Fordham Law Review

Volume 79 | Issue 6 Article 12

November 2011

"Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After Kiobel v. Royal Dutch Petroleum Co.

Mara Theophila

"MORAL MONSTERS" UNDER THE BED: HOLDING CORPORATIONS ACCOUNTABLE FOR VIOLATIONS OF THE ALIEN TORT STATUTE AFTER *KIOBEL V. ROYAL DUTCH PETROLEUM CO.*

*Mara Theophila**

The Alien Tort Statute (ATS) provides foreign plaintiffs with the sole means of obtaining jurisdiction in U.S. courts for alleged human rights abuses. These plaintiffs increasingly seek to hold corporations accountable for complicity in some of the most notorious violations of international law occurring overseas. Prior to 2010, U.S. courts routinely entertained ATS claims against corporations without question. Yet, the U.S. Court of Appeals for the Second Circuit in Kiobel v. Royal Dutch Petroleum Co. *recently held that the ATS does not provide foreign plaintiffs redress against corporate entities. The Second Circuit relied solely on international law in making this finding.*

This Note examines whether international or domestic law should control a court's determination of which defendants may be held liable under the ATS. This Note analyzes the established choice of law principles for determining what constitutes a "violation of the law of nations" and the recent split between circuits on who can be liable for such a violation. From this discussion, this Note advocates a new approach to choice of law principles based on the difference between conduct and remedies under the ATS. The U.S. Supreme Court undoubtedly requires lower courts to consider international law in determining whether a defendant's conduct violates international law. Once this is established, domestic law provides the means for holding that defendant—whether an individual or corporate entity—accountable.

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* J.D. Candidate, 2012, Fordham University School of Law; B.A., 2008, American University. I would like to thank my advisor, Professor Eric Jensen, for his guidance throughout this process.

INTRODUCTION

U.S. common law has treated corporations as "persons" since the early republic by vesting corporate entities with many of the same rights and responsibilities as any individual.[1] The U.S. Supreme Court continues to expand the parameters of the rights encompassed by this corporate personhood.[2] During its 2009 Term, the Court struck down a federal law limiting corporate political campaign contributions as too burdensome on a corporation's First Amendment rights.[3] This Term, the Court considered the merits of further extending to corporations the rights of privacy,[4] mandatory arbitration,[5] and due process.[6] As the Court becomes increasingly sympathetic to corporate rights, one would expect that with these rights would come greater corporate responsibilities.

Yet, quite the opposite has resulted within the context of the Alien Tort Statute (ATS).[7] The U.S. Court of Appeals for the Second Circuit, along with two district courts, recently denied the ability of U.S. courts to ever hold corporate "persons" liable for violations of the law of nations under the ATS.[8] This seemingly contradictory outcome results from the courts' novel applications of international law to determine whether a corporation can violate the ATS.[9] Prior to September 2010, courts adjudicating ATS

1. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").

2. *See* Adam Liptak, *Justices To Examine Rights of Corporations*, N.Y. TIMES, Sept. 29, 2010, at A20; Lyle Denniston, *Analysis: The Personhood of Corporations*, SCOTUSBLOG (Jan. 21, 2010, 6:45 PM), http://www.scotusblog.com/2010/01/analysis-the-personhood-of-corporations/.

3. *See* Citizens United v. FEC, 130 S. Ct. 876, 886 (2010).

4. *See* FCC v. AT&T Inc., 131 S. Ct. 1177, 1180–81 (2011) (considering whether corporate documents fall within an exception to the Freedom of Information Act).

5. *See* Laster v. AT&T Mobility LLC, 584 F.3d 849, 852 (9th Cir. 2009), *cert. granted sub nom.* AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010) (asking whether courts must enforce a provision within a corporate contract that requires a consumer to waive the right to file a class action lawsuit).

6. *See* McDonnell Douglas Corp. v. United States, 567 F.3d 1340, 1346 (Fed. Cir. 2009), *cert. granted sub nom.* Gen. Dynamics Corp. v. United States, 131 S. Ct. 62 (2010) (questioning whether the government can constitutionally invoke the state secrets doctrine to prevent a corporate contractor from defending itself).

7. 28 U.S.C. § 1350 (2006). In accordance with judicial practice, this Note will use the phrases "law of nations" and "customary international law" interchangeably. *See, e.g.*, Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1261 (11th Cir. 2009) ("A violation of the law of nations is broadly understood as a violation of the norms of customary international law."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 1, ch. 2, intro. note (1987) ("[T]he law of nations [is] later referred to as international law . . . .").

8. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010); Flomo v. Firestone Natural Rubber Co., 744 F. Supp. 2d 810, 815–16 (S.D. Ind. 2010); Viera v. Eli Lilly & Co., No. 1:09-cv-0495, 2010 WL 3893791, at *1–3 (S.D. Ind. Sept. 30, 2010); Doe v. Nestle, S.A., No. CV 05-5133, 2010 WL 3969615, at *6 (C.D. Cal. Sept. 8, 2010).

9. Judge Pierre N. Leval issued a strongly worded concurrence in the U.S. Court of Appeals for the Second Circuit case, which laid out his frustration with both the reasoning of the majority, and the injustice that would occur as a result. *See Kiobel*, 621 F.3d at 150–51 (Leval, J., concurring).

claims uniformly applied domestic concepts of corporate liability and did so without question in the overwhelming majority of cases.[10] In *Kiobel v. Royal Dutch Petroleum Co.*,[11] the Second Circuit rejected application of domestic law as "entirely irrelevant" to determining who is capable of violating international law.[12] In denying the plaintiffs' request for rehearing, Judge Dennis G. Jacobs countered the fears that the decision would give "absolution to moral monsters."[13] He described these "moral monsters" as humans, who may still be brought to justice following the *Kiobel* decision.[14] However, as this Note demonstrates, the Second Circuit's interpretation of the ATS unjustifiably conflates the threshold question of what constitutes a violation with the secondary issue of who can be held liable under the statute.[15]

This Note draws from these recent and largely unexamined opinions to provide a better understanding of which body of law governs the question of whether corporate defendants can be liable under the ATS. To do so, Part I of this Note describes the basic choice of law guidelines laid out by the Supreme Court and the way in which lower courts attempt to apply these principles. Next, Part II examines the divergent approaches taken by courts in determining whether a corporate entity can be held liable for a violation of the law of nations. From this discussion, Part III argues that lower courts should adopt a new approach to identifying whether international or domestic law governs an issue arising under the ATS. This Note concludes that the principles laid out by the Supreme Court command that if a corporate entity violates international standards of conduct, domestic law supplies the means for holding that corporation accountable.

I. THE ALIEN TORT STATUTE, *SOSA V. ALVAREZ-MACHAIN*, AND CHOICE OF LAW PRINCIPLES

Courts struggle to adjudicate ATS claims according to a consistent set of principles. Much of this difficulty stems from the lack of a clear understanding of the purpose behind the ATS. Part I.A of this Note provides a brief overview of the background surrounding the enactment of the ATS and the Supreme Court's single attempt to clarify the principles underpinning the statute. Part I.B describes the way that lower courts

10. *See id.* at 161 & n.12 (listing the courts imposing liability on corporations).

11. 621 F.3d 111 (2d Cir. 2010).

12. *Id.* at 118 n.11.

13. Kiobel v. Royal Dutch Petroleum Co., Nos. 06-4800-cv, 06-4876-cv, 2011 WL 338048, at *4 (2d Cir. Feb. 4, 2011) (Jacobs, J., concurring).

14. *Id.*

15. *See infra* Part III.A. Following the *Kiobel* opinion, Professor Kenneth Anderson framed the issue before the Second Circuit in similar terms. *See* Kenneth Anderson, *Extra Thoughts on Today's 2nd Circuit ATS Decision*, OPINIO JURIS (Sept. 17, 2010, 10:49 PM), http://opiniojuris.org/2010/09/17/extra-thoughts-on-todays-2nd-circuit-ats-decision/. Specifically, Anderson described the question before the court as whether the legal qualities of "who" violates the ATS are relevant after a court determines that "what" constitutes a violation is satisfied by the defendant's conduct. *Id.* This Note offers an independent analysis of the question while utilizing Anderson's language—the "who" and the "what"—to frame the issue.

utilize these principles to determine what constitutes a violation under the ATS. Lastly, Part I.C summarizes the widely varied approaches to deciding who can be liable for an ATS violation in the absence of clear guidance by the Supreme Court.

A. The Development of ATS Jurisprudence

The First Congress of the United States passed the ATS as one sentence of the Judiciary Act of 1789.[16] The statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[17] The debates surrounding the adoption of the Judiciary Act of 1789 did not reference the ATS, and there is little evidence of the drafters' intent behind this sentence.[18] Described as a "legal Lohengrin," the ATS was perceived as an "old but little used section," which "no one seems to know whence it came."[19] As a result, there existed little understanding of, or use for, the ATS following its enactment.[20]

Although minimal, there were two notable exceptions to this characterization during the years immediately following the ATS's enactment.[21] First, in *Bolchos v. Darrel*,[22] the U.S. District Court for the District of South Carolina assumed that the ATS provided a supplemental basis for jurisdiction over an admiralty suit for damages brought by a French privateer against a mortgagee of a British slave ship.[23] Furthermore, in 1795, Attorney General William Bradford advised the State Department on whether American citizens who took part in the destruction of a British slave colony could be subject to criminal liability.[24] Although

16. Ch. 20, § 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2006)). Congress has slightly modified the Alien Tort Statute (ATS) on a number of occasions since its original passage. Sosa v. Alvarez-Machain, 542 U.S. 692, 713 n.10 (2004); *see* JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 32118, THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS 5–7 (2003) (describing these minor textual changes).

17. 28 U.S.C. § 1350.

18. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (noting that the debates nowhere mention the provision, as far as the court was aware); ELSEA, *supra* note 16, at 2, 4–5.

19. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975); *see Sosa*, 542 U.S. at 718–19 (describing a lack of consensus in understanding the congressional intent behind the ATS). For a comprehensive examination of the circumstances surrounding the enactment of the ATS, see William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985).

20. *Sosa*, 542 U.S. at 718–19; *Vencap*, 519 F.2d at 1015.

21. *See* Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1607); Breach of Neutrality, 1 Op. Att'y Gen. 57, 58–59 (1795). For a discussion of how these incidents inform an understanding of the scope of the ATS, see *Sosa*, 542 U.S. at 720–21; BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 6–7 (2d ed. 2008); Randall, *supra* note 19, at 48–52.

22. 3 F. Cas. 810 (D.S.C. 1795) (No. 1607).

23. *See id.* at 810–11.

24. *Breach of Neutrality*, 1 Op. Att'y Gen. at 58–59.

Bradford expressed doubt regarding the citizens' criminal culpability, he opined that a federal court would be willing to entertain the foreign plaintiffs' civil claims under the ATS.[25] Despite this decree, the ATS lay nearly dormant for the next 200 years.[26]

A 1978 complaint filed in a district court within the Second Circuit ushered in the modern era of ATS litigation.[27] In *Filártiga v. Peña-Irala*,[28] two Paraguayan nationals brought suit against a former Paraguayan police officer then residing in the United States.[29] Invoking jurisdiction under the ATS, the plaintiffs alleged that the former officer had kidnapped and tortured a family member in violation of international law.[30] The U.S. District Court for the Eastern District of New York dismissed the claim for lack of subject matter jurisdiction.[31] On appeal, the Second Circuit reversed the lower court's decision, holding that "[a]lthough the Alien Tort Statute has rarely been the basis for jurisdiction during its long history . . . there can be little doubt that this action is properly brought in federal court."[32] The plaintiffs undeniably fulfilled the plain language of the statute—an action by an alien, for a tort only, committed in violation of the law of nations—and thus properly invoked jurisdiction under the ATS.[33] The ATS did not create new rights, but simply opened the federal courts to adjudication of certain substantive rights already universally accepted by international law.[34]

Following *Filártiga*, plaintiffs increasingly filed suits under the ATS to seek redress for various types of alleged violations of the law of nations.[35] Despite this flurry of litigation, the Supreme Court's 2004 opinion in *Sosa v. Alvarez-Machain*[36] constituted the first substantive examination of the

25. *Id.* at 59 ("[T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations . . . .").

26. *See* ELSEA, *supra* note 16, at 13; Casto, *supra* note 19, at 468 (describing the provision as having "lapsed into desuetude"). For the few reported cases in which federal courts considered the ATS prior to 1980, see Casto, *supra* note 19, at 469 n.7.

27. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004) (characterizing *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), as "the birth of the modern line of cases"); William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 638 (2006).

28. 630 F.2d 876 (2d Cir. 1980).

29. *Id.* at 878.

30. *Id.* at 878–79.

31. *Id.* at 879–80.

32. *Id.* at 887.

33. *Id.* at 880, 889.

34. *Id.* at 887.

35. *See* ELSEA, *supra* note 16, at 15; STEPHENS ET AL., *supra* note 21, at 12.

36. 542 U.S. 692 (2004). Prior to *Sosa*, the U.S. Courts of Appeals for the Second, Fifth, Ninth, and Eleventh Circuits, in addition to district courts within the U.S. Courts of Appeals for the First and D.C. Circuits, applied the ATS principles as outlined by *Filártiga*. *See* STEPHENS ET AL., *supra* note 21, at 16.

ATS in its 215-year history.[37] The case was brought by Alvarez-Machain, a Mexican national, who alleged that he had been arbitrarily arrested and detained in Mexico by Mexican authorities and by an agent of the United States.[38] Alvarez-Machain claimed that these actions violated the law of nations and he filed suit, under the ATS, in the U.S. District Court for the Central District of California.[39] The district court awarded summary judgment and $25,000 in damages to the plaintiff on the ATS claim.[40] A three-judge panel for the U.S. Court of Appeals for the Ninth Circuit affirmed the ATS judgment.[41] En banc, a divided court upheld the decision.[42]

The Supreme Court granted certiorari, in part, on the question of whether Alvarez-Machain's abduction and detention was a violation of customary international law that would support an action under the ATS.[43] Prior to *Sosa*, a number of courts had agreed with the Second Circuit's interpretation of the ATS as creating a federal tort for violations of the law of nations.[44] Backed by the United States in a supporting brief,[45] Sosa argued that the plaintiff was not entitled to relief under the ATS because the statute was not intended to grant a right of action without further congressional approval.[46] The parties argued that the ATS solely vested the federal courts with subject matter jurisdiction.[47]

In determining the scope of the ATS, the Court first examined the historical evidence pertaining to the enactment of the ATS by the First Congress. At the founding, the law of nations consisted of two principle elements: (1) judicial and executive norms of behavior governing the relationship between States, and (2) common law regulating the behavior of individuals outside domestic boundaries.[48] However, there existed a sphere in which these rules overlapped.[49] In a narrow set of offenses against the law of nations, such as the violations of safe conduct, ambassadorial rights, and piracy, individuals could seek a judicial remedy in U.S. courts.[50] Yet

37. Lucien J. Dhooge, *Lohengrin Revealed: The Implications of* Sosa v. Alvarez-Machain *for Human Rights Litigation Pursuant to the Alien Tort Claims Act*, 28 LOY. L.A. INT'L & COMP. L. REV. 393, 421 (2006).

38. *Sosa*, 542 U.S. at 697–98.

39. *Id.* at 697.

40. *Id.* at 699.

41. *Id.*

42. *Id.*

43. *Id.* at 712.

44. *See, e.g.*, *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1474–76 (9th Cir. 1994) (finding that the ATS "creates a cause of action for violations of specific, universal and obligatory international human rights standards"); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 776–82 (D.C. Cir. 1984) (Edwards, J., concurring) (adhering to the principles laid out in *Filártiga*).

45. *See* Brief for the United States as Respondent Supporting Petitioner at 11–23, *Sosa*, 542 U.S. 692 (No. 03-339).

46. *Sosa*, 542 U.S. at 713.

47. *Id.*

48. *Id.* at 714–15.

49. *Id.* at 715.

50. *Id.*

the conduct could also have serious implications on foreign relations.[51] It is within this purview that the members of the First Congress drafted the Judiciary Act of 1789.[52]

The First Congress likely enacted the Judiciary Act of 1789 to reinforce the Court's original jurisdiction over cases affecting ambassadors and diplomats under Article III of the Constitution.[53] The *Sosa* Court made two assumptions regarding the intent of the First Congress. First, the Court found it unlikely that the very Congress empowering federal courts with jurisdiction over claims alleging a violation of international law would not take further action to create a cause of action for such claims.[54] Second, the First Congress likely intended the ATS to have "practical effect the moment it became law" for a limited number of violations.[55] These violations included those torts recognized by the First Congress as existing at the intersection between individual remedies and foreign relations, including offenses against ambassadors, violations of safe conduct, and piracy claims.[56] Although the ATS is a purely jurisdictional statute, the Court concluded that it was "enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations."[57]

Next, the Court rejected Sosa's argument that the scope of international law violations cognizable in ATS litigation was limited to those recognized in 1789.[58] The Court acknowledged that, under *Erie Railroad Co. v. Tompkins*,[59] federal courts have no authority to derive general common law (the Erie Doctrine).[60] However, the Erie Doctrine does not bar all judicial

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51. *Id.*

52. *Id.*

53. *Id.* at 717. The Framers of the Constitution vested the U.S. Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls" in response to the increasing concern that the federal government lacked the judicial powers to manage effectively matters of an international character. U.S. CONST. art. III, § 2; *see also* Randall, *supra* note 19, at 19 (explaining the intent behind the ATS as "to establish and extend the power of the federal judiciary over actions affecting foreign affairs and involving aliens").

54. *Sosa*, 542 U.S. at 719.

55. *Id.* at 720, 724.

56. *Id.*; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *68 (identifying these offenses as law of nations violations).

57. *Sosa*, 542 U.S. at 724.

58. *Id.* at 712; *see also* STEPHENS ET AL., *supra* note 21, at 35 (characterizing the Court as rejecting this "extreme interpretation"); Casto, *supra* note 27, at 645 (noting that if the plaintiffs could only bring claims for torts recognized in 1789, the ATS "would be little more than an antiquarian oddity").

59. 304 U.S. 64 (1938). *Erie* involved the question of whether a federal court could disregard the common law rules of a state in cases of diversity jurisdiction. *Id.* at 71. Federal courts previously exercised independent judgment as to what the common law of the state was or should have been. *Id.* However, the resulting difference between state and federal adjudication within a jurisdiction caused plaintiffs to forum shop and resulted in inequitable administration of the laws. *See id.* at 75. In light of these concerns, *Erie* held that courts had no power to make general federal common law and, instead, must apply the laws of the state where the court sits in diversity cases. *Id.* at 77–78.

60. *Sosa*, 542 U.S. at 729. In a concurring opinion, Justice Scalia argued that the majority had manufactured new federal common law, contrary to *Erie*. *Id.* at 746–47 (Scalia,

recognition of new substantive rules.[61] Federal courts may derive some substantive law in limited circumstances.[62] Courts have been doing so for two centuries by recognizing the law of nations as part of federal common law.[63]

Yet the Court repeatedly emphasized the need for judicial caution in recognizing any new cause of action under the law of nations.[64] In particular, the Court acknowledged the following factors as counseling toward limited recognition of ATS actions[65]: (1) the substantial element of discretion inherent in application of international law,[66] (2) the limited role of the judiciary following *Erie*,[67] (3) the superiority of legislative judgment in the creation of a cause of action,[68] (4) the potential foreign policy implications of an ATS suit,[69] and (5) the lack of a clear congressional mandate to seek out new causes of action.[70] As a result, the Court premised its holding "on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[71] Ultimately, the Court concluded that courts should require that any claim based on the present-day law of nations "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to" the modest number of violations recognized at the time the ATS was enacted.[72]

Sosa remains the sole Supreme Court case guiding ATS jurisprudence within the federal court system.[73] The decision put to rest the question of

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J., concurring). Justice Scalia claimed that, under an originalist perspective, the ATS did not grant courts the right to recognize new federal common law claims for violations of the law of nations. *Id.*

61. *Id.* at 729 (majority opinion).

62. *Id.* The Supreme Court has sanctioned the development of federal common law in situations involving "'uniquely federal interests.'" Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)). An example of a type of case involving "uniquely federal interests" includes one implicating U.S. foreign policy. *See* Zschernig v. Miller, 389 U.S. 429 (1968).

63. *Sosa*, 542 U.S. at 729–30; *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426–27 (1964).

64. *Sosa*, 542 U.S. at 725–28.

65. *Id.* at 725–28. For one scholar's understanding of these factors and how they can provide an analytical roadmap for future ATS litigation, see Casto, *supra* note 27, at 645–68.

66. Although the legal community viewed law as able to be "found or discovered" at the time the ATS was enacted, *Sosa*, 542 U.S. at 725–26, the Court explained that law is now acknowledged to be "a product of human choice." *Id.* at 729.

67. *See supra* notes 58–60 and accompanying text.

68. *Sosa*, 542 U.S. at 726 ("[T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law.").

69. *Id.*; *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 805 (D.C. Cir. 1984) (Bork, J., concurring) (describing the possibility that an ATS suit will interfere with U.S. foreign affairs).

70. *Sosa*, 542 U.S. at 728.

71. *Id.* at 729.

72. *Id.* at 725.

73. On September 30, 2009, the Supreme Court granted certiorari in a case brought, in part, under the ATS against foreign officials. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2282–83 (2010). Although seen as an opportunity for the Court to scale back the expanding scope of the ATS, the Court rested its decision squarely on foreign sovereign immunity

which body of law—international or domestic—should guide the inquiry of what constitutes a violation of the law of nations in an ATS lawsuit.[74] Lower courts must recognize ATS claims for violations of "specific, universal, and obligatory" norms, as defined by customary international law.[75] Yet the Court left district courts to grapple with the question of which body of law applies to define the potential perpetrators of a violation of the law of nations.[76]

Considering the principles laid out in *Sosa*, the next section of Part I examines the well-settled use of international law in identifying an ATS violation. The remaining section, Part I.C, explores the widely varied choice of law principles courts have applied to determine who, in the absence of guidance by the Supreme Court, can be liable under the ATS and the disparities that occur as a result.

B. Use of International Law To Determine what Qualifies as a "Violation of the Law of Nations"

A threshold question in any ATS case is whether the tort alleged by the plaintiff is a violation of the law of nations.[77] In the wake of *Sosa*, courts must examine customary international law to determine whether the alleged tort is actionable under the ATS.[78] While the use of the ATS to redress international law violations may be perceived as novel, the incorporation of customary international law into federal common law was long settled prior to *Sosa*.[79] Part I.B.1 identifies the sources of international law examined by courts. Part I.B.2 discusses the way courts apply international law to ATS litigation.

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grounds. *See* Duncan Hollis, *ATS vs. FSIA, ATS Wins?*, OPINIO JURIS (June 1, 2010, 6:15 PM), http://opiniojuris.org/2010/06/01/ats-vs-fsia-ats-wins/ ("[H]uman rights activists should be breathing a huge sigh of relief tonight. The Court had a chance here to gut the ATS, and it declined to do so.").

74. STEPHENS ET AL., *supra* note 21, at 21; Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 278 (2009).

75. *Sosa*, 542 U.S. at 732 (quoting *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

76. *See infra* Part.I.C.

77. *See* Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002), *appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005); STEPHENS ET AL., *supra* note 21, at 40.

78. *See supra* notes 73–75 and accompanying text.

79. *See* Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740, 740–43 (1939); *supra* notes 62–63 and accompanying text (discussing *Sosa*'s conclusion that use of international sources of law has long been recognized within the U.S. court system). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 849–70 (1997) (arguing that the Erie Doctrine abandoned the tradition of recognizing customary international law within federal common law).

1. Sources of International Law To Be Considered by U.S. Courts

The Supreme Court's 1900 ruling in *The Paquete Habana*[80] held that the judiciary must recognize customary international law as U.S. federal common law under certain circumstances.[81] Where no posited law controlled, a court must resort to the "customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor . . . have made themselves peculiarly well acquainted with the subjects."[82] In subsequent cases, the Supreme Court has continually affirmed the principle that domestic courts must acknowledge certain sources of international law.[83]

The method described in *The Paquete Habana* is consistent with the modern way courts identify principles of customary international law.[84] Article 38(1) of the Statute of the International Court of Justice (ICJ Statute)[85] has been recognized as the leading authority on sources of international law within the United States.[86] The ICJ Statute provides four types of authorities that a court should consider when determining international law.[87] Although not everything that fits under this framework qualifies as international law, these sources provide the means for proving whether a rule has in fact attained status as international law.[88]

According to the ICJ Statute, a court must apply the general and particular rules established within binding international conventions.[89] However, in the absence of a binding treaty, customary international law provides an additional source of international authority.[90] To discern common practice by the international community, a court is directed to look at whether state practice exists across nations and whether States believe

80. 175 U.S. 677 (1900).

81. *Id.* at 700–01.

82. *Id.* at 700.

83. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004) (turning to "those [international] sources we have long, albeit cautiously, recognized"); Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (noting that "international disputes implicating . . . our relations with foreign nations" are one of the "narrow areas" in which federal common law exists); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("United States courts apply international law as a part of our own in appropriate circumstances.").

84. *See* Doe v. Nestle, S.A., No. CV 05-5133, 2010 WL 3969615, at *6 (C.D. Cal. Sept. 8, 2010) (discussing the impact of *The Paquete Habana* on the reasoning of modern day courts).

85. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060 [hereinafter ICJ Statute].

86. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 132 (2d Cir. 2010); Filártiga v. Peña-Irala, 630 F.2d 876, 880–81 & n.8 (2d Cir. 1980); MALCOLM N. SHAW, INTERNATIONAL LAW 66 (5th ed. 2003).

87. ICJ Statute, *supra* note 85, art. 38(1)(a)–(d).

88. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. a (1987); *cf.* Flores v. S. Peru Copper Corp., 414 F.3d 233, 247–48 (2d Cir. 2003) (describing customary international law as deriving from "myriad decisions made in numerous and varied international and domestic arenas" and "not . . . from any single, definitive, readily-identifiable source").

89. ICJ Statute, *supra* note 85, art. 38(1)(a).

90. *Id.* art. 38(1)(b).

that this practice is made obligatory by the rule of law, in other words, *opinio juris*.[91] Although a practice may previously not have obtained status as *opinio juris*, it is possible for "ancient usage" to "gradually ripen[] into a rule of international law."[92] Furthermore, the ICJ Statute instructs a court to consider "general principles of law recognized by civilized nations."[93] Lastly, the judicial decisions and scholarship of the most highly regarded publicists provide further evidence of the current state of international law.[94] Accordingly, when examining an ATS claim, federal courts are directed to consider these sources of international law.[95]

A court is entitled to consider all relevant international authorities in making its determination, whether or not submitted by a party.[96] In practice, a court will provide an exhaustive review of international treaties, court precedent, and leading scholarship.[97] However, lower courts are still bound to apply domestic common law interpretations of international law, as decided by superior courts.[98] This often means that a lower court is bound by *Sosa*'s examination of specific international authorities. The next section discusses the ways in which the Supreme Court and lower courts have examined sources of international law when determining whether a defendant is liable.

2. Application of International Law in *Sosa* and Lower Courts

Courts consider a variety of international sources of law when determining whether a defendant violated a "specific, universal, and obligatory" norm of the law of nations.[99] In *Sosa*, the Supreme Court

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91. North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, 41–42, ¶ 70–73 (Feb. 20); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c (1987). Even if the United States was not party to a treaty, domestic courts may still treat treaties as binding customary law if the treaty's obligations "passed into the general *corpus* of international law, and [are] now accepted as such by the *opinio juris*." *Continental Shelf*, 1969 I.C.J. at 42, ¶ 71.

92. The Paquete Habana, 175 U.S. 677, 686 (1900).

93. ICJ Statute, *supra* note 85, art. 38(1)(c); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(4) (1987). For example, the general elements of "natural justice," including principles of equity and fairness, are considered a source of law. *See* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 50–55 (1991); Frances T. Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations—A Study*, 10 UCLA L. REV. 1041, 1044–50 (1963).

94. ICJ Statute, *supra* note 85, art. 38(1)(d).

95. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (listing similar sources); *see also* United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820) (stating that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law").

96. FED. R. CIV. P. 44.1. Courts are generally provided with wide discretion in researching questions of international law. *In re* "Agent Orange" Prod. Liab. Litig., 373 F. Supp. 2d 7, 18 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008).

97. *See infra* Part III.

98. Hilton v. Guyot, 159 U.S. 113, 163 (1895); *Smith*, 18 U.S. (5 Wheat.) at 160–61 (1820).

99. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (quoting *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

examined a number of international sources in ultimately concluding that plaintiff's brief detention by Mexican and U.S. officials did not qualify as a violation.[100] First, the Court examined the Universal Declaration of Human Rights[101] and the International Covenant on Civil and Political Rights.[102] The Court concluded that neither source created enforceable obligations, *opinio juris*, and thus had not attained the status of binding customary international law.[103] Next, the Court rejected the plaintiff's reliance on a survey of national constitutions, an International Court of Justice (ICJ) decision, and domestic federal law, finding that the authorities did not define "arbitrary detention" with the specificity necessary for an ATS violation.[104] Lastly, the Court found the requirement of "prolonged arbitrary detention," as set out by the *Restatement (Third) of Foreign Relations Law of the United States*, to be persuasive evidence of customary international law.[105] As a result, the Court held that Alvarez-Machain advanced only aspirational norms that were not defined by international law with enough specificity to support the creation of a federal remedy.[106]

Using the standard set in *Sosa*, lower courts turn to various sources of international law to define what torts are recognizable under the ATS. It is now well settled that, in addition to the paradigmatic offenses recognized at the ATS's enactment,[107] there is universal acceptance of defined prohibitions on torture, genocide, and certain war crimes within the international community to meet the *Sosa* standard.[108] The legal community generally considers these actions to be *jus cogens*[109] violations of the law of nations.[110]

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100. *Id.* at 734–38.

101. G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

102. art. 9, Dec 19, 1966, 999 U.N.T.S. 171.

103. *Sosa*, 542 U.S. at 735; *see supra* notes 91–92 and accompanying text (discussing the process in which treaties become part of customary international law). Rather than imposing obligations, the treaties were viewed as articulating a set of aspirations for the international community. *Sosa*, 542 U.S. at 734–36. Furthermore, the United States only ratified the International Covenant on Civil and Political Rights on the express understanding that it would not be enforceable in domestic courts. *Id.*

104. *Sosa*, 542 U.S. at 734–38 & n.27.

105. *Id.* at 737 (discussing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987)).

106. *Id.* at 738.

107. *See supra* notes 49–52, 56 and accompanying text (identifying offenses against ambassadors, violations of safe conduct, and piracy as recognized at the time the ATS was enacted).

108. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Pena-Irala, 22 HARV. INT'L L.J. 53, 90–97 (1981).

109. *Jus cogens* refers to a "mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted." BLACK'S LAW DICTIONARY 937 (9th ed. 2009); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. k (1987).

110. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. n (1987); Blum & Steinhardt, *supra* note 108, at 90.

However, any prohibition that is a "specific, universal, and obligatory" norm—whether *jus cogens* or not—is actionable under the ATS.[111] When considering less accepted norms, a court must determine whether the principles of customary international law warrant the creation of a new tort remedy under the ATS.[112] Courts face a number of difficulties in making this determination. There is still uncertainty among lower courts on how far international prohibitions extend.[113] Furthermore, courts apply conflicting principles when attempting to define the elements of the violation.[114] For example, courts recently split on the significant question of which law governs elements of aiding and abetting liability.[115] As a result, the regime of aiding and abetting liability has been marked by substantial uncertainty.[116] Additionally, courts question which sources of international law should be consulted and given the most weight in applying the *Sosa* standard.[117] This discussion is not to say that *Sosa* left doubt as to which body of law applies when identifying a violation.[118] Rather, the analysis highlights the challenges courts often face in adjudicating ATS claims even after following the principles articulated by *Sosa*.[119]

After it is established that a certain tort is actionable under the ATS, courts must next consider which defendants can be liable for that tort. The next section discusses the various approaches available to courts to

111. Doe I v. Unocal Corp., 395 F.3d 932, 945 n.15 (9th Cir. 2002), *appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Talisman I*), 244 F. Supp. 2d 289, 306 n.18 (S.D.N.Y. 2003).

112. Casto, *supra* note 27, at 646.

113. *See, e.g.*, Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 119–23 (2d Cir. 2008) (holding that the prohibition on use of herbicides during the Vietnam War was not universally accepted or sufficiently specific to be actionable); Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1020–22 (S.D. Ind. 2007) (allowing only the "worst forms" of child labor to be actionable); *see also* STEPHENS ET AL., *supra* note 21, at 205–14 (describing the types of claims that rarely meet the *Sosa* standard); Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 69–70 & nn.33–34 (2008) (discussing cases where courts have found that the underlying violation did not meet the *Sosa* standard).

114. *Compare* Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Talisman II*), 582 F.3d 244, 258–59 (2d Cir. 2009) (requiring that a defendant act with purpose to meet the mens rea element of aiding and abetting liability), *with* Cabello v. Fernandez-Larios, 402 F.3d 1148, 1158–59 (11th Cir. 2005) (identifying knowledge of illegality as sufficient).

115. *See supra* note 114 (comparing the conflicting definitions of an element of aiding and abetting liability based on application of international or domestic law); *see also* Keitner, *supra* note 113, at 62.

116. Jonathan Drimmer, *The Aiding and Abetting Conundrum Under the Alien Tort Claims Act*, LEXISNEXIS EXPERT COMMENTARY, June 2008, at 1; *see also In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1302 (S.D. Fla. 2006) (describing the "pressing need for clarification of these issues"); Keitner, *supra* note 113, at 62 ("The doctrinal question of what standards govern accomplice liability continues to perplex courts . . . .").

117. *Compare* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 177–87 (2d Cir. 2009) (finding concrete evidence that non-consensual medical experimentation violated the law of nations based on the Nuremberg Tribunals and incorporation into conventions, declarations, and domestic laws), *with id.* at 195–97 (Wesley, J., dissenting) (arguing that evidence of customary international law should primarily be deduced from treaties).

118. *See supra* note 74 and accompanying text.

119. *Cf.* Carmichael v. United Techs. Corp., 835 F.2d 109, 113 (5th Cir. 1988) ("The question of defining 'the law of nations' is a confusing one which is hotly debated . . . .").

determine who, in the absence of well-established choice of law principles, can be liable under the ATS.

C. Determining Who Can Be Liable for a "Violation of the Law of Nations" Based on International and Domestic Law

The Supreme Court has never ruled on what categories of defendants can be held liable for a violation of the law of nations, nor has the Court indicated which body of law—domestic or international—should control this inquiry. Particularly with the infusion of corporate defendants into ATS litigation, courts have only recently begun to analyze the question. Part I.C.1 identifies the Supreme Court's limited discussion of who can be held liable under the ATS. The following section, Part I.C.2, discusses the advent of corporations into ATS litigation. The remaining section, Part I.C.3, considers the divergent treatment of corporate entities under international and domestic law.

1. The Lack of Guidance from the U.S. Supreme Court

The Court's holdings in *Argentine Republic v. Amerada Hess Shipping Co.*,[120] and *Sosa* may be construed as offering lower courts limited direction on the question of who may be liable under the ATS. In *Amerada*, the Court considered whether the Foreign Sovereign Immunities Act of 1976 (FSIA)[121] afforded the Republic of Argentina immunity from an ATS suit and thus deprived the court of subject matter jurisdiction over the claim.[122] Although the Court ultimately determined that Congress intended the FSIA to be the sole way of obtaining jurisdiction over a foreign sovereign, the Court briefly discussed the scope of the ATS.[123] Specifically, the Court concluded that "[t]he Alien Tort Statute by its terms [did] not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states."[124]

120. 488 U.S. 428 (1989).

121. 28 U.S.C. §§ 1330, 1332(a), 1391(f) 1441(d), 1602–1611 (2006). The Foreign Sovereign Immunities Act of 1976 (FSIA) eliminated the ability of U.S. courts to hear cases against sovereign governments, except under limited circumstances. *Id.* § 1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in [the exceptions] of this chapter."). Prior to the enactment of the FSIA, defendants often received immunity under existing common law. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2284–86 (2010).

122. *See Amerada*, 488 U.S. at 428. On appeal from the district court's decision, the Second Circuit held that the ATS was "'no more than a jurisdictional grant based on international law'" and that "'who [was] within' the scope of that grant was governed by 'evolving standards of international law.'" *Id.* at 433 (quoting Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987)) (alteration added). The Second Circuit concluded that the enactment of the FSIA was not meant to eliminate the ATS's grant of subject matter jurisdiction to foreign plaintiffs. *See id.* The Supreme Court fully rejected this argument. *Id.* at 433–35.

123. *See id.* at 438.

124. *Id.*

While *Sosa* involved an ATS claim against government officials, the Court explicitly referenced the possibility of suits against other types of defendants.[125] In footnote twenty of *Sosa* (footnote twenty), the Court noted that a "related consideration" for whether a norm is sufficiently definite to support a cause of action "is whether international law extends the scope of liability . . . to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[126] In making this statement, the Court contrasted two opposing views on whether a private actor, rather than a state actor, could violate international law.[127] Furthermore, Justice Breyer's concurrence made reference to the type of defendant being held accountable for violating international law.[128] Justice Breyer interpreted the Court's opinion as requiring that "[t]he norm . . . extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue."[129] In making this observation, Justice Breyer cited to footnote twenty of the majority opinion.[130] As Part II of this Note will examine further, courts contest the relevance of footnote twenty in adjudicating the question of whether a corporation can violate the ATS.[131]

The next section identifies the changes to ATS litigation with the introduction of corporate defendants. The last section of Part I.C analyzes the differences in corporate liability depending on whether a court applies domestic or international law.

2. Corporations as a New Class of Defendants

Against this muddled legal background, foreign plaintiffs have increasingly brought suits against a variety of defendants for acts in violation of the law of nations.[132] For the first fifteen years after *Filártiga* and the birth of modern ATS claims, aliens brought ATS suits in U.S. courts only against individuals or foreign States.[133] The first ATS case where a plaintiff alleged that a corporate entity violated the law of nations was as recent as 1997.[134]

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125. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

126. *Id.* (comparing Tel-Oren v. Libyan Arab Republic, 726 F.2d 744, 791–95 (D.C. Cir. 1984) (Edwards, J., concurring) (holding that private actors could not be liable), with Kadic v. Karadžić, 70 F.3d 232, 239–41 (2d Cir. 1995) (finding that a private actor could violate the law of nations)).

127. *Id.*

128. *Id.* at 760 (Breyer, J., concurring).

129. *Id.*

130. *See id.*

131. *See infra* Part II.

132. ELSEA, *supra* note 16, at 15.

133. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116–17 (2d Cir. 2010); *see also* Doe I v. Unocal Corp., 395 F.3d 932, 965 n.3 (9th Cir. 2002) (Reinhardt, J., concurring) ("It is the rare [ATS] case that does not involve a foreign state or official as a defendant."), *appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005); *supra* notes 120–24 and accompanying text (discussing an example of a case involving a foreign sovereign).

134. *Kiobel*, 621 F.3d at 116–17.

In *Doe I v. Unocal Corp.*,[135] the Central District of California considered a complaint alleging that Unocal Corp., a U.S. oil company, acted in collusion with the government of Myanmar while working as a joint venture for construction of a gas pipeline in Burma.[136] The Burmese plaintiffs claimed that the Burmese military had committed a number of international law violations during the period that they undertook the project.[137] After the district court granted Unocal's motion for summary judgment, the Ninth Circuit reversed, holding that a corporation may be held liable under the ATS for knowingly providing assistance to the perpetrators of a crime.[138]

First, the court addressed the threshold question of whether the alleged torts of forced labor, murder, rape, and torture could qualify as violations of the law of nations.[139] Relying on international agreements and declarations[140] and on circuit interpretations of international law,[141] the Ninth Circuit found that these torts qualified as violations of the law of nations.[142]

Next, the court considered the additional threshold question of whether the alleged tort requires that the party engage in state action.[143] Prior to *Unocal*, the Second Circuit in *Kadic v. Karadžić*[144] clarified previous divided holdings on the state action requirement under the ATS.[145] The court concluded that although individual acts of rape and torture are "proscribed by international law only when committed by state officials or under color of law," these acts are actionable when collectively committed in pursuit of a larger campaign of genocide or war crimes.[146] Specifically, these *jus cogens* violations are actionable under the ATS regardless of state action.[147] Finding the Second Circuit's reasoning persuasive, the Ninth Circuit held that Unocal Corp., as a private actor, could be held liable for the alleged torts regardless of whether the entity acted under color of Burmese law.[148]

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135. 395 F.3d 932 (9th Cir. 2002).
136. *Id.* at 937.
137. *See id.* at 936–37.
138. *Id.* at 945.
139. *Id.*
140. *Id.* (citing Universal Declaration of Human Rights, *supra* note 101, art. 23, among others).
141. *Id.*
142. *Id.*
143. *Id.* The argument that individuals cannot be subject to jurisdiction is based on a rigid understanding of international law as solely law between states. Keitner, *supra* note 113, at 70.
144. 70 F.3d 232 (2d Cir. 1995).
145. *Id.* at 240 (adopting and extending Judge Harry T. Edwards's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794–95 (D.C. Cir. 1984) (Edwards, J., concurring)); *see also* STEPHENS ET AL., *supra* note 21, at 252 (addressing *Kadic*'s "color of law" analysis).
146. *Kadic*, 70 F.3d at 243.
147. *Id.* at 242–44.
148. *Unocal*, 395 F.3d at 945–46.

Although the *Unocal* court extended liability to corporate ATS defendants, the court did not distinguish between corporate entities and private individuals.[149] Rather, the Ninth Circuit premised corporate liability on whether international law holds a private actor, versus a public actor, liable for the alleged torts.[150]

Since the *Unocal* complaint was filed in federal court, nearly 140 cases alleging human rights violations under the ATS have been brought against corporate defendants across the country.[151] This trend likely reflects the increasing attractiveness of corporate defendants to plaintiffs seeking redress of international law violations.[152] Generally, large corporations have sufficient assets to make settlements or judgments more worthwhile for plaintiffs.[153] Unlike the difficulty plaintiffs face when suing sovereign defendants,[154] multinational corporations are not entitled to foreign immunities under the FSIA because they are private actors.[155] Therefore, the plaintiffs do not see their cases dismissed on subject matter jurisdiction grounds like in earlier ATS actions involving claims against foreign governments.[156] Additionally, corporations are often likely to opt for settlement.[157]

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149. *See generally id.*

150. *See id*. at 945–46. Generally, the state action doctrine now requires that private actors act in concert with state officials or receive state aid, with the limited exceptions being in situations of *jus cogens* violations, i.e., alleged slave trading, piracy, genocide, and war crimes. Keitner, *supra* note 113, at 71; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (conferring jurisdiction over private actors for certain offenses recognized by nations "as of universal concern"); *id.* § 702 (recognizing jurisdiction over a state for genocide, slavery, murder or disappearance of persons, torture, prolonged arbitrary detention, systematic racial discrimination, and a pattern of gross violations of recognized rights); *supra* notes 108–10 and accompanying text.

151. Jonathan C. Drimmer, *Is Second Circuit Ruling a "Talisman" Against Alien Tort Statute Suits?*, LEGAL BACKGROUNDER (Wash. Legal Found., Washington, D.C.), Feb. 12, 2010, at 1, *available at* http://www.wlf.org/Upload/legalstudies/legalbackgrounder/02-15-10Drimmer_LegalBackgrounder.pdf; *see also* Ramsey, *supra* note 74, at 278–79. Like *Unocal*, cases involving corporate defendants often rest their holdings on whether a private actor, as opposed to a public actor, can be held liable. *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 282–83 (2d Cir. 2007) (Katzmann, J., concurring) (noting that courts often treat "the issue of whether corporations may be held liable under the [ATS as] indistinguishable from the question of whether private individuals may be"). Part II of this Note discusses the few cases explicitly addressing the question of whether a corporate entity, as opposed to an individual, may be liable under the ATS. *See infra* Part II.

152. Marc J. Gottridge & Matthew J. Galvin, *The Alien Tort Statute: An Introduction and Current Topics*, 826 PRACTISING L. INST. 87, 102 (2010), *available at* 826 PLI/Lit 87.

153. *Id.*; *see also* Keitner, *supra* note 113, at 64 & n.11; Ramsey, *supra* note 74, at 279.

154. *See* Cynthia R.L. Fairweather, *Obstacles To Enforcing International Human Rights Law in Domestic Courts*, 4 U.C. DAVIS J. INT'L L. & POL'Y 119, 120–22 (1998); *supra* notes 121–23 and accompanying text.

155. *See* Gottridge & Galvin, *supra* note 152, at 102 (discussing *Unocal* as an example, where the court dismissed the Government of Myanmar but kept the corporate defendants in the action); *see also* STEPHENS ET AL., *supra* note 21, at 22–23; Ramsey, *supra* note 74, at 279.

156. *See supra* notes 120–24 and accompanying text.

157. *See, e.g.*, Order, Estate of Albazzaz v. Prince, No. 1:09cv616 (E.D. Va. Jan. 6, 2010), ECF No. 102 (settling claims against private government contractor Blackwater and its founder, Erik Prince); Settlement Agreement and Mutual Release, Wiwa v. Shell

However, ATS lawsuits against corporate defendants are not without their difficulties for plaintiffs. These claims are often dismissed on a number of procedural grounds. In *Sosa*, the Court suggested that the plaintiffs might need to exhaust local remedies in particular situations before seeking U.S. jurisdiction under the ATS.[158] As a result, many corporate defendants seek dismissal under the principle of forum non conveniens and often see their motions granted.[159] Moreover, in light of the difficulties in pleading facts regarding a foreign crime, plaintiffs face increasing difficulty in meeting the pleading standard recently set forth by the Supreme Court.[160] Furthermore, as discussed in *Unocal*, the state action requirement greatly limits the susceptibility of corporate defendants to suit in cases not involving *jus cogens* violations.[161]

Procedural limitations pose a number of obstacles for foreign plaintiffs seeking recovery against corporate defendants under the ATS. However, recent cases that more fundamentally question the exercise of jurisdiction over a corporation under the ATS pose a far greater danger to plaintiffs.[162] Corporate liability for a violation of the law of nations is largely dependent on whether a court employs international or domestic law.[163] The following section discusses the divergent outcomes arising from the application of these two bodies of law.

3. Differences in Corporate Liability Depending on Whether International or Domestic Law Applies

As abstract, artificial beings, corporations are viewed as "judicial persons" by the legal system.[164] This term reflects the character of a corporate entity as fundamentally a creation of the law and only possessing

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Petroleum, N.V., No. 96-cv-8386 (S.D.N.Y. June 8, 2009), ECF No. 520 (resolving allegations that company aided Nigerian military in violating the rights of an indigenous group for $11 million); Order, Xiaoning v. Yahoo!, Inc., No. 07-02151 (N.D. Cal. Nov. 28, 2007), ECF No. 115 (settling claims alleging Yahoo! aided and abetted Chinese government by providing state with information regarding dissenters).

158. Sosa v. Alvarez-Machain, 542 U.S. 692, 721 (2004).

159. *See, e.g.*, Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283, 1300 (11th Cir. 2009) (affirming dismissal of suit on forum non conveniens grounds); Aguinda v. Texaco, Inc., 303 F.3d 470, 473 (2d Cir. 2002) (dismissing suit by Ecuadorian citizens based on forum non conveniens doctrine).

160. *See, e.g.*, Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1270 (11th Cir. 2009) (dismissing complaint because allegations did not meet heightened pleading standard set in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)); Doe v. Nestle, S.A., No. CV 05-5133, 2010 WL 3969615, at *35 (C.D. Cal. Sept. 8, 2010) (same).

161. *See* David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 941 (2004); *supra* notes 143–50 and accompanying text.

162. *See infra* Part II.B.

163. For an extensive analysis of the ways courts apply international and domestic law within the context of corporate liability, see *infra* Part II.

164. *See* 1 BLACKSTONE, *supra* note 56, *467; *see also* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 517, 636 (1819).

those properties conferred upon it by the law.[165] These "judicial persons" are granted a varying degree of rights, obligations, and duties depending on whether domestic or international law applies.

Common law in the United States has long recognized the corporate entity as a "legal person."[166] In *New York Central & Hudson River Railroad Co. v. United States*,[167] the Supreme Court first acknowledged that the changing nature of society demanded that corporations be held accountable, just as individuals are, for illegal conduct.[168] In holding that corporations are fully liable, the Court rejected the notion that a corporate entity could not commit a crime solely because of its organization and nature.[169] Today, U.S. statutory law often treats corporations and individuals similarly.[170] Additionally, companies are afforded a patchwork of constantly evolving rights[171] and responsibilities under U.S. law.[172]

The place of corporations within the international legal landscape is not nearly as clear. Traditionally, corporate entities were not viewed as "subjects" of international law.[173] Rather, corporate law was almost exclusively a domestic matter.[174]

An examination of corporate nationality and shareholder rights by the ICJ illustrates this traditional viewpoint. In 1958 and 1962, the Belgian government filed suit for reparations from the Spanish government, alleging that organs of Spain caused damage to Barcelona Traction, Light and Power Company, Ltd., a Canadian company, and, as a result, injured Belgian shareholders.[175] In its decision, the ICJ stated that:

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165. *Woodward*, 17 U.S. (4 Wheat.) at 636; Asbury Hosp. v. Cass Cnty., 7 N.W.2d 438, 449–50 (N.D. 1943); *see also* 1 BLACKSTONE, *supra* note 56, *467.

166. *See* Cook Cnty. v. United States *ex rel.* Chandler, 538 U.S. 119, 125 (2003) (examining sources confirming "the common understanding . . . that corporations were 'persons' in the general enjoyment of the capacity to sue and be sued"); N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495–96 (1909) (recognizing that the changed nature of the economy requires that courts hold corporations accountable); *Woodward*, 17 U.S. (4 Wheat.) at 667 (noting that corporations possessed the capacity to be sued at common law).

167. 212 U.S. 481 (1909).

168. *Id.* at 495–96.

169. *Id.* at 492–96.

170. *See, e.g.*, 1 U.S.C. § 1 (2006) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the [word] 'person' [includes] corporations."); Securities Act of 1933, 15 U.S.C. § 77b(a)(2) (2006) ("The term person means . . . a corporation . . . ."); FCC v. AT&T Inc., 131 S. Ct. 1177, 1182 (2011) ("We have no doubt that 'person,' in a legal setting, often refers to artificial entities.").

171. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876 (2010) (Free Speech Clause of First Amendment); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) (limited Fourth Amendment rights); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186 (1946) (Due Process Clause of Fifth and Fourteenth Amendments); Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886) (Equal Protection Clause of Fourteenth Amendment).

172. *See, e.g.*, Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961–1968 (2006); *In re* Temporomandibular Joint Implants Prods. Liab. Litig., 113 F.3d 1484, 1495–97 (8th Cir. 1997) (applying the common law standard for aiding and abetting to corporations).

173. Kinley & Tadaki, *supra* note 161, at 944.

174. *Id.* at 937.

175. Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, ¶ 1 (Feb. 5).

> [I]nternational law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.[176]

The court concluded that international law only authorizes the national state of the company alone to bring suit on behalf of shareholders.[177] However, the court noted that the way international law recognizes corporate activity may be changing. Municipal institutions, such as the corporate entity, increasingly cross borders and transform the relations between States.[178] As a result, international law continues to evolve in response to the transformation of international economic relations.[179] The ICJ suggested that perhaps customary international law should have already developed rules governing the international activities of corporations.[180]

Today, a substantial body of international law recognizes the corporate entity in some capacity. Corporations have a number of duties and obligations under international law.[181] Corporate entities are indirectly bound by specific international obligations directly imposed on States.[182] Furthermore, corporations can be held civilly liable for certain violations of international environmental law.[183] It is also possible for corporations to enforce their rights in a variety of international legal fora, including the International Center for the Settlement of Investment Disputes, the Iran-United States Claims Tribunals, and the United Nations Claims

176. *Id.* ¶ 38.
177. *Id.* ¶ 78.
178. *Id.* ¶ 38.
179. *Id.* ¶ 39.
180. *See id.* ¶ 89 ("[I]t may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.").
181. *See, e.g.*, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter U.N. Human Rights Norms for Corporations] (discussing the obligation of businesses to respect human dignity); U.N. Conference on Trade and Development, *The Social Responsibility of Transnational Corporations*, U.N. Doc. UNCTAD/ITE/IIT/Misc. 21 (Oct. 1999) (requiring that transnational corporations abide by responsible business practices); *see also* Kinley & Tadaki, *supra* note 161, at 949–60 (discussing these various duties of corporations, otherwise known as "soft law" obligations).
182. U.N. Human Rights Norms for Corporations, *supra* note 181, pmbl. (listing various international instruments that indirectly bind corporations).
183. *See, e.g.*, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment art. 2, ¶ 6, June 21, 1993, 32 I.L.M. 1228 (defining person as any entity, "whether corporate or not"); International Convention on Civil Liability for Oil Pollution Damage art. 1, ¶ 2, Nov. 29, 1969, 973 U.N.T.S. 3 [hereinafter Convention on Oil Pollution] (binding any person, "whether corporate or not"); Vienna Convention on Civil Liability for Nuclear Damage art. 1(1)(a), May 21, 1963, 1063 U.N.T.S. 265 [hereinafter Vienna Convention] (imposing liability on "any private or public body whether corporate or not" for nuclear damage).

Commission.[184] These treaties may demonstrate that international law recognizes the corporate entity in some form.[185]

Within the context of human rights, the international community acknowledges that international law must in some way monitor the behavior of corporations.[186] In the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, the United Nations recognized that corporations have the obligation to promote, respect, and protect human rights as established by international and national laws.[187] To ensure compliance with this aspiration, the document proposed that corporations establish internal compliance regimes and allow periodic monitoring by international organizations.[188] Additionally, the statement suggested that States establish the necessary legal framework for assuring that corporations comply with these norms and award the necessary damages to those affected by a company's failure to comply.[189]

On going debate exists over whether customary international law recognizes corporate liability for a violation of the law of nations.[190] The question of whether corporations can be held civilly liable under the ATS is largely dependent on whether a court chooses to apply international or domestic law.[191] However, Supreme Court precedent gives little indication of which body of law courts should draw upon in making this determination.[192] Part II examines the varied approaches that different courts employ to address whether a corporation can be liable under the ATS.

II. THE INCREASING CONFUSION OVER WHETHER A CORPORATE DEFENDANT CAN BE LIABLE FOR A "VIOLATION OF THE LAW OF NATIONS"

The divergent application of *Sosa*'s principles by lower courts has created high levels of uncertainty for ATS litigants.[193] Specifically, when answering the question of whether corporations can be subject to liability under the ATS, courts utilize a variety of approaches that are rooted in

184. *See* Kinley & Tadaki, *supra* note 161, at 947.

185. *See id.* at 948. For a broad discussion of these treaties and more international decisions in favor of corporate liability, see Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 475–88 (2001).

186. *See* U.N. Human Rights Norms for Corporations, *supra* note 181, pmbl.

187. *Id.* ¶ 1.

188. *Id.* ¶¶ 15–16.

189. *Id.* ¶¶ 17–18; *see also* U.N. Report of the Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right To Development*, ¶ 87, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) ("States are required to take appropriate steps to investigate, punish and redress corporate-related abuse of the rights of individuals within their territory and/or jurisdiction—in short, to provide access to remedy.").

190. *See infra* Part II.A–B.

191. *See supra* Part I.C.3.

192. *See supra* Part I.C.1.

193. *See supra* notes 111–19 and accompanying text.

international law, domestic law, or an overlay of both sets of principles. The following section, Part II.A, identifies cases where courts have either implicitly or expressly held that corporations can violate the law of nations. Part II.B addresses the recent jurisprudence of a number of courts finding that corporate entities cannot be defendants under the ATS.

A. The Different Rationales for Holding Corporations Accountable Under the ATS

Courts frequently rule on ATS cases involving corporate defendants[194] or impose liability[195] on these defendants without specifically addressing whether corporate entities can be held liable (precedent sub silentio).[196] Rather, corporate liability is often assumed without any discussion.[197] Additionally, some courts have explicitly stated that they are assuming that corporations can be held liable under the ATS.[198] Although substantial in terms of volume, these courts provide no rationale behind their decisions and, thus, provide little meaningful insight into the issue of corporate

194. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 174–75, 187–88 (2d Cir. 2009) (concluding that jurisdiction over corporate defendants existed for nonconsensual medical experimentation on humans because universally accepted norms of customary international law prohibited the conduct); Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1202–03 (9th Cir. 2007) (affirming the lower court's finding that jurisdiction existed over nonfrivolous claims asserted against mining corporation for vicarious liability of *jus cogens* norms), *remanded in part on other grounds*, 550 F.3d 822 (9th Cir. 2008) (en banc); Doe v. Exxon Mobil Corp., 473 F.3d 345, 357 (D.C. Cir. 2007) (upholding the lower court's denial of oil company's motion to dismiss on political questions grounds); Bigio v. Coca-Cola Co., 239 F.3d 440, 449 (2d Cir. 2000) (holding that corporate defendants did not act in concert with the state to be liable); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92 (2d Cir. 2000) (finding that the court had personal jurisdiction over energy companies but that the action must be dismissed on forum non conveniens grounds); Roe v. Bridgestone Corp., 492 F. Supp. 2d 988, 1012–15 (S.D. Ind. 2007) (holding that allegations of forced labor by multinational company did not fall within the meaning well-established under international law); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1183 (C.D. Cal. 2005) (allowing claim to proceed against oil company and private security firm); *supra* notes 149–50 and accompanying text (discussing *Unocal*).

195. *See* Licea v. Curacao Drydock Co., 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008) (holding that Cuban nationals were entitled to between fifteen and twenty million dollars each in compensatory damages and ten million dollars each in punitive damages from corporate defendants for human trafficking and forced labor); *see also* Judgment in a Civil Trial, Chowdhury v. WorldTel Bangl. Holding, Ltd., No. 08-CV-1659 (BMC) (E.D.N.Y. Aug. 6, 2009), ECF No. 48 (jury verdict of $1.5 million in compensatory damages and $250,000 in punitive damages against corporate defendant for torture claim).

196. Precedent sub silentio refers to cases where issues are passed on in silence, without being expressly mentioned. BLACK'S LAW DICTIONARY, *supra* note 109, at 1296.

197. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 161 & n.12 (2d Cir. 2010) (Leval, J., concurring) (collecting cases involving corporate defendants where liability was "assumed").

198. *See, e.g.*, *Talisman II*, 582 F.3d 244, 261 n.12 (2d Cir. 2009) ("We will also assume, without deciding, that corporations . . . may be held liable for the violations of customary international law . . . ."); Carmichael v. United Techs. Corp., 835 F.2d 109, 113–14 (5th Cir. 1988) (assuming that the court had subject matter jurisdiction over the corporate defendant because it was "unnecessary to decide" the question).

liability. As a result, substantial disagreement exists over whether these cases qualify as binding authority.[199]

However, the U.S. Court of Appeals for the Eleventh Circuit,[200] U.S. District Courts for the Southern and Eastern Districts of New York,[201] and a concurring judge within the Second Circuit,[202] have expressly concluded that ATS liability can properly be imposed upon corporate entities. In doing so, these courts often rely on the decisions of courts where liability was assumed to hold that liability is appropriate in the current case.

1. The U.S. Court of Appeals for the Eleventh Circuit

The Eleventh Circuit is the only circuit to have explicitly ruled in support of corporate liability under the ATS.[203] In *Romero v. Drummond Co.*,[204] a labor union, its leaders, and relatives of its deceased leaders brought an ATS action in the U.S. District Court for the Northern District of Alabama against the mining company Drummond.[205] The plaintiffs alleged that, under the direction of corporate executives in the United States, the company hired paramilitaries affiliated with the United Self-Defense Forces of Colombia to torture the union leaders.[206] On appeal, the defendants argued that the district court lacked subject matter jurisdiction because the ATS did not allow suits against corporations.[207]

The Eleventh Circuit held that the district court properly exercised subject matter jurisdiction over Drummond under the ATS.[208] The court relied on two arguments in deciding that the ATS permitted suits against corporate defendants. First, the court cited its prior decision in *Aldana v. Del Monte Fresh Produce, Inc.*[209] In *Aldana*, the court found that the plaintiffs had properly stated a claim under the ATS against a corporate defendant.[210] The *Aldana* court simply assumed that a corporate entity could be held liable without any discussion of the issue.[211] Nonetheless, the Eleventh Circuit, in *Romero*, characterized itself as "bound by that precedent."[212] Next, the Eleventh Circuit briefly addressed the text of the

199. *Compare In re* "Agent Orange" Prod. Liab. Litig., 373 F. Supp. 2d 7, 58–59 (E.D.N.Y. 2005) (listing cases and finding that "the disposition of these cases is inconsistent with the assertion that no claim under the ATS can be brought against corporations"), *aff'd*, 517 F.3d 104 (2d Cir. 2008), *with Kiobel*, 621 F.3d at 124–25 (holding that the fact that the court has decided ATS cases involving corporations "does not foreclose consideration of the issue").

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

201. *Agent Orange*, 373 F. Supp. 2d at 58; *Talisman I*, 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003).

202. *Kiobel*, 621 F.3d at 149 (Leval, J., concurring).

203. *See* Gottridge & Galvin, *supra* note 152, at 122.

204. 552 F.3d 1303 (11th Cir. 2008).

205. *Id.* at 1309.

206. *Id.*

207. *Id.* at 1314.

208. *Id.* at 1315.

209. 416 F.3d 1242 (11th Cir. 2005).

210. *Id.* at 1250; *see also Romero*, 552 F.3d at 1315.

211. Gottridge & Galvin, *supra* note 152, at 122; *see also Aldana*, 416 F.3d at 1250.

212. *Romero*, 552 F.3d at 1315.

statute.[213] Because the statute provided no express exception for corporations, the court concluded that corporations were not immune from suit.[214]

In concluding that corporations could be liable, the Eleventh Circuit engaged in no substantive analysis of customary international law.[215] Rather, the court relied upon its silence in past cases and the express text of the statute. The Eleventh Circuit cited favorably to *Romero* in a subsequent ATS case, where the court again rejected defendants' argument that corporations could not be held liable under the statute.[216] As such, the issue of corporate liability is viewed as a settled question within the Eleventh Circuit.[217]

A number of district courts have also concluded that the ATS applies to corporate defendants. In particular, two district court opinions from the Second Circuit—*Presbyterian Church of Sudan v. Talisman Energy, Inc.* (*Talisman I*)[218] and *In re "Agent Orange" Product Liability Litigation*[219]—provide the most extensive examination of the question.[220] Although these cases are no longer binding in light of the Second Circuit's holding in *Kiobel*, other jurisdictions draw heavily upon these cases in concluding that corporations can commit a violation of the law of nations.[221] As a result, these cases remain highly instructive on the issue that this Note seeks to address.[222]

2. The U.S. District Court for the Southern District of New York

Although the Second Circuit decided *Filártiga*, the first modern ATS case, in 1980,[223] the first case to address the question of corporate liability

213. *Id.*
214. *Id.*
215. Gottridge & Galvin, *supra* note 152, at 122.
216. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009).
217. *Cf.* Gottridge & Galvin, *supra* note 152, at 122.
218. 244 F. Supp. 2d 289 (S.D.N.Y. 2003).
219. 373 F. Supp. 2d 7 (E.D.N.Y. 2005).
220. *See* Doe v. Nestle, S.A., No. CV 05-5133, 2010 WL 3969615, at *61 (C.D. Cal. Sept. 8, 2010).
221. *See, e.g.*, Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702, 753–54 (D. Md. 2010) (discussing *Romero*, *Talisman I*, and *Agent Orange*); *In re* XE Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 588 (E.D. Va. 2009) (discussing *Talisman I* and *Agent Orange*); *see also Nestle*, 2010 WL 3969615, at *61 ("Many other courts have relied almost exclusively on the reasoning employed by these two decisions.").
222. Without providing extensive analysis, a number of other district courts also expressly reject the argument that a corporation cannot be held liable under the ATS. *See, e.g.*, *Al-Quraishi*, 728 F. Supp. 2d at 753–54 (determining that the law of nations extends to corporations based on domestic precedent); *XE Servs.*, 665 F. Supp. 2d at 588 (holding that nothing in *Sosa* may be read to distinguish between private and public actors); Bowoto v. Chevron Corp., No. C 99-02506, 2006 WL 2455752, at *9 (N.D. Cal. Aug. 22, 2006) (finding that once "an international norm has been sufficiently well established to reach private actors, there is very little reason to differentiate between corporations and individuals").
223. *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); *see also supra* note 27 and accompanying text.

within the circuit was decided in 2003.[224] In *Talisman I*, a group of plaintiffs alleged that Talisman Energy, Inc., a large Canadian energy company, participated with the Sudanese government in the ethnic cleansing of the non-Muslim Sudanese population within the country's southern oil fields.[225] According to the complaint, Talisman aided this genocidal policy for the purpose of facilitating exploitative oil activities in the region.[226] Talisman moved to dismiss the complaint for lack of subject matter jurisdiction, in part, claiming that a corporation is legally incapable of violating the law of nations.[227]

The Southern District of New York rejected the company's argument. The court held that corporations could be liable for violations of the law of nations, "particularly when their actions constitute *jus cogens* violations."[228] In making this determination, the court cited a "considerable body" of domestic and international precedent in support of its holding.[229]

Because the district court decided *Talisman I* prior to *Sosa*, the court started its review of domestic precedent with Second Circuit decisions.[230] The court offered an extensive review of circuit precedent, beginning with the birth of ATS litigation in *Filártiga*,[231] through *Kadic*'s extension of liability to individuals,[232] to more recent cases brought against corporate defendants.[233] The court concluded that Second Circuit precedent indicates that imposition of liability on corporations is the norm, not the exception, in ATS jurisprudence.[234]

The court rejected the defendant's argument that sub silentio precedent could not support a finding of corporate liability.[235] Because subject matter jurisdiction is fundamental in determining whether a court may hear a case, it is the duty of any court to consider if jurisdiction is proper even if the parties do not raise the issue.[236] Therefore, if corporate entities were incapable of being subject to jurisdiction, prior courts had the legal duty to address the issue sua sponte.[237] By not dismissing prior ATS cases against

224. *See Talisman I*, 244 F. Supp. 2d 289, 308 (S.D.N.Y. 2003).
225. *Id.* at 296.
226. *Id.*
227. *Id.* at 308. Talisman primarily relied on the opinions of two esteemed international legal scholars, James Crawford and Christopher Greenwood. *Id.* These scholars submitted affidavits examining international law to conclude that a corporate entity cannot be liable. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 309.
232. *Id.* at 309–11.
233. *Id.* at 311–13 (discussing Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); Bigio v. Coca-Cola Co., 239 F.3d 440 (2d Cir. 2000); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998)).
234. *Id.* at 319.
235. *Id.* at 312.
236. *Id.* at 312–13.
237. *Id.* A court is considered to act sua sponte when it issues a ruling without prompting or suggestion by the parties. BLACK'S LAW DICTIONARY, *supra* note 109, at 1560.

corporations, the Second Circuit "tacitly acknowledged that subject matter jurisdiction lay in that case."[238]

The district court then examined the weight of international precedent in favor of its conclusion.[239] The court rejected Talisman's argument that because the Nuremberg Tribunals (the Tribunals) held individuals and not their corporate entities liable following World War II, the Tribunal did not consider corporations liable.[240] Rather, the court found informative the language of the Tribunals, which spoke in terms of corporate liability.[241] This language showed that the Tribunals considered corporations culpable and thus formed the basis for the concept of corporate liability for *jus cogens* violations.[242] Next, the court examined numerous treaties pertaining to the environment, which impose liability directly upon corporate entities.[243] Because a number of treaties impose liability on corporations for unintentional toxic torts, "logic would suggest that they can be held liable for intentional torts such as complicity in genocide, slave trading, or torture."[244] Lastly, the court noted that international organizations, such as the United Nations and the European Union, impose various duties on corporate behavior to ensure that human rights are respected.[245]

As a result of the lengthy analysis of domestic and international precedent, the court concluded that when the plaintiffs alleged *jus cogens* violations, corporations can be subject to liability.[246] The court stated that this "result should hardly be surprising" considering that a private corporation has no immunity under U.S. or international law, and there is no logical reason to provide such an immunity.[247] Although the court never explicitly discussed what body of law controlled its inquiry, its examination

238. *Talisman I*, 244 F. Supp. 2d at 312.

239. *Id.* at 315–18.

240. *Id.* at 315–16; *see also* Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 344–45 (2008). Formed as military courts following World War II by the London Charter, the U.S. and British Nuremberg Tribunals (the Tribunals) prosecuted German corporate executives for the various ways they contributed to the atrocities. *See* Allison Marston Danner, *The Nuremberg Industrialist Prosecutions and Aggressive War*, 46 VA. J. INT'L L. 651, 653 (2006); *see also* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter London Charter] (establishing the Tribunals). Courts increasingly look to the Tribunals for guidance on the scope of corporate liability under the ATS. *See* Skinner, *supra*, at 326.

241. *Talisman I*, 244 F. Supp. 2d at 316 (discussing United States v. Krupp, Control Council No. 10 (Dec. 20, 1945), *quoted in* Ratner, *supra* note 185, at 477–78 n.134); *see* Skinner, *supra* note 240, at 344–45.

242. *Talisman I*, 244 F. Supp. 2d at 316; *see* Skinner, *supra* note 240, at 344–45.

243. *Talisman I*, 244 F. Supp. 2d at 316–18 (citing Vienna Convention, *supra* note 183, art. 2(1); Convention on Oil Pollution, *supra* note 183, art. 3(1), among others).

244. *Id.* at 317.

245. *Id.* at 317–18 (citing Universal Declaration of Human Rights, *supra* note 101). *But see supra* notes 101–03 and accompanying text (*Sosa* rejecting the plaintiff's reliance on the Universal Declaration of Human Rights as evidence).

246. *Talisman I*, 244 F. Supp. 2d at 319.

247. *Id.*

of international precedent suggests that the court considered international law as governing.

3. The U.S. District Court for the Eastern District of New York

Two years following *Talisman I*, a second district court within the Second Circuit concluded that ATS liability could be imposed on corporate entities. The Eastern District of New York analyzed corporate liability in *Agent Orange*.[248] The court dismissed a complaint brought by Vietnamese nationals and the Vietnamese Association for Victims of Agent Orange/Dioxin against corporations based in the United States for violations of international and domestic law.[249] Specifically, the plaintiffs alleged that the companies manufactured and supplied herbicides to the United States and South Vietnam, who then sprayed and spilled the chemicals in Vietnam from 1961 to 1975.[250] The party sought damages for the deaths and exposure to the herbicides of the plaintiffs under the ATS, in addition to environmental clean-up costs, abatement, and disgorgement of profits.[251]

In their motion to dismiss, defendants argued that customary international law did not extend to corporate behavior.[252] Although the court recognized that there was "substantial support for this position,"[253] it held that a corporation was not immune from civil liability based on international law.[254] First, Judge Jack B. Weinstein rested on general principles of fairness and logic in stating there existed no reason why corporations should not be held liable to the same extent as individuals under the ATS.[255] The court noted that:

> Limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world. . . . Our vital private activities are conducted primarily under corporate auspices, only corporations have the wherewithal to respond to massive toxic tort suits, and changing personnel means that those individuals who acted on behalf of the corporation and for its profit are often gone or deceased before they or the corporation can be brought to justice.[256]

248. 373 F. Supp. 2d 7 (E.D.N.Y. 2005).
249. *Id.* at 15.
250. *Id.* at 27.
251. *Id.*
252. *Id.* at 54–55.
253. *Id.* at 55. The court noted that many of the sources of international law cited by the defendants concerned criminal liability. *Id.* at 57. However, "limitations on criminal liability of corporations do not necessarily apply to civil liability of corporations." *Id.*
254. *Id.* at 58.
255. *See id.* at 58–59; *see also* Doe v. Nestle, S.A., No. CV 05-5133, 2010 WL 3969615, at *62 (C.D. Cal. Sept. 8, 2010) (characterizing *Agent Orange*'s argument as based on general principles of fairness).
256. *Agent Orange*, 373 F. Supp. 2d at 58.

According to the court, international law in no way immunizes corporations from civil legal actions.[257]

Next, the court adopted a portion of an amicus brief that addressed the weight of precedent in favor of its decision.[258] Amici stated that the Supreme Court had "acknowledged that corporations can be sued under the ATS" in footnote twenty of *Sosa*.[259] Furthermore, the brief cited to a number of Second Circuit cases where the court considered claims against corporations for breach of international law without expressly addressing corporate culpability.[260] Amici contended that the disposition of these cases was inherently inconsistent with the defendants' argument that corporations were not subject to ATS liability.[261] Similar to *Romero*, the court relied on precedent sub silentio to conclude that courts had already acknowledged corporate defendants as potentially culpable.[262] The court also acknowledged that the *Talisman I* court affirmatively decided the issue of corporate liability under the ATS.[263] In particular, no court had ever presented a policy reason for why corporations should be immune from ATS liability, and Judge Weinstein declined to find differently.[264]

Lastly, the court held that even if domestic law applied, corporate defendants could still be sued under the ATS.[265] Ultimately, the Supreme Court had "made clear that an ATS claim is a federal common law claim and it is a bedrock tenet of American law that corporations can be held liable for their torts."[266]

While *Agent Orange* recognized that corporations could be liable for a violation of the law of nations,[267] the opinion provided far less clarity in understanding which law governs the question. According to the court, both international and domestic law bolstered its finding.[268] Yet the court supported its position with few sources of international law.[269] Nowhere did the court address whether a "specific, universal, and obligatory" norm of international law extended liability to corporate entities.[270] Furthermore, within the context of domestic law, the court merely surmised that, as a

257. *Id.*

258. *Id.*; *see Nestle*, 2010 WL 3969615, at *64–65 (characterizing this as a "stare decisis-based argument"). The court found the amicus brief submitted by Professor Jordan J. Paust particularly "learned and compelling." *Agent Orange*, 373 F. Supp. 2d at 18.

259. *Agent Orange*, 373 F. Supp. 2d at 58; *see also* Keitner, *supra* note 113, at 72.

260. *Agent Orange*, 373 F. Supp. 2d at 58.

261. *Id.* at 58–59.

262. *See supra* notes 209–12 and accompanying text.

263. *Agent Orange*, 373 F. Supp. 2d at 59 (citing *Talisman I*, 244 F. Supp. 2d 289, 311–19 (2003)).

264. *Id.*

265. *Id.*

266. *Id.*; *see supra* note 57 and accompanying text.

267. *See Agent Orange*, 373 F. Supp. 2d at 59.

268. *Id.*

269. *See generally id.* at 55–58 (expressly rejecting a handful of sources of international law cited within the defendant's brief as not granting corporations immunity).

270. *See* Doe v. Nestle, S.A., No. CV 05-5133, 2010 WL 3969615, at *63 (C.D. Cal. Sept. 8, 2010) (identifying *Agent Orange* as failing to apply the *Sosa* standard).

federal common law claim, the ATS binds corporations just as any domestic tort would.[271]

4. Judge Pierre N. Leval's Concurrence in *Kiobel v. Royal Dutch Petroleum Co.*

The Second Circuit's recent opinion in *Kiobel* offered a substantive examination of which body of law should decide corporate ATS liability.[272] Writing separately, Judge Pierre N. Leval reasoned that corporations could be held liable for a violation of the law of nations.[273] However, because the complaint fell short of the pleading standards articulated by the Supreme Court in *Ashcroft v. Iqbal*,[274] Judge Leval concurred with the majority in judgment.[275] Although written as a concurrence, this opinion functions largely as a dissent due to the divergent choice of law principles that Judge Leval applied.[276]

Judge Leval utilized a complex two-tiered choice of law analysis in his concurrence.[277] A court should first consider whether any set of facts in an ATS case alleges a violation of the law of nations.[278] A defendant can only be held accountable for a violation if no principle of international law exempts that type of defendant.[279] If no such exemption exists, a court's second inquiry should focus on the appropriate remedies for a plaintiff under international law.[280] Because international law allows States to impose domestic remedies for civil violations, a judge should ask whether domestic law allows a court to grant the plaintiff the requested remedy against the defendant.[281]

In accordance with this approach, Judge Leval began his analysis by considering whether the set of facts alleged a violation of international law.[282] If international law exempted corporations from liability, the court could not hold the defendants accountable.[283] According to the concurrence, corporations are not immune under international law.[284] However, the *Kiobel* majority identified an exemption based in part on the

271. *See supra* notes 265–66 and accompanying text.

272. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010). The arguments presented by the majority in this case will be analyzed *infra* Part II.B.2.

273. *See id.* at 150 (Leval, J., concurring).

274. 129 S. Ct. 1937 (2009); *see supra* note 160 and accompanying text (explaining how the pleading standard has placed limitations on the ability of plaintiffs to sue corporate entities).

275. *Kiobel*, 621 F.3d at 153–54 (Leval, J., concurring).

276. *See* Anderson, *supra* note 15.

277. In Part III.A.2, this Note will further examine the method chosen by Judge Leval and ultimately conclude that the approach can be simplified in accordance with the Supreme Court's holding in *Sosa*.

278. *Kiobel*, 621 F.3d at 174.

279. *Id.*

280. *Id.* at 176.

281. *Id.*

282. *Id.* at 174, 188.

283. *Id.* at 174.

284. *Id.* at 175.

lack of international tribunals exercising jurisdiction over corporations.[285] According to Judge Leval, the absence of tribunals exercising jurisdiction in no way implies that international law deems a corporation immune from liability.[286] Rather, this is a reflection on the type of international jurisdiction exercised over private actors.[287] Notably, every tribunal to ever exercise jurisdiction over private actors has acted within the context of criminal liability.[288] However, it is widely believed by the international community that imposing criminal punishment over a judicial person, like a corporate entity, would be incompatible with the objectives of criminal law.[289] Thus, the absence of tribunals exerting jurisdiction over corporations results from the fact that these courts are only empowered to exert criminal liability over private actors.[290] Judge Leval noted that, if this lack of civil liability means that international law immunizes corporations, natural persons would be immune from civil liability under the ATS as well.[291]

Although international law exerts jurisdiction solely over private actors within the criminal context, it allows States to decide whether to inflict civil penalties on these defendants.[292] If a State decides to do so, the remedies available are also left to that State's discretion.[293] This discretion exists in light of the diversity of legal systems across the world and in recognition of the near impossibility of reaching State consensus on how to impose civil liability.[294] According to Judge Leval, a number of multilateral treaties protecting human rights exemplify this principle.[295] These treaties define the general prohibited conduct, but allow each State to devise its own system for enforcing the norm.[296] As such, a court's second inquiry should

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285. *See id.* The majority in *Kiobel* disputed Judge Leval's characterization of its holding as "immun[izing]" corporations from an ATS claim. *Id.* at 120 (majority opinion). The majority maintained this characterization assumed that an international norm existed, rather than correctly asking first whether international law extended liability to corporate defendants. *Id.*

286. *Id.* at 166 (Leval, J., concurring).

287. *See id.* at 166–67.

288. *Id.* at 170–71 (citing Rome Statute of the International Criminal Court pmbl., ¶ 4, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute]; London Charter, *supra* note 240, art. 1).

289. *Id.* at 166–68. The concurrence described the following objectives of criminal law: retribution, incapacitation, specific deterrence, and general deterrence. *See id.* at 167. However, the only punishment that can be inflicted on a corporation is a monetary fine. *Id.* at 168.

290. *See id.*; *see also supra* note 253 (describing *Talisman I*'s recognition of the distinction between civil and criminal liability under international law).

291. *Kiobel*, 621 F.3d at 176 (Leval, J., concurring).

292. *Id.* at 172–74.

293. *Id.* at 173.

294. *Id.*

295. *Id.* (discussing the Convention on the Prevention and Punishment of the Crime of Genocide arts. I, II, V, Dec. 9, 1948, 78 U.N.T.S. 277).

296. *Id.*; *see also supra* notes 184–89 and accompanying text (describing the U.N. Human Rights Norms for Corporations, which encourages States to enforce human rights domestically).

focus on whether the domestic court has provided for such a remedy.[297] By enacting the ATS, the U.S. Congress empowered courts to adjudicate claims by foreign plaintiffs for violations of the law of nations and, thus, sanctioned suits against corporate entities.[298]

Judge Leval rejected the contention that, under *Sosa*, imposition of particular civil remedies must be universally accepted and applied by States within their domestic courts.[299] Although *Sosa* required a "norm" to have achieved universal acceptance, a norm refers to standards of conduct, not the remedies States decide to implement.[300] This view is consistent with *Sosa*, where the violation turned on whether the conduct of arbitrarily detaining someone violated the law of nations.[301] Additionally, opinions considering the state action requirement support this contention.[302] In *Tel-Oren v. Libyan Arab Republic*,[303] the U.S. Court of Appeals for the D.C. Circuit considered whether conduct performed without color of State law could be actionable.[304] As a result, *Sosa*'s requirement that a norm enjoy universal acceptance does not relate to the remedies that States decide to impose domestically.[305]

Next, Judge Leval concluded that the question of whether a corporation, as opposed to an individual, can be liable relates to the remedy and not to the corporation's conduct.[306] The conduct of the corporate defendants in *Kiobel* "indisputably *does* violate the law of nations."[307] Judge Leval distinguished this from *Tel-Oren*, where the defendant's conduct, "because

297. *See Kiobel*, 621 F.3d at 175 (Leval, J., concurring).

298. *See id.*

299. *Id.* at 176–78.

300. *See id.* Much of this discussion mirrors the theories proposed by Professors William R. Casto and Chimène I. Keitner, who argue that *Sosa* directs courts to distinguish between conduct-regulating rules and other rules of decision under the ATS. *See* Casto, *supra* note 27, at 638–39 ("The new cause of action envisioned by *Sosa* is unintelligible unless the well-established distinction between rights and remedies is kept clearly in mind."); William R. Casto, *Regulating the New Privateers of the Twenty-First Century*, 37 RUTGERS L.J. 671, 695 (2006) (finding that the Sosa guidelines "draw a sharp distinction between the norms for which a tort remedy is provided and the multitude of other legal issues that arise in tort litigation"); Keitner, *supra* note 113, at 79–81 (distinguishing between "conduct-regulating norms" and "ancillary" questions). Part III.B of this Note will further develop this theory within the context of corporate liability and propose that courts utilize this approach in understanding choice of law principles.

301. *Kiobel*, 621 F.3d at 176–78 (Leval, J., concurring); *see also supra* notes 99–106 and accompanying text (laying out *Sosa*'s examination of international sources to determine whether the defendant's conduct constituted a violation).

302. *See Kiobel*, 621 F.3d at 176–78 (discussing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)); *see also* Kadic v. Karadžić, 70 F.3d 232, 239–41 (2d Cir. 1995)).

303. 726 F.2d 774 (D.C. Cir. 1984).

304. *Id.*; *see Kiobel*, 621 F.3d at 177 (Leval, J., concurring).

305. *Kiobel*, 621 F.3d at 178; *see also* Casto, *supra* note 300, at 695 (describing "rules of decision that are not conduct-regulating norms" as not subject to the *Sosa* standard).

306. *See Kiobel*, 621 F.3d at 176–78. In addressing Judge Leval's argument, the *Kiobel* majority held that corporate liability should be considered akin to accessorial liability, rather than a remedial issue. *Id.* at 147–48 (majority opinion). Remedies solely refer to what a plaintiff may recover under the law. *Id.* at 147 n.50.

307. *Id.* at 177 (Leval, J., concurring).

done by an actor of specified character, [did] *not* violate the law of nations."[308] Instead, the *Kiobel* defendants would be liable for their conduct under the ATS even if an individual undertook that conduct.[309] In other words, the question of whether a corporate defendant, as opposed to an individual, can be held liable does not hinge on the conduct performed by the defendant. Therefore, *Sosa*'s requirement of a "specific, universal, and obligatory" norm should have no bearing on the issue at hand.[310]

Like the court in *Agent Orange*, Judge Leval contended that footnote twenty of *Sosa* also supported his position.[311] His concurrence rejected the corporate defendant's argument that footnote twenty distinguishes between corporate and individual conduct.[312] Rather, read in context, the footnote concerned the distinction between a private actor and state actor, not the distinction between a corporate entity and an individual.[313] By placing corporate entities and individuals together, the court implied that natural persons and judicial persons should be treated "identically" under the ATS.[314]

The patchwork of judicial opinions discussed above employs various choice of law principles in concluding that corporations can be liable under the ATS. The Eleventh Circuit rested its decision solely on precedent sub silentio and the text of the statute.[315] Although never explicitly addressing which law governs, the Southern District of New York provided extensive review of international authorities and precedent sub silentio in making its determination.[316] The Eastern District of New York also examined international sources in *Agent Orange*, but suggested that the fact that domestic law imposes liability may suffice under the ATS.[317] Finally, in first looking to international law, Judge Leval's *Kiobel* concurrence concluded that this body of law allows States to apply their own domestic remedies for conduct performed in violation of international law.[318]

The concluding section of Part II analyzes the recent jurisprudence denying that a corporate entity is capable of an ATS violation. While the opinions addressed above employed widely divergent approaches in

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308. *Id.*
309. *Id.*
310. *See id.*
311. *Id.* at 163–65; *see also supra* notes 258–59 and accompanying text (examining the U.S. District Court for the Eastern District of New York's reasoning in *Agent Orange*).
312. *Kiobel*, 621 F.3d at 163–64.
313. *Id.* at 165 ("If the violated norm is one that international law applies only against States, then '*a private actor, such as a corporation or an individual*,' who acts independently of a State, can have no liability . . . . [I]f the conduct is of the type classified as a violation . . . regardless of whether done by a State or a private actor, then '*a private actor, such as a corporation or an individual*,' has violated the law of nations . . . ." (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004))); *see also* Keitner, *supra* note 113, at 72.
314. *Kiobel*, 621 F.3d at 165; *see also* Keitner, *supra* note 113, at 72.
315. *See supra* Part II.A.1.
316. *See supra* Part II.A.2.
317. *See supra* Part II.A.3.
318. *See supra* Part II.A.4.

holding corporations liable, courts reaching the opposite result have uniformly based their decisions on international law.

B. Courts Holding that Corporations Cannot Be Held Liable Under the ATS Based on International Law

Prior to 2010, no court addressing the question of whether a corporation could violate the law of nations had denied the existence of liability.[319] However, within the span of a month, three courts—the Second Circuit,[320] and the U.S. District Courts for the Central District of California[321] and Southern District of Indiana[322]—had foreclosed plaintiffs from asserting an ATS claim against any corporation within their jurisdictions.

1. The U.S. District Court for the Central District of California

Thirteen years following *Unocal* and the influx of corporate defendants into ATS litigation,[323] the Central District of California held that courts have no jurisdiction over corporate entities. In *Doe v. Nestle, S.A.*,[324] the court dismissed corporate defendants Archer-Daniels-Midland Co., Nestle USA, and Cargill, Inc. from a complaint alleging that the companies aided and abetted the forced labor of Malians working on cocoa fields in Cote d'Ivoire.[325] Although the court rested its holding on the plaintiffs' failure to plead sufficient facts under *Iqbal*,[326] the court chose to address the corporate defendants' argument that international law does not extend liability to corporations.[327]

The court first examined *Sosa* and the two opposing concerns that lower courts grapple with when applying *Sosa*'s choice of law principles.[328] Although the Supreme Court observed in *Sosa* that the First Congress did not intend for the ATS to lay dormant, the Supreme Court also expressed the need for restraint in recognizing causes of action under the ATS.[329] The Central District of California found that *Sosa*'s discussion of law as "'a product of human choice'" weighs in favor of a restrained approach.[330] The court concluded that *Sosa* sought to cabin a judge's discretion by requiring that a court look to universally recognized and well-defined international legal principles.[331] In light of the language of footnote twenty,[332] the

319. *See Kiobel*, 621 F.3d at 151.
320. *Kiobel*, 621 F.3d at 111 (majority opinion).
321. Doe v. Nestle, S.A., No. CV 05-5133, 2010 WL 3969615 (C.D. Cal. Sept. 8, 2010).
322. Flomo v. Firestone Natural Rubber Co., 744 F. Supp. 2d 810 (S.D. Ind. 2010); Viera v. Eli Lilly & Co., No. 1:09-cv-0495, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010).
323. *See supra* note 151 and accompanying text.
324. *Nestle*, 2010 WL 3969615.
325. *Id.* at *1.
326. *Id.* at *31.
327. *Id.* at *57.
328. *Id.* at *57–60.
329. *Id.* at *57–58; *see supra* notes 64–72 and accompanying text.
330. *Nestle*, 2010 WL 3969615, at *58 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004)); *see supra* note 66 and accompanying text.
331. *Nestle*, 2010 WL 3969615, at *58–59.

Central District of California held that a court must utilize the same restraint in assessing whether a particular type of defendant could be held liable.[333] In other words, "the correct approach under *Sosa* is to determine whether universal, well-defined international law 'extends the scope of liability for a violation of a given norm to . . . corporation[s].'"[334]

The court next examined the various lines of reasoning used by courts—most notably in *Agent Orange* and *Talisman I*—that found in favor of corporate liability.[335] First, the court rejected what it characterized as logic-based arguments.[336] These courts opined that there is no principled basis for treating corporations differently than other defendants.[337] Yet *Sosa* requires that judges not rely on their own opinion of what is fair or logical.[338] According to the Central District of California, a court should instead consider whether international law *actually* contains a specific and universally recognized norm.[339]

Nor did the court find that arguments based on judicial or historical precedent illustrated a well-accepted norm of international law.[340] Despite the abundance of case law recognizing corporate liability, none of these opinions identified a sufficiently established norm,[341] and most did not even mention corporate liability.[342] Furthermore, this would ignore the fundamental principle that issues decided sub silentio should not be afforded precedential value.[343] Turning to historical precedent,[344] the court examined the following three sources: the Supreme Court's early recognition of the crime of piracy,[345] Blackstone's commentary on

332. *See Sosa*, 542 U.S. at 732 n.20; *see also supra* notes 64–72 and accompanying text.

333. *Nestle*, 2010 WL 3969615, at *59.

334. *Id.* at *59 (alteration in original) (quoting *Sosa*, 542 U.S. at 732 n.20).

335. *Id.* at *62–71.

336. *Id.* at *62–64 (analyzing *Romero*, *Talisman I*, and *Agent Orange*, among others). For discussion of the specific arguments utilized by these courts, see *supra* notes 213–14 and accompanying text (*Romero*), *supra* notes 244, 247 and accompanying text (*Talisman I*), and *supra* notes 254–57 and accompanying text (*Agent Orange*).

337. *Nestle*, 2010 WL 3969615, at *62.

338. *Id.* at *58. *But see supra* note 93 and accompanying text (explaining that principles of fairness are evidence of the existing rules of international law).

339. *Nestle*, 2010 WL 3969615, at *64.

340. *Id.* at *65–66.

341. *Id.* (discussing *Romero*, *Talisman I*, and *Agent Orange*, among others). For discussion of the specific arguments utilized by these courts, see *supra* notes 209–12 and accompanying text (*Romero*), *supra* notes 234–38 and accompanying text (*Talisman I*), and *supra* notes 260–62 and accompanying text (*Agent Orange*).

342. *Nestle*, 2010 WL 3969615, at *65–66.

343. *Id.* at *65; *see* Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

344. Although the court described these arguments as one of the lines of reasoning utilized by other courts, the opinion failed to cite one instance in which a court considered these specific sources. *See Nestle*, 2010 WL 3969615, at *65–66.

345. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) (discussing whether piracy can be committed by a legal entity or solely by individuals).

corporate crimes,[346] and a 1907 Attorney General's opinion regarding the use of the ATS.[347] Although the first two sources rejected the concept of corporate liability, the Attorney General's opinion provided some support for the view that international law may potentially hold corporations liable.[348]

Previous courts addressing corporate liability under the ATS relied extensively on international tribunals and conventions to hold corporate defendants accountable.[349] Specifically, these courts cited heavily to statements made by the Nuremberg Tribunals.[350] In *Nestle*, the court characterized as "nothing more than *dicta*" any "stray references" made by the tribunals regarding the possibility of corporate liability.[351] Next, the court examined the treaties relied upon in *Talisman I*.[352] Although *Talisman I* identified a handful of environmental treaties binding corporate behavior, these treaties did not establish an accepted norm within the context of human rights abuses. Furthermore, sources identifying a mere indirect effect on or mere possibility of liability did not provide a universal and well-defined consensus.[353] Again, the court emphasized that these international sources did not rise to the high threshold required by *Sosa*.[354]

Following a rejection of the sources utilized by previous courts, the Central District of California concluded that the minimum requirements of *Sosa* had not been satisfied.[355] Therefore, the court held that corporations are not subject to ATS liability, and the extent they should be is a matter better left for Congress to decide.[356]

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346. *See* 1 BLACKSTONE, *supra* note 56, *476 ("A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities.").

347. *See* Charles J. Bonaparte, Mexican-Boundary-Diversion of the Rio Grande, 26 Op. Att'y Gen. 250, 252–53 (1907) (recommending that a plaintiff use the ATS to remedy the harm created by a corporation's treaty violation).

348. *Nestle*, 2010 WL 3969615, at *66; *cf.* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 162–63 (2d Cir. 2010) (Leval, J., concurring) (arguing that the opinion by the Attorney General refutes the view that international law does not recognize corporate liability).

349. *Nestle*, 2010 WL 3969615, at *66–71.

350. *Id.* at *66–68 (examining the rationales of *Agent Orange* and *Talisman I*). For discussion of the specific arguments utilized by these courts, see *supra* notes 240–42 and accompanying text (*Talisman I*) and *supra* note 257 and accompanying text (*Agent Orange*).

351. *Nestle*, 2010 WL 3969615, at *68.

352. *Id.* at *68–71; *see supra* notes 239–45 and accompanying text (analyzing *Talisman I*'s reliance on international treaties and conventions).

353. *Nestle*, 2010 WL 3969615, at *69–70.

354. *Id.* In rejecting these sources, the court identified the statute creating the International Criminal Court as a compelling argument against treating corporate liability as actionable under international law. *Id.* at *70–71 (discussing ICC Statute, *supra* note 288, art. 25(1)). Specifically, the drafters of the statute were unable to reach a consensus on whether corporations should be held responsible for human rights abuses. *Id.*

355. *Id.* at *74.

356. *Id.*

2. The U.S. Court of Appeals for the Second Circuit

Less than ten days following *Nestle*, a second court issued a decision holding that a corporation cannot violate the ATS.[357] In *Kiobel*, the Second Circuit for the first time decided the question of whether the ATS extends to actions against corporations.[358] Residents of Nigeria alleged that two corporations aided and abetted the Nigerian government's violent suppression of an activist group opposed to their oil exploration activities.[359] The Nigerians brought ATS claims in the Southern District of New York for "aiding and abetting (1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction."[360] In September 2006, the district court dismissed a number of the claims because they were not sufficiently defined by international law.[361] The court allowed the remaining claims to move forward, but certified the entire order for interlocutory appeal to the Second Circuit.[362]

On appeal, the Second Circuit described the issue of whether the ATS extends liability to judicial persons, such as corporate entities, as a question "lurking in [its] ATS jurisprudence."[363] Although the court had decided ATS cases involving corporations previously, the Second Circuit did not consider itself bound when a later case raised a jurisdictional issue that had only been decided sub silentio.[364] Therefore, the Second Circuit rejected the argument that the cases, in any way, foreclosed consideration of this "lurking" question.[365]

As a preliminary matter, Judge José A. Cabranes, writing for the majority, analyzed which body of law controlled the type of perpetrator potentially liable under the ATS.[366] First, the court noted that international law is not silent on the subjects of international law nor does it leave this question to individual States to determine.[367] This fact is particularly

357. Although the *Kiobel* court acknowledged the decision in *Nestle*, it did not examine the Central District of California's opinion. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117 n.10 (2d Cir. 2010). This is likely because the Second Circuit had, in large part, drafted the lengthy *Kiobel* opinion prior to the issuance of *Nestle*. *See id* at 151 n.* (Leval, J., concurring).

358. *Id.* at 117 (majority opinion). One judge in the circuit previously expressed the view that corporations were not subject to ATS liability on the basis of customary international law. *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 321–26 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part). Since this dissenting opinion was published, a number of corporations moved for dismissal based on this viewpoint. *Kiobel*, 621 F.3d at 161 (Leval, J., concurring).

359. *Kiobel*, 621 F.3d at 123 (majority opinion).

360. *Id.*

361. *Id.* at 124.

362. *Id.*

363. *Id.* at 117.

364. *Id.* at 124–25 (citing Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974)).

365. *See id.*

366. *Id.* at 125–31.

367. *Id.* at 126–27.

evident from the Nuremberg Tribunals' explicit recognition of individual liability.[368] The Tribunals specifically rejected the argument that international law was solely concerned with the actions of States and declared that individuals could also be punished under international law.[369] This discussion implied that international law had the ability to recognize corporate liability, as it had previously done with individual liability.[370]

Next, the court examined *Sosa* and precedent interpreting and applying the Supreme Court's *Sosa* reasoning.[371] According to the court, footnote twenty and Justice Breyer's concurrence in *Sosa* left no question that a court must look to international law to determine whether jurisdiction exists over a particular ATS defendant.[372] This interpretation of *Sosa* is consistent with three decades of Second Circuit precedent.[373] It had been the practice of the court, starting with *Filártiga*, to look to international law to determine whether a state official committed a violation.[374] Additionally, in *Kadic*, the court looked to international law to determine whether a private actor could be liable.[375] Following *Sosa*, the court considered footnote twenty as requiring it to resort to international law to determine whether aiders and abettors could violate the law of nations.[376] The court found "no principled basis for treating the question of corporate liability differently."[377] As a result, the Second Circuit concluded that international law, *Sosa*, and circuit precedent required application of customary international law.[378]

The court next turned to whether the sources of international law demonstrate that corporate liability had obtained the status of a "specific, universal, and obligatory" norm in international law.[379] In reviewing the decisions of international tribunals, the court concluded that no tribunal had ever held a corporation liable for violation of customary international

368. *Id.*
369. *Id.*
370. *See id.*
371. *Id.* at 127–31.
372. *See id.* at 127–28; *see supra* notes 125–30 and accompanying text.
373. *Id.* at 131.
374. *Id.* at 128.
375. *Id.* (citing Kadic v. Karadžić, 70 F.3d 232, 239–41 (2d Cir. 1995)).
376. *Id.* at 128–29 (citing *Talisman II*, 582 F.3d 244, 258–59 (2d Cir. 2009)). The court also discussed Judge Robert Allen Katzmann's separate opinion in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 282 (2d Cir. 2007) (Katzmann, J., concurring), as requiring the court to consider international law under the ATS because, "'[u]nder the [ATS] the relevant norm is provided not by domestic statute but by the law of nations, and that law extends responsibility for the violations of its norms to aiders and abettors.'" *Kiobel*, 621 F.3d at 130 (alternation in original) (emphasis omitted) (quoting *Khulumani*, 504 F.3d at 282 (Katzmann, J., concurring)). However, in Judge Katzmann's dissent from the denial of rehearing en banc, he described his position in *Khulumani* as consistent with Judge Leval's determination that corporations can be held accountable under the ATS. *See* Kiobel v. Royal Dutch Petroleum Co., Nos. 06-4800-cv, 06-4876-cv, 2011 WL 338151, at *1 (2d Cir. Feb. 4, 2011) (en banc) (Katzmann, J., dissenting).
377. *Kiobel*, 621 F.3d at 130.
378. *Id.* at 130–31.
379. *Id.* at 131–45.

law.[380] Specifically, the Nuremberg Tribunals purposely declined to hold the corporations involved liable. Rather, the Tribunals "expressly defined liability under the law of nations as liability that could not be divorced from *individual* moral responsibility."[381] Additionally, the court found significant that the drafters of the charters establishing both the International Criminal Tribunal for Yugoslavia[382] and the International Criminal Court[383] expressly rejected proposals to include judicial persons within the jurisdiction of the courts.[384]

The Second Circuit's examination of treaty-based obligations also failed to demonstrate a well-established norm of customary international law in favor of corporate liability.[385] The court rejected *Talisman I*'s reliance on treaties not ratified by the United States, many of which had not been ratified by the States most affected by the terms of the treaty.[386] Because only universally recognized treaties may be treated as evidence of customary international law,[387] the court found these treaties insufficient to demonstrate a norm of corporate liability.[388] Additionally, the few treaties that were ratified and universally recognized by States had little influence within the context of human rights law.[389] These treaties could not be said to crystallize an emerging general rule of customary international law beyond their limited subject matters.[390] Lastly, the court rejected these treaties as lacking a "fundamentally norm creating character" and thus failing to demonstrate a norm of customary international law.[391]

The court identified the submissions of two publicists, Professor James Crawford and then-Professor Christopher Greenwood, as further supporting its holding.[392] Although many scholars favor imposing liability on corporations under the ATS, even these individuals acknowledge that no

380. *Id.* at 132. In Judge Leval's concurrence, he contended that the majority's argument depended on the practice of international *criminal* tribunals. *Id.* at 166–70 (Leval, J., concurring). For a discussion on the effect that this difference between criminal and civil law has on corporate liability under international law, see *supra* notes 288–91 and accompanying text.

381. *Kiobel*, 621 F.3d at 135 (majority opinion).

382. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

383. ICC Statute, *supra* note 288, art. 25(1).

384. *Kiobel*, 621 F.3d at 136–37.

385. *Id.* at 137–41.

386. *Id.* at 138.

387. *See supra* text accompanying notes 90–92 (discussing the relevance of treaties as customary international law).

388. *Kiobel*, 621 F.3d at 138–41.

389. *Id.* at 139. The court characterized these agreements as "specialized treaties." *Id.*

390. *Id.* Even if these treaties could be viewed as crystallizing an international norm, the court argued that the express rejection of corporate liability within the context of human rights treaties would make doing so inappropriate. *Id.*

391. *Id.*

392. *Id.* at 142–44. Principles of international law allow courts to consider the works of publicists, such as professors and jurists, to be evidence of customary international law. *See supra* note 94 and accompanying text. In *Talisman I*, the court considered affidavits submitted by these two publicists and ultimately rejected their conclusions. *See supra* notes 227–28 and accompanying text.

international body has yet imposed criminal liability on a corporate entity.[393]

From this extensive review of international tribunals, international treaties, and works of publicists, the Second Circuit concluded that the concept of corporate liability had not yet ripened into a rule of customary international law.[394] Subject matter jurisdiction over claims against corporations can only be attained by universal acceptance of corporate liability within the international community, which for the time being, has yet to be established.[395] However, the court emphasized that its opinion in no way foreclosed suits against individual corporate officers, actions against corporations under other bodies of law, or the ability of Congress to take action.[396]

Following the *Kiobel* decision, the plaintiffs petitioned the panel for rehearing.[397] On February 4, 2011, the panel denied plaintiffs' request for rehearing in a 2–1 vote.[398] Judge Dennis G. Jacobs filed a concurring opinion that described the various policy considerations supporting the majority's decision.[399] First, Judge Jacobs argued that Judge Leval's opinion failed to acknowledge that other nations have an interest in the remedies afforded under U.S. law.[400] For example, while it is universally accepted that piracy is in violation of international law, a country still may not extradite that individual in light of that country's opposition to capital punishment in the United States.[401] Second, Judge Jacobs described the majority's holding as promoting international comity.[402] Cases brought against foreign companies cause international rivalries and grievances.[403] According to Judge Jacobs, this outcome contradicts the universal consensus at the foundation of customary international law.[404] Third, *Kiobel* will have the practical benefit of preventing plaintiffs from using the ATS "to extort settlements" from corporations.[405] For these reasons, Judge

393. *Kiobel*, 621 F.3d at 142–44. In Judge Leval's concurrence, he explained that these affidavits were prepared in response to a request for further briefing on what countries or international tribunals have held corporations liable for a violation of the law of nations. *Id.* at 182 (Leval, J., concurring). However, the absence of such judgments does not bar a domestic court from imposing liability. *See supra* notes 292–98 and accompanying text.

394. *Kiobel*, 621 F.3d at 149 (majority opinion).

395. *Id.*

396. *Id.* at 122.

397. Kiobel v. Royal Dutch Petroleum Co., Nos. 06-4800-cv, 06-4876-cv, 2011 WL 338048, at *1 (2d Cir. Feb. 4, 2011).

398. *Id.*

399. *Id.* (Jacobs, J., concurring in the denial of panel rehearing); *see also Second Circuit Denies Rehearing in* Kiobel*: Confirms that the Circuit Does Not Recognize Corporate Liability Under the Alien Tort Statute*, MILBANK LITIGATION 2 (2011), http://www.milbank.com/NR/rdonlyres/9ED14DF9-61E3-4ECD-A18C-27C26790ADE0/0/021011Kiobel_En_Banc_Litigation_Client_Alert.pdf.

400. *Kiobel*, 2011 WL 338048, at *1.

401. *Id.*

402. *Id.* at *2–3.

403. *Id.* at *2.

404. *Id.*

405. *Id.* at *3–4.

Jacobs found the *Kiobel* opinion to be a "matter of great importance" and rightly decided.[406]

Following *Kiobel*, an active judge and a senior judge of the Second Circuit also requested a poll on whether to rehear the case en banc.[407] On the same day that the panel denied rehearing, the active judges of the Second Circuit divided 5–5 as to whether to proceed with an en banc rehearing.[408] Because no majority favored en banc review, the request for rehearing was denied.[409]

3. The U.S. District Court for the Southern District of Indiana

Thirteen days following the decision in *Kiobel*, the Southern District of Indiana, in *Viera v. Eli Lilly & Co.*,[410] fully adopted the Second Circuit's reasoning.[411] Brazilian residents filed an ATS claim against six U.S. corporations for injuries suffered from pollution emanating from a number of manufacturing facilities located in two Brazilian cities.[412] Although the court opined in dicta that the allegations of environmental pollution did not constitute an actionable ATS violation,[413] the court primarily rested its holding on the Second Circuit's assertion that "the ATS cannot provide federal court jurisdiction over claims based on voluntary actions taken by a corporation."[414]

Within a week of *Viera*, a second judge within the Southern District of Indiana dismissed an ATS case based on the *Kiobel* reasoning. In *Flomo v. Firestone Natural Rubber Co.*,[415] a group of Liberian children filed a complaint against Firestone Natural Rubber Co. for its Liberian subsidiary's use of forced child labor.[416] While the defendant's motion for summary judgment was under review, the Second Circuit handed down *Kiobel*.[417] After requesting supplemental briefing, Judge Jane Magnus-Stinson concluded that the court had subject matter jurisdiction to hear the

406. *Id.* at *4. Judge Leval dissented from the denial of rehearing and described Judge Jacobs's opinion as "reveal[ing] an intense, multi-faceted policy agenda that underlies the majority's undertaking to exempt corporations from the law of nations." *Id.* at *4 (Leval, J., dissenting). While Judge Leval did not find all of the policy considerations to be frivolous, he did not believe it was the role of the courts to make foreign and domestic policy. *Id.* Additionally, he viewed most of Judge Jacobs's grievances as directed at ATS jurisdiction generally and having no bearing on the specific issue of corporate liability. *Id.*

407. Kiobel v. Royal Dutch Petroleum Co., Nos. 06-4800-cv, 06-4876-cv, 2011 WL 338151, at *1 (2d Cir. Feb. 4, 2011) (en banc).

408. *See id.* (Katzmann, J., dissenting).

409. *Id.*

410. No. 1:09-cv-0495, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010).

411. *See id.* at *2 (finding the "reasoning of the Second Circuit persuasive").

412. *Id.* at *1.

413. *Id.* at *2–3.

414. *See id.* at *2.

415. 744 F. Supp. 2d 810 (S.D. Ind. 2010).

416. *Id.* at 812.

417. *Id.*

plaintiffs' claims.[418] However, the court granted summary judgment for the defendants in light of the *Kiobel* reasoning.[419]

The court first considered plaintiffs' contention that federal law automatically controlled the scope of a corporation's liability under the ATS.[420] After examining footnote twenty, the court held that such an argument is against the plain language of *Sosa*.[421]

Next, the court asked whether international law directed domestic courts to apply federal common law.[422] The court found persuasive the majority's reasoning in *Kiobel* that corporate liability was not proper "until international law . . . affirmatively approves the doctrine."[423] Judge Magnus-Stinson found three arguments put forth by the *Kiobel* majority particularly compelling. First, there existed a lack of consensus regarding the applicability of corporate liability under international law.[424] To discount such fact would run counter to internationally accepted norms by allowing a court to punish a company, rather than merely compensate an injured party.[425] Second, Congress expressly limited complaints under the Torture Victim Protection Act of 1991 (TVPA)[426] to those against individuals.[427] The TVPA was intended to codify the classic ATS claim of torture performed by a State.[428] Because of this, the court determined that the decision to limit the scope of this statute provided the court with congressional guidance on the question of corporate liability.[429] Third, there exists no availability of civil corporate liability for violations of the law of nations outside of the ATS or for American citizens.[430] In light of this, the court held that recognizing corporate liability would increase forum shopping and result in disparate treatment of citizens and foreign plaintiffs.[431]

Therefore, the Southern District of Indiana held that no norm of customary international law held corporations accountable.[432] Because

418. *Id.* at 812–13. Specifically, the court noted that because the question of corporate liability was not definitely resolved, the court could not find the claims to be frivolous so as to deprive the court of subject matter jurisdiction. *Id.* at 813.

419. *See id.* at 814–16.

420. *See id.* at 815–16.

421. *Id.*

422. *See id.* at 816–18.

423. *Id.* at 816.

424. *Id.* at 816–17; *see supra* notes 371–93 and accompanying text.

425. *Flomo*, 744 F. Supp. 2d at 817. For a discussion of the appropriate objectives of international criminal law, see *supra* notes 287–90 and accompanying text.

426. Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

427. *Flomo*, 744 F. Supp. 2d at 817. While Judge Jane Magnus-Stinson found this argument particularly compelling, the *Kiobel* majority only mentioned it briefly in a footnote. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 122 n.23 (2d Cir. 2010).

428. *Flomo*, 744 F. Supp. 2d at 817.

429. *Id.*

430. *Id.* at 818.

431. *Id.*

432. *Id.*

plaintiffs failed to establish a legally cognizable claim, the court entered summary judgment for the defendant.[433]

The Northern District of California, Second Circuit, and Southern District of Indiana uniformly applied international law to analyze whether a corporation can be liable for an ATS violation. Ultimately, these courts concluded that no norm of international law held corporations accountable and thus jurisdiction could not be exerted over the category of defendants.[434]

III. A FRAMEWORK FOR UNDERSTANDING CHOICE OF LAW PRINCIPLES AFTER *KIOBEL*

The conflicting outcomes analyzed in Part II resulted almost entirely from the courts' initial decisions to apply either domestic or international law. However, the uncertainty regarding which body of law governs is not limited to the context of corporate liability, but is part of a more encompassing inconsistency across circuits when confronting any novel ATS issue.[435] For example, prior to *Kiobel*, the muddled state of aiding and abetting liability caused frustration among scholars and persistent uncertainty for litigants.[436] A framework to guide choice of law decisions would not only add clarity to the question of corporate liability, but would also relieve the enduring confusion with ATS choice of law principles.

The next part of this Note advocates for the fashioning of a new framework that provides a broad rule to guide all choice of law decisions made within the scope of the ATS. Part III.A addresses the delinquencies inherent in the alternative approaches taken by courts in both allowing and denying corporate ATS liability in an effort to discern the appropriate choice of law principles. Part III.B expounds upon the works of Professors William R. Casto and Chimène I. Keitner to argue that international law solely controls the inquiry of what constitutes a violation of the law of nations. All other issues, including whether corporate entities can be liable under the ATS, are to be governed by U.S. federal common law.

A. The Significant Shortcomings of the Current Approaches

Despite a number of opportunities to add clarity to this issue, the overwhelming number of courts decline to address the question.[437] At first blush, these opinions appear to imply that corporate liability is undoubtedly

433. *Id.*

434. *See supra* notes 355–56 and accompanying text (*Nestle*); *supra* notes 394–96 and accompanying text (*Kiobel*); *supra* notes 410–14 and accompanying text (*Viera*); *supra* notes 432–33 and accompanying text (*Flomo*).

435. *See, e.g.*, *supra note* 113 and accompanying text (confusion regarding how far a norm extends); *supra* notes 114–16 and accompanying text (varied application of laws to define the elements of aiding and abetting liability); *supra* note 117 and accompanying text (questions regarding which international sources should be considered).

436. *See supra* notes 114–16 and accompanying text.

437. *See supra* notes 194–99 and accompanying text.

appropriate.[438] However, even disregarding their debatable precedential weight,[439] these courts make no attempt to identify the correct choice of law principles. Therefore, this Note will not consider precedent sub silentio informative on the question of what body of law should govern whether corporations can be held liable. Although deeply flawed, the handful of opinions that do directly address the issue provide some insight. This section assesses what value, if any, the opinions examined in Part II of this Note have added to the issue.

1. The Failure To Understand "Norms" as "Standards of Conduct"

Turning first to cases denying the liability of corporate defendants, these opinions all suffer from one critical flaw. The Second Circuit and Central District of California assumed that the standard for defining what constitutes a violation of a "specific, universal, and obligatory norm" must somehow also control the definition for who can commit a violation.[440] Judge Leval's *Kiobel* concurrence highlighted the confusion underlying the approach taken by the *Kiobel* majority and other courts: the Supreme Court intended the *Sosa* standard solely to govern the question of whether a defendant's conduct violated international law.[441] *Sosa*'s interpretation of the ATS, and subsequent courts' reliance on *Sosa*, demonstrate that a "norm" solely relates to a defendant's conduct.[442]

A "norm" relates to standards of conduct when viewed in the context of the original understanding of the ATS.[443] According to the Supreme Court in *Sosa*, it is generally understood that the First Congress enacted the ATS with a narrow set of offenses in mind—cases "threatening serious consequences in international affairs" and still demanding an individual judicial remedy.[444] Specifically, *Sosa* identified infringements of ambassadorial rights, piracy claims, and violations of safe conduct as falling within this limited category.[445] These examples hinged on the international character implicated by the conduct.[446] Therefore, when

438. For use of precedent sub silentio as an argument in favor of recognizing corporate liability, see *supra* notes 209–12 and accompanying text (*Romero*), *supra* notes 234–38 and accompanying text (*Talisman I*), and *supra* notes 260–62 and accompanying text (*Agent Orange*).

439. For an understanding of why these opinions should not be regarded as binding precedent, see *supra* notes 341–43 and accompanying text (*Nestle*) and *supra* notes 363–65 and accompanying text (*Kiobel*).

440. *See supra* notes 328–34 and accompanying text (*Nestle*); 366–78 and accompanying text (*Kiobel*).

441. *See supra* notes 299–305 and accompanying text.

442. *See supra* notes 299–305 and accompanying text.

443. *See supra* notes 299–300 and accompanying text; *see also supra* notes 49–56 and accompanying text (describing *Sosa*'s examination of the motives behind the First Congress's enactment of the ATS).

444. Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004); *see also supra* notes 50–52 and accompanying text.

445. *See supra* note 50 and accompanying text.

446. *See supra* notes 299–301 and accompanying text; *see also supra* notes 53–57 and accompanying text.

comparing any claim based on the present-day law of nations to these offenses, *Sosa* merely required that the conduct be defined with the same level of specificity and universal acceptance as the conduct troubling the First Congress.[447]

Sosa's application of the standard to Alvarez-Machain's claim of a modern day violation further illustrates the Court's focus on a norm as conduct.[448] The Court exclusively questioned whether Sosa's conduct—arbitrarily detaining Alvarez-Machain—violated a universally recognized norm.[449] In finding for Sosa, the Court again described the issue solely in terms of conduct: Alvarez-Machain failed to demonstrate that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment" violated customary international law.[450] The Court never indicated that the same standard should govern who could be liable for such conduct.[451]

Cases applying this standard fully support the conclusion that *Sosa* defined a "norm" as a standard of conduct.[452] In cases brought against private individuals, courts often question whether a norm of international law can hold private actors liable for the specific conduct at issue.[453] In *Kadic*, the Second Circuit undoubtedly considered the identity of the perpetrator as a public or private actor.[454] However, the court solely distinguished between the two categories of actors to determine whether the conduct at issue was of "universal concern."[455] This is exactly the distinction the Supreme Court recognized as potentially significant in footnote twenty.[456] While footnote twenty asked whether international law extended to the perpetrator being sued, the Supreme Court was concerned with whether the conduct of a private actor could violate the law of nations.[457] In other words, certain conduct performed under "color of state law" is more likely to meet the *Sosa* standard than conduct performed by a private actor.[458] Once the Second Circuit in *Kadic* determined that the private actor's conduct violated a well-established and universally recognized norm, the defendant's identity as a private individual had little bearing on his liability.[459]

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447. *See supra* notes 299–300 and accompanying text; *see also supra* note 72 and accompanying text.

448. *See supra* note 301 and accompanying text; *see also supra* notes 100–06 and accompanying text.

449. *See supra* notes 100–06 and accompanying text.

450. Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004).

451. *See supra* note 301 and accompanying text; *see also supra* notes 100–06 and accompanying text (discussing *Sosa*'s examination of sources of international law).

452. *See supra* notes 302–05 and accompanying text.

453. *See supra* notes 143–50 and accompanying text (discussing *Unocal* and *Kadic*'s holding on the state action requirement).

454. *See supra* notes 144–47 and accompanying text.

455. *See supra* notes 144–47, 150 and accompanying text.

456. *See supra* notes 258–59, 311–14 and accompanying text; *see also supra* notes 125–30 and accompanying text (describing footnote twenty in *Sosa*).

457. *See supra* notes 311–14 and accompanying text.

458. *See supra* notes 302–05 and accompanying text.

459. *See supra* notes 144–47 and accompanying text.

Furthermore, although still an open question, courts often apply the *Sosa* standard to determine the elements of aiding and abetting liability.[460] In *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (*Talisman II*),[461] the Second Circuit looked to international law to find a well-established and universally recognized standard for accessorial liability.[462] Again, this discussion focused solely on the conduct of the defendant—whether Talisman purposefully assisted in the ethnic cleansing of the Sudanese population—and not on any separate attribute possessed by the defendant.[463]

Sosa solely required that standards of conduct be well-established and universally recognized within international law to form the basis of an ATS claim.[464] In employing this approach to determine whether a corporate entity can be liable under the ATS, the Second Circuit, Central District of California, and Southern District of Indiana failed to make this critical distinction.[465]

2. The Misapplication of International Law to "Remedial Questions"

Courts holding that corporate entities are proper ATS defendants correctly decline to apply the *Sosa* standard to the issue of who can be liable under the ATS.[466] However, these opinions are also not without their shortcomings. Judge Leval's *Kiobel* concurrence began by questioning whether "any set of facts" violates international law.[467] Yet, this opinion offered no clear justification for doing so. Although Judge Leval recognized that federal common law provides the source of law for remedial questions, he based this finding strictly on principles stemming from international law.[468] Specifically, Judge Leval opined that there exists a principle of international law that allows States to fashion their own domestic remedies for civil liability.[469] Only because of this principle did Judge Leval find it appropriate to turn back to federal common law for a remedy against corporate defendants.[470] Although Judge Leval's *Kiobel* concurrence ultimately applied the correct body of law—federal common law—his opinion failed to recognize that *Sosa* allows courts to apply domestic law directly to remedial questions.

460. *See supra* notes 114–16 and accompanying text.
461. 582 F.3d 244 (2d Cir. 2009).
462. *Id.* at 258–59.
463. *See generally id.*
464. *See supra* notes 443–47 and accompanying text.
465. *See supra* notes 328–34 and accompanying text (*Nestle*); *supra* notes 366–79 and accompanying text (*Kiobel*); *supra* notes 410–14 and accompanying text (*Viera*); *supra* notes 420–21 and accompanying text (*Flomo*).
466. *See supra* notes 208–15 and accompanying text (*Romero*); *supra* notes 268–70 and accompanying text (*Agent Orange*); *supra* notes 299–305 and accompanying text (*Kiobel* (Leval, J., concurring)).
467. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 174 (2d Cir. 2010) (Leval, J., concurring); *see supra* note 278 and accompanying text.
468. *See supra* notes 292–96 and accompanying text.
469. *See supra* notes 292–97 and accompanying text.
470. *See supra* notes 293–98 and accompanying text.

In *Sosa*, the Supreme Court made clear that federal common law still plays a significant role in adjudication of ATS cases. While the Court denied that the ATS created a new cause of action, it recognized that the ATS granted jurisdiction to a limited number of claims by foreign plaintiffs.[471] As discussed above, a judge must consider international law to determine whether a defendant has violated a particular standard of conduct and, thus, is entitled to jurisdiction.[472] A defendant's conduct must "violate [a] norm of customary international law so well defined as to support the creation of a federal remedy."[473] In other words, once this threshold has been met, federal common law provides the remedy.[474]

While "remedies" are often viewed as the type of recovery available to a plaintiff,[475] used within the context of the ATS, the term "remedies" encompasses a far broader meaning. As described by the Court in *Sosa*, the "remedies" flowing from domestic law refer to the creation of the cause of action.[476] Here, Professor Casto's comparison to 42 U.S.C. § 1983 actions provides a useful illustration.[477] Like the ATS, § 1983 authorizes creation of a remedy for violations of standards of conduct. The U.S. Constitution provides these standards for § 1983 actions.[478] The rights in the Constitution, like the norms stemming from international law, provide the means of identifying an actionable violation.[479] However, once these violations are identified, a court has the discretion to adjudicate both types of claims under federal common law.[480] While this comparison is undoubtedly imperfect, it serves as a useful means for understanding the interaction between international law, which governs the norms violated by a defendant, and domestic law, which provides plaintiffs with a remedy for such a violation.

Part III.A identified two significant flaws in the reasoning of courts considering the issue of corporate liability. First, courts denying the liability of corporations mechanically apply the *Sosa* standard without any justification for doing so. Second, courts holding corporations accountable fail to recognize that *Sosa* allows courts to apply federal common law to remedial questions regardless of the contours of international law. From these principles, the remaining section constructs a workable framework for courts to utilize when choosing the correct law in future ATS cases.

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471. *See supra* note 57 and accompanying text.

472. *See supra* Part III.A.1.

473. Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004).

474. *See* Casto, *supra* note 27, at 638–44; Casto, *supra* note 300, at 694; Keitner, *supra* note 113, at 81; *see also supra* note 57 and accompanying text.

475. *See supra* note 306 (discussing the Second Circuit's argument that remedies only relate to what a plaintiff may recover).

476. *See supra* note 57 and accompanying text.

477. *See* Casto, *supra* note 27, at 639–40.

478. *Id.* at 640.

479. *Id.* Specifically, § 1983 authorizes a federal court to entertain claims by a plaintiff who alleges that a state official deprived him or her of "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (2006).

480. Casto, *supra* note 27, at 640.

B. A Framework Based on the Distinction Between "Standards of Conduct" and "Remedies"

The escalating conflict among courts over whether corporate entities may be held liable under the ATS stems largely from a failure to fully comprehend the relationship between standards of conduct and remedies.[481] Professors Casto and Keitner describe a coherent way for courts to distinguish between these two issues.[482] For the most part, this approach has only been advocated within the context of aiding and abetting liability.[483] However, in light of *Kiobel*, this framework provides a valuable approach for future courts faced with the question of whether they may impose ATS liability on a corporation. Additionally, if adopted by courts, this framework would not only help resolve the persistent questions surrounding the ATS but also act as a guide for the range of issues likely to arise in future ATS cases.

According to these scholars, there exist two categories of issues arising under the ATS. First, a court may be presented with the question of whether the defendant violated a "'conduct-regulating norm[].'"[484] This category of issues demands substantive inquiry into the nature of a defendant's behavior. Like the issues examined in Part I.B of this Note, "conduct-regulating norms" involve determining what constitutes a violation of the law of nations. In accordance with *Sosa*, these norms must be examined by resorting to principles of international law.[485] Specifically, when considering a "conduct-regulating norm" a judge must ask whether the defendant's conduct violated a "specific, universal, and obligatory" international norm.[486]

Because federal common law provides the source of the remedy in ATS litigation, there exists a second category of issues characterized as "ancillary" questions.[487] These tort remedies are a matter of "pure domestic law."[488] While these questions have previously been

481. *See supra* Part III.A.

482. *See generally* Casto, *supra* note 27; Casto, *supra* note 300; Keitner, *supra* note 113.

483. *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 284–86 (2d Cir. 2007) (Hall, J., concurring) (arguing that accessorial liability is not a rule of primary liability and consulting federal common law); Doe I v. Unocal Corp., 395 F.3d 932, 963 (9th Cir. 2002) (Reinhardt, J., concurring) (characterizing aiding and abetting liability as an ancillary question and applying domestic law), *appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005); Keitner, *supra* note 113, at 74–83 (arguing that aiding and abetting liability is a question of conduct and applying international law); Charles Ainscough, Note, *Choice of Law and Accomplice Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 588, 596 (2010) (contending that accomplice liability regulates conduct and arguing for application of international law).

484. Keitner, *supra* note 113, at 80–81 (quoting Casto, *supra* note 300, at 695).

485. *See supra* notes 74–75 and accompanying text.

486. *See supra* Part III.A.1.

487. *See* Keitner, *supra* note 113, at 80–81; *see also* Casto, *supra* note 27, at 639; Casto, *supra* note 300, at 695.

488. *See* Casto, *supra* note 27, at 644.

characterized as matters of practice and procedure,[489] they more broadly include all other issues which, whether substantive or not, do not bear on the defendant's conduct.[490] It is from this understanding that these scholars argue that any issue arising under the ATS can be addressed.

Under this framework, the question of who can be liable for violating the ATS hinges on whether a perpetrator's identity in any way relates to that perpetrator's conduct. If not, this likely should be classified as an "ancillary" issue and be governed by domestic law.[491] However, if the identity of a corporation, as a judicial entity or otherwise, sheds light on the illegality of that corporation's conduct, it may be relevant to a "conduct-regulating norm."[492] As demonstrated in *Kadic* and *Talisman II*, a defendant's identity as a private actor or aider and abettor may factor into the consideration of whether a corporation's conduct violated international law.[493] In these circumstances, it is proper for the court to consider the *Sosa* standard as guiding its focus.[494]

Yet the identity of a corporation as a "judicial entity" in no way affects a court's analysis of the corporation's conduct.[495] The courts that denied the liability of corporations failed to contend that the conduct performed by the corporate defendants did not violate a "specific, universal, and obligatory" norm of international law.[496] The conduct by the defendants in *Kiobel* undoubtedly violated the law of nations.[497] Had this conduct been performed by a private actor, there would be little reason not to hold that actor accountable.[498] The court, however, refused to hold the defendant liable for its conduct solely on account of its existence as a corporate entity.[499] As a result, there existed no principled reason for treating the question of corporate liability as anything other than a remedial issue governed by the long-established practice of treating corporations as any other person under federal common law.

Courts holding corporations accountable have in some way articulated this argument. In *Romero*, *Talisman I*, and *Agent Orange*, the courts continually emphasized that no reason existed for treating corporations differently than any other private actor.[500] However, these courts failed to link the principle to a larger understanding of the difference between

489. *See* Keitner, *supra* note 113, at 81 & n.93 (citing Doe I v. Unocal Corp., 395 F.3d 932, 964 (9th Cir. 2002) (Reinhardt, J., concurring), *appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005)).

490. *See* Casto, *supra* note 27, at 642–43; *see also supra* Part III.A.2.

491. *See supra* notes 487–90 and accompanying text.

492. *See supra* notes 484–86 and accompanying text.

493. *See supra* notes 452–63 and accompanying text.

494. *See supra* notes 452–59 and accompanying text.

495. *See supra* notes 306–10 and accompanying text.

496. *See supra* Part II.B.

497. *See supra* note 307 and accompanying text.

498. *See supra* notes 306–10 and accompanying text.

499. *See supra* notes 306–10 and accompanying text.

500. *See supra* notes 213–14 and accompanying text (*Romero*); *supra* notes 244, 247 and accompanying text (*Talisman I*); *supra* notes 254–57 and accompanying text (*Agent Orange*).

conduct and remedies under the ATS. By failing to do so, they opened their position up to criticism from opposing jurists as merely based on principles of fairness and not rooted in any substantive ATS principle.[501] Yet as this Note demonstrates, the ATS and Supreme Court jurisprudence mandate that when the conduct of a corporation violates international law, a plaintiff is entitled to a cause of action based on principles of federal common law.[502] With the issue of corporate liability at the forefront of the debate following *Kiobel*, courts must act quickly to articulate a clearer set of choice of law principles based on the distinction between standards of conduct and remedial issues, or risk having the Second Circuit's reasoning further adopted across circuits.

CONCLUSION

The Second Circuit's decision in *Kiobel* shattered the already fractured landscape of ATS jurisprudence existing within the United States.[503] Although *Sosa* in many ways achieved its goal by articulating a standard for what constitutes a violation,[504] the opinion offered inherently inconsistent advice as to who can be held liable.[505] With the recent flurry of suits against corporate entities,[506] courts finding in favor of liability have struggled to articulate a coherent rationale behind their holdings.[507] This Note identified the contrary holdings courts have reached based in part on the varying choice of law principles applied.[508] In the wake of *Kiobel*, courts must provide a fundamental reassessment of their overall approach to determining which body of law applies to questions arising under the ATS. A framework based on the distinction between standards of conduct, which are governed by international law, and remedies, which are controlled by domestic law, offers judges a valuable starting point in their analysis.[509]

501. *See supra* notes 335–39 and accompanying text (discussing *Nestle*'s holding that arguments based on principles of fairness have no bearing on what norms of international law actually exist).

502. *See supra* Part III.A.2.

503. *See supra* notes 113–17 and accompanying text (describing the confusion among courts in applying the *Sosa* standard prior to the Second Circuit's decision in *Kiobel*).

504. *See supra* notes 73–75 and accompanying text.

505. *See supra* Part I.C.1.

506. *See supra* Part I.C.2.

507. *See supra* Part II.B.

508. *See supra* Part II.

509. *See supra* Part III.B.