RECENT DEVELOPMENT

Chowdhury v. Worldtel Bangladesh Holding, Ltd.: The Juridical Extraterrestrial, Phone Home Denied

I. OVERVIEW

Businessmen can occasionally act ruthlessly in the pursuit of corporate gain, but one seldom encounters a corporate board member capable of harnessing military force to torture a colleague in order to bolster his financial and professional status. However, Amjad Hossain Khan did precisely that.[1] Khan and Nayeem Mehtab Chowdhury served as board members on World Bangladesh Ltd.'s (WBL) board of directors.[2] WBL was a company jointly controlled by Worldtel Bangladesh Holding Ltd. (WBH), Khan's business, and World Communications Investments Inc. (WCII), a company in which Chowdhury owned stock and served as an officer.[3] In addition to Chowdhury's duties as a WBL board member, Chowdhury served as WBL's managing director, which fueled the animosity between Chowdhury and Khan.[4] In this role, and under the belief that WBL's shares would be worth over $100 million, Chowdhury issued more shares of WBL in 2005 and assumed additional debt.[5] Prior to Chowdhury's initiative, WBH owned 50% of WBL.[6] However, after the issuance of new shares, WBH ownership dropped to less than 1%.[7] Incensed by his financial loss, Khan sought redress, alleging that Chowdhury used improper corporate procedures and forged signatures to issue the new

1. Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 45-46 (2d Cir. 2014).
2. *Id.* at 45.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

shares.[8] Khan then filed official complaints against Chowdhury with over seventeen Bangladeshi government agencies and divisions.[9] Khan's complaints remained unanswered until the summer of 2007.[10] Khan, who had affiliations with a Bangladeshi paramilitary unit known as the Rapid Action Battalion (RAB), enlisted the RAB to arrest Chowdhury and hold him hostage for eight days.[11] Pursuant to Khan's orders, the RAB brutally tortured Chowdhury by blindfolding, handcuffing, applying electric shocks to his thighs and arms, and hanging him from a prison door.[12] Khan tortured Chowdhury as retribution for the diminished value of Khan's stock and hoped that torture would persuade Chowdhury to transfer his business interest to Khan.[13]

After Chowdhury's release, he, along with WCII, filed a complaint against Khan and WBH in federal district court alleging that Khan subjected Chowdhury to torture in violation of the Alien Tort Statute (ATS) and the Torture Victim Protection Act of 1991 (TVPA).[14] His complaint also alleged that the defendants aided and abetted Bangladeshi authorities in violation of the ATS and TVPA.[15] The district court dismissed the claims brought by the plaintiff corporation, WCII, because corporate entities cannot be tortured.[16] The district court also dismissed Chowdhury's complaint against WBH because a corporation cannot act under actual or apparent foreign authority, and as such, fails to meet the requirement set forth by the TVPA.[17] Chowdhury's aiding and abetting claims against Khan were also dismissed because they are not cognizable offenses under the TVPA and the ATS.[18] Chowdhury, acting as the sole plaintiff, subsequently amended his complaint to allege that Khan caused his torture at the hands of the RAB and offered to end his suffering only

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8. *Id.*

9. *Id.*

10. *Id.* The Directorate General of Forces Intelligence (DGFI) summoned Chowdhury with Khan present, but released him with no harm fifty-three days later. *Id.*

11. *Id.*

12 *Id.* at 45-46.

13. *Id.*

14. *Id.* at 46. The ATS provides original jurisdiction in the federal district court over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2012). Conversely, the TVPA holds liable for civil damages any "individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture." Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992).

15. *Chowdhury*, 746 F.3d at 46.

16. Chowdhury v. Worldtel Bangl. Holding, Ltd., 588 F. Supp. 2d 375, 388 (E.D.N.Y. 2008).

17. *Id.*

18. *Chowdhury*, 746 F.3d at 46-47.

in exchange for his financial interest in WBL.[19] His amended complaint proceeded to trial, where a jury found Khan and WBH liable for torture.[20] On appeal, Khan argued that the recent decision in *Kiobel v. Royal Dutch Petroleum Co.* required Chowdhury's ATS claim to be dismissed because the alleged conduct occurred outside U.S. territory.[21] Khan then attacked Chowdhury's TVPA claims asserting that, like the ATS, the TVPA claim must be dismissed because the underlying conduct occurred extraterritorially.[22] Khan further argued that the alleged conduct was not actionable torture and that the lower court improperly applied agency theories to find him liable under the TVPA.[23] The United States Court of Appeals for the Second Circuit *held* that under *Kiobel*, conduct that occurred on foreign soil cannot support a claim brought under the ATS; however, the court held that the TVPA has no territorial constraint, that electric shock can constitute torture, and that agency principles extend liability under the TVPA beyond those who administer the torture. Therefore, Chowdhury's claim was based on actionable torture under the TVPA. *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 54-55 (2d Cir. 2014).

II. BACKGROUND

In 1776, the United States stepped into the international arena as an independent republic bound by the general norms that governed the behavior among sovereign nations.[24] At the time, the United States Continental Congress was unable to adequately punish violations of the rights of foreign dignitaries located within the United States.[25] When such an event occurred, it was not only perceived as an injury to the foreign sovereign, but also carried serious foreign policy repercussions for a burgeoning nation.[26] However, foreign affairs were primarily of legislative or executive concern and exceeded the judiciary's responsibilities. Thus, the courts were reluctant to provide a civil remedy to foreign ambassadors without congressional guidance.[27] The

19. *Id.* at 47.

20. *Id.* Khan and WBH were held liable for compensatory damages and Khan alone for punitive damages. *Id.*

21. *Id.* at 48.

22. *Id.*

23. *Id.*

24. Sosa v. Alvarez-Machain, 542 U.S. 692, 714-15 (2004) (discussing the period when the United States had first declared independence and where the law of nations was guided by principles that benefitted individuals and "overlapped with the norms of state relationships").

25. *Id.* at 716.

26. *Id.* at 715-16.

27. *Id.* at 714-15.

Continental Congress responded by enacting the ATS as part of the Judiciary Act of 1789.[28] The ATS granted the district courts original jurisdiction in a tort suit brought by an alien for a violation of the law of nations.[29] Although the ATS's scope as intended at its inception is unclear and the legislative history is sparse, two principles are readily apparent: (1) the ATS was a jurisdiction-establishing statute, and (2) the Continental Congress intended that the ATS provide a remedy for only a limited number of violations.[30] Soon after its enactment, however, the development of ATS jurisprudence went cold and remained undisturbed for nearly two centuries.[31] Then in 1980, the Second Circuit's decision in *Filartiga v. Pena-Irala* breathed new life into this undeveloped area of law.[32]

Filartiga established not only that the ATS created federal jurisdiction and a cause of action, but also firmly established torture as a violation of the law of nations.[33] Plaintiff Dolly Filartiga, a citizen of Paraguay, brought an action in federal district court against Americo Pena-Irala (Pena), also a citizen of Paraguay, alleging that Pena tortured and killed her brother.[34] Dolly's parents joined the suit, and the Filartigas' principal argument rested on ATS jurisdiction.[35] Though Pena asserted that Paraguayan law provided an adequate remedy for the alleged torture, the Filartigas believed that "further resort to the courts of [Paraguay] would be futile" because Pena's role as Inspector General of Police in Asuncion, Paraguay, gave him leverage over the courts.[36] The district court dismissed the case, finding that the ATS "exclud[es] that law which governs a state's treatment of its own citizens."[37] The Second Circuit reversed and held that where the international community has universally proclaimed a right, the ATS will provide both jurisdiction and a cause of action.[38] The Second Circuit explained that the United States has an

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28. Ch. 20, § 9(b), 1 Stat. 73, 77 (codified at 28 U.S.C. § 1350 (2012)); *Sosa*, 542 U.S. at 717-18.

29. 28 U.S.C. § 1350. The cause of action was a violation of the law of nations. *See id.*

30. *Sosa*, 542 U.S. at 715, 720.

31. *Id.* at 724-25; Kiobel v. Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (2013).

32. 630 F.2d 876 (2d Cir. 1980).

33. *Id.* at 880 ("In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violated established norms of the international law of human rights, and hence the law of nations.").

34. *Id.* at 878.

35. *Id.* at 879-80.

36. *Id.* at 878-79.

37. *Id.* at 879-80.

38. *Id.* at 887-90. In this case, the right is to be free from torture. *See id.*

interest in resolving disputes among those within its borders when the conduct is unlawful in both the United States and abroad.[39] Following the guidance of the United States Supreme Court on the appropriate sources of international law, the Second Circuit considered "the works of jurists," "the general usage and practice of nations," and "judicial decisions" to determine which laws had become international norms.[40] By recognizing that the law of nations must be analyzed not as it was in 1789 but instead in its contemporary evolution,[41] *Filartiga* pulled the ATS discussion into the twentieth century.[42]

The Second Circuit's decision in *Filartiga* was not well-received by the United States Court of Appeals for the District of Columbia, which noted its disagreement in *Tel-Oren v. Libyan Arab Republic*.[43] Specifically, the D.C. Circuit questioned whether the ATS provided a cause of action or simply created jurisdiction.[44] Congress quelled the D.C. Circuit's criticisms by passing the TVPA, which explicitly granted a private cause of action against any individual who committed torture or summary execution under the facade of official state authority.[45] Anticipating that the TVPA would be misconstrued as rendering the ATS inoperable, Congress stipulated that the ATS still had "other important uses."[46] Moreover, Congress understood that torture and summary execution did "not exhaust the list of actions" that may ripen into international norms as the law of nations evolved.[47]

Although the ATS and TVPA differ in scope and clarity, the two statutes are interrelated.[48] First, the ATS provides a civil cause of action

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39. *Id.* at 885.

40. *Id.* at 880 (citing United States v. Smith, 18 U.S. 153, 160-61 (1820); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 295 (E.D. Pa. 1963)).

41. *Id.* at 881.

42. *See* Kadic v. Karadžić, 70 F.3d 232, 240 (2d Cir. 1996) (discussing *Filartiga*'s failure to answer whether the ATS applied to violations of the law of nations by private individuals or state officials and discussing how other courts and judges have interpreted *Filartiga*).

43. 726 F.2d 774 (D.C. Cir. 1984). With only a three-judge panel, the D.C. Circuit set out three separate concurring opinions. *Id.*

44. *Compare id.* at 777 (Edwards, J., concurring) (determining that the ATS both establishes jurisdiction and "opens the federal courts for adjudication of the rights already recognized by international law"), *with id.* at 822 (Bork, J., concurring) (finding that *Filartiga* was incorrect and it is "improper for judges to infer a private cause of action not explicitly granted").

45. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (establishing liability when an "individual who, under actual or apparent authority, or color of law, of any foreign nation" tortures another); *see also Kadic*, 70 F.3d at 245 (defining authority as some official state involvement).

46. *Kadic*, 70 F.3d at 241.

47. *Id.*

48. Philip Mariani, Comment, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1383, 1410-12 (2008) (high-

for an alien in U.S. courts for a violation of the law of nations when that violation occurs within U.S. territory.[49] The ban on extraterritorial application of the ATS is the subject of much jurisprudence. Although the ATS provides aliens with access to U.S. courts, U.S. foreign policy appears not to be threatened because the actionable conduct must first satisfy the threshold that it be a firmly settled violation of international law. If the threshold is satisfied, then the United States' exercise of jurisdiction would not encroach upon a foreign nation's sovereignty.[50] Second, the TVPA grants U.S. courts federal jurisdiction over any person, acting under apparent foreign authority, who subjects another person—U.S. citizen or alien—to torture or extrajudicial killing.[51] Jurisprudence, while not concrete, indicates that the TVPA applies primarily to conduct occurring outside of the United States.[52] Third, the TVPA thoroughly defines torture and extrajudicial killing and requires the exhaustion of local remedies before access to U.S. courts is granted, whereas the ATS provides no definition for a violation of the law of nations and has no exhaustion requirement.[53] Finally, the TVPA presumes some form of government involvement, whereas the ATS fails to state a similar requirement.[54]

The TVPA's government nexus requirement came under the Second Circuit's scrutiny in *Kadic v. Karadžić*.[55] In *Kadic*, the plaintiffs, Croat and Muslim citizens of Bosnia-Herzegovina, alleged that they were raped and tortured. The plaintiffs also represented those who were summarily executed by Bosnian-Serb military forces under the direction of President Karadžić.[56] President Karadžić was the president of the self-proclaimed Bosnian-Serb republic that exercised dominion over large

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lighting statutory distinctions between the ATS and TVPA first in plain language, second in domestic versus extraterritorial application, and third in providing a remedy to only aliens versus all people).

49. 28 U.S.C. § 1350 (2012).

50. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712-13, 727 (2004) (discussing the implications on foreign relations when U.S. courts exercise jurisdiction over the citizens of a foreign sovereign).

51. 28 U.S.C. § 1350; Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992).

52. Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 51 (2d Cir. 2014) ("Although [the ATS] could conceivably refer to conduct occurring within the United States, the provision is more naturally understood to address primarily conduct occurring in the territory of foreign sovereigns.").

53. 28 U.S.C. § 1350; Torture Victim Protection Act, 106 Stat. 73.

54. 28 U.S.C. § 1350; Torture Victim Protection Act, 106 Stat. 73.

55. 70 F.3d 232, 245-46 (2d Cir. 1995).

56. *Id.* at 236-37.

parts of the internationally recognized territory of Bosnia-Herzegovina.[57] Karadžić asserted that he was not a state actor and not subject to TVPA liability while simultaneously adhering to his title as president of the self-proclaimed Bosnian-Serb Republic of Srpska.[58] The court determined that under the TVPA, the relevant inquiry was whether the offending actor exercised what appeared to be official government authority and not whether that authority was legitimate.[59] In finding President Karadžić liable,[60] the court affixed genocide, war crimes, and torture to the ATS's list of actionable conduct regardless of whether the offenses were committed by a state actor or private individual.[61] The court explained that under the ATS, the president's acts of genocide, war crimes, and torture established federal jurisdiction.[62] Once the ATS established jurisdiction, the plaintiffs were able to reach the TVPA, and the court noted that state legitimacy was irrelevant because the president "purport[ed] to wield official power and exceeded internationally recognized standards of civilized conduct."[63] In so holding, *Kadic* vastly expanded the TVPA because, for the first time, a court was declaring that the statute provided jurisdiction over foreign national presidents.[64] Following *Kadic*, the ATS was viewed as a jurisdiction—establishing statute for violations of commonly known and well-established international norms. The TVPA codified two of these norms—torture and extrajudicial killing—which, if violated with the assistance of a foreign government, would "permit the [plaintiffs] to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act."[65]

The Second Circuit in *Kadic* resolved that genocide, war crimes, and torture were actionable under the ATS, but the Supreme Court in *Sosa v. Alvarez-Machain* refused to extend a commensurate significance to arbitrary arrest and detention.[66] In *Sosa*, a Mexican national sued an American Drug Enforcement Agency (DEA) agent under the ATS for his arbitrary arrest and detention in Mexico in violation of the laws of

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57. *Id.* at 237. The Bosnian-Serb republic was not a recognized state actor. *Id.*
58. *Id.* at 239.
59. *Id.* at 245.
60. *Id.* at 236-37.
61. *Id.* at 241-43. Outside of genocide and war crimes, torture is actionable only when committed by state officials or under the color of law as prescribed by the TVPA. *Id.* at 243.
62. *Id.* at 242-44.
63. *Id.* at 242-45.
64. *Id.*
65. *Id.* at 246.
66. Sosa v. Alvarez-Machain, 542 U.S. 692, 699, 738 (2004); Kadic v. Karadžić, 70 F.3d 232, 242-44 (2d Cir. 1995).

nations.[67] The Court affirmed the Second Circuit's proposition that the ATS conferred federal jurisdiction over causes of action that developed into international norms, but arbitrary arrest and detention was insufficient to confer jurisdiction.[68] The Court explained that arbitrary arrest and detention possessed "less definite content and acceptance among civilized nations" when compared to the "historical paradigms familiar when [the ATS] was enacted."[69] The Court cautioned future courts to exercise judicial restraint in interpreting the law of nations because failure to do so would result in substantial discretionary judgment, encroachment on the powers of the other branches, infringement of the legislature's power to create the private right of action, and would have serious foreign policy implications.[70]

Exercising judicial restraint in a case seemingly unrelated to the ATS or TVPA, the Supreme Court in *Morrison v. National Australia Bank Ltd.* held that absent a clear indication from Congress, a statute is presumed to apply only within U.S. territory.[71] In *Morrison*, Australian investors purchased stock[72] from an Australian bank that had fraudulently inflated the worth of the stock in violation of the Securities and Exchange Act of 1934 (SEA).[73] The Supreme Court explained that the stock was not listed on any U.S. exchanges, the purchases occurred outside U.S. territory, and the SEA did not express congressional intent for extraterritorial application under 15 U.S.C. § 78(b).[74] Although *Morrison* did not directly concern the ATS or TVPA, the Court's methodology and the holding recognizing the presumption against extraterritoriality would later come to define the scope of this body of law.

Within one year, the rationale established in *Morrison* that confined the application of U.S. law to conduct that occurred within U.S. territory was applied in *Kiobel v. Royal Dutch Petroleum Co.*[75] In *Kiobel*, Nigerian nationals residing in the United States sued foreign corporations in federal court under the ATS, alleging that the corporations aided the Nigerian government in committing violations of the law of nations

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67. *Sosa*, 542 U.S. 692, 698-99.

68. *Id.* at 724, 738-39.

69. *Id.* at 715, 731-32. Historical violations of international law were violations of safe conducts, assaults on ambassadors, and piracy. *Id.* at 715.

70. *Id.* at 725-28.

71. 561 U.S. 247, 250-55 (2010).

72. The stock was in a U.S. company. *Id.* at 251-53.

73. *Id.*

74. *Id.* at 251, 269, 271. Some subsections clearly expressed extraterritorial effect such as subsection 30(a). *Id.* at 265.

75. 133 S. Ct. 1659, 1664 (2013).

in Nigeria.[76] Relying on the ATS's history as presented in *Sosa* and the methodology established in *Morrison*, the Court held that "the presumption against [extraterritorial application] applies to claims under the ATS [because] nothing in the statute rebuts that presumption."[77] The Court echoed that the presumption ensured "that the Judiciary [did] not erroneously adopt an interpretation of U.S. law that carrie[d] [unintended] foreign policy" implications, which necessarily encroaches on the other political branches.[78] The Court also worried that an alternative holding would grant other nations the reciprocal ability to hale U.S. citizens into court for law of nations violations occurring within U.S. territory.[79] Although the Court denied extraterritorial application of the ATS, the Court stated that it would reconsider an ATS claim that not only "touch[ed] and concern[ed] the territory of the United States" but also "d[id] so with sufficient force to displace the presumption against extraterritorial application."[80] On those grounds, the Court refused to extend ATS liability to the defendant-corporation, finding that resting jurisdiction on "mere corporate presence" when corporations were so plentiful would expand ATS jurisdiction too far.[81]

Adhering to *Kiobel*, the Second Circuit held in *Balintulo v. Daimler AG* that "a claim under the ATS cannot be brought for violations of the law of nations" when that violation occurs beyond U.S. territory.[82] In *Balintulo*, black South Africans sued U.S. corporations in federal court under the ATS, alleging that the corporations aided the South African government in committing violations of the law of nations.[83] The plaintiffs' key arguments were first that *Kiobel* did not preclude a suit under the ATS where the defendants were American nationals and second that the corporations' conduct concerned a significant American interest.[84] Noting that the plaintiffs' argument mirrored Justice Breyer's concurring opinion from *Kiobel*, the Second Circuit was not persuaded.[85]

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76. *Id.* at 1662.
77. *Id.* at 1669.
78. *Id.* at 1664.
79. *Id.* at 1669.
80. *Id.*
81. *Id.* Under the TVPA, the Court held that "individual" means a natural person, not an organization. Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1705-08 (2012).
82. 727 F.3d 174, 189 (2d Cir. 2013) (quoting Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 1662, 1668-69 (2013)).
83. *Id.* at 179, 180, 182. The corporations sold cars and computers to the government, which allegedly facilitated the government's rape, torture, and extrajudicial killing of South African citizens. *Id.* at 180.
84. *Id.* at 189, 191.
85. *Id.* at 189.

Instead, the Second Circuit found that because all of the alleged conduct occurred abroad, *Kiobel* barred extraterritorial application.[86] Despite the plaintiffs' argument that "supporting the struggle against apartheid" was a compelling American interest, the court remained entrenched and held that "in *all* cases" extraterritorial conduct cannot give rise to a cause of action under the ATS.[87]

III. THE COURT'S DECISION

In the noted case, the Second Circuit again felt the constraints of *Kiobel*. The court divided their discussion into four parts; this Note focuses on the ATS claim and the TVPA claim.[88] The discussion on the ATS claim centers on the extraterritoriality of the statute, while the relevant parts concerning the TVPA claim include a discussion on extraterritoriality, torture, and agency.[89] Khan argued that the ATS claim against him must be dismissed in light of *Kiobel* because the conduct occurred beyond U.S. territory, and the court agreed.[90] However, the Second Circuit affirmed the district court finding that Khan was liable for torture under the TVPA claim.[91] The court succinctly refuted each of Khan's arguments and held that Chowdhury's TVPA claim was not barred by extraterritoriality, that the use of electric shock does constitute torture, and that agency liability was properly applied because Khan acted with apparent authority when he facilitated Chowdhury's torture.[92]

The court first analyzed the ATS claim in light of *Kiobel* and reversed the district court's determination that Khan was liable under the ATS.[93] The court began by citing *Sosa*, which explained that the ATS not only provides a jurisdictional hook that allows aliens to file suit within U.S. territory but also provides a common law cause of action for violations of international law.[94] Next, the court discussed *Kiobel*'s clarification of the presumption against extraterritorial ATS application by explaining that a judicial decision based on conduct occurring beyond U.S. territory may carry serious foreign policy implications and that such

86. *Id.* at 189-90.
87. *Id.* at 191-92 (emphasis added).
88. Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 48-54 (2d Cir. 2014). This Comment does not extensively address the court's analysis of the general verdict rule nor the question of hearsay regarding the RAB's statements.
89. *Id.* at 50-53.
90. *Id.* at 48-50.
91. *Id.* at 50-53.
92. *Id.*
93. *Id.* at 48-50.
94. *Id.* at 49 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004)).

decisions are best left to the other political branches.[95] Thus, under *Kiobel*'s delimiting influence and because Chowdhury was detained and tortured in Bangladesh, the court ruled that his ATS claim was barred.[96]

Second, the court dismissed each of Khan's challenges to the district court's ruling that he was liable under the TVPA.[97] First, Khan purported that the ATS's territorial constraints also applied to the TVPA. The court conducted an individual two-step statutory analysis of the TVPA and found Khan's argument unconvincing.[98] The court examined the TVPA text and emphasized that the TVPA imposed liability on any individual acting with the "actual or apparent authority, or color of law, of any foreign nation," which the court found to be a logical reference to extraterritorial conduct.[99] In examining the TVPA's legislative history, the court determined that Congress intended to allow the victims of torture that occurred abroad to file a civil suit in U.S. courts.[100] Thus, the court found no bar to TVPA liability for acts conducted outside U.S. territory.[101] Khan then argued that the conduct giving rise to the TVPA claim did not constitute torture under the statute, which the court rejected by making clear that sufficiently severe electric shock may constitute torture.[102] The court defined "sufficiently severe" as conduct that is "deliberate . . . calculated . . . of an extremely cruel and inhuman nature specifically intended to inflict excruciating and agonizing physical or mental pain or suffering."[103] The court explained that the TVPA also anticipates that the torturer has a purpose.[104] The electric shock satisfied both the definition of torture and its severity requirement and, additionally, was committed for a purpose: to compel the transfer of Chowdhury's business interest to Khan.[105] Finally, Khan argued that the RAB agent's conduct was improperly attributed to him under an agency theory of liability.[106] The court demonstrated, however, that against the backdrop of common law principles, the TVPA does not require direct action by a private

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95. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013); *Chowdhury*, 746 F.3d at 49.

96. *Chowdhury*, 746 F.3d at 49-50.

97. *Id.* at 50-53.

98. *Id.* at 50-51.

99. *Id.* at 51 (quoting Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (internal quotation marks omitted)) (emphasis omitted).

100. *Id.* (citing S. REP. NO. 102-249, at 3-4 (1991)).

101. *Id.*

102. *Id.* at 51-52. Six circuit courts support electric shock as torture. *Id.* at 52.

103. *Id.* at 52.

104. *Id.* at 51-52. The purpose may include obtaining information, punishment, intimidation, coercion, or discrimination. *Id.*

105. *Id.*

106. *Id.* at 52.

individual.[107] The court relied on *Kadic*, which explained that the TVPA holds any actor liable for torture who acted "under actual or apparent authority, or color of law, of any foreign nation."[108] The plaintiff would need to prove that the defendant not only possessed the power to act with state officials or state aid, but also acted with some government involvement; otherwise a torture claim could not be supported under the TVPA.[109] As *Kadic* instructed, the court looked to principles of agency law to determine if the defendant acted under "actual or apparent authority, and color of law."[110] The court found that Khan colluded with the RAB, thus satisfying the color of law requirement.[111] In applying agency principles, the court reasoned that any individual responsible for subjecting another to torture, even without directly administering the torture, should be held liable unless Congress expresses a contrary intent.[112]

Finally, Judge Pooler in her concurring opinion highlighted the Supreme Court's open-ended guidance regarding the limits that *Kiobel* placed on the ATS's scope.[113] Specifically, Judge Pooler interpreted *Kiobel* as permitting ATS claims arising from extraterritorial conduct only in certain circumstances.[114] In *Kiobel*, however, the Supreme Court provided that it would only consider "claims [that] touch[ed] and concern[ed] the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[115] No further guidance was provided.[116]

IV. ANALYSIS

The Second Circuit swiftly discussed Chowdhury's ATS claim and then foreclosed the issue in light of the holding in *Kiobel* because all relevant conduct occurred abroad.[117] Just as in *Sosa*, the Second Circuit

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107. *Id.* at 53.

108. *Id.* at 52 (citing Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992)).

109. *Id.* at 52-53.

110. *Kadic*, 70 F.3d at 245; *Chowdhury*, 746 F.3d at 52.

111. *Chowdhury*, 746 F.3d at 53.

112. *Id.*

113. *Id.* at 55-57.

114. *Id.* Judge Pooler highlighted Justice Breyer's concurring opinion in *Kiobel* that alluded to granting ATS jurisdiction where the tortious conduct occurred on American soil, the defendant was an American national, or the conduct substantially and adversely affects an important national interest. *Id.* (Pooler, J., concurring).

115. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

116. *Id.*

117. *Chowdhury*, 746 F.3d at 48-50.

easily accepted the presumption against the extraterritorial application of the ATS.[118] Despite the court's expansion of TVPA liability,[119] the law surrounding the ATS remains stagnant in the Second Circuit.[120] However, the brevity of the court's analysis concerning the ATS claim indicates the instability of ATS jurisprudence across the circuits.[121]

The decision in *Chowdhury* contributes to TVPA jurisprudence in several ways. First, the court held that the TVPA was not limited by the territorial constraints of the ATS.[122] The court noted that it could conceivably apply to conduct occurring in the United States, but its legislative history supported extraterritorial application.[123] Still, the court failed to make a steadfast ruling on the domestic application of the TVPA. Second, the court held that electric shock to the body could rise to the level of torture.[124] The court established parameters that would assist other courts in similarly evaluating whether a particular activity satisfies the TVPA's definition of torture.[125] The court specified that an act constitutes torture when it is deliberate, calculated, extremely cruel and inhumane, and intended to inflict unbearable physical or mental pain.[126] Third, the court held that agency law "provide[s] a theory of tort liability" under the TVPA if a defendant did not personally torture the victim,[127] which conformed to congressional guidance.[128]

Chowdhury has also contributed to jurisprudence on agency liability. Once again, the Second Circuit shied away from considering agency liability under the ATS, just as they failed to address the issue in *Balintulo*.[129] However, agency liability under the TVPA was discussed and held to be an acceptable means of establishing actionable conduct.[130]

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118. Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004); *Chowdhury*, 746 F.3d at 49-50.

119. Under the TVPA, the *Chowdhury* court determined that extraterritorial application was allowable, defined torture, and expanded liability by incorporating agency principles. *Chowdhury*, 746 F.3d at 51-53.

120. *Id.* at 48-49.

121. *Id.* at 49-50 (failing to discuss how agency principles apply to the ATS and failing to elaborate on the exceptions to the *Kiobel* presumption).

122. *Id.* at 51.

123. *Id.* at 51-52.

124. *Id.* at 52.

125. *Id.* at 51-52.

126. *Id.* Deliberate implies *mens rea* or intent, calculated contemplates a purpose, extremely cruel and inhumane is a fact-intensive analysis, and the intent to inflict pain assumes a sort of reckless disregard for human life. *Id.*

127. *Id.* at 53.

128. *See* S. REP. NO. 102-249, at 8 (1992) (instructing courts to "look to principles of liability under U.S. civil rights laws . . . as well as . . . agency theory in order to give the fullest coverage possible").

129. Balintulo v. Daimler AG, 727 F.3d 174, 183-84 (2d Cir. 2013).

130. *Chowdhury*, 746 F.3d 52-53.

The TVPA's affinity for principles of agency entices a similar reading of agency application in the ATS, but applying the TVPA's construction and meaning to the ATS would improperly supplant the ATS, which is exactly the type of interpretation that the Supreme Court warned against.[131] In *Kiobel*, the Supreme Court viewed the two statutes as capable of coexistence, and found that it was the duty of the courts, absent a clear expression of congressional intent to the contrary, to regard each as effective.[132]

Despite significant TVPA clarification and expansion, the noted case failed to advance ATS jurisprudence. Namely, the court avoided settling exactly what activity could "touch and concern" the United States with enough substantiality to rebut the presumption against extraterritorial ATS application.[133] Though the court failed to venture into this arena, the rationale that bolsters the presumption's continued existence deserves discussion.

The presumption against extraterritorial application protects against international conflict. The application of U.S. law to conduct abroad projects U.S. law in a way unintended by Congress, essentially by placing the judiciary in a law-making capacity.[134] Even if the judiciary accurately ascribes U.S. law to violations of conduct that have obtained the "less definite content and acceptance among civilized nations" as compared to the historical "paradigms familiar when [the ATS] was enacted,"[135] that does not mean that international sovereigns must, or even will, agree on the remedy.[136] The presumption attempts to prevent the judiciary from negatively impacting foreign affairs, an area historically within the discretion of the executive and legislative branches.[137] However, the

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131. *Cf.* Morton v. Mancari, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

132. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1676-77 (2013) (Breyer, J., concurring) (discussing the TVPA's accompanying Senate Report that suggested the ATS "should not be replaced" by the TVPA, Congress's awareness of the similar remedies available under each statute, and Congress's decision to enact additional statutes that codify the laws of nations rather than repeal or otherwise limit the ATS).

133 *Chowdhury*, 746 F.3d at 56-57 (Pooler, J., concurring).

134. Sosa v. Alvarez-Machain, 542 U.S. 692, 725-28 (2004); *see also* Transcript of Oral Argument at 28:1-3, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (NO. 10-1491).

135. *Sosa*, 542 U.S. at 732.

136. Transcript of Oral Argument, *supra* note 134, at 40:10-16 (alluding to the impact on foreign relations when U.S. civil remedies are forced on foreign nationals for ATS claims arising from extraterritorial conduct thereby stripping foreign sovereigns of the opportunity to choose an appropriate remedy).

137. *See* Balintulo v. Daimler AG, 727 F.3d 174, 187-88 (2d Cir. 2013) (acknowledging that the ATS requires heightened appellate oversight because the risk of adverse foreign policy consequences is high and the ATS places judges in a lawmaking role).

Kiobel presumption cannot continue to be so rigidly construed in a world where the trend toward universal human rights has been garnering momentum.[138] Moreover, the United States has a universal responsibility to prosecute and repress violations of international law.[139] Following the Second Circuit's early 2014 decision in *Chowdhury*, a number of courts have found extraterritorial conduct sufficient to break the *Kiobel* bar.[140] Of those courts, none struck so negatively toward the Second Circuit's blind acceptance of the *Kiobel* presumption as the United States Court of Appeals for the Fourth Circuit in *Al Shimari v. CACI Premier Technology*, which trailed *Chowdhury* by four months.[141]

In *Al Shimari*, the Fourth Circuit admonished the Second Circuit for holding the *Kiobel* court's statement concerning "all relevant conduct" as conduct where a plaintiff sustains his injury, which cuts short the jurisdictional reach of the ATS.[142] Taking a broader approach, the Fourth Circuit interpreted the doctrine of touch and concern as a cue for courts to consider all the facts that give rise to a claim, which includes not only where the physical tortious conduct occurred, but also the parties

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138. *See* Council on Foreign Relations, *Chapter 8: World Opinion on Human Rights*, PUB. OPINION ON GLOBAL ISSUES (Nov. 2009), http://www.cfr.org/public_opinion (providing a comprehensive digest of large-scale polls that sampled world populations and reported that the dominant view is that the United Nations should "actively promot[e] human rights principles in member states").

139. *See* Penny M. Venetis, *Enforcing Human Rights in the United States: Which Tribunals Are Best Suited To Adjudicate Treaty-Based Human Rights Claims?*, 23 S. CAL. REV. L. & SOC. JUST. 121, 176-77 (2014) (asserting that U.S. courts provide the best alternative for victims when their country fails to provide appropriate remedies); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. b (1987) (providing that the principle of universality is not limited to criminal law).

140. *Compare* Du Daobin v. Cisco Sys., Inc., No. PJM 11-1538, 2014 WL 769095, at *1, *9 (D. Md. Feb. 24, 2014) (finding that there was no extraterritorial bar because the defendant was an American corporation and because a substantial part of the alleged conduct occurred domestically), *and* Krishanti v. Rajaratnam, No. 2:09-cv-05395 (JLL)(JAD), 2014 WL 1669873, at *1, *9-11 (D.N.J. Apr. 28, 2014) (finding no extraterritorial bar where American defendants domestically planned and managed a campaign of repression felt in Sri Lanka), *with* William v. AES Corp., No. 1:14CV343JCC/TRJ, 2014 WL 2896012, at *1, *10 (E.D. Va. June 26, 2014) (holding the *Kiobel* presumption intact when faced with mere corporate presence where an American corporation "profited from and [was] actively involved in the decision-making of its foreign [power distribution] subsidiar[y]" that allegedly caused death, misery, and substantial economic loss as a result of providing substandard power distribution).

141. No. 13-1937, 13-2162, 2014 WL 2922840, at *1 (4th Cir. June 30, 2014). The court found the *Kiobel* presumption effectively rebutted because first, the defendants were American citizens employed by an American corporation at a facility operated by the U.S. government; second, a federal agency contracted the corporation to perform services, the Department of Defense conducted background checks, and the employees were hired in the United States; and third, the corporate managers in the U.S. were aware of the tortious conduct but did nothing to stop it. *Id.* at *9-10.

142. *Id.* at *9.

involved and their relationship to the causes of action.[143] In the Fourth Circuit, the *Kiobel* presumption is effectively rebutted when the alleged tort occurs within U.S. territory, the defendant is an American national, or the defendant's conduct "substantially and adversely affects an important national interest."[144] Undeterred by *Kiobel*, the Fourth Circuit managed to establish a governing precedent to rebut the presumption against the extraterritorial application of the ATS while simultaneously holding the jurisprudential door ajar for future cases that may be confronted with the *Kiobel* presumption.

V. CONCLUSION

In a time where technology has brought foreign concepts of normalcy to our doorstep, what does and does not become a violation of the law of nations will be in perpetual flux. Though the Second Circuit lost its foothold as the preeminent circuit setting ATS precedent, as evidenced by the growing number of courts ruling in contrast to its position, the court's decision made significant contributions to TVPA jurisprudence.[145]

The court's decision in *Chowdhury* fell in line with the precedent established before it, expanded TVPA understanding, and highlighted questions left unanswered. The court applied the law in accordance with the congressional intent established in 1789 while maintaining that fidelity on through 1992. Although courts have allowed agency principles of law to penetrate ATS and TVPA jurisprudence, those courts rendered their decisions in tandem with congressional intent. In doing so, the courts ensured that no matter how ATS and TVPA jurisprudence evolved in contemporary times, the purpose of the law would remain faithful to its redactors. Circuits that were not initially involved in the debate are tackling some of the questions left unanswered by *Kiobel*. However, despite *Chowdhury* leaving one jurisprudential foot stuck in the mud, the other foot stepped forward and firmly laid the groundwork necessary to provide courts with future guidance.[146] What remains to be seen is whether the United States will accept the established exercise of extraterritorial jurisdiction for violations of international law, or if U.S.

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143. *Id.* at *8-9.

144. *Id.* (citing Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring)).

145. Chowdhury v. Worldtel Bangl. Holding Ltd., 746 F.3d 42, 50-53 (2d Cir. 2014); Al Shimari v. CACI Premier Tech., Nos. 13-1937, 13-2162, 2014 WL 2922840, at *1 (4th Cir. June 30, 2014).

146 This is a comparison of the Second Circuit's expansion of TVPA jurisprudence with their imperceptible augmentation to the ATS.

courts will shy away from human rights concerns and simply answer the call with a dial tone. Denied.

In sum, the courts should return to *Filartiga* when doubt intrudes upon the fervor that a first-world nation should exude in protecting the inalienable rights of all mankind.

> Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. . . . Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.[147]

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147. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

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