuit's own *Kiobel* precedent. In, *In Re: South African Apartheid Litigation*,¹⁰² the Southern District of New York held that the Supreme Court's decisions,¹⁰³ as well as the second circuit opinions in *Licci* and *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*,¹⁰⁴ significantly undermined the central holding of *Kiobel* – “that corporations cannot be held liable for claims brought under the ATS.” – and left the question open within the circuit.¹⁰⁵ According to *Apartheid Litigation*, the *Tymoshenko* decision was reached prior to the *Licci* and *Chowdhury* decisions and relied exclusively on the Second Circuit's *Kiobel* precedent.¹⁰⁶ Therefore, *Apartheid Litigation* concluded that because *Tymoshenko* issue of corporate liability under the ATS was still an open question within the circuit.¹⁰⁷ The *Apartheid Litigation* opinion went on to significantly criticize the Second Circuit's *standing* as an outlier among other courts in finding that no corporation has been held liable by an international tribunal and further, that corporations are immune from liability under the ATS. The *Apartheid Litigation* court stated that the Second Circuit's decision in *Kiobel* not only failed to recognize corporate liability in international law, but also incorrectly conflated the issue of whether a tort violates a customary norm with the remedies available for that norm.¹⁰⁸ As a result, *Apartheid Litigation* concluded that the ATS contemplated federal common law to govern what remedies were available for a violation of a customary or *jus cogens* norm, and further, that “nothing in the text, history or purposes of the ATS indicates that corporations are immune from liability on the basis of federal common law.”¹⁰⁹

Another district court within the second circuit also reached

¹⁰² 15. F.Supp.3d 454 (S.D.N.Y. Apr. 17, 2014) [hereinafter *Apartheid Litig.*]

¹⁰³ *Daimler AG v. Bauman*, 134 S. Ct. 746, 762, 187 L. Ed. 2d 624 (2014); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013)

¹⁰⁴ 746 F.3d 42, 57 (2d Cir.) cert. denied sub nom. 135 S. Ct. 401 (2014)

¹⁰⁵ *Apartheid Litig.*, 15 F.Supp.3d at 460.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 461.

¹⁰⁸ *Id.* at 463 (noting that far “from implying that natural persons and corporations are treated *differently* for purposes of civil liability under the ATS, the [*Sosa* Court] intended . . . that they are treated *identically*”).

¹⁰⁹ *Id.* at 464.

the same conclusion. In *Sikhs for Justice Inc. v. Indian Nat'l Cong. Party*,¹¹⁰ the court also found that corporations could be liable for ATS violations.¹¹¹ Similar to the *Apartheid Litigation* holding, the *Sikhs for Justice Inc.*, decision significantly criticized the Second Circuit's *Kiobel* decision and largely adopted the reasoning of the *Apartheid Litigation*.¹¹² Moreover, *Sikhs for Justice Inc.* expressly held that "the Supreme Court's recent opinions suggest that holding corporate defendants liable under the statute, assuming other jurisdictional requirements are met, is appropriate."¹¹³

As a result of these precedents, there is a growing consensus that the *Kiobel* holding is no longer binding precedent. Two Second Circuit District Courts have emphatically embraced the holdings of other jurisdictions and expressly held that corporations could be liable under the ATS.¹¹⁴ Accordingly, the Second Circuit's position as the sole jurisdiction to hold corporations immune from liability under the ATS is significantly diminished, and largely untenable when viewed outside the doctrine of *stare decisis*. Recent decisions by other courts have reached the same conclusion at the district courts within the second circuit regarding corporate liability under the ATS. In the Eleventh Circuit, the court examined a plaintiffs' ATS claim and held that a corporation could be held liable for ATS violations through the federal common law.¹¹⁵ Similarly, in *William v. AES Corp.*,¹¹⁶ the Eastern District of Virginia specifically held that although a plaintiff's Alien Tort Statute claim failed because it did not have a sufficient nexus to the United States, the defendants were not immune under the statute merely because of their corporate status.¹¹⁷ In light of these precedents, courts are increasingly unwilling to hold a

¹¹⁰ 17 F. Supp.3d 334 (S.D.N.Y. Apr. 25, 2014) *aff'd sub nom*, *Sikhs for Justice, Inc. v. Nath*, No. 14-1724-CV, 2014 WL 7232492 (2d Cir. Dec. 19, 2014).

¹¹¹ *Id.*

¹¹² *Id.* at 341.

¹¹³ *Id.*

¹¹⁴ See *Apartheid Litig.*, 15 F.Supp.3d at 454; *Sikhs for Justice Inc.*, 17 F. Supp.3d at 334.

¹¹⁵ *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 584 (11th Cir. 2015).

¹¹⁶ No. 1:14CV343 JCC/TRJ, 2014 WL 2896012 (E.D. Va. June 26, 2014).

¹¹⁷ *William v. AES Corp.*, 28 F.Supp.3d 553 (E.D. Va. 2014).

corporate defendant immune under the ATS.¹¹⁸ As a result, this analysis has demonstrated that the ATS provides a sufficient remedy against Company Y for engaging in inhumane and tortious interrogation techniques upon detainees within the CIA's Interrogation and Detention Program. This analysis will now to turn to the jurisdictional issue under the ATS and argue that that Company Y is subject to the jurisdiction of U.S. Courts under the ATS.

III. DISPLACING THE PRESUMPTION AGAINST EXTRATERRITORIALITY IN *KIOBEL II*

In *Kiobel II*, the Supreme Court held that the ATS did not provide an explicit grant of extraterritorial jurisdiction, and “even where [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”¹¹⁹ Notably, the court failed to articulate a precise standard to determine whether an ATS claim sufficiently touches and concerns the territory of the United States, and what conduct may be deemed sufficient to displace the presumption against extraterritorial application.¹²⁰ Indeed, the crafters of the ATS did not envision that corporations such as Company Y would be able to commit heinous violations of customary law with impunity and eviscerate the congressionally intended protections of the ATS, rendering the practical effect the statute gutless and hollow. As this analysis will posit, private military corporations may be held accountable for violations of customary law overseas where their actions have a sufficient nexus to the United States. Further, where military contractors commit violations of customary international law, a plaintiff may be able

¹¹⁸ *E.g.*, *Du Daobin v. Cisco Systems, Inc.*, 2 F.Supp.3d 717 (D. Md. 2014) (examining whether the corporate defendants could be held liable under the ATS for aiding the Chinese government to suppress the privacy and free speech rights of the plaintiffs in China); *id.* (The *Du Daobin* court did not specifically address the status of the corporate defendants, but specifically stated, “this Court harbors doubt that corporations are immune under the ATS).

¹¹⁹ *Kiobel II*, 133 S. Ct. at 1669 (2013).

¹²⁰ *Kiobel II* at 1669 (Kennedy, J., concurring) (the ATS may still “reach” abroad); *id.* at 1673 (Breyer, J., (concurring) (the majority’s standard “leaves for another day the determination of just when the presumption against extraterritoriality may be overcome).

to assert ATS jurisdiction over these corporations by demonstrating that some relevant conduct occurred within a territory of the United States. Lastly, where private military corporations violate international law in territories where the United States exercises *de facto* sovereignty, those actions may also meet the necessary jurisdictional requirements of the *Kiobel II* holding.

- A. Private Military Contractors may be held liable for customary law violations that occurred overseas under the ATS where plaintiffs are able to establish that some 'relevant conduct' occurred within the United States

A cornerstone of the *Kiobel II* decision is the requirement that ATS claims must "touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application."¹²¹ However, the majority in *Kiobel II* failed to articulate any guidance on how lower courts should apply the "touch and concern" requirement to ATS claims.¹²² The concurring opinions sought to remedy this ambiguity by proposing two approaches. According to Justice Alito's concurrence, an ATS claim falls outside the scope of the presumption—and thus is not barred by the presumption—only if the event or relationship that was the 'focus' of congressional concern under the relevant statute takes place within the United States.¹²³ Justice Breyer articulated a factor based approach that would give rise to jurisdiction under the ATS, which would arise when "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other

¹²¹ *Id.*.

¹²² *Doe I v. Nestle USA Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014); *Tymoshenko*, 2013 WL 4564646, at *4 ("[T]he Court failed to provide guidance regarding what is necessary to satisfy the 'touch and concern' standard.").

¹²³ *Id.* (Alito, J., concurring); *see also id.* (Kennedy, J., concurring); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 268, (2010) (holding that courts should look to the 'focus' of congressional intent when seeking to determine the extraterritorial reach of a statute).

common enemy of mankind.”¹²⁴ A number of courts have applied these approaches and found jurisdiction under the ATS where plaintiffs allege extensive, substantial or specific, relevant domestic conduct.¹²⁵ Accordingly, Company Y may be held liable for violations of customary law that occurred overseas under the ATS where a plaintiff is able to establish a sufficient nexus between Company Y’s interrogation techniques to a territory of the United States.

A number of courts have determined that ATS claims against private military corporations sufficiently touch and concern the territory of the United States when the plaintiffs are able to show specific relevant domestic conduct. For instance, in *Al Shimari v. CACI Premier Technology, Inc.*,¹²⁶ the plaintiff was a detainee in Abu Ghraib prison during the U.S. occupation of Iraq.¹²⁷ The defendant was a U.S. corporation who provided civilian interrogators that committed heinous and sadistic acts of violence and criminal abuses against the detainees at the prison.¹²⁸ In displacing the ATS’ presumption against extraterritoriality, the court found that there was extensive relevant conduct within a U.S. territory to warrant jurisdiction under the ATS. In *Al Shimari*, the CACI interrogators were themselves U.S. citizens, the interrogators were hired in the U.S. pursuant to a contract executed with the U.S. Department of Interior in Arizona, and the interrogators received security clearances that were issued by the U.S. Department of Defense.¹²⁹ Furthermore, the plaintiff contended that “CACI’s managers located in the United States were aware of reports of misconduct abroad, attempted to cover up the misconduct, and “implicitly, if not expressly, encouraged it.”¹³⁰ Accordingly, the *Al-Shimari* court found that the plaintiffs alleged extensive and specific conduct of the defendants that occurred within the territory of the U.S. to displace the presumption against

¹²⁴ *Kiobel II*, at 1671 (Breyer, J., concurring).

¹²⁵ *Doe v. Drummond Co. Inc.*, 782 F.3d 576, 593 (11th Cir. 2015); *Al Shimari v. CACI Premier Tech. Inc.*, 758 F.3d 516, 529 (4th Cir. 2014); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 195 (2d Cir. 2014).

¹²⁶ 758 F.3d at 516.516, (4th Cir. 2014).

¹²⁷ *Al Shimari*, 758 F.3d 516 at 516.

¹²⁸ *Id.* at 521.

¹²⁹ *Id.* at 528-29.

¹³⁰ *Id.*

extraterritoriality.

Similarly, the Second Circuit found that specific conduct between a defendant located in the U.S. and the perpetrators of human rights abuses abroad displaced the presumption against extraterritoriality under the ATS. In *Mastafa v. Chevron Corp.*,¹³¹ the plaintiffs alleged that defendants engineered a corrupt banking agreement that allowed the Saddam Hussein regime to circumvent international economic sanctions and that defendant “aided and abetted the abuses of the Saddam Hussein regime by paying the regime kickbacks and other unlawful payments, which enabled the regime to survive and perpetrate the abuses suffered by plaintiffs.”¹³² The Second Circuit found that the corporate defendants structured fraudulent contractual agreements and overtly conspired within the U.S. to evade the international sanctions regime against Iraq.¹³³ Thus, the court determined that the overt actions, including a combination of carefully structured financial transactions, which occurred within the U.S., were sufficient to displace the presumption against extraterritoriality.¹³⁴

The Eleventh Circuit also considered the *Al Shimari* factors in deciding whether the plaintiffs’ ATS claims displaced the presumption against extraterritoriality, but the court reached a different conclusion because the plaintiffs’ jurisdictional claims lacked specificity. In *Doe v. Drummond Co., Inc.*, the plaintiff brought suit against corporate defendants within the United States who allegedly contracted with paramilitary groups in Colombia to eliminate opposition to the defendants’ mining operations in Colombia.¹³⁵ The plaintiff raised three “focus” arguments in addressing the presumption against extraterritoriality. First, the corporate defendants in the instant action are domiciled in the United States. Secondly, the paramilitary group contracted by the defendants are labeled as a terrorist organization by the U.S. government, thus there are strong national interests. Lastly, the defendants’ agreement to conspire, aid, abet, and fund the terrorist organization occurred

¹³¹ 770 F.3d at 170. (2d Cir. 2014).

¹³² *Id.* at 175.

¹³³ *Id.* at 191.

¹³⁴ *Id.*

¹³⁵ *Drummand Co, Inc.*, 782 F. 3d at 580.

within the United States.¹³⁶ In addressing the plaintiffs' focus arguments, the *Drummond* court relied on previous circuit precedent to hold that "general allegations of agreement with and support of the AUC did not warrant displacement" of the presumption against extraterritoriality.¹³⁷ Additionally, the plaintiffs in *Drummond* failed to offer any specific allegations of instances where the defendants conspired with Colombian paramilitary forces within the United States. Accordingly, the *Drummond* court held that the plaintiffs did not proffer any specific, relevant domestic conduct to support their ATS claims.¹³⁸ However, the *Drummond* court did not foreclose on the possibility that domestic financial transactions and agreements could serve as a basis for jurisdiction under the ATS. In fact, the *Drummond* court did find relevant the corporate citizenship of the defendants, the status of the paramilitary group as a designated terrorist organization by the U.S. government, and the alleged transactional conduct by the defendants.¹³⁹

- B. The relationship between the CIA and its Contractors during the agency's Interrogation and Detention program establish sufficient 'relevant domestic conduct' to hold the contractors liable for violations of customary law under the ATS

Application of *Al-Shimari*, *Drummond*, and *Mastafa* framework demonstrate a viable ATS litigation strategy against private military contractors, such as CIA interrogators who utilized 'enhanced interrogation' techniques. Through the CIA's interrogation and detention program, these contractors committed serious human rights abuses that were clear violations of customary law.¹⁴⁰ Moreover, there is significant "relevant domestic conduct" to displace the presumption against extraterritoriality under the ATS with regard to the CIA's interrogation and detention program. The CIA engaged in extensive financial and contractual relations with private

¹³⁶ *Id.* at 594.

¹³⁷ *Id.* at 596.

¹³⁸ *Id.* at 599; *Mastafa*, 770 F.3d at 195.

¹³⁹ *Drummond Co. Inc.*, 782 F.3d at 598-600.

¹⁴⁰ *See generally Amnesty Int'l Report, supra* note 14.

contractors within the interrogation and detention program.¹⁴¹ The private military corporation was headquartered and incorporated within the United States, and at least two of the interrogators who designed and implemented the enhanced interrogation techniques held medical licenses within the United States.¹⁴² Lastly, corporate employees conspired with CIA officials within the United States to shield the true nature of the interrogation and detention program from public officials.¹⁴³ These factors strongly indicate that relevant domestic conduct exists within the relationship between the CIA and its privately contracted interrogators to warrant a displacement of the presumption against extraterritoriality under the ATS.

In 2002, the CIA contracted two psychologists to draft and implement 'enhanced interrogation techniques.'¹⁴⁴ Media outlets and various public records have identified the two psychologists as Dr. James Elmer Mitchell and Dr. Bruce Jessen, both of whom held medical practitioners licenses within the United States.¹⁴⁵ The techniques drafted and implemented by the two psychologists were found to be in violation of numerous international conventions and treaties against torture and inhumane treatment.¹⁴⁶ Mitchell and Jessen incorporated a private military corporation ("Company Y"), within the United States¹⁴⁷ and contracted with the CIA to provide interrogators and "operational psychologists, debriefers, and security personnel at CIA detention site[s]."¹⁴⁸ By 2005, the CIA had

¹⁴¹ *Mastafa*, 770 F.3d at 192.

¹⁴² *Al-Shimari*, 758 F.3d at 528-29.

¹⁴³ *Mwani v. Bin Laden*, 947 F.Supp.2d 1, 5 (D.D.C.2013) (ATS claims touched and concerned the United States because plaintiffs had "presented evidence that . . . overt acts in furtherance of [the defendants'] conspiracy took place in the United States").

¹⁴⁴ *SSCI Report*, *supra* note 16, at 21.

¹⁴⁵ U.S. Senate Armed Services Committee, Senate Armed Services Committee Inquiry Into The Treatment of Detainees in U.S. Custody 1-7 (2008) [hereinafter *Senate Armed Services Report*]; Petition for Judicial Review, *Cox v. Texas State Bd. of Examiners Of Psychologists*, No. D-1-GN-11-001285, 2011 WL 1652243 (D.Tex. Apr. 29, 2011).

¹⁴⁶ *SSCI Report*, *supra* note 16, at Findings and Conclusions p. 3.

¹⁴⁷ Various reports have identified Company Y as "Mitchell, Jessen and Associates" a private military consulting corporation incorporated in the United States. *Senate Armed Services Report*, *supra* note 145 at 24.

¹⁴⁸ *Id.* at 169.

effectively outsourced its interrogation and detention program to Company Y.¹⁴⁹ Company Y received numerous payments from the CIA for its services, procured a five million dollar indemnification contract with the agency, and received approximately one million dollars in legal representation costs, which included legal services provided at a Senate Committee briefing.¹⁵⁰

Significantly, the Company Y officials designed, planned and executed the strategic use of torture as an enhanced interrogation technique within the United States, or with officials located within the United States, and exported those techniques to be utilized against detainees held in U.S. custody overseas. Company Y contractors created programs and techniques in the United States and acted in concert with the CIA headquarters to conceptualize and design torture techniques, exported these techniques to the CIA's Black Sites, "personally applied them to detainees, conducted psychological evaluations of detainees whom they would torture, trained other interrogators in the use of torture, and recommended what techniques should be employed on which detainees."¹⁵¹ The design and implementation of the interrogation tactics are similar to that of a bomb maker who manufactures an improvised explosive device within the United States and then exports that device to be utilized in a terrorist attack overseas.¹⁵²

The corporate status of Company Y, the contractual relationship between the CIA and Company Y, and the overt

¹⁴⁹ *SSCI Report*, *supra* note 16, Findings and Conclusions at 11.

¹⁵⁰ *Id.*

¹⁵¹ Keller, Dougherty, et.al, *Doing Harm: Health Professionals' Central Role in the CIA Torture Program*, Physicians for Human Rights, Dec. 2014 at 5, <http://physiciansforhumanrights.org/library/reports/doing-harm-health-professionals-central-role-in-the-cia-torture-program.html>; *see also SSCI Report*, *supra* note 16, at Findings and Conclusions p. 11.

¹⁵² *See Sexual Minorities Uganda v. Lively*, 960 F.Supp.2d 304, 309 (D.Mass. 2013) ("Defendant's alleged actions in planning and managing a campaign of repression [overseas] from the United States are analogous to a terrorist designing and manufacturing a bomb in this country, which he then mails [overseas] with the intent that it explodes there"); *Mwani v. Al Qaeda*, No. CV 99-125 (JMF), 2014 WL 4749182, at 8 (D.D.C. Sept. 25, 2014) (terrorist attack that was plotted in part within the United States is sufficient to displace the presumption against extraterritoriality).

actions of CIA officials to shield the program from public scrutiny and attempts to cover up the torture of detainees within the Interrogation program are relevant factors in determining whether an ATS claim against Company Y displaces the presumption against extraterritoriality.¹⁵³ Moreover, since Company Y was arguably created for the specific purpose of committing human rights violations overseas at the behest of a U.S. intelligence agency, there are significant national and domestic interests that warrant displacement of the presumption against extraterritoriality.¹⁵⁴ In instances, such as here, where a corporation is formed specifically within the U.S. for the sole purpose of effectuating illegal activity abroad, courts have determined that the process of domestic incorporation is relevant in domestic conduct to displace the presumption against extraterritoriality.¹⁵⁵

Company Y managers were also aware of unauthorized and unlawful interrogation techniques that were either ignored or encouraged by CIA officials within the United States *SSCI Report*, Findings and Conclusions at 12. Extensive communication between Company Y and CIA officials demonstrate that CIA officials and Company Y officials were aware of the torture being inflicted upon detainees and continued to encourage the use of the illegal interrogation techniques.¹⁵⁶ In one particular instance, a medical officer

¹⁵³ *Al Shimari*, 758 F.3d at 529 (noting that acts of torture committed by U.S. citizens, employed by a U.S. corporation, acting pursuant to a contract procured with a U.S. agency constituted relevant domestic conduct); *Lively*, at 311-12 (holding that *Kiobel* did not bar ATS claims because some relevant conduct was based on activities that occurred within the United States”).

¹⁵⁴ *SSCI Report*, *supra* note 16, Executive Summary at p. 12 (by 2008, approximately 85% of the CIA's interrogation program was staffed by the sole source contract procured by Company Y).

¹⁵⁵ *Lively*, 960 F.Supp.2d at 309; *Mwani*, 947 F.Supp.2d at 5 (where defendants laid criminal plans within the U.S. for the specific purpose of exporting those crimes abroad, those acts constitute relevant domestic conduct); *Kiobel II*, 133 S.Ct. at 1671 (Breyer, J., concurring) (the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind”).

¹⁵⁶ *SSCI Report*, *supra* note 16, at Executive Summary, p. 168, n. 128 (noting extensive communication between Company Y and CIA headquarters within the United States); *id.* at Executive Summary, p. 99.

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remarks on the aggressive waterboarding of detainees stating in an e-mail that “the requirements coming from *home* are really unbelievable in terms of breadth and detail.”¹⁵⁷ Accordingly, the blatant disregard for the rights of the detainees through the continued use of enhanced interrogation techniques in spite of its illegality, and the tacit approval given by Company Y officials within the U.S. established sufficient relevant domestic conduct.¹⁵⁸

Cumulatively, the extensive entanglement between the CIA and Company Y to administer the Interrogation and Detention Program demonstrate sufficient relevant conduct to displace the presumption against extraterritoriality under the ATS. The corporate citizenship of Company Y, its assets, officers, and employees all possess significant contacts with the United States. Moreover, the heinous abuse and torture effectuated by Company Y interrogators upon detainees at CIA Black Sites represent the very behavior that congress intended the ATS to prohibit. Namely, the United States possess a moral responsibility to prohibit domestic corporations such as Company Y from committing heinous acts of torture overseas with perceived impunity.¹⁵⁹

C. The United States maintained *de facto* sovereignty over ‘Black Sites’ within the CIA’s Interrogation and Detention

¹⁵⁷ *SSCI Report*, *supra* note 16 at Executive Summary p. 84; *id.* at 145 (noting a CIA Inspector General report; stating that there is a strong argument that the enhanced interrogation techniques violates international and domestic law); U.S. Dep’t of Justice Office of the Inspector Gen., *A Review of the FBI’s Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* xxvii, 368 (2008)(Department of Justice report noting that Federal Bureau of Investigations Agents did not attempt to dissuade contractors from using enhanced interrogation techniques despite knowledge of its illegality because the policies were approved at “high levels”).

¹⁵⁸ *Al Shimari*, 758 F.3d at 531 (finding relevant domestic conduct under the ATS where a private military corporation’s managers “gave tacit approval to the acts of torture committed by . . . employees at the Abu Ghraib prison, attempted to ‘cover up the misconduct, and ‘implicitly, if not expressly, encouraged it”).

¹⁵⁹ *Kiobel II*, 133 S.Ct. at 1671 (Breyer, concurring) (noting that the United States holds a distinct interest in preventing itself “from becoming a safe harbor . . . for a torturer or other common enemy of mankind”).

Program

In *Kiobel II*, the Supreme Court decided that territorial jurisdiction is an essential component of ATS claims.¹⁶⁰ However, the majority analysis's was careful to confine territorial jurisdiction to "a territory of" the United States, not exclusively "within" the United States.¹⁶¹ The touch and concern analysis is conducted on a case-by-case basis and applied in a manner that "does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign."¹⁶² As a result, application of the ATS is proper in cases where the underlying wrongful conduct occurred in territories overseas where U.S. law is operative (either by treaty or another method).¹⁶³ Absent formal sovereignty, territories under the exercise and control of the United States are "de facto" territories of the United States. Accordingly, U.S. law is applicable to the de facto territories under the control of the United States.¹⁶⁴ As a result, this analysis will demonstrate that Company Y's illegal interrogation techniques occurred within de facto territories of

¹⁶⁰ *Id.* at 1667.

¹⁶¹ *Id.* (citing *Bolchos*, 3 F. Cas. at 810-11 (wrongful seizure of slaves from a vessel while in port in the United States); *Moxon*, 17 F. Cas. at 942-45 (wrongful seizure in United States territorial waters, outside the geographic territory of the United States)).

¹⁶² *Id.* at 1667; see *Foreign Relations Law-Alien Tort Statute-Fourth Circuit Allows Alien Tort Statute Claim Against Abu Ghraib Contractor.-al Shimari v. Caci Premier Technology, Inc.: Fourth Circuit Allows Alien Tort Statute Claim Against Abu Ghraib Contractor*, 128 HARV. L. REV. 1534, 1537 (2015) (noting a primary justification for the presumption against extraterritoriality is to prevent conflicts between national laws).

¹⁶³ See *O'Reilly De Camara v. Brooke*, 209 U.S. 45, 51 (1908) (noting that the ATS applied to extraterritorial conduct because of a treaty between the U.S. and Spain that made U.S. law operative in Cuba during a U.S. occupation of the country); *Fleming v. Page*, 50 U.S. 603, 614 (1850) (finding that the United States exercised dominion and control over the Port of Tampico, Mexico where "the country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the orders of the President"); *Rasul v. Bush*, 542 U.S. 466, 468 (2004) (holding that the ATS may apply to actions in Guantanamo Bay, Cuba because the United States maintained complete jurisdiction and control over the territory as demonstrated by an express lease agreement).

¹⁶⁴ *Boumediene v. Bush*, 553 U.S. 723, 755 (2008) (finding that the "United States, by virtue of its complete jurisdiction and control over the base [in Cuba], maintains *de facto* sovereignty over [Guantanamo Bay, Cuba]").

the United States to give rise to jurisdiction under the ATS.

The United States exercises practical sovereignty over territories within the CIA's Interrogation and Detention program.¹⁶⁵ Unlike *de jure* sovereignty, practical sovereignty is a justiciable question that allows courts to examine the degree of control the United States exerts over a territory.¹⁶⁶ In order to make this determination, courts must determine whether the United States, for all practical purposes, [is] answerable to no other sovereign for its acts" in that territory.¹⁶⁷ This analysis must be done on a case-by-case basis and take into account the following: 1) the legal authorities for U.S. control over a territory; 2) the length of military occupation and whether the U.S. intended to displace foreign law;¹⁶⁸ 3) the inherent dangers of an occupied territory; and 4) the host's nation jurisdiction and whether application of domestic law would "cause friction with a host government."¹⁶⁹

It is axiomatic that U.S. maintains *de facto* sovereignty over Guantanamo Bay, Cuba, and other CIA Black Sites which comport with *Boumediene's* practical sovereignty analysis.¹⁷⁰ For example, in March 2003, the United States assumed complete jurisdiction and sovereignty over Iraq by dethroning its government and serving as the principal administrator of the Coalition Provincial Authority (hereinafter "CPA").¹⁷¹ The CPA

¹⁶⁵ *Id.* at 754.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 769.

¹⁶⁸ *Boumediene*, 553 U.S. at 768.

¹⁶⁹ *Id.* at 769.

¹⁷⁰ *Id.* at 755; *Rasul*, 542 U.S. at 480; See, e.g., *Judgments, Al-Nashiri v. Poland*, (Eur. Ct. H. R. Jul. 24, 2014) (Application 28761/11) (holding that "Poland knew of the nature and purposes of the CIA's activities on its territory at the material time and that, by enabling the CIA to use its airspace and the airport, by its complicity in disguising the movements of rendition aircraft and by its provision of logistics and services, including the special security arrangements, the special procedure for landings, the transportation of the CIA teams with detainees on land, and the securing of the Stare Kiejkuty base for the CIA's secret detention, Poland cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory."); *Salim v. Mitchell*, No. CV-15-0286-JLQ, 2016 WL 1717185, at *1 (E.D. Wash. Apr. 28, 2016).

¹⁷¹ See e.g., *The Imminent Transfer of Sovereignty of Iraq: Hearing Before the H. Comm. on International Relations*, 108th Cong. 19-20 (2004) (Statement of Lt. Gen. Walter L. Sharp, Director, Strategic Plans and Policy, The Joint

functioned as the government of Iraq with plenary legal and political power.¹⁷² Congress appropriated funds for the administration of the CPA and referred to Iraqi territory “as an entity of the U.S. Government” in the CPA’s appropriation bill.¹⁷³ Additionally, the government of the United States explicitly referred to the CPA as an “instrumentality” of the United States.¹⁷⁴ Significantly, the CPA effectively preempted Iraqi law in its territory. The CPA granted immunity to contractors from liability in Iraqi courts and provided that *United States domestic law* would apply to the activities of contractors.¹⁷⁵ Accordingly, the underlying rationale of avoiding displacement of another sovereign’s domestic law did not apply to the territory of Iraq at that time.¹⁷⁶

The fundamental rationale underlying the presumption against extraterritorial application of the ATS did not apply to Afghanistan during the period where Company Y was conducting enhanced interrogation techniques in the country.

Staff) (noting that MNF-I “is subordinate to General Abizaid as Commander, U.S. Central Command”); U.S. OFFICE OF MGMT. AND BUDGET, Pub. L. No. PUBLIC LAW 108-11, 108th, CONG., REP ON EMERGENCY WARTIME SUPPLEMENTAL APPROPRIATIONS ACT, 2003 (2003), <https://www.whitehouse.gov/sites/default/files/omb/assets/omb/legislative/1506.pdf> (The CPA exercises powers of government temporarily in order to provide for the effective administration of Iraq . . . The CPA is vested by the President with all executive, legislative and judicial authority necessary to achieve its objectives . . . The CPA Administrator has primary responsibility for exercising this authority).

¹⁷² See Coalition Provisional Authority, *Coalition Provisional Authority Regulation Number 1*, §1.2 (May 16, 2003) (“The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives . . .”).

¹⁷³ See Emergency Supplemental Appropriations Act for the Defense and Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, 117 Stat. 1209, 1225, 1236 (Nov. 6, 2003).

¹⁷⁴ See Supplemental Brief of the United States at 2, *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 472 F. Supp. 2d 787 (E.D. Va. 2007) (No. 1:04cv199); *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295, 306 (4th Cir. 2009) (holding that there is sufficient evidence to conclude that the CPA could be deemed an instrumentality of the United States government).

¹⁷⁵ See SUHAIL NAJIM ABDULLAH AL SHIMARI, Taha Yaseen Arraq Rashid, Salah Hasan Nusaif Al-Ejaili, Asa'ad Hamza Hanfoosh Al-Zuba'e, Plaintiffs-Appellants, v. CACI PREMIER TECHNOLOGY, INC., Caci International, Inc., Defendants-Appellees, Timothy Dugan, L-3 Services, Inc., Defendants., 2013 WL 5823704 (C.A.4), 34

¹⁷⁶ *Kiobel II*, 133 S.Ct. at 1665.

In *Kiobel II*, Justice Breyer strongly stressed the principles of comity as the underlying rationale against extraterritorial extension of the ATS. However, in instances where the law of a foreign sovereign does not apply, the rationale of the presumption is no longer applicable.¹⁷⁷ Similar to Guantanamo, the United States exerted practical sovereignty over military installations in Afghanistan during the time period where detainees were subject to torture by Company Y. The lease agreement between Afghanistan and the United States conferred “exclusive, peaceable, undisturbed, and uninterrupted possession” of the Bagram Airbase.¹⁷⁸ The United States’ control over the Bagram was exclusive, perpetual, and terminable or transferrable only in its sole discretion.¹⁷⁹ The agreement further confers the United States complete control and jurisdiction over Bagram “... without any interruption whatsoever by the host nation or its agents.”¹⁸⁰ Additionally, the Status of Forces Agreement (SOFA) between the United States and Afghanistan ceded core functions of Afghan sovereignty to the U.S.¹⁸¹ The practical effect of the U.S. control within Afghanistan during the CIA Interrogation and Detention program demonstrate that the U.S. maintained complete control

¹⁷⁷ *Kiobel II*, 133 S.Ct at 1659 (Breyer, J., concurring); see Dawinder S. Sidhu, *Shadowing the Flag: Extending the Habeas Writ Beyond Guantanamo*, 20 WM. & MARY BILL RTS. J. 39, 56 (2011).

¹⁷⁸ Respondents’ Motion to Dismiss First Amended Petition for Writ of Habeas Corpus at Exh. 1, Exh. A to Tennison Declaration ¶ 9, *al Maqaleh v. Gates*, 604 F. Supp. 2d (D.D.C. 2008) (No. 06-1669) (offering as an exhibit to the Tennison Declaration, the Accommodation Consignment Agreement For Lands and Facilities at Bagram Airfield Between the Islamic Republic of Afghanistan and the United States of America (Sept. 26, 2006) [hereinafter *Bagram Lease*]).

¹⁷⁹ *Bagram Lease*, at ¶ 4, 9, 12.

¹⁸⁰ *Id.* at ¶ 9.

¹⁸¹ See Respondents’ Motion to Dismiss First Amended Petition for Writ of Habeas Corpus, *al Maqaleh v. Gates*, 604 F. Supp. 2d (D.D.C. 2008) (No. 06-1669); Diplomatic Note from Embassy of the United States delivered to the Afghan Ministry of Foreign Affairs (Sep. 26, 2002) Tennison Decl., Ex. 2; Transitional Islamic State of Afghanistan, Ministry of Foreign Affairs, Note, May 28, 2003, Tennison Decl., Ex. A [hereinafter *Afghan SOFA*] <http://www.scotusblog.com/wp-content/uploads/2009/04/bagram-ruling-bates-4-2-09.pdf> (noting that American personnel within Afghanistan were subject only to U.S. criminal jurisdiction, and ceded sovereign functions to the U.S. government such as immigration control, customs enforcement, and infrastructure development).

over the territory, and “for all practical purposes, [was] answerable to no other sovereign for its acts” within the country.¹⁸²

Exercising jurisdiction over a de facto U.S. territory under the domestic laws is not without historical precedent. In *O'Reilly De Camara v. Brooke*, the Supreme Court examined a Cuban national's ATS claim against a U.S. military Governor of Havana during the United States occupation of Cuba in the early twentieth century.¹⁸³ The plaintiff was a sheriff in Havana prior to the occupation. However, during the U.S. occupation, the military governor revoked the property rights of the plaintiff.¹⁸⁴ The plaintiff brought suit for deprivation of property under the ATS and a U.S. treaty with Spain, which made the U.S. Constitution operative during Cuba's occupation. Although the court dismissed the plaintiff's claim under the Platt Amendment, the court implied that the plaintiff's ATS claim fell within the territorial jurisdiction of the United States since it was under U.S. control at the time of the seizure.¹⁸⁵ Moreover, in *Rasul v. Bush*,¹⁸⁶ the petitioner was a detainee in Guantanamo Bay, Cuba. Rasul alleged an ATS claim, a federal habeas petition, and a claim for violations of his due process under the Administrative Procedures Act against the government for their actions against him as a detainee.¹⁸⁷ Although the plaintiff abandoned the ATS during the appeal process,¹⁸⁸ the court held that the plaintiff's federal habeas petition applied because the U.S. exercised “complete jurisdiction and control” over Guantanamo Bay.¹⁸⁹ The *Rasul* precedent largely comport with the line of Supreme Court cases applying domestic law to territories under the practical sovereignty of the United States.¹⁹⁰

¹⁸² *Boumediene*, 553 U.S. at 770.

¹⁸³ *O'Reilly De Camara*, 209 U.S. at 45.

¹⁸⁴ *Id.* at 49, 52.

¹⁸⁵ See also Alex S. Moe, *A Test by Any Other Name: The Influence of Justice Breyer's Concurrence in Kiobel v. Royal Dutch Petroleum Co.*, 46 LOY. U. CHI. L.J. 225, 238 (2014).

¹⁸⁶ 542 U.S. 466, 468 (2004)

¹⁸⁷ *Id.* at 472.

¹⁸⁸ *Id.* at 505 n.6.

¹⁸⁹ *Id.* at 480.

¹⁹⁰ *De Lima v. Bidwell*, 182 U.S. 1, 21 (1901); *Balzac v. Porto Rico*, 258

Judicial decisions holding that military installations in Iraq and Afghanistan are not under the de facto sovereignty of the United States are incorrectly decided. In *Al Maqaleh v. Gates*,¹⁹¹ the court found it dispositive that the United States did not deem the leasehold agreement between Afghanistan and the United States to establish indicia of “permanence”.¹⁹² Judicial decisions holding the permanence factor as dispositive in determining practical sovereignty are at odds with the rationale of the *Boumediene* decision and incorrectly emphasize formal, rather than practical sovereignty considerations.¹⁹³ The lease agreement between the United States and Cuba at issue in *Boumediene* and *Rasul* neither contains a provision exhibiting an intention of permanence of U.S. forces nor does it contain a provision providing for the ultimate sovereignty of the United States. Significantly, it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another.”¹⁹⁴

Additionally, the *Al Maqaleh* relies on *Johnson v. Eisentranger*,¹⁹⁵ to contend that “active theatres of war” preclude

U.S. 298 (1922) (extending “fundamental personal rights” to inhabitants of the “unincorporated” U.S. territories, such as Puerto Rico, Guam and the Philippines); *Dorr v. United States*, 195 U.S. 138, (1904) (The United States maintained complete sovereignty over these territories, and Congress governed the territories); *Rasul v. Myers*, 563 F.3d 527, 532 (D.C. Cir. 2009).

¹⁹¹ *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

¹⁹² *Id.* at 97. Other courts have reached similar conclusions based on the *Al Maqaleh* precedent, see *Ali v. Rumsfeld*, 649 F.3d 762, 772 (D.C. Cir. 2011) (finding it dispositive that like Bagram Air Force Base, the United States has not established an intention of permanence in Iraq to warrant the exercise of de facto sovereignty); *Doe v. United States*, 95 Fed. Cl. 546, 571 (2010) (citing *Al Maqaleh* to hold that Iraq was not under the de facto sovereignty of the United States).

¹⁹³ See *Rasul*, 542 U.S. at 475 (ATS may apply where U.S. exercises “plenary and exclusive jurisdiction,” but not “ultimate sovereignty”); *Boumediene*, 553 U.S. at 764 (rejecting government’s “formalistic, sovereignty-based and nothing that objective factors and practical concerns color the de facto sovereignty analysis); *id.* at 754 (relevant question is whether U.S. exercises “dominion or power” in “the general, colloquial sense”); see also Dawinder S. Sidhu, *Shadowing the Flag: Extending the Habeas Writ Beyond Guantanamo*, at 56 (2011) (questioning the issue of permanence in *Al-Maqalah*).

¹⁹⁴ *Boumediene*, 553 U.S. at 754.

¹⁹⁵ *Johnson v. Eisentranger*, 339 U.S. 763 (1950).

a finding of de facto sovereignty. However, a proper reading of *Eisentranger* does not categorically preclude extraterritorial application of U.S. law in military occupied territories. Instead, *Eisentranger* holds that military occupation of foreign territory does not mean that U.S. law “is wholly inapplicable in foreign territories that we occupy and govern.”¹⁹⁶ Significantly, the *Al Maqaleh* court indicated that it would have decided differently had it been aware that detainees were shuffled to active theatres of war in order to evade domestic law.¹⁹⁷ In the instant matter, there is clear evidence that CIA officials transferred detainees to Black Sites within Iraq and Afghanistan in order to avoid application of domestic law. As will be discussed further below, Company Y conspired with CIA officials to move detainees to facilities where it was perceived that application of U.S. law would not apply.

- D. Detainees within the CIA’s Interrogation and Detention Program in Cuba and Afghanistan are able to bring ATS claims against Company Y because the enhanced interrogation program occurred within de facto territories of the United States

A number of detainees within the CIA’s Interrogation and Detention program were held in territories exclusively under the exercise and control of the United States, or in territories that required acquiescence by the CIA headquarters officials.¹⁹⁸ Additionally, the detainees were subject to inhumane acts of torture by Company Y interrogators within de facto territories of the United States because the U.S. government exercised

¹⁹⁶ *Id.*; *United States v. Siddiqui*, 699 F.3d 690, 701 (2d Cir. 2012), *as amended* (Nov. 15, 2012) (rejecting the argument that “active theatres of war” generally preclude extraterritorial application of a U.S. statute . . .” it would be incongruous to conclude that statutes aimed at protecting United States officers and employees do not apply in areas of conflict where large numbers of officers and employees operate”).

¹⁹⁷ *Al Maqaleh*, 605 F.3d at 98.

¹⁹⁸ While this analysis will not examine whether arrangements between foreign sovereigns and the CIA required approval from CIA headquarters, it is more than plausible that approval of territorial agreements between CIA officials within the United States and host nations were required in order to effectuate the Interrogation and Detention Program in locations outside of the United States.

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“complete jurisdiction and control” over the territories Company Y operated in.¹⁹⁹ Unlike the *Kiobel* precedents, potential ATS claims arising from detainees subject to Company Y’s interrogation techniques within Iraq and Afghanistan arose during a time and under a legal regime in which there was effectively no operative law other than that of the United States. This factor significantly undermines the fundamental premise for the presumption against extraterritorial application of the ATS and removes any conflicts with foreign law. Notably, the fundamental lesson of *Rasul* holding is that there can be no prisons beyond the law.

Beginning in 2003, the CIA held a number of detainees within the vicinity of military installations in Guantanamo Bay, Cuba.²⁰⁰ After detaining at least 113 individuals through 2004, the CIA brought only six additional detainees into its custody: four in 2005, one in 2006, and one in 2007. By March 2006, the interrogation program was operating in only one country. The CIA last used its enhanced interrogation techniques on November 8, 2007. The CIA did not hold any detainees after April 2008.²⁰¹ In 2004, the Department of Justice voiced concerns that the pending Supreme Court decision in *Rasul v. Bush* may allow the detainees to raise federal habeas petitions. In response to these concerns, the CIA transferred all Guantanamo Bay detainees to other detention facilities.²⁰² These actions indicate that the CIA sought to transfer detainees from the de facto sovereignty of the United States to other detention beyond the reach of U.S. law.²⁰³

During the operational period of Company Y’s enhanced interrogation techniques, the United States maintained de facto sovereignty over Guantanamo Bay, Cuba. According to the *SSCI Report*, Detention Site Red was presumably located in Guantanamo Bay, Cuba – during the period that Company Y was operating as the sole source of interrogators for the CIA.²⁰⁴

¹⁹⁹ *Rasul*, 542 U.S. at 480.

²⁰⁰ *SSCI Report*, *supra* note 16 at 140.

²⁰¹ *SSCI Report*, *supra* note 16 Findings and Conclusions at 16.

²⁰² *Id.* at 141,151.

²⁰³ *See Boumedienne*, 553 U.S. at 755; *Al Maqaleh*, 605 F.3d at 98.

²⁰⁴ *Amnesty Int’l Report*, *supra* note 14, at 24; *SSCI Report*, *supra* note 14, at Executive Summary p. 140 n.848.

Detainees who were subject to Company Y's enhanced interrogation techniques at Detention Site Red were within a de facto territory of the United States at that time.²⁰⁵

CIA detention sites in Afghanistan²⁰⁶ were under the practical sovereignty of the United States during Company Y's operational period. The *SSCI Report* identifies Detention Site Orange and Detention Site Brown as facilities operated within Afghanistan during the period that Company Y also operated as the sole source contract for enhanced interrogation techniques.²⁰⁷ Detention Sites Orange and Brown were also operational through 2006 Company Y's sole source contract.²⁰⁸ Additionally, a number of reports have linked Detention Sites Brown and Orange to U.S. military installations at Bagram Air Base, Afghanistan.²⁰⁹ During this period, the United States held

²⁰⁵ *SSCI Report*, *supra* note 16, Findings and Conclusions at 16, *SSIC Report* at 140; *O'Reilly De Camara*, 209 U.S. at 50 (noting that the ATS applied to extraterritorial conduct because of a treaty between the U.S. and Spain that made U.S. law operative in Cuba during a U.S. occupation of the country); *Fleming v. Page*, 50 U.S. 603, 614 (1850) (finding that the United States exercised dominion and control over the Port of Tampico, Mexico where "the country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the orders of the President"); *Rasul*, 542 U.S. at 468 (holding that the ATS may apply to actions in Guantanamo Bay, Cuba because the United States maintained complete jurisdiction and control over the territory as demonstrated by an express lease agreement).

²⁰⁶ Human Rights Watch, *Lithuania: Reopen Investigation into Secret CIA Prisons*, June 25, 2013, <http://www.hrw.org/news/2013/06/25/lithuania-reopen-investigation-secret-cia-prisons>; VICE NEWS, *CIA Held Detainees at Lithuania Black Site, Investigators Claim*, Jan. 16, 2015, <https://news.vice.com/article/cia-held-detainees-at-lithuania-black-site-investigators-claim>; Diana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644_pf.html

²⁰⁷ *Amnesty Int'l Report*, *supra* note 16, at 24.

²⁰⁸ *Id.* at 50; *SSCI Report*, *supra* note 16, at Executive Summary p. 96.

²⁰⁹ Amy Goodman, "Worse" Than Guantanamo: U.S. Expands Secretive Prison Inside Bagram Air Base in Afghanistan, DEMOCRACY NOW, Feb. 27, 2006, http://www.democracynow.org/2006/2/27/worse_than_guantanamo_u_s_expands; Tim Golden and Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. TIMES, Feb. 26, 2006, <http://www.nytimes.com/2006/02/26/international/26bagram.html?pagewanted=all>; Marc Ambinder, *Inside the Secret Interrogation Facility at Bagram*, THE ATLANTIC, May 14, 2010, <http://www.theatlantic.com/politics/archive/2010/05/inside-the-secret-interrogation-facility-at-bagram/56678/>; Alissa Rubin, *Afghans Detail*

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virtually complete control of Bagram Air Force Base Afghanistan.²¹⁰ Moreover, detainees were transferred to this location for the sole purpose of evading the reach of U.S. domestic law.²¹¹ In each of these facilities, the U.S. maintained de facto sovereignty due to the nature of its control over the territories.

CONCLUSION

This in-depth analysis has articulated fully the legal theories and obstacles governing Company Y's legal liability under the Alien Tort Statute. Company Y operated in *de facto* territories of the United States when conducting enhanced interrogation techniques. Additionally, since corporate liability is a remedy under the Alien Tort Statute, Company Y may be held liable for its tortious interrogation tactics conducted on detainees within the CIA's Detention and Interrogation program.

Detention in "Black Jail" at U.S. Base, N.Y. TIMES, Nov. 28, 2009, <http://www.nytimes.com/2009/11/29/world/asia/29bagram.html?pagewanted=all>.

²¹⁰ *Fleming v. Page*, 50 U.S. 603, 614 (1850) (finding that the United States exercised dominion and control over the Port of Tampico, Mexico where "the country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the orders of the President"); see also *Al Maqaleh v. Gates*, 390 U.S. App. D.C. 352, 605 F.3d 84 (2010); See also, *Wahid v. Gates*, 876 F. Supp. 2d 15, 20 (D.D.C. 2012) (analyzing then Deputy Secretary of Defense for Detainee Policy statements regarding the intent of the U.S. to maintain control over Bagram indefinitely and finding that the U.S. maintained control over Bagram currently, but there is no conclusive evidence that it intended to do so indefinitely).

²¹¹ *Al Maqaleh*, 605 F.3d at 98 (purposeful movement of detainees to evade the reach of domestic law is a relevant factor in determining whether practical sovereignty exists).