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Abstract

This Note examines the newly-created circuit split between the Second Circuit and the Ninth, and Eleventh Circuits regarding corporate liability. Part I introduces the ATCA, chronicling its transformation from a short provision in the Judiciary Act of 1789 to the weapon of choice employed against international corporations for alleged human rights violations. Part II focuses on the newly-created circuit split, identifying important case law and the current standing of ATCA human rights corporate liability in all three circuits. Emphasis is placed upon the international implications of and reactions to these decisions. Finally, Part III concentrates on the international implications of the split and advances the argument that the Second Circuit correctly decided Kiobel in light of the ATCA's purpose and the potential impact that continued ATCA litigation poses to US external relations.

NOTES

THE ALIEN TORT CLAIMS ACT AND CORPORATE LIABILITY: A THREAT TO THE UNITED STATES' INTERNATIONAL RELATIONS

*Theresa (Maxi) Adamski**

INTRODUCTION

An obscure sentence, penned by the first US Congress in 1789, has found its way to the forefront of human rights litigation, and is being utilized against multinational corporations.[1] The statute, the Alien Tort Claims Act ("ATCA"), wielded by plaintiffs who have suffered human rights violations, has managed to pull multinational corporate giants, such as Coca-Cola Company, Yahoo!, Unocal, and ExxonMobil into US courts for alleged human rights violations committed on non-US soil with little nexus to the United States.[2] While human rights

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1. *See* PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE: LAW, HISTORY AND ANALYSIS ix (2009) (contending that in the last thirty years the Alien Tort Claims Act ("ATCA") has developed into a "weapon in the arsenal of human rights advocates" employed against multinational corporations); *see also* Theresa Harris, *Settling a Corporate Accountability Lawsuit Without Sacrificing Human Rights:* Wang Xiaoning v. Yahoo!, 15 HUM. RTS. BRIEF 10–11 (2008) (observing that ATCA actions are a form of "impact litigation" employed by activists to influence policy and legislative change, especially if the action does not have public support); *infra* Part II (chronicling ATCA activity in the Second, Ninth, and Eleventh Circuits).

2. *See* 28 U.S.C. § 1350 (2006); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009); Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001); Doe v. Exxon Mobil Corp., 573 F. Supp. 2d 16 (D.D.C. 2008); Wang Xiaoning v. Yahoo!, Inc., No. 07 Civ. 02151 (N.D. Cal. Nov. 9, 2007) (entailing an ATCA action brought against the internet provider Yahoo! by Chinese political prisoners, which was ultimately settled confidentially); *see also* Harris, *supra* note 1, at 10 (discussing the settlement agreement in *Wang Xiaoning v. Yahoo!*); John B. Bellinger, *Will Federal Court's* Kiobel *Ruling End Second Wave of Alien Tort Statute Suits?*, LEGAL BACKGROUNDER, Nov. 12, 2010, at 2, http://www.wlf.org/Upload/legalstudies/legalbackgrounder/11-12-10Bellinger_LegalBackgrounder.pdf [hereinafter Bellinger, *Second Wave*] (contending that most corporations conducting business in developing nations have encountered ATCA litigation); John B. Bellinger, *Shortening the Long Arm of the Law*, INT'L HERALD TRIB., Oct. 9, 2010, at 8 [hereinafter Bellinger, *Shortening the Long Arm of Law*] (noting that the countries and regions impacted by ATCA litigation have included Burma, China, Colombia, Gaza, Indonesia, Nigeria, and South Africa); Melissa Maleske, *Court Decision Could Block Alien Tort Claims Against Corporations*, INSIDE COUNS., Nov. 1, 2010, http://www.insidecounsel.com/Issues/2010/November-2010/Pages/Court-Decision-Could-Block-Alien-Tort-Statute-Claims-Against-Corporations.aspx (quoting a corporate attorney who classified ATCA litigation as a "cottage industry" after favorable rulings for human rights plaintiffs in the Second, Ninth, and Eleventh Circuits); JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 32118, THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY

plaintiffs have embraced the ATCA with increasing frequency and enthusiasm, businesses are "sounding the alarm" and painting nightmare scenarios of high punitive damages, negative economic impact, and international relations consequences.[3]

ATCA litigation has been concentrated in the US Courts of Appeals for the Second, Ninth, and Eleventh Circuits.[4] Initially, all three circuits, applying different standards of proof, recognized the possibility of a multinational corporate defendant's liability for violations of a plaintiff's human rights.[5]

EXECUTIVE BRANCH VIEWS 2 (2003) (recognizing that the ATCA is also referred to as the Alien Tort Statute ("ATS")); GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 133 (2008) (commenting that because the Supreme Court referred to the ATCA as the ATS, many scholars and courts now refer to it as the ATS); HENNER, *supra* note 1, at 1 (noting that the ATCA was adopted in the United States' infancy during the first congressional session).

3. *See* GARY C. HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 7 (2003) (remarking that ATCA plaintiffs have claimed damages in excess of US$200 billion against over fifty corporate defendants for their actions in Africa, Asia, Latin America, and the Middle East); Jordan W. Cowman, *The Alien Tort Statute: Corporate Social Responsibility Takes on a New Meaning*, METROPOLITAN CORP. COUNS., July 1, 2009, at 30 (stating that companies who conduct business in developing nations are ideal defendants for an ATCA claim); Jenna Greene, *Gathering Storm: Suits that Claim Overseas Abuse Are Putting U.S. Executives on Alert and Their Lawyers on Call*, LEGAL TIMES, July 21, 2003, at 1 (pointing out that businesses throughout the country are "sounding the alarm" in the face of the modern incarnation of the ATCA, now being used to hold government officials and companies liable worldwide); Maleske, *supra* note 2 (observing that the United States is the only nation that opens its courtroom doors to torts occurring abroad involving non-US actors and, further, that the US Department of State views ATCA claims as a possible source of friction disturbing US international relations); *see also* Bellinger, *Second Wave*, *supra* note 2, at 3 (asserting that ATCA litigation is not only a nuisance for corporations, but also troublesome for US diplomatic relations as evidenced by complaints that the US Department of State has fielded from other countries, the European Union, and trade organizations arguing that US courts exercising jurisdiction over non-US entities is a violation of customary international law when the events at issue have no nexus to the United States); CENTER FOR CONSTITUTIONAL RIGHTS ET AL., UNIVERSAL PERIODIC REVIEW UNITED STATES OF AMERICA: STAKEHOLDER SUBMISSION ON UNITED STATES OBLIGATIONS TO RESPECT, PROTECT AND REMEDY HUMAN RIGHTS IN THE CONTEXT OF BUSINESS ACTIVITIES 3–4 (2010), *available at* http://www.earthrights.org/sites/default/files/documents/escrnet-upr-april-19-2010.pdf (explaining that the executive branch of the US federal government has expressed significant opposition to corporate ATCA liability, arguing that such litigation harms US external relations and US business interests while also undermining US national security).

4. *See* Maleske, *supra* note 2 (noting that the Second, Ninth, and Eleventh Circuits are popular forums for ATCA litigation); *see also supra* note 2 and accompanying text; *infra* Part II (outlining ATCA litigation in the three circuits).

5. *See infra* Part II and accompanying text (discussing the Second, Ninth, and Eleventh Circuits' treatment of ATCA human rights litigation).

In 2010, however, the Second Circuit in *Kiobel v. Royal Dutch Petroleum Company* ruled that human rights plaintiffs could no longer bring claims of corporate liability under the ATCA, thereby closing the circuit's door to such cases.[6]

This Note examines the newly-created circuit split between the Second Circuit and the Ninth, and Eleventh Circuits regarding corporate liability. Part I introduces the ATCA, chronicling its transformation from a short provision in the Judiciary Act of 1789 to the weapon of choice employed against international corporations for alleged human rights violations. Part II focuses on the newly-created circuit split, identifying important case law and the current standing of ATCA human rights corporate liability in all three circuits. Emphasis is placed upon the international implications of and reactions to these decisions. Finally, Part III concentrates on the international implications of the split and advances the argument that the Second Circuit correctly decided *Kiobel* in light of the ATCA's purpose and the potential impact that continued ATCA litigation poses to US external relations.

I. *THE BEGINNINGS OF THE ATCA*

Section A chronicles the birth of the ATCA, emphasizing two important international incidents that arguably sparked the enactment of the ATCA: the 1784 Marbois affair and the 1787 violation of Dutch Minister Mr. Van Berckel's immunity. Section B first considers the 1980 ATCA case, *Filártiga v. Peña-Irala*.[7] This Second Circuit decision is credited with awakening the ATCA and distinguishing it as a contemporary tool able to implement international law and human rights standards.[8] The discussion then turns to the 2004 Ninth Circuit case, *Sosa v. Alvarez-*

6. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010).

7. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

8. *See* HENNER, *supra* note 1, at 49 (describing the ATCA as a "modern weapon" used to protect against human rights abuses); *see also Filártiga*, 630 F.2d 876; Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 J. INT'L CRIM. JUST. 745, 748 (2010) (arguing that the *Filártiga* decision marked the start of the "modern era of human rights litigation in the United States"); Ralph G. Steinhardt, *The Internationalization of Domestic Law*, *in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 3, 50 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999) (commenting that ATCA case law before the *Filártiga* decision did not favor human rights plaintiffs).

Machain.[9] This case marks the first time that the US Supreme Court considered the contemporary ATCA and, although only in a footnote, arguably recognized the potential of corporate liability.[10] Finally, Section C addresses the shift to the multinational corporate defendant, focusing on the pinnacle case, *Doe v. Unocal Corporation*, in which Burmese villagers brought charges for human rights violations against Unocal.[11]

A. *The Judiciary Act of 1789 and the ATCA: "[L]egal Lohengrin . . . no one seems to know whence it came."*[12]

The ATCA consists of a single sentence adopted during the first session of the US Congress in 1789.[13] As a young government, the United States was charged, among other things, with the formation of a judiciary act that would create the new federal court system.[14] Essential to this system was the ability of

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

10. *Id.* at 732 n.20 ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."); Rachel Chambers, *The* Unocal *Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, 13 HUM. RTS. BRIEF, Winter 2005, at 15 (recognizing that the *Sosa* case was the first time that the US Supreme Court addressed the modern day ATCA and opened the door to litigation against corporations); Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT'L L.J. 507, 534 (2006) (indicating that in *Sosa*, the Supreme Court made important assertions concerning its understanding of the ATCA).

11. Doe v. Unocal Corp., 248 F.3d 915, 920–21 (9th Cir. 2001); *see* HENNER, *supra* note 1, at 76 (noting that *Doe v. Unocal Corporation* is significant in ATCA case law not only because it is one of the first corporate ATCA cases, but it also reportedly settled for over US$30 million); Chambers, *supra* note 10, at 14 (contending that many view the *Unocal* litigation as the first case successfully brought against a corporation for alleged human rights violations); Kochan, *supra* note 10, at 532 (discussing that the *Doe v. Unocal* decision marked the start of a wave of ATCA cases filed against multinational corporations); *see also* JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS 212 (2008) (pointing out the *Unocal* case's impact on ATCA litigation).

12. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

13. 28 U.S.C. § 1350 (2006) ("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."); *see also* MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH US TORTS LAW 3 (2009) (explaining that the Judiciary Act of 1789, Congress' first statute, formed the federal court system).

14. *See* HENNER, *supra* note 1, at 28 (explaining that one of the first Congress' initial responsibilities was the institution of a federal judiciary); *see also* ELSEA, *supra* note

non-US citizens to bring claims in domestic courts against US citizens.[15] The ATCA was one of four sections in the Judiciary Act of 1789 that addressed the right of an alien to commence litigation in US courts.[16] Although limited records exist concerning the legislative history of the ATCA, most historians accept that the basis for the ATCA's enactment was the Framers' intention to comply with the law of nations.[17] As a new nation, the United States sought to establish itself and win the respect of its international counterparts. This was especially important on the heels of two international incidents, which arguably played a role in spurring the adoption of the ATCA.[18]

13, at 4 (recounting that the Judiciary Act of 1789, also called the Act of September 24, 1789, created the US courts pursuant to Article III of the US Constitution). *See generally* ELSEA, *supra* note 13, at 4–6 (observing that the ATCA was initially codified in the ninth clause of the Judiciary Act, which was amended in 1878, 1911, and finally in 1948).

15. *See* FLETCHER, *supra* note 2, at 18 (explaining that federal jurisdiction for torts allegedly violating the law of nations is only available to non-US citizens); HENNER, *supra* note 1, at 30 (discussing the significance of providing non-US citizens the opportunity to pursue claims against US-citizens for violations of international law and the law of nations).

16. *See* HENNER, *supra* note 1, at 31–33 (noting that four separate sections of the Judiciary Act of 1789, specifically the ninth, eleventh, twelfth, and thirteenth, addressed the rights of aliens to litigate in the United States); BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 15 (1996) (clarifying that the Judiciary Act of 1789 was, in part, intended to ensure that federal courts had jurisdiction over a non-US citizen's civil claims); *see also* BLACK'S LAW DICTIONARY 84 (9th ed. 2009) ("In the United States, an alien is a person who was born outside the jurisdiction of the United States, who is subject to some foreign government, and who has not been naturalized under U.S. law.").

17. *See, e.g.*, HUFBAUER & MITROKOSTAS, *supra* note 3, at 3 (articulating that the ATCA was meant to demonstrate to the European powers the United States' commitment to enforcing the law of nations and protecting non-US citizens such as diplomats and merchants); KOEBELE, *supra* note 13, at 3 (indicating that the ATCA's purpose is unclear due to the lack of legislative history surrounding its enactment); STEPHENS & RATNER, *supra* note 16, at 14 (opining that the framers' respect for the law of nations speaks to the enactment of the ATCA); William R. Casto, *The Federal Court's Protective Jurisdiction over Torts Committed in Violation of the Laws of Nations*, *in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY, supra note 8, at 142: (explaining that little legislative history is available regarding the ATCA, as members of the first Congress may not have considered it controversial).

18. *See* HENNER, *supra* note 1, at 29 (arguing that the Federalist Papers, reports, and journals concerning the Judiciary Act recognized the need for the United States, as a young nation, to show respect for international law); *see also* HUFBAUER & MITROKOSTAS, *supra* note 3, at 3 (outlining that the ATCA was enacted in reaction to two separate assaults on non-US diplomats on US soil); STEINHARDT, *supra* note 8, at 4 (noting that, as a new player in the international arena, the United States needed to demonstrate its dedication to enforcing the law of nations); STEPHENS & RATNER, *supra* note 16, at 14–15 (positing that the ATCA was enacted in order to save the federal

The first of these two events was the 1784 Marbois affair. The incident involved a clash between Chevalier de Longchamps, a former French military officer, who attacked Francis Marbois, the French consul, on a Philadelphia, Pennsylvania, street.[19] The episode was considered not only a serious crime but also a blatant violation of the law of nations, which mandates the protection of diplomats.[20] US federal law, however, provided little recourse, and the Continental Congress had no option but to defer to the Commonwealth of Pennsylvania to address and remedy the situation.[21]

The second incident occurred in 1787, when New York police officers entered the home of a Dutch minister in order to arrest a domestic servant, violating the minister's diplomatic immunity.[22] Again, due to the inadequacies of US federal law, the Continental Congress could only ask the state of New York to address the offense.[23] The Mayor of New York complied with Congress' wishes to prosecute, but expressed concern to the US Secretary of State, John Jay, that the US Congress and the New

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government from embarrassment in light of a series of torts against international diplomats committed in the United States).

19. *See* FLETCHER, *supra* note 2, at 10 (describing the Marbois affair, in which Francois Marbois, secretary of the French legation was assaulted by a Frenchman, Chevalier de Longchamps); HENNER, *supra* note 1, at 34 (chronicling the 1784 assault of Francis Marbois); *see also* DAVIS, *supra* note 11, at 28 (acknowledging that, to the embarrassment of the United States, France expressed strong disappointment in the Continental Congress' response to the Marbois attack).

20. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (Pa. 1784) ("The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well being of nations; he is guilty of a crime against the whole world."); *see also* HENNER, *supra* note 1, at 34 (affirming that diplomats are protected under the law of nations).

21. *See* FLETCHER, *supra* note 2, at 10 (explaining that the Continental Congress, unable to directly prosecute the incident due to a lack of power, could only request that Pennsylvania charge De Longchamps); HENNER, *supra* note 1, at 34 (noting that the US Articles of Confederation did not provide for relief under US federal law).

22. *See generally* FLETCHER, *supra* note 2, at 11 (chronicling the second incident, which involved a violation of the Dutch ambassador's diplomatic immunity in New York, an incident that emphasized to the constitutional drafters the importance of preserving relations with the international community); HENNER, *supra* note 1, at 35 (recounting the details of the 1787 incident involving New York police and the Dutch Minister Van Berckel).

23. *See* FLETCHER, *supra* note 2, at 11 (explaining that the Continental Congress could not prosecute the offender, but had to rely upon New York authorities, who eventually elected to bring charges); HENNER, *supra* note 1, at 35 (noting that only state authorities had the ability to hold parties liable for violations committed against ambassadors).

York legislature had yet to address the "breach of privileges of ambassadors."[24] Moreover, this crime fell under the law of nations, which was not yet a part of US law.[25] Both episodes emphasized to the Continental Congress the importance of federal jurisdiction over incidents involving aliens in order to avoid international embarrassment, protect national security, and preserve international relations.[26]

An additional theory suggests that the enactment of the ATCA by the first Congress reflected the understanding that, as a nation, the United States was obligated to uphold and incorporate the law of nations into American jurisprudence.[27] The ATCA has been considered the first Congress' response to the conflict between federal law, international law, the rights of aliens on US soil, and international relations.[28]

Just as the impetus behind the ATCA has been questioned and extensively analyzed, there has also been much speculation

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24. *See* HENNER, *supra* note 1, at 35 (quoting the Mayor of New York's letter to US Secretary of State John Jay).

25. *See* HENNER, *supra* note 1, at 35 (clarifying that although the Mayor of New York ordered the arrest of the offending officer, he still had certain reservations, commenting,

> I need not remind you, sir, that neither Congress nor our internal legislature have passed any act respecting a breach of the privileges of ambassadors; so that the degree and nature of punishment depend on the common law, the crime on the law of nations, which is a breach of the common law.)

26. *See* STEPHENS & RATNER, *supra* note 16, at 15 (explaining that the purpose of the ATCA was to grant jurisdiction to federal courts over torts committed against non-US citizens, in part to preserve the US government's reputation); *see also* FLETCHER, *supra* note 13, at 10 (finding that the these early incidents illustrated to the Continental Congress the potential risks, including a negative impact on the United States' external relations, associated with violations committed against non-US citizens); HUFBAUER & MITROKOSTAS, *supra* note 3, at 3–6 (suggesting that the United States was concerned with exhibiting respect for international principles and ideals); Curtis A. Bradley & Jack L. Goldsmith, Op-Ed., *Rights Case Gone Wrong; A Ruling Imperils Firms and U.S. Diplomacy*, WASH. POST, Apr. 19, 2009, at A19 (suggesting that it is preferable that federal courts, as opposed to state courts, handle diplomatic matters in order to ensure impartial adjudication).

27. *See* STEPHENS & RATNER, *supra* note 16, at 17 (observing that the ATCA was part of a larger plan to implement international law locally and enforce globally-recognized obligations); *see also* HENNER, *supra* note 1, at 36 (stating that the ATCA was initially meant to apply only to a small number of torts, specifically those recognized as offending the law of nations in the eighteenth century).

28. *See generally* ELSEA, *supra* note 13, at 8 (contending that the ATCA reflects the Framers' desire to grant the US federal government control over international affairs and deter struggles stemming from US dealings with aliens).

about the statute's meaning and purpose.[29] The language of the ATCA is simple and imprecise.[30] It is comprised of three key phrases: "by an alien," "a tort only," and "in violation of the law of nations or a treaty of the United States."[31] A brief analysis of each phrase provides further insight into the statute's application.

The plaintiff in an ATCA case must be an alien.[32] Additionally, the ATCA does not require that the plaintiff be present in the United States or that the tort occur within the territory of the United States.[33] The statute, however, does not offer any such guidelines as to the defendants who fall within its scope.[34] The categories of accepted ATCA defendants have evolved and developed since 1789.[35] The defendant can be either an individual or group, and may be of any nationality, including American.[36] Defendants have also included state actors and

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29. *See* STEPHENS & RATNER, *supra* note 16, at 49 (describing the ATCA as a vague and unique statute that gives little indication or direction as to its application and the circumstances under which it is triggered); *see also* HENNER, *supra* note 1, at 2 (commenting that despite the statute's length, it is extremely complex); *cf.* HUFBAUER & MITROKOSTAS, *supra* note 3, at 46 (pointing out that the ATCA is a unique creation and that no other nation has a similar statute).

30. *See supra* note 29 and accompanying text (pointing out that the ATCA is surrounded by uncertainty).

31. 28 U.S.C. § 1350 (2006). *See generally* FLETCHER, *supra* note 2, at 18–22 (describing the basic elements of the ATCA).

32. *See* FLETCHER, *supra* note 2, at 18 (clarifying that only an alien can bring a suit alleging a tort offending the law of nations); HENNER, *supra* note 1, at 16 (noting that the ATCA creates jurisdiction in US courts for aliens with tort claims).

33. *See* FLETCHER, *supra* note 2, at 20 (explaining that the ATCA does not require the tort to occur within the continental United States); HENNER, *supra* note 1, at 16 (noting that many ATCA cases arise out of actions that occur beyond US borders); Greene, *supra* note 3, at 2 (establishing that the ATCA creates jurisdiction for US courts to adjudicate matters brought by non-US plaintiffs for incidents occurring abroad).

34. *See* 28 U.S.C. § 1350 (2006); *see also* FLETCHER, *supra* note 13, at 18 (clarifying that the statute does not set forth any requirements concerning the nationality of the defendant); HUFBAUER & MITROKOSTAS, *supra* note 3, at 4–5 (articulating that three different categories of defendants have developed: state actors, private actors, and multinational corporations); STEPHENS & RATNER, *supra* note 16, at 6 (acknowledging that the ATCA does not provide any citizenship restrictions for the defendant).

35. *See supra* note 34 and accompanying text (identifying the different categories of ATCA defendants that have developed over time).

36. *See supra* note 34 and accompanying text (enumerating the different types of ATCA defendants); Kochan, *supra* note 10, at 527 (positing that ATCA cases have been brought against a variety of defendants for allegedly violating international law).

private actors, including, as discussed in this Note, multinational corporations.[37]

The charged offense must arise in tort and offend the law of nations or a treaty of the United States.[38] In 1789, when the Judiciary Act and accompanying ATCA were passed, such actionable offenses were limited to 1) violations of safe conduct; 2) infringement of the rights of ambassadors; and 3) piracy.[39] The ATCA, however, is not a static doctrine, and scholars and judges alike recognize evolving and expanding definitions of both international law and ATCA torts.[40] They agree that the ATCA should be considered in light of modern definitions of international law.[41] International law has primarily been drawn from international agreements and customary law.[42] Further, torts in violation of the law of nations are actionable in US

37. See *supra* note 34 and accompanying text (setting forth the different categories of ATCA defendants); LINDA A. WILLET, MICHELE S. SUGGS & M. ALEXIS PENNOTTI, THE ALIEN TORT STATUTE AND ITS IMPLICATIONS FOR MULTINATIONAL CORPORATIONS 16 (2003) (describing the contemporary ATCA as a vehicle to charge international companies with human rights abuses).

38. 28 U.S.C. § 1350 (2006).

39. *See* HENNER, *supra* note 1, at 36 (acknowledging that in 1789 the law of nations recognized three categories of violations: "1) violations of safe conduct, 2) rights of ambassadors, and 3) piracy."); Casto, *supra* note 17, at 137 (describing the primary tort offenses in the eighteenth century, according to English municipal law, as: "1. [v]iolations of safe-conducts; 2. [i]nfringement of the rights of ambassadors; and 3. [p]iracy").

40. *See* HENNER, *supra* note 1, at 114 (explaining that the available causes of action under the ATCA are tied to the evolving standards of international law and will be delineated as each case is decided); Gallagher, *supra* note 8, at 752 (establishing that the US Supreme Court has deemed international law to be an evolving and changing body).

41. *See supra* note 40 and accompanying text (explaining that international law is recognized by the global community as an evolving body of law); STEPHENS & RATNER, *supra* note 16, at 52–53 (commenting that ATCA scholars believe that the statute should be understood according to contemporary interpretations of international law, as opposed to its eighteenth century definition).

42. *See* MICHAEL GARCIA, CONG. RESEARCH SERV., RL 32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 1 (2004) (explaining that international law is established in three ways: "(1) by international, formal agreement, usually between States, (2) in the form of international custom, and (3) by derivation of principles common to major world legal systems"); *see also* HENNER, *supra* note 1, at 21 (setting forth that international law is defined as "specific, universal, and obligatory norms" established by general consensus among nations). *See generally* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (clarifying that the ATCA is rooted in international law).

courts, as international law is now considered part of federal common law.[43]

B. Filártiga v. Peña-Irala, *and* Sosa v. Alvarez-Machain: *Awakening the ATCA from Its 200-Year Slumber*[44]

Prior to the filing of the Second Circuit case *Filártiga v. Peña-Irala* in 1980, ATCA jurisdiction was invoked less than two dozen times in US federal courts, with jurisdiction upheld in only two cases.[45] When the Second Circuit recognized the then "rarely-invoked provision," it opened the federal courts for the adjudication of ATCA claims, and addressed which torts violated the law of nations.[46] Plaintiffs, the Paraguayan Filártiga family, brought this action in the US District Court for the Eastern District of New York ("EDNY") against Americo Noberto Peña-Irala ("Peña"), also of Paraguay.[47] Peña was alleged to have kidnapped and tortured seventeen-year old Joelito Filártiga ("Joelito"), ultimately causing his death.[48] The Filártiga family alleged that Joelito's death was in retaliation for his father's

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43. *See* DAVIS, *supra* note 11, at 29 (observing that US federal jurisdiction over an ATCA action is only created when the plaintiff claims a violation of international law); STEPHENS & RATNER, *supra* note 16, at 35 (finding that US Supreme Court precedent recognizes customary international law as part of federal common law under which there is a right to sue in order to remedy violations).

44. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); *see* STEPHENS & RATNER, *supra* note 16, at 7 (commenting that the ATCA had essentially been dormant for 200 years); *see also* Kochan, *supra* note 10, at 527 (asserting that the statute has impacted how international law is understood in US courtrooms).

45. *See* ELSEA, *supra* note 2, at 12 (discussing *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607), in which the court held that the defendant's violation of the Treaty of Amity with France invoked a US court's jurisdiction pursuant to the ATCA, and *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), in which the court found that passport fraud in an international child custody case was actionable under the law of nations and therefore under the ATCA); STEPHENS & RATNER, *supra* note 16, at 8 (identifying the two ATCA cases as *Bolchos* and *Adra*).

46. *See Filártiga*, 630 F.2d at 878, 887 ("[W]e believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."); *see also* DAVIS, *supra* note 11, at 21 (explaining that *Filártiga* "served notice that . . . [US] courts are open to judge actions in any corner of the world."); Maleske, *supra* note 2 (explaining that the ATCA permits a Paraguayan citizen to bring an action against a Paraguayan official in a US federal court because the charged offense violates international law).

47. *Filártiga*, 630 F.2d at 878.

48. *Id.*

political activities and beliefs.[49] In 1979, Dolly Filártiga, Joelito's sister, who had since moved to the United States, learned of Peña's presence in New York and filed a summons and complaint in civil court bringing, among other charges, a violation of the ATCA.[50] The Second Circuit ultimately held that a US court could hold Peña, a former inspector general of the Paraguayan police, liable for the torture and murder of a Paraguayan citizen.[51]

Filártiga is crucial to the development of the ATCA because it established two important principles. First, the international law applicable to the ATCA should be based not on an understanding of the law in 1789, but on contemporary principles.[52] The Second Circuit clarified that international law is an evolving body of law recognized by the international community.[53] Additionally, according to the court, the law of nations is drawn not only from the works of jurists, but also reflected in the "general usage and practice of nations."[54] Therefore, the *Filártiga* court found torture to be in violation of

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49. *Id.*; *see* DAVIS, *supra* note 11, at 18 (remarking that the Filártigas had attempted to prosecute Peña in Paraguay, but their efforts were met with substantial obstacles, including the arrest of Mrs. Filártiga and her daughter for frivolous charges).

50. *Filártiga*, 630 F.2d at 878–79; *see* DAVIS, *supra* note 11, at 18–19 (chronicling the process of filing the *Filártiga* case and explaining that an attorney with the Center for Constitutional Rights ("CCR"), expressing concern about the viability of charging Peña, suggested a novel tactic to employ the then obscure ATCA to bring a civil case for damages against Peña).

51. *Filártiga*, 630 F.2d at 880 ("[W]e find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."); *see* DAVIS, *supra* note 11, at 21 (recounting that although the *Filártiga* court applied Paraguayan law, the district court judge nevertheless elected to award $US10 million dollars in punitive damages).

52. *See* HENNER, *supra* note 1, at 58 (observing that the *Filártiga* court established that "1) international law under the ATS is determined based upon contemporary standards rather than the standards of 1789, and 2) international law standards address the relationship between a nation and individual citizens"); *see also Filártiga*, 630 F.2d at 884–85 (holding that "[t]treaties and accords...as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments"); HUFBAUER & MITROKOSTAS, *supra* note 3, at 4 (emphasizing that the *Filártiga* decision created a right for non-US citizens to bring suit in US courts for international law violations as contemporaneously interpreted).

53. *Filártiga*, 630 F.2d at 881 ("[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.").

54. *Id.* at 880 (citing United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820)).

international law based on universal condemnation, customary law, and international treaties and agreements.[55]

The final paragraph of the *Filártiga* decision emphasizes the increasing importance and awareness of basic human rights on the international stage.[56] Prior to the twentieth century, there was little international recognition or consensus concerning human rights.[57] Only in the aftermath of the atrocities of the First and Second World Wars, and in light of the Nuremberg trials and birth of the United Nations did the protection and preservation of human rights rise to the level of an international norm.[58] The *Filártiga* court, by recognizing torture as a crime, signaled to potential plaintiffs that human rights violations could be actionable under the ATCA.[59]

In 2004, the US Supreme Court further clarified the reach and scope of the ATCA when it decided *Sosa v. Alvarez-Machain*, finding that the statute is jurisdictional and applicable only to a

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55. *See id.* ("[I]n light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.").

56. *See id.* at 890 ("In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights."); *see also id.* ("In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.").

57. *See* HENNER, *supra* note 1, at 47 (contending that the *Filártiga* decision must be understood in the context of the atrocious human rights violations of the twentieth century and an increasing awareness that the international community is obliged to guarantee that such offenses do not transpire again); *see also infra* note 58 and accompanying text (discussing the evolution of human rights law).

58. *See Filártiga*, 630 F.2d at 890 (recognizing that international human rights developed in the twentieth century, largely in response to the Second World War during which civilian life was treated with a heretofore unknown degree of indifference); *see also* DAVIS, *supra* note 11, at 12 (positing that the Nuremberg Tribunals, following the Second World War, affirmed the existence of international law applicable to all nations that mandates protection of human rights); HENNER, *supra* note 1, at 46 (noting that legal developments following the Second World War reflected a growing recognition that nations have the responsibility to protect human rights).

59. *See Filártiga*, 630 F.2d at 890 ("Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."); *see also* Steinhardt, *supra* note 8, at 81 (stating that the *Filártiga* court acknowledged the existence of human rights that are due to all, irrespective of citizenry).

narrow set of international law violations.[60] In *Sosa*, the plaintiff, Humberto Alvarez-Machain ("Alvarez-Machain"), was a Mexican doctor charged with playing a role in the torture and murder of a Drug Enforcement Agency agent.[61] Alvarez-Machain alleged that he was abducted and brought to the United States to stand trial.[62] Consequently, he brought a civil action against Sosa, a Mexican national, and the United States, among others, claiming a violation of the ATCA.[63]

The US Supreme Court rejected Alvarez-Machain's ATCA claim, holding that a claim of kidnapping was not actionable under the ATCA.[64] The Court explained that any violation of the contemporary law of nations must be based not only on custom accepted by the international community, but must also be analogous to those principles recognized in the eighteenth century.[65] Further, the US Supreme Court charged the lower courts with "vigilant doorkeeping," explaining that, "the door is still ajar . . . and thus open to a narrow class of international norms today."[66] To clarify, however, the US Supreme Court would still allow the prosecution of a limited set of serious human right violations under the ATCA.[67]

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60. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004) ("Congress intended the ATS to further jurisdiction for a relatively modest set of actions alleging violations of the law of nations."); *see also* Gallagher, *supra* note 8, at 751 (acknowledging that in *Sosa*, the Supreme Court recognized a narrow category of rights that violate the law of nations and are actionable under the ATCA); *cf.* DAVIS, *supra* note 11, at 25 (explaining that the US Supreme Court's decision in the *Sosa* matter was long awaited, with eighteen amicus curiae briefs filed on behalf of interested parties ranging from non-governmental organizations to the European Commission).

61. *See Sosa*, 542 U.S. at 697.

62. *See id.* at 698.

63. *Id.* at 697.

64. *See* HENNER, *supra* note 1, at 8–9 (explaining that the Supreme Court did not believe that kidnapping was actionable under the ATCA); *see also* DAVIS, *supra* note 11, at 35 (mentioning that the Supreme Court advised lower courts to use caution when determining that a tort violates the law of nations and that such offenses must be "specific, universal and obligatory").

65. *See Sosa*, 542 U.S. at 725 ("[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.").

66. *Id.* at 729; *see also* Maleske, *supra* note 2 (recognizing that the Supreme Court's instructions to lower courts explaining the application of the ATCA were extremely unclear).

67. *See* FLETCHER, *supra* note 2, at 135 (asserting that the US Supreme Court Justices were in agreement that the ATCA is an enduring fixture in US jurisprudence);

Further, the US Supreme Court in footnote twenty to its decision recognized the question of whether private actors and corporate liability existed under the ATCA.[68] The Court, however, did not answer it. Instead, the Court asserted, "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual . . . ."[69] Human rights plaintiffs and corporate defendants alike have utilized this short footnote in support of their respective arguments that a corporation may or may not be held liable pursuant to the ATCA.[70]

C. Doe v. Unocal: *The Multinational Corporation Becomes an ATCA Defendant*

As the recognition of certain human rights obligations has become universal, the belief that multinational corporations should be held liable for their alleged involvement in or association with human rights violations has also become increasingly prevalent.[71] While both *Filártiga* and *Sosa* served to

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HENNER, *supra* note 1, at 80 (observing that, following the *Sosa* decision, ATCA plaintiffs were still free to pursue human rights violations in court); *cf.* DAVIS, *supra* note 11, at 35–36 (explaining that the US government has expressed concern about ATCA human rights litigation, and the impact it will have on the nation's external relations, and the separation and balance of power between the branches of government).

68. *Sosa*, 542 U.S. at 733 n.20.

69. *Id.*

70. *See* Gallagher, *supra* note 8, at 751–52 (suggesting that plaintiffs view footnote twenty of the *Sosa* opinion as support for the contention that corporations can be liable under international law, while corporate defendants argue that footnote twenty calls into question whether they can be held liable as non-state actors under international law).

71. *See* HENNER, *supra* note 1, at 5 (stating that worldwide attentiveness to human rights issues has increased); HUFBAUER & MITROKOSTAS, *supra* note 3, at 45 (recognizing that in the aftermath of the Second World War, the international community became increasingly aware of its obligation to protect and preserve human rights); Sheri Qualters, *Rights Cases Multiply against Companies: Growth of Global Corporate Operations and Key 9th Circuit Court of Appeals Case Lead to Upswing in Alien Torts*, FULTON COUNTY DAILY REP., Aug. 24, 2007, at 8, *available at* 2007 WLNR 28038151 (setting forth an increasing awareness that corporations may be charged for alleged human rights violations under the ATCA); *see also* Bellinger, *Second Wave*, *supra* note 2, at 2 (establishing that contemporary ATCA litigation occurred in two waves, first against international government officials, and second against US and non-US corporations for aiding and abetting human rights violations); KOEBELE, *supra* note 13, at 7 (contending that the second wave of ATCA litigation against international corporations is based on the fact that international law does not directly regulate or place legal obligations upon

clarify the reach of the ATCA, the 1995 Second Circuit decision *Kadic v. Karadzic* is also significant.[72] The *Kadic* decision opened the US courts to ATCA actions against private individuals and extended subject matter jurisdiction to torture, summary execution, genocide, and war crimes.[73] This shift also led to increased tensions in US international relations as the United States began to adjudicate crimes occurring abroad, committed in many circumstances by non-US multinational corporations.[74]

In 1996, *Doe v. Unocal Corporation*, the first ATCA case against a multinational corporation for alleged human rights violations, was filed in the Ninth Circuit.[75] The plaintiffs were Burmese villagers, and the defendant, the Unocal Corporation, was constructing a pipeline in Burma.[76] The plaintiffs alleged that Unocal, aware of the Burmese military's record of human rights abuses, hired the military to secure the pipeline route, subjecting plaintiffs to forced labor, rape, murder, and

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corporations); *cf.* DAVIS, *supra* note 11, at 56 (quoting a CCR attorney, who said, "we were jubilant about the [*Filártiga*] decision and we said we're going to apply this to other cases and people kept coming to us[;] . . . we worked to extend the principles to command responsibility and to corporate liability.").

72. *See Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

73. *See id.* at 239–40; HENNER, *supra* note 1, at 7 (asserting that the Second Circuit *Kadic* decision established that private citizens could be liable for torture, summary execution, genocide, and war crimes, and stating that the court found for the plaintiff and awarded damages of US$5.245 billion against the self-proclaimed president of the 'Republic of Srpska,' Radovan Karadzic); *see also* DAVIS, *supra* note 11, at 57 (remarking that after the *Kadic* case, suits were increasingly brought against private individuals).

74. *See* Judith Chomsky, *Will the Real ATS Please Stand Up?*, 33 SUFFOLK TRANSNAT'L L. REV. 461, 462 (2010) (acknowledging that some non-US governments have objected to ATCA litigation as a challenge to their sovereignty); Bellinger, *Shortening the Long Arm of Law*, *supra* note 2, at 8 (asserting that the contemporary use of the ATCA may frustrate the statute's original purpose, which was to preserve international relations).

75. *See* Doe v. Unocal Corp., 963 F. Supp. 880 (C.D.Cal. 1997); *see also* ELSEA, *supra* note 2, at 20 (identifying *Doe v. Unocal* as the first ATCA case for alleged human rights violations brought against a corporate defendant); DAVIS, *supra* note 11, at 204 (noting that in early October 1996 Earth Rights International and CCR filed a case on behalf of Burmese villagers against Unocal, Union, and Total Oil for human rights violations). *See generally* Chambers, *supra* note 10, at 14 (establishing that the *Unocal* litigation had proceeded further than any similar litigation brought against a corporate defendant).

76. *See* Doe v. Unocal Corp., 963 F.Supp. 880, 885 (C.D.Cal. 1997); ELSEA, *supra* note 2, at 20–21 (describing the events leading to the filing of the *Doe v. Unocal* case); DAVIS, *supra* note 11, at 204–06 (explaining the events that brought about the *Unocal* suit). *See generally* DOE V. UNOCAL CASE HISTORY, http://www.earthrights.org/legal/doe-v-unocal-case-history (last visited Feb. 5, 2011) [hereinafter UNOCAL CASE HISTORY] (chronicling the *Doe v. Unocal* litigation).

relocation.[77] The plaintiffs filed suit, and the United States District Court for the Central District of California agreed to hear the case.[78] The court held that, although corporations could be liable under the ATCA, Unocal was not liable, as the plaintiffs failed to prove that Unocal had intended for the military to commit human rights abuses.[79] The Burmese villagers appealed, and the Ninth Circuit reversed allowing the case to proceed.[80] The Ninth Circuit ultimately decided to rehear the appeal en banc.[81] Unocal, however, agreed to settle the case prior to the hearing for a substantial undisclosed sum compensating the villagers.[82] Although the bench never issued a ruling, one scholar argues that if it had, it would have created a broad standard of aiding and abetting impacting multinational corporations and their activities in developing nations.[83] On the one hand the settlement signaled to plaintiff's lawyers that the ATCA was a viable instrument to hold multinational corporations liable for human rights violations.[84] On the other hand, it also indicated to

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77. *See supra* note 76 and accompanying text (breaking down the events leading to the *Unocal* litigation).

78. *See supra* note 76 and accompanying text (indicating that the *Unocal* suit was filed).

79. *See* Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1306–07, (C.D. Cal. 2000) ("Plaintiffs present no evidence that Unocal 'participated in or influenced' the military's unlawful conduct; nor do Plaintiffs present evidence that Unocal 'conspired' with the military to commit the challenged conduct.").

80. *See* Doe I. v. Unocal Corp., 395 F.3d 932, 956 (9th Cir. 2002) (noting that the Circuit Court reversed the district court's grant of summary judgment on several of the ATCA claims); *see also* DAVIS, *supra* note 11, at 57 (explaining that the Ninth Circuit "ruled that the ATS supported claims against private defendants for aiding and abetting violations of international law").

81. *See Unocal*, 395 F.3d at 979 ; *cf.* DAVIS, *supra* note 11, at 210–11 (noting that at this point in the litigation, US President Bush's Administration submitted briefs to the Court on Unocal's behalf).

82. *See* DAVIS, *supra* note 11, at 211 (noting that although the terms of settlement are confidential, attorneys for the Burmese villagers indicated that they were pleased with the results); Armin Rosencranz & David Louk, Doe v. Unocal: *Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 CHAP. L. REV. 135, 148 (2005) (commenting that the Ninth Circuit did not have the opportunity to rehear the matter as it was settled prior to the scheduled hearing date).

83. *See* WILLET, SUGGS & PENNOTTI, *supra* note 37, at 28–29 (describing that ATCA litigation could potentially impact multinational corporations and the manner in which they do business in developing nations); *see also* Chambers, *supra* note 10, at 15 (setting forth that the *Unocal* decision is important because of the determination that a company could be charged for human rights abuses based on a theory of aiding and abetting).

84. *See* DAVIS, *supra* note 11, at 58 (establishing that after the *Unocal* settlement NGOs began employing the ATCA against multinational corporations they suspected of

multinational corporations and the international community the potentially high cost and present threat of ATCA litigation.[85]

The *Unocal* litigation also sparked the interest of the US government, who filed an amicus brief voicing opposition to corporate liability under the ATCA.[86] In its brief, President Bush's Administration emphasized the risk of negative consequences for the nation's foreign relations, and pointed out that US federal courts were not the appropriate forum to address the world's injustices.[87] Additionally, the US Department of Justice clarified that if Congress wanted US courts to play such a role, it would establish a rule permitting them to do so.[88] Similarly, it contended that the court's' understanding of the ATCA potentially interfered with the nation's external relations, normally the province of Congress and the executive branch.[89]

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being linked to human rights abuses); Rosencranz, *supra* note 82, at 148 (observing that the *Unocal* settlement was enthusiastically accepted by those who hoped that multinational corporations could be held liable for their involvement in human rights abuses).

85. *See* DAVIS, *supra* note 11, at 212 (quoting a US Department of State Legal Adviser: "and then you start to see the corporate cases come in, [and] if they can get the vicarious liability theory—then there is gold"); *see also* Anthony Sebok, *Unocal Announces It Will Settle A Human Rights Suit: What is the Real Story Behind Its Decision*, FINDLAW.COM (Jan. 10, 2005), http://writ.news.findlaw.com/sebok/20050110.html (observing that Unocal may have settled to avoid negative publicity).

86. *See* Chambers, *supra* note 10, at 14 (commenting that US President Bush's Administration filed multiple amicus briefs opposing the use of the ATCA against corporations); *see also* DAVIS, *supra* note 11, at 124 (noting that the US President Clinton's Administration took a different stance towards ATCA cases voicing opposition in response to cases that offended "traditional immunity or specific political question issues").

87. *See* WILLET, SUGGS & PENNOTTI, *supra* note 37, at 30 (declaring that ATCA litigation harms US external relations and that US federal courts were not intended to police the world); *see also* DAVIS, *supra* note 11, at 126 (commenting that President Bush's Administration argued that the application of the ATCA to human rights disputes between non-US nationals strayed from the statute's intended purpose).

88. *See* Supplemental Brief for the United States of America, as Amicus Curiae Supporting Defendants-Appellants at 4, Doe I v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003) (Nos. 00-56603, 00-56628) ("In this case, the aiding and abetting claim asserted against defendants turns upon the abusive treatment of the Burmese people by their military government. It would be extraordinary to give U.S. law an extraterritorial effect to regulate conduct by a foreign country vis-[à-]vis its own citizens in its own territory, and all the more so for a federal court to do so as a matter of common law-making power.").

89. *See id.* at 14–15 ("Importantly, the adoption of an aiding and abetting for ATS cases would not be limited to the case of Burma, but potentially could affect policy options for the United States around the world. Hence, this Court must look to the 'practical consequences' beyond its application to the facts of this case. Adopting aiding

US jurisdiction pursuant to the ATCA is not the only reason that human rights plaintiffs select the United States as a forum for litigation. Several advantages of the US adversarial system are attractive to ATCA litigants.[90] First, the cost of litigation in the United States is generally lower than elsewhere given that not-for-profit lawyers are willing to take these cases free of charge.[91] Plaintiffs are not necessarily responsible for their opponent's costs if claims are unsuccessful.[92] Second, because of the contingency fee system, plaintiff's legal costs may also be reduced.[93] As ATCA human rights cases against corporations under the ATCA are not a guaranteed success, such protections are very attractive.[94] Further, human rights plaintiffs will find

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and abetting liability under the ATS would, in essence, be depriving the Executive of an important tactic of diplomacy and available tools for political branches in attempting to induce improvements in foreign human rights practices. The selection of the appropriate tools, and the proper balance between rewards and sanctions, requires policymaking judgment properly left to the federal political branches."); *see also* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 57 (2004) (discussing the US Department of Justice's stance that the ATCA interferes with international relations).

90. *See* JOSEPH, *supra* note 89, at 16 (observing that the United States is a favorable forum for human rights litigation against transnational corporations because of procedural advantages that the US adversarial system offers); KOEBELE, *supra* note 13, at 13 (observing that human rights plaintiffs prefer litigating in the United States because of access to juries, discovery advantages, lower litigation costs and punitive damages); Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 6 (2002) (specifying that procedural advantages unique to the United States provide the ideal forum for successful ATCA human rights claims). *See also* HUFBAUER & MITROKOSTAS, *supra* note 3, at 47 (alleging that the nature of the US court system, which allows class action suits, awards high punitive damages, and permits contingency fees, could cause additional friction with other countries).

91. *See* JOSEPH, *supra* note 89, at 16 (acknowledging that contingency fees, the potential for high rewards, and the willingness of public interest lawyers to represent victims for minimal fees all contribute to lower litigation costs); Stephens, *supra* note 90, at 13 (explaining that public interest, not-for-profit law firms, and pro bono litigation allow human rights cases to be litigated with no fee).

92. *See* JOSEPH, *supra* note 89, at 16 (identifying that, in the United States, losing parties are generally not obligated to pay the opposing parties' fees, unless directed to do so by the courts); Stephens, *supra* note 90, at 14 (explaining that the United States does not abide by the "loser pays" system).

93. *See* JOSEPH, *supra* note 89, at 16 (remarking that the contingency fee system in the United States lowers a plaintiff's financial risk in the instance that they do not win the case).

94. *See* JOSEPH, *supra* note 89, at 16 (observing that US procedural advantages are especially significant as human rights attorneys raise unique and original legal arguments against corporations leading to uncertain outcomes).

legal representation with relative ease because of the potential for substantial rewards.[95] US discovery regulations also favor plaintiffs, allowing them greater access to documents in a corporate defendant's control.[96] Finally, human rights plaintiffs are also likely to win higher damages in US courts.[97] The United States awards punitive damages, meant to not only compensate the victims but also to serve as an expression of "society's revulsion for the [impugned] conduct."[98]

When the ATCA was first enacted in the eighteenth century, Congress intended to preserve the United States' reputation by seeking to meet the standards imposed by international law and custom. The statute, however, remained essentially dormant until it was invoked by lawyers in the *Filártiga* case in 1980. Following this decision, the ATCA began its transformation into the statute it is today. In 2004, with the *Sosa* case, the US Supreme Court recognized the potential for corporate liability, although only in a footnote. The *Unocal* litigation affirmed the reality of ATCA corporate liability, and set the stage for ATCA activity in the Second, Ninth, and Eleventh Circuits.

II. *THE SECOND CIRCUIT VS. THE NINTH AND ELEVENTH CIRCUITS: A DIFFERENCE IN OPINION*

The Second, Ninth, and Eleventh Circuits are currently the most active forums for ATCA litigation.[99] All three have heard

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95. *See* JOSEPH, *supra* note 89, at 17 (setting forth that successful ATCA litigation against corporations is likely to be lucrative because of a corporation's ability to pay substantial damages); STEPHENS & RATNER, *supra* note 16, at 167–68 (commenting that ATCA litigation has resulted in damages of tens of millions of dollars, and that punitive damages are largely based on the wealth and resources of the defendant).

96. *See* JOSEPH, *supra* note 89, at 17 (clarifying that US discovery regulations grant plaintiffs greater access to documents in a corporate defendant's possession); Stephens, *supra* note 90, at 15 (explaining that plaintiffs have greater access to a defendant's documents in the United States).

97. *See* JOSEPH, *supra* note 89, at 17 (noting that the US courts generally award higher damages than other international forums); Stephens, *supra* note 90, at 15 (explaining that American punitive damages lead to higher monetary awards than systems that only reward compensation damages).

98. Stephens, *supra* note 90, at 15; *see supra* note 97 and accompanying text (discussing American punitive damages); *see also* STEPHENS & RATNER, *supra* note 16, at 213 (commenting that although many non-US legal systems do not award punitive damages, the United States does so in order to penalize and reprimand the defendant).

99. *See infra* notes 102–104 and accompanying text (describing the distribution of ATCA cases among the US circuit courts). *See generally* Sarah A. Altschuller, *The Federal*

cases involving disputes between multinational corporations and human rights plaintiffs.[100] The Circuits' rulings, however, have been inconsistent, creating a circuit split.[101] Part II Section A focuses on the Second Circuit, which has heard a substantial number of ATCA cases and, consequently, handed down a series of important decisions concerning corporate liability.[102] The discussion begins with an overview of *Khulumani v. Barclay National Bank Ltd.* and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, and concludes with the Second Circuit's most recent decision *Kiobel v. Royal Dutch Petroleum Corp.* holding that corporations are not liable under the ATCA.[103]

The Ninth and Eleventh Circuits have also heard a significant number of ATCA cases.[104] Unlike the Second Circuit, however, the Ninth and Eleventh Circuits have not ruled against ATCA corporate liability, nor do they impose the same burden of proof on plaintiffs as the Second Circuit previously did.[105] Section B begins with a discussion of the Eleventh Circuit case *Romero v. Drummond Co., Inc.* then turns to the Ninth Circuit case *Bowoto v. Chevron Corp.* and concludes with an overview of the Eleventh Circuit case *Sinaltrainal v. Coca-Cola Co.* to highlight the different approaches the circuits have taken to ATCA cases.[106]

Courts and Corporate Liability under the Alien Tort Statute, CORPORATE SOCIAL RESPONSIBILITY AND THE LAW, Sept. 27, 2010), http://www.csrandthelaw.com (mentioning that the US First, Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have not directly addressed the question of corporate liability under the ATCA); Doe v. Exxon Mobil Corp., No. 09-7125, 2011 WL 2652384, at *1 (D.C. Cir. July 8, 2011) (holding that the D.C. Circuit recognizes corporate liability pursuant to the ATCA).

100. *See supra* note 2 and accompanying text (identifying multinational corporate ATCA defendants Caterpillar, Dow Chemical, Yahoo!, Coco Cola, Nestle, Texaco, Royal Dutch Shell, and a series of Swiss Banks, among others).

101. *See infra* Part II.A. and Part II.B. (surveying the split between the Second, Ninth, and Eleventh Circuits).

102. *See* Jonathan Drimmer & Michael Lieberman, *Drimmer and Lieberman on Talisman Energy and the Alien Tort Statute: The Continuing Threat of Secondary Liability,* 2010 EMERGING ISSUES 5182 (noting that roughly thirty percent of corporate ATCA cases to date have been heard in the Second Circuit).

103. *See infra* Part II.A. (discussing the relevant Second Circuit ATCA decisions).

104. *See* Drimmer & Lieberman, *supra* note 102 (remarking that the Ninth and Eleventh Circuits, which have not accepted the Second Circuit's aiding and abetting purpose standard see roughly twenty and ten percent of ATCA cases respectively).

105. *See id.*

106. *See* Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Bowoto v. Chevron Corp., 621 F.3d 1116 (9th Cir. 2010); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009). *See generally* Drimmer & Lieberman, *supra* note 102 (showing that unlike the Second Circuit, the Ninth and Eleventh Circuits employ a knowledge

A. Kiobel*: The Second Circuit Decides Corporations Are Not Liable Under the ATCA*

In 2007, the Second Circuit heard the *Khulumani v. Barclay National Bank Ltd.* case.[107] The action was a consolidated case brought on behalf of South African plaintiffs who were victims, or relatives of victims, of South Africa's apartheid regime.[108] The defendants were corporations that operated in the country during the apartheid, including a roster of top banks and businesses ranging from Ford Motor Company to International Business Machines Corporation.[109] Plaintiffs alleged that because defendants continued to conduct business in South Africa during the apartheid they were guilty of aiding and abetting the regime's human rights abuses.[110] In 2004, the US District Court for the Southern District of New York ("SDNY") granted defendant's motion to dismiss the ATCA claims.[111] In 2007, the Second Circuit heard the case, affirming in part, vacating in part and remanding.[112]

The Second Circuit held that "a plaintiff may plead a theory of aiding and abetting liability under the ATCA" thereby

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standard when evaluating aiding and abetting liability, requiring that plaintiffs demonstrate only that defendants had an awareness that their actions would facilitate harm, not that they intended the consequences of their actions).

107. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007).

108. *See id.* at 258.

109. *See id.* at 254 (identifying, among others, Citigroup Inc., Ford Motor Co., and Exxonmobil Corp. as defendants).

110. *Khulumani*, 504 F.3d at 258 (2d Cir. 2007) ("The plaintiffs argue that these defendants actively and willingly collaborated with the government of South Africa in maintaining a repressive, racially based system known as 'apartheid,' which restricted the majority black African population in all areas of life while providing benefits for the minority white population."); *see* WILLET, SUGGS & PENNOTTI, *supra* note 37, at 26 (commenting that multinational corporations were faulted essentially for continuing to conduct business in apartheid South Africa).

111. *In re* South African Apartheid Litigation, 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004) ("[T]his Court finds that there is no subject matter jurisdiction under the ATCA, and thus all claims thereunder, including those for human rights violations, crimes against humanity, unfair labor practices, and all other premised under international law, must be dismissed. Because this Court finds no cause of action under international law, plaintiffs have failed to state claims upon which to ground jurisdiction under 28 U.S.C. §§ 1331 and 1332.").

112. *See generally Khulumani*, 504 F.3d at 264 (affirming the lower court's dismissal of several claims for an inability to satisfy 28 U.S.C. § 1332, and rejecting the district's dismissal of plaintiff's ATCA allegations).

acknowledging corporate liability in the Second Circuit.[113] While two of the three circuit court judges agreed that aiding and abetting is actionable under the ATCA, the judges differed as to whether domestic or international law provided the appropriate standard for analysis.[114] Regardless of approach, however, the Second Circuit confirmed that it was an open forum for corporate liability under the ATCA.[115]

The recognition of corporate liability raised concerns among critics, who argued that the possibility of corporate liability for the actions of the apartheid regime could considerably impact the operation of corporations in developing countries.[116] Further, the court recognized that ATCA human rights litigation touched upon US foreign policy, and that a degree of deference should be accorded to these concerns.[117]

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113. *See id.* at 260; *see also* Sarah Altschuller, Dan Feldman & Lara Blecher, *Corporate Social Responsibility*, 42 INT'L L. 489, 490 (2008) (underscoring that the Second Circuit, in *Khulumani*, supported a theory of aiding and abetting liability); Kristen Hutchens, *International Law in American Courts*—Khulumani v. Barclay National Bank Ltd., 9 GERMAN L.J. 639, 644 (2008) (describing the revolutionary nature of the *Khulumani* decision).

114. *See* Gallagher, *supra* note 8, at 762 (recounting that the *Khulumani* Court split as to whether to consult international or domestic law to define the factors of aiding and abetting under the ATCA); *see also* Sebok, *supra* note 85 (recognizing that it is uncertain whether ATCA aiding and abetting liability should be based on international law or federal common law). *Compare Khulumani*, 504 F.3d at 284 (Hall, J., concurring) ("As *Sosa* makes clear, a federal court must turn to international law to divine standards of primarily liability under the ATCA. To derive a standard of accessorial liability, however, a federal court should consult the federal common law."), *with id.* at 270 (Katzmann, J., concurring) ("[T]o assure itself that it has jurisdiction to hear a claim under the ATCA, [a federal court] should first determine whether the alleged tort was in fact 'committed in violation of the law of nations, 28 U.S.C. § 1350, and whether this law would recognize the defendants' responsibility for that violation."). *But see id.* at 321 (Korman, J., dissenting) (positing that international law does not recognize corporate liability).

115. *See supra* note 114 and accompanying text (stating that the *Khulumani* Court, although differing on applicable standards, recognized the possibility of aiding and abetting liability under the ATCA).

116. *See Khulumani*, 504 F.3d at 297 (Hall, J., concurring); *see also* WILLET, SUGGS & PENNOTTI, *supra* note 37, at 20 (alleging that if corporate defendants could be held liable for violations committed by the South African apartheid regime, businesses may be deterred from investing or conducting business in nations with similar problems); Gallagher, *supra* note 8, at 757 (noting Germany's concerns that ATCA litigation against a German corporation would offend the country's sovereignty, and international economic exchange).

117. *See Khulumani*, 504 F.3d at 259 (commenting that the both the US and South African governments voiced opposition to this litigation); *id.* at 306–11 (Korman, J., dissenting) (contending that deference should be accorded to the concerns of the US executive, and other nations to protect US foreign policy).

Additionally, the possibility of such liability could also discourage investment in or forming relationships with governments with questionable human rights records.[118]

On October 2, 2009, the Second Circuit issued another significant decision for ATCA corporate liability, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*[119] The suit, first filed in 2001 in SDNY, alleged that Talisman Energy, a Canadian corporation, aided and abetted the Sudanese government's ethnic-cleansing campaign and displacement of local populations in order to secure oil exploration and protect oil fields.[120] Talisman twice filed a motion to dismiss, which the courts denied.[121] In 2006, however, the court granted summary judgment for Talisman.[122] Plaintiffs appealed to the Second Circuit, which affirmed the lower court's holding.[123] The Court held that the plaintiffs failed to prove that Talisman Energy

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118. *See id.* at 330 (Korman, J., dissenting) ("[T]he decision to embrace this broader scope of ATCA liability will generate tremendous uncertainty for private corporations, who will be reluctant to operate in countries with poor human rights records for fear of incurring legal liability for the regimes' bad acts."); *see also* JOSEPH, *supra* note 89, at 52 (reasoning that continued ATCA litigation against corporations may lead companies to curb investment in economically dependent countries that have questionable human rights histories).

119. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009).

120. *See id.* at 262–64; *see also* DAVIS, *supra* note 11, at 159 (clarifying that in *Presbyterian Church* the plaintiffs, Sudanese residents, charged Talisman Energy with facilitating the Sudanese government's blatant human rights violations, including genocide and crimes against humanity in order to protect oil exploration); Regina, *Canada Says U.S. Can't Hear Lawsuit,* Canada.com (May 26, 2007), http://www.canada.com/reginaleaderpost/news/story.html?id=0b22a8b6-36a3-48c0-a8ed-86ecb9a86e98 (acknowledging the Sudanese plaintiffs' position that the government with the aid of Talisman Energy lead an ethnic cleansing campaign).

121. *See Presbyterian Church,* 582 F.3d at 251–52 (chronicling Talisman Energy's motions to dismiss); *see also No Liability for Violations of International Law Unless Aid Was Purposeful, Second Circuit Rules in Cause Brought Under Alien Tort Statute,* MILBANK LITIGATION (2009), http://www.milbank.com/NR/rdonlyres/78529DE8-6577-400E-ABC320650084B954/0/101309_Presbyterian_Church_of_Sudan_v_Talisman_Energy_Inc.pdf (noting that the court rejected both of Talisman's motions to dismiss, despite the US and Canadian governments' opposition to the litigation).

122. *See Presbyterian Church,* 582 F.3d at 254 (explaining that after Talisman won summary judgment the district court entered a judgment for Talisman).

123. *See id.* at 256 (asserting that although the violations of international law alleged by plaintiffs: "[i] genocide, [ii] war crimes, and [iii] crimes against humanity" are all actionable under the ATCA, plaintiffs failed to establish the requisite purpose required for liability).

purposefully partook in human rights violations against the Sudanese people.[124]

In its opinion, the Second Circuit clarified the standard for corporate liability under the ATCA. The court posited that the applicable standard is found in international law.[125] Therefore, by mandating the application of the international *mens rea* standard, the court established that aiding and abetting liability requires purpose, not merely knowledge.[126] Accordingly, a plaintiff must demonstrate that the defendant acted with the *purpose* of committing human rights abuses, which Presbyterian Church failed to do.[127]

The *Presbyterian Church* decision is relevant for the evolution of corporate ATCA liability in the Second Circuit for several reasons. First, the court did not definitively declare that corporations can be held liable for violating international law.[128] The court noted that because plaintiff's claims failed on other grounds, it was unnecessary to rule on the question of corporate

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124. *See id.* at 247 (holding that "[t]he standard for imposing accessorial liability under the ATS must be drawn from international law; and that under international law, a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses"); *see also* Drimmer & Lieberman, *supra* note 102 (explaining that plaintiffs failed to prove that Talisman Energy intentionally supported the claimed violations).

125. *See Presbyterian Church*, 582 F.3d at 259 ("Thus applying international law, we hold that the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge."); *see also* Chimène I. Keitner, Kiobel v. Royal Dutch Petroleum, *Another Round in the Fight over Corporate Liability under the Alien Tort Statute*, 14 AM. SOC'Y INT'L L. 30 (2010), *available at* http://www.asil.org/insights100930.cfm (discussing the Second Circuit's contention that international law requires a plaintiff to demonstrate that the defendant purposefully aided and abetted human rights violations).

126. *See supra* note 125 and accompanying text (identifying the applicable standard); *see also* Drimmer & Lieberman, *supra* note 102 (advancing that when the Court identified international law as the source of ATCA secondary liability it declined to adopt the US domestic standard articulated in the Restatement (Second) of Torts § 876(b), which only requires knowledge to establish aiding and abetting liability).

127. *See* Drimmer & Lieberman, *supra* note 102 (summarizing the Second Circuit's holding that mere knowledge of human rights violations is not enough to establish liability). *See generally Presbyterian Church*, 582 F.3d 244.

128. *Presbyterian Church*, 582 F.3d at 261 n.12 ("We will assume, without deciding, that corporations such as Talisman may be held liable for the violations of customary international law that Plaintiffs allege. Because we hold that plaintiffs' claim fail on other grounds, we need not reach, in this action, the question of 'whether international law extends the scope of liability' to corporations.").

liability first raised in footnote twenty of the *Sosa* decision.[129] Second, the court's decision heightened a plaintiff's burden of proof, making it increasingly difficult to bring human rights claims against corporate defendants.[130] On October 4, 2010, the US Supreme Court declined Talisman Energy's request to rule on the question of corporate liability under international law.[131]

Not only did the US government object to the application of the ATCA to multinational corporations, but the Canadian government and a group of Canadian businesses, as amicus curiae, also voiced opposition to the case.[132] The Canadian government, in a statement of interest explained that US adjudication of the case would have a detrimental effect on Canada's strategy to negotiate a peace settlement in Sudan through economic engagement in the nation.[133] The Canadian

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129. *Id.*; *see also* Gallagher, *supra* note 8, at 759 (reaffirming that the court did not rule on the question of corporate liability first raised in footnote twenty of the Supreme Court's *Sosa* opinion).

130. *See No Liability for Violations of International Law*, *supra* note 121 (observing that human rights plaintiffs in the Second Circuit will no longer be able to charge multinational corporations based on a corporation's mere knowledge of wrongdoing in a country where they are conducting economic activity).

131. *See Talisman Energy, Inc. v. Presbyterian Church of Sudan*, 131 S. Ct. 122 (2010) (denying a petition for writ of certiorari); *see also Alien Torts Trial Trails: An American Court Blocks Human-Rights Suits Against Businesses*, ECONOMIST, Oct. 9, 2010, at 51 (reporting that the US Supreme Court elected not to confront the question of whether corporations could be held liable for human rights violations under international law).

132. *See generally* Brief for the United States as Amicus Curiae Supporting Defendant-Appellee, *The Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2007) (No. 07-0016) (detailing the negative impact that ATCA litigation has on the country's international relations and Canada's objection to the litigation); Brief for the Canadian Chamber of Commerce, the Mining Association of Canada et al., as Amici Curiae Supporting Defendant-Appellee, *The Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2007) (No. 07-0016) ("Canada was the place where this dispute should have been addressed assuming that Sudan, itself the alleged violator of the law of nations, was not a place where justice could be done. When filed, the case had more connection to Canada than to the United States, and the comity of nations and international rules of jurisdiction would have directed it to Canada.").

133. *See Presbyterian Church*, 582 F.3d at 252 (identifying Canada's argument that ATCA litigation interferes with the country's sovereignty, hampers its ability to use trade to affect peace, and offends traditional extraterritorial jurisdiction); Brief for the United States, *Presbyterian Church*, *supra* note 132, at 22 ("As the district court in this case observed, the State Department received a diplomatic note from Canada raising significant concerns about United States courts' expansive exercise of jurisdiction under the ATS in a manner that disrupts Canada's own efforts to use economic engagement in Sudan, combined with sanctions, in an attempt to bring about peaceful resolution of Sudan's internal disputes."); *see also* DAVIS, *supra* note 11, at 159–60 (recognizing Canada's contention that the United States should not adjudicate the case because the

business community also warned that ATCA litigation could complicate and discourage investment in developing countries.[134] Similarly, the United States also appealed to the Court regarding its own relations with Sudan.[135] The Southern District of New York rejected the argument that concern for US international relations mandated dismissal of the case, reasoning that the relationship between the case and US relations with Sudan and Canada was insufficient grounds.[136] Although Talisman Energy won the case, the company still ultimately withdrew from Sudan.[137]

On September 17, 2010, the Second Circuit definitively held that multinational corporations could not be held liable for human rights violations under the ATCA.[138] In 2002, Esther

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events occurred outside the country, and further that it could negatively impact Canada's peace efforts in Sudan); Jonathan Drimmer, *Think Globally, Sue Locally,* WALL ST. J., June 19, 2010, at A23 (noting that Talisman Energy, spent millions of dollars in Sudan on development programs in order to bring peace in the "civil war ravaged nation"). *See generally* Brief for Wash. Legal Found. & Allied Educ. Found. as Amici Curiae Supporting Appellee, The Presbyterian Church of Sudan v. Talisman Energy (2d Cir. 2007) (No. 07-0016) (expressing concern for Canadian international affairs: "Canada by diplomatic note has confirmed that 'the lawsuit interfered with Canadian foreign policy by undermining Canada's ability to offer trade support services to the Sudanese government as an inducement to resolve Sudan's internal disputes, because Canadian Corporations would be unwilling to cooperate with the provisions of such services if doing so would subject them to suits in U.S. courts'").

134. *See* Brief for the Canadian Chamber of Commerce, *supra* note 132, at 27–28 ("Canadian policies using economic trade as a tool of diplomacy may be impeded if investments abroad are curtailed by fear of ATS claims. If ATS litigation is permitted to chill legitimate business investment and activities in developing countries, it will diminish one of the most effective vehicles for economic development and with it increased respect for human rights.").

135. *See* JOSEPH, *supra* note 89, at 44 (noting that the court found that continued litigation would not hamper the United States' efforts to negotiate a peace agreement in Sudan); Washington Brief, *supra* note 133, at 24–25 (describing the Washington Legal Foundation's belief that because the events at issue in the suit did not occur in the United States, and plaintiffs did not have any meaningful contact with the country, it makes little sense for a US federal court to hear the matter).

136. *See Presbyterian Church,* 582 F.3d at 252 ("As to dismissal on political question grounds, the court emphasized that the State Department letter did not explicitly declare that the lawsuit would interfere with United States policy toward the Sudan or Canada . . . ."); *see also Presbyterian Church of Sudan v. Talisman Energy,* No. 01-9882, 2005 WL 2082846, at *6 (S.D.N.Y. Aug. 30, 2005) (discussing Canada's letter to the Court, and dismissing Canada's concerns about the application of the ATCA).

137. *See* Drimmer, *supra* note 133 (clarifying that in the aftermath of the case, Talisman sold its interests and withdrew from Sudan).

138. *See* Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 120 (2d Cir. 2010) ("As we explain in detail below, however, customary international law has steadfastly rejected the

Kiobel of Nigeria filed a putative class action suit against the Royal Dutch Petroleum Company of the Netherlands, the Shell Transport and Trading Company of the United Kingdom, and subsidiaries.[139] The Shell Transport Petroleum Development Company of Nigeria engaged in oil exploration and development in the Ogoni region of the Niger Delta.[140] Residents of the Ogoni region protested the environmental impacts of these activities.[141] The plaintiffs alleged that defendants enlisted the Nigerian Army to quell the protests.[142] The army was accused of massacring the Ogoni villagers, raping and arresting residents, and plundering and looting with the approval and assistance of the corporate defendants.[143] In 2006, the Southern District of New York dismissed the lawsuit in part, and certified its entire order for interlocutory appeal.[144] The Second Circuit proceeded to dismiss the claim citing a lack of subject matter jurisdiction.[145] On February 4, 2011, the court denied plaintiffs' petition for a panel rehearing.[146]

The Second Circuit bench split in its decision, with the majority holding that corporations cannot be held liable under

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notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for violation of the law of nations. We must conclude, therefore, that insofar as plaintiffs bring claims under the ATS against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs' claims fall outside the limited jurisdiction provided by the ATS.").

139. *Id.* at 123.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *See id.* at 124 (describing the procedural history of the case).

145. *See id.* at 149 (citations omitted) ("We do not know whether the concept of corporate liability will 'gradually ripen[ ] into a rule of international law.' It can do so, however, only by achieving universal recognition and acceptance as a norm in the relations of the States *inter se.* For now, and for the foreseeable future, the Alien Tort Statute does not provide subject matter jurisdiction over claims against corporations."); *see also* Keitner, *supra* note 125 (commenting that the Second Circuit dismissed the case due to lack of subject matter jurisdiction because the defendants were not natural persons but a corporation).

146. *See* Kiobel v. Royal Dutch Petroleum Co., 2011 WL 338048, at *4 (2d Cir. 2011) (Jacobs, J. concurring) ("The majority opinion demonstrates why ATS suits against corporations are foreclosed. It is a matter of great importance to say so, in order to promote international comity, to administer efficient handling of cases, and to avoid the use of our courts to extort settlements.").

international law and, therefore under the ATCA.[147] The two-judge majority reasoned that because no international tribunal has recognized corporate liability under customary international law, it follows that it is not actionable under the ATCA.[148] Drawing on footnote twenty of the *Sosa* opinion, as well as the *Presbyterian Church* decision, the court considered customary international law when determining what claims are actionable under the ATCA, and who may be a defendant.[149] Therefore, courts should look not to domestic law, which permits corporate liability, but instead to customary international law, which the judges insist has not yet accepted this form of liability.[150] Further, the court recognized the relevance of the ATCA's original purpose to protect and preserve international relations.[151]

The concurring judge, although in agreement with the outcome, rejected the finding that corporations cannot be liable

147. *Kiobel*, 621 F.3d at 149 ("Moreover, nothing in this opinion limits or forecloses corporate liability under any body of law *other than the ATS*—including the domestic statutes of other States-and nothing in this opinion limits or forecloses Congress from amending the ATS to bring corporate defendants within our jurisdiction.").

148. *Id.* at 148–49 ("No corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot, as a result, form the basis of a suit under the ATS."); *see also* Keitner, *supra* note 125 (highlighting that international tribunals have not recognized corporate liability pursuant to international law, and therefore the ATCA may not either).

149. *Kiobel*, 621 F.3d at 128.

150. *See* Keitner, *supra* note 125 (stating that the Second Circuit's decision recognized that in footnote twenty of the *Sosa* decision "the Supreme Court foreclosed the application of domestic law to the question of corporate liability"); *see also* Julian G. Ku, *The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Lawmaking*, 51 VA. J. INT'L L. 353, 372 (2010) (explaining that the *Kiobel* majority considers international law the defining source behind ATCA jurisprudence).

151. *Kiobel*, 621 F.3d at 140 ("It bears underscoring that the purpose of the ATS was not to encourage the United States courts to create new norms of customary international law unilaterally. . . . Instead, the statute was rooted in the ancient concept of comity among nations and was intended to provide a remedy for violations of customary international law that 'threaten[ ] serious consequences for in international affairs.' . . . Unilaterally recognizing new norms of customary international law—that is, norms that have not been universally accepted by the rest of the civilized world- would potentially create friction in our relations with foreign nations and, therefore, would contravene the international comity the statute was enacted to promote.").

pursuant to the ATCA.[152] He protested that the majority's interpretation of the law undermines international law's commitment to fundamental human rights.[153] Further, he faulted the majority's reliance on international criminal law as opposed to civil law, reasoning that the law of nations has outlawed certain conduct, and it is for each state to determine how to punish such violations.[154] The concurring judge also pointed out that the United States has chosen to look to civil instead of criminal liability, and the majority dismisses this approach.[155] Despite the judge's differing opinions with *Kiobel*, ATCA plaintiffs lost the "traditionally most hospitable" circuit for human rights actions against corporations.[156]

The Second Circuit's decision was also welcomed by non-US communities and multinational corporations.[157] These groups had consistently voiced their opposition to the United States claiming jurisdiction over the affairs and actions of i multinationa corporations. They posited that such an action, in itself, was a violation of international law.[158]

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152. *Kiobel*, 621 F.3d at 160 (Leval, J., concurring) ("No authoritative source document of international law adopts or in any way approves the majority's view that international law authorizes imposing civil awards of compensatory damages on natural persons but leaves corporations free to violate its rules without legal consequences."); *see* Ku, *supra* note 150, at 372 (observing that in light of the *Kiobel* decision, prior ATCA decisions concerning corporate liability were incorrectly decided).

153. *Kiobel*, 621 F.3d at 170 (Leval, J., concurring) ("There is simply no logic to the majority's assumption that the withholding from international *criminal* tribunals of jurisdiction to impose *criminal* punishments on corporations (for reasons relating solely to a perception that corporations cannot commit crimes) means that international law's prohibitions of inhumane conduct do not apply to corporations.").

154. *See id.* at 175 ("[T]he majority's contention . . . misunderstands how the law of nations functions. Civil liability *under the ATS* for violation of the law of nations is not awarded because of a perception that international law commands civil liability throughout the world. . . . The majority's ruling defeats the objective of international law to allow each nation to formulate its own approach to the enforcement of international law.").

155. *See supra* notes 151–152 and accompanying text (describing the majority's application of international criminal law).

156. *See* Keitner, *supra* note 125 (contending that human rights plaintiffs are likely anxious about the result of the *Kiobel* decision, as the Second Circuit was an open forum for ATCA claims).

157. *See* Bellinger, *Shortening the Long Arm of the Law*, *supra* note 2, at 8 (noting that members of the international community who oppose the United States' exercise of extraterritorial jurisdiction, and adjudication of non-US citizens welcome the *Kiobel* decision).

158. *See supra* note 157 and accompanying text (explaining that the international community positively reacted to the court's holding).

B. *The Ninth and Eleventh Circuits: US Courtroom Doors Are Still Open to Corporate Liability under the ATCA*

While the ATCA cases in the Second Circuit ended prior to trial, the Eleventh Circuit, in 2007, was the first to send such a case to a jury.[159] The case, *Romero v. Drummond Company*, involved a conflict between a Colombian trade union, and the local Colombian subsidiary of Drummond Co., an Alabama coal mining company.[160] The plaintiffs, heirs of the deceased union leaders, and the union, alleged that Drummond's local subsidiary, with the knowledge of executives in the United States, hired Colombian paramilitaries to torture and kill union leaders.[161] Additional claims were also brought under Colombian law, the Torture Victim Protection Act of 1991, and Alabama state law.[162] Only one claim, that Drummond aided and abetted the abuses went to trial, the rest were dismissed in summary judgment proceedings.[163] A jury ultimately found for Drummond Co., absolving the company of any liability.[164] Plaintiffs appealed to the Eleventh Circuit, which affirmed the lower court's holdings and outcome of the trial.[165]

Romero is significant for human rights plaintiffs and corporate defendants because the Eleventh Circuit recognized that ATCA liability extends to corporations.[166] The court based its holding not only on precedent but also on the text of the ATCA, which does not expressly bar a corporate defendant.[167] Further,

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159. *See* Eric A. Savage & Michael G. Congiu, *The Continued Viability of the Alien Tort Claims Act and the Torture Victim Protection*, MONDAQ, Jan. 29, 2009, *available at* 2009 WLNR 1699098 (explaining that the Eleventh Circuit *Drummond* case was the first corporate ATCA case to go to trial); *see also* Qualters, *supra* note 71, at 8 (describing the first ATCA jury trial in an Alabama court as "heartening to corporate defendants"); Altschuller, Feldman & Blecher, *supra* note 113 (claiming that with the *Drummond* case the first ATCA case headed to trial).

160. *See* Romero v. Drummond Co., 552 F.3d 1303, 1308–09 (11th Cir. 2008).

161. *Id.*

162. *Id.* at 1318.

163. *Id.* at 1313.

164. *Id.*; *see also* Qualters, *supra* note 71, at 8 (commenting that while the trade unionists alleged that the paramilitaries were Drummonds agents, the jury disagreed and found Drummond not liable for the deaths of the trade unionists).

165. *Romero*, 552 F.3d at 1303–04.

166. *See infra* note 167 (identifying the Court's holding).

167. *Romero*, 552 F.3d at 1315 ("Because the Alien Tort statute is jurisdictional, we must address . . . corporate liability under that statute. The text of the Alien Tort Statute provides no express exception for corporations . . . and the law of this circuit is that this

the court also recognized the existence of aiding and abetting liability.[168] Although the jury found for Drummond Co., after the *Romero* decision, the Eleventh Circuit remained a hospitable forum for corporate ATCA claims.[169] Significantly, the outcome of the case demonstrated the possibility of defeating ATCA claims at trial.[170] Although Drummond Co. won the suit, the company still suffered economic consequences following the litigation, including the loss of a potential client.[171]

In 2008, *Bowoto v. Chevron Corp* went to trial in the United States District Court for the Northern District of California.[172] The suit arose out of events that occurred on the Parabe oil platform off the coast of Nigeria in May 1998 when Nigerian natives took over the platform in what plaintiffs described as a peaceful protest.[173] Chevron, however, disagreed with the characterization, alleging that the protesters were dangerous, and that they seized Chevron's workers threatening them with violence.[174] After four days of protest and failed negotiations, Chevron called upon the Nigerian government's security forces for assistance.[175] The forces killed several protestors and allegedly tortured others.[176] The Northern District of California, after dismissing several of plaintiffs' claims, allowed the remaining claims, including liability for aiding and abetting under the

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statute grants jurisdiction from complaints of torture against corporate defendants."). *But see* Nora L. Tooher, *Human-Rights Cases Find Shelter under 'Pirate-Law,'* MISSOURI LAWYERS WEEKLY, Sept. 10, 2007, *available at* 2007 WLNR 26821480 (expressing concern for the foreign policy implications of ATCA litigation).

168. *See Romero*, 552 F.3d at 1315 ("the law of this Circuit permits a plaintiff to plead a theory of aiding and abetting liability under the Alien Tort Statute . . . .").

169. *See supra* note 167 and accompanying text (commenting that corporate ATCA liability exists in the Eleventh Circuit); *see also* Savage, *supra* note 159 (clarifying that the Eleventh Circuit recognized that a multinational company can be found liable for human rights violations under the ATCA).

170. *See* Qualters, *supra* note 71, at 8 (pointing out that plaintiffs argued that their inability to present additional witnesses may have affected the outcome of the case).

171. *See* Mike Cooper, *Danish Energy Firm Will Stop Buying from Drummond, Pending Court Case*, PLATTS COAL OUTLOOK, Nov. 27, 2006, at 6, *available at* 2006 WLNR 21355024 (remarking that the Danish firm Dong declined "to book any fresh Colombian coal from the US company Drummond while a legal action alleging its involvement in the deaths remain[ed] unresolved").

172. *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010).

173. *Id.* at 1121.

174. *Id.*

175. *Id.* at 1122.

176. *Id.*

ATCA to go to trial.[177] On December 1, 2008, the jury returned a verdict for Chevron, plaintiffs appealed and the Ninth Circuit affirmed the jury verdict.[178]

Although the case ended in a verdict for the corporate defendants, the *Chevron* court still acknowledged the validity of corporate liability under the ATCA for aiding and abetting.[179] The court explained that the Nigerian military was only Chevron's agent when carrying out the specific tasks Chevron had hired them to perform, namely security.[180] The jury, based on the presented evidence, found that the military had not used excessive force, thereby freeing Chevron of liability.[181] After its victory, Chevron filed for court fees, an application that the court denied.[182] Despite this loss, human rights plaintiffs still consider *Chevron* a landmark case because it reached trial, and thereby demonstrated potential for corporate liability in the future.[183] At

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177. *See id.; see also* Pamela A. MacLean, *Chevron Seeks Costs after Winning Human Rights Case,* LEGAL INTELLIGENCER, Mar. 16, 2009, at 4 (commenting that plaintiffs ultimately alleged that Chevron should be liable for aiding the Nigerian military); Qualters, *supra* note 71, at 8 (noting that on August 14, 2007, Judge Susan Illston reversed her 2006 judgment, granting summary judgment for some of the defendant's claims and sent the remaining open issues to trial).

178. *See Bowoto,* 621 F.3d at 1116–17; MacLean, *supra* note 177, at 4 (reporting that a jury denied plaintiffs' claims that they were subject to torture and wrongful death because of their involvement in the platform protest).

179. *See* Bowoto v. Chevron, No. 99-02506, 2006 WL 2455752, at *9 (N.D. Cal. Aug. 22, 2006) (explaining that because private actors are liable under international law, corporations are also); *see also* James Donnelly-Saalfield, *Irreparable Harms: How the Devastating Effects of Oil Extraction in Nigeria Have Not Been Remedied by Nigerian Courts, the African Commission, or U.S. Courts,* 15 HASTINGS W.-NW. J. ENVT'L. L. & POL'Y 371, 403 ("First, the court concluded that the plaintiffs had demonstrated sufficient evidence of aiding and abetting to establish state action, including evidence that Chevron personnel were directly involved in the attacks that formed the basis of the suit, transported the Nigerian military to the sites of the attacks, paid the Nigerian military and knew that it was prone to use of excessive force.").

180. *See* Keither Ecker, *Alien Allegations: Jury Clears Chevron of Responsibility in Nigerian Security Operation,* INSIDE COUNSEL, Mar. 1, 2009, at 20 (clarifying the court's finding that for ATCA liability, the security forces would only be considered Chevron's agent if when performing the actions they were acting under Chevron's instructions. Regardless, the jury found the military's actions appropriate considering the circumstances).

181. *Id.*

182. *See* MacLean, *supra* note 177, at 4 (observing that Chevron requested, and the Court rejected, US$485,000 in court fees from Nigeria, perhaps in an effort to discourage future ATCA cases).

183. *See* Dana Wagner, *The Chevron Precedent,* PAMBAZUKA NEWS (June 30, 2010), http://pambazuka.org/en/category/features/65583 (recognizing that the *Chevron* court further reaffirmed that multinational companies can be liable as a third party, and

the same time, the case also showed corporations that if they elect not to settle an ATCA case, the possibility remains that such claims can be defeated at trial.[184] Chevron's counsel also vocalized his concerns about the nature of ATCA litigation, explaining that US courtrooms provided a forum for plaintiffs to make claims that are exaggerated and harmful to a corporation.[185]

Although *Sinaltrainal v. Coca-Cola Company*, filed in the United States District Court for the Southern District of Florida in the Eleventh Circuit, never made it to trial, the case is also indicative of ATCA litigation in the circuit.[186] In 2001, Sinaltrainal, a Colombian workers' union, filed claims against Coca-Cola Company and its bottling subsidiaries alleging that they collaborated with paramilitaries and the local police, to systematically intimidate, detain, kidnap, torture, and murder Colombian trade unionists.[187] Sinaltrainal brought four separate claims, three of which the court considered together.[188] The Southern District of Florida ultimately dismissed the claims

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that such cases, which are likely to be settled outside of the courtroom, can also make it to trial, demonstrating to "communities around the world . . . that they have recourse to legal mechanisms to bring corporations that violate their human rights to justice").

184. *See* Ecker, *supra* note 180 (quoting Chevron's General Counsel: "[w]e as a company are certainly willing to contemplate settlement if the economics are right for doing so. But that includes the importance of our reputation, which also has a concept of justice embedded into it. We certainly don't want to pay people just because they run into a courthouse and make some allegations").

185. *See generally* Michael Peel, *Old Law Exhumed by Human Rights Fighters*, FIN. TIMES, May 25, 2009, http://www.ft.com/cms/s/0/3d93c1a0-493f-11de-9e19-00144feabdc0.html#axzz1IzTiTmSb ("[T]he statute provides an easy platform for claimants to make damaging allegations before a U.S. audience that often prove 'very much overstated' when they are tested in court.").

186. *See generally* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009).

187. *See id.* at 1257–58; *see also* John Pacenti, *Ruling Helps Coke, Chiquita Fight Federal Law Suits*, BROWARD DAILY BUS. REV., Oct. 1, 2009, at A1 (explaining that "the allegations stem from four lawsuits claiming Coca-Cola bottlers Panamco and Bebidas collaborated with paramilitary forces in what the Eleventh Circuit called 'the systematic intimidation, kidnapping, detention, torture and murder of Colombian trade unionists'"); *Civil Procedure—Pleading Requirements—Eleventh Circuit Dismisses Alien Tort Statute Claims Against Coca-Cola under* Iqbal*'s Plausibility Pleading Standard*, 123 HARV. L. REV. 580, 581 (2009) [hereinafter *Pleading Requirements*] (identifying the subsidiaries as Bebidas and Panamco Columbia, S.A); Regina A. Rauxloh, *A Call for the End of Impunity for Multinational Corporations*, 14 TEX. WESLEYAN L. REV. 297, 301 (2008) (explaining that plaintiffs alleged that Coca-Cola had a relationship with violent paramilitary).

188. *See Sinaltrainal*, 578 F.3d at 1258–60 (explaining the procedural history).

against Coca-Cola USA and Coca-Cola Colombia in 2003 and the remaining claims in 2006.[189]

Plaintiffs appealed to the Eleventh Circuit, which upheld the dismissal of the suits against Coca-Cola.[190] The dismissal, however, was not indicative of the court's standing on corporate liability under the ATCA. The court explicitly stated that the circuit recognized such liability pursuant to the ATCA.[191] In fact, the court dismissed the claims for a failure to satisfy pleading standards under *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.[192] Therefore, human rights lawyers were not discouraged by the result, arguing that, as the claims were dismissed on a technicality, the bottlers and Coca-Cola were not officially exonerated for the events in Colombia.[193] At the same time, a demand for such pleading specificity may also be an obstacle for human rights plaintiffs.[194] Despite the dismissal, however, Coca-Cola was not left unscathed, suffering damage to its image and lost contracts.[195] As in previous cases, concerned parties also

189. *See id.*; *see also Pleading Requirements*, *supra* note 187, at 581–82 (clarifying that the lack of subject matter jurisdiction, and the terms of the bottling agreement that Coca Cola had with its subsidiary contributed to the dismissal of the claims).

190. *Sinaltrainal*, 578 F.3d at 1252; *see also* JOSEPH, *supra* note 89, at 143 (setting forth that *Sinaltrainal* shows that multinational corporations are not necessarily liable for the actions of their subsidiaries).

191. See *Sinaltrainal*, 578 F.3d at 1263 ("In addition to private individual liability, we have also recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations.").

192. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (establishing a heightened pleading standard); *Aschcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."); *see also* Pacenti, *supra* note 187, at A1 (explaining that pursuant to *Iqbal* a judge may accept well-pled facts as true, but the court is not obliged to accept the plaintiff's legal conclusion and can dismiss the complaint if the court deems it implausible); *Pleading Requirements*, *supra* note 187, at 582–83 (explaining that plaintiffs did not meet the plausibility requirement set forth in *Twombly*).

193. *See* Alison Frankel, *Coke Wins Test Case of Alien Tort Laws*, MIAMI DAILY BUS. REV., Aug. 14, 2009, at A3 (contending that the case was dismissed on a technicality).

194. *See Pleading Requirements*, *supra* note 187, at 584 (clarifying that the plausibility standard applied by the *Sinaltrainal* court may be an obstacle to ATCA claims in the Eleventh Circuit).

195. *See* Drimmer, *supra* note 133, at A23 (explicating that ATCA litigation is not just limited to traditional motion practice, but is accompanied by media and political campaigns seeking to cause financial detriment to the companies or forcing sizeable settlements); Hannah McGoldrick, *U. Massachusetts Students Boycott Coca-Cola*, UNIVERSITY WIRE (May 4, 2009, 11:51 PM) (stating that University students boycotted Coca-Cola products served on campus in light of this case); KOEBELE, *supra* note 13, at 303

voiced strong opposition to the litigation, pointing to the detrimental effect it has on the United States' foreign relations.[196]

The case law and rulings produced by the three circuits in the area of ATCA corporate liability have created a significant circuit split. With the *Kiobel* decision, the Second Circuit held that it no longer recognizes corporate liability. The Ninth and Eleventh Circuits have not made such a definitive ruling. Instead, those circuits have seen ATCA cases go to trial, and the courts have recognized the existence of such liability. In light of the above, the landscape of corporate ATCA liability in the United States is varied.

III. *THE SECOND CIRCUIT IS CORRECT: WHY MULTINATIONAL CORPORATIONS SHOULD NOT BE LIABLE UNDER THE ATCA*

While the human rights abuses alleged in corporate ATCA actions are undeniably atrocious and mandate remedy and recourse, it is questionable whether the ATCA is the appropriate vehicle to address these concerns. The newly-created circuit split, with two circuits allowing such claims and one ruling against them, only emphasizes the importance of this question.[197] Part III analyzes the implications of this division, stressing its international repercussions and advocating that the Second Circuit's *Kiobel* holding be uniformly adopted. Section A argues that continued ATCA corporate litigation threatens to result in American judicial imperialism. Section B contends that ATCA litigation poses a real economic threat not only to multinational corporations, but also to developing countries, negatively impacting US international relations. Finally, Section C advocates for the US Supreme Court to review, and definitively determine

(recognizing the value of media coverage and boycott if success in an ATCA claim seems unlikely).

196. *See* Brief for The National Foreign Trade Council, et al., as Amici Curiae Supporting Defendants, Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (2009) (No. 01-03208), 2008 WL 2805225 (positing that ATCA litigation harms US external policy for four reasons: 1) casting the limelight on a US ally; 2) risking that discovery may embarrass the implicated nation; 3) threatening comity; 4) causing friction in US relations).

197. *See supra* Part II.A. and II.B. (explaining the split between the Second, Ninth, and Eleventh Circuits).

that corporate liability does not exist under the ATCA in light of the conflicting standards among the circuits.

A. *The Threat of Misinterpreting the ATCA*

The *Kiobel* court correctly recognized that the ATCA was enacted in large part to preserve international affairs.[198] In that vein, the court asserted that if US courts, on their own accord, identified corporate liability as a new standard of customary law they would risk offending other countries and thereby flout the ATCA's original purpose.[199] This holding is in line with the first Congress' intention to observe international standards and demonstrate respect for the international community.[200]

Further, the fact that the United States, the governments of other sovereign states, and concerned entities have repeatedly submitted amicus curiae briefs expressing their objections to ATCA litigation, underscores the position that the current incarnation of the ATCA contradicts its original purpose.[201] Arguments raised in opposition to the ATCA have included infringement of sovereign immunity and interference with another country's foreign relations.[202] The founders did not intend for the federal courts to meddle in international affairs.[203] Instead they charged the courts with saving the country from

198. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 140–41 (2d Cir. 2010) ("Unilaterally recognizing new norms of customary international law—that is, norms that have not been universally accepted by the rest of civilized world—would potentially create friction in our relations with foreign nations and, therefore, would contravene the international comity the statute was enacted to promote."); *see supra* note 138 and accompanying text (detailing the *Kiobel* Court's perspective on ATCA history).

199. *See supra* notes 138, 145, 148 and accompanying text (pointing out that the *Kiobel* Court evaluated the ATCA in light of the framers' intentions to preserve international comity and respect the established norms of international law).

200. *See supra* note 151 and accompanying text (setting forth that the ATCA was first meant to remedy situations that threatened international relations); *see also supra* Part I.A. (discussing the beginnings of the ATCA and the first Congress' intention to abide by international standards).

201. *See supra* notes 60, 81, 85–86, 88–89, 132–133, 196 and accompanying text (identifying a series of briefs filed on behalf of institutions and governments opposing corporate ATCA litigation).

202. *See supra* note 67, 74, 116, 133 and accompanying text (explaining concerns surrounding the ATCA corporate litigation).

203. *See generally supra* Part I.A. (describing the first Congress' prerogative to establish itself in the international community and exhibit the new nation's intent to abide by international norms).

embarrassment and preserving relationships.[204] Allowing US courts to pass judgment on the policies of other countries by adjudicating these claims does not satisfy that goal, and may lead to international conflict. For example, other countries may understandably oppose multinational corporations being hauled into US courtrooms. Similarly, US judicial interference in another country's economy or governance is risky and could lead to international repercussions; especially since US courts are hesitant to consider the concerns of other nations.[205] Therefore, it is not surprising that multinational corporations and other countries alike welcomed the Second Circuit's *Kiobel* holding.[206] The Second Circuit's approach protects international relations and respects the intention of the ATCA.

In *Sosa* the US Supreme Court highlighted the role of the executive branch, and asserted that deference should be accorded to its viewpoints and opinions in regard to foreign affairs.[207] The executive branch has repeatedly advanced the argument that ATCA litigation will hamper US international relations.[208] In the face of international and governmental backlash, the Second Circuit's ruling confronts this issue and offers an obviously effective remedy: disallow corporate liability under the ATCA.

The United States must proceed with caution when facing the controversy surrounding the ATCA. The United States is assuming the right to judge and punish international entities. At the same time, however, the United States is reluctant to allow

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204. *See supra* notes 17–28 and accompanying text (positing that the first Congress granted the federal courts the right to adjudicate claims involving non-US citizens in the aftermath of two international incidents involving diplomats that highlighted the importance of federal control over sensitive incidents).

205. *See generally supra* notes 117–19, 132–33, 196 and accompanying text (demonstrating that although the international community voiced their opposition to the ATCA it was not always entertained by courts).

206. *See supra* note 157 and accompanying text (describing that the international community welcomed the court's decision).

207. Sosa v. Alvarez-Machain, 542 U.S. 761 (2004) (emphasizing that the "serious weight" of the "executive branch's view of the case's impact on foreign policy" and the need "to ensure that ATS litigation does not undermine the very harmony it was intended to promote").

208. *See supra* notes 3, 86–89, 117 and accompanying text (explaining the US Executive branch's reactions to ATCA litigation).

other nations to exercise similar power over themselves.[209] This double standard highlights yet another source for international conflict in the world of ATCA litigation. Therefore, the actions of the US courts are bordering on a form of American judicial imperialism.[210] This is not in line with the aims of the first Congress, which was highly concerned with the integration of and deference to international law.[211]

B. *The ATCA: An Economic Nightmare*

"If you're a business and you haven't been sued under this law, don't worry, you will be."[212]

Corporate liability under the ATCA also threatens to negatively impact economic development and investment by multinational corporations.[213] Scholars have identified various nightmare scenarios, all ending with multinational corporations pulling out of developing countries to protect themselves from potential ATCA liability.[214] Comparing the standards set forth by the Second, Ninth, and Eleventh Circuits, what actually qualifies as aiding and abetting is ambiguous.[215] It is unclear if a corporation can be held liable for the offenses committed by a local government or its agents, because the available standards

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209. *See supra* note 28 and accompanying text (setting forth that the US has failed to allow the international community to adjudicate United States corporate human rights misdeeds); *see also Periodic Review*, *supra* note 3, at 6 (mentioning that the US has not complied with international human rights regulations in the face of its own corporate human rights violations).

210. *See* HUFBAUER & MITROKOSTAS, *supra* note 3, at 8–9 (warning that if US federal courts continue to adjudicate corporate ATCA matters, their actions will likely be classified as judicial imperialism).

211. *See supra* note 18 (discussing the Congress' intentions behind the enactment of the ATCA).

212. WILLET, SUGGS & PENNOTTI, *supra* note 37, at 35.

213. *See* KOEBELE, *supra* note 13 (furthering that multinational corporations may hesitate to conduct business or invest in developing countries with questionable human right records); *see also supra* notes 116–19, 133–36 (discussing implications for economic activities by corporations charged with ATCA liability).

214. *See* Hutchens, *supra* note 113, at 656 (claiming that the ATCA is a "monster" that could compel multinationals to cease economic activity in countries with shaky human rights records); HUFBAUER & MITROKOSTAS, *supra* note 3, at 1–2 (describing continued ATCA litigation as an economic nightmare scenario).

215. *See supra* Part II (recognizing the different standards imposed by the Second, Ninth, and Eleventh Circuits concerning aiding and abetting liability).

are not definitive.[216] If a multinational company decides not to invest in a developing country out of concern that they may be hauled into court, and forced to litigate or settle claims on account of their mere presence in a nation, such consequences will obviously have an impact on the world economy.[217] A questionable American statute should not be dragging multinational corporations into US courts.

C. *The Time Is Ripe for US Supreme Court Review*

This Note advocates that the Supreme Court rule on this circuit split, and adopt the Second Circuit's interpretation of the ATCA. An undesirable consequence of this circuit split is forum shopping by human rights plaintiffs, as they are free to file their suit in the circuit whose laws allow them to most effectively meet their objectives.[218] The nature of forum shopping makes ATCA litigation unpredictable, inconsistent, and burdensome for corporate defendants. Human rights plaintiffs, who are non-US citizens, alleging serious human rights abuses and claiming millions of US dollars in damages against multinational corporations, should not be able to pick and choose a forum at their leisure. The Supreme Court, or in the alternative, Congress, must institute a uniform interpretation of the ATCA and clarify the meaning, application and continuing purpose of this powerful statute.

Additionally, as the "plaintiff friendly" American tort system arguably entices human rights plaintiffs to file matters in the country, the Supreme Court must clearly define what factors are necessary to maintain a claim.[219] Multinational corporations have deep pockets and American juries the power to award substantial damages, especially when confronted with human rights

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216. *See supra* Part II (positing that the Second Circuit no longer recognizes liability, and that although the Ninth and Eleventh Circuit do, they have not developed a clear formula for success).

217. *See supra* notes 116–19, 133–36 (acknowledging that the threat of ATCA litigation may cause businesses to limit or cease investment in developing nations); *see also* Cowman, *supra* note 3 (emphasizing that the ATCA is punishing those companies who may be able to effect positive change in the countries they invest in).

218. *See* Maleske, *supra* note 2, at 6 (describing that human rights plaintiffs as "free floating").

219. *See supra* notes 90–97 and accompanying text (pointing to the procedural advantages of the US court adversarial system).

abuses.[220] Moreover, ATCA litigation has the potential to be extremely lucrative for plaintiffs' attorneys. When considering these factors, it is understandable that multinational corporations are concerned about facing trial in the United States. Multinational corporations settle claims, forgoing the chance to prove their innocence, in order to avoid public criticism and high expenditures.[221]

If multinational corporations are guilty of human rights abuses, they deserve punishment. But, in light of the above considerations, the Second Circuit rightly determined that the ATCA is not the appropriate instrument to address these concerns, without offending international law, the international community, or potentially mutating into a "form of global 'ambulance chasing.'"[222]

CONCLUSION

The belief that an end to corporate ATCA liability will result in corporate human rights violations going unaddressed is misplaced. Rather, the global community must select a mutually acceptable forum. While this task is not simple to accomplish, the Second Circuit has come closer to compelling the international community to do so, and the United States has come closer to backing such a measure by ruling that corporate liability is not available under ATCA. The Second Circuit properly recognized that as corporate liability does not exist under customary international law, it is not actionable under the ATCA. This decision carries additional importance in light of the impact that ATCA litigation has had on US external relations. The United States and other countries have repeatedly submitted their objections to ATCA litigation to the courts. The international community has expressed criticism, arguing that the United States is inching closer to judicial imperialism when it adjudicates

220. *See supra* notes 91–98 and accompanying text (recognizing that the financial capabilities of corporations make them attractive defendants).

221. *See supra* note 147 and accompanying text (identifying that the Second Circuit recognized the threat of corporate liability extorting settlements); *see also supra* note 195 and accompanying text (setting forth the public relations consequences faced by Coca-Cola).

222. JOSEPH, *supra* note 89, at 17.

claims for wrongs that did not occur on American soil, or did not involve US corporations.

The United States should not be permitted to punish a multinational corporation with "American style" damages, when the method of establishing a corporation's guilt is questionable. Multinational corporations cannot completely cease investment in developing countries with questionable human rights practices. Such a solution is unrealistic. Instead, a more concrete formula for corporate liability must be established, one that is agreed upon by a majority of the international community.[223] In light of the recent ATCA cases, the Supreme Court must step in and decide what should remain of ATCA corporate liability, and, should anything remain, what definitive set of facts are required for recourse.

223. *See* John H. Knox, *The Human Rights Council Endorses "Guiding Principles" for Corporations*, 15 AM. SOC'Y INT'L L. 01 (2011), http://www. asil.org/insights 110801.cfm (explaining that on June 16, 2011 the United Nations Human Rights Counsel endorsed Guiding Principles on Business and Human Rights, indicating that the international community is capable of establishing mutually agreeable standards for multinational regulation).