No. 16-

IN THE

Supreme Court of the United States

RAMCHANDRA ADHIKARI, *et al.*,
Petitioners,

v.

KELLOG BROWN & ROOT, INCORPORATED, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners allege that Respondents, U.S. military contractors, subjected them to human trafficking and forced labor while acting pursuant to a U.S. government contract to provide workers for a military base in Iraq that was under exclusive U.S. jurisdiction and control. Although there is no available foreign forum for Plaintiffs' claims, the Fifth Circuit held that such allegations do not give rise to a claim under the Alien Tort Statute (ATS), 28 U.S.C. § 1350 because they do not do not "touch and concern" U.S. territory with "sufficient force to displace the presumption against extraterritoriality," as this Court required in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

The Question Presented is:

Whether, under *Kiobel*'s "touch and concern" test, courts must consider all connections the ATS claims have to U.S. territory, as the Fourth, Ninth, and Eleventh Circuits have held, or only the location of the alleged tort itself, as the Second and Fifth Circuits have held.

PARTIES TO THE PROCEEDINGS

The Petitioners, who were plaintiffs-appellants below, are Ramchandra Adhikari; Devaka Adhikari; Jit Bahdur Khadka; Radhika Khadka; Bindeshore Singh Koiri; Pukari Devi Koiri; Chittij Limbu; Kamala Thapa Magar; Maya Thapa Magar; Bhakti Maya Thapa Magar; Tara Shrestha; Nischal Shrestha; Dil Bahadur Shrestha; Ganga Maya Shrestha; Satya Narayan Shah; Ram Naryan Thakur; Samundri Devi Thakur; Jitini Devi Thakur; Bhim Bahadur Thapa; Bishnu Maya Thapa; Bhuji Thapa; Kul Prasad Thapa; and Buddi Prasad Gurung.

The Respondents, who were defendants-appellees below, are Kellogg Brown & Root, Incorporated; Kellogg Brown & Root Services, Incorporated; KBR, Incorporated; KBR Holdings, L.L.C.; Kellogg Brown & Root, L.L.C.; KBR Technical Services, Incorporated; Kellogg Brown & Root International, Incorporated; Service Employees International, Incorporated; Overseas Employment Administration; and Overseas Administration Services.

RULE 29 STATEMENT

None of the Petitioners is a non-governmental corporation. None of the Petitioners has a parent corporation or shares held by a publicly traded company.

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INTRODUCTION

This case presents a question left unanswered by *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013): whether federal courts have jurisdiction over a claim under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, based on an injury that occurs abroad but that directly implicates U.S. interests and conduct by U.S. defendants, including conduct in the United States. In this case, Nepali citizens brought claims alleging that a U.S. corporation and its agents engaged in human trafficking and forced labor while implementing a U.S. government contract to supply labor at a U.S. military base in Iraq. Despite the extensive connections between these claims and U.S. territory and the absence of an available alternative forum, a divided panel of the Fifth Circuit held that the district court did not have jurisdiction under the ATS.

The Fifth Circuit's decision both deepens a division among the courts of appeals over the meaning of this Court's decision in *Kiobel* and is incorrect. *Kiobel* held that to be actionable under the ATS, a claim must "touch and concern the territory of the United States…with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669. Unlike the Fourth, Ninth, and Eleventh Circuits, the Fifth Circuit concluded that, in order to satisfy this standard, the alleged tort must be committed *on* U.S. soil, irrespective of any other connections the case might have to U.S. territory, including the citizenship of the defendants and their relationship to the U.S. government, the U.S. government's control over the foreign locus of

the tort, and the exclusivity of U.S. jurisdiction. *See* Pet. App. 2a-4a.

As the Fifth Circuit itself recognized, "other circuits have offered differing interpretations of *Kiobel*'s 'touch and concern language.'" *Id.* at 13a. Specifically, the Fourth, Ninth, and Eleventh Circuits have held that a "mechanical" inquiry into the location of the conduct is inadequate and that the involvement of U.S. citizens and U.S. interests can be relevant factors in determining whether the purposes of the ATS would be served by exercising jurisdiction even when the tort occurs abroad. *See Doe v. Drummond Co.*, 782 F.3d 576, 592 (11th Cir. 2015); *Al Shimari* v. *CACI Premier Tech., Inc.*, 758 F.3d 516, 529-31 (4th Cir. 2014); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014). On the other hand, the Fifth Circuit has joined the Second Circuit in rejecting as irrelevant any connections to the United States aside from the location of the violation of the law of nations. *See* Pet. App. 18a-19a; *Mastafa v. Chevron Corp.*, 770 F. 3d 170, 188-89 (2d Cir. 2014). Indeed, the Fifth Circuit's "touch and concern" test is even narrower than the Second Circuit's approach in that the Fifth Circuit did not consider relevant U.S.-based conduct that the Second Circuit would have considered.

These starkly different approaches create anomalous results, as a case may be allowed to go forward in one court that would be dismissed for lack of subject-matter jurisdiction in another. Indeed, the court below acknowledged that the outcome in this case would likely have been different if it were brought in Virginia rather than

Texas. *See* Pet. App. 23a-24a. Certiorari is therefore warranted to resolve the conflict among the circuits, and it is especially appropriate here because this case presents the strongest possible argument for applying the ATS to claims arising overseas, given its multiple connections to U.S. territory and the absence of any available alternative forum.

Resolving the disagreement among the circuits is of profound import for U.S. foreign policy. As this Court clarified in *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090 (2016), the most significant purpose of the presumption against extraterritoriality is "to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *Id.* at 2100. Here, unlike in *Kiobel*, international discord arises from the absence of jurisdiction in U.S. courts. The defendants are U.S. citizens acting under the authority of a contract with the U.S. military whose conduct contributing to the violation of international law was committed in the United States and on a military base under U.S. jurisdiction and control. In these circumstances, failure to provide a forum for these victims' claims where no foreign court has jurisdiction undermines the United States' reputation as a defender of human rights and strains its relations with the victims' home countries. It also flies in the face of the affirmative obligations the United States has undertaken to combat human trafficking and provide remedies to victims of human trafficking by U.S. defendants. *See e.g.* G.A. Res. 55/25, annex II to the U.N. Convention Against Transnational Organized Crime, Protocol to Prevent, Suppress,

and Punish Trafficking in Persons (Nov. 15, 2000) ("Trafficking Protocol").

For all of these reasons, this Court's review is not only warranted, but imperative.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 845 F. 3d 184 and reprinted in the Petition Appendix at 1a-62a. The memorandum opinion of the district court denying the motion to dismiss is reported at 697 F. Supp. 2d 674 and reprinted in the Petition Appendix at 63a-98a. The district court's opinion granting defendants' motion for summary judgment on the ATS claim is available at 2013 WL 4511354 and reprinted in the Petition Appendix at 99a-123a. The district court's opinion denying plaintiff's motion for reconsideration is reported at 95 F. Supp. 3d 1013 and reprinted in the Petition Appendix at 124a-145a.

JURISDICTION

The U.S. Court of Appeals for the Fifth Circuit entered its judgment on January 3, 2017. On March 13, 2017, Justice Thomas granted Petitioners' application for an extension of time within which to file a petition for a writ of certiorari to and including June 2, 2017. The Court has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Alien Tort Statute, 28 U.S.C. § 1350, provides in full: "The district courts shall have original jurisdiction of any civil action by an alien

for a tort only, committed in violation of the law of nations or a treaty of the United States."

STATEMENT OF THE CASE

I. Background

Petitioners are the family members of deceased victims of human trafficking and one survivor. The victims were trafficked from their home country across international borders to provide menial labor at a U.S. military base in order to fulfill Respondents' contract with the U.S. government, a contract that was funded with U.S. taxpayer dollars. Pet. App. 4a-5a; First. Am. Compl. at ¶ 51, Dkt. No. 58.

"The particular violation alleged here, human trafficking, is a transnational crime that uses a global supply chain, which typically extends across multiple countries and requires an extensive transnational network to succeed." Pet. App. 43a. (Graves, J., concurring in part and dissenting in part) (citing U.S. DEP'T OF STATE TRAFFICKING IN PERSONS REPORT at 13-18 (2015)). International agreements have long recognized the transnational character of trafficking and the slave trade. *See*, *e.g.*, European Parliament Resolution on Trafficking in Human Beings, art. 1, 1996 O.J. (C32) 88, 90 (EC) (defining trafficking in human beings as when someone "encourages a citizen from a third country to enter or stay in another country in order to exploit that person by using deceit or any other form of coercion"); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 3,

Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3 (conveying slaves "from one country to another"). The focus of the international prohibition against human trafficking has for well over a century emphasized the transnational nature of the crime and the need for international cooperation to adequately and effectively combat this scourge. *See* Br. for Int'l Law Scholars as Amici Curiae Supporting Appellants, at 20-24, *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017) (No. 15-20225), 2015 WL 6408204, at *20-24; Trafficking Protocol at, *e.g.*, Preamble & Art. 4.

The concerns about cooperation repeatedly expressed by the international community are exacerbated here because the only country where Petitioners can seek redress from Respondents is the United States. Respondents are not present in the victims' home country, Nepal, and although the victims were transported through Jordan, neither they nor Respondents are Jordanian citizens. KBR is a U.S. corporation and KBR's agent, Daoud & Partners, is incorporated in the Cayman Islands and is not registered to do business in Jordan. Mem. & Order at 13, Dkt. No. 273. Even if Jordanian courts did have jurisdiction, moreover, the district court found that Jordan was not an adequate forum because Jordanian courts would not consider claims arising out of conduct on a U.S. military installation. Mem. & Order at 37, Dkt. No. 273.

Nor is Iraq an available forum. During the U.S. occupation of Iraq, the country was governed by the Coalition Provisional Authority (CPA), "an instrumentality of the United States." Br. for

Retired Military Officers as Amici Curiae Supporting Appellants at 7, Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184 (5th Cir. 2017) (No. 15-20225), 2015 WL 6408209, at *7. CPA Order No. 17 (Revised) provided that military contractors were subject to the exclusive jurisdiction of their sending state: claims against contractors are to be dealt with by their "sending state" according to its law and contractors were immune from Iraqi legal process. Coalition Provisional Authority Order No. 17 (Revised) at Sections 4 & 18, CPA/ORD/27 June 2004/17 (June 27, 2004). CPA Order No. 17 (Revised) remained in place during the time period relevant to this case.[1] CPA Order 17 (Revised) also provided that the U.S. military bases remained under the exclusive jurisdiction and control of the U.S.-led military force.[2]

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[1] *See also* Coalition Provisional Authority Order No. 7 at § 1, CPA/ORD/9 June 2003/07 (June 9, 2003) (placing Iraqi judges and prosecutors under CPA control); Br. for Retired Military Officers as Amici Curiae Supporting Appellants at 7-10, *Adhikari*, 845 F.3d 184 (No. 15-20225) (explaining the transitional period and U.S. command and control over the MNF, the U.S.-led forces that succeeded the CPA).

[2] Citing this same authority, Respondents have argued in roughly a dozen other cases that U.S. courts have exclusive and original jurisdiction over military bases and facilities in Iraq. *See, e.g.*, Defs.' Notice of Removal at 13, *Guthery v. KBR*, No. 4:11CV03157, 2011 WL 9191296 (S.D. Tex. Aug. 29, 2011) (U.S. court has "exclusive and original jurisdiction" and citing Coalition Provisional Authority Order No. 17 (Revised) §9); Defs.' Notice of Removal, *Salem v. KBR*, No. 8:11CV01092, 2011 WL 9162234 (S.D. Tex. Apr. 1, 2011); Notice of Removal, *Coffey v. Kellogg Brown & Root*, No. 1:08-CV-2911-JOF, 2008 U.S. Dist. Ct. Pleadings LEXIS 11272 (N.D. Ga. Sept. 17,

Congress and the Executive Branch have specifically targeted the problem of human trafficking by military contractors, repeatedly finding that contractor involvement in trafficking undermines the credibility and mission of U.S. military and diplomatic programs. *E.g.*, Pet. App. 48a-49a; *see also* U.S. DEP'T OF STATE TRAFFICKING IN PERSONS REPORT at 19 (2006) (discussing Department of Defense response to labor trafficking at U.S. military bases in Iraq); MNF-I FRAGO 06-188 [Trafficking in Persons], General George W. Casey (Apr. 4, 2006) [*hereinafter* MNF-I FRAGO 06-188]; *See also* Br. for Retired Military Officers as Amici Curiae Supporting Appellants at 6-7, *Adhikari*, 845 F.3d 184 (No. 15-20225) (describing U.S. military efforts to combat human trafficking and noting "allowing defendant contractors to escape the jurisdiction of U.S. courts for human trafficking committed in the course of fulfilling military contracts would undermine these long-established, global anti-trafficking efforts that are a cornerstone of U.S. law and foreign policy.").

More than just describing the problem, Congress has also sought to provide at least some remedies for trafficking and related crimes committed overseas, providing a "clear mandate," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004), for recognizing Petitioners' claims. *See*, *e.g.*, 18 U.S.C. § 7(9)) (expanding the special maritime and territorial jurisdiction of the United States to include military missions in foreign states, for offenses committed by

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2008); Notice of Removal, *Smith v. Halliburton*, No. 06 0462, 2006 WL 520176 (S.D. Tex. Feb. 10, 2006).

U.S. nationals); 18 U.S.C. § 1596(a) (extending additional extraterritorial jurisdiction over trafficking offenses where an alleged offender is a U.S. national); 18 U.S.C. § 3271(a) (trafficking offenses committed by persons employed by or accompanying the Federal Government outside the United States); *see also* Br. for Senator Richard Blumenthal as Amicus Curiae Supporting Appellants at 6-20, *Adhikari*, 845 F.3d 184 (No. 15-20225), 2015 WL 6408207, at *6-20 (detailing statutory history).[3]

II. Facts

Respondents, Kellogg, Brown & Root, Inc. and related entities (collectively, "KBR"), entered into and administered a contract with the U.S. government to provide logistical support for U.S. military bases in Iraq. In order to fulfill its obligations under the contract, KBR was responsible for recruiting laborers and transporting them to the base, where they would pick up trash, serve meals, clean, and perform other menial but necessary

[3] As this case illustrates, Congressional efforts to hold U.S. citizens responsible for human trafficking committed abroad have not obviated the need for plaintiffs to be able to bring claims for trafficking under the ATS. Here, because the district court granted summary judgment to KBR on Petitioners' TVPRA claims on the ground that the TVPRA did not apply extraterritorially before 2008, *see* section III *infra*, whether there is jurisdiction over Petitioners' ATS claims will be dispositive as to whether Petitioners can recover at all for the injuries caused by the trafficking. In any event, the question presented by this case has implications for torts that have been recognized as actionable under the ATS but that have not been addressed by Congress.

tasks. First. Am. Compl. at ¶ 49, Dkt. No. 58. Once at the bases, the laborers worked under KBR's complete direction, management, and control. Pet. App. 129a. At the time, KBR held a larger contract with the United States government than any other firm, and the United States paid KBR in excess of $35 billion in U.S. taxpayer dollars for their services. First. Am. Compl. at ¶ 53.

KBR utilized a labor broker, Daoud & Partners, to provide a steady stream of foreign workers for the contract. On summary judgment, the district court found that Plaintiffs had presented evidence that Daoud was an agent of KBR and that "KBR had the authority to exercise control and did exercise said control, over Daoud's recruitment and supply of the laborers in this case." Pet. App. 56a (Graves, J., concurring in part and dissenting in part); *id.* at 120a-122a. Daoud was KBR's only source for laborers and Daoud's only business was its work for KBR on KBR's contracts with the U.S. government. *Id.* at 50a; Mem. & Order at 13, Dkt. No. 273. Daoud's services were provided exclusively at U.S. military facilities. Mem. & Order at 13, Dkt. No. 273. KBR paid Daoud from the United States by transferring money from New York banks. Pet. App. 49a-50a (Graves, J., concurring in part and dissenting in part).

KBR knew it was obtaining and putting to work on its contracts with the U.S. government laborers who had been promised jobs elsewhere and transported against their will to U.S. military bases. Pet. App. 117a. KBR was aware that the workers were being paid lower wages than they had been

promised, had their passports confiscated, and were subjected to other coercive practices that amounted to human trafficking. *Id.*

Specifically, KBR's "U.S.-based employees knew about the human rights abuses by Daoud and KBR overseas while KBR continued to use Daoud as a supplier of cheap labor." *Id.* at 50a (Graves, J., concurring in part and dissenting in part). Indeed, U.S.-based KBR employees received reports of human trafficking at its operations on U.S. military bases from the media, diplomats, and the U.S. military, as well as from KBR's own employees and subcontractors. Such reports were received by KBR executives and managers in the United States, whose response included threatening to fire and actually firing workers who reported abuses and working to cut off any inquiries. *Id.* at 51a-52a. In one instance, after a contract auditor lodged complaints about abuses of third country nationals, including human trafficking and coercive labor practices, "two KBR employees from Houston, including an investigator, flew to the Middle East to threaten the consultant with termination." *Id.* at 51a; *see also id.* (stating that "complaints from a U.S. Marine regarding ill treatment of third-country nationals at Al Asad were forwarded through KBR's U.S.-based employees to on-site base staff").

Petitioners and their family members were victims of this trafficking scheme. They answered advertisements offering hotel and retail jobs in Amman, Jordan, *id.* at 4a, 118a, but when they arrived in Jordan, they were met by men who took their passports, drove them to a compound with a

high wall around it, and locked them inside. *Id*. at 118a. They were unable to escape. *Id.* One night, the men were loaded into an "unprotected" automobile caravan and taken against their will across the border toward Al Asad military base in Iraq. *Id*. at 4a, 102a. Although Petitioner Gurung made it to the base, the other eleven men (the other Petitioners' family members) were captured by Iraqi insurgents, who posted videos on the internet describing how the Nepali men had been forced to go to Iraq to work for the U.S. military. *Id.* at 5a, 103a. After posing the Nepali men with the American flag, Pls.' Resp. in Opp'n to KBR's Mot. for Summ. J. at Ex. 169, Dkt. No. 405-23, the insurgents executed all eleven men during a video broadcast. Pet. App. 5a. One of the men was beheaded, the others were shot in the back of the head, one by one. *Id* at 103a.

When Petitioner Gurung arrived at Al Asad base, he was put to work against his will. Pet App. 5a, 103a. Mr. Gurung labored in a warehouse for approximately fifteen months, supervised by KBR employees. *Id*. at 129a. The base was in a warzone and access was tightly controlled. *Id.* at 102a-103a. Mr. Gurung asked KBR employees to allow him to leave the base and return home, but he was told by KBR that he could not leave until his work was complete. *Id*. at 5a, 103a.

The facts of this case reinforced concerns about human trafficking on U.S. military bases in both the legislative and executive branches of the U.S. government. Indeed, the plight of the Nepali victims has been the subject of congressional hearings and led to the inclusion for the first time of a section on

the U.S. Department of Defense in the State Department's Trafficking in Persons Report.[4] In 2006, after an investigation, the top U.S. commander in Iraq confirmed that contractors at U.S. bases had violated human trafficking laws and committed other abuses. *See* MNF-I FRAGO 06-188. The United States ordered all contractors to take action to ensure that the workers supplied to U.S. bases were not victims of human trafficking. *Id*; Br. for Retired Military Officers as Amici Curiae Supporting Appellants at 6, *Adhikari*, 845 F.3d 184 (No. 15-20225).

III. Procedural History

Petitioners filed suit against KBR in 2008 alleging violations of the ATS, the Trafficking

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[4] *See Human Trafficking: Joint Hearing Before the Subcomm. on Afr., Glob. Human Rights and Int'l Operations of the H. Comm. on Int'l Relations, and the Subcomm. on Military Pers. of the H. Comm. on Armed Servs.*, 109th Cong. 4 (2006) (statement of Rep. Christopher H. Smith, Chairman, Subcomm. on Afr., Glob. Human Rights and Int'l Operations) (describing the trafficking of Nepalese laborers to work on U.S. military bases and concluding that "contractor involvement in trafficking…weakens the rule of law, strengthens criminal networks and undermines DOD's own mission" and noting that when U.S. taxpayer funds allow human trafficking to prosper, "the efforts of our President, the State Department, and Congress to combat this criminal scourge are thwarted"); *Legal Options to Stop Human Trafficking: Hearing Before the Subcomm. on Human Rights and the Law, S. Comm. on the Judiciary*, 110th Cong. 21 (2007) (statement of Sen. Richard Durbin) (discussing "trafficking network" including U.S. contractors "that stretched from Kathmandu in Nepal to U.S. military bases in Iraq"); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT at 19 (2006).

Victims Protection Reauthorization Act (TVPRA), the Racketeer Influenced and Corrupt Organizations Act (RICO), and state law.[5] KBR moved to dismiss Petitioners' claims, and the district court granted the motion as to the state law claims but denied the motion as to the other claims. Pet. App. 76a-82a. The district court found that Petitioners' allegations of human trafficking and forced labor stated a claim under the ATS. *Id.*

Well before discovery was complete, KBR moved for summary judgment on all claims. *Id.* at 104a. After *Kiobel* was decided, and while its first summary judgment motion was pending, KBR filed a supplemental motion for summary judgment arguing that the district court lacked jurisdiction over Petitioners' ATS claims. *Id.*

The court granted the motion,[6] relying on *Kiobel's* statement that "mere corporate presence" is not sufficient to rebut the presumption against extraterritoriality and pointing to the fact that after *Kiobel*, this Court had granted, vacated and remanded another ATS case that allowed extraterritorial claims to proceed against a foreign defendant with substantial business contacts with the United States. *Id.* at 111a. The court concluded, without further elaboration, that, as in that case,

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[5] KBR's agent, Daoud & Partners, was also a defendant in the original suit. Those claims were resolved.

[6] The court also granted summary judgment to KBR on Petitioners' RICO claim, but denied summary judgment to KBR on the TVPRA claim. Pet. App. 115a, 122a.

"KBR's corporate presence is not enough to overcome the presumption." *Id.* at 112a.

Petitioners moved for rehearing and leave to amend their ATS claims to allege additional conduct in the United States. The district court denied both motions.[7] *Id.* at 125a. The court found that under *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010), it was required to "consider whether the alleged domestic conduct coincides with the "focus' of congressional concern."" Pet. App. 131a. After deciding that the focus of congressional concern in this case was "human trafficking," the court concluded that Petitioners' claims did not touch and concern the United States because "the trafficking occurred in Nepal; Jordan; Iraq; and points in transit between and among those foreign locations." *Id*. at 132a.

Although the court acknowledged that "Plaintiffs were unquestionably heading to [the U.S. military base] Al Asad," that Petitioner Gurung worked on the base, and that the base was "under U.S. control," it held that those connections did not affect the touch and concern analysis. *Id.* at 135a. Finally, while acknowledging its previous finding that "Plaintiffs present a genuine issue of material fact as to whether KBR knowingly obtained trafficked labor during the relevant time period," the court rejected that evidence as irrelevant because knowledge could not conclusively be attributed to KBR employees in the United States, rather than

[7] The court also reversed its position and granted summary judgment to KBR on the TVPRA claim.

those working abroad. *Id.* at 136a. Similarly, the court rejected Petitioners' reliance on evidence that U.S.-based employees received reports of trafficking and took retaliatory action against at least one employee who reported trafficking on the grounds that, for example, the U.S.-based employee also requested staff at the base to investigate. *Id.* at 137a n.4.

A divided panel of the Fifth Circuit affirmed. In addressing the "touch and concern" language from *Kiobel*, the Court of Appeals discussed the view of the Fourth Circuit that "courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action." *Id.* at 11a (quoting *Al Shimari*, 758 F.3d at 527). The court rejected that view, holding instead that the proper test to apply was the "focus" test from *Morrison* as explained most recently in *RJR Nabisco*. In those cases, this Court held that, where a conduct-regulating statute does not have extraterritorial reach and where the claims include some domestic conduct and some conduct abroad, the court must look to the conduct that is the "focus of congressional concern" in order to determine whether the application of the statute at issue is extraterritorial or domestic. *See RJR Nabsico*, 136 S.Ct. at 2101; *Morrison*, 561 U.S. at 266. The Fifth Circuit reasoned that since there was "some domestic activity relevant to the claim," it must examine the "focus" of the ATS, even though it is a jurisdictional, rather than conduct-regulating statute. Pet. App. 12a. The court noted that this

approach "largely comports with the Second Circuit's 'ATS 'focus' analysis.'" *Id.* at 13a-14a.

The court then turned to answering the question "whether there is any domestic conduct relevant to Plaintiffs' claims under the ATS," and concluded there was not. *Id.* at 14a. As the district court did, the Fifth Circuit emphasized that "the recruitment, transportation, and alleged detention" of the victims "occurred in Nepal, Jordan, and Iraq," and thus the conduct relevant to their trafficking claims occurred abroad. *Id.* With respect to Petitioner Gurung, the court rejected the argument that the fact that he was trafficked to and kept at a U.S. military base by a U.S. government contractor provided a sufficient connection between his claims and United States territory, and thus any conduct that occurred there was "extraterritorial" and could not provide the basis for a claim under the ATS. *Id.* at 18a.

The Fifth Circuit also rejected Petitioners' argument that U.S.-based conduct by KBR was sufficient to rebut the presumption against extraterritoriality. The factors excluded by the court included "KBR's domestic payments to Daoud" and "that employees based in Houston, Texas, were 'aware of allegations of human trafficking at KBR's worksites.'" *Id.* The court concluded that these actions were not the "focus" of the ATS, which is the "conduct that violates international law." *Id.* at 19a. The court noted Petitioners' allegations that the trafficking was funded in the United States, but held that "they failed to connect the alleged international law violations to these payments." *Id.* at 19a-20a. Finally, the court held that the U.S.

connections of the case and the U.S. interests implicated did not matter for its analysis because "the foreign policy consequences and the international norms underlying the claim are immaterial." *Id.* at 21a.

Judge Graves dissented from the majority's ATS analysis, stating that "[t]here is much to support the conclusion that these claims 'touch and concern' the United States." *Id.* at 41a (Graves, J., concurring in part and dissenting in part). He rejected the "unnecessarily restrictive view" adopted by the majority because its "test would eliminate the extraterritorial reach of the [ATS] completely." *Id.* at 41a-42a. Indeed, "if the alleged ATS violations must take place on domestic soil, the *Kiobel* majority's statement regarding 'touch and concern' would be meaningless." *Id.* at 42a.

Although Judge Graves agreed with the majority that the court "should interpret *Kiobel*'s 'touch and concern language in light of the step-two focus inquiry," he did "not agree that *RJR Nabisco* is somehow determinative of the issues in this case" because it did not address "how to interpret the focus of the ATS, what conduct is relevant to that focus, and how courts should proceed when there is potentially relevant conduct both within and outside the United States." *Id.* at 42a-43a (internal quotation marks omitted).

Judge Graves noted that, in a human trafficking case in particular, each member of a global trafficking scheme undertakes actions that form part of the overall enterprise. *Id.* at 43a. Thus, even though "some of these actions, in isolation, may not

constitute a violation of the law of nations, they nevertheless constitute 'relevant conduct' for purposes of the 'focus' inquiry, if they play an integral role in the law of nations violation." *Id.* Specifically, "no inferential leap is required to find payment for trafficked labor to be an action critical to the operation of a global trafficking scheme." *Id.* at 50a.

Further, Judge Graves stated that, in addition to the conduct at issue, "surely the inquiry permits consideration of pertinent facts underlying the plaintiff's claim, such as the identity of the defendant, the nature of the defendant's liability (direct or indirect), the type of violation alleged, and any significant connections to the United States." *Id.* at 44a. He emphasized that "[n]otably absent from the majority opinion is any mention of the fact that KBR is a U.S. corporation," a fact that distinguishes this case from *Kiobel*. *Id*.

Judge Graves also explained the importance to the ATS of U.S. foreign policy concerns, which "were central to the ATS's passage." *Id.* at 46a. "These foreign policy concerns are particularly heightened where, as here, the defendant's conduct directly implicates the United States and its military." *Id*. at 48a.

Applying his view of the touch and concern test to the facts of this case, Judge Graves concluded that KBR's payment for trafficked labor "is domestic conduct relevant to the alleged law of nations violation" and that "a jury could conclude on this record that U.S. employees failed to properly investigate these accusations of human rights

abuses by KBR overseas and either willfully ignored evidence of such abuses or actively sought to cover up the misconduct," while continuing to use trafficked labor. *Id.* at 50a, 54a.

REASONS FOR GRANTING THE WRIT

I. The lower courts are divided over the proper scope of *Kiobel*'s "touch and concern" test.

Since this Court's decision in *Kiobel*, the courts of appeals have splintered over the application of the "touch and concern" test. In his concurring opinion in *Kiobel*, Justice Breyer explained that the Court's decision "leaves for another day the determination of just when the presumption against extraterritoriality might be 'overcome'" in an ATS case. 133 S. Ct. at 1673 (Breyer, J., concurring); *see also id.* at 1669 (Kennedy, J., concurring) ("[T]he proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."); *id.* (Alito, J. concurring) (noting that the "touch and concern" formulation leaves much "unanswered").

That day has come. Five circuits have attempted to define "touch and concern," and each has applied a different test for determining when an ATS claim sufficiently touches and concerns U.S. territory, with the divergent approaches reflecting "a spectrum between a bright-line rule and a totality of the circumstances standard." Note, *Clarifying Kiobel's "Touch and Concern" Test*, 130 HARV. L. REV. at 1910. Indeed, as acknowledged by the court below, the outcome in this case would likely have

been different if it were brought in Virginia rather than Texas. *See* Pet. App. 23a, 55a, 135a.

Not only have the circuit courts reached an array of inconsistent conclusions as to the proper scope of the "touch and concern" test, but in this case the Fifth Circuit has now effectively held that there are, in fact, no circumstances in which a tort committed abroad could satisfy *Kiobel*'s touch and concern test. Certiorari is warranted to resolve the confusion among the lower courts.

A. The Second and Fifth Circuits

Both the Fifth Circuit and the Second Circuit have construed the holding in *Kiobel* narrowly, holding that courts lack jurisdiction whenever the conduct at issue occurred abroad, regardless of other connections between the claims and the United States. That narrow approach was outcome determinative here.

The Second Circuit has twice addressed the "touch and concern" test since *Kiobel*. In *Balintulo v. Daimler AG*, 727 F.3d 174, 194 (2d Cir. 2013), it held that "federal courts may not, under the ATS, recognize common-law causes of action for conduct occurring in another country," even if there are other significant connections between the claim and the United States. And in *Mastafa v. Chevron Corp.*, it emphasized that the appropriate inquiry for the touch and concern test "is on conduct constituting a violation of customary international law or of aiding and abetting such violations, not on where the defendants are present." 770 F.3d 170, 190 (2d Cir. 2014). Like the Fifth Circuit, the Second Circuit

expressly "disagree[d]" with the Fourth Circuit's view "that a defendant's U.S. citizenship has any relevance to the jurisdictional analysis," *id.* at 189, and instead emphasized that "[w]hether a complaint passes jurisdictional muster . . . depends upon alleged conduct by anyone—U.S. citizen or not—that took place in the United States." *Id.*; *see also id.* at 184 (stating that "in conducting our extraterritoriality analysis, we look solely to the site of the alleged violations of customary international law").

In this case, the Fifth Circuit approvingly cited *Balintulo* and *Mastafa* for the proposition that the court should examine only "the conduct alleged to constitute violations of the law of nations," rather than other factors such as the citizenship of the defendants or the U.S. interests at stake, when deciding whether an ATS claim touches and concerns the United States. *See* Pet. App. 13a-14a; *see also id.* at 13a (stating that the Fifth Circuit's "approach largely comports with the Second Circuit's ATS focus analysis") (internal quotation marks omitted). But the Fifth Circuit defined "conduct" even more narrowly than the Second Circuit, with the Fifth Circuit declining to consider relevant conduct that *did* occur in the United States, such as profiting from the trafficking or hiring someone to engage in recruitment, conduct that is traditionally part of the tort. *Id.* at 19a-20a.

In *Mastafa*, the Second Circuit held that a combination of U.S.-based actions touched and concerned the United States with sufficient force to displace the presumption against extraterritorial-

ity—actions that included financing the torts through U.S. companies in the United States, recouping the profits from the torts in the United States, and maintaining an escrow account in the United States where payments in support of the torts were transmitted and unlawfully distributed. *Mastafa*, 770 F.3d at 191.

In contrast, the Fifth Circuit found similar evidence inadequate to displace the presumption, including evidence that KBR financed the trafficking scheme from within the United States, that payments were transmitted from KBR in the United States through U.S. banks to pay for trafficked labor, and that KBR profited from the trafficking in the United States. Pet. App. 19a-20a; *see also id.* at 49a-50a (Graves, J., concurring in part and dissenting in part) (stating that these actions constituted "U.S.-based conduct by KBR that evinced their participation in a transnational trafficking scheme that ensnared Plaintiffs"). While the Fifth Circuit held that Petitioners "failed to connect the alleged international law violations to these payments," *id.* at 19a-20a, the Second Circuit would have found these facts to be relevant domestic conduct. In addition, the Fifth Circuit believed that Petitioners' request to amend their complaint to allege additional connections between Petitioners' claims and U.S. territory would have been futile, further demonstrating that the Fifth Circuit's "touch and concern" test is even narrower than the Second Circuit's approach. *See id.* at 58a-60a (Graves, J., concurring in part and dissenting in part). Thus, although the Fifth Circuit and the

Second Circuit apply the same general test, Petitioners' claims failed in the Fifth Circuit while they would have been able to proceed in the Second Circuit.

B. The Ninth and Eleventh Circuits

Unlike the Second and Fifth Circuits, the Eleventh Circuit applies a broader test that looks at the focus of the claims generally, rather than the focus of the conduct. *See Drummond Co., Inc.*, 782 F.3d at 592 (stating that "we look to the ATS claims as alleged in order to determine whether the action is focused in the United States"); *see also Baloco v. Drummond Co., Inc.*, 767 F.3d 1229, 1237 (11th Cir. 2014) ("While *Morrison* emphasized where the transaction which is the focus of the statute occurred, the ATS, unlike the Securities Exchange Act, does not itself focus on transactions which occur in any pre-identified type of location."). In the Eleventh Circuit, "the site of the conduct alleged is relevant and carries significant weight," but ultimately the "touch and concern" analysis is "a fact-intensive inquiry, requiring us to look closely at the allegations and evidence in the case before us." *Drummond*, 782 F.3d at 592.

Moreover, unlike the Second and Fifth Circuits, in the Eleventh Circuit the "citizenship or corporate status of the defendant is relevant" to "determining whether a claim sufficiently touches and concerns the territory of the United States to confer jurisdiction to U.S. courts," *id.* at 595, and that the fact that U.S. interests were at stake was a "relevant factor." *id.* at 597. At the same time, "the sufficiency question—whether the claims do so with

'sufficient force' or to the 'degree necessary' to warrant displacement—will only be answered in the affirmative if *enough* relevant conduct occurred within the United States." *Id.*[8] Thus, while the Eleventh Circuit considers factors that the Second and Fifth Circuits do not, it still requires that "enough" conduct giving rise to the violation of international law occur in the United States.

The Ninth Circuit takes an approach similar to that of the Eleventh Circuit, holding that the relevant inquiry is the connection between the "claims" and the United States, not the defendants' conduct and the United States, and examining factors such as the citizenship of the defendant and

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[8] Before *Baloco* and *Drummond*, the Eleventh Circuit held in *Cardona v. Chiquita Brands, Int'l, Inc.*, 760 F.3d 1185, 1191 (11th Cir. 2014), that the district court lacked jurisdiction under the ATS because "[t]here is no allegation that any torture occurred on U.S. territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force." That decision rejected the plaintiffs' "attempt to anchor ATS jurisdiction in the nature of the defendants as United States corporations." *Id.* at 1189. *But see Cardona*, 760 F.3d at 1192-95 (Martin, J., dissenting) (arguing that the claims touch and concern the United States because the defendant was a U.S. corporation and the plaintiffs had alleged sufficient conduct that occurred in the United States). However, in *Drummond*, the court made clear that citizenship is a relevant consideration and distinguished *Cardona* on the grounds that "it did not jettison this factor's usefulness entirely." 782 F.3d at 595. Moreover, the different weight given to this factor by different panels of the Eleventh Circuit underscores the need for a uniform standard for evaluating whether ATS claims touch and concern the United States.

the U.S. interests involved. In *Mujica v. AirScan, Inc.* the court concluded that U.S. citizenship alone was not enough for a claim to touch and concern the United States, but stated that "a defendant's U.S. citizenship or corporate status is one factor that, in conjunction with other factors, can establish a sufficient connection between an ATS claim and the territory of the United States." 771 F.3d 580, 594 (9th Cir. 2014).

Unlike the Eleventh Circuit, the Ninth Circuit does not apply *Morrison*'s "focus" test to determine whether there is jurisdiction under the ATS. The court explained in *Doe v. Nestle USA, Inc.* that "the opinion in [*Kiobel*] did not incorporate *Morrison*'s focus test . . . and chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard it did adopt." 766 F.3d 1013, 1028 (9th Cir. 2014). The court further noted that, "since the focus test turns on discerning Congress's intent when passing a statute, it cannot sensibly be applied to ATS claims, which are common law claims based on international legal norms." *Id.* Thus, although the Ninth and Eleventh Circuit tests both fall on the middle of the spectrum, the tests are not identical.

C. The Fourth Circuit

At the other end of the spectrum from the Fifth Circuit, the Fourth Circuit has held that a claim may "touch and concern" the United States even where the conduct at issue occurs "solely outside the United States." *Warfaa v. Ali*, 811 F.3d 653, 661 n.11 (4th Cir. 2016). The Fourth Circuit applies "a fact-based analysis" and "consider[s] a broader

range of facts than the location where the plaintiffs actually sustained their injuries." *Al Shimari*, 758 F.3d at 528-29. Thus, under facts strikingly similar to those considered by the Fifth Circuit below—a violation of international law "committed by United States citizens who were employed by an American corporation" and which "occurred at a military facility operated by United States government personnel"—the court reached the opposite result, concluding that there was jurisdiction under the ATS even though the torture at issue in the case itself occurred exclusively abroad. *Id.* at 528.[9] Moreover, like the Ninth Circuit and contrary to the Second, Fifth, and Eleventh Circuits, the Fourth Circuit does not rely on *Morrison*'s focus test to determine what conduct should be included in the extraterritoriality inquiry.

Although Petitioners' case involves a U.S. government contract under strikingly similar circumstances, the Fifth Circuit declined to consider any of the factors considered by the Fourth Circuit,

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[9] In addition to the citizenship of the defendants and the torture occurring on a U.S. military base, the court also considered the fact that the defendants were acting under a contract with the U.S. government, which was issued by a U.S. government office in the United States, authorized the defendants to collect payments in the United States, and required the defendants' employees to obtain security clearances from the U.S. government. *See id.* at 529. Further, the court noted that the plaintiffs had alleged that managers in the United States were aware of the conduct abroad and at least "implicitly…encouraged it." *Id.* The Fifth Circuit in this case gave no weight to similar facts. *See* Pet. App. 58a-60a (Graves, J., concurring in part and dissenting in part).

looking only for evidence of "domestic activity" that in of itself was sufficient to establish a violation of the law of nations. *See* Pet. App. 14a. As the Fifth Circuit stated below in affirming the denial of leave to amend the complaint to allege additional facts that would satisfy *Al Shimari*, "*Al Shimari* is not the test" in the Fifth Circuit. *Id.* at 23a. Thus, this case came out differently in the Fifth Circuit than it would have in the Fourth Circuit.

* * * *

Petitioners' claims in this case would easily have satisfied the "touch and concern" test under the approaches employed by the Fourth, Ninth, and Eleventh Circuits. They would even have satisfied the Second Circuit's approach, given the extent of the conduct that occurred on U.S. territory. Only in the Fifth Circuit could claims with such significant connections to the United States fall outside of *Kiobel*'s "touch and concern" standard. Whichever court is correct, this array of approaches is no longer tenable, and this Court's review is warranted to resolve the conflict among the Circuits on the question whether, in light of *Kiobel*, the ATS categorically precludes claims based on conduct outside the United States.

II. The Fifth Circuit's unduly narrow approach to the "touch and concern" test is at odds with the history and purposes of the ATS as recognized in this Court's cases.

The Fifth Circuit's view that only the location where the trafficking took place, rather than other significant connections between the claims and U.S. territory, can overcome the presumption against extraterritoriality is contrary to how the ATS has been interpreted by this Court. In *Kiobel*, the Court used broad language to describe the circumstances under which the presumption could be rebutted: when the "claims" not merely the tortious conduct, "touch and concern the territory of the United States." 133 S. Ct. at 1669. Notably, the Court did not state that the entire alleged violation of international law must occur in the United States. If the Court had simply meant to hold that the ATS had no extraterritorial application (as the Fifth Circuit effectively concluded here), then there would have been no need for such linguistic nuance.

Instead, the "touch and concern" language reflects the difficulties posed by applying the presumption against extraterritoriality to a jurisdictional statute like the ATS. As noted above, the Fifth Circuit's decision was based in part on the erroneous view that *Kiobel* directed courts to apply *Morrison*'s "focus" test, as described by this Court in *RJR Nabisco*, to ATS claims in the same way that they would apply the test to a conduct-regulating statute. Pet. App. 12a. Unlike the statutes at issue

in those cases, however, the ATS only provides for jurisdiction in U.S. courts; it does not proscribe particular conduct or create a cause of action. *See Sosa*, 542 U.S. at 712-14. Thus, there is no "focus of congressional concern" because the violation at issue is of a treaty or customary international norms, not a congressionally created statute. Moreover, unlike a conduct-regulating statute, the application of the ATS to conduct that occurred abroad poses no substantive conflict with the laws of other nations, as the international norms enforceable under the ATS are obligatory throughout the world.

In *Kiobel*, the Court recognized these limits to applying the "focus" test directly, but acknowledged that the "principles underlying" the presumption against extraterritoriality, such as a concern with "unintended clashes between our laws and those of other nations which could result in international discord" must still inform its analysis. 133 S. Ct. at 1664 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). Thus, the Court chose an ATS-specific test that reflected those concerns: whether the "claims touch and concern the territory of the United States." That is the test that the Fifth Circuit should have applied here.

The Fifth Circuit's mechanical application of the "focus" test cannot be squared with the broader purposes of the ATS. As this Court explained in *Sosa*, 542 U.S. at 716, the drafters of the ATS were likely concerned with "vindicat[ing] rights under the law of nations," and providing redress to foreign victims injured by U.S. citizens. Applying the "focus" test such that only domestic violations of the law of

nations are actionable under the ATS would be contrary to that purpose, particularly where, as here, there is no other court that has jurisdiction over the foreign victims' claims. Moreover, in *Sosa* this Court approvingly cited the Second Circuit's decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) and the Ninth Circuit's decision in *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994), both of which involved claims for conduct that occurred abroad but against a defendant who was residing in the United States. *See Sosa*, 542 U.S. at 724-25 (referring to *Filartiga* as the "birth of the modern line of [ATS] cases"); *id.* at 732 (discussing the holdings of both cases).

In *Filartiga*, the Paraguayan plaintiff was tortured by the Paraguayan defendant in Paraguay but later moved to the United States. The defendant was arrested while visiting the United States and the plaintiff commenced a civil suit against him. The only connection that the claims had to the United States was that both the plaintiff and the defendant were present here. 630 F.2d at 878-80. Likewise, in *Marcos*, the conduct alleged to violate international law occurred in the Philippines, but the defendants were sued after they fled to the United States. *See* 25 F.3d at 1469. Those facts "touch and concern" the United States far less than the claims here, where Respondents are U.S. corporations doing business at a U.S. military base in Iraq pursuant to a U.S. government contract and the violations of international law at issue were alleged to have been committed in part by U.S. citizens. Moreover, unlike *Filartiga* and *Marcos*,

Petitioners have alleged that Respondents engaged in conduct in the United States to further the trafficking that occurred abroad. *See* Pet. App. 49a-52a (Graves, J., concurring in part and dissenting in part). Thus, the Fifth Circuit's decision is inconsistent with past applications of the ATS in cases that have been endorsed by this Court.

III. This case is a good vehicle for resolving an issue with significant ramifications for U.S. foreign policy.

This case presents the ideal opportunity for this Court to resolve the division among the courts of appeals regarding the application of the "touch and concern" test because the Fifth Circuit applied the narrowest possible standard to facts evidencing strong and pervasive connections between the claims at issue and the United States, while the Fourth Circuit applied a balancing approach to strikingly similar facts and reached the opposite result.

Unlike the conduct in *Kiobel*, the alleged violations of international law in this case are directly attributable to U.S. actors—contractors for the U.S. Department of Defense—for the purpose of providing labor for a U.S. military base. If such strong contacts are insufficient for Petitioners' claims to "touch and concern" United States territory, the category of claims that are not already encompassed by state tort law will be vanishingly small indeed. In fact, because of the significant connections between Petitioners' claims and the United States and the fact that some conduct giving rise to their claims occurred in the United States,

Petitioners' claims would not have been dismissed in any circuit other than the Fifth. Thus, no matter which analysis this Court decides is the correct one, its decision will be dispositive here.

Moreover, unlike in *Kiobel*, there is no alternative forum for Petitioners' claims against Respondents. *See supra* pp. 6-7. One of the primary concerns of the Court in *Kiobel* was that other countries had objected to the exercise of jurisdiction by the United States over foreign citizens for conduct subject to jurisdiction in their own states. But that concern is not present here, where U.S. courts would be exercising jurisdiction over their own citizens, which is "uncontroversial." *Kiobel*, 133 S. Ct. at 1676 (Breyer, J., concurring (quoting Brief for European Commission as *Amicus Curiae*)).

Relatedly, *Kiobel* expressed concern that, in the absence of the presumption against extraterritoriality, the judiciary may "erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.* at 1664 (quoting *EEOC*, 499 U.S. at 248). This case presents the opposite scenario: an overly narrow application of the presumption against extraterritoriality to the ATS threatens to prevent the United States from holding its own citizens to account even where no other state can or will exercise jurisdiction.

The U.S. government has repeatedly expressed the view that U.S. foreign policy interests would be negatively impacted if federal courts could not assert jurisdiction over some violations of international law that occur abroad. In *Kiobel*, the

United States took the position that the Supreme Court should not "articulate a categorical rule foreclosing" the application of the ATS to conduct occurring abroad because in certain circumstances allowing such a suit would be "consistent with the foreign relations interests of the United States, including the promotion of respect for human rights." Suppl. Br. for the United States as Amicus Curiae Supporting Respondents at *4-5, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2161290 at *4-5. In particular, the United States was concerned with "circumstances that could give rise to the prospect that this country would be perceived as harboring the perpetrator," pointing to *Filartiga* as an example. *Id.* at *4; *see also* Br. for the United States as Amicus Curiae Supporting Appellants at *22-23, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146 at *22-23 (stating that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights").

Here, even more than in *Filartiga*, the failure to provide a remedy for the victims undermines U.S. interests because the perpetrators were U.S. citizens working for the U.S. military to staff a U.S. military base. U.S. officials have repeatedly emphasized that human trafficking is contrary to public policy and that the interests of the United States abroad are negatively impacted by the failure to hold U.S. government contractors responsible for their involvement in trafficking. Br. for Retired

Military Officers as Amici Curiae Supporting Appellants at 6, *Adhikari*., 845 F.3d 184 (No. 15-20225); *supra* p. 13 n.4. These concerns motivated a landmark National Security Presidential Directive that announced a zero tolerance policy against human trafficking by U.S. contractors and defined the crime of trafficking in persons as a global threat to national security. *See* President George W. Bush, Nat'l Sec. Presidential Directive 22/NSPD-22 at 1 (Dec. 16, 2002), http://www.combat-trafficking.army.mil/docu-ments/policy/NSPD-22.pdf ("The policy of the United States is to attack vigorously the worldwide problem of trafficking in persons, using law enforcement efforts, diplomacy, and all other appropriate tools.").[10] The Fifth Circuit's decision that foreign victims of human trafficking by a U.S. corporation cannot hold that corporation accountable in a U.S. court undermines these public statements and weakens U.S. credibility abroad. In fact, reports of the human trafficking scheme involved in this case drew diplomatic protests from foreign governments, Pet. App. 53a (Graves, J., concurring in part and dissenting in part), and the trafficking at issue here

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[10] *See also* Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to Sec'ys of the Military Dep'ts (Jan. 30, 2004) (Trafficking in Persons by Department of Defense contract personnel "undermines our peacekeeping efforts"); Memorandum from Donald Rumsfeld, Sec'y of Def., to Sec'ys of the Military Dep'ts (Sept. 16, 2004) (expressing concern about labor trafficking at overseas Department of Defense locations and declaring, "[t]hese trafficking practices will not be tolerated in DoD contractor organizations or their subcontractors in supporting DoD operations.").

was directly used by insurgents in Iraq as propaganda. *See supra* p. 12.

If U.S. courts cannot exercise jurisdiction even under such circumstances, the United States may be in the same position that led Congress to enact the ATS in the first place: "embarrassed by its potential inability to provide judicial relief" to victims of crimes committed by U.S. citizens. *Kiobel*, 133 S. Ct. at 1668. This Court's guidance is needed to avoid the negative consequences for U.S. foreign policy that result from some circuits exercising jurisdiction when U.S. interests and U.S. citizens are implicated and others declining to do so under the same circumstances.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: June 2, 2017

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 15-20225

Ramchandra Adhikari; Devaka Adhikari; Jit Bahdur Khadka; Radhika Khadka; Bindeshore Singh Koiri; Pukari Devi Koiri; Chittij Limbu; Kamala Thapa Magar; Maya Thapa Magar; Bhakti Maya Thapa Magar; Tara Shrestha; Nischal Shrestha; Dil Bahadur Shrestha; Ganga Maya Shrestha; Satya Narayan Shah; Ram Naryan Thakur; Samundri Devi Thakur; Jitini Devi Thakur; Bhim Bahadur Thapa; Bishnu Maya Thapa; Bhuji Thapa; Kul Prasad Thapa; Buddi Prasad Gurung, Plaintiffs – Appellants,	* * * * * * * *	Appeal from the United States District Court for the Southern District of Texas. [PUBLISHED]

v.

Kellogg Brown & Root,

Incorporated; Kellogg Brown & Root Services, Incorporated; KBR, Incorporated; KBR Holdings, L.L.C.; Kellogg Brown & Root L.L.C.; KBR Technical Services, Incorporated; Kellogg Brown & Root International, Incorporated; Service Employees International, Incorporated; Overseas Employment Administration; Overseas Administration Services,

Defendants – Appellees.

Filed: January 3, 2017

Before HIGGINBOTHAM, PRADO, and GRAVES, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:

In 2004, an Iraqi insurgent group kidnapped and murdered twelve Nepali men as they traveled through Iraq to a United States military base to work for Daoud & Partners ("Daoud"), a Jordanian corporation that had a subcontract with Defendant–

Appellee Kellogg Brown Root ("KBR").[1] In 2008, the victims' families, and one Daoud employee who was not captured (collectively "Plaintiffs"), sued Daoud and KBR. Plaintiffs alleged that the companies "willfully and purposefully formed an enterprise with the goal of procuring cheap labor and increasing profits," and thereby engaged in human trafficking. Plaintiffs brought causes of action under the Alien Tort Statute ("ATS"), the Trafficking Victims Protection Reauthorization Act ("TVPRA"), and state common law. Although Plaintiffs settled with Daoud, they have continued their lawsuit against KBR. The district court, after nearly six years of motion practice and discovery, eventually dismissed all of Plaintiffs' claims.

We hold that the district court's grant of summary judgment on the ATS claims in favor of KBR was proper in light of the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), which held that the ATS did not apply extraterritorially. We also conclude that the district court correctly dismissed the TVPRA claims because (1) the TVPRA did not apply extraterritorially at the time of the alleged conduct in 2004 and (2) applying a 2008 amendment to the TVPRA that had the effect of permitting Plaintiffs' extraterritorial claims would have an improper retroactive effect on KBR. Lastly, we hold that the district court did not abuse its discretion in dismissing the common law claims by refusing to

[1] KBR refers to several related corporate entities—all named as Defendants in this case.

equitably toll Plaintiffs' state law tort claims. Accordingly, we AFFIRM.

I. BACKGROUND

A. Factual Background

Plaintiffs–Appellants in this case are Buddi Gurung ("Plaintiff Gurung") and surviving family members of eleven deceased men (collectively, the "Deceased"). All Plaintiffs are citizens of Nepal. In or around 2004, the Deceased were recruited to work by a Nepal-based recruiting company. As the district court found, "each man was promised a hotel related job in Jordan" and "each man's family took on significant debt in order to pay recruitment fees." The Deceased travelled from Nepal to Jordan where they were housed by a Jordanian job-brokerage company, Morning Star for Recruitment and Manpower Supply ("Morning Star"). Morning Star transferred the Deceased to Daoud. Daoud had a subcontract with KBR, a U.S. military contractor, to provide staff to operate the Al Asad Air Base ("Al Asad"), a U.S. military base north of Ramadi, Iraq.

While in Jordan, the Deceased "were subject to threats and harm," "their passports were confiscated," and they were "locked into a compound and threatened." The Deceased were also told for the first time that they were actually being sent to Iraq to work on Al Asad and would be paid only three-quarters of what they were initially promised.

In August 2004, Daoud transported the Deceased into Iraq in an unprotected automobile caravan. The Deceased, however, never made it to the base. While traveling through Iraq, they were captured by Iraqi insurgents. The insurgents posted online videos of the Deceased in which the Deceased said that they

had been "trapped and deceived and sent to Jordan" and had been "forced . . . to go to Iraq." Horrifically, the Iraqi insurgents executed the Deceased, and a video of the executions was broadcast by international media outlets,

Plaintiff Gurung travelled in the same automobile caravan as the Deceased. He also had been recruited to work in Nepal and had travelled to Jordan, but the car he was in was not captured and he arrived at Al Asad. Plaintiff Gurung worked on the base as a "warehouse loader/unloader" for approximately fifteen months. Plaintiff Gurung alleged that Daoud and KBR told him that "he could not leave until his work in Iraq was complete."

B. Procedural Background

In 2008, Plaintiffs filed suit against KBR and Daoud. They asserted claims under the TVPRA and the ATS, and also brought common law negligence claims.[2] In November 2009, the district court granted KBR's motion to dismiss Plaintiffs' common law negligence claims. It held that these claims were barred by the statute of limitations and denied Plaintiffs' request for equitable tolling. However, the court denied KBR's motion as to Plaintiffs' TVPRA and ATS claims.

In August 2013, the district court granted in part and denied in part KBR's motion for summary judgment. It dismissed Plaintiffs' ATS claims against KBR in light of the Supreme Court's intervening

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[2] Plaintiffs also asserted claims under the Racketeer Influenced and Corrupt Organization statute ("RICO"), which the district court dismissed. Because Plaintiffs do not challenge the dismissal of these claims, they are not at issue on appeal.

decision in *Kiobel*. In *Kiobel*, the Supreme Court held that the presumption against extraterritoriality applies to ATS claims and nothing in the statute rebuts the presumption. 133 S. Ct. at 1669. The district court held that *Kiobel* compelled dismissal of the ATS claims because "all relevant conduct by Daoud and KBR occurred outside of the United States." The court denied KBR's motion for summary judgment on the TVPRA claim, noting that the law was "expressly extraterritorial" under 18 U.S.C. § 1596.

KBR moved for interlocutory review of the district court's TVPRA ruling under 28 U.S.C. § 1292(b). In response, the district court reconsidered its denial of summary judgment sua sponte on the TVPRA claim. The court reversed its previous decisions and held that the TVPRA—like the ATS—did not apply extraterritorially at the time of the alleged conduct in 2004. It explained that although Congress passed an amendment in 2008 that provided federal courts with jurisdiction over purely extraterritorial TVPRA civil claims, See Pub. L. No. 110-457, § 223(a), 122 Stat. 5044 (2008) (codified at 18 U.S.C. § 1596(a)), this amendment had the effect of altering the parties' substantive rights and, as a result, could not be applied retroactively to KBR's alleged 2004 conduct.

Plaintiffs responded by filing motions for rehearing on the district court's TVPRA and ATS rulings and for leave to amend their ATS claims. In March 2015, the district court denied these motions. This appeal followed.

II. DISCUSSION

Plaintiffs argue that we should allow their ATS, TVPRA, and common law tort claims to proceed. We address each claim in turn.

A. The ATS Claims

The district court dismissed the ATS claims at summary judgment. We review a grant of summary judgment de novo. *RTM Media, LLC v. City of Houston*, 584 F.3d 220, 223 (5th Cir. 2009). "Summary judgment is proper when the evidence demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (quoting *Chacko v. Sabre, Inc.*, 473 F.3d 604, 609 (5th Cir. 2006)).

"The ATS provides, in full, that '[t]he 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.'" *Kiobel*, 133 S. Ct. at 1663 (quoting 28 U.S.C. § 1350). Although the statute "provides district courts with jurisdiction to hear certain claims," it "does not expressly provide any causes of action." *Id.* Rather, the ATS provides jurisdiction for a "modest number of international law violations" that are derived from federal common law. *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004)). To be cognizable, a plaintiff's claims must be stated "with the requisite definite content and acceptance among civilized nations." *Doe v. Drummond Co.*, 782 F.3d 576, 583 (11th Cir. 2015) (quoting *Kiobel*, 133 S. Ct. at 1663), *cert. denied*, 136 S. Ct. 1168 (2016).

Plaintiffs contend that KBR's alleged involvement in the trafficking of the Deceased and Plaintiff

Gurung and in the forced labor of Plaintiff Gurung at Al Asad constitute actionable torts under the ATS. KBR counters that Plaintiffs' allegations of misconduct in foreign countries are barred by the presumption against extraterritoriality.

1. The Presumption Against Extraterritoriality

The presumption against extraterritoriality is a canon of statutory interpretation rooted in the "longstanding principle" that a federal statute "is meant to apply only within the territorial jurisdiction of the United States" absent congressional intent to the contrary. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

A two-step inquiry governs the presumption's application to a statute. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). First, "we ask whether the presumption against extraterritoriality has been rebutted— that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* Second, "[i]f the statute is not extraterritorial, then . . . we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's 'focus.'" *Id.*

Step two's "focus" inquiry is derived from the Supreme Court's decision in *Morrison*. *See* 561 U.S. at 255. As the Supreme Court explained, whether the presumption bars a claim is not always "self-evidently dispositive" because cases will often have some "contact with the territory of the United

States." *Id.* at 266. In *Morrison*, the plaintiffs had brought suit under § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") based on alleged misrepresentations made in connection with the sales and purchases of securities registered on foreign exchanges. *Id.* at 250–53. Some of these misrepresentations occurred in the United States. *Id.* After holding the presumption against extraterritoriality applied to § 10(b), *id.* at 265, the Court "engaged in a separate inquiry to determine whether the complaint . . . involved a permissible domestic application of § 10(b) because it alleged that some of the relevant misrepresentations were made in the United States." *RJR Nabisco*, 136 S. Ct. at 2100. The Court's separate inquiry considered the statute's "focus." *Id.*; *Morrison*, 561 U.S. at 266. The Court ruled that the Exchange Act's "focus" was "not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Morrison*, 561 U.S. at 266. It concluded that because the statute was focused on domestic securities transactions, the plaintiffs' alleged domestic activity—the misrepresentations—made in connection with a foreign transaction failed to show a permissible domestic application of the statute. *See id.* at 267; *RJR Nabisco*, 136 S. Ct. at 2100.

As for the ATS, the Supreme Court in *Kiobel* addressed step one of the extraterritoriality inquiry: the Court held that the "presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption." 133 S. Ct. at 1669. In that case, Nigerian nationals sued Dutch, British, and Nigerian corporations, alleging that they aided and abetted the Nigerian military in committing international

law violations in Nigeria. *Id.* at 1662. The Court held that the ATS did not confer jurisdiction because "all the relevant conduct took place outside the United States."[3] *Id.* at 1669. Although the Court found that the presumption precluded the plaintiffs' claims "[o]n these facts," it did not foreclose the possibility that there may be circumstances in which the bar would not apply. *Id.* The Court stated that the ATS could create jurisdiction for "claims [that] touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.* (citing *Morrison*, 561 U.S. at 265–73). Notably, in discussing claims that "touch and concern" the United States, the Court cited to *Morrison* and its "focus" inquiry. *See Kiobel*, 133 S. Ct. at 1669 (citing *Morrison*, 561 U.S. at 265–73).

On appeal, the parties dispute the meaning of *Kiobel*'s "touch and concern" language, including how to reconcile it with *Morrison*'s "focus" inquiry. Plaintiffs, along with amici curiae, suggest that *Kiobel* provided an ATS-specific test that largely

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[3] The plaintiffs in *Kiobel* alleged that after residents of Ogoniland, Nigeria, began to protest the defendants' oil exploration in that area, the defendants "enlisted the Nigerian Government to violently suppress [these] burgeoning demonstrations." 133 S. Ct. at 1662. The plaintiffs further alleged that the defendants "aided and abetted" the Nigerian military and police forces in committing atrocities against the Ogoni residents, including by providing the "Nigerian forces with food, transportation, and compensation." *Id.* at 1663. The defendants' only identified contact with the United States was that their shares were listed on the New York Stock Exchange and an affiliated company had an office in New York City. *Id.* at 1677 (Breyer, J., concurring).

supplants *Morrison*'s "focus" analysis. In support, Plaintiffs point to the Fourth Circuit's decision in *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014), one of the first decisions to analyze *Kiobel*'s "touch and concern" language. In *Al Shimari*, the court observed that "the 'claims,' rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force, suggesting that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action." *Id.* at 527 (quoting *Kiobel*, 133 S. Ct. at 1669). Plaintiffs contend that *Kiobel* mandates a fact-specific analysis that looks to "the totality of [their] claim's connection to U.S. territory and the national interest."

KBR responds that *RJR Nabisco* makes clear that *Morrison*'s "focus" test still governs. We agree. In *RJR Nabisco*, the Supreme Court observed that both "*Morrison* and *Kiobel* reflect a two-step framework for analyzing extraterritoriality issues." 136 S. Ct. at 2101. As the Court clarified, *Kiobel* did not reach step two—i.e., the Court "did not need to determine, as [it] did in *Morrison*, the statute's 'focus'"—because "'all the relevant conduct' regarding" the alleged international-law violations occurred overseas. *Id.* (quoting *Kiobel*, 133 S. Ct. at 1670). In other words, the Court in *Kiobel* did not disclaim the focus inquiry for ATS claims. It simply pretermitted the issue. *See Balintulo v. Daimler AG*, 727 F.3d 174, 191 (2d Cir. 2013) ("[S]ince all the relevant conduct in *Kiobel* occurred outside the United States—a dispositive fact in light of the Supreme Court's holding—the Court had no reason to explore, much less explain,

how courts should proceed when some of the relevant conduct occurs in the United States.").

Therefore, if an ATS claim involves some domestic activity relevant to the claim, "further analysis" is required. *Morrison*, 561 U.S. at 266; accord *RJR Nabisco*, 136 S. Ct. at 2100. This analysis—step two of the extraterritoriality inquiry—requires looking to the ATS's focus, which resolves whether the claims "touch and concern" the United States territory with "sufficient force" such that the presumption against extraterritoriality is displaced. *Kiobel*, 133 S. Ct. at 1669; See also *Mastafa v. Chevron Corp.*, 770 F.3d 170, 182 (2d Cir. 2014) ("An evaluation of the presumption's application to a particular case is essentially an inquiry into whether the domestic contacts are sufficient to avoid triggering the presumption at all.").

Step two, however, requires distinguishing between conduct underlying the plaintiff's claim—i.e., cause of action—from conduct relevant to the statute's focus. Only conduct relevant to the statute's focus determines domestic application of the statute. *See Morrison*, 561 U.S. at 266. Thus, for ATS claims, "[i]f the conduct relevant to the [ATS's] focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *RJR Nabisco*, 136 S. Ct. at 2101. But "if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*

We note that other circuits have offered differing interpretations of *Kiobel*'s "touch and concern" language, including to what extent it adopts *Morrison*'s "focus" inquiry. The Ninth Circuit has explicitly held that *Kiobel* "did not incorporate *Morrison*'s focus test," *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014), although the eight judges that dissented from denial of rehearing en banc disagreed, See *Doe I v. Nestle USA, Inc.*, 788 F.3d 946, 953 (9th Cir. 2015) (Bea, J., dissenting). By contrast, the Second Circuit has held that *Morrison* controlled its ATS analysis by requiring courts to evaluate "the 'territorial event[s]' or 'relationship[s]' that were the 'focus' of the ATS." *Mastafa*, 770 F.3d at 184 (quoting *Morrison*, 561 U.S. at 266). The Eleventh Circuit has adopted a hybrid approach: it "amalgamate[d] *Kiobel*'s standards with *Morrison*'s focus test, considering whether 'the claim' and 'relevant conduct' are sufficiently 'focused' in the United States to warrant displacement and permit jurisdiction." *Doe v. Drummond*, 782 F.3d at 590 (quoting *Baloco v. Drummond Co.*, 767 F.3d 1229, 1238–39 (11th Cir. 2014)), *cert. denied*, 136 S. Ct. 1168 (2016).

We have not yet entered the jurisprudential fray surrounding *Kiobel*. Nevertheless, we conclude that the Supreme Court's guidance in *RJR Nabisco*—which was issued after the foregoing circuit court opinions—is determinative and, in turn, apply *RJR Nabisco*'s two-step framework. *See* 136 S. Ct. at 2101. As explained further below, our approach largely comports with the Second Circuit's "ATS 'focus' analysis" to the extent it involves "examining the conduct alleged to constitute violations of the law

of nations, and the location of that conduct." *Mastafa*, 770 F.3d at 185.

2. Application of the Two-Step Framework

We turn to applying the two-step framework where, as here, the ATS claims involve extraterritorial conduct. *Kiobel* answered step one: the ATS does not apply extraterritorially. Thus, under step two, we must determine whether Plaintiffs have sought a domestic application of the statute. We first look to whether there is any domestic conduct relevant to Plaintiffs' claims under the ATS. If we conclude that the record is devoid of any domestic activity relevant to Plaintiffs' claims, our analysis is complete: as in *Kiobel*, the presumption against extraterritoriality bars the action. *See Kiobel*, 133 S. Ct. at 1669; *RJR Nabisco*, 136 S. Ct. at 2101.

Plaintiffs allege that KBR violated international law by engaging in a scheme to traffic Plaintiffs and to subject them to forced labor on Al Asad. As for the claim regarding the Deceased, the recruitment, transportation, and alleged detention by Daoud and Morning Star all occurred in Nepal, Jordan, and Iraq. The Deceased never arrived at Al Asad. Thus, none of this overseas conduct relevant to their trafficking claim—even assuming without deciding that it can be imputed to KBR—could support the conclusion that Plaintiffs Seek to apply the ATS domestically.

Plaintiffs further contend that the district court had jurisdiction under the ATS in light of KBR's conduct (1) on Al Asad and (2) within the United States, which Plaintiffs argue is sufficient to displace the presumption against extraterritoriality.

a. Al Asad

Plaintiffs argue that Al Asad was under the jurisdiction and control of the United States and that, as a result, KBR's actions on the base constitute domestic conduct for purposes of their ATS claims. In particular, they claim that KBR's conduct on Al Asad was integral to Plaintiff Gurung's claim that he was subject to forced labor during the fifteen months he worked on the base. They also contend that KBR's conduct at Al Asad is relevant to the claim that the Deceased were victims of human trafficking. Notably, the district court found that Plaintiffs had presented a genuine dispute of material fact whether KBR "knowingly obtained trafficked labor during the relevant time period," although it concluded that evidence pointed only to KBR's Al Asad operations.

In deciding whether KBR's conduct on Al Asad constitutes domestic conduct, we first address how to distinguish between domestic and foreign conduct for purposes of the presumption against extraterritoriality.[4] KBR contends that the question is a matter of de jure sovereignty, arguing that "Iraq's retention of de jure sovereignty over Al Asad defeats characterizing it as U.S. territory." *See* Coalition Provisional Authority Order No. 17 (Revised) § 9 (noting that any premises operated by the Multinational Forces in Iraq "remain Iraqi territory"). KBR's assertion is not without support in

[4] It is worth noting the scope of Plaintiffs' reasoning: it is not limited to the ATS. Plaintiffs' contention would compel the conclusion that federal laws generally applied to Al Asad in 2004.

recent Supreme Court case law. In *Kiobel*, the Court held that the issue was whether a claim under the ATS "may reach conduct occurring in the territory of a *foreign sovereign*." 133 S. Ct. at 1664 (emphasis added). *RJR Nabisco* also suggests that domestic conduct is that which "occurred in the United States" rather than "in a foreign country." 136 S. Ct. at 2101. Nevertheless, the Supreme Court in *Kiobel* and *RJR Nabisco* did not squarely address whether what constitutes the United States also encapsulates its de facto territory.

Plaintiffs counter by citing to the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), which suggests a functional inquiry may be applicable. In *Rasul*, the Court addressed whether the federal habeas statute, 28 U.S.C. § 2241, applied to persons detained at the United States Naval Base at Guantanamo Bay, Cuba. *Id.* at 470–75. The Court explained that "[w]hatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States." *Id.* at 480 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). In coming to this conclusion, the Court highlighted that the "United States exercise[d] 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses." *Id.* (quoting Treaty Between the United States of America and Cuba, art. 3, May 29, 1934). However, the Court also noted its conclusion was supported by the Government's concession that the habeas statute "would create federal-court jurisdiction over the

claims of an American citizen held at the base." *Id.* at 481.

At least one court has observed that *Rasul*'s holding is essentially limited to the habeas context. *See Marshall v. Exelis Sys. Corp.*, No. 13-CV-00545, 2014 WL 1213473, at *7 (D. Colo. Mar. 24, 2014).[5] Regardless, we need not resolve to what extent *Rasul*'s reasoning extends beyond the habeas context for purposes of the presumption against extraterritoriality. Assuming arguendo that it applies here, Plaintiffs have failed to establish that the United States controlled Al Asad in 2004 such that it constituted the territory of the United States. As other courts have found, a U.S. military base does

[5] Plaintiffs also cite the Supreme Court's analysis in *Boumediene v. Bush*, 553 U.S. 723 (2008), which adopted a functional approach rather than a "formalistic sovereignty-based test for determining the reach of the Suspension Clause." *Id.* at 762. They argue that we should apply *Boumediene*'s analysis to decide whether Al Asad constituted United States territory for purposes of the presumption against extraterritoriality. KBR counters that *Boumediene* is inapposite because it was "driven by separation-of-powers concerns," namely the essential role the writ of habeas corpus has on constraining government authority. *See Boumediene*, 553 U.S. at 765–66. By contrast, the presumption against extraterritoriality— a canon of statutory interpretation—is only "a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate." *Morrison*, 561 U.S. at 255. We agree with KBR that *Boumediene*'s analysis does not apply. *See Marshall*, 2014 WL 1213473, at *7 (" *Boumediene* is not simply a rights-based decision which bestows rights and freedoms upon those at Guantánamo. Rather, it is a limitation on government power to act extra-judicially in a place that is functionally a territory of the United States."). Thus, we address Plaintiffs' claim based solely on *Rasul* because it explicitly addressed the presumption against extraterritoriality.

not constitute de facto territory where "the United States has not demonstrated intent to exercise sovereignty over" that base permanently. *Marshall*, 2014 WL 1213473, at *6; *Al Maqaleh v. Gates*, 605 F.3d 84, 97 (D.C. Cir. 2010) (rejecting "the notion that [the United States'] de facto sovereignty extends to" Bagram Airfield in Afghanistan where "there is no indication of any intent to occupy the base with permanence"). Here, in contrast with the Guantanamo Bay Naval Base—over which the United States had "unchallenged and indefinite control," *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring)—the United States' use of Al Asad had only begun in 2003, one year before the conduct at issue. Further, it lasted until only 2011. On this record, we are unconvinced that Al Asad constituted de facto territory of the United States in 2004. Consequently, because KBR's actions at Al Asad occurred in Iraq and not the United States, those actions cannot constitute domestic conduct relevant to their ATS claims.

b. U.S.-Based Conduct

Plaintiffs also argue that U.S.-based conduct rebuts the presumption against extraterritoriality. First, they cite KBR's domestic payments to Daoud, the subcontractor that hired the Deceased and Plaintiff Gurung. Second, they claim that employees based in Houston, Texas, were "aware of allegations of human trafficking at [KBR's] worksites."

Whether Plaintiffs Seek a domestic application of the statute is determined by the location of the conduct relevant to the ATS's focus. *See RJR Nabisco*, 136 S. Ct. at 2101. Thus, we ask what the "'focus' of congressional concern" is with the ATS.

Morrison, 561 U.S. at 266. We agree with the district court that the ATS's focus is the "tort . . . committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. That is, the focus is conduct that violates international law, which the ATS "Seeks to 'regulate'" by giving federal courts jurisdiction over such claims. *Morrison*, 561 U.S. at 267. And if that conduct "occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *RJR Nabisco*, 136 S. Ct. at 2101; See also *Mastafa*, 770 F.3d at 185 (noting that the "ATS 'focus' analysis" requires "examining the conduct alleged to constitute violations of the law of nations, and the location of that conduct"); *Doe v. Drummond*, 782 F.3d at 592 ("[O]ur jurisdictional inquiry requires us to consider the domestic or extraterritorial location where the defendant is alleged to engage in conduct that directly or secondarily results in violations of international law within the meaning of the ATS.").

Plaintiffs allege that KBR was directly liable for the tort of human trafficking and forced labor. However, all the conduct comprising the alleged international law violations occurred in a foreign country. As the district court explained, "Plaintiffs can no more pursue an ATS claim against KBR based on those extraterritorial actions than they can pursue an ATS claim against Daoud."

Plaintiffs have failed to show how KBR's alleged financial transactions permit a domestic application of the ATS. They contend that KBR "transferred payments to [Daoud] from the United States, using New York Banks." However, they failed to connect the alleged international law violations to these

payments or demonstrate how such payments—by themselves— demonstrate that KBR's U.S.-based employees actually engaged in trafficking the Deceased or forcing Plaintiff Gurung to work on its base. *See Mastafa*, 770 F.3d at 185 (citing *Balintulo*, 727 F.3d at 192 (holding that the plaintiffs' "allegations were insufficient to displace the presumption" against extraterritoriality where "defendants' alleged domestic conduct lacked a clear link to the human rights abuses occurring in South Africa that were at the heart of plaintiffs' action")).

Further, Plaintiffs' contention that KBR's U.S.-based employees may have known about "allegations" of human rights abuse by Daoud or KBR overseas is not enough to raise a genuine fact dispute that those employees were directly liable for violating international law. In response to Plaintiffs' motion for reconsideration of its ruling, the district court acknowledged that Plaintiffs had introduced some evidence suggesting KBR knew it obtained trafficked labor. However, it noted that such evidence only implicated KBR's operations overseas. Plaintiffs had failed to introduce any evidence indicating that KBR's U.S.-based employees either (1) "understood the circumstances surrounding Daoud's 'recruitment' and 'supply' of third-country nationals like Plaintiffs" or (2) "worked to prevent those circumstances from coming to light or Daoud's practices from being discontinued." Further, Plaintiffs effectively concede this point: in reference to the district court's reasoning that U.S.-based employees did not "cover up" human trafficking, they argue they "would have specifically alleged such conduct by U.S.-based KBR employees" had they been permitted to amend their complaint.

Lastly, we find Plaintiffs' alternative arguments unpersuasive. They note that the Supreme Court in *Kiobel* reasoned the presumption against extraterritoriality serves to protect against "international discord" that could result if U.S. law governed overseas. *Kiobel*, 133 S. Ct. at 1661 (citing *Arabian Am. Oil Co.*, 499 U.S. at 248). Relying on this language, Plaintiffs argue that *Kiobel* established the inverse rule: the presumption does not apply in cases where entertaining the ATS claim would not "negatively impact[] U.S. foreign policy." They further contend that refusing to apply the presumption here would promote U.S. foreign policy because it would enable Plaintiffs to hold a military contractor such as KBR liable for conduct on a U.S. military base. Relatedly, Plaintiffs argue that their claims are distinguishable from those at issue in *Kiobel* because the prohibition against human trafficking is "unique[] among international human rights norms" insofar as it "involves extraterritorial conduct."

However, "[t]hese case-specific policy arguments miss the mark." *Balintulo*, 727 F.3d at 191. The foreign-policy consequences and the international norms underlying the claim are immaterial to our analysis. "The canon against extraterritorial application is 'a presumption about a *statute's meaning*.'" *Id.* (quoting *Morrison*, 561 U.S. at 255) (emphasis in original). Thus, its applicability does not depend on "whether we think 'Congress would have wanted' a statute to apply to foreign conduct 'if it had thought of the situation before the court.'" *RJR Nabisco*, 136 S. Ct. at 2100 (quoting *Morrison*, 561 U.S. at 261). The presumption applies "across the board, 'regardless of whether there is a risk of

conflict between the American statute and a foreign law.'" *Id.* (quoting *Morrison*, 561 U.S. at 255). "Rather than guess anew in each case" as Plaintiffs urge, "we apply the presumption in *all* cases, preserving a stable background against which Congress can legislate with predictable effects." *See Morrison*, 561 U.S. at 261 (emphasis added). The Supreme Court in *Kiobel* held that the presumption applied to the ATS. That ruling binds us in all cases.

3. Leave to Amend

Plaintiffs contend that they should have been permitted to amend their complaint to allege aiding and abetting in the United States in light of *Kiobel*. The district court denied this request. "[W]here, as here, the district court's denial of leave to amend was based solely on futility, we apply a de novo standard of review identical, in practice, to the standard used for reviewing a dismissal under Rule 12(b)(6)." City of *Clinton v. Pilgrim's Pride Corp.*, 632 F.3d 148, 152 (5th Cir. 2010). In denying Plaintiffs' request, the district court explained that its "decision was based on the summary judgment record, not on the pleadings." The district court noted that because Plaintiffs failed to identify any evidence which was not or could not have been presented to the court prior to its ruling, amendment in this case would be futile.

Plaintiffs on appeal argue that granting leave to amend would comport with the decisions of other courts after *Kiobel* which have allowed plaintiffs to add allegations that might displace the presumption against extraterritoriality. Plaintiffs state they "will be able to allege that U.S.-based managers knew they were obtaining trafficked labor, and continued

to do so despite this knowledge." Additionally, Plaintiffs assert that they "will be able to allege the same facts found sufficient in *Al Shimari*." In particular, they claim that they will point to (1) KBR's U.S. corporate citizenship; (2) the U.S. citizenship of the responsible KBR employees; (3) the existence of a contract between KBR and the U.S. government; (4) KBR's U.S.-based managers' approval and cover-up of misconduct; and (5) the express intent of Congress.

We affirm the district court's decision to deny leave to amend. As an initial matter, an aiding and abetting theory of liability was not presented to the district court. Counsel for Plaintiffs reiterated at oral argument that they believed aiding and abetting was already a theory within the original complaint, but were Seeking to add allegations that would more specifically satisfy *Kiobel*'s "touch and concern" test in light of emerging case law. However, while the "touch and concern" test may have been unsettled after *Kiobel*, Plaintiffs had already presented the evidence and made the allegations that supported their argument in favor of displacing the presumption against extraterritoriality.[6] Plaintiffs argue they would be able to allege facts that satisfy *Al Shimari*, but *Al Shimari* is not the test. As we have discussed, our approach requires analysis of the conduct relevant to the statute's "focus." *See Morrison*, 561 U.S. at 266. Plaintiffs essentially Seek to plead the same allegations that this Court has

[6] As KBR explains, "even after KBR raised *Kiobel* in a supplement to its motion for summary judgment, Plaintiffs still did not Seek leave to amend, arguing instead that their claims as-then-pleaded satisfied *Kiobel*'s 'touch and concern' language."

found insufficient to displace the presumption against extraterritoriality. Amendment would bring Plaintiffs no closer to satisfying the test articulated in *Morrison* and in *RJR Nabisco*. Accordingly, amendment would be futile.

B. The TVPRA Claim

Plaintiffs alleged that KBR's actions violated the TVPRA, 18 U.S.C. §§ 1589, 1590, which prohibits forced labor and human trafficking, respectively. In their first amended complaint, Plaintiffs cited 18 U.S.C. § 1595, the TVPRA's civil-remedy provision, which Congress first enacted in 2003. *See* Pub. L. No. 108-193, 117 Stat. 2878 (2003). Section 1595 permits suits by private parties for violations of, inter alia, § 1589 or § 1590. After Plaintiffs filed their first amended complaint, 18 U.S.C. § 1596 became law. *See* Pub. L. No. 110-457, § 223(a), 122 Stat. 5044 (2008) (codified at 18 U.S.C. § 1596(a)). This provision, entitled "Additional jurisdiction in certain trafficking offenses," provides:

> In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591 if—
>
> > (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or

> (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.

18 U.S.C. § 1596(a) (the "2008 Amendment").

The parties do not dispute that the 2008 Amendment enables federal courts to entertain a private party's civil suit that alleges extraterritorial violations of the TVPRA. *See Kiobel*, 133 S. Ct. at 1665 ("Congress, even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad."). However, because the TVPRA, unlike the ATS, is extraterritorial in scope, Plaintiffs argue that their TVPRA claims are viable under a different theory than the ATS claims. They argue that § 1596—which explicitly rebuts the presumption against extraterritoriality—applies to their pending lawsuit.

However, in seeking to apply § 1596 to pre-enactment conduct, Plaintiffs confront a different canon of statutory interpretation: the presumption against retroactivity. This "presumption against retroactive legislation . . . is deeply rooted in our jurisprudence." *Margolies v. Deason*, 464 F.3d 547, 551 (5th Cir. 2006) (quoting *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997)).

Plaintiffs make two distinct arguments as to why the presumption against retroactivity does not prevent applying § 1596 to their pending lawsuit. First, they claim that § 1596 did not alter the law. Rather, it clarified Congress's intent to allow a civil remedy for extraterritorial violations of the TVPRA. Because the 2008 Amendment merely clarified a meaning extant in the TVPRA at the time of the

alleged conduct, it applies to their case. *See*, *e.g.*, *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) ("[C]oncerns about retroactive application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify . . . rather than effect a substantive change in the law."); *Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887, 890 (1st Cir. 1992) (finding it "need not determine" the retroactivity issue because the amendment at issue merely clarified existing law). Second, Plaintiffs claim that even if § 1596 was not merely clarifying, it nonetheless applies to KBR's alleged pre-enactment conduct because it is a purely jurisdictional statute that speaks only to the power of the court rather than the parties' substantive rights. We address each argument in turn.

1. Extraterritoriality Prior to the 2008 Amendment

Plaintiffs argue that the 2008 Amendment clarified rather than changed the TVPRA and therefore should apply to their lawsuit. We have observed that "changes in statutory language" do not always "constitute a change in meaning or effect" of that statute. *NCNB Tex. Nat'l Bank v. Cowden*, 895 F.2d 1488, 1500 (5th Cir. 1990) (quoting *United States v. Montgomery Cty.*, 761 F.2d 998, 1003 (4th Cir. 1985)). Rather, Congress may amend a law merely "to make what was intended all along even more unmistakably clear." *Id.* (quoting *Montgomery Cty.*, 761 F.2d at 1003).

Several factors inform whether a statutory amendment merely clarifies the law rather than effects a substantive change. For instance, courts

consider: (1) "whether the enacting body declared that it was clarifying a prior enactment"; (2) "whether a conflict or ambiguity existed prior to the amendment"; and (3) "whether the amendment is consistent with a reasonable interpretation of the prior enactment." *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 642 (7th Cir. 2016) (quoting *Middleton v. City of Chicago*, 578 F.3d 655, 663–64 (7th Cir. 2009)); See also *FDIC v. Belli*, 981 F.2d 838, 841 (5th Cir. 1993).

We begin with the original act—the civil-remedy provision, 18 U.S.C. § 1595—and conclude that it was not ambiguous. At the time Congress added a civil remedy in 2003, the law regarding extraterritoriality was clear: it was "assume[d] that Congress legislates against the backdrop of the presumption against extraterritoriality." *Arabian Am. Oil Co.*, 499 U.S. at 248. Thus, a law was presumed not to apply extraterritorially absent "the affirmative intention of the Congress clearly expressed." *Id.* (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

Notably, other provisions of the TVPRA expressly contemplated overseas endeavors, such as § 107, which established "initiatives in foreign countries to assist . . . victims of human trafficking." Trafficking Victims Protection Act, Pub. L. No. 106-386, § 107(a) (2000) (codified at 22 U.S.C. § 7105). However, there is no express indication of extraterritorial application in the private cause-of-action provision, § 1595, or its substantive prohibitions, §§ 1589 and 1590. Rather, the pre-2008 TVPRA was silent on whether the civil remedy applies extraterritorially. In light of the well-established presumption against extraterritoriality,

we conclude that § 1595 unambiguously did not apply extraterritorially until § 1596 was enacted.

Further, nothing in the text of § 1596 expressly indicates that Congress intended to clarify rather than change the TVPRA. *See Middleton*, 578 F.3d at 664; *Belli*, 981 F.2d at 841. Rather, as the provision's title indicates, it provided "[a]dditional jurisdiction."[7] Indeed, the two courts to address TVPRA's civil remedy provision before 2008 held that the law did not provide a cause of action for extraterritorial conduct. *See Nattah v. Bush*, 541 F. Supp. 2d 223, 234 (D.D.C. 2008), *aff'd in part, rev'd in part on other grounds*, 605 F.3d 1052 (D.C. Cir. 2010); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 999–1004 (S.D. Ind. 2007). As such, in contrast to cases where this Court has held an amendment was clarifying, there was no circuit split or conflict that "provoked" Congress to "enact an amendment to clarify rather than change the law." *Cowden*, 895 F.2d at 1501.

Plaintiffs' only argument is nontextual circumstantial evidence: the 2008 Amendment "was passed promptly after cases questioning the TVPRA's extraterritorial application"—specifically, the district

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[7] The Fifth Circuit has held that the legislative history may be informative in discerning whether a law was clarifying. *See Belli*, 981 F.2d at 841; *Cowden*, 895 F.2d at 1500. However, in this case, Plaintiffs have failed to introduce any evidence in the legislative history to support their view. Even if we were to rely on the legislative history, we find that it supports the view that Congress expanded jurisdiction rather than simply clarifying existing jurisdiction. The House Report for the original version of what became the 2008 amending act states: "This section *provides jurisdiction* to U.S. courts." H.R. Rep. No. 110- 430(I), at 55 (2007) (emphasis added). The language "provides jurisdiction" implies that such jurisdiction did not already exist.

court decisions in *Nattah* and *John Roe I*. We may consider the circumstances surrounding the enactment to determine whether it was clarifying. *See Laubie v. Sonesta Int'l Hotel Corp.*, 752 F.2d 165, 168 (5th Cir. 1985).

However, in this case, we find Plaintiffs' theory of temporal proximity unavailing. The question is whether, in passing § 1596, Congress "merely intended to clarify what it had meant all along" in the TVPRA's civil-remedy provision. *Belli*, 981 F.2d at 840. Nothing in the text of the pre-2008 TVPRA or in the text of § 1596 indicates that a plaintiff was allowed to sue for extraterritorial violations of the TVPRA before 2008.

Further, we find *Laubie*, the case relied on by Plaintiffs, distinguishable. In that case, this Court held that a Louisiana state law was clarifying based on the "the timing of the amendment[] and its language." *Laubie*, 752 F.2d at 168. Here, the language indicates that the 2008 Amendment is not clarifying. In contrast to *Laubie*, Plaintiffs' only evidence is timing. But it is not evident that the temporal proximity between the two district court rulings and § 1596's enactment—by itself—supports their claim. It is equally plausible to infer based on timing alone that Congress amended the TVPRA to provide a civil remedy for extraterritorial violations because it had concluded none previously existed. Indeed, a district court recently made just that inference. *See St. Louis v. Perlitz*, No. 3:13-CV-1132, 2016 WL 1408076, at *2 (D. Conn. Apr. 8, 2016) ("That Congress added [§ 1596,] a new provision explicitly giving extraterritorial effect to § 1591[, the TVPRA's prohibition on sex trafficking,] further supports the conclusion" that the law did not

apply extraterritorially before the amendment.). Such lack of clarity regarding Plaintiffs' evidence of timing is precisely why we have admonished that "reliance on subsequent legislative actions to determine the meaning of an earlier statute is hazardous." *Cowden*, 895 F.2d at 1500. Accordingly, given that nothing in the text of the TVPRA either in 2004 or today indicates that Plaintiffs could assert a civil remedy for extraterritorial violations before § 1596 was enacted, the amendment's timing fails to persuade us that the law was a clarifying amendment.

2. The 2008 Amendment's Retroactive Effect

The district court also held that the presumption against retroactivity prevents applying § 1596 to KBR's pre-enactment conduct, reasoning that the law was not merely jurisdictional. The presumption against retroactivity "is based on 'the unfairness of imposing new burdens on persons after the fact.'" *Hartford Cas. Ins. Co. v. FDIC*, 21 F.3d 696, 700 (5th Cir. 1994) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). The Supreme Court's decision in *Landgraf v. USI Film Products* provides the two-step framework for addressing retroactivity questions.

First, we consider "whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. If Congress has addressed the issue, a court need not rely on the "judicial default rules." *Id.* But if "the statute contains no such express command, the court must determine whether the new statute would have retroactive effect." *Id.* A statute, however, does not have a retroactive effect "merely because it is applied in a

case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Id.* at 269 (internal citation omitted). Rather, a retroactive effect is present when that statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. "If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

However, there are situations where a court must "apply the law in effect at the time it renders its decision." *Id.* at 273 (quoting *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (2006)). "Such situations generally involve procedural changes to existing law, including statutes which merely alter jurisdiction." *Hartford Cas. Ins.*, 21 F.3d at 700. Jurisdiction-altering rules "usually" do not have retroactive effect because such rules "take[] away no substantive right but simply change[] the tribunal that is to hear the case." *Id.* at 701 (quoting *Landgraf*, 511 U.S. at 274). In other words, a jurisdictional statute has no retroactive effect if it "affect[s] only where a suit may be brought, not whether it may be brought at all." *Hughes Aircraft*, 520 U.S. at 951.

Plaintiffs do not argue that Congress has "expressly prescribed" the temporal reach of the TVPRA. Thus, we proceed to the second step to address whether § 1596 has a retroactive effect.

Plaintiffs claim that § 1596 has no retroactive effect because it is "purely jurisdictional." They argue that the 2008 Amendment, entitled "Additional

jurisdiction in certain trafficking offenses," only "enlarges the jurisdiction of U.S. courts" by providing them with "extraterritorial jurisdiction over trafficking offenses."

The Supreme Court's decision in *Hughes Aircraft* is instructive. That case concerned whether an amendment to the False Claims Act ("FCA") could be applied retroactively. *Hughes Aircraft*, 520 U.S. at 941. Prior to the amendment, the FCA barred a private party's qui tam suit "based on information already possessed by the Government." *Id.* at 944. The amendment eliminated this bar in some circumstances. *Id.* at 941. The court of appeals held that the amendment "removing certain defenses to qui tam suits should be applied retroactively to suits based on pre-[enactment] conduct because the amendment involved only the 'subject matter jurisdiction' of courts to hear qui tam claims and did not affect the substantive liability of qui tam defendants." *Id.* at 944–45.

The Supreme Court reversed, reasoning that the amendment had a retroactive effect under *Landgraf*. *Id.* at 946–47. The Court reasoned that the amendment "change[d] the substance of the existing cause of action for qui tam defendants" by "eliminat[ing] a defense to a qui tam suit—prior disclosure to the Government." *Id.* at 948. The Court also found that the amendment "essentially create[d] a new cause of action" for private parties. *Id.* at 950. Before the amendment, "once the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant." *Id.* at 949. The amendment therefore resulted in an "extension of an FCA cause of action to

private parties in circumstances where the action was previously foreclosed." *Id.*

Further, the Court rejected the qui tam plaintiffs' argument that because the amendment was "jurisdictional," the "general *Landgraf* presumption against retroactivity" did not apply. *Id.* at 950. The Court explained that jurisdiction-allocating statutes are not categorically exempt from the *Landgraf* analysis. *Id.* at 950. Rather, "[t]he fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity." *Id.* at 951. The Court explained that the legal effect of this jurisdictional amendment was not limited to "merely allocat[ing] jurisdiction among forums." *Id.* The amendment also "create[d] jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* As a result, the FCA amendment was "as much subject to [the] presumption against retroactivity as any other." *Id.*

The Supreme Court's decision in *Martin v. Hadix*, 527 U.S. 343 (1999), confirms that the mere fact that a statute is jurisdictional does not fully resolve the retroactivity inquiry. As the Court explained, "[w]hen determining whether a new statute operates retroactively, it is not enough to attach a label (*e.g.*, 'procedural,' 'collateral') to the statute." *Id.* at 359. Instead, under *Landgraf*, our retroactivity inquiry "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its

enactment.'" *Id.* at 357–58 (quoting *Landgraf*, 511 U.S. at 270).

The 2008 Amendment, although jurisdictional in nature, alters a party's substantive rights under the TVPRA. Prior to § 1596, a private party could not maintain a civil cause of action under the TVPRA for forced labor or human trafficking that occurred overseas. Such an action, as noted, would have been barred by the presumption against extraterritoriality. However, by conferring "extra-territorial jurisdiction over any offense . . . under" the TVPRA, § 1596 permits private parties to pursue a civil remedy under the TVPRA for extraterritorial violations. As with the amendment in *Hughes Aircraft*, § 1596 has the legal effect of "eliminat[ing] . . . a prior defense." 520 U.S. at 950. After § 1596's enactment, a TVPRA defendant in a civil suit could no longer rely on a previously available defense: the presumption against extraterritoriality. Indeed, Plaintiffs do not identify any forum in which they could have permissibly brought a TVPRA civil cause of action based on their allegations.[8] Consequently,

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[8] Plaintiffs rely heavily on *Gordon v. Pete's Auto Service of Denbigh, Inc.*, 637 F.3d 454 (4th Cir. 2011). However, *Gordon* is distinguishable. That case involved § 307 of the Servicemembers Civil Relief Act ("SCRA"), which "prohibits enforcement of liens against servicemembers during military service." *Id.* at 456 (citing 50 U.S.C. app. § 537). The question was whether a new federal law—§ 802 of the SCRA—which provided a federal cause of action to enforce § 307's protections would have a retroactive effect under *Landgraf*. *Id.* at 458–59. The Fourth Circuit found that the new federal law did not "impair[] the parties' rights or impose[] new duties" because § 307's right of non-foreclosure "was already enforceable" in a state court conversion act. *Id.* at 459–60 ("In fact, § 307 contemplates that the owner's right might be enforced in a

because § 1596 "creat[ed] jurisdiction" for a TVPRA civil case "where none previously existed" it "speaks not just to the power of a particular court but to the substantive rights of the parties as well." *See id.* at 951.

Further, Plaintiffs' emphasis that § 1596 did not alter the unlawfulness of the alleged conduct under the TVPRA is misplaced. In *Hughes Aircraft*, the federal government would have been able to bring suit against the defendant for the conduct alleged by the private plaintiffs. Prior to § 1596's enactment, the federal government could have criminally prosecuted parties for extraterritorial violations of §§ 1589 and 1590, the prohibitions against human trafficking and forced labor that KBR is alleged to have violated. *See* 18 U.S.C. § 3261. However, despite these pre-existing criminal prohibitions, § 1596 exposed a TVPRA defendant to civil claims brought by private parties. Such a result fits squarely within *Hughes Aircraft*'s reasoning: "In permitting actions by an expanded universe of plaintiffs with different incentives [than the federal government], the [2008 Amendment] essentially creates a new cause of action." *See* 520 U.S. at 950.

Plaintiffs counter that even if § 1596 removed a defense to a civil suit under the TVPRA, the law nonetheless did not alter the parties' substantive rights given other laws in effect at the time of the

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conversion action."). By contrast, Plaintiffs have not asserted that they could have enforced TVPRA's substantive protections—i.e., § 1589 and § 1590—before the 2008 Amendment. Thus, unlike the law in *Gordon*, the 2008 Amendment made the TVPRA's conduct-regulating provisions enforceable in civil suits for a new class of claims.

alleged conduct. Specifically, they contend that KBR was already "civilly liable for the same conduct under common law and Iraqi law, which provide the same tort remedies." Under this interpretation, permitting Plaintiffs to pursue their TVPRA claims would have no retroactive effect if the parties' rights and remedies under the TVPRA are identical to their pre-existing rights and remedies under other laws.

In support, Plaintiffs cite two cases in which other courts have found that the Torture Victim Protection Act—which created a civil cause of action for torture—would not have a retroactive effect because it created "no new liabilities" and did not "impair rights." *See Cabello v. Fernández-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005); *Alvarez-Machain v. United States*, 107 F.3d 696, 702 (9th Cir. 1996). Both of these cases, however, concluded that the Torture Victim Protection Act was indistinguishable from claims made available under the ATS. *Cabello*, 402 F.3d at 1154; *Alvarez-Machain*, 107 F.3d at 702–03.

By contrast, Plaintiffs cannot prove there exist parallel rights and remedies under the ATS. After *Kiobel*, Plaintiffs' extraterritorial ATS claims are barred, and the 2008 Amendment removed the previously available defense of extraterritoriality. The ATS cannot be said to provide parallel rights or remedies to Plaintiffs' extraterritorial TVPRA claims. *See Kiobel*, 133 S. Ct. at 1663–65.

Plaintiffs also argue that the parties' rights and liabilities under pre-existing foreign and state law defeat the district court's conclusion that § 1596 attaches new legal consequences. We find these arguments unavailing. First, Plaintiffs cite the Iraqi

Civil Code, which they argue authorizes tort victims— including victims of trafficking—to bring claims for civil remedies. Yet, even if KBR may be liable under Iraqi law, Plaintiffs have not proven that the remedies under the TVPRA and Iraqi Civil Code are co-extensive. Plaintiffs, for instance, Seek punitive damages in this case. But whereas the TVPRA authorizes punitive damages, *Francisco v. Susano*, 525 F. App'x 828, 835 (10th Cir. 2013); *Ditullio v. Boehm*, 662 F.3d 1091, 1096 (9th Cir. 2011), no such damages are available under Iraqi law, *Harris v. Kellogg, Brown & Root Servs., Inc.*, 796 F. Supp. 2d 642, 666 (W.D. Pa. 2011). "Retroactive imposition of punitive damages" is precisely what the Supreme Court found problematic in *Landgraf*. *See* 511 U.S. at 281.

Second, Plaintiffs cite the "transitory tort doctrine," arguing that KBR would have been liable under state tort law. But Plaintiffs' state law claims are barred by the statute of limitations. Allowing Plaintiffs to retroactively bring a TVPRA claim would eliminate that defense, thereby imposing new liability to KBR. *See Hughes Aircraft*, 520 U.S. at 948. Additionally, Plaintiffs' rights or remedies under expired claims cannot be said to parallel the remedies that the TVPRA would make available if applied. Consequently, allowing Plaintiffs to bring a TVPRA claim would have an impermissible retroactive effect.

3. The MEJA's Criminal Jurisdiction

Plaintiffs alternatively rely on the Military Extraterritorial Jurisdiction Act ("MEJA") as a basis for jurisdiction for the TVPRA civil claims. Plaintiffs contend that the TVPRA's civil remedy attaches

whenever a person subject to the court's jurisdiction commits a trafficking offense—regardless of whether the person is criminally prosecuted. In other words, Plaintiffs argue that MEJA's limited extraterritorial extension of a host of federal offenses, including §§ 1589 and 1590 of the TVPRA, can be married with TVPRA's civil-remedy provision to provide an alternative "jurisdictional" basis for Plaintiffs' claim. MEJA applies to "[c]riminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States." 18 U.S.C. § 3261. Plaintiffs argue that when Congress enacted the 2008 Amendment, it built upon the existing TVPRA and MEJA framework and did not exempt TVPRA violations by MEJA-covered persons. However, Plaintiffs do not cite any cases in which MEJA triggered the TVPRA and permitted jurisdiction.

It is undisputed that the TVPRA provisions KBR is alleged to have violated—§ 1589 and § 1590—could have been prosecuted under MEJA. However, this Court declines to find that MEJA's grant of criminal jurisdiction over felony offenses committed abroad gives Plaintiffs an alternative jurisdictional basis for their civil claims. Congress must clearly express an affirmative intention to give a statute extraterritorial effect. *Morrison*, 561 U.S. at 255. It is simply not clear that Congress affirmatively intended to give extraterritorial effect to the TVPRA civil-remedy provision via an unrelated criminal statute that is nowhere referenced in the TVPRA. We agree with the district court's conclusion that MEJA is "simply not relevant to the question of whether Congress intended to legislate extraterritorially when it enacted . . . the

TVPRA." The connection between these statutes is too attenuated for the Court to find jurisdiction on this basis.

C. The State Law Claims

The district court dismissed Plaintiffs' negligence claims as time barred under California or Texas law and declined to toll the claims. Plaintiffs argue that if their claims did not touch and concern the United States, then the choice-of-law analysis should have led to the application of Iraqi law. KBR contends that Plaintiffs cannot revive their state law negligence claims by invoking Iraq's statute of limitations for the first time on appeal. KBR argues that Plaintiffs waived any right to the application of Iraqi law by not raising that argument earlier and that the district court properly rejected Plaintiffs' conclusory arguments for tolling the limitations.

Plaintiffs argue there is no waiver when there is a change in law. They cite *McGee v. Arkel Int'l, LLC*, 671 F.3d 539 (5th Cir. 2012), as a case in which "this Circuit held for the first time that Iraqi law may apply to contractor conduct in Iraq." The problem, however, is that even if this Court viewed McGee as changing the law, it issued that opinion in 2012. While Plaintiffs discussed McGee in 2014, they did not make this argument until 2015 on appeal. The district court initially issued an order in 2009 addressing only California and Texas law. The district court entertained a motion to reconsider, and there were other opportunities for Plaintiffs to request the application of the Iraqi statute of limitations.

In the alternative, Plaintiffs argue that if California or Texas law applies, the Court should

apply equitable tolling. "The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *United States v. Patterson*, 211 F.3d 927, 930 (5th Cir. 2000) (quoting *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998)). Courts apply equitable tolling "principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Id.* (citations omitted). We review the district court's decision to deny equitable tolling for abuse of discretion, unless the district court denied tolling as a matter of law. *See Palacios v. Stephens*, 723 F.3d 600, 603 (5th Cir. 2013).

Plaintiffs argue that the civil conflict in Nepal delayed their suit. The district court rejected this argument, finding that "[g]eographic location and personal hardship cannot provide the sole basis for tolling an otherwise applicable statute of limitations." Moreover, the district court cited Plaintiffs' other potential avenues for relief. We find the district court did not abuse its discretion in denying tolling.

III. CONCLUSION

For the foregoing reasons, we AFFIRM.

JAMES E. GRAVES, JR., Circuit Judge, concurring in part, dissenting in part:

I.

I concur with the majority's decision on Plaintiffs' non-ATS claims. But this case squarely raises the question that *Kiobel* expressly left open: under what circumstances do a plaintiff's "claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application [of the ATS]." *Kiobel*, 133 S. Ct. at 1669. And on this question, I part ways with the majority. Plaintiffs here allege that a U.S. military contractor participated in a human trafficking scheme in order to fulfill its contract with the U.S. government to provide labor on a U.S. military base. There is much to support the conclusion that these claims "touch and concern" the United States. Therefore, I respectfully dissent.

A. *Kiobel*'s "Touch and Concern" Test

The majority adopts an unnecessarily restrictive view as to the meaning of *Kiobel*'s "touch and concern" language by engaging in a formalistic application of the *Morrison* "focus" test. The majority's application of the "focus" test belies the *actual* focus of the ATS and is inconsistent with the Supreme Court's ATS jurisprudence. In the majority's reading of the "touch and concern" test, only "domestic conduct . . . sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations" would permit extraterritorial application of the ATS. *See Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring)). Rather than assessing what would displace the presumption against

extraterritorial application of the ATS, *id.* at 1669, however, this test would eliminate the extraterritorial reach of the statute completely. If the alleged ATS violations must take place on domestic soil, the *Kiobel* majority's statement regarding "touch and concern" would be meaningless. In my view, the defendant's conduct here falls squarely within the focus of the ATS, and the claims, therefore, touch and concern the United States with sufficient force to displace the presumption against extraterritorial application.

The majority gives inordinate weight to *RJR Nabisco* in its application of *Kiobel*'s "touch and concern" test. Although I agree with the majority that *RJR Nabisco* sets forth a two-step framework for analyzing extraterritoriality issues and suggests that we should interpret *Kiobel*'s "touch and concern" language in light of the step-two "focus" inquiry, derived from *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. at 2883–88, I do not agree that *RJR Nabisco* is somehow "determinative" of the issues in this case. *RJR Nabisco*, like *Kiobel*, stopped after step one. In *RJR Nabisco*, the Court determined that Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO) was not expressly extraterritorial and thus requires a civil RICO plaintiff to allege and prove a domestic injury. 136 S. Ct. at 2111. The plaintiffs, however, had filed a stipulation in the district court waiving their damages claims for domestic injuries. Therefore, as in *Kiobel*, all the "relevant conduct" took place outside the United States. *RJR Nabisco* no more illuminates the "focus" inquiry at step two than does *Kiobel*, and it leaves open the questions of how to interpret the focus of the ATS, what conduct is

relevant to that focus, and how courts should proceed when there is potentially relevant conduct both within and outside the United States.

The majority then reasons that the "ATS 'focus' analysis" involves examining "the conduct alleged to constitute violations of the law of nations, and the location of that conduct" (quoting *Mastafa*, 770 F.3d at 185). I have no issue with this broad proposition; however, it is no simple matter to apply it to a case, such as this one, where the alleged conduct is comprised of several constituent actions that are part of an overall course of conduct constituting a violation of the law of nations. The particular violation alleged here, human trafficking, is a transnational crime that uses a global supply chain, which typically extends across multiple countries and requires an extensive transnational network to succeed. The crime is accomplished through a dense system of recruiters, contractors, subcontractors, and parent corporations that cross cities, states, countries, and continents.[1] Each participant undertakes actions, such as recruitment, transportation, detention, and employment that form part of the overall criminal enterprise. While some of these actions, in isolation, may not constitute a violation of the law of nations, they nevertheless constitute "relevant conduct" for purposes of the "focus" inquiry, if they play an integral role in the law of nations violation.

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[1] *See*, *e.g.*, U.S. Department of State, *Trafficking in Persons Report* (July 2015), at 13–18, available at https://www.state.gov/documents/organization/245365.pdf.

In addition, I am mindful that the "focus" inquiry centers on the *conduct* that constitutes the alleged law of nations violation. But surely the inquiry permits consideration of pertinent facts underlying the plaintiff's claim, such as the identity of the defendant, the nature of the defendant's liability (*direct or indirect*), the type of violation alleged, and any significant connections the alleged violation has to the United States, above and beyond necessary allegations of relevant conduct occurring in the United States. While *Morrison* and *RJR Nabisco* are instructive in analyzing how the presumption against extraterritoriality should be applied to statutes generally, the Supreme Court's ATS-specific precedents, *Kiobel* and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), must also guide our "focus" inquiry in the context of the ATS. *Sosa* and *Kiobel* demonstrate that such factors are central to the analysis of an ATS claim, and therefore they ought to inform our examination of the relevance of the alleged conduct, particularly any domestic conduct, to the focus of the ATS.

Notably absent from the majority opinion is any mention of the fact that KBR is a U.S. corporation, which Plaintiffs argue distinguishes this case from the "foreign-cubed" scenario in *Kiobel*. By omitting any mention of this fact, the majority presumably agrees with the Second Circuit (currently alone in this view) that a defendant's U.S. citizenship has no relevance to the "focus" analysis. *See Mastafa*, 770 F.3d at 189. But *Kiobel* itself made clear that the citizenship of the defendant is not inconsequential. In the same paragraph describing the "touch and concern" exception to the presumption against extraterritoriality, the *Kiobel* majority opined that

"[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." 133 S. Ct. at 1669. Some courts and commentators have taken this statement to mean that, although a corporation's presence in the United States may be insufficient, standing alone, to displace the presumption against extraterritoriality, the fact of a defendant's U.S. citizenship has some relevance to whether the claims touch and concern the United States. *E.g.*, *Doe v. Drummond*, 782 F.3d 576, 594 (11th Cir. 2015) ("*Kiobel* implicitly supports that citizenship or corporate status may be relevant to whether a claim touches and concerns the territory of the United States, given that, after it set forth the test, it determined that 'mere corporate presence' was insufficient."); Sarah H. Cleveland, *After Kiobel*, J. Int'l Crim. Just. (2014) 12 (3): 551 (explaining that "although mere corporate presence was not enough in *Kiobel*" the majority opinion left open whether "domicile or nationality of a defendant corporation or individual could be sufficient").

Sosa also provides guidance as to the focus of the ATS. In *Sosa*, the Court examined historical materials at the time of the ATS's enactment to determine that in the 18th century, the law of nations comprised two principal elements: norms governing behavior of nation states toward each other and "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor." 542 U.S. at 714–15. The law of nations required sovereigns to provide redress for law of nations violations in at least three circumstances: (1) when the violation occurred on a sovereign's territory; (2) when *a sovereign's subject*

committed the violation; and (3) when a perpetrator used the sovereign's territory as a safe harbor to avoid punishment for having committed great wrongs. *See* Anthony J. Bellia Jr & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations,* 78 U. Chi. L. Rev. 445, 471–76 (2011); *See also Restatement (Third) of Foreign Relations Law* § 402 ("Subject to [the reasonableness requirement of] § 403, a state has jurisdiction to prescribe law with respect to (1) (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory; (2) *the activities, interests, status, or relations of its nationals outside as well as within its territory* . . .") (emphasis added). Failure to provide such redress implicated the sovereign as an accomplice in the violation and risked reprisal from the nation suffering the wrong. *See* 4 William Blackstone, Commentaries on the Law of England 67–68 (1769); Emmerich de Vattel, Law of Nations, Book II, ch. 6, § 76 (1758) (a sovereign "ought not to suffer his subjects to molest the subjects of other states, or to do them an injury"). Consequently, U.S. citizens committing international law violations abroad had the potential to implicate the United States in diplomatic conflicts.

In sum, concerns about foreign relations were central to the ATS's passage.[2] "The statute's purpose

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[2] The majority nevertheless states that "foreign-policy consequences and the international norms underlying the claim are immaterial to our analysis." In support, the majority cites *RJR Nabisco*'s statement that a presumption about a statute's meaning applies "across the board, 'regardless of whether there

was to address 'violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs.'" *Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring) (quoting Sosa, 542 U.S. at 715). Prior to the enactment of the ATS, Congress was frustrated by the federal government's incapacity to vindicate rights under the law of nations. *Sosa*, 542 U.S. at 716–17. Congress enacted the ATS as an important federal enforcement mechanism intended to enable the United States as a fledgling nation to meet its obligations under the law of nations and avoid diplomatic strife with other nation states.

Given the proliferation of international agreements condemning human trafficking and forced labor, surely these foreign policy concerns are no less pertinent in the present day. Among several international accords concerning trafficking, the United States has signed and ratified a treaty that asks signatories to hold their citizens responsible for transnational trafficking.[3] Human trafficking has

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is a risk of conflict between the American statute and a foreign law,'" 136 S. Ct. at 2100 (quoting *Morrison*, 561 U.S. at 261). *RJR Nabisco*, however, was referring, not to the "focus" inquiry at step two of the extraterritoriality analysis, but to step one, when a court must determine whether the presumption applies to the statute at all. Concerns that were central to Congress's purpose in enacting the statute, such as the foreign-policy implications of a defendant's conduct with respect to the ATS, are by definition material to the step two analysis of the statute's focus and of whether the conduct at issue is relevant to that focus.

[3] *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized

been condemned as a modern-day form of slavery. The slave trader, like the pirate, is "*hostis humani generis*, an enemy of all mankind." *See Sosa*, 542 U.S. at 732 (quoting *Filartiga v. Pena–Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).[4] "And just as a nation that harbored pirates provoked the concern of other nations in past centuries, so harboring 'common enemies of all mankind' provokes similar concerns today." *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring) (internal reference omitted).

These foreign policy concerns are particularly heightened where, as here, the defendant's conduct directly implicates the United States and its military. KBR was one of the largest U.S. military contractors operating in Iraq. While KBR was allegedly exploiting trafficked labor at Al Asad, the U.S. government and military were engaged in an aggressive anti-trafficking campaign. "Contractors provide crucial support for the U.S. military and are perceived internationally as an extension of the military."[5] Congress repeatedly expressed concern

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Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&clang=_en.

[4] Notably, an interpretation of "touch and concern" that requires conduct constituting a violation of the law of nations within the United States fails to address piracy, which the *Kiobel* Court deemed to fall within the ambit of ATS jurisdiction, despite its occurrence on the high seas. 133 S. Ct. at 1667.

[5] Amici curiae retired U.S. military officers explain that during the events at issue, the United States retained both exclusive control of the Al Asad Airbase and practical control over Iraqi territory. Although this may not be sufficient to render Al Asad

that failure to hold U.S. military contractors accountable for human trafficking overseas undermines U.S. foreign policy.

This case substantially implicates the interests of the United States, both domestically and abroad. While these considerable connections to the United States may not be dispositive to the extraterritoriality inquiry, they are of critical importance to analyzing the focus of the ATS. At a minimum, they counsel a hard look at any domestic conduct alleged on the part of the defendant. It simply contravenes the *focus* of the ATS to disregard these facts entirely.

B. Application of the "Touch and Concern" Test to the Summary Judgment Record

Properly applying the "touch and concern" test here leads to the conclusion that Plaintiffs have adduced sufficient evidence of domestic conduct relevant to the alleged law of nations violation to displace the presumption against extraterritorial application of the ATS. Plaintiffs contend that the district court's analysis of the evidence in the summary judgment record was improper. I agree.

Plaintiffs allege a number of actions by KBR occurring in the United States that form part of the alleged law of nations violations on which their ATS claims are based. Plaintiffs allege that KBR is directly liable for the torts of human trafficking and forced labor. In support of their allegations, Plaintiffs submitted evidence of U.S.-based conduct by KBR

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de facto territory of the United States, it most certainly implicates the United States in KBR's conduct at Al Asad.

that evinced their participation in a transnational trafficking scheme that ensnared Plaintiffs. Specifically, Plaintiffs offered that KBR transferred payments to the labor broker, Daoud, from the United States, using New York banks. These payments were made pursuant to KBR's subcontract with Daoud, the Master Agreement of which had been executed by a U.S.-based KBR employee located in Houston. Daoud was the *only* approved source for obtaining third-country national ("TCN") temporary laborers at the Al Asad Airbase. The majority states that Plaintiffs "failed to connect the alleged international law violations to these payments or demonstrate how such payments—by themselves—demonstrate that KBR's U.S.-based employees actually engaged in trafficking the Deceased or forcing Plaintiff Gurung to work on its base." But no inferential leap is required to find payment for trafficked labor to be an action critical to the operation of a global trafficking scheme. This is domestic conduct relevant to the alleged law of nations violation.

Plaintiffs have also offered evidence raising the inference that U.S.- based employees knew about the human rights abuses by Daoud and KBR overseas while KBR continued to use Daoud as a supplier of cheap labor. On this point, the majority summarily adopts the district court's conclusion that Plaintiffs' evidence of KBR's knowledge "only implicated KBR's operations overseas." Plaintiffs assert, however, that they did present evidence of knowledge implicating KBR's U.S. operations. But the district court improperly weighed this evidence against other evidence and drew conflicting inferences therefrom. *See Haverda v. Hays Cty.*, 723 F.3d 586, 591 (5th Cir.

2013) ("A court considering a motion for summary judgment must . . . draw all reasonable inferences in favor of the nonmoving party and may not make credibility determinations or weigh the evidence. In addition, a court must disregard all evidence favorable to the moving party that the jury is not required to believe." (internal quotations and citations omitted)).

In a footnote, the district court noted that Plaintiffs' "most damning piece of evidence" was a decision by a U.S.-based employee to terminate a consultant working for KBR at Al Asad after he complained regarding the treatment of third-country nationals employed by Daoud, including, quite pertinently, Plaintiffs in this suit. The district court, however, discounted this evidence of "U.S.-based complicity" because the U.S. employee who decided to "pull" the consultant from Al Asad simultaneously requested an independent investigation into the consultant's complaints. Moreover, the district court made no mention of other evidence that two KBR employees from Houston, including an investigator, flew to the Middle East to threaten the consultant with termination following the escalation of his complaints.

And the record demonstrates that this was not the only complaint of abuses at Al Asad that made its way to the United States. The district court noted but assigned no significance to evidence that "complaints from a U.S. Marine regarding ill treatment of third-country nationals at Al Asad were forwarded through KBR's U.S.-based employees to on-site base staff." The email message, titled "Problem with Halliburton Subcontractor in Iraq,"

was forwarded with the comment, "If true, fixe [sic] it, if not, ignore it."

Furthermore, these specific incidents occurred against the backdrop of media reports and growing international concern regarding potential human trafficking and other labor abuses by U.S. military contractors in Iraq, as well as an aggressive anti-trafficking campaign by the U.S. military and agencies including the Department of Defense, targeted at U.S. military contractors.[6] It defies reason to conclude that all KBR employees in the U.S. were oblivious to these controversies. But Plaintiffs' theory does not rely on inference alone.

Plaintiffs offered evidence that KBR's U.S.-based employees managed KBR's responses to press and governmental inquiries into human trafficking. For example, in response to a May 2004 New York Times inquiry regarding human trafficking, a U.S.-based employee wrote to his colleagues: "[T]he press continues to dig up these stories and Houston insists on answering each one."

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[6] For example, in 2002, President Bush announced that "[t]he United States hereby adopts a 'zero tolerance' policy regarding U.S. Government employees and contractor personnel representing the United States abroad who engage in trafficking in persons." President George W. Bush, National Security Presidential Directive-22 (Dec. 16, 2002), *available at* http://www.combat-trafficking.army.mil/documents/policy/NSPD-22.pdf). The directive required departments and agencies to investigate and punish, as appropriate, those personnel who engage in trafficking. *Id.* at 4. Pursuant to this policy, the Department of Defense implemented specific procedures to combat trafficking on military bases, including vigorous anti-trafficking investigations.

U.S.-based employees also were involved in fielding questions from Time Magazine's New Delhi Bureau after the Indian government in May 2004 requested clarification from the U.S. government concerning reports that Indian nationals working at Al Asad wished to return home but "were being compelled to continue to remain in Iraq against their will." The Indian Ambassador had lodged a formal complaint specifically mentioning Daoud's delay in repatriating third-country nationals who wished to return home and KBR's "abdication of responsibility." Time's questions were forwarded in the KBR email chain along with suggested responses. Some examples include:

> [H]ow much responsibility does Halliburton accept for what essentially amounts to human trafficking by your subcontractors? Will you be investigating? *[L]egal needs to address . . . but we should probably make a general statement that we do not know that these men were employed by any KBR subcontractor, that KBR is not the only contractor in Iraq. . . .*
>
> What is your response to the Indian workers' claims that they were "slaves"? *I'd probably say something like: We cannot respond to this. This issue needs to be address [sic] to the firm that employed them.*

In July 2004, the Washington Post published an article describing KBR's frequent use of debt bondage in Iraq, after which the Department of Defense immediately implemented measures requiring contractors to meet minimum compensation levels, create individual employment

contracts, and establish other procedures to eliminate trafficking and forced labor. Despite such highprofile inquiries and governmental pressure, KBR continued to employ Daoud as its labor broker for staffing needs at Al Asad.

At a minimum, the evidence tends to show that some U.S.-based employees knew about the allegations of abuses embroiling KBR's overseas operations. Further, drawing all reasonable inferences in Plaintiffs' favor, a jury could conclude on this record that U.S. employees failed to properly investigate these accusations of human rights abuses by KBR overseas and either willfully ignored evidence of such abuses or actively sought to cover up the misconduct. *Cf. Al Shimari*, 758 F.3d at 522, 531 (finding this type of domestic conduct sufficient to displace the presumption against extraterritoriality). The district court erred in concluding that this evidence failed to raise a genuine dispute of material fact sufficient to overcome KBR's motion for summary judgment.[7]

II.

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[7] The majority states that "Plaintiffs effectively concede" that they failed to introduce any evidence indicating that KBR's U.S.-based employees were aware of Daoud's recruitment practices or worked to prevent those practices from coming to light or prevent their discontinuance because Plaintiffs argue that they "'would have specifically alleged such conduct by U.S.-based KBR employees' had they been permitted to amend their complaint." In light of the aforementioned evidence in the record, I fail to See how Plaintiffs' request for leave to amend their complaint to specifically allege these facts functions as a concession that evidence in support of these facts does not exist.

The majority also affirms the district court's decision to deny Plaintiffs leave to amend on futility grounds. I disagree that Plaintiffs' proposed amendments would necessarily be futile. First, there is already evidence of relevant domestic conduct in the record, which was prepared well before discovery closed. Allowing leave to amend for the parties to conduct further discovery targeted at domestic conduct sufficient to satisfy *Kiobel*'s "touch and concern" test would be reasonable and not clearly an exercise of futility. Second, Plaintiffs' alternative grounds for amendment—to allege a theory of aiding and abetting in the United States—would state a plausible claim for relief even under the majority's restrictive interpretation of the "touch and concern" test; consequently, amendment would not have been futile.

A. Leave to Amend for Further Factual Development

Rule 15 governs motions to amend made before trial and provides that "[t]he court should freely give leave when justice so requires." *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016) (quoting Fed. R. Civ. P. 15(a)(2)). When the denial of leave to amend is based on grounds of futility, we apply the 12(b)(6) standard to review the sufficiency of the complaint. If the allegations are "'enough to raise a right to relief above the speculative level' and [the] claim for relief is plausible on its face,' . . . amendment would not have been futile." *Id.* at 593 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (additional citations omitted).

The district court stated that Plaintiffs' leave to amend their complaint in light of *Kiobel* would be

futile because the court's "conclusion that the relevant conduct by KBR and Daoud occurred outside of the territory of the United States" was based on the summary judgment record, and not on the pleadings. The district court's conclusion, however, is based on its erroneous determination that evidence of domestic conduct in the summary judgment record was immaterial. If the district court had properly deemed this evidence material, it could not have concluded that Plaintiffs' allegations, accepted as true, "lacked sufficient factual matter" to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

Moreover, Plaintiffs' counsel clarified at oral argument that the parties were in the middle of discovery when the *Kiobel* decision issued. All discovery up to that point had been taken prior to *Kiobel* and therefore was not focused on U.S.-based conduct. The entire summary judgment record was prepared prior to *Kiobel*, on the basis of which the district court, without a hearing, decided that *Kiobel* mandated dismissal of Plaintiffs' ATS claims.

Plaintiffs argue that they should have been permitted to amend their complaint to allege that U.S.-based managers had control and supervision over the labor flow and knew about the trafficking and did nothing to stop it. The district court had already found that Plaintiffs presented sufficient evidence that "KBR had the authority to exercise control, and did exercise said control, over Daoud's recruitment and supply of laborers." Specifically, Plaintiffs sought to amend their complaint to allege that:

> KBR managers in the United States knew of the use of labor brokers and their practices, received reports of wrongdoing, at all times had power to take corrective action, but declined to do so; that managers in the United States were involved when there was conflict or controversy concerning KBR's operations in Iraq, including incidents regarding subcontractors and/or third country nationals, and that KBR managers in the United States had ultimate authority over such issues.

As discussed above, it is my view that these actions, if borne out by the evidence, constitute "relevant conduct" to the alleged international law violations for which Plaintiffs assert KBR should be held directly liable, and that this relevant conduct is sufficient to satisfy *Kiobel*'s "touch and concern" test. Plaintiffs have already pointed to evidence in the record tending to support these contentions. It is plausible that further reasonable discovery, if permitted, would uncover more evidence of a similar nature. Accordingly, Plaintiffs' proposed allegations to satisfy *Kiobel* are "enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, and would not have been futile.

B. Leave to Amend to Allege Aiding and Abetting in the United States

Even accepting the majority's limited reading of *Kiobel*'s "touch and concern" language, it is not apparent that amendment would have been futile. In the alternative, Plaintiffs sought to amend to allege aiding and abetting in the United States in light of *Kiobel*. Concluding that Plaintiffs' theory of indirect

liability would have been futile, the majority states, "Plaintiffs argue they would be able to allege facts that satisfy *Al Shimari*, but *Al Shimari* is not the test. . . . [O]ur approach requires analysis of the conduct relevant to the statute's 'focus.' *See Morrison*, 561 U.S. at 266." But Plaintiffs' aiding and abetting claim does not rely on *Al Shimari*. And this is a plausible claim even under the majority's restrictive reading of *Kiobel*.

Plaintiffs assert that they should have been permitted to add allegations of aiding and abetting in the United States because post-*Kiobel* "[c]ourts have uniformly concluded that when the U.S.-based conduct itself constitutes a violation of the ATS, such as aiding and abetting a violation from the United States, the touch and concern test is satisfied."

As support, Plaintiffs cite the Second Circuit's decision in *Mastafa*, 770 F.3d at 185, whose approach to the "touch and concern" test the majority purports to follow. In *Mastafa*, the Second Circuit held that "relevant conduct" for purposes of the "touch and concern" test is "the conduct of the defendant which is alleged by plaintiff to be either a direct violation of the law of nations or . . . conduct that constitutes aiding and abetting another's violation of the law of nations." *Id.* In other words, "relevant conduct" is conduct that is itself "sufficient to violate an international law norm [satisfying] *Sosa*'s requirements of definiteness and acceptance among civilized nations." *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring). In *Mastafa*, there were allegations that the defendants engaged in financial transactions in the United States, some through a New York bank account, which indirectly financed the alleged international law violations—torture by agents of the

Saddam Hussein regime in Iraq. 770 F.3d at 191. The Second Circuit found these transactions to be "non-conclusory conduct that appears to 'touch and concern' the United States with sufficient force to displace the presumption against extraterritoriality[.]" *Id.* (alterations omitted). Nevertheless, because the Second Circuit had adopted a purposeful *mens rea* standard for aiding and abetting under the ATS, the *Mastafa* court determined that the conduct would fall short of that standard and could not be relied upon to displace the presumption. *Id.* at 192– 93.

Plaintiffs here have pled and offered evidence of similar U.S.-based transactions, specifically, KBR's payments to Daoud from the United States, using New York banks. Therefore, if Plaintiffs are able to offer evidence satisfying the *mens rea* standard for aiding and abetting, this conduct would appear to satisfy even the narrow "touch and concern" test. Unlike the Second Circuit, our Court has not settled on the proper *mens rea* standard for aiding and abetting liability under the ATS. A split exists among other circuits that have reached the issue as to whether the standard is purpose or a lesser standard akin to knowledge. *Compare Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (purpose); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 398 (4th Cir. 2011) (following *Talisman* in adopting purpose standard) *with Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013) (knowledge). In *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1024 (9th Cir. 2014), the Ninth Circuit declined to decide the *mens rea* standard, finding that the plaintiffs' allegations would satisfy either standard. It is also

unnecessary to reach the issue here because Plaintiffs' proposed allegations would satisfy even the more stringent purpose standard.

The Ninth Circuit's analysis in *Doe I* is instructive. In *Doe I*, the plaintiffs were former child slaves who were forced to harvest cocoa on the Ivory Coast. 766 F.3d at 1017. The defendants maintained and protected a steady supply of cocoa through buyer/seller relationships with Ivorian cocoa farmers. *Id.* By virtue of their economic leverage, they effectively controlled the production of Ivorian cocoa. *Id.* The complaint alleged that they economically benefitted from the use of child slavery, could have stopped or limited the use of child slave labor by their suppliers, did not use their control to do so, but instead offered support that facilitated it. *Id.* at 1025. The Ninth Circuit held that these allegations supported the inference that defendants "acted with the purpose to facilitate child slavery." *Id.* at 1024.

The *Doe I* court was careful to note that merely doing business with the suppliers would not satisfy the purpose standard. The court found, however, that the defendants' alleged plan to *benefit from* the use of child slave labor as a means of reducing their production costs distinguished the case from other ATS decisions where the purpose standard was not met. *Id.* at 1024–25. In those cases, the defendants profited by doing business with known human rights violators, but were not alleged to have benefited in any way from the underlying human rights violations. *Id.* at 1024 (discussing *Talisman Energy, Inc.*, 582 F.3d at 262–64 and *Aziz*, 658 F.3d at 394, 401). In contrast, the *Doe I* defendants allegedly received a direct benefit from the commission of the international law violation, which bolstered the

allegation that they acted with the purpose to support it. *Id.*

The allegations here also support the inference that Defendants acted with the purpose of supporting trafficking and forced labor. Plaintiffs allege that KBR "willfully and purposefully formed an enterprise with the goal of procuring cheap labor and increasing profits." Plaintiffs provided evidence that KBR both knew about Daoud's recruitment practices and had the authority to exercise control over them, and did exercise said control. KBR exercised an even greater level of control over the labor flow than the defendants did in *Doe I*. Plaintiffs propose to allege further that U.S.-based managers had control and supervision of the labor flow, knew about the trafficking, and did nothing to stop it. They have already presented evidence that U.S.-based managers received multiple complaints of misconduct, including one concerning *these* Plaintiffs, and made a decision to investigate and terminate the employee who complained. Courts have found the place of decision-making significant to the relevant conduct inquiry when plaintiffs allege indirect liability. *See, e.g.*, *Drummond*, 782 F.3d at 597 (relevant conduct inquiry extends to place of decision-making as opposed to site of actual violation); *Doe v. Exxon Mobil Corp.*, No. CV 01-1357 (RCL), 2015 WL 5042118, at *14 (D.D.C. July 6, 2015) ("Decisions to provide assistance that will have a substantial effect on a violation of customary international law are part of a course of conduct that gives rise to a claim for aiding and abetting under the ATS. Therefore, the site of these decisions is relevant to the Court's application of the

presumption against extraterritoriality and the touch and concern test.").

Similar to the allegations in *Doe I*, Plaintiffs allege that KBR received a direct benefit from the commission of the international law violations. Plaintiffs would allege various actions in the United States that directly facilitated the violations, including payments to the labor supplier, decisions that perpetuated the wrongdoing, and efforts to conceal it. These allegations would support the inference that Defendants acted with the purpose of facilitating trafficking and forced labor. Plaintiffs' proposed allegations state a plausible claim for aiding and abetting in the United States. It was error for the district court to deny leave to amend as futile.

Accordingly, I respectfully dissent in part.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

RAMCHANDRA ADHIKARI, et al.,	)	
Plaintiffs,	)	**Case No. 09-cv-1237**
v.	)	
DAOUD & PARTNERS, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

Pending before the Court is the Motion to Dismiss Plaintiffs' First Amended Complaint ("FAC", Doc. No. 58) filed by Defendants Kellogg Brown & Root, Inc.; Kellogg Brown & Root Services, Inc.; KBR, Inc.; KBR Holdings, LLC; Kellogg Brown & Root, LLC; KBR Technical Services, Inc.; Kellogg Brown & Root International, Inc.; Service Employees International, Inc.; and Overseas Administration Services, Ltd. ("KBR" collectively) (Doc. No. 138). For the following reasons, KBR's Motion must be granted in part and denied in part.

I. BACKGROUND

For purposes of this Motion to Dismiss, the Court accepts the factual allegations in Plaintiffs' FAC as true. *Frame v. City of Arlington,* 575 F.3d 432, 434 (5th Cir. 2009). This case is brought by Plaintiff Buddi Prasad Gurung ("Gurung") and the surviving family members of twelve other men: Prakash

Adhikari, Ramesh Khadka, Lalan Koiri, Mangal Limbu, Jeet Magar, Gyanendra Shrestha, Budham Sudi, Manoj Thakur, Sanjay Thakur, Bishnu Thapa, and Jhok Bahadur Thapa ("Deceased" collectively). All Plaintiffs are Nepali citizens and currently reside in Nepal.

Defendant Daoud & Partners ("Daoud") is a Jordanian corporation. Daoud has entered into a number of contracts with the United States for the provision of services at military bases, including AI Asad Air Base in Iraq. (FAC ¶ 22.) Defendant KBR is a business conglomerate including a parent corporation with its principal place of business in Houston, Texas, and several divisions, subsidiaries, and associated partnerships with pecuniary interests in the outcome of this case. One such KBR subsidiary serves as a contractor with the United States government to perform specific duties at United States military facilities in Iraq. (FAC ¶¶ 23-29.)

The gravamen of the FAC is that, in an effort to fulfill their contractual obligations, Defendants "willfully and purposefully formed an enterprise with the goal of procuring cheap labor and increasing profits" and thereby engaged in human trafficking. (FAC ¶54.) Plaintiffs allege that the Deceased, whose ages ranged from 18 to 27, were recruited from their several places of residence in August of 2004 by Moonlight Consultant Pvt, Ltd. ("Moonlight"), a recruiting company based in Nepal. (*Id.* ¶ 62.) Most of the men were told that they would be employed by a luxury hotel in Amman, Jordan. (*Id.*¶ 63.) Some were told that that they would be working in an American camp. (*Id.*) Although there is no indication that they were told where the camp would be, their family members assumed they were going to the

United States. (*Id.*) All of the men were led to believe that they would not be placed in a dangerous location, and that if they found themselves in a dangerous area, they would be sent home at the employer's expense. (*Id.*) They were promised a salary of approximately $500 per month. (*Id.*¶ 64.) The men and their families incurred substantial debt to pay the brokerage fees in seeking out this employment (*Id.*¶ 65.)

After they were recruited, Plaintiffs were then transferred to the custody of a Jordanian job brokerage company that operates in Amman called Morning Star for Recruitment and Manpower Supply ("Morning Star"). (*Id.* ¶ 66.) The men were held in Jordan by Daoud and agents of Daoud; all of the men were required to tum over their passports to Daoud. (*Id.* ¶¶ 67-68.) It was there that they first discovered that they were actually being sent to Iraq to work on Al Asad Air Base, north of Ramadi, Iraq. (*Id.*¶ 70.) Several of the men phoned relatives in Nepal, expressing concern and fear about their futures. (*Id.* ¶¶ 70-71.) At least one of the Deceased informed his family that he and the other men were being kept in a dark room and were unable to see. (*Id.*¶ 72.) In Jordan, the men were also informed that they would be paid only three quarters of what they were initially promised. (*Id.* ¶ 73.) Daoud transported the Deceased into Iraq on or about August 19,2004, via an unprotected automobile caravan of seventeen vehicles. (*Id.*¶ 75.) They traveled along the Amman-to-Baghdad highway, which was known to be a highly dangerous. (*Id.* ¶¶ 76-81.) Daoud was aware of the significant and well-known risks involved in traveling on this highway at the time Plaintiffs were

thus transported. (*Id.*) No security was provided for the caravan. (*Id.* ¶ 81.)

As they were nearing Al Asad base, the two lead cars in which the Deceased were being transported were stopped by a group of men who later revealed themselves to be members of the Ansar al-Sunna Army, an insurgent group in Iraq. (*Id.* ¶ 81-83.) The men told the drivers to leave the Deceased at the checkpoint, and that the Americans would come from the base to pick them up. (*Id.*¶ 81.)

Between August 20 and August 24, the Ansar al-Sunna Army posted an internet statement that it had captured the Deceased, posted pictures of the Deceased, and sent a video of ten of the Deceased to the Foreign Ministry of Nepal. (*Id.* ¶¶ 83-86.) Many of the family members of the Deceased saw the images broadcast on Nepali television. In the video, the Deceased described their trip to Iraq, stating that they "were kept as captives in Jordan at first" and were not allowed to return home. (*Id.*) They all stated that they were forced to go to Iraq, and were visibly very frightened. (*Id.*)

On or about August 31, 2004, international media outlets broadcasted video of the Ansar al-Sunna Army executing the Deceased. (*Id.*¶ 86.) The group beheaded one of the men, and shot the other eleven men in the back of their heads. (*Id.*)

Like the Deceased, Plaintiff Gurung was recruited from his residence in Nepal. (*Id.* ¶ 91.) He was sent to Delhi, India for twenty days and then went on to Amman, Jordan for another twenty days. (*Id.*) Gurung was transported to Iraq in one of the cars of the caravan in which the Deceased were also traveling. (*Id.*¶ 92.) Gurung's car was not captured

by the insurgents, and he arrived at Al Asad base as scheduled. (*Id.*¶ 93.) There, he was supervised by KBR in his duties as a warehouse loader/unloader. (*Id.*) Upon learning about the death of the Deceased, Gurung became frightened and expressed his desire to return to Nepal. He was told by both Daoud and KBR that he could not leave until his work in Iraq was complete. (*Id.*) After fifteen months, during which he experienced frequent mortar fire without protection, Gurung was permitted to return to Nepal. (*Id.* ¶¶ 95-96.)

Plaintiffs allege that KBR knew or should have known prior to August 2004 of the circumstances under which the men were being brought to Iraq to work for them. KBR was repeatedly told by the workers brought to Iraq from India, Sri Lanka, and Nepal that they did not want to come to Iraq and that they were not informed in advance that they were being brought there. (*Id.* ¶ 98.) Furthermore, Daoud was previously involved in an incident in which eighteen Indian laborers were forcibly kept in a camp in Fallujah where they worked, although they had quit their jobs months before. (*Id.*¶ 102.)

In addition, KBR knew of complaints made by the workers during their time in Iraq regarding their safety and security, and the provision of food, water, and health care. (*Id.* ¶ 100.) Finally, Plaintiffs allege that KBR had the authority to terminate all subcontractors who mistreated employees, unlawfully compelled employees to perform work, or unlawfully compelled employees to remain somewhere against their will. (*Id.* ¶101.)

Pursuant to these allegations, Plaintiffs bring causes of action against Defendants under the

Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1595; the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), as well as conspiracy to violate the same; the Alien Tort Statute ("ATS"), 28 U.S.C § 1350; and various common law claims including, in particular, negligence claims against KBR. KBR now moves to dismiss these actions pursuant to Federal Rule of Civil Procedure 12(b)(1), claiming that this Court lacks subject matter jurisdiction to hear these claims, and Rule 12(b)(6), alleging that Plaintiffs have failed to state a claim upon which relief can be granted. This case was initially filed in the United States District Court for the Central District of California, but was transferred to this Court pursuant to KBR' s motion.

II. STANDARD OF REVIEW

A. FED. R. CIV. P. 12(b)(1)

The court must dismiss a case when the plaintiff fails to establish subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). "It is incumbent on all federal courts to dismiss an action whenever it appears that subject matter jurisdiction is lacking." *Stockman v. Federal Election Comm 'n,* 138 F.3d 144, 151 (5th Cir. 1998). A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass 'n of Mississippi, Inc. v. City of Madison, Miss.,* 143 F.3d 1006, 1010 (5th Cir. 1998) (internal quotation marks and citation omitted). The burden of establishing federal jurisdiction rests on the party seeking the federal forum. *Stockman,* 138 F.3d at 151.

B. FED. R. CIV. P. 12(b)(6)

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). When considering a Rule 12(b)(6) motion to dismiss, a court must "accept the complaint's well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Johnson v. Johnson,* 385 F.3d 503, 529 (5th Cir. 2004). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiffs grounds for entitlement to relief-including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor,* 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). That is, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. ---, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly,* 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* (citing *Twombly,* 550 U.S. at 556). The plausibility standard is not akin to a "probability requirement," but asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not be sufficient. *Id.* at 1949 (quoting *Twombly,* 550 U.S. at 555).

III. TVPRA

A. Extraterritoriality

KBR's first objection to Plaintiffs' claims under the TVPRA is that this Court lacks jurisdiction to hear these claims under the principle of extraterritoriality. Although 18 U.S.C. Section 1596 grants U.S. courts "extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under Sections 1581, 1583, 1584, 1589, 1590, or 1591," which comprise the substantive provisions of the TVPRA, KBR points out that this provision had not been enacted at the time that the alleged offenses occurred. Thus, argues KBR, Plaintiffs are relying on substantive provisions of the TVPRA that were not applicable outside of U.S. territory during the period in question. Although Section 1596 now grants this Court jurisdiction to hear extraterritorial claims under the TVPRA, KBR argues that the presumption against retroactive application of statutes bars this Court from relying on Section 1596 to adjudicate events occurring before its enactment.

A statute that impairs vested substantive rights under existing laws or creates new obligations or duties with respect to events already past are subject to a presumption against retroactivity. *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 947 (1997) (citations omitted). In *Hughes Aircraft,* the Court found that an amendment to the jurisdictional provision of the False Claims Act ("FCA") permitting certain private parties, in addition to the government, to bring suits, could not be applied retroactively. *Id.* at 949. The Court reasoned that, because these private plaintiffs had

different incentives for bringing suit than did government officials, applying the provision retroactively subjected defendants to new disability. *Id.*

Subsequently, however, in *Republic of Austria v. Altmann,* 541 U.S. 677 (2004), the Court held that an amendment to the Foreign Sovereign Immunities Act ("FSIA") that effectively enlarged federal court jurisdiction to hear certain claims against foreign sovereigns could be applied retroactively because it did not affect substantive rights. The Court distinguished *Hughes Aircraft,* stating:

> When a "jurisdictional" limitation adheres to the cause of action in this fashion-when it applies by its terms regardless of where the claim is brought-the limitation is essentially substantive. In contrast, the FSIA simply limits the jurisdiction of federal and state courts to entertain claims against foreign sovereigns. The Act does not create or modify any causes of action.

Id. at 695 n.l5. The Court then looked to the purpose of FSIA and went on to explain that "[t]he principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts." *Id.* at 696.

The instant proceeding is more analogous to *Republic of Austria* than to *Hughes Aircraft.* As with *Republic of Austria,* this Court does not deprive Defendants of any vested right in applying Section 1596 to the events alleged in Plaintiffs' FAC. The Defendants do not now, nor did they in 2004, have

the right to traffic human beings at home or abroad. Furthermore, unlike the jurisdictional provision at issue in *Hughes Aircraft,* Section 1596 does not create any additional duties for, or obligations upon, Defendants. Regardless of the extent of this Court's jurisdiction to hear claims, the passage of the TVPRA plainly created an express public duty to refrain from acts of trafficking. That a defendant, subject to the laws of the United States, chose to commit a criminal act in a location where this Court may not have had jurisdiction does not alter the criminality of the act itself. Section 1596, which explicitly recognizes this Court's jurisdiction over extraterritorial TVPRA claims, only enlarges jurisdiction of courts within the United States, but does not change the operative substantive laws. Thus, the concerns surrounding retroactive application of this statute do not apply.

Furthermore, to find that Section 1596 did not apply retroactively would contravene the purpose of the TVPRA. While the substantive provisions of the TVPRA, which were in place when the alleged acts took place, did not explicitly apply extraterritorially until the passage of Section 1596, human trafficking is by nature an "international" crime; it is difficult clearly to delineate those trafficking acts which are truly "extraterritorial" and those which sufficiently reach across U.S. borders. Accordingly, the thrust of the TVPRA would be severely undermined by a holding that U.S. defendants who gained commercial advantage in this country through engaging in illegal human trafficking were free from liability, so long as the trafficking acts themselves took place outside of American borders. Therefore, the Court finds that the traditional presumption against the retroactive application of statutes would contravene the clear

purpose of the TVPRA, and would inappropriately absolve those who could in fact be guilty of violating its provisions.

KBR further contends that, by choosing to extend jurisdiction over alleged TVPRA criminal offenses but declining expressly to include Section 1595, which allows for civil remedies under the TVPRA, Congress manifested its intent not to authorize extraterritorial civil claims. (Def. Mot. at 16.) This argument is unavailing. Section 1596 identifies the substantive criminal provisions of the TVPRA and expands the circumstances under which they can be enforced. The civil remedies authorized by Section 1595 attach when any claim is properly brought before a court of law. In this case, therefore, Section 1595 remedies are triggered because, as discussed above, Plaintiffs bring this case pursuant to this Court's statutorily granted jurisdiction. This is consistent with the structure of the statute, which contains substantive criminal provisions enforceable through civil remedies. To hold that the jurisdictional grant of Section 1596 excludes the remedies provided in Section 1595 would be both illogical and in contravention of the purpose of the statute.

Finally, KBR argues that to hold that Section 1596 applies retroactively would violate constitutional guarantees against ex post facto laws, because the TVPRA is a criminal statute that merely "piggy-backs" civil remedies. (Def. Mot. at 16.) The Ex Post Facto Clause's prohibition is triggered only by a statute that criminally punishes an act that was not criminal when committed, makes the punishment for a crime more burdensome after its commission, or deprives a criminally charged person

of a defense that was available when the act was committed. *Wilson v. Lensing,* 943 F.2d *9* (5th Cir. 1991) (citing *Collins v. Youngblood,* 497 U.S. 37 (1990)). Changes in the manner in which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes, do not violate the Ex Post Facto Clause. *Collins,* 497 U.S. at 45.

Here, as previously discussed, the kind of human trafficking in which Plaintiffs claim that Defendants engaged was criminal at the time that the alleged incidents occurred. Section 1596 did nothing to alter or expand the criminality of the actions themselves. Therefore, a conclusion that Section 1596 applies to this case does not violate the Ex Post Facto Clause of the Constitution.

B. Sufficiency of Pleadings

KBR also contends that Plaintiffs' TVPRA allegations fail because they do not allege facts sufficient to support their claims. Under *Iqbal* and *Twombly,* a plaintiff must plead facts in its complaint that make the allegations facially plausible. *Iqbal,* 129 S. Ct. at 1949. Pleadings that offer no more than conclusory allegations and which track the language of the statute itself are insufficient. *Id.* (quoting *Twombly,* 550 U.S. at 555).

In this case, Plaintiffs' pleadings meet the *Iqbal* standard. Plaintiffs have sufficiently alleged facts to make out claims under Section 1595 and the substantive provisions of the TVPRA.[1] Plaintiffs'

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[1] 18 U.S.C. Section 1595{a) provides: "An individual who is a victim of a violation may bring a civil action against the perpetrator {or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in

complaint alleges that KBR actively participated in and knowingly benefited from a venture that involved forced labor and trafficking. (FAC ¶¶ 97-103.) Plaintiffs further allege facts that make these claims plausible. In the FAC, they allege that the Deceased were misled and deceived into working in a dangerous area, held in a dark room, had their passports taken away, and were transported against their will along a knowingly dangerous route, all while being told that they could not return to their home country. They further allege that KBR knew this was occurring, both through statements and complaints made by laborers brought to Iraq, as well as through previously publicized complaints and incidents involving Daoud. *Id.* They also allege that KBR deliberately formed an enterprise with the purpose of trafficking cheap labor to U.S. military installations in Iraq in order to earn a profit, and that they performed concrete acts to further this purpose. (FAC ¶¶ 131-36.) Whether these allegations, if proven, will lead to a Plaintiffs' verdict is irrelevant at this stage. Under *Iqbal,* all that is required at this pleading stage is that the claims made by Plaintiffs are plausible, not that they show probability of success. By providing significant, though not indisputable, factual support for their allegations of trafficking, Plaintiffs meet that burden in this case.

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an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees." Thus, in this case, Plaintiffs must allege and provide support for the contention that Defendants participated in or knowingly benefited from forced labor (Section 1589) or trafficking (Section 1590).

IV. ALIEN TORT STATUTE

KBR also avers that Plaintiffs' claims under the Alien Tort Statute ("ATS") fail because they do not allege state action, they are not cognizable under *Sosa v. Alvarez Machain,* 542 U.S. 692, 732 (2004), and they are preempted by claims brought under the TVPRA.

A. State Action

While some circuits require that any claims brought under the Alien Tort Statute allege state action, other circuits have explicitly recognized exceptions to this requirement. In *Kadi v. Karadzic,* 70 F.3d 232, 239 (2d Cir. 1995), the Second Circuit held that, for certain categories of action, including genocide, the scope of the law of nations is not confined solely to state action but reaches conduct of private individuals. Other circuits have since elaborated upon this finding. *See Sinaltrainal v. Coca-Cola Co.,* 578 F.3d 1252, 1266-67 (11th Cir. 2009) (stating that "plaintiffs need not plead state action for claims of torture and murder perpetrated in the course of war crimes"); *Abdullahi v. Pfizer, Inc.,* 562 F.3d 163, 188 (2d Cir. 2009) (finding that a private individual will be held liable under the ATS if he "acted in concert with" the state, that is, "under color of law") (citations omitted); *Abagninin v. AMVAC Chern. Corp.,* 545 F.3d 733, 741 (9th Cir. 2008) (holding that the district court correctly found that defendants were not "States or State-like organizations" for purposes of international law or crimes against humanity under ATS); *Doe v. Unocal Corp.,* 963 F. Supp. 880, 891-892 (C.D. Cal. 1997) (noting that "forced labor, is among the handful of crimes ... to which the law of nations attributes

individual liability" such that state action is not required). The Fifth Circuit has yet to address this precise issue.

In light of this precedent, this Court recognizes that the state action requirement under the ATS is not absolute. KBR argues that, to the extent that courts have recognized any exception to the state action requirement for ATS claims, they have done so only in instances where the crimes alleged by the plaintiff were so grave as to rise to the level of war crimes or genocidal acts. According to KBR, the crimes alleged here fall significantly short of this level. Plaintiffs do not deny that courts have regularly required that claims brought under the ATS allege some form of state action. Rather, they argue that state action is a requirement only for claims for which state action is an element of the law of nations violation that gives rise to the ATS claim. In other words, whether a claim against a private individual is actionable under the ATS is determined by the nature and requirements of the underlying offense. This argument is consistent with the widely accepted notion that slave trade, which is traditionally carried out by private actors, does not require state action in order to constitute a violation of the law of nations. *See, e.g.,* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956, art. 3 § 1, Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3 (prescribing penalties for "persons" convicted of various forms of slavery). Plaintiffs' argument finds further support in recent ATS case law. *See Kadic v. Karadzic,* 70 F.3d 232, 241 (2d Cir. 1995) (finding that, because evolving

standards of international law govern who is within the ATS jurisdictional grant, courts must examine the offense of which the private defendant is accused in determining ATS actionability); *Beanal v. Freeport-McMoRan, Inc.,* 969 F. Supp. 362, 371 (E.D. La. 1997) (finding that state action is not required for all international torts covered by the ATS, as certain conduct, like genocide, violates the law of nations whether committed by a state or private actor).

This Court finds Plaintiffs' arguments and reasoning to be based on sound principle. Although, as Plaintiffs point out, federal courts of appeal have explicitly found exceptions to the state action requirement only in the context of genocide or war crimes, this Court recognizes that internationally accepted prohibitions on those acts are not limited to states, but also extend to private individuals. Accordingly, ATS claims for violations of those offenses do not require state action. The law cited above makes it clear that the state action requirement is not inherent to the ATS; rather, its frequent and consistent application by courts for claims brought under the ATS stems from the fact that, for the majority of crimes recognized as universal norms and international law, the accused actor must be a state. Thus, to the extent that Plaintiffs can show that *private* acts of trafficking have become universally prohibited, the ATS state action requirement does not apply.

As elaborated upon further below, Plaintiffs have in fact met that burden. It is apparent from the findings of both judicial and academic authorities, discussed later in this Memorandum and Order, that human trafficking and forced labor, whether committed by states or private individuals, have

been recognized as violations of *jusco gens* norms, and therefore fall within the jurisdictional grant of the ATS.

B. Cognizable under *Sosa*

Claims cognizable under the ATS statute are those that are "specific, universal, and obligatory" international legal norms. *Sosa v. Alvarez-Machain,* 542 U.S. 692, 732 (2004). In *Sosa,* the Court stated that, when deciding whether an alleged norm of international law is sufficiently definite that violation thereof will support cause of action under the ATS, the court, in absence of any treaty, or of any controlling executive or legislative act or judicial decision, must resort to

> the customs and usages of civilized nations and, as evidence of these, to 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.

Id. at 734 (quoting *The Paquete Habana,* 175 U.S. 677, 700 (1900)). Furthermore, "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732-33. The existence of a norm or customary international law is one determined, in part, by reference to the custom or practices of many states and the broad acceptance

of that norm by the international community. *Abdullahi* v. *Pfizer, Inc.,* 562 F.3d 163, 176 (2d Cir. 2009). Furthermore, whether the treaty that embodies the alleged crimes is self-executing is relevant to, but not determinative of, the question of whether the norm permits ATS jurisdiction. *Id.* It is important to distinguish between those claims that are not actionable under the ATS because this Court lacks jurisdiction, from those that should be dismissed due to insufficient pleadings. *See John Roe I v. Bridgestone Corp.,* 492 F. Supp. 2d 988, 1006 (S.D. Ind. 2007) (finding that "to establish subject matter jurisdiction under the ATS it should be sufficient that plaintiffs allege an arguable violation of the law of nations," which is different from whether they adequately plead a violation of the law of nations).

Plaintiffs cite to several documents of international consensus that prohibit the modem forms of forced labor alleged in the FAC. (FAC ¶ 170.) Plaintiffs also point to numerous international conventions which prohibit human trafficking. (*Id.*) Numerous courts within the United States have found trafficking, forced labor, and involuntary servitude cognizable under ATS. *See, e.g., Licea v. Curacao Drydock Co., Inc.,* 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (finding that alleged forced labor and international human trafficking of plaintiff by operator of a drydock facility constituted violations of international law); *In re World War II Era Japanese Forced Labor Litigation,* 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001) (holding that forced labor violates the law of nations); *Doe v. Unical Corp.,* 963 F. Supp. 880, 892 (C.D. Cal. 1997) (allegations that defendants participated and benefited from forced

labor sufficient to establish jurisdiction under the ATS).

The Court finds this sufficient to establish that the trafficking and forced labor alleged in this FAC qualify as universal international norms under *Sosa,* such that they are actionable under ATS. The Declaration of Professor William J. Aceves, in which he describes the overwhelming consensus regarding the status of forced labor and trafficking as international crimes, only provides further support for this conclusion. (Pl. Resp., Ex. 15.)[2] In their FAC, Plaintiffs allege that they were deceived and coerced into traveling to Iraq to work for KBR, thereby making them victims of human trafficking and forced labor. Whether these crimes have been sufficiently pled is a separate issue with no bearing upon this Court's jurisdiction to consider the claims. Thus, this Court has jurisdiction to consider Plaintiffs' ATS claims.

C. TVPRA Preemption

KBR further alleges that Plaintiffs' ATS claims are preempted by those brought pursuant to the TVPRA. Because few courts have addressed

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[2] The Court has considered Defendant's Motion to Strike Professor Aceve's Declaration (Doc. No. 148). In light of the fact that *Sosa* anticipates that courts may look to jurists and commentators for evidence as to the content of international law, *Sosa,* 542 U.S. at 734, and that courts routinely use declarations of academic experts to assist them in deciding upon subject matter jurisdiction under the ATS, this Court finds that this Motion should be denied. Nonetheless, based on the international agreements and case law cited by Plaintiffs, the Court finds that Professor Aceve's Declaration is not necessary to its determination that the crimes alleged in Plaintiffs' FAC create actionable claims under the ATS.

preemption specifically in the context of the TVPRA, it is helpful to look to the case law addressing this very issue with respect to the Torture Victim Protections Act ("TVPA").

There is a clear divide among circuits as to the preemptive effect of the TVPA on claims brought under ATS. According to some circuits, the enactment of the TVPA did not diminish the scope of the ATS in any way. *See Kadic v. Karadzic,* 70 F.3d 232, 241 (2d Cir. 1995) ("[t]he scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act"); *Aldana v. Del Monte Fresh Produce, Inc.,* 416 F.3d 1242, 1250 (11th Cir. 2005) (finding that plaintiff may bring distinct claims under both the TVPA and the ATS). The Seventh Circuit, however, disagrees with this finding. *See Enaharo v. Abubakar,* 408 F.3d 877, 885 (7th Cir. 2005) (finding that creation of a specific statutory cause of action under the TVPA preempts ATS claims).

We choose to adopt the reasoning of the Second and Ninth Circuits in holding that the TVPRA and the ATS provide separate and distinct causes of action for the alleged crimes. Particularly at this preliminary stage in the litigation, Plaintiffs should be given the chance to proceed on both theories in order to assess over the course of discovery which best captures the nature of the events that took place, and the remedies that are sought.

V. RICO CLAIMS

KBR objects to Plaintiffs' RICO claims on numerous grounds. Each of these objections will be considered in tum:

A. Subject Matter Jurisdiction

KBR first asserts that this Court lacks subject matter jurisdiction over these claims, because RICO does not allow for subject matter jurisdiction over alleged foreign conduct with only foreign effects.[3] Courts have created two basic tests for subject matter jurisdiction in RICO actions that involve activity abroad: the "conduct" test, which in essence asks whether the fraudulent conduct that forms the alleged violation occurred in the United States, and the "effects" test, which asks whether conduct outside the United States has had a substantial adverse effect on American investors or securities markets. *Robinson v. TCI/US W. Commc'ns Inc.,* 117 F.3d 900,905 (5th Cir. 1997).

1. Extraterritorially Indictable RICO offenses

As a preliminary matter, Plaintiffs argue that the predicate acts of which the FAC alleges Defendants

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[3] In their Response, Plaintiffs aver that extraterritorial concerns do not apply in this case, because the AI Asad base is "subject to the exclusive control and authority of the United Nations Multinational Force-Iraq," citing *Rasul v. Bush,* 542 U.S. 466, 480 (2004). (Pl. Resp. at 13-14.) While the Court has misgivings about the applicability of *Rasul* to the specific circumstances of this case, we find it unnecessary to reach this question. As a significant portion of the events and conduct that make up the alleged RICO violation took place outside of the AI Asad base, we find that, regardless of the status of the base, it is necessary to perform an extraterritorial RICO analysis. Furthermore, because we do not reach this question, we also find it unnecessary to consider KBR's Motion to Strike the declaration of Maureen E. McOwen and the exhibit attached thereto-a chart comparing U.S. jurisdiction and control at U.S. military bases in Iraq, Cuba, and Bermuda. The Court did not consider this evidence in its analysis.

are guilty are extraterritorially indictable, thereby making the conduct/effects analysis unnecessary with respect to their RICO claims. RICO applies to any act that is indictable under specified provisions of Title 18, including 18 U.S.C. Sections 1589, 1590, and 1592, the offense alleged here. 18 U.S.C. § 1961. Plaintiffs aver that the Military Extraterritorial Jurisdiction Act ("MEJA"), 18 U.S.C. § 3261, renders the offenses on which their RICO claims are predicated extraterritorially indictable, thereby removing the extraterritoriality concerns of the alleged RICO violations. MEJA provides:

> Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States while employed by or accompanying the Armed Forces outside the United States ... shall be punished as provided for that offense."

18 U.S.C. § 3261(a). KBR does not controvert Plaintiffs' assertion that, if the offenses upon which the RICO claims are predicated are extraterritorially indictable, then extraterritoriality concerns do not apply to their RICO claims. Instead, KBR attempts to limit MEJA's applicability to those federal statutes that reference the "special maritime and territorial jurisdiction" of the United States. This Court finds that imposing such a limitation is inappropriate. As Plaintiffs point out, MEJA indictments have been issued and upheld for violations of federal statutes of general applicability, or those enacted pursuant to Congress's enumerated powers as opposed to U.S. special maritime and

territorial jurisdiction. (*See* Pl. Supp. Brief, Doc. No. 167, at 7.) Sections 1589, 1590, and 1592, as federal laws of general applicability, could, under MEJA, therefore also extend extraterritorially to parties employed by the United States Armed Forces, including KBR. This Court therefore holds that, because the alleged predicate offenses can be indicted extraterritorially, the RICO allegations at issue here are not subject to extraterritoriality limitations indicated in the conduct and effects tests. Nonetheless, because of MEJA's novelty and the relatively limited contexts in which it has been applied, we will now proceed through the conduct and effects analysis so as to avoid resting our jurisdictional finding on a relatively murky area of the law.

2. Conduct Test

As to the conduct test, circuits are divided as to the nature of the conduct necessary to establish jurisdiction. The Second and District of Columbia Circuits have adopted a more restrictive position in which the domestic conduct must have been "of material importance" to or have "directly caused the acts complained of." *Robinson,* 117 F .3d at 905 (citing *Itoba Ltd.* v. *Lep Gr. PLC,* 54 F .3d 118, 122 (2d Cir. 1995); *Zoelsch* v. *Arthur Anderson & Co.,* 824 F.2d 27, 31-33 (D.C. Cir. 1987); *Psimenos* v. *E.F. Hutton & Co.,* 722 F.2d 1041, 1045-46 (2d Cir. 1983); *IIT v. Cornfeld,* 619 F.2d 909, 918-21 (2d Cir. 1980) (remaining citations omitted)). The Third, Eighth, and Ninth Circuits, on the other hand, generally require some "lesser quantum of conduct," and look to whether the domestic conduct is significant to, rather than the direct cause of, the alleged crimes. *Id.* (citing *Butte Mining PLC* v. *Smith,* 76 F.3d 287,

290-91 (9th Cir. 1996); *Grunenthal GmbH* v. *Hotz,* 712 F.2d 421, 424-25 (9th Cir. 1983); *Cont'l Grain* (*Australia*) *Pty. Ltd.* v. *Pac. Oilseeds, Inc.,* 592 F.2d 409, 420-21 (8th Cir. 1979); *SEC* v. *Kasser,* 548 F.2d 109, 114 (3d Cir. 1977); *Travis* v. *Anthes Imperial, Ltd.,* 473 F.2d 515, 524 (8th Cir. 1973)). In *Robinson,* the Fifth Circuit expressly adopted the more restrictive test of the Second Circuit. *Id.* at 906. Thus, in evaluating the case at hand, we look to whether KBR's domestic conduct was of material importance to, or the direct cause of, the crimes alleged by Plaintiffs.

Here, we cannot find that the conduct test is met. Although, as Plaintiffs point out, it seems that much of the decision making as to KBR contracting was within the United States, the Court finds these actions significantly remote from the alleged acts of trafficking, which occurred between and among Nepal, Jordan, and Iraq. Indeed, according to KBR in its Motion to Transfer Venue (Doc. No. 39), it was only the umbrella contract governing KBR's operation of various military bases in Iraq that was managed in the United States; KBR's subsequent subcontract with Daoud was executed in Iraq. (Def. Mot., Doc. No. 39, at 11.) Plaintiffs offer no facts or evidence to contradict this assertion; this Court therefore accepts it as true. Because the RICO allegations primarily involve the decision making structure between and among KBR, Daoud, and other parties located abroad who are not named in this litigation, we cannot say that the management decisions made in the United States were the direct cause of, or were material to, the alleged harms experienced by Plaintiffs. Thus, the conduct test is not met in this case.

3. Effects Test

We must now look to whether Plaintiffs have satisfied the effects test for extraterritorial jurisdiction. The effects test provides for jurisdiction whenever there are "substantial effects within the United States." *North-South Fin. Corp. v. Al-Turki,* 100 F.3d 1046, 1051 (2d Cir. 1996). The court in *North-South Finance* was careful to distinguish between substantial effects and "remote and indirect effects." *Id.*

KBR cites to several cases to support its contention that Plaintiffs must be actually injured within the United States for the effects test to be met. However, unlike the circumstances of those cases, this case does not involve fraudulent acts concerning securities in which the harms are primarily economic in nature. (Def. Mot. at 5.) *See Norex Petrol. Ltd. v. Access Indus., Inc.,* 540 F. Supp. 2d 438 (S.D.N.Y. 2007); *lnterbew v. Edperbrascan Corp.,* 23 F. Supp. 2d 425 (S.D.N.Y 2007). The RICO statute is designed to punish organized criminal activity, the effects of which can be physical and/or economic in nature. That these foreign Plaintiffs experienced the physical effects of the alleged RICO crimes outside of this country is therefore not dispositive in determining whether the effects test has been met, if the economic harms of the alleged violation did reach across American borders.

Accordingly, this Court must examine the domestic effects and determine if they were, in fact, sufficiently substantial. The effects that Plaintiffs allege in this case are that "the supply of cheap labor benefited the RICO participants, which disadvantaged their competitors for [Department of

Defense] contracts and impacted the U.S. labor market, and the jobs were not offered to U.S. workers." (Pl. Resp. at 16.) In addition, Plaintiffs point to the fact that the alleged RICO enterprise passed money through the U.S. banking system, and that the contracts were funded by U.S. taxpayers. *Id.*

Taking these allegations as true, as the Court must, this case presents a large American business allegedly engaged in racketeering activity. More specifically, we note that the FAC describes an American defendant engaged in labor trafficking on a systematic, widespread scale. The American defendant gained substantial economic benefit through this activity, and this gain occurred at the expense of other American companies bidding for the same government contracts. Finally, the alleged racketing activity occurred in furtherance of a public purpose, namely the U.S. occupation in Iraq. Regardless of whether these allegations prove true, this Court nonetheless finds that Plaintiffs have sufficiently alleged substantial effects within the United States such that this court may exercise jurisdiction over these claims.

B. RICO Standing

KBR further objects to Plaintiffs' RICO claims on the grounds that Plaintiffs lack RICO standing. A plaintiff has RICO standing if he has been "injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 483 (1985). Lost property is not equated with legally protected property rights in procedural due process analysis; what is required is a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate

statutes. *Mendoza v. Zirkle Fruit Co.,* 301 F.3d 1163, 1168 (9th Cir. 2002). Plaintiffs in this case allege that, as a result of KBR's conduct, Plaintiffs were compelled to pay out-of-pocket fees to Defendants, suffered a reduction in promised wages, and were prevented from obtaining alternative employment. (FAC ¶¶ 65, 69, 73, 74.)

We find these allegations of financial loss sufficient to establish RICO standing. The Fifth Circuit has recognized that alleged victims of trafficking violations have RICO standing for claims of denied wages. *See Abraham v. Smith,* 480 F.3d 351 (5th Cir. 2007) (reaching the question of whether RICO allegations based on alleged trafficking were sufficiently pled). Thus, the Deceased, in addition to Gurung, would have had standing to bring these claims for relief had they survived.

Instead, Plaintiffs, aside from Gurung, bring this case on behalf of their deceased relatives. The most persuasive authority as to whether the family members of the Deceased have standing to assert these claims is from the Fourth Circuit. It has expressly upheld a number of district court opinions finding that RICO claims survive the death of the injured party. *Faircloth v. Finesod,* 938 F.2d 513, 518 (4th Cir. 1991) (noting that "civil RICO claims do not abate upon the death of the injured party") (citing cases). Although the Fifth Circuit has yet to address this precise issue, we find no reason to reject this principled reasoning.

In addition, there is proximate causation in this case, because the allegations assert financial losses resulting from Defendants' alleged acts of trafficking, not from the untimely death of the Deceased at the

hands of terrorists. It is clear from this case, and others brought in other circuits, that the statutory requirements for standing under RICO are not so rigorous as to render Plaintiffs' allegations inadequate.

C. Statute of Limitations

KBR also objects to Plaintiffs' RICO claims as a violation of the four-year statute of limitations. This limitation begins to run as soon as Plaintiffs "knew or should have known about this injury." *Rotella v. Wood,* 147 F.3d 438, 439-40 (5th Cir. 1998), *aff'd,* 528 U.S. 549, 555-58 (2000).

Here, KBR alleges that the statute of limitations began to run on either August 19, 2004, or August 24, 2004, the day that the laborers were informed that they were being taken to Iraq, and the day that the Foreign Ministry received the video in which ten of the Deceased stated that they were forcibly taken to Iraq, respectively. Thus, KBR alleges that Plaintiffs, in bringing this action on August 27, 2008, missed the statute of limitation by three days.

This Court takes note of the fact that more typical cases under RICO involve acts of ongoing securities fraud in which the plaintiffs are not subject to any form of restricted movement, and are often sophisticated participants in commerce. Here, the Deceased were killed before having any significant contact with their family members regarding the circumstances that led them into the custody of terrorists. We cannot assume that, on August 24, 2004 the day the video was sent to the Nepali government, the family members of the Deceased were immediately aware of it or knew of the facts presented in Plaintiffs' RICO claims. In fact, as

Plaintiffs point out in their Response, the alleged trafficking enterprise was deliberately concealed by at least some of Defendants, who deceived both Plaintiffs' families as well as the Nepali government into thinking that the men were being taken to Jordan. Such concealment is further evidence of the improbability that the families of the Deceased were sufficiently certain as to their sons' situations to initiate legal proceedings on August 24. (Pl. Resp. at 24.) In addition, Gurung has alleged that, although he was working in Iraq for some time, he was not permitted to leave or travel such that he could take legal action upon realizing that he was the victim of trafficking. We cannot find, in light of the restrictions placed upon his freedom of movement, that the statute of limitations began to run while Gurung was still being held in Iraq. *Cf. Wallace v. Kato,* 549 U.S. 384, 388 (2007) (finding that the limitations for a Section 1983 action began to run when the alleged false imprisonment ended).

Accordingly, this Court cannot find, on the present record, that August 19 and 24, 2004 are the relevant dates from which the statute of limitations should be measured. On August 19, 2004, the men themselves became aware that they were being sent to Iraq, but were prevented from acting upon this knowledge because of the continuing acts of trafficking. On August 24, 2004, it became known to the Nepali government that the Deceased had been captured, but the family members presumably remained unaware of the circumstances that brought them to that tragic situation. This Court finds that, in light of the notably small margin by which KBR asserts that the limitation has been breached, we can conclusively find that Plaintiffs did not become

aware of their injuries until after August 27, 2004, and thus there is no statute of limitations violation in this case.

D. Plaintiffs Failure to Plead a Violation under Section 1962(c)

In order successfully to bring an action under RICO, Plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 (1985).

1. Allegations of an Association-In-Fact Enterprise

KBR contends that Plaintiffs failed adequately to allege an association-in-fact enterprise. In the recent case of *Boyle v. United States,* 129 S. Ct. 2237 (2009), the Supreme Court clarified the pleading standard for alleging an association-in-fact under RICO. There, the Court found that the enterprise was required to have structure, but it need not have an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engaged. *Boyle,* 129 S. Ct. at 2244. In other words, it need not have a hierarchical structure or a chain-of-command. *Id.* An association-in-fact is merely "a group of persons associated together for a common purpose of engaging in a course of conduct." *Id.* at 2243-44. By alleging that the alleged RICO enterprise acted to fulfill Department of Defense contracts through engaging in a "pattern of racketeering activity for the common illegal purpose of providing trafficked labor at a low cost," Plaintiffs have alleged that KBR was part of a unit that, even absent any decision making structure, worked cooperatively and illegally to achieve that goal. (FAC ¶¶ 132-33.) That they allege

no facts to suggest that KBR had any actual contact with Moonlight or Morningstar is of no moment; the allegations that KBR actively associated themselves with Daoud is enough to establish that they were acting as part of an enterprise to achieve a common purpose: the provision of cheap labor for the fulfillment of the government contract.

2. "Racketeering Activity"

Racketeering activity must consist of two or more predicate acts that "amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 239 (1989). One method of alleging continuity is to show that the offenses are part of an entity's "regular way of doing business." *Id.* at 241-43. The Court finds that Plaintiffs have sufficiently alleged that KBR regularly employed laborers brought to Iraq against their will. Aside from Plaintiff Gurung, who was in Iraq for the full fifteen months of his contract, Plaintiffs name another Nepali laborer, Sarad Sapkota, who was allegedly brought to Iraq against his will in 2003. (FAC ¶ 98.) They further allege that Sapkota was brought there with ninety other laborers from Sri Lanka and Nepal, who were there under similar circumstances. (*Id.* ¶ 99.) We find these allegations sufficiently plead that bringing in cheap laborers against their will was part and parcel of KBR's operation at Al Asad base. Thus, the pleading requirements for continuity are met.

KBR further alleges that Plaintiffs have not met the standard of *Iqbal* and *Twombly* in alleging the predicate acts necessary for a RICO claim. As KBR points out, the predicate crimes that Plaintiffs allege

in their complaint involve the common elements of coercion, deception, and force. (Def. Mot. at 12.)

In accordance with the finding that Plaintiffs have sufficiently pled a violation of the TVPRA, this Court also finds that the predicate acts under RICO have been sufficiently alleged. That Plaintiffs were deceived over the course of their journey to Iraq is made clear; they were all told they would be employed at either a hotel in Jordan or in an area where there would be no danger to their lives. (FAC ¶ 63.) Plaintiffs also allege elements of force and coercion. Plaintiffs incurred extreme financial debt to arrange their promised employment opportunities, they were required to tum over their passports when they arrived in Jordan, and were kept in a room so dark they were unable to see. (FAC ¶ 65, 68, 72.) Plaintiff Gurung was specifically told in Iraq, upon expressing his fear and desire to return home, that he could not leave until his employment was over. (FAC ¶ 94.) The fact that physical force is not explicitly alleged in the Complaint should not be given the weight that KBR assigns it. "Conduct other than the use, or threatened use, of law or physical force may, under some circumstances, have the same effect as the more traditional forms of coercion--or may even be more coercive." *U.S. v. Mussry,* 726 F.2d 1448, 1453 (9th Cir. 1984). That these factual allegations may not be sufficient conclusively to prove the elements of force or coercion is irrelevant; what is significant to the Court at this stage is that they make the predicate acts alleged by Plaintiff plausible.

3. Sufficiency of Plaintiffs' pleadings under Section 1962(d)

To be guilty of a RICO conspiracy, the conspirator must agree "to the objective of a violation of RICO; he need not agree personally to violate the statute." *U.S. v. Marmolejo,* 89 F.3d 1185, 1196 (5th Cir. 1996). "A conspirator must intend to further an endeavor which, if completed, would satisfy all the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Salinas v. United States,* 522 U.S. 52, 65 (1997).

In this case, Plaintiffs allege that, in subcontracting with Daoud, KBR willfully entered into an agreement with another party to benefit from and to further the goal of procuring cheap labor and increasing profits. Plaintiffs point out that the predicate acts alleged in their briefs required recruitment, transportation, retention, and supervision. Plaintiffs further allege KBR's knowledge of the recruiting and transporting, and their active participation in the retention and supervision. (FAC ¶¶ 94-102.) These allegations sufficiently allege a violation under 18 U.S.C. Section 1962(d).

4. Vicarious Liability Under RICO

KBR also seeks to dismiss Plaintiffs' alternative theory of KBR's vicarious RICO liability for the actions of Daoud. At this preliminary stage, the FAC does allege facts that would establish an agency relationship between KBR and Daoud. Plaintiffs point out that a contractual relationship existed between KBR and Daoud. KBR is correct that a contract does not automatically create a principal-agent relationship. *See Texaco Exploration & Prod., Inc. v. AmClyde Engineered Prods. Co.,* 448 F.3d 760,

778-79 (5th Cir. 2006); *Avondale Indus. v. Int'l Marine Carriers,* 15 F.3d 489, 494 (5th Cir. 1994). However, because the only burden on Plaintiff at this pleading stage is one of plausibility, the contractual relationship between KBR and Daoud, combined with Plaintiffs' additional allegations that "KBR had the authority to supervise, prohibit, control, and/or regulate Daoud personnel," meet the *Iqbal* standard in establishing a principal-agent relationship. (FAC ¶ 206.)

VI. NEGLIGENCE CLAIMS

KBR avers that Plaintiffs' common law negligence claims should be dismissed as violating the applicable two-year statute of limitations.[4] Because the limitations period on Plaintiffs' negligence claims is two years shorter than that under RICO, the rationale used there will not apply to these claims.

Plaintiffs argue that this Court should invoke the "extraordinary circumstances" doctrine to apply equitable tolling to these negligence claims. (Pl. Resp. at 24-25.) It is true that, in cases of violent civil war or authoritarian regimes, courts have applied equitable tolling to claims brought by plaintiffs unable to vindicate their legal rights because of unrest and instability. *See Jean v. Dorelien,* 431 F.3d 776, 780 (11th Cir. 2005) (citing cases). However, such cases differ in material respects. Most notably, they involve civil unrest at the hands of authoritarian governments that directly prohibited the plaintiffs from bringing their claims to light. *See,*

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[4] California Code of Civil Procedure Section 335.1 and Texas Civil Practice and Remedies Code Section 16.003 impose an identical two-year limitations period for personal injuries attributable to the wrongful act or neglect of another.

e.g., Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996) (tolling statute of limitations for claims of torture, disappearance, and summary execution against former Philippine dictator Ferdinand Marcos until he left power and the country regained democratic rule); *Doe v. Saravia,* 348 F. Supp. 2d 1112, 1146-48 (E.D. Cal. 2004) (tolling statute of limitations during and after El Salvadorian civil war due to fear of retaliation from military, government, and death squads if plaintiffs were to bring litigation in United States); *Doe v. Unocal Corp.,* 963 F. Supp. 880, 897 (C.D. Cal. 1997) (stating that ATCA and TVPA claims "should be tolled" during Burmese dictatorship based on plaintiffs' alleged inability to "obtain access to judicial review" in Burma and the "threat of reprisal from [the government]" if plaintiffs attempted to access courts in the United States). While Plaintiffs point out that Nepal was mired in a civil war between the Nepali government and Maoist rebels that lasted until November of 2006, they allege no facts which suggest that this war had a direct and significant impact on the ability of litigants to bring civil claims, particularly against an American company with no connections to the fighting. They allege nothing to suggest that Plaintiffs were prohibited from traveling or were otherwise cut off from the information necessary for them to learn of Defendants' actions for two full years following the death of their sons. Indeed, the "limited contact with the outside world" which Plaintiffs do allege seems more a product of Plaintiffs' geographic location and economic circumstances, rather than the civil conflict itself. Geographic location and personal hardship cannot

provide the sole basis for tolling an otherwise applicable statute of limitations.

In addition, because Plaintiffs maintain the possibility of legal recourse through their human rights claims under the TVPRA, the ATS, and RICO, this Court cannot view this as a compelling case for equitable tolling of Plaintiffs' negligence claims under state law. Barring these claims on statute of limitations grounds does not leave Plaintiffs without legal recourse. Thus, in light of the two-year statute of limitations, this Court finds that Plaintiffs' negligence claims against KBR must be dismissed.

VII. CONCLUSION

In light of the foregoing, KBR's Motion to Dismiss is hereby **GRANTED IN PART and DENIED IN PART.**

IT IS SO ORDERED.

SIGNED this 3rd day of November, 2009.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITE STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAMCHANDRA ADHIKARI, et al.,	)	
Plaintiffs,	)	**Case No. 09-cv-1237**
	)	**FILED UNDER SEAL**
v.	)	
DAOUD & PARTNERS, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

Pending before the Court is Defendant KBR's Motion for Summary Judgment (Doc. Nos. 346; 347) and Supplemental Motion for Summary Judgment (Doc. Nos. 561; 562), and Defendant Daoud & Partners' ("Daoud") Motion for Judgment on the Pleadings. (Doc. No. 570.)

After considering the motions, all responses thereto, and the applicable law, the Court finds and holds that KBR's Motion for Summary Judgment (Doc. Nos. 346; 347) must be **GRANTED IN PART AND DENIED IN PART.** KBR's Supplemental Motion for Summary Judgment (Doc. Nos. 561; 562) must be **GRANTED IN PART AND DENIED IN PART.** Daoud's Motion for Judgment on the Pleadings (Doc. No. 570) must be **GRANTED.**

I. BACKGROUND

This case is brought by Plaintiff Buddi Prasad Gurung ("Gurung") and the surviving family members of twelve other men: Prakash Adhikari, Ramesh Khadka, Lalan Koiri, Mangal Limbu, Jeet Magar, Gyanendra Shrestha, Budham Sudi, Manoj Thakur, Sanjay Thakur, Bishnu Thapa, and Jhok Bahadur Thapa (collectively, the "Deceased Plaintiffs"). All Plaintiffs are Nepali citizens and currently reside in Nepal.

Defendants Kellogg Brown and Root, Inc.; Kellogg Brown & Root Services, Inc.; KBR, Inc.; KBR Holdings, LLC; Kellogg Brown & Root LLC; KBR Technical Services, Inc.; Kellogg Brown & Root International, Inc.; Service Employees International, Inc.; and Overseas Administration Services, Ltd. (collectively "KBR") is a business conglomerate including a parent corporation with its principal place of business in Houston, Texas, and several divisions, subsidiaries, and associated partnerships with pecuniary interests in the outcome of this case. One such KBR subsidiary serves as a contractor with the United States government to perform specific duties at United States military facilities in Iraq. (Doc. No. 58, *hereinafter* "First Amended Complaint", ¶¶ 23- 29.)

A. Plaintiffs' Allegations

The gravamen of Plaintiffs' Complaint is that, in an effort to fulfill their contractual obligations, Defendants Daoud and KBR "willfully and purposefully formed an enterprise with the goal of procuring cheap labor and increasing profits," and thereby engaged in human trafficking. (*Id.* at ¶ 54.) The complaint alleges that the Deceased Plaintiffs,

whose ages ranged from 18 to 27, were recruited from their places of residence in August 2004 by Moonlight Consultant Pvt. Ltd., a recruiting company based in Nepal. (*Id.* at ¶ 62.) Most of the men were told that they would be employed by a luxury hotel in Amman, Jordan. (*Id.* at ¶ 63.) Some were told that that they would be working in an American camp. (*Id.*) Although there is no indication that they were told where the camp would be, the Deceased Plaintiffs' family members assumed that they were going to the United States. (*Id.*) All of the men were led to believe that they would not be placed in a dangerous location, and that, if they found themselves in a dangerous area, they would be sent home at the employer's expense. (*Id.*) They were promised a salary of approximately $500 per month. (*Id.* at ¶ 64.) The men and their families incurred substantial debt to pay the brokerage fees in seeking out this employment. (*Id.* at ¶ 65.)

After they were recruited, the Deceased Plaintiffs were then transferred to the custody of Morning Star for Recruitment and Manpower Supply ("Morning Star"), a Jordanian job brokerage company that operates in Amman. (*Id.* at ¶ 66.) Morning Star housed the Deceased Plaintiffs upon their arrival in Jordan and arranged for their transfer to Iraq. (*Id.* at ¶ 59.) Morning Star then transferred the Deceased Plaintiffs to Daoud. (*Id.*) The men were held in Jordan by agents of Daoud, and were required to turn over their passports to Daoud. (*Id.* at ¶¶ 67-68.) It was there that the Deceased Plaintiffs first discovered that they were actually being sent to work at Al Asad, north of Ramadi, Iraq. (*Id.* at ¶ 70.) Several of the men phoned relatives in Nepal, expressing concern and fear about their futures. (*Id.*

at ¶¶ 70-71.) At least one of the Deceased Plaintiffs informed his family that he and the other men were being kept in a dark room and were unable to see. (*Id.* at ¶ 72.) In Jordan, the men were also informed for the first time that they would be paid only three quarters of what they were initially promised. (*Id.* at ¶ 73.) Although they wanted to return home to Nepal, rather than proceed into the Iraqi war zone, the men were compelled to proceed to Iraq because of the debts that their families had assumed to pay the brokers. (*Id.* at ¶ 74.)

Daoud transported the Deceased Plaintiffs into Iraq on or about August 19, 2004, via an unprotected automobile caravan of seventeen vehicles. (*Id.* at ¶ 75.) They traveled along the Amman-to-Baghdad highway, which was known at the time to be a highly dangerous route. (*Id.* at ¶¶ 76-81.) As they were nearing Al Asad, the two lead cars in which the Deceased Plaintiffs were being transported were stopped by a group of men who later revealed themselves to be members of the Ansar al-Sunna Army, an insurgent group in Iraq. (*Id.* at ¶¶ 81-83.) The men told the drivers to leave the Deceased Plaintiffs at the checkpoint, and that the Americans would come from the base to pick them up. (*Id.* at ¶ 81.)

Between August 20 and August 24, the Ansar al-Sunna Army posted an internet statement that it had captured the Deceased Plaintiffs, posted pictures of the Deceased Plaintiffs, and sent a video of ten of the Deceased Plaintiffs to the Foreign Ministry of Nepal. (*Id.* at ¶¶ 83-86.) Many of the family members of the Deceased Plaintiffs saw the images broadcast on Nepali television. (*Id.* at ¶ 85.) In the video, the Deceased Plaintiffs describe their trip to Iraq, stating

that they "were kept as captives in Jordan at first," were not allowed to return home, and were forced to go to Iraq. (*Id.* at ¶ 86.) One man in the video says, "I do not know when I will die, today or tomorrow." (*Id.* at ¶ 87.)

On or about August 31, 2004, international media outlets broadcasted video of the Ansar al-Sunna Army executing the Deceased Plaintiffs. (*Id.* at ¶ 87.) The group beheaded one of the men, and shot the other eleven men, one by one, in the back of their heads. (*Id.*) The families of Deceased Victims saw the execution video, which caused them great emotional distress. (*Id.* at ¶ 88.) The bodies of the Deceased Plaintiffs were never found. (*Id.* at ¶ 89.)

Like the Deceased Plaintiffs, Plaintiff Gurung was recruited from his residence in Nepal. (*Id.* at ¶ 91.) He was sent to Delhi, India for twenty days and then went on to Amman, Jordan for another twenty days. (*Id.*) Gurung was transported to Iraq as part of the same caravan in which the Deceased Plaintiffs were also traveling. (*Id.* at ¶ 92.) Gurung's car was not captured by the insurgents, and he arrived at Al Asad as scheduled. (*Id.* at ¶ 93.) There, he was supervised by KBR in his duties as a warehouse loader/unloader. (*Id.*) Upon learning about the death of the Deceased Plaintiffs, Gurung became frightened and expressed his desire to return to Nepal. He was told by both Daoud and KBR that he could not leave until his work in Iraq was complete. (*Id.* at ¶ 94.) After fifteen months, during which he experienced frequent mortar fire without protection, Gurung was permitted to return to Nepal. (*Id.* at ¶¶ 95-96.)

Pursuant to these allegations, Plaintiffs bring claims for relief against Defendants under the

Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1595; the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), as well as conspiracy to violate the same; the Alien Tort Statute ("ATS"), 28 U.S.C § 1350; and also assert various common law claims including, in particular, negligence claims on the part of KBR.

B. Defendants' Motions

In 2009, KBR filed a Motion to Dismiss (Doc. No. 138), which the Court granted in part and denied in part in its November 2009 Memorandum and Order (the "2009 Order") (Doc. No. 168). Specifically, the Court denied the motion as to Plaintiffs' TVPRA, ATS, and RICO claims; the Court granted the motion with regard to Plaintiffs' negligence claims, and dismissed those claims as barred by the statute of limitations.

The Court held oral argument on KBR's pending Motion for Summary Judgment (Doc. Nos. 346; 347) in April 2013. KBR's Supplemental Motion for Summary Judgment (Doc. Nos. 561; 562), and Daoud's Motion for Judgment on the Pleadings (Doc. No. 570) were filed subsequently.

II. LEGAL STANDARD

To grant summary judgment, the Court must find that the pleadings and evidence show that no genuine issue of material fact exists, and therefore the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The party moving for summary judgment must demonstrate the absence of any genuine issue of material fact; however, the party need not negate the elements of the nonmovant's case. *Little v. Liquid Air Corp.*, 37 F.3d

1069, 1075 (5th Cir. 1997). If the moving party meets this burden, the nonmoving party must then go beyond the pleadings to find specific facts showing there is a genuine issue for trial. *Id.* "A fact is material if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 326 (5th Cir. 2009) (quotations and footnote omitted).

Factual controversies should be resolved in favor of the nonmoving party. *Liquid Air Corp.*, 37 F.3d at 1075. However, "summary judgment is appropriate in *any* case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." *Id.* at 1076 (internal quotations omitted). Importantly, "[t]he nonmovant cannot satisfy his summary judgment burden with conclusional allegations, unsubstantiated assertions, or only a scintilla of evidence." *Diaz v. Superior Energy Services, LLC*, 341 Fed.Appx. 26, 28 (5th Cir. 2009) (citation omitted). The Court should not, in the absence of proof, assume that the nonmoving party could or would provide the necessary facts. *Liquid Air Corp.*, 37 F.3d at 1075. As the Supreme Court has noted, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

III. EVIDENTIARY OBJECTIONS

Before the Court delves into the merits of KBR's Motion for Summary Judgment and Supplemental

Motion for Summary Judgment, and Daoud's Motion for Judgment on the Pleadings, it must first resolve evidentiary objections. These have been raised in KBR's Motion to Strike (Doc. Nos. 433, 436); Daoud's Objections and Request to Strike Plaintiffs' Third-Party Declarations (Doc. No. 434); and KBR's Objections to and Motion to Strike Declarations and Other Documents Attached to Plaintiffs' Supplemental Response. (Doc. No. 563.)

A. Daoud's Objections and Request to Strike (Doc. No. 434)

Daoud seeks to strike three declarations Plaintiffs have filed in support of their response to KBR's Motion for Summary Judgment. Daoud alleges these declarations contain inadmissible hearsay and speculation.

First, Daoud asserts that Duane Banks's ("Banks") declaration contains numerous references to statements by "people," without identifying who these people are. Banks was an independent auditor employed by Navigant Consulting to provide contract administration services for KBR at Al Asad Air Base in August 2004. (Doc. No. 405-5, ¶ 1.) Essentially, Banks's job was to review and audit time sheets and purchase orders KBR submitted to the United States Military under contracts between those two entities. (*Id.*) Though Banks's duties did not include matters relating to TCNs, shortly after arriving at Al Asad, people approached him to tell him about abuse and mistreatment of TCNs at Al Asad. (*Id.* at ¶ 2.) Banks's declaration repeats statements made by KBR and Daoud employees about the employment and working conditions of third country nationals ("TCN"), which fall within their scope of work. Such

statements by KBR and Daoud employees are an admission of a party opponent. The Court finds that Banks's declaration is admissible.

Second, Daoud argues that Michael Henson's ("Henson") declaration should be struck because it is unsigned and refers to statements by TCNs without identifying the TCN's names. Henson was a labor supervisor for KBR from March 2005 through July 2005. His observations of the working and living conditions are based on his personal knowledge (found in Henson Decl. Para. 9-11, 14, 19). The statements found in Hensen's Declaration Paragraphs 5, 8, 12, 13, 15, and 16 are inadmissible as hearsay since they are simply repeated statements made by TCNs. Those paragraphs will be stricken from Hensen's Declaration. Furthermore, Plaintiffs should cure Henson's declaration by submitting a signed version.

Third, Daoud argues that Sanjay Raut's ("Raut") declaration is inadmissible because it contains statements made by third parties. Raut is a Nepali citizen who was recruited to work in Jordan but ended up working for KBR in Jordan. He traveled with, and was subjected to the same conditions as, four of the Deceased Plaintiffs. Therefore, when Raut testifies from personal knowledge, it is admissible. However, Paragraph 16 of Raut's declaration, which states "I remember that Sanjay, Budhan, Manoj, and Lalan told me they wanted to go home" is inadmissible hearsay. Paragraph 16 will be stricken from Raut's declaration.

B. KBR's Motions to Strike (Doc. Nos. 433, 436, 563)

KBR has filed a Motion to Strike as to evidence Plaintiffs filed with their Response to KBR's Motion for Summary Judgment. (Doc. Nos. 433, 436.) KBR has also filed a Motion to Strike Declarations and Other Documents Attached to Plaintiffs' Supplemental Response to KBR's Motion for Summary Judgment. (Doc. No. 563.)

In its Motion to Strike evidence attached to Plaintiffs' Supplemental Response, KBR argues that Plaintiffs' translator declarations are not competent summary judgment evidence. The Fifth Circuit requires an indication of a translator's skill beyond selfsupporting claims. *Cruz v. Aramark Servs., Inc.*, 213 Fed. App'x 329, 334 (5th Cir. 2000). Plaintiffs have used Swati Sharma ("Sharma") as one of the interpreters. Sharma demonstrates her competency in the Nepali language by asserting that she was born in Kathmandu, Nepal, is a native speaker of Nepali, and has worked at the Supreme Court of Nepal and the United Nations in Nepal. Sharma also demonstrates her competency in the English language by asserting that she graduated from law school in the United States and has extensive work history in the United States. The Court is satisfied with Sharma's qualifications as a Nepali interpreter. Furthermore, the Court is satisfied with Sharma's independence and competency as an interpreter even though she is employed by the firm who represents Plaintiffs.

KBR also argues that Cortne Edmonds ("Edmonds") is not qualified to act as a translator. Edmonds works for an independent translation service, TransPerfect Legal Solutions, Inc., the same translation service that the Defendants retained for several recent depositions. TransPerfect is the

world's largest privately owned language services provider and has provided translation services to law firms and courts for twenty years. The Court is satisfied with the qualifications of Edmonds as a translator.

Second, KBR challenges Plaintiffs' TCN declarations. These are seven declarations from Nepali citizens who traveled with and/or were held in Jordan with the Deceased Plaintiffs. Arguments on these declarations were made before the Court at a hearing on April 11, 2013. The declarations were made from personal knowledge. Any statements regarding job expectations or statements by Defendants are admissible as they demonstrate the men's reliance on these statements rather than for the truth of the matter asserted. Statements made by Defendants are also admissible as admissions by party opponents. The TCN declarations are admissible.

Third, KBR argues that declarations of former KBR employees are not competent summary judgment evidence. KBR challenges Henson and Banks' declarations, which have been addressed above. As for the remaining declarations, the witnesses have sufficient personal knowledge from working at KBR. These declarations are admissible.

Fourth, KBR seeks to strike Buddi Prasad Gurung's declaration. Gurung has submitted a written statement that clarifies a previous point of confusion. At this time, Gurung's declaration is permitted. At trial, Defendants can seek to impeach Gurung's testimony.

As for the remaining objections in KBR's two Motions to Strike, the Court does not find a need to

address each objection at this time. Based on Plaintiffs' submission of curative evidence (Doc. No. 555), uncontested evidence in the record, and admissible evidence that survives unmeritorious objections, the Court finds there is a genuine issue of material fact for the surviving claim.

IV. ANALYSIS

A. ATS Claim

As already noted, Plaintiffs have asserted claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. This claim is governed by the recent Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (U.S. 2013). In *Kiobel*, Nigerian nationals residing in the United States sued Dutch, British, and Nigerian corporations pursuant to the ATS, alleging that corporations aided and abetted Nigerian government in committing violations of the law of nations in Nigeria. The Supreme Court held that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption." *Id.* at 1669. In other words, Plaintiffs may not seek relief for violations of the law of nations occurring outside the United States. The Supreme Court quoted Justice Story, "No nation has ever yet pretended to be the custos morum of the whole world . . . ." *Id.* at 1668 (*quoting United States v. The La Jeune Eugenie,* 26 F.Cas. 832, 847 (No. 15,551) (C.C.Mass. 1822)). In *Kiobel*, "all the relevant conduct took place outside the United States." *Id.* The Supreme Court explained that, even where the claims "touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.* The Court also

discussed corporations, stating that corporations are often present in many countries, but a "mere corporate presence" in the United States is insufficient.

Following the Supreme Court's decision in *Kiobel*, summary judgment on the ATS claim must be granted for both Defendants KBR and Daoud. Claims against Daoud are "foreign cubed" – foreign plaintiffs have sued a foreign defendant based on conduct that occurred in a foreign country. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2894, n. 11 (2010) (defining foreign cubed as "actions in which (1) foreign plaintiffs [are] suing (2) a foreign issuer in an American court for violations of American securities laws based on securities transactions in (3) foreign countries."). Daoud is a Jordanian company with no presence in the United States. The conduct underlying Plaintiffs' ATS claim is entirely foreign. This Plaintiffs' ATS claims are precisely what *Kiobel* seeks to bar.

Although KBR is a U.S. national, the Supreme Court held in *Kiobel* that a "mere corporate presence" in the United States was not sufficient to rebut the presumption against extraterritoriality. The Supreme Court has now provided further illustration of "mere corporate presence." A few days after *Kiobel*, the Court vacated and remanded a Ninth Circuit decision that had allowed extraterritorial ATS claims to proceed. *Rio Tinto PLC v. Sarei*, 569 U.S. ---, 2013 WL 1704704 (April 22, 2013). In *Rio Tinto*, foreign plaintiffs sued foreign defendants who had "substantial operations in this country," including "assets of nearly $13 billion – 47% of which are located in North America." *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 744 (9th Cir. 2011). Even this degree of

corporate presence was not enough to overcome the presumption of extraterritoriality when the alleged torts had occurred outside the United States. As in this case, KBR's corporate presence is not enough to overcome the presumption. Plaintiffs have not demonstrated sufficient domestic conduct by KBR to "displace the presumption." Since all relevant conduct by Daoud and KBR occurred outside of the United States, summary judgment on Plaintiffs' ATS claim must be granted for KBR and Daoud.

B. RICO Claim

In its 2009 Order, the Court held that Plaintiffs' RICO claims could proceed against KBR. *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 694 (S.D. Tex. 2009). Following the Supreme Court's decision in *Morrison*, this Court again held that, even under *Morrison*, RICO was clearly intended by Congress to have an extraterritorial reach when the predicate acts are themselves extraterritorially indictable. (Doc. No. 273, p. 33.) The Court now revisits its previous holdings in light of *Kiobel*.

Although this Court is not bound by the holdings of courts in other circuits, they are informative. It appears that post-*Morrison* courts have uniformly held that RICO does not apply extraterritorially. *United States v. Chao Fan Xu*, 706 F.3d 965, 974 (9th Cir. 2013), *as amended on denial of reh'g* (Mar. 14, 2013) ("Other courts that have addressed the issue have uniformly held that RICO does not apply extraterritorially.") (citations omitted). *See also Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1348 (S.D. Fla. 2012) (finding that the Eleventh Circuit's pre-*Morrison* holding that RICO may apply extraterritorially was no longer correct after

Morrison. The court stated, "the Court agrees with the post- *Morrison* decisions cited above uniformly holding that RICO does not apply extraterritorially."); *In re Toyota Motor Corp*., 785 F. Supp. 2d 883, 913 (C.D. Cal. 2011) ("the Court concludes that RICO does not apply extraterritorially."); *European Cmty. v. RJR Nabisco, Inc*., 02-CV-5771 NGG VVP, 2011 WL 843957 (E.D.N.Y. Mar. 8, 2011), *reconsideration denied*, 02-CV-5771 NGG VVP, 2011 WL 1463627 (E.D.N.Y. Apr. 15, 2011) ("Therefore, in light of *Morrison*, this silence prohibits any extraterritorial application of RICO."). Though not reaching the issue of RICO's application extraterritorially, a court in this district recently noted that "in the RICO context, multiple courts have held that predicate acts in foreign countries in violation of statutes with extraterritorial reach are insufficient to rebut the presumption against extraterritoriality of the encompassing statute." *Asadi v. G.E. Energy* (*USA*)*, LLC*, CIV.A. 4:12-345, 2012 WL 2522599 (S.D. Tex. June 28, 2012) (Atlas, J.), *aff'd sub nom. Asadi v. G.E. Energy* (*USA*)*, L.L.C*., 720 F.3d 620 (5th Cir. 2013).

Kiobel reiterates *Morrison*, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison*, 130 S.Ct. at 2878. With such a clear holding from the Supreme Court, this Court cannot read the language of RICO to overcome the presumption against extraterritoriality. No language within RICO clearly indicates that Congress intended the statute to be applied extraterritorially. Plaintiffs argue that the Military Extraterritorial Jurisdiction Act ("MEJA") is another basis for overcoming the presumption. However, MEJA does not establish extraterritorial

jurisdiction for any underlying RICO predicate. As stated in the 2009 Order, this Court is not willing to rest on the "murky area of law" that is MEJA to overcome the presumption against extraterritoriality. *Adhikari*, 697 F. Supp. 2d at 689. The Court reconsiders its previous holding in light of recent Supreme Court developments and finds that it is not clear that Congress intended RICO to apply extraterritorially. In line with other courts who have considered the issue, this Court concludes that RICO does not apply extraterritorially.

In its previous Order, the Court did not need to apply the second step of *Morrison* and address whether Plaintiffs are actually seeking to apply RICO extraterritorially. (Doc. No. 273, p. 34.) Now that the Court finds RICO does not apply extraterritorially, it is appropriate to turn to the second step of *Morrison*. Plaintiffs argue that its RICO claims "arguably require no extraterritorial application" because the alleged acts orbited a U.S. military facility. (Doc. No. 593 p. 50.) However, the Court previously stated that, because "a significant portion of the events and conduct that make up the alleged RICO violation took place outside of the Al Asad base, we find that, regardless of the status of the base, it is necessary to perform an extraterritorial RICO analysis." *Adhikari*, 697 F. Supp. 2d at 688. Daoud is a Jordanian company (First Amended Complaint ¶ 22) whose "services are provided exclusively in Iraq." (Doc. No. 273, pp. 13, 24.) The majority of the events and conduct that make up the alleged RICO violation take place outside of the base. In fact, the Deceased Plaintiffs never made it to the military base. The Court finds that Plaintiffs' RICO claim impermissibly seeks to

apply RICO extraterritorially. Therefore, judgment on the RICO claim must be granted for both KBR and Daoud.

C. TVPRA Claim

Plaintiffs assert claims under the Trafficking Victims Protection Act ("TVPRA"), 18 U.S.C. §§ 1590, 1592, 1594 and 22. U.S.C. § 7101.

1. TVPRA Claim Against Daoud

Daoud argues that Section 1596 of the TVPRA cannot be applied to Daoud without exceeding the statute's extraterritorial limits. Section 1595 provides "extraterritorial jurisdiction over any offense . . . if – (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence …; or (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender." 18 U.S.C. § 1596. Daoud argues that, since it is not a U.S. national or permanent resident and has never been in the United States, Plaintiffs cannot bring a TVPRA claim against it.

Plaintiffs argue that "present in the United States" does not mean physical presence. (Doc. No. 593, p. 38.) This interpretation goes against the plain language meaning of the statute. If Plaintiffs' reading of § 1596(a)(2) were adopted, it would make § 1596(a)(1) superfluous. The plain meaning of § 1596(a)(2) is clear. The offender must be present in the United States for a TVPRA claim to be brought. Daoud was not present and has never been present in the United States. Therefore, Plaintiffs' TVPRA claim against Daoud must be dismissed.

2. Applicability of TVPRA After *Kiobel*

KBR argues that the TVPRA has no clear indication of any extraterritorial application to overcome the *Kiobel* presumption. However, this is an inappropriate reading of *Kiobel*. Unlike the ATS, which was silent about extraterritorial application, the TVPRA is expressly extraterritorial. 18 U.S.C. § 1596. Section 1596 states that "the courts of the United States have extra-territorial jurisdiction over any offense… if an alleged offender is a national of the United States . . . ." This Court specifically examined the issue of whether the TVPRA may be extraterritorially and retroactively applied. This Court held that "TVPRA could be extraterritorially applied to KBR's actions even though they were committed before Section 1596 was passed." *Adhikari v. Daoud & Partners*, CIV.A. 09-CV-1237, 2010 WL 744237 (S.D. Tex. Mar. 1, 2010). This is not a case in which the statute is silent on the issue of extraterritoriality. Therefore, *Kiobel* does not alter this Court's holding regarding the expressly extraterritorial language of the TVPRA.

3. TVPRA Claim Against KBR

KBR argues that the TVPRA statute limits liability to the "perpetrator," 18 U.S.C. § 1595, who "knowingly provides or obtains" forced labor, 18 U.S.C. § 1589, who "knowingly" engages in trafficking, 18 U.S.C. § 1590, or who actively "conspires" to do those things, 18 U.S.C. § 1594. KBR argues that the version in effect at the time of the conduct at issue provided for liability only against "the perpetrator." Only in 2008 did Congress amend § 1595 to "enhance[] the civil action by providing that an action is also available against any person who

knowingly benefits from trafficking." H.R. Rep. 110-430, at 55 (2007). Therefore, for conduct from 2003 to 2008, only perpetrators were subject to liability, and even after 2008, knowledge of the offense was still required for liability.

Plaintiffs do not contest the knowledge requirement. Nor do they allege that KBR was merely one who benefitted from the violations. Instead, Plaintiffs contend that KBR was a perpetrator through agency and thus was in violation of the TVPRA as in effect at the time of the conduct at issue.

a. *Knowing Requirement*

Plaintiffs present a genuine issue of material fact as to whether KBR's conduct was knowing. (Doc. No. 401, Statement of Facts, ¶¶ 42-57.) Plaintiffs present evidence alleging that, before the events in this case, KBR knew that third country national workers had been promised jobs elsewhere and transported against their will to Iraq; were paid lower wages than promised; had their passports confiscated; were charged additional fees along the way; and were compelled to stay because they and their families were in debt to labor recruiters. For example, in July 2004, the Indian Ambassador complained to KBR of Daoud's delay in repatriating third country nationals who wished to return home and of KBR's "abdication of responsibility." (Doc. No. 401, Statement of Facts, ¶ 43.) A KBR employee recommended to management that "we need to dump [Daoud] as our master broker." (*Id.* at ¶ 49.) Plaintiffs present evidence of other similar situations. KBR Area Security Officer, Thomas Lynch, wrote in an e-mail, "KBR has been accused of running a 'Slave Labor

Camp' on Al Asad by different USMC commanders on Al Asad." (*Id.* at ¶ 44; Doc. No. 401, Ex. 112.) Lynch was aware that the USMC on Al Asad was "developing a file against KBR for submittal to the DCMA for "Improper Business Practices" … include[ing] failure to perform as directed by the contract and running slave labor camps." (*Id.*) Lynch pleaded for assistance on the matter immediately. This is sufficient evidence to raise a genuine issue of material fact as to KBR's knowledge of the conduct.

b. Forced Labor or Trafficked

KBR further argues that Plaintiffs have no evidence that any of the Nepalis were trafficked or subject to forced labor. Specifically, KBR calls into question the alleged unlawful coercion regarding seven workers: Prakash Adhikari, Ramesh Khadka, Mangal Limbu, Jeet Magar, Gyanendra Shrestha, Bishnu Thapa, and Jhok Bahadur Thapa. In response, Plaintiffs present evidence that each alleged victim suffered unlawful coercion. (Doc. No. 542, pp. 24- 54.) The proffered evidence shows that each man was deceived about his promised job; each man was promised a hotel related job in Jordan; each man's family took on significant debt in order to pay recruitment fees; when the men arrived in Jordan, they were subject to threats and harm; their passports were confiscated; and the men were locked into a compound and threatened. (Doc. No. 542 pp. 17-18.) The Fifth Circuit has found that passport confiscation is sufficient to show coercion. *United States v. Nnaji*, 447 F. App'x 558 (5th Cir. 2011) cert. denied, 132 S. Ct. 1763, 182 L. Ed. 2d 547 (U.S. 2012) and cert. denied, 132 S. Ct. 1770 (U.S. 2012). While KBR is correct that there are legitimate reasons for holding a passport that are not in

violation of the TVPRA, Plaintiffs have presented evidence that could lead a jury reasonably to find that the passport holding was coercive. Because this proffered evidence raises a genuine issue of material fact as to the existence of forced labor or trafficking, it is an issue of fact that should be submitted to the jury.

c. *Vicarious Liability*

KBR argues that the TVPRA precludes Plaintiffs' vicarious liability theory since the statute limited liability to "the perpetrator," 18 U.S.C. § 1595, in the version of the statute in effect at the time of the conduct at issue. KBR argues that only in 2008 did Congress amend 18 U.S.C. § 1595 to "enhance[] the civil action by providing that an action is also available against any person who knowingly benefits from trafficking." H.R. Rep. 110-430, at 55 (2007). KBR's reading of the TVPRA prior to the 2008 amendment is too restrictive.

The Court is aware that resort to legislative history is always problematic. In this instance, however, the history is unambiguous. Before adopting the TVPRA, Congress discussed the widespread nature of trafficking in a report in 2000. Congress found that trafficking was the "largest manifestation of slavery today." H.R. CONF. Rep. 106-939, Sec. 102(1) (2000). Furthermore, Congress found that "[t]rafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises." *Id.* at Sec. 102(8). Congress lamented the existing and insufficient punishment for such a grave crime, noting that "existing laws often fail to protect victims of trafficking." *Id.* at Sec. 102(17). These findings lead the Court to conclude that

Congress had a broader meaning for "perpetrator" than KBR's reading. This is reflected in the 2003 version of the statute, which was in effect at the time of the alleged conduct. The 2003 version of § 1595 authorized civil actions by "[a]ny individual who is a victim of a violation of section 1589, 1590, or 1591." Section 1590(a) imposes liability on "**whoever knowingly** recruits, harbors, transports, provides, or obtains, **by any means**, any person for labor or services" (emphasis added). The Eighth Circuit recently held this to be "expansive language" that "criminalizes a broad spectrum." *United States v. Jungers*, 702 F.3d 1066, 1070 (8th Cir. 2013). Therefore, a vicarious liability theory of the perpetrator can proceed under the 2003 version of the TVPRA.

Plaintiffs have raised a genuine issue of material fact as to whether Daoud was an agent of KBR for purposes of vicarious liability under the TVPRA. Under Texas law, "[t]he essential element of an agency relationship is the right of control." *Matter of Carolin Paxson Adver., Inc.*, 938 F.2d 595, 598 (5th Cir. 1991) (*citing Wynne v. Adcock Pipe & Supply*, 761 S.W.2d 67, 69 (Tex.App.-San Antonio 1988, writ denied); *Carr v. Hunt*, 651 S.W.2d 875, 879 (Tex.App.-Dallas 1983, writ ref'd n.r.e.)). "The alleged principal must have the right to control both the means and the details of the process by which the alleged agent is to accomplish his task." *Id.* (*citing Xarin Real Estate, Inc. v. Gamboa*, 715 S.W.2d 80, 84 (Tex.App.-Corpus Christi 1986, writ ref'd n.r.e.); *Johnson v. Owens*, 629 S.W.2d 873, 875 (Tex.App.-Fort Worth 1982, writ ref'd n.r.e.)). Absent proof of the right to control, only an independent contractor relationship is established. *See First Nat'l Bank of*

Fort Worth v. Bullock, 584 S.W.2d 548, 551-52 (Tex.Civ.App.-Dallas 1979, writ ref'd n.r.e.); *In re Cooper*, 2 B.R. 188, 193 (Bankr. S.D.Tex.1980). Parties agree that control is evidenced by (1) the power to hire and fire; (2) the power of supervision over the agent's employees; (3) to participate in the daily operations of the agent's work; and (4) to give the agent interim instructions once work has begun. *Cardinal Health Solutions, Inc. v. Valley Baptist Med. Ctr.*, 643 F. Supp. 2d 883, 889 (S.D. Tex. 2008).

Plaintiffs have provided evidence that KBR had the authority to exercise control, and did exercise said control, over Daoud's recruitment and supply of the laborers in this case. First, Plaintiffs presented evidence that KBR had the power to fire Daoud employees. In one instance, KBR directed Daoud to remove Daoud's Site Manager from the B-6 Man Camp. (Doc. No. 401, Ex. 97.) In another, Daoud's Jordanian employees at the B8 DFAC were terminated by KBR. (Doc. No. 542, Ex. 308.) Second, Plaintiffs have presented evidence that KBR had the power of supervision over Daoud's employees. (*See* Doc. No. 401, Statement of Material Fact, ¶¶ 1-13, 27-34.) Third, Plaintiffs raise a genuine issue of material fact to challenge KBR's assertion that KBR did not participate in Daoud's daily operations. KBR employed on-site representatives to control daily work, including approval for any changes in the dining facility menu. (Doc. No. 542, Exs. 282, 285.) KBR's involvement in Daoud's daily operations included inspection of forks, spoons, pans, and spatulas Daoud used in the dining facility (Doc. No. 542, 285), a three times a day report of water quality measurement (Doc. No. 542, 282), and a requirement for Daoud to report accidents to KBR's Health,

Safety and Environment site representative. (Doc. No. 542, 286.) This evidence shows that KBR gave Daoud interim instructions once work had begun. Therefore, Plaintiffs have raised a genuine issue of material fact as to vicarious liability. The Court cannot grant summary judgment for KBR on the TVPRA claim.

V. KBR'S MOTION TO SHOW CAUSE AND MOTION FOR SANCTIONS

Also pending before the Court are KBR's Motion to Show Cause (Doc. No. 428), joined by Daoud (Doc. No. 431), KBR's Motion for Sanctions (Doc. Nos. 479, 480), and KBR's Motion to Strike Declarations and Documents Attached to Plaintiffs' Opposition to KBR's Motion for Sanctions. (Doc. No. 530.) The Motion to Show Cause (Doc. No. 428) concerns a letter dated July 31, 2004, from Prakash Adhikari to his parents. KBR asks the Court to require Plaintiffs to explain the timing of the production, which Plaintiffs have done. No further Court intervention is necessary, so the Motion to Show Cause is moot. KBR's Motion for Sanctions (Doc. Nos. 479, 480) must be denied. This is a complicated and fact intensive case. Emotions understandably run high when human lives have been lost. However, sanctions are not – even remotely – justified.

VI. CONCLUSION

For the reasons discussed above, KBR's Motion for Summary Judgment (Doc. Nos. 346; 347) is **GRANTED IN PART AND DENIED IN PART.** KBR's Supplemental Motion for Summary Judgment (Doc. Nos. 561; 562) is **GRANTED IN PART AND DENIED IN PART.**

- Summary Judgment is **GRANTED** on the ATS claim;
- Summary judgment is **DENIED** on the TVPRA claim;
- Summary judgment is **GRANTED** on the RICO claim.

Daoud's Motion for Judgment on the Pleadings (Doc. No. 570) is **GRANTED.**

Several other motions were also ruled on in this order. Daoud's Objections and Request to Strike Plaintiffs' Third-Party Declarations (Doc. No. 434) is **GRANTED IN PART AND DENIED IN PART.** KBR's Motion to Strike (Doc. Nos. 433, 436) and KBR's Objections to and Motion to Strike Declarations and Other Documents Attached to Plaintiffs' Supplemental Response (Doc. No. 563) are **MOOT.** KBR's Motion to Show Cause (Doc. No. 428) is terminated as **MOOT.** KBR's Motion for Sanctions (Doc. Nos. 479, 480) is **DENIED.** KBR's Motion to Strike Declarations and Documents Attached to Plaintiffs' Opposition to KBR's Motion for Sanctions (Doc. No. 530) is **MOOT.**

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the 21th day of August, 2013.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITE STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

RAMCHANDRA ADHIKARI, et al.,	)	
Plaintiffs,	)	**Case No. 09-cv-1237**
v.	)	
DAOUD & PARTNERS, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

The Court revisits, one final time, two summary judgment rulings in favor of KBR[1] in this devastating human trafficking case. Plaintiffs believe that the Court erred when it granted judgment to KBR on their Trafficking Victims Protection Reauthorization Act ("TVPRA") and Alien Tort Statute ("ATS") claims. Plaintiffs urge rehearing and, as to their ATS claim, leave to amend. (Doc. Nos. 672, 685/686.)

For the reasons stated below, and because of controlling law and the facts as elucidated by

[1] "KBR" refers to several related corporate entities, all named as Defendants in this case. These defendants are Kellogg Brown and Root, Inc.; Kellogg Brown & Root Services, Inc.; KBR, Inc.; KBR Holdings, LLC; Kellogg Brown & Root LLC; KBR Technical Services, Inc.; Kellogg Brown & Root International, Inc.; Service Employees International, Inc.; and Overseas Administration Services.

Plaintiffs, the Court cannot grant relief. Perhaps the Court has too conservatively interpreted the limitations placed on it by Congress and the United States Supreme Court; if so, however, the best recourse it can offer Plaintiffs is a direct path to the Fifth Circuit Court of Appeals. Plaintiffs' Motion for Rehearing Pursuant to Fed. R. Civ. P. 54(b) of This Court's January 2014 Order (Doc. No. 672) and Motion for Rehearing on Their ATS Claims against KBR and for Leave to Amend (Doc. No. 685/686) are **DENIED**. The Court reaches this conclusion notwithstanding its wholehearted sympathy with the victims and their families.

I. LEGAL STANDARD

Though the Federal Rules of Civil Procedure do not themselves specifically provide for a motion for reconsideration, such motions nevertheless are entertained under the Rules. Plaintiffs state that they are seeking "rehearing" under Rule 54(b), which permits the Court to reexamine its prior interlocutory rulings "for any reason it deems sufficient." *United States v. Renda*, 709 F.3d 472, 479 (5th Cir. 2013) (internal quotation marks and citation omitted). Motions for reconsideration from interlocutory orders are governed by the standards for Rule 59(e) motions. *Thakkar v. Balasuriya*, 2009 WL 2996727, at *1 (S.D. Tex. Sept. 9, 2009).

A motion under Rule 59(e) must "'clearly establish either a manifest error of law or fact or must present newly discovered evidence.'" *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005) (quoting *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)). Relief is also appropriate where there has been an intervening change in the controlling law.

See Schiller v. Physicians Resource Group Inc., 342 F.3d 563, 567 (5th Cir. 2003). Motions under Rule 59(e) "'cannot be used to raise arguments which could, and should, have been made before the judgment issued.'" *Id.* (quoting *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863 (5th Cir. 2003)). In considering a motion for reconsideration, a court "must strike the proper balance between two competing imperatives: (1) finality, and (2) the need to render just decisions on the basis of all the facts." *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 355 (5th Cir. 1993).

II. BACKGROUND FACTS

For purposes of context, the Court repeats the statement of facts included in its August 2013 and January 2014 summary judgment orders. As the current motions are for reconsideration, the Court will not include allegations or facts not presented to the Court for consideration on summary judgment.

This case is brought by Plaintiff Buddi Prasad Gurung and the surviving family members of twelve other men: Prakash Adhikari, Ramesh Khadka, Lalan Koiri, Mangal Limbu, Jeet Magar, Gyanendra Shrestha, Rajendra Shrestha, Budhan Sudi, Manoj Thakur, Sanjay Thakur, Bishnu Thapa, and Jhok Bahadur Thapa (collectively, the "Deceased Plaintiffs"). All Plaintiffs are Nepali citizens and currently reside in Nepal.

Plaintiffs allege that KBR and Defendant Daoud & Partners ("Daoud") engaged in a scheme to traffic the Plaintiffs from Nepal to Iraq, where one KBR subsidiary served as a contractor with the United States government to perform specific duties at United States military facilities. According to

Plaintiffs, Defendants "established, engaged and/or contracted with a network of suppliers, agents, and/or partners in order to procure laborers from third world countries." (Doc. No. 58 ("First Am. Compl."), at ¶ 54.)

The Deceased Plaintiffs, whose ages ranged from 18 to 27, were recruited from their places of residence by Moonlight Consultant Pvt, Ltd., a recruiting company based in Nepal. (*Id.* ¶ 62.) Most of the men were told that they would be employed by a luxury hotel in Amman, Jordan. (*Id.* ¶ 63.) Some were told that that they would be working in an American camp. (*Id.*) Although there is no indication that they were told where the camp would be, the Deceased Plaintiffs' family members assumed that they were going to the United States. (*Id.*) All of the men were led to believe that they would not be placed in a dangerous location, and that, if they found themselves in a dangerous area, they would be sent home at the employer's expense. (*Id.*) They were promised a salary of approximately $500 per month. (*Id.* ¶ 64.) The men and their families incurred substantial debt to pay the brokerage fees in seeking out this employment. (*Id.* ¶ 65.)

After they were recruited, the Deceased Plaintiffs were then transferred to the custody of Morning Star for Recruitment and Manpower Supply ("Morning Star"), a Jordanian job brokerage company that operates in Amman. (*Id.* ¶ 66.) Morning Star housed the Deceased Plaintiffs upon their arrival in Jordan and arranged for their transfer to Iraq. (*Id.* ¶ 59.) Morning Star then transferred the Deceased Plaintiffs to Daoud. (*Id.*) The men were held in Jordan by agents of Daoud, and were required to turn over their passports to Daoud. (*Id.* ¶¶ 67-68.) It

was there that the Deceased Plaintiffs first discovered that they were actually being sent to work at Al Asad, north of Ramadi, Iraq. (*Id.* ¶ 70.) Several of the men phoned relatives in Nepal, expressing concern and fear about their futures. (*Id.* ¶¶ 70-71.) At least one of the Deceased Plaintiffs informed his family that he and the other men were being kept in a dark room and were unable to see. (*Id.* ¶ 72.) In Jordan, the men were also informed for the first time that they would be paid only three quarters of what they were initially promised. (*Id.* ¶ 73.) Although they wanted to return home to Nepal, rather than proceed into the Iraqi war zone, the men were compelled to proceed to Iraq because of the debts that their families had assumed to pay the brokers. (*Id.* ¶ 74.)

Daoud transported the Deceased Plaintiffs into Iraq on or about August 19, 2004, via an unprotected automobile caravan of seventeen vehicles. (*Id.* ¶ 75.) They traveled along the Amman-to-Baghdad highway, which was known at the time to be a highly dangerous route. (*Id.* ¶¶ 76-81.) As they were nearing Al Asad, the two lead cars in which the Deceased Plaintiffs were being transported were stopped by a group of men who later revealed themselves to be members of the Ansar al-Sunna Army, an insurgent group in Iraq. (*Id.* ¶¶ 81-83.) The men told the drivers to leave the Deceased Plaintiffs at the checkpoint, and that the Americans would come from the base to pick them up. (*Id.* ¶ 81.)

Between August 20 and August 24, the Ansar al-Sunna Army posted an internet statement that it had captured the Deceased Plaintiffs, posted pictures of the Deceased Plaintiffs, and sent a video of ten of the Deceased Plaintiffs to the Foreign Ministry of

Nepal. (*Id.* ¶¶ 83- 86.) Many of the family members of the Deceased Plaintiffs saw the images broadcast on Nepali television. (*Id.* ¶ 85.) In the video, the Deceased Plaintiffs describe their trip to Iraq, stating that they "were kept as captives in Jordan at first," were not allowed to return home, and were forced to go to Iraq. (*Id.* ¶ 86.) One man in the video says, "I do not know when I will die, today or tomorrow." (*Id.*)

On or about August 31, 2004, international media outlets broadcasted video of the Ansar al-Sunna Army executing the Deceased Plaintiffs. (*Id.* ¶ 87.) The group beheaded one of the men, and shot the other eleven men, one by one, in the back of their heads. (*Id.*) The families of Deceased Victims saw the execution video, which caused them great emotional distress. (*Id.* ¶ 88.) The bodies of the Deceased Plaintiffs were never found. (*Id.* ¶ 89.)

Like the Deceased Plaintiffs, Plaintiff Gurung was recruited from his residence in Nepal. (*Id.* ¶ 91.) He was sent to Delhi, India for twenty days and then went on to Amman, Jordan for another twenty days. (*Id.*) Mr. Gurung was transported to Iraq as part of the same caravan in which the Deceased Plaintiffs were also traveling. (*Id.* ¶ 92.) Mr. Gurung's car was not captured by the insurgents, and he arrived at Al Asad as scheduled. (*Id.* ¶ 93.) There, he was supervised by KBR in his duties as a warehouse loader/unloader. (*Id.*) Upon learning about the death of the Deceased Plaintiffs, Mr. Gurung became frightened and expressed his desire to return to Nepal. He was told by both Daoud and KBR that he could not leave until his work in Iraq was complete. (*Id.* ¶ 94.) After fifteen months, during which he experienced frequent mortar fire without protection,

Mr. Gurung was permitted to return to Nepal. (*Id.* ¶¶ 95-96.)

III. ANALYSIS

A. Plaintiffs' ATS Claim

The Court granted summary judgment on Plaintiffs' ATS claim based on the presumption against extraterritoriality, which the Supreme Court applied to the ATS in *Kiobel v. Royal Dutch Petroleum Company*, 133 S. Ct. 1659 (2013). (Doc. No. 614/617, at 11-12.) This Court found "KBR's corporate presence" in the U.S. and its "domestic conduct" insufficient to rebut the presumption, concluding that KBR was entitled to judgment because "all *relevant* conduct by Daoud and KBR occurred outside of the United States." (*Id.* at 12 (emphasis added).)

Plaintiffs suggest that the Court misconstrued *Kiobel* as embracing a bright-line rule which prohibits the extraterritorial application of the ATS in all cases, regardless of the specific facts and circumstances. They emphasize the conclusion of the Supreme Court's majority opinion, which indicated that the "presumption against extraterritorial application" could be "displace[d]" by ATS claims that "touch and concern the territory of the United States . . . with sufficient force." *Kiobel*, 133 S. Ct. at 1669. Plaintiffs also point to judicial authority postdating the Court's summary judgment ruling on the ATS claim, in which district and circuit courts outside the Fifth Circuit employ a fact-intensive analysis to determine whether claims "touch and concern" the territory of the United States with enough "force" to displace the presumption. On this authority, as well as *Kiobel*, they seek

reconsideration of the Court's decision to award summary judgment to KBR on Plaintiffs' ATS claim. (Doc. No. 685/686, at 6-8.) The Court does, of course, welcome the additional case authority that has been generated since its last decision. Indeed, part of the delay in issuing this decision has been to see if new decisional authority might bolster Plaintiffs' legal position.

The Court wishes to clarify any ambiguity in its summary judgment ruling. The Court did not, and does not wish to, embrace a bright-line rule. It considered the arguments raised by Plaintiffs regarding the points of connection between their ATS claim and the territory of the United States—arguments reiterated throughout Plaintiffs' motion for reconsideration. It reviewed the record evidence. It ruled on evidentiary objections. And it ultimately concluded that the conduct "relevant" to the ATS claim occurred outside of the United States. (Doc. No. 614/617, at 12.)

In reaching this conclusion, the Court heeded the guidance of the Supreme Court that the presumption against extraterritoriality is often "not self-evidently dispositive" and "requires further analysis" when *some* domestic conduct is involved. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010). The Supreme Court acknowledged that few cases will arrive in federal court without any domestic ties. *See id.* ("For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States."). The Supreme Court therefore instructed lower courts to consider whether the alleged domestic conduct coincides with the "'focus' of

congressional concern." *See id*.[2] In the case of the ATS, the focus of congressional concern is the "tort . . . committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

The tort here is human trafficking. As described above, the trafficking occurred in Nepal; Jordan; Iraq; and points in transit between and among these foreign locations. Even assuming that Daoud and other subcontractors operated as agents of KBR in enticing and then entrapping third country nationals as cheap labor for the Iraqi war zone, those activities unquestionably occurred on foreign soil. Plaintiffs can no more pursue an ATS claim against KBR based on those extraterritorial actions than they can pursue an ATS claim against Daoud. *See In re South African Apartheid Litig.*, --- F. Supp. 2d ----, 2014 WL 4290444, at *5 (S.D.N.Y. Aug. 28, 2014) ("Here, any alleged violation of international law norms was inflicted by the South African subsidiaries over whom the American defendant corporations may have exercised authority and control. While corporations are typically liable in tort for the actions of their putative agents, the underlying tort must

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[2] The Ninth Circuit has expressed doubt that the majority opinion in *Kiobel* "incorporate[d] *Morrison*'s focus test," suggesting that the "touch and concern" language used by the Court indicated a different test than that employed in *Morrison*. *See Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014). This Court reads *Kiobel* differently. As highlighted by Judge Rawlinson in her partial concurrence and partial dissent, *id*. at 1035, *Kiobel* specifically cited the passage in *Morrison* applying the "focus test" in support of the pronouncement that claims must "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." 133 S. Ct. at 1669.

itself be actionable. However, plaintiffs have no valid cause of action against the South African subsidiaries under [*Kiobel*] because all of the subsidiaries' conduct undisputedly occurred abroad.").

Plaintiffs seek a result on their ATS claim against KBR different from the result on their ATS claim against Daoud, based on the fact that KBR is a U.S. national while Daoud is not. But the Court cannot agree that this distinction has dispositive effect in the application of the presumption against extraterritoriality. *See Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014) (rejecting attempt to "anchor ATS jurisdiction in the nature of the defendants as United States corporations"); *Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013) ("Lower courts are bound by [the rule announced in *Kiobel*] and they are without authority to 'reinterpret' the Court's binding precedent in light of irrelevant factual distinctions, *such as the citizenship of the defendants*.") (emphasis added); *Doe v. Exxon Mobil Corp.*, --- F. Supp. 3d ----, 2014 WL 4746256, at *12 (D.D.C. Sept. 23, 2014) (concluding that "the presumption against extraterritoriality is not displaced by a defendant's U.S. citizenship alone").

Finally, Plaintiffs argue that this Court's ruling on the ATS claim against KBR is at odds with the reasoning of the Fourth Circuit in another case concerning atrocities committed in the course of the Iraqi war, *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014). Plaintiffs urge the Court to reconsider its ultimate conclusion, vacate its earlier decision, and conform its reasoning to that used in *Al Shimari*.

Plaintiffs in *Al Shimari* were foreign nationals who were detained and tortured at the notorious Abu Ghraib prison in Iraq when that prison was under the control of the U.S. military. The torture was carried out, at least in part, by U.S. civilian contractors employed by CACI Premier Technology, Inc. ("CACI"), a U.S. corporation. *See* 758 F.3d at 521-22. The plaintiffs asserted ATS claims against CACI. *Id*. at 524. The district court dismissed the ATS claims based on *Kiobel* and the presumption against extraterritoriality. *Id*. The Fourth Circuit reversed, finding the presumption adequately "displace[d]" by the following facts and circumstances:

> (1) CACI's status as a United States corporation; (2) the United States citizenship of CACI's employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI's employees to obtain security clearances from the United States Department of Defense; (4) the allegations that CACI's managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it; and (5) the expressed intent of Congress, through enactment of the [Torture Victim Protection Act of 1991] and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to

> hold citizens of the United States accountable for acts of torture committed abroad.

758 F.3d at 530-31.

Al Shimari is not binding on this Court. Nor are the other recent ATS decisions identified in Plaintiffs' and KBR's papers. Nonetheless, the Court has reviewed the cases commended to it, including *Al Shimari*, and finds them persuasive in the sense that they indicate how other lower courts have attempted to give substance to the blank spaces not addressed by the facts in *Kiobel*. But whereas the Fourth Circuit found the facts in *Al Shimari* to sufficiently "touch and concern the territory of the United States," this Court is not persuaded that the facts here do the same. For purposes of clarity, the Court will address Plaintiffs' arguments one-by-one.

First, as noted above, the Court does not believe that KBR's U.S. citizenship obviates the extraterritoriality analysis. Second, the Court disagrees that KBR's contract with the U.S. government shows a relevant connection to the *territory* of the United States. *Kiobel*, 133 S. Ct. at 1669. Third, Plaintiffs' assertion that the relevant conduct "occurred at a military facility operated by U.S. military personnel" exaggerates the importance of the Al Asad base in the circumstances of the case. While Deceased Plaintiffs were unquestionably headed to Al Asad, their journey was horrifically cut short before they reached the base. And while Mr. Gurung reached Al Asad, he was first brought from Nepal to Jordan and through Iraq—all foreign territories not alleged to be under U.S. control.[3]

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[3] Because the Al Asad base is not at the heart of Plaintiffs' ATS claim—unlike the centrality of Abu Ghraib to the plaintiffs'

Fourth, the Court is not empowered to use the political branches' condemnation of human trafficking to ignore territorial limits on enacted legislation, even if that condemnation is "repeated[]" and "unambiguous[]" and signals a "zero tolerance" approach to the issue. *See id.* at 1664-65 (noting that the foreign policy concerns underlying the presumption against extraterritoriality "are not diminished" in the context of "alleged violations of international law norms that are 'specific, universal, and obligatory'" because "identifying such a norm is only the beginning of defining a cause of action") (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

Plaintiffs raise an additional argument that conceivably moves their case closer to *Al Shimari*. They allege that KBR's U.S.-based managers "covered up" human trafficking, and that this U.S.-based conduct is sufficient to anchor the ATS claim in the territory of the United States. As the Court noted in August 2013, Plaintiffs present a genuine issue of material fact as to whether KBR knowingly obtained trafficked labor during the relevant time period. (Doc. No. 614/617, at 17-18.) But the relevant evidence stems from KBR's overseas operations. Plaintiffs' U.S.-based evidence presents a different picture. From emails, reports, and other routine communications, it appears that KBR's U.S.-based employees monitored and directed activities at

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ATS claims in *Al Shimari*—the Court need not decide whether it constitutes U.S. territory for the purposes of applying the presumption against extraterritoriality, as argued by Plaintiffs. (Doc. No. 685/686, at 13-14.)

various Iraqi and Kuwaiti military bases. (*E.g.*, Exs. 13-14, 22, 24-27, 33; Doc. No. 685-3, at 125-141, 180-86, 194-242.) The subject matter of these documents ranges from the mundane (e.g., chlorine levels in the water) to the vitally important (e.g., an email conversation regarding whether KBR or its subcontractors were responsible for providing personal defense gear to subcontracted employees). None of it indicates, however, that KBR's U.S.-based employees understood the circumstances surrounding Daoud's "recruitment" and "supply" of third-country nationals like Plaintiffs, or that KBR's U.S.-based employees worked to prevent those circumstances from coming to light or Daoud's practices from being discontinued.[4]

In summary, Plaintiffs have adduced no new legal authority, and identified no error in law or fact, which disturbs the Court's conclusion that the relevant conduct by KBR and Daoud occurred outside of the territory of the United States.

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[4] Plaintiffs' most damning piece of evidence—a decision by a U.S.-based employee to "pull" a consultant from Al Asad after he complained regarding the treatment of third-country nationals employed by Daoud—suffers from several disconnects to Plaintiffs' theory of U.S.-based complicity. Most importantly, at the same time that the U.S.-based manager capitulated to the instruction of KBR's on-site base supervisor that the consultant be removed from Al Asad, she requested an independent investigation into the consultant's complaints. (Doc. No. 401-8, at 66- 72.) Similarly, complaints from a U.S. Marine regarding ill treatment of third-country nationals at Al Asad were forwarded through KBR's U.S.-based employees to on-site base staff with the following notation: "If true, fixe [sic] it, if not, ignore it." (Ex. 20; Doc. No. 685-3, at 164-68.)

Plaintiffs' motion for rehearing on this claim must be denied.[5]

B. Plaintiffs' TVPRA Claim

1. Retroactivity of Section 1596

Extraterritoriality principles have also foreclosed Plaintiffs' TVPRA claim. As discussed in the Court's most recent summary judgment ruling, the TVPRA had no extraterritorial application at the time of the tragic events recounted above. (Doc. No. 670, at 6-9.) Although Congress amended the TVPRA in 2008 to provide for extraterritorial application, the Court found that the relevant provision—18 U.S.C. § 1596—could not be applied retroactively to KBR's pre-2008 conduct. (*Id.* at 10-13.) This was a reversal of the Court's prior ruling that Section 1596 was a jurisdiction-enlarging statute which did not implicate retroactivity principles and could be applied to pending cases such as this one. (Doc. No. 168, at 7-11.) The Court twice affirmed its retroactivity decision over strenuous objection by Defendants. (Doc. No. 183, at 6-9; Doc. No. 614/617, at 16.) Only on Defendants' third sally against the Court's ruling—a motion to certify the Court's initial summary judgment ruling for interlocutory appeal (Doc. No. 631)— did the Court reverse itself.

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[5] Plaintiffs alternatively move for leave to amend their complaint in light of *Kiobel*. (Doc. No. 685/686, at 22-25.) But the Court's decision was based on the summary judgment record, not on the pleadings, and Plaintiffs have identified no evidence which was not or could not have been presented to the Court prior to its ruling. Because amendment would be futile, leave to amend is denied. *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993) ("In deciding whether to grant leave to file an amended pleading, the district court may consider . . . futility of amendment.").

Plaintiffs urge the Court to reverse its reversal. They offer several arguments as to how the Court's most recent summary judgment ruling gets the retroactivity analysis wrong. (Doc. No. 673/674, at 6-20.) With the utmost respect to Plaintiffs' counsel, however, these are not new arguments. The retroactivity debate—i.e., on which side of the *Hughes Aircraft*/*Republic of Austria*[6] line Section 1596 falls—has featured in no fewer than 15 thorough, well-researched legal briefs provided to the Court in this case. (Doc. Nos. 138, 143, 145, 171, 174, 561/62, 588/593, 601, 631, 638, 643, 673/674, 675, 676, 679.) In three separate orders, the Court addressed the debate at length. (Doc. Nos. 168, 183, 670.) No purpose can be served by covering this well-trod ground a fourth time.

The Court clarifies, however, the role that *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), played in its most recent decision. Plaintiffs forcefully argue that the case sheds no light on whether Section 1596 can be retroactively applied. (Doc. No. 673/674, at 6-9.) The Court cannot agree. Although its most recent decision not to apply Section 1596 to this pending case was governed by the standards articulated in *Landgraf*,[7] *Hughes Aircraft*, and *Republic of Austria*, the Court drew upon *Morrison* for guidance as to how Section 1596 should be classified under those standards. As previously explained, "a nominally jurisdictional statute" which "necessarily affects the substantive

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[6] *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

[7] *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

rights of the parties" cannot be categorized as "mere procedure;" rather, it represents a substantive change in operative law, thereby "trigger[ing]" the presumption against retroactivity. (Doc. No. 670, at 12-13.) This decision comports with the Supreme Court's acknowledgment in *Morrison* that whether a federal conduct-regulating statute is intended to govern extraterritorial conduct is inherently a *merits* question. *See* 561 U.S. at 254 ("[T]o ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question."). Congress may express that intent through a statute phrased in jurisdictional terms, as it has in Section 1596. But because Section 1596 "adheres to the [TVPRA] cause of action in this fashion," it is "essentially substantive."[8] *Republic of Austria v. Altmann*, 541 U.S. 677, 695 n.15 (2004).

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[8] Plaintiffs cite *In re South African Apartheid Litigation*, 15 F. Supp. 2d 454 (S.D.N.Y. 2014), as persuasive new authority construing *Morrison* and supporting their argument for reconsideration. According to Plaintiffs, Judge Scheindlin resolved—correctly—that the Supreme Court in *Morrison* "did not intend to shift jurisdictional statutes into the merits column." (Doc. No. 676, at 3.) The relevant language from *In re South African Apartheid Litigation* is contained in a footnote addressing whether the extraterritorial reach of the ATS should be characterized as a "merits" question, or a "jurisdictional" one. *See* 15 F. Supp. 2d. at 461, n.43. The passage has no bearing on the retroactivity of Section 1596. While both the ATS and Section 1596 are nominally jurisdictional statutes, they operate very differently. The ATS is a "strictly jurisdictional" statute which "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-24 (2004). Section 1596 is not "strictly jurisdictional." To use Judge Scheindlin's own language, Section 1596 is part of a "complex statutory scheme"—the TVPRA. As such, it "adheres"

Plaintiffs have identified no intervening legal authority which disturbs the Court's most recent analysis on the retroactivity of Section 1596. If Plaintiffs are to receive a more favorable answer on this question, they must seek it from a higher court.

2. Applicability of MEJA

a. As to the TVPRA

Plaintiffs argue, alternatively, that the Military Extraterritorial Jurisdiction Act ("MEJA") provides a jurisdictional basis for Plaintiffs' TVPRA claim. (Doc. No. 673/674, at 20-25.) MEJA has long been at the periphery of this case, primarily as an alternative justification for finding that Plaintiffs' RICO claims could be applied extraterritorially. (Doc. No. 168, at 19-20; Doc. No. 273, at 33-34.) Plaintiffs only recently began to argue that MEJA also provides an alternative jurisdictional basis for their TVPRA claims. (Doc. No. 588/593, at 39-40; Doc. No. 638, at 1, 12-13.) The Court rejected the argument; not simply because MEJA is a "murky" area of law, but because the Court disagreed that MEJA has any implication for the availability and extraterritoriality of Plaintiffs' civil TVPRA claim. (Doc. No. 670, at 9 ("MEJA's provision of criminal jurisdiction over felony offenses committed abroad does not provide Plaintiffs with an alternative source of jurisdiction for their civil claims under the TVPRA.").)

Plaintiffs have provided no cause for the Court to retreat from its position. MEJA is not part of the TVPRA. It provides for criminal prosecution of

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to Plaintiffs' substantive cause of action and cannot be applied retroactively under *Landgraf*.

certain felonies committed abroad "while employed by or accompanying the Armed Forces" or "while a member of the Armed Forces." 18 U.S.C. § 3261(a). It appears to be undisputed that Sections 1589 and 1590 of the TVPRA—the provisions KBR is alleged to have violated—would qualify for prosecution under MEJA. Plaintiffs argue that MEJA's limited extraterritorial extension of a host of federal offenses—including Sections 1589 and 1590 of the TVPRA—can be married with the TVPRA's civil remedy provision to provide an alternative "jurisdictional" basis for Plaintiffs' claim. (Doc. No. 673/674, at 20-25.)

Plaintiffs' argument loses sight of the central inquiry before the Court—whether Congress, when it enacted the civil remedy provision of the TVPRA, intended it to have extraterritorial effect. *Morrison* instructs that Congressional intent must be affirmative and clear. *See* 561 U.S. at 255 ("'[U]nless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'") (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)). Plaintiffs would have this Court find that Congress affirmatively and clearly expressed its intent to give (limited) extraterritorial effect to the TVPRA's civil remedy provision *first* by reference to the TVPRA's conduct-regulating provisions and *then* by reference to an unrelated criminal statute which is not part of the TVPRA and is nowhere referenced in the TVPRA. To the extent this was Congress's intent, it was neither affirmative nor clear. MEJA does not provide the answer that Plaintiffs seek.

b. As to RICO

A recent Second Circuit decision, issued in the RICO-context, deserves special mention here, although it does not warrant reconsideration of the Court's rulings in favor of KBR. In *European Community v. RJR Nabisco, Inc.*, 764 F.3d 129, 136-39 (2d Cir. 2014), the Second Circuit determined that RICO has extraterritorial reach to the extent that it explicitly incorporates predicate acts that are themselves explicitly extraterritorial. This Court once reached the same conclusion as that expressed by the Second Circuit in *European Community*. (Doc. No. 168, at 19-20; Doc. No. 273, at 32-34.) It reversed its position in 2013, finding that "[n]o language within RICO clearly indicates that Congress intended the statute to be applied extraterritorially." (Doc. No. 614/617, at 14.) This reversal was based in large part on non-binding but persuasive case law stemming from a 2010 Second Circuit case—*Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29 (2d Cir. 2010)—which was addressed and clarified in *European Community*. *See* 764 F.3d at 136 ("The district court here construed our rejection in *Norex* of arguments that RICO applies extraterritorially *in all of its applications* as a ruling that RICO can never have extraterritorial reach in *any* of its applications. This was a misreading of *Norex*.") (citation omitted).

European Community is offered by Plaintiffs here, ostensibly as support for its MEJA argument in the TVPRA context. (Doc. No. 676, at 5-7.) Plaintiffs have not asked the Court to reconsider its decision to grant summary judgment to KBR on Plaintiffs' RICO claims. To obviate any such request, the Court makes clear that reconsideration would not be granted. Although *European Community* conflicts with the

Court's ruling that RICO, as a whole, has no extracurricular application (Doc. No. 614/617, at 13-14), it does not support reinstatement of Plaintiffs' RICO claims. *European Community* focused on RICO's explicit incorporation of certain predicate acts which are themselves explicitly extraterritorial. *See* 764 F.3d at 136-37. Were RICO a purely domestic concern, the Second Circuit reasoned, the incorporation of these extraterritorial activities as predicate acts would be impossible to reconcile. *See id*. at 136.

The Second Circuit's reasoning in *European Community* assists Plaintiffs only to the extent that the RICO predicates of which they complain are themselves expressly extraterritorial. The predicates at issue in this case—Sections 1589 and 1590 of the TVPRA—were not expressly extraterritorial prior to 2008. (Doc. No. 670, at 6-9.) Plaintiffs have argued that MEJA gives Sections 1589 and 1590 extraterritorial reach. (Doc. No. 167, at 6-7; Doc. No. 588/593, at 45- 49.) Functionally, it is the same argument they make here in the TVPRA context. And the Court accepted it before as a basis for finding RICO extraterritorially applicable to Plaintiffs' claims (Doc. No. 168, at 19-20; Doc. No. 273, at 33 & n.17), although it expressed hesitation in "resting" its "jurisdictional finding" on MEJA, "a relatively murky area of the law" (Doc. No. 168, at 20).

As should be made clear, above, the Court is now persuaded that MEJA is not a "clear expression" of "affirmative [Congressional] intent" necessary to render either the TVPRA or RICO extraterritorial. MEJA is not explicitly referenced in either of those statutory regimes. It is not a predicate act for RICO.

See 18 U.S.C. § 1961(1). It is not an offense on which a civil TVPRA claim can be grounded. *See* 18 U.S.C. § 1595(a). MEJA is simply not relevant to the question of whether Congress intended to legislate extraterritorially when it enacted RICO and the TVPRA—the question that *Kiobel* and *Morrison* require this Court to answer.

IV. CONCLUSION

For reasons stated above, the Court **DENIES** Plaintiffs' Motion for Rehearing Pursuant to Fed. R. Civ. P. 54(b) of This Court's January 2014 Order (Doc. No. 672) and **DENIES** Plaintiffs' Motion for Rehearing on Their ATS Claims against KBR and for Leave to Amend (Doc. No. 685/686). The parties are ordered to submit a proposed final judgment, agreed as to form only, by March 30, 2015.

The Court again notes its profound regret at the outcome of this action. The crimes that are at the core of this litigation are more vile than anything the Court has previously confronted. Moreover, the herculean efforts of Plaintiffs' counsel have been in the highest traditions of the bar. No lawyer or group of lawyers could have done more or done better. But, the perpetrators of the subject crimes are not before the Court, and the relief that Plaintiffs seek is not appropriate as to those who are before the Court.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the twenty-fourth day of March, 2015.

/s/ Keith P. Ellison

KEITH P. ELLISON

UNITE STATES DISTRICT JUDGE