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Al Shimari v. Caci International, Inc.: The Application of Extraterritorial Jurisdiction in the Wake of Kiobel

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AL SHIMARI V. CACI INTERNATIONAL, INC.: THE APPLICATION OF EXTRATERRITORIAL JURISDICTION IN THE WAKE OF *KIOBEL*

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INTRODUCTION

On June 25, 2013, the United States District Court for the Eastern District of Virginia decided *Al Shimari v. CACI International, Inc.*,[1] a case in which four Iraqi citizens, via the Alien Tort Statute (ATS), brought claims in common law and international law alleging that CACI Premier Technology, Inc. (CACI PT), "a United States military government contractor, abused and tortured them during their detention in Abu Ghraib, Iraq."[2] The plaintiffs attempted to impose liability in common law tort and under customary international law.[3] Pursuant to the United States Supreme Court's April 2013 decision in *Kiobel v. Royal Dutch Petroleum*,[4] the district court held that it lacked ATS jurisdiction over the plaintiffs' claims.[5] The district court further held that Iraqi law governs plaintiffs' common law claims.[6] Finally, the district court held that plaintiffs' failed to state a claim under Iraqi law, and as such, plaintiffs' common law claims against CACI PT were dismissed.[7]

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[1] *See* Al Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857 (E.D. Va. 2013).

[2] *Id.* at 858.

[3] *Id.* at 859. Plaintiffs' asserted "jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity), 28 U.S.C. § 1350 (ATS), and 28 U.S.C. §1367 (supplemental jurisdiction)." *Id.* The plaintiffs' third amended complaint alleged twenty "causes of action including torture; civil conspiracy to commit torture; aiding and abetting torture; cruel, inhuman, or degrading treatment; and war crimes." *Id.*

[4] *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

[5] *See* Al Shimari, 951 F. Supp. 2d at 863–68.

[6] *See id.* at 869–71.

[7] *See id.* at 871–74.

First, this comment will discuss the district court's analysis and holdings of the three major issues in this case. Second, it will argue that the district court failed to properly analyze the *Kiobel* holding causing it to wrongly deny its own jurisdictional powers over the defendants and in doing so the district court expanded upon the initial meaning of *Kiobel*. Third, it will analyze the use of the Ohio choice of law provisions and the court's improper analysis of Iraqi law. Finally, this comment will discuss some of the potential ramifications created by the decisions of the district court in *Al Shimari*.

I. FACTS AND PROCEDURAL BACKGROUND

Al Shimari v. CACI International, Inc. is the culmination of a series of transfers from numerous district courts, case consolidations, and multiple decisions from the District Court for the Eastern District of Virginia, which were the result of many pretrial motions, including motions to dismiss various parties and claims.[8] The case had also has been before the Fourth Circuit Court of Appeals on two different occasions.[9]

On June 30, 2008, plaintiff Suhail Najim Abdullah Al Shimari, an Iraqi citizen, filed the initial action against CACI International, Inc. (CACI, Inc.),[10] alleging he was physically and mentally abused and tortured while he was interrogated as an enemy combatant by CACI PT and the U.S. military at the Abu Ghraib military detention

[8] *See id.* at 859; *see also* Al Shimari v. CACI Int'l, Inc., 933 F. Supp. 2d (E.D. Va. 2013); Al Shimari v. CACI Premier Tech., Inc., 657 F. Supp. 2d 700 (E.D. Va. 2009), *rev'd*, 658 F.3d 413 (4th Cir. 2011), *rev'd en banc*, 679 F.3d 205 (4th Cir. 2012) ; Al Shimari v. CACI Int'l, 2008 WL 7348184 (E.D. Va. 2008), *vacated*, 933 F. Supp. 2d 793 (E.D. Va. 2013).

[9] *See* Al Shimari v. CACI Int'l, Inc., 658 F.3d 413 (4th Cir. 2011), *rev'd en banc*, 679 F.3d 205 (4th Cir. 2012).

[10] Al Shimari, 951 F. Supp. 2d at 859. CACI International, Inc. is "a Delaware corporation with its headquarters in Arlington, Virginia, and CACI PT its wholly-owned subsidiary and [is] also located in Arlington, Virginia." *Id.* "Both CACI PT and CACI, Inc. are corporations that contractually provided interrogation services for the United States military at Abu Ghraib during the period in question. Specifically, beginning in September 2003, CACI PT provided civilian interrogators for the U.S. Army's military intelligence brigade assigned to the Abu Ghraib prison." *Id.* (citations omitted).

centers (Abu Ghraib).[11] These allegations included food deprivation, forced nudity, beatings, electric shock, sensory deprivation, extreme temperatures, death threats, oxygen deprivations, sexual assaults, and mock executions. On September 18, 2008, plaintiffs Taha Yaseen Arraq Rashid, Asa'ad Hamza Hanfoosh Al-Zuba'e, and Salah Hasan Nsaif Jasim Al-Ejaili joined the action.[12]

On March 18, 2009, the district court denied one of the motions to dismiss plaintiffs' state law claims, and rejected the argument that CACI PT and CACI, Inc. were entitled to sovereign immunity or that these claims were preempted.[13] However, the district court also refused to exercise jurisdiction over the plaintiffs' ATS claims stating that the tort claims were "too modern and too novel to satisfy the *Sosa* [*v. Alvarez-Machain*] requirements for ATS jurisdiction."[14] While use of the ATS has seen a dramatic increase in recent years, the ATS was enacted as a part of the Judiciary Act of 1789.[15] The ATS allows "aliens" to bring tort claims in federal district courts for violations "of the law of nations or a treaty of the United States."[16]

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[11] Between September 22, 2003 and May 6, 2005, many Iraqi citizens were interrogated and held at various military detention centers within a complex located in Abu Ghraib, Iraq. *Id.* There have been wide spread reports of abuse and torture that occurred during this period of time. *Id.*

[12] Al Shimari v. CACI Int'l, 2008 WL 7348184 at *1 (E.D. Va. 2008).

[13] *See* Al Shimari, 657 F. Supp. 2d at 731–32; *see also Al Shimari*, 951 F. Supp. 2d at 859.

[14] Al Shimari, 951 F. Supp. 2d at 859; *see* Al Shimari, 657 F. Supp. 2d at 731–32. The Fourth Circuit noted that Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), dictates that federal courts should dismiss private claims "for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 [ATS] was enacted." Al Shimari, 657 F. Supp. 2d at 727 (quoting *Sosa*, 542 U.S. at 732). The Fourth Circuit also noted that federal courts should be cautious "when recognizing additional torts under the common law that enable ATS jurisdiction." *Id.* (citing Sosa, 542 U.S. at 729).

[15] *See* Teresa M. O'Toole, Comment, Amerada Hess Shipping Corp. v. Argentine Republic*: An Alien Tort Statute Exception to Foreign Sovereign Immunity*, 72 MINN. L. REV. 829, 837 n.49 (1988).

[16] 28 U.S.C. § 1350 (2012).

However, the ambiguity of the ATS language forces many courts to deny jurisdiction.[17]

The district court declined to address the question of whether war crimes; torture; and cruel, inhuman, and degrading treatment are sufficiently universal and obligatory international law norms that meet the *Sosa* standard, instead reasoning that claims against government contractors are a fairly modern construct and do not have an adequate definition within the realm of international law.[18]

On September 21, 2011, in a divided panel, the Fourth Circuit reversed the district court's 2009 ruling, finding that acts which are integrated into the activities of military combatants should be immune from liability.[19] However, on May 11, 2012, sitting en banc,[20] the Fourth Circuit vacated the panel decision, finding that proper jurisdiction over CACI, Inc. and CACI PT had not been found during the appeal.[21] On May 31, 2012, CACI, Inc. and CACI PT argued for a stay of the Fourth Circuit's mandate arguing that they were going to file a petition of certiorari with the United States Supreme Court.[22] On June 1, 2012, the Fourth Circuit stayed its mandate, yet issued its final mandate on June 29, 2012.[23]

While the case was still before the District Court for the Eastern District of Virginia on remand, the U.S. Supreme Court addressed how the ATS should be applied to acts that occurred on foreign soil in its decision of *Kiobel v. Royal Dutch Petroleum*.[24] Due to the *Kiobel* decision, the district court "stayed all pending motions as of April 18, 2013 and ordered [briefings on two issues:] (1) the effect,

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[17] While the language of the ATS allows aliens to bring tort claims in district courts, the remainder of the statutory language is so vague that district courts frequently deny jurisdiction. O'Toole, *supra* note 15, at 839.

[18] *See Al Shimari*, 657 F. Supp. 2d. at 727.

[19] *See* Al Shimari v. CACI Int'l, Inc., 658 F.3d 413, 420 (4th Cir. 2011), *rev'd en banc*, 679 F.3d 205 (4th Cir. 2012).

[20] Upon losing an appeal, the losing side may request a rehearing in front of the entire membership of the circuit that ruled on the case. In the alternative, the losing side may request that a three-judge panel to reconsider its decision. Fed. R. App. P. 35a–c.

[21] Al Shimari v. CACI Int'l, Inc., 679 F.3d 205, 224 (4th Cir. 2012).

[22] Al Shimari v. CACI Int'l, Inc., 951 F. Supp.2d 857, 860 (E.D. Va. 2013)

[23] *Id.*

[24] *See* Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013).

if any, of *Kiobel* on Plaintiffs' [ATS] claims . . . and (2) whether the Court retains jurisdiction over Plaintiff Al Shimari's common law claims and the choice-of-law determination on those claims."[25]

After the district court's order, CACI PT filed a "Motion for Reconsideration, or in the alternative Motion to Dismiss Plaintiffs' [ATS] Claims, and Motion to Dismiss Plaintiffs' Third Amended Complaint for Failure to State a Claim."[26] Upon the filing of these motions, the district court now had three issues pending before it: (1) "whether the court ha[d] subject matter jurisdiction, by operation of the ATS, over Plaintiffs' claims of violations of international law against CACI PT for torture, war crimes, and inhuman treatment resulting from injuries occurring in Abu Ghraib"; (2) "whether the Court [should] apply Ohio, Virginia, or Iraqi law to Plaintiff Al Shimari's common law claims where Al Shimari filed suit in Ohio against a Virginia corporation for acts and injuries occurring in Iraq during a multinational occupation of Iraq"; and (3) "whether the Court should grant CACI PT's Motion to Dismiss for failure to state a claim under Iraqi law where Al Shimari present[ed] various common law claims for actions occurring in Iraq, . . . governed by laws promulgated by the Coalition Provisional Authority (CPA),[27] during occupation by a multinational force."[28]

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[25] *Al Shimari*, 951 F. Supp.2d at 861.

[26] Al Shimari v. CACI Int'l Inc., 951 F. Supp. 857, 857–58 (E.D. Va. 2013).

[27] The Coalition Provisional Authority "governed Iraq between May 2003 and June 28, 2004 at which time the CPA ceded governance to the Interim Government of Iraq." *Id.* at 871 (citing United States ex rel. DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295, 298 (4th Cir. 2009)). "During its governance, the CPA issued a number of 'orders' setting forth the operative legal framework of Iraq . . . ." *Id.* (citing Galustian v. Peter, 591 F.3d 724, 728 (4th Cir. 2010)).. Order Number 17, the order relevant here, states in Section 3 that "'[c]oalition contractors and their sub-contractors as well as their employees . . . shall not be subject to Iraqi laws or regulations in matters relating to the Coalition forces or the CPA.'" *Id.* (citation omitted) The order further states in Section 6 that:

> third party claims including those for . . . personal injury, illness or death or in respect of any other matter arising from or attributed to Coalition personnel or any persons employed by them . . . that do not arise in connection with military combat operations, shall be submitted and dealt with by the Parent State whose Coalition personnel,

II. ANALYSIS

A. REPORT

1. MOTION TO DISMISS ATS CLAIMS

On April 17, 2013, the U.S. Supreme Court decided the *Kiobel* case, which turned on the issue of whether and in what situations the ATS allowed federal courts to retain jurisdiction over causes of action pertaining to violations of international law which did not occur inside the jurisdiction of the United States.[29] "*Kiobel* involved former Nigerian nationals, [currently] residing in the United States, who filed suit under the ATS against Dutch, British, and Nigerian corporations for [assisting] the Nigerian government" in violating international law within Nigeria.[30] The Supreme Court in *Kiobel* "rejected the extraterritorial application of the ATS" relying upon "statutory construction, which states that absent Congress's indication otherwise, there [is a] presumption against extraterritorial application of federal statutes."[31] The Supreme Court went further to state that "the text of the ATS failed to rebut the presumption that the statute would not be"[32] applied extraterritorially and that "'nothing in the text of the [statute] suggest[ed] that Congress intended . . . [such] extraterritorial reach."[33] Therefore, the Supreme Court held that because the alleged violations of customary international law occurred exclusively outside United States territory, "federal courts were not a proper forum for the plaintiffs' claims absent . . . [any] congressional intent for the ATS to apply to injuries which occurred within . . . another sovereign."[34]

The Eastern District of Virginia first looked at CACI PT's motion to dismiss plaintiffs' ATS claims. The district court granted defendant's motion, holding that it lacked "subject matter jurisdiction

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> property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the national laws of the Parent State.

Id. (citation omitted).

[28] *Al Shimari*, 951 F. Supp. at 858.

[29] *Id.* at 864. (citing Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (2013)).

[30] *Id*. (citing *Kiobel*, 133 S. Ct. at 1662–63).

[31] *Id.* (citing *Kiobel*, 133 S. Ct. at 1664).

[32] *Id.* (citing *Kiobel*, 133 S. Ct. at 1664).

[33] *Id.* (citing *Kiobel*, 133 S. Ct. at 1665).

[34] *Id.* at 864–65 (citing Kiobel, 133 S. Ct. at 1669).

over Plaintiffs' ATS claims because, as held in *Kiobel*," the ATS does not grant jurisdiction to tort claims where the alleged conduct occurred entirely outside United States territory.[35]

The district court found that the ATS expands the jurisdiction of the district courts by granting them jurisdiction over tort claims that come from violations of international law, as opposed to creating a new cause of action[36] The district court reasoned that, by applying *Kiobel*, it must dismiss the plaintiffs' international law claims for lack of subject matter jurisdiction since plaintiffs' allegations dealt with violations that occurred outside a U.S. territory.[37]

Additionally, concluding that the acts and injuries which gave rise to the plaintiffs' claims do not, and cannot, support ATS jurisdiction, the district court refused to adopt the plaintiffs' "argument that Iraq was not a territory external to the United States" due to de facto sovereignty.[38] The district court noted that "while wartime occupation may show *de jure* sovereignty," the military force, which occupied Iraq during the time in question, was comprised of more than just the United States military.[39] Therefore, the district court reasoned that the United States did not exclusively control Iraq. [40] The district court also disagreed with the plaintiffs'

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[35] *Id.* at 863. The ATS was "enacted by the First Congress as a part of the Judiciary Act of 1789" as a jurisdictional statute. *Id.* It provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.* (citing 28 U.S.C. § 1350 (2006)).

[36] *Id.* at 863 (citing Sosa v. Alvarez–Machain, 542 U.S. 692, 714 (2004)).

[37] *Id.* at 865.

[38] *Id.* De facto sovereignty requires a judicial determination. *Id.* (citing Boumedine v. Bush, 553 U.S. 723, 753–54 (2008)). "Plaintiffs' rely on *Boumedine* and Rasul v. Bush, 542 U.S. 466 (2004), [in which] the Supreme Court held that . . . the United States maintained complete jurisdiction and control over Guantanamo Bay, Cuba" as demonstrated by an express lease agreement. *Id.* (citing Boumedine, 553 U.S. at 754; Rasul, 542 U.S. at 480). However, in the case before the District Court for the Eastern District of Virginia, there was no express agreement, only the CPA-promulgated regulations to support the plaintiffs' position. *See id*.

[39] *Id.*

[40] *Id.*

interpretation of *Kiobel*,[41] stating that the Supreme Court was clear "that the presumption against extraterritoriality is only rebuttable by legislative act, and not by judicial decision."[42] Specifically citing four arguments from *Kiobel*, [43] the district court found that the Supreme Court did not intend for there to be a rebuttable presumption that could be altered by the facts and circumstances of any one case. [44]

The district court's reasoning and reading of *Kiobel* also was consistent with *Morrison*,[45] the case *Kiobel* heavily relied upon. The

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[41] Plaintiffs' argued that *Kiobel* should be interpreted to "hold that the presumption against extraterritoriality" would be overcome if a sufficient connection with the United States existed. *Id.* at 866. Plaintiffs' further argued that "*Kiobel* does not impose a 'bright line test"' or automatically bar jurisdiction if the tort occurs in a foreign territory, but "allows for the facts of the case to rebut the presumption" if there is a sufficient connection with the United States. *Id.* In essence, plaintiffs interpreted *Kiobel* to allow for the presumption against extraterritoriality to be overcome by judicial decision and that the Supreme Court intended to leave the question "of what cases or claims could displace the presumption" up to the judiciary. *Id.*

[42] *Id.*

[43] The district court found that its narrower reading of *Kiobel* was supported by at least four specific reasons in the Supreme Court opinion. First, the discussion in *Kiobel* stated that "'[w]hen a *statute* gives no clear indication of an extraterritorial application, it has none,'" which could only suggest "that the text of the statute itself" has to rebut the presumption. *Id.* (quoting Kiobel, 133 S. Ct. 1659, 1664 (2013) (citing Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010)). Next, *Kiobel* said "that 'to rebut the presumption, the ATS would need to evince a clear indication of extraterritoriality,'" showing again that the statute must rebut the presumption. *Id.* (citing Kiobel, 133 S. Ct. at 1665). Third, the Supreme Court stated that if Congress had intended for the ATS to have an extraterritorial reach, then a more specific statute would be needed. *See id.* Finally, the Supreme Court explained that the presumption assists in maintaining the balance between the branches of government so that "'the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.'" *Id.* (citing *Kiobel*, 133 S. Ct. at 1664 (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991))).

[44] *See id.* at 867.

[45] *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010). *Morrison* revolved around the issue of "whether the Securities Exchange Act . . . provided a cause of action to foreign plaintiffs for fraudulent securities exchanges originating outside the United States." Al Shimari, 951 F. Supp. 2d at 867 (citing Morrison, 130 S. Ct. at 2875). In reviewing the lower

district court rejected the plaintiffs' arguments[46] on the grounds that *Morrison* expressly rejected their view and that *Kiobel* did not place any limitations on *Morrison* regarding *Morrison*'s disapproval of judicial guesswork in the presumption's applicability instead of relying on the statutory construct.[47] Instead, the district court read the text of *Kiobel* to extend the presumption to the ATS,[48] and denied the plaintiffs' ATS claims due to lack of jurisdiction.[49]

2. Motion to Dismiss Common Law Claims

Next, the district court looked at CACI PT's motion to dismiss Al Shimari's common law claims and granted its motion because Iraqi law precludes liability for the alleged actions.[50] Holding to the long-standing *Erie* Doctrine,[51] the district court found that the

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courts decisions, the Supreme Court "invoked the presumption against extraterritorial application of the Act," finding that, unless Congress clearly intended to give a statute extraterritorial effect, the Court must "'presume [the statute] is primarily concerned with domestic conditions.'" *Id.* (citing Morrison, 130 S. Ct. at 2877 (quoting *EEOC*, 499 U.S. at 248)). The *Morrison* Court held that courts should "apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." Morrison, 130 S. Ct. at 2881.

[46] Plaintiffs argued that the district court should make a factual judicial determination. Al Shimari, 951 F. Supp. 2d at 867. This argument was similar to the "north star" approach taken by the Second Circuit, before it was so firmly rejected by the *Morrison* Court. *Id.* This approach calls for a judicial weighing of the "conduct" and "effects" (specifically in securities cases) to see whether the presumption against extraterritoriality was sufficiently rebutted. *See id.*; Morrison, 130 S. Ct. at 2879.

[47] *Al Shimari*, 951 F. Supp. at 867.

[48] *See id.*

[49] *See id.* at 868.

[50] *Id.*

[51] As set forth in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1983), when a district court is sitting in diversity it must apply the substantive law of the state in which the court sits. Al Shimari, 951 F. Supp. at 868 (citing Erie, 304 U.S. at 78). This includes the state's choice of law rules. *Id.* (citing Colgan Air, Inc. v. Raytheon Aircraft Co., 507 F.3d 270, 275 (4th Cir. 2007) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–97 (1941); Erie, 304 U.S. at 78)). The exception to the *Erie* doctrine arises under 28 U.S.C. § 1404(a), which allows a district court to transfer a civil action to another district, for the convenience of the parties, if the case could

presumption of Ohio's choice of law rule[52] required the district court to apply Iraqi law to Al Shimari's common law claims.. The district court then analyzed the claims to determine whether the claims had a more significant relationship to another jurisdiction. The district court found that the *Morgan* factors "fail[ed] to compel a departure from the presumptive application of Iraqi law."[53] Therefore, because

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have originally been brought in the transferee court or if all parties consent to the transfer. *See* 28 U.S.C. §1404(a) (2006). Under these circumstances, it is only the location that is changed, not the laws that are being applied, and the transferee court is required to apply the law of the original court. *See* Goad v. Celotex Corp., 831 F.2d 508, 510 & n.5 (4th Cir. 1987). Therefore, based on the *Erie* Doctrine and § 1404(a) ,while this case is being heard in the Eastern District of Virginia, the district court must apply both Ohio's substantive law and choice of law rule, since the case was transferred to the District Court for the Eastern District of Virginia from the Southern District of Ohio. Al Shimari, 951 F. Supp. at 869.

[52] The Ohio choice of law provision generally requires that in tort actions the applicable law is that of the place of injury. *See* Morgan v. Biro Mfg. Co., 474 N.E.2d 286, 288 (Ohio 1984). This rebuttable presumption can be set aside if the court finds that "another jurisdiction has a more significant relationship to the lawsuit." *Id.* at 289. In determining if another jurisdiction's relationship is more significant, the court is to consider the following factors:

> (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; and (5) any factors under Section 6 [of the *Restatement (Second) of Conflict of Laws*] which the court may deem relevant to the litigation.

Id. Morgan goes further in breaking down the fifth factor to include:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of [the] law to be applied.

Id. n.6 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971)).

[53] *See supra*, note 44; Al Shimari, 951 F. Supp. 2d at 870. In going through the *Morgan* factors, the district court found that: (1) the injury

the facts failed to rebut the choice of law presumption, the district court is required to apply Iraqi law.

At the time of the alleged actions, the district court found that Iraqi law precluded liability for the actions taken by CACI PT.[54] CACI PT argued that the Supreme Court defines the term "relating to" broadly when used by Congress to preempt state legislation; therefore, the district court should also interpret "relating to" broadly in this case.[55] The district court agreed with CACI PT's argument, and accordingly, CACI PT's actions, and the alleged harms caused by those actions, "relate to" CACI PT's contract and were, therefore, protected.[56] As such, Al Shimari is prevented from pursuing claims under Iraqi law due to Order Number 17 Section 3.

In the alternative, the district court found that Section 6 of Order No. 17 also precludes Al Shimari's common law claims. The district court was not persuaded by the plaintiff's argument,[57] but instead reasoned that the "[t]he detention and interrogation of potential enemy combatants or hostile individuals is most certainly connected with contemporaneous military combat operations."[58] The district court further reasoned Section Six does not require a judicial

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occurred in Iraq; (2) the conduct causing the injury also occurred in Iraq; (3) "Al Shimari is an Iraqi citizen and CACI PT is a Delaware corporation with its principal place of business in Virginia" supporting the conclusion that there is not a more significant relationship by a place other than Iraq; (4) the relationship of the parties also was located in Iraq; and (5) no other state has a greater relationship to the claim than Iraq. *Id.*

[54] *See supra* note 21. The governing CPA orders at the time in question stated that contractors were to be granted immunity for actions related to the terms of their contract. *See* Al Shimari, 951 F. Supp. 2d at 871. The law also provided for an exception for personal injury liability where the injury was the result of military combat operations and its related activities. *Id.*

[55] Al Shimari, 951 F. Supp. 2d at 871–72 (citing Altria Grp., Inc. v. Good, 555 U.S. 70, 85 (2008)).

[56] The Supreme Court has interpreted "relating to" broadly where Congress used the language in preempting state legislation. *See* Altria Grp., Inc., 555 U.S. at 85.

[57] Plaintiff argued Section 6 requires the actions to involve military combat operations and as the contract between CACI PT and the United States military strictly prohibited CACI PT from participating in any combat operations, CACI PT could not have participated in military combat operations. Al Shimari, 951 F. Supp. 2d at 872.

[58] *Id.*

determination of an exception to liability because "merely a connection to combat activity is sufficient."[59] Therefore, because CACI PT's activities were clearly connected to combat activity, CACI PT cannot be held liable for its actions. For these reasons, the district court granted CACI PT's motion to dismiss Al Shimari's common law claims for failure to state a claim under Iraqi common law.[60]

B. ANALYSIS

1. ATS Claims

The District Court for the Eastern District of Virginia ultimately found that the *Kiobel* decision precluded Al Shimari's ATS claims under the circumstances of the case. For its part, *Kiobel* pertained entirely to extraterritorial acts where none of the parties were citizens of the United States.[61] This district court expands upon the holding in *Kiobel* to now state that ATS jurisdiction does not extend to violations of humanitarian law that were committed by American governmental entities.[62] Yet, given that the defendants in this case were United States corporations with primary places of business located in the United States, it would initially appear that the claims of the plaintiffs "'touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritoriality.'"[63] However, Chief Justice Roberts clearly stated in *Kiobel* that a "mere corporate presence" in the United States, when the conduct occurred solely outside the United States territory, is not enough to "touch and concern" the United States.[64]

The district court in this case refused to apply the "touch and concern" language of the *Kiobel* court.[65] As argued by the plaintiffs,

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[59] *Id.* at 872–73.

[60] In coming to this decision, the district court made sure to note that its decision did not arise from military immunity, but from the application of Iraqi law that was applied due to the Ohio choice of law provisions. *Id.* at 873.

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

[62] Al Shimari, 951 F. Supp. 2d 857.

[63] *See* Sexual Minorities Uganda v. Lively, No. 12-CV30051-MAP, 2013 WL 4130756, at *15 (D. Mass. Aug. 14, 2013) (quoting Kiobel, 133 S. Ct. at 1669).

[64] Kiobel, 133 S. Ct. at 1669.

[65] *See* Al Shimari, 951 F. Supp. at 867–68.

the Supreme Court did not create a bright line test in *Kiobel*; and accordingly, the door was left open for district courts to interpret the *Kiobel* decision and apply it appropriately to the factual situation presented before them.[66] In a comparable case, *Sexual Minorities Uganda v. Lively*,[67] the District Court of Massachusetts held the ATS still provides jurisdiction for actions, which occurred outside the United States, when the actor is a United States citizen and much of the planning of his actions occurred within the United States.[68] However, in *Al Shimari*, the district court failed to analyze whether the connection to the United States went any further than the fact that the companies were based outside of the United States and that the contract in question was between the United States military and United States corporations. Following the theory of *Sexual Minorities Uganda*, this alone might have been sufficient to show that the defendants' actions "touch[ed] and concern[ed] the territory of the United States . . . with sufficient force to displace the presumption against extraterritoriality," thereby meeting the *Kiobel* and *Morrison* test.[69] Additionally, there is case law that the district court failed to appropriately apply. *Sexual Minorities Uganda*, while not precedent to *Al Shimari*, is helpful in illuminating the Supreme Court's previous interpretation of the jurisdictional reach of the ATS. In order for a federal court to recognize a claim under the ATS, the Supreme Court previously dictated that "a federal court can only recognize a claim under the ATS if the claim seeks to enforce an underlying norm of international law that is as clearly defined and accepted as the international law norms familiar to Congress in 1789 when the ATS was enacted."[70]

Had the District Court for the Eastern District of Virginia had *Sexual Minorities Uganda* as a reference while making its decision, it should have followed the District of Massachusetts interpretation of the ATS. The district court would therefore be required to first determine if there is a violation of an international norm, and second to determine if said norm is within the group of claims under ATS

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[66] *See id.* at 867.

[67] *See generally* Sexual Minorities Uganda, 2013 WL 4130756.

[68] Sexual Minorities Uganda, 2013 WL 4130756, at *15.

[69] Kiobel, 133 S. Ct. at 1699.

[70] Sexual Minorities Uganda, 2013 WL 4130756, at *7 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)).

jurisdiction.[71] Applying this theory to the facts of *Al Shimari*, the plaintiffs alleged violations of their human rights, including torture, which have clearly been prohibited in many international treaties and international courts have found are crimes against humanity.[72] Therefore, the district court must derive whether torture was prohibited by international law norms in 1789, the year the ATS was enacted.

Prohibitions of torture have been recognized since before the mid-1900's.[73] Treaties, judicial decisions, and legislative or executive decisions may determine international law.[74] Additionally, the Supreme Court has found that if these controlling documents are absent, then the existence of international law and its contents may be drawn from:

> "[T]he customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[75]

Even a cursory overview of international treaties shows that "no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be

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[71] *See id.*

[72] *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, US Treaty Doc. 110-20, 1465 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention Relative to the Treatment of Prisoners of War art 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 136; *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 255 (June 27); Prosecutor v. Du[ko Tadi] a/k/a/ "Dule," Case No. IT-94-1-I, Decision on the Defence Motion on Jurisdiction, 65–74 (Aug. 10, 1995).

[73] *See supra* note 72.

[74] *See* Paquete Habana, 175 U.S. 677 (1900).

[75] Sosa v. Alvarez–Machain, 542 U.S. 692, 734 (2004) (quoting Paquete Habana, 175 U.S. at 700).

threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."[76] Therefore, the plaintiffs' cause of action should have been found appropriate under the ATS as the plaintiffs were being held as prisoners of war at Abu Ghraib.

2. COMMON LAW CLAIMS

In deciding Al-Shimari's common law claims, the district court properly followed Ohio's choice of law rule pursuant to the *Erie* doctrine. The *Erie* doctrine, along with the exception for transfers pursuant to § 1404(a), is well-settled law that applies to substantive law claims, which include choice of law rules.[77] Ohio's choice of law provisions provide a rebuttable presumption that the governing law is law of the state where the injury occurred.[78]

Arguably, the district court properly weighed the *Restatement* factors to determine if the presumption was rebutted. First, the defendants are United States corporations. Therefore, the plaintiff is not requesting that the district court apply foreign law to the defendants, but simply apply the law of the defendants' home country. Second, Iraqi law does not provide a remedy for the conduct because it protects contractors from being charged. Therefore, the plaintiff has no forum for this claim in Iraq.

The district court also pushed aside the plaintiff's categorization of the defendants' actions, stating that the defendants' fell under a grant of immunity in the military combat provision of Section 6.[79] However, as Al Shimari pointed out, the defendants' contract with the United States strictly prohibited the defendants from participating in any form of military activity.[80] Therefore, the defendants' contract with the United States was invalidated by their military combat

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[76] David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 LAW & INEQ. 343, 349 (2011) (quoting Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 72).

[77] *See* Sexual Minorities Uganda v. Lively, No. 12-CV30051-MAP, 2013 WL 4130756, at *22 (D. Mass. Aug. 14, 2013).

[78] *See* Byers v. Lincoln Elec. Co., 607 F. Supp. 2d 840, 846–47 (N.D. Ohio 2009).

[79] *See supra* note 52.

[80] *See supra* note 57 and accompanying text.

actions and; therefore, the CDCI PT and CDCI, Inc. would not be covered by the protections of Iraqi common law.

C. PRACTICAL IMPACT

Al Shimari is one of the first cases to be decided after the landmark decision made in *Kiobel*. While it may not be a landmark case in its own right, it is the beginning of a new era in which, under the ATS some district courts may believe they do not hold jurisdiction over claims arising from actions committed outside the United States.

The district court in this case has restricted the jurisdiction of district courts even further than *Kiobel* did by failing to properly apply the "touch and concern" test from *Kiobel*. This means that many cases that potentially fall under the jurisdiction of district courts will be dismissed because courts will fail to see the error of this analysis.

As can be seen, is it possible for the ATS to still provide jurisdiction for cases outside the United States territory, however, some courts will read *Al Shimari's* expansion of *Kiobel* to restrict jurisdiction to deny coverage to crimes committed by citizens of the United States outside of the territory of the United States. In some circumstances, the victims will not be able to find a venue to air their grievances due to this narrowing of the jurisdiction of district courts.

CONCLUSION

Al-Shimari and his fellow plaintiffs claim they were brutally and inhumanely treated at the hands of CDCI PT and CDCI, Inc. The case presented before the district court ask: (1) whether the court has subject matter jurisdiction, by operation of the ATS, over the plaintiffs' claims of violations of international law against CACI PT for torture, war crimes, and inhuman treatment resulting from injuries occurring in Abu Ghraib; (2) whether the district court should apply Ohio, Virginia, or Iraqi law to plaintiff Al Shimari's common law claims where Al Shimari filed suit in Ohio against a Virginia corporation for acts and injuries occurring in Iraq during a multinational occupation of Iraq; and (3) whether the district court should grant CACI PT's motion to dismiss for failure to state a claim under Iraqi law where Al Shimari presents various common law

claims for actions occurring in Iraq, which was governed by laws promulgated by the CPA during occupation by a multinational force?

The district court found it did not have jurisdiction over the plaintiffs' ATS claims pursuant to the recent holding in *Kiobel*, which denied the district court's jurisdiction over claims for actions occurring outside the United States except in specific circumstances. The district court then found that, by applying Ohio's choice of law provision, Al Shimari's common law claims had to be dismissed because Iraqi law at the time the alleged offenses were committed provided a grant of immunity for the defendants.

The district court, however, failed to properly analyze the facts of the *Al Shimari* case by refusing to apply the "touch and concern" test, as provided in *Kiobel*. Due to the lack of specificity provided by the Supreme Court in the *Kiobel* case, the district court did not know how to apply the test, so they failed to do so entirely.

The district court similarly failed to review additional precedent, which grants district courts jurisdiction over ATS claims for violations of international norms. By failing to review the international norms and customs regarding torture and prisoners of war, the district court declined on jurisdiction when it was not required to.

Finally, the district court took the Iraqi common law at face value, instead of reviewing the facts to determine if the Iraqi law actually protected the defendants. The district court granted the defendants immunity pursuant to Iraqi common law; however, by acting outside the scope of their contract, the defendants might not have been eligible for this protection.

By expanding the holding of the *Kiobel* case to include actions committed by United States corporations outside the territory of the United States, the district court precludes many victims from an avenue of redress, which may have been their only opportunity for justice. The district court similarly created a loophole for United States corporations to get away with horrible crimes against humanity.