ALIEN INVASION: CORPORATE LIABILITY AND ITS REAL IMPLICATIONS UNDER THE ALIEN TORT STATUTE

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I. INTRODUCTION

The Alien Tort Statute (ATS) is part of the Federal Judiciary Act of 1789, which provides in its entirety: "The district courts shall have original jurisdiction in 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."[1] Unlike other legislative enactments from the same time period, Congress provided virtually no legislative history in formulating the ATS.[2] Instead, the text of the ATS itself is all lawyers and historians have to interpret its meaning.[3] For nearly two centuries, this brief statute was largely forgotten and rarely invoked.[4] In the early 1980s, however, human-rights groups began to use the ATS as a mechanism for bringing human-rights lawsuits.[5] Since then, district and circuit courts have tried, with extensive disagreement, to determine the meaning and scope of the ATS.[6] The Supreme Court

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[1] 28 U.S.C. § 1350 (2006).

[2] Sosa v. Alvarez-Machain, 542 U.S. 692, 718–19 (2004). *Sosa* was the first Supreme Court case to address the ATS. *Id.* There, the Justices went to great lengths to evaluate the history behind the ATS and to attempt to provide some insight into what the original Congress intended the Statute to mean. *See id.*

[3] *Id.*

[4] *See* Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 18 (D.C. Cir. 2011). In one of the most recent circuit court cases involving the ATS, the D.C. Circuit in *Doe VIII* analyzed the history of ATS cases and the development of the corresponding legal doctrines. *See id.*

[5] *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[6] *See generally* Kiobel v. Royal Dutch Shell Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, No. 10-1491, 2011 U.S. LEXIS 7522 (Oct. 17, 2011); Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009); Romero v. Drummond Co., 552 F.3d 1303

purported to clarify the ATS,[7] but in reality, its decision only created more questions.[8]

One open question generating considerable attention is whether corporations can be sued under the ATS for torts occurring in foreign countries.[9] Circuit courts are bitterly split over the issue,[10] prompting a plethora of scholarly debate and public concern.[11] Corporations fear that their liability under the ATS will result in huge expenses and judgments and reduce their investments and profits.[12] But the issue of corporate liability concerns not only victims of human-rights abuses and corporations, but also much larger issues of human-rights law, foreign relations, and corporate responsibility.[13] In assessing whether corporations can be sued under the ATS, courts must first decide whether international or domestic law governs the question.[14] Second, courts must address whether that body of law recognizes corporate liability.[15]

In *Doe v. Exxon Mobil Corp.* (*Doe VIII*), the D.C. Circuit joined the Eleventh Circuit in holding that corporations can be sued under the ATS.[16] In arriving at its conclusion, the court held that it must look at U.S. law, rather than the law of nations, to determine if corporations could be sued under the ATS.[17] Essentially, the court held that under the ATS *international* law must recognize the *tort* alleged in the complaint, but U.S. law governs the question of who can be sued.[18] The court noted in dicta that, even if it were to apply international law to the question of who can be held liable under the ATS, it would

(11th Cir. 2008); Khulumani v. Daimler Chrysler Corp., 504 F.3d 254 (2d Cir. 2007); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 2005); *Filartiga*, 630 F.2d at 876; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

[7] *Sosa*, 542 U.S. at 692.

[8] *See infra* Part IV.

[9] *See Doe VIII*, 654 F.3d at 15.

[10] Circuit Judges within the same circuit often find themselves at odds with their colleagues. *See, e.g.*, *Doe VIII*, 654 F.3d 11; *Kiobel*, 621 F.3d 111. Moreover, there is wide split between circuits that allow corporations to be sued under the ATS and circuits that do not. *See, e.g.*, *id.*

[11] *Cf. Doe VIII*, 654 F.3d at 18–20 (discussing the history of ATS claims and the disagreement about its applicability to corporations).

[12] There are, perhaps, good reasons to fear these things. *See infra* Part IV.

[13] *See infra* Part V.

[14] *See Doe VIII*, 654 F.3d at 41.

[15] *See id.*

[16] *Doe VIII*, 654 F.3d at 15.

[17] *Id.* at 41.

[18] *Id.*

still arrive at the same conclusion.[19] The D.C. Circuit's holding stands in stark contrast to the Second Circuit's conclusion in *Kiobel v. Royal Dutch Petroleum Co.* that international law governs the inquiry of who can be sued under the ATS.[20] The Supreme Court has now granted certiorari and heard arguments in *Kiobel* and has the opportunity to resolve the question of whether corporations can be sued under the ATS.[21]

Large multi-national corporations are terrified about the implications of corporate liability under the ATS.[22] Specifically, they fear that corporate liability under the ATS may result in more frequent and more costly judgments, bad press, and may stymie corporate activity in developing countries.[23] Fearful that liability under the ATS would result in a kind of corporate armageddon, corporations have challenged corporate liability under the ATS through the courts.[24] This Comment argues that the D.C. Circuit is correct that corporations can be held liable under the ATS. Furthermore, this Comment argues that corporate liability under the ATS will not be as detrimental as many corporate leaders and scholars contend. Instead, corporate liability under the ATS is in line with legal precedent and facilitates domestic, foreign, and human-rights policy goals. Corporate liability under the ATS facilitates these goals without severely and negatively impacting business interests and development, both at home and abroad.

Part II of this Comment briefly addresses the history of the ATS and recent developments in ATS jurisprudence, including the circuit split on corporate liability. Part III analyzes the *Doe VIII* decision in detail by examining both the majority and dissenting opinions. Then, Part IV argues that the D.C. Circuit decided correctly in *Doe VIII* that domestic law rather than international law governs the question of who can be liable under the ATS. Even if the D.C. Circuit was incorrect in deciding the case under domestic law, international law still recognizes corporate liability. Part V examines the

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[19] *Id.* at 49.

[20] See *Kiobel*, 621 F.3d at 127.

[21] Kiobel v. Royal Dutch Petroleum, No. 10-1491, 2011 U.S. LEXIS 7522 (Oct. 17, 2011) (granting certiorari).

[22] GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 1 (2003) ("This one-sentence law . . . could plausibly culminate in a nightmare, more than 200 years after it was enacted.").

[23] *See id.*

[24] *See, e.g.*, Doe VIII v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011); *Kiobel*, 621 F.3d at 111.

implications of holding corporations liable under the ATS and will argue that doing so will not detrimentally and unjustly affect business. Moreover, corporate liability, in limited cases, will serve human rights and foreign relations public policy goals. Part VI concludes, reiterating that both domestic and international law permit corporations to be sued under the ATS and that such a rule is not contrary to corporate or political concerns.

II. HISTORY OF AND RECENT DEVELOPMENTS IN ATS JURISPRUDENCE

The First Congress passed the ATS in 1789.[25] There are many interpretations of the murky history behind its development and subsequent adoption. The predominant narrative is that the ATS is the product of the realization that, at the founding of the nation, state courts were not properly equipped to handle judicial matters involving foreign nations.[26] As a result, some scholars and commentators argue that the ATS was structured to bring matters of international importance into the federal courts in order to prevent mishandling in the state courts.[27] Other scholars posit more generally that the ATS arose out of the inability of the Continental Congress to deal with issues of international importance, thereby damaging the new nation's reputation abroad.[28] These scholars argue that it was necessary to provide a forum in which international claims could be addressed in order to boost respect for the fledgling democracy, both politically and economically.[29] Finally, some other scholars argue that, in fact, the meaning of the ATS can only be perceived through

[25] 28 U.S.C. § 1350 (2006).

[26] *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring); Carolyn A. D'Amore, Sosa v. Alvarez-Machain *and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 597 (2006).

[27] *See Tel-Oren*, 726 F.2d at 782 (Edwards, J., concurring); D'Amore, *supra* note 26, at 597.

[28] Sosa v. Alvarez-Machain, 542 U.S. 692, 716–17 (2004); *see* Respublica v. DeLongchamps, 1 Dall. 111, 1 L. Ed. 59 (O. T. Phila. 1784). The *Sosa* Court claims that the ATS arose out of the Marbois incident of May 1784, in which a Frenchman verbally assaulted the Secretary of the French Legion in Philadelphia. *Sosa*, 542 U.S. at 716–17 (citing *Respublica*, 1 Dall.). Until that point, Congress had not vested the courts with power to deal with matters arising out of or pertaining to the law of nations. *See Sosa*, 542 U.S. at 717. Frustrated with the court's inability to deal with the issue, the French launched a formal protest with the new government. *See id.* Worried that the incident may cause international backlash and undermine the new nation's credibility, Congress decided to include in the new Judiciary Act a provision that would become known as the ATS. *See id.*

[29] D'Amore, *supra* note 26.

an understanding of what the words in the ATS meant at the time of its drafting.[30] According to these scholars, the word "foreigner" was changed to "alien" during drafting, which reflects a conscious decision by the Founders to include only people who would have been considered "aliens" under the eighteenth-century meaning of that word, *i.e.*, only individuals born in other nations but residing in the United States.[31] Few courts or academics, however, give this view credence.

Whatever its original purpose, plaintiffs rarely used the ATS; in fact, district courts applied it only twice between 1789–1980.[32] The ATS remained largely forgotten or ignored until 1980, when the Second Circuit applied the ATS in *Filartiga v. Pena-Irala*.[33] There, a dissident Paraguayan family, the Filartigas, brought an action against Américo Norberto Peña-Irala (Peña), who allegedly tortured and killed their son, Joelito.[34] The Filartigas commenced a criminal action in Paraguayan courts, which failed because of the hostile political environment there.[35] When Joelito's sister Dolly came to the United States to seek asylum, she learned that her brother's murderer, Peña, was residing in the United States.[36] As a result, she filed suit in the United States under the ATS claiming that Peña caused Joelito's wrongful death by torture in violation of the law of nations.[37]

Applying the ATS for the first time in a circuit court, the Second Circuit held that the Filartigas's claims had merit under international law.[38] Specifically, the court held that the law of nations prohibits torture, and as a result, the Filartigas could bring their action against

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[30] M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT'L L. 316, 320–21 (2009).

[31] Berry, *supra* note 30 (arguing that "[i]t is fair to say that an understanding of what Congress intended by the deceptively simple change from 'foreigner' to 'alien' was a narrowing of the ATS; making it available to 'aliens' but not to 'foreigners.' In other words, making it only available to residents of the United States"). This argument is given little credence in modern ATS jurisprudence and has never been discussed in a circuit opinion in depth, largely because it is a new and facially innocuous.

[32] *See, e.g.*, Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961); Bolchos v. Darrel, 3 F. Cas. 819, F. Cas. No. 1607 (D.S.C. 1795) (No. 1,607).

[33] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[34] *Id.* at 878.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 879.

[38] *Id.* at 884.

Peña in the United States under the ATS.[39] As the Supreme Court described, the *Filartiga* case was "the birth of the modern line of [ATS] cases."[40] In essence, the *Filartiga* case revived the ATS and led to a number of decisions in the Second Circuit and in other circuits that further developed ATS jurisprudence.[41] In particular, courts began to explore the "scope and contours of the ATS" in often hotly debated and conflicting majority, concurring, and dissenting opinions.[42] Intense disagreement over the interpretation of the ATS and its applicability in various situations led to a huge divergence between the circuits and a renewed call for clarification from the Supreme Court.[43]

But clarify it did not. In an opinion by Justice Souter in *Sosa v. Alvarez-Machain*, the Supreme Court held that the ATS is a purely jurisdictional statute and does not provide a separate cause of action.[44] Thus, the Court held that the ATS could be used to establish jurisdiction in a case—but the violation itself must come from the law of nations.[45] The defendant in *Sosa* was a Mexican national and doctor named Alvarez who was indicted in the United States for the torture and murder of an agent of the U.S. Drug Enforcement Administration in Mexico.[46] The United States hired Mexican nationals, including Sosa, to abduct Alvarez in Mexico and bring him to the United States where he was subsequently tried and acquitted.[47] Upon returning to Mexico, Alvarez brought a claim

[39] *Filartiga*, 630 F.2d at 884.

[40] Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004).

[41] *See, e.g.*, Kiobel v. Royal Dutch Shell Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, No. 10-1491, 2011 U.S. LEXIS 7522 (Oct. 17, 2011); Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009); Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Khulumani v. Daimler Chrysler Corp., 504 F.3d 254 (2d Cir. 2007); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 2005); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

[42] Nicholas C. Thompson, *Putting the Cart Back Behind the Horse: The Future of Corporate Liability Under the Alien Tort Statute After* Kiobel, 9 DEPAUL BUS. & COMM. L.J. 293, 295 (2001); *see* Frank Cruz-Alvarez & Laura E. Wade, *The Second Circuit Correctly Interprets the Alien Tort Statute:* Kiobel v. Royal Dutch, 65 U. MIAMI L. REV. 1109, 1111 (2011).

[43] *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 788–89, 796 (D.C. Cir. 1984) (examining the disagreement between Judge Edwards and Judge Bork about which claims are recognized under the ATS and customary international law and whether the particular claim was subject to the political question doctrine).

[44] *Sosa*, 542 U.S. at 712.

[45] *Id.*

[46] *Id.* at 698.

[47] *Id.*

under the ATS alleging, inter alia, that Sosa had tortured him in violation of the law of nations.[48] The district and circuit courts held that the ATS created a cause of action for the alleged violation of the law of nations.[49] The Supreme Court reversed, finding that the lower courts erred in reading the ATS to create a separate cause of action for a violation of the law of nations.[50] Instead, the Court held that the ATS is a purely jurisdictional statute.[51] As such, an action "under" the ATS merely means that a court has jurisdiction to hear a case—a case it would not have jurisdiction to hear otherwise—by virtue of the ATS.[52] The substance of a claim must be recognized by the law of nations.[53]

The Supreme Court limited the ATS's jurisdictional breadth by stating that "at the time of the enactment[,] the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."[54] Thus, "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations"—which, at least in 1789, would have been incorporated into federal common law.[55] This law would have encompassed the "general norms governing the behavior of national states with each other" and "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries."[56] These general norms and practices accepted as law by nations are often referred to as customary international law.[57] Thus, the jurisdictional grant of the ATS would require courts to look only to a limited number of claims that the law of nations, or international law, recognizes.[58] Moreover, the ATS does not specify *who* can be sued, only what claims are recognized.[59]

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[48] *Id.*

[49] *Id.*

[50] *Sosa*, 542 U.S. at 712.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 720; *see id.* at 713; Ware v. Hylton, 3 Dall. 199, 281, 3 U.S. 199, 1 L. Ed. 568 (1796).

[56] *Sosa*, 542 U.S. at 720; *see id.* at 713; *Ware*, 3 Dall. at 281, 3 U.S. at 199, 1 L. Ed. at 568.

[57] *See* 1 OPPENHEIM'S INTERNATIONAL LAW § 12, at 17 (H. Lauterpacht 8th ed. 1955).

[58] *Sosa*, 542 U.S. at 714–15.

[59] Brief for International Human Rights Organizations and International Law Experts as Amici Curiae in Support of Petitioners, Kiobel v. Royal Dutch Petroleum,

The Court noted that lower courts could look beyond the scope of customary international law at the time Congress passed the ATS to determine the scope of the substance of claims, but cautioned that these courts must not go too far.[60] The Court identified five reasons why courts should be careful when recognizing claims under the ATS. First, *Erie* changed prior conceptions of federal common law by noting that "there is a general understanding that the law is not so much found or discovered as it is either made or created."[61] Second, *Erie* eliminated the conception of federal common law.[62] Third, the Court advised caution in inferring "intent to provide a private cause of action where the statute does not supply one expressly."[63] Fourth, the potential implications for U.S. foreign relations in creating new causes of action may be high.[64] Finally, there is no congressional mandate to creatively expand the law of nations.[65] As a result, violations of international law under the ATS are inherently limited.[66]

The Court recognized that a claim brought under the international law—or the law of nations—must be sufficiently defined and substantive to be adjudicated in the federal courts.[67] Justice Souter then added the now infamous footnote twenty. In full, the footnote states: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[68] The footnote, which was added as an attempt to explain, has only created more confusion and is cited by courts to both support and reject corporate liability under the ATS.[69]

182 L. Ed. 2d 270 (No. 10-1491), at 22, *available at* http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/.

[60] *Sosa*, 542 U.S. at 732 (noting that "federal courts should not recognize private claims under the federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted"); *see* U.S. v. Smith, 18 U.S. 153 (1820).

[61] *Sosa*, 542 U.S. at 725.

[62] *Id.* at 726.

[63] *Id.* at 727.

[64] *Id.*

[65] *Id.* at 728.

[66] *See id.*

[67] *Sosa*, 542 U.S. at 732–33 ("[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause of action available to litigants in the federal courts.").

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

[69] Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 50–51 (D.C. Cir. 2011); *see generally* Kiobel v. Royal Dutch Shell Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert.*

If *Sosa* cleared up the jurisdictional issue, the ambiguous language of footnote twenty in *Sosa* created more overall confusion.[70] In particular, courts have fought over the scope of the ATS, both in terms of what causes of action are recognized under the law of nations and the ATS, and who can be sued under the ATS.[71] The Supreme Court failed to answer these questions in *Sosa*, leaving the door wide open for other interpretive cases.[72] In deciding such cases, other courts have had to address whether corporations can be held liable under the ATS.[73]

In the years following *Sosa*, there was little agreement over the scope and breadth of the ATS.[74] In *Kadic v. Karadzic*, the Second Circuit held that state action is not necessarily required for a finding of a violation of customary international law, and thus private actors may be liable under the ATS.[75] Applying this standard in *Khulumani v. Barclay National Bank, Ltd.*, the Second Circuit agreed that aiding and abetting is a cognizable claim under the law of nations and the ATS, but was split as to whether the *Kadic* holding extended only to private *individuals* or all private actors including corporations.[76] Because the parties themselves in *Khulumani* did not raise the issue of corporate liability under the ATS, and because there was no

granted, 2011 U.S. LEXIS 7522 (Oct. 17, 2011); Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009); Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Khulumani v. Daimler Chrysler Corp., 504 F.3d 254 (2d Cir. 2007); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 2005).

[70] *See, e.g.*, *Doe VIII*, 654 F.3d 11; *Kiobel*, 621 F.3d 111; *Abdullahi*, 562 F.3d 163; *Presbyterian Church of Sudan*, 582 F.3d 244; *Romero*, 552 F.3d 1303; *Khulumani*, 504 F.3d 254; *Kadic*, 70 F.3d 232.

[71] *See generally*, sources cited *supra* note 6.

[72] *See Sosa*, 542 U.S. at 732–33, 733 n.20.

[73] *See, e.g.*, *Doe VIII*, 654 F.3d at 50–55; *Kiobel*, 621 F.3d at 128–31.

[74] *See, e.g.*, *Doe VIII*, 654 F.3d 11; *Kiobel*, 621 F.3d 111; *Abdullahi*, 562 F.3d 163; *Talisman*, 582 F.3d 244; *Romero*, 552 F.3d 1303; *Khulumani*, 504 F.3d 254; *Kadic*, 70 F.3d 232.

[75] *Kadic*, 70 F.3d at 239 (holding that "certain forms of conduct violate the laws of nations whether undertaken by those acting under the auspices of a state or only as private individuals.").

[76] *Khulumani*, 504 F.3d at 260. Judge Katzmann noted that the court had "repeatedly treated the issue of whether corporations may be held liable under the [ATS] as indistinguishable from the question of whether private individuals may be." *Id.* at 282 (Katzmann, J., concurring). Judge Hall agreed that "private parties and corporate actors are subject to liability under the [ATS]." *Khulumani*, 504 F.3d at 289 (Hall, J., concurring). Finally, in his dissenting opinion, Judge Korman argued that international law and norms do not recognize corporate liability and as a result, corporations cannot be held liable under the ATS. *Khulumani*, 504 F.3d at 326 (Korman, J., dissenting).

agreement over whether corporations could be sued under the ATS, the *Khulumani* decision left the door open for future resolution of the issue.[77]

The Second Circuit was able to avoid the ultimate question of corporate liability until *Kiobel v. Royal Dutch Petroleum* in 2010.[78] In *Kiobel*, plaintiffs—residents of Nigeria—claimed that various corporations aided and abetted the Nigerian government in committing human-rights abuses in violation of the law of nations, using the ATS as a vehicle to get into U.S. courts.[79] Specifically, plaintiffs alleged that corporate defendants aided the Nigerian government in killing, "beating, raping, and arresting residents and destroying property."[80] In addressing the threshold question of whether the corporate defendants could be sued, the Second Circuit first held that the Supreme Court's *Sosa* opinion and footnote twenty required lower courts to determine who can be sued under the ATS by examining international law.[81] Second, the Second Circuit held that customary international law does not recognize—indeed flatly rejects—corporate liability as a norm.[82] Thus, the court held that

[77] *See Khulumani*, 504 F.3d at 260–61.

[78] The Second Circuit declined to answer the question in an earlier case. *See Talisman*, 582 F.3d at 244. There, in making its determination that international law under the ATS recognized aiding and abetting liability, but that such liability required a purposeful mens rea, the court assumed, without deciding, that corporations may be held liable under the ATS. *Id.* at 261 n.12. The court found that because the plaintiffs' claims failed to meet the mens rea requirement of purpose it need not decide "'whether international law extends the scope of liability' to corporations." *Id.* (quoting *Sosa*, 524 U.S. at 732 n.20).

[79] *Kiobel*, 621 F.3d at 117.

[80] *Id.* at 123 ("Specifically, plaintiffs allege that defendants, *inter alia*, (1) provided transportation to Nigerian forces, (2) allowed their property to be utilized as a staging ground for attacks, (3) provided food for soldiers involved in the attacks, and (4) provided compensation to those soldiers.").

[81] *Id.* at 127. The Second Circuit noted that the language of *Sosa* clearly mandates analyzing the scope of liability under the ATS by examining international law. "That language requires that we look to *international law* to determine our jurisdiction over ATS claims against a particular class of defendant, such as corporations." *Id.* Furthermore, "'the norm [of international law] must extend liability to the *type of perpetrator* (*e.g.*, a private actor) the plaintiff seeks to sue.'" *Id.* at 128 (quoting *Sosa*, 542 U.S. at 760 (Breyer, J., concurring)).

[82] *Kiobel*, 621 F.3d at 134. To determine whether international law recognizes corporate liability, the court surveyed the following: international conventions, international custom, general principles of law, and judicial and scholarly opinions. *Id.* at 132. Specifically, the court addressed international tribunals such as Nuremberg and its progeny and determined that these tribunals recognized individual liability but expressly denied corporate liability. *Id.* at 135; *see* The Nuremberg Trial, 6 F.R.D at 110; 7 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (The Farben Case) 11–60

plaintiffs' claims could not proceed.[83]

In a concurring opinion, Judge Leval agreed that plaintiffs' claims must fail because under aiding-and-abetting liability, plaintiffs must prove that the defendants acted with purpose to commit the underlying crime.[84] He would have found, however, that corporations are liable under the ATS.[85] Judge Leval did not dispute the majority's holding that international law governs the question of who can be held liable under the ATS, but objected to the majority's opinion that international law does not allow corporations to be sued.[86] Judge Leval posited that international law is inconclusive on the question of whether corporations may be sued and thus the court should have looked to domestic law to answer the question.[87] These conclusions have paved the way for other circuit courts to address the issue of corporate liability and the ATS,[88] most recently in *Doe VIII*.

III. THE DOE VIII CASE

The D.C. Circuit's decision in *Doe VIII* came after years of litigation and seven previous *Doe* decisions.[89] *Doe VIII* is one of the latest circuit decisions to join the majority of decisions holding that corporations can be held liable under the ATS. Its decision stands in stark contrast to the Second Circuit's decision in *Kiobel*.[90] In short,

(1952). The court noted that a proposal to hold corporations liable under the International Criminal Court was flatly rejected. *Kiobel*, 621 F.3d at 136.

[83] *Kiobel*, 621 F.3d at 145.

[84] *Id.* at 154 (Leval, J., concurring).

[85] *Id.* at 152–53.

[86] *Id.*

[87] *Id.* Judge Leval found that international law is inconclusive because the majority relies only on international *criminal* law and not *civil* law: "Because international law generally leaves all aspects of the issue of civil liability to individual nations, there is no rule or custom of international law to award damages in any form or context, either as to persons or as to juridical ones." *Id.*

[88] Other courts to consider the ATS and corporate liability include the Eleventh Circuit in Romero v. Drummond, Ltd., 552 F.3d 1303, 1308 (11th Cir. 2008) (holding that "[t]he text of the [ATS] provides no express exception for corporations . . . and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants"), the Central District of California in Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (assuming that corporations can be held liable under the ATS), and the Seventh Circuit in Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011) (refusing to decide the issue).

[89] *See* Doe I v. Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005); Doe VII v. Exxon Mobil Corp., 658 F. Supp. 2d 131 (D.D.C. 2009); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 14–17 (D.C. Cir. 2011).

[90] *Compare Doe VIII*, 654 F.3d 11 (D.C. Cir. 2011), *with Kiobel*, 621 F.3d 111 (2d

the D.C. Circuit held that U.S. law governs the question of who can be sued under the ATS.

A. Facts

The D.C. Circuit in *Doe VIII* tackled the same issues that the Second Circuit addressed in *Kiobel*. In *Doe VIII*, plaintiffs—villagers in Aceh, Indonesia—contended that they were tortured and injured by Exxon Mobil security forces hired in accordance with an Indonesian government contract.[91] Eleven of the fifteen plaintiffs filed claims alleging that Exxon's security forces "committed murder, torture, sexual assault, battery, and false imprisonment in violation of the (ATS) and Torture Victim Protection Act (TVPA), and various common-law torts."[92] The other four plaintiffs asserted claims in violation of common-law torts.[93] The district court dismissed the claims under the ATS and the TVPA, but proceeded with the common-law claims, which were eventually dismissed.[94] In the D.C. Circuit, plaintiffs appealed the dismissal of their claims, and defendant cross-appealed, raising for the first time its contention that corporations are not liable under the ATS.[95]

B. Majority Opinion

The majority held that Exxon Mobil could be held liable for violations of customary international law under the ATS.[96] In doing so, the D.C. Circuit explained that U.S law—not international law—governs the question of who can be sued in a case where jurisdiction is obtained through the ATS.[97] Even under international law, corporations would still be held liable.[98] At the outset, the D.C. Circuit noted that the case was distinguishable from *Sosa* because *Sosa* dealt with whether a particular *claim* was recognizable under international law and derivatively under the ATS, while the *Doe VIII* case deals instead with whether corporations can be sued.[99] The issue

Cir. 2009).

[91] *Doe VIII*, 654 F.3d at 14–15.

[92] *Id.* at 15.

[93] *Id.*

[94] Doe I v. Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005); Doe VII v. Exxon Mobil Corp., 658 F. Supp. 2d 131 (D.D.C. 2009).

[95] *Doe VIII*, 654 F.3d at 15.

[96] *Id.* at 15.

[97] *Id.* at 57.

[98] *Id.* at 51–55.

[99] *Id.* at 41.

in *Sosa* was whether the alleged arrest and torture could support a *cause of action*, and thus the court looked to customary international law.[100] As *Sosa* made clear, international law determines which causes of action plaintiffs can assert using the ATS.[101] But the *Sosa* Court did not address the scope of who can be sued for these violations of international law.[102] *Doe VIII*, however, dealt with who would be made to pay for the alleged wrong.[103] The court turned to an example to illustrate this point: "in legal parlance one does not refer to the tort of 'corporate battery' as a cause of action. The cause of action is battery; agency law determines whether a principal will pay damages for the battery committed by the principal's agent."[104] Thus, the proper question here is "whether a corporation can be made to pay damages for the conduct of its agents in violation of the law of nations."[105] While customary international law may provide the basis for determining whether disapproval attaches to certain conduct, international law does not provide all of the procedural and underlying law necessary for making a determination under the ATS.[106] Thus, courts must look to federal common law for an answer to the question of who can be sued under the ATS.

The majority in *Doe VIII* recognized that both the majority and minority in *Kiobel* misread footnote twenty of *Sosa*.[107] The *Doe VIII* majority maintains that all private actors—both persons and corporations—are treated the same for purposes of the ATS.[108] The *Doe VIII* majority held that the purpose of footnote twenty is to question the distinction between all *private* actors and *public* actors, not *between* private actors.[109] As a result, the court must look to

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100 *Id.*

101 *Doe VIII*, 654 F.3d at 41.

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 41.

106 *Id.* at 49.

107 *See Doe VIII*, 654 F.3d at 50–52.

108 *Id.* at 49.

109 *Id.* at 51.

If the violated norm is one that international law applies only against states, then "*a private actor* [] *such as a corporations or an individual*," who acts independently of a State can have no liability for a violation of the law of nations because there has been no violation of the law of nations. On the other hand, if the conduct is of the type classified as a violation of the norms of international law regardless of whether done by a State or private actor, then "*a private* [] *such as a corporation or an individual*," has violated the law of nations and is subject to liability in a suit under the ATS.

Id. (citing *Kiobel*, 621 F.3d at 166 (Leval, J., concurring) (emphasis in original)).

domestic law to determine which private actors can be sued.

Having dispensed with the choice-of-law question, the issue of whether domestic law recognizes corporate liability was an easy one for the D.C. Circuit to address.[110] According to that court, corporate liability has been recognized in the United States for centuries.[111] In addition, the D.C. Circuit found that even the Founders had a conception of corporate liability at the time that Congress enacted the ATS.[112] As a result, it held that corporations are not immune from liability under the ATS and can be held liable for violations of customary international law giving rise to a specific cause of action.[113]

Finally, the court found that even assuming, arguendo, that international law governs, Exxon Mobil is still liable because international law recognizes corporate civil liability.[114] The *Kiobel* court's examples of the absence of corporate liability in international law are misplaced because all of those examples deal exclusively with *criminal* liability, not *civil* liability.[115] Indeed, history provides persuasive support for the proposition that corporations can be held civilly liable.[116] The majority in *Doe VIII* states that *Kiobel*'s focus on the *Nuremberg Trials* and the Tribunal's dismissal of I.G. Farben Corporation is also misplaced because that decision had less to do with whether international law recognizes corporate liability than with the specific circumstances of post-war Germany's economic situation.[117] As a result, the majority stated that even if international law governs the corporate liability inquiry, there are ample sources of international law that recognize corporate liability.[118]

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[110] *Doe VIII*, 654 F.3d at 47.

[111] *Id.*

[112] *Id.* In arguing that corporate liability has been recognized for centuries, international law scholars cite to the suit against the East India Company in the late seventeenth century in which the Company was sued for "its agent's torts in violation of the law of nations." Brief for Professors of Legal History William R. Casto, et al. as Amici Curiae Supporting Petitioners' Writ of Certiorari, Kiobel v. Royal Dutch Petroleum Co., *cert. granted*, No. 10-1491, 2011 U.S. LEXIS 7522 (Oct. 17, 2011), *available at* http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/.

[113] *Doe VIII*, 654 F.3d at 57.

[114] *Id.* at 51–52.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *See id.* at 57–64. The D.C. Circuit also addressed a number of other important issues in its opinion in *Doe VIII*, including extraterritoriality, the interplay between the ATS and TVPA and the appropriate mens rea standard for aiding and abetting liability. *Id.* at 20–28, 57–64.

C. *Dissenting Opinion*

Judge Kavanaugh's dissent in *Doe VIII* is important because it provides the basis for the argument that corporations cannot be sued under the ATS, which is similar to the reasoning that the Second Circuit used in *Kiobel*.[119] First, Judge Kavanaugh would have held that under the presumption against extraterritoriality, the ATS does not apply to torts committed in foreign countries, but rather only to actions by aliens for conduct that occurred inside the United States.[120] Second, Judge Kavanaugh would have applied customary international law and determined that corporate liability does not exist under recognized international law.[121] Third, Judge Kavanaugh would have barred corporate liability because of its inconsistency with the TVPA, which provides that an action may only be sustained against "persons."[122] Finally, Judge Kavanaugh would have applied the political question doctrine and consequently found that it was contrary to U.S. foreign policy to hold corporations liable under the ATS.[123] While the reasons set forth by Judge Kavanaugh do make some sense, they are contrary to U.S. law, ATS jurisprudence, and public policy.[124]

IV. CORPORATIONS SHOULD BE LIABLE UNDER THE ATS: WHY THE D.C. CIRCUIT CORRECTLY DECIDED *DOE VIII*

The majority in *Doe VIII* correctly held that corporations can be liable under the ATS. In so holding, the court properly applied domestic law rather than international law to address the question of who can be sued when jurisdiction is obtained by the ATS. There are seven reasons why *Doe VIII* was correctly decided. First, *Sosa*'s footnote twenty and other ATS jurisprudence require courts to look at domestic law, not international law.[125] In other words, international law provides only the cause of action and its elements while other questions related to deciding the case, such as jurisdictional issues, are left to domestic law. Second, holding that individuals—but not corporations—can be liable under the ATS is

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[119] *See Doe VIII*, 654 F.3d at 81–85.

[120] *Id.* at 72 (Kavanaugh, J., dissenting).

[121] *Id.* at 72–73.

[122] *Id.* at 73.

[123] *Id.*

[124] *See infra* Part IV.

[125] *See infra* Part IV.A.

major conceptual flaw.[126] Third, holding corporations liable is consistent with the purpose of the ATS.[127] Fourth, the implications of a contrary holding are squarely U.S. against policy.[128] Fifth, it does not make sense to look at international law to determine who can be a defendant because international law does not provide rules for decision-making.[129] Sixth, the *Doe VIII* court was also correct in holding that, even assuming international law governs, corporations would still be liable.[130] Finally, corporate liability under the ATS is consistent with international human-rights norms and principles of corporate responsibility.[131]

A. Sosa *Requires Courts to Look at Domestic Law*

The *Doe VIII* majority was correct that the ATS itself and footnote twenty of *Sosa* require courts to look not at international law but at federal law to determine whether corporations can be sued under the ATS. The text of the ATS does not limit who can be a defendant, but rather, only who can be a plaintiff.[132] The Supreme Court endorsed this understanding of the ATS in *Argentine Republic v. Amerada Hess Shipping Corp.*, where it recognized that "[t]he [ATS] by its terms does not distinguish among classes of defendants . . . ."[133] Thus, Congress in no way expressly limited the class of defendants to which the Statute could extend.[134] From a statutory construction standpoint, there is no reason to believe that Congress intended the ATS to limit a class of defendants.[135]

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[126] *See infra* Part IV.B.

[127] *See infra* Part IV.C.

[128] *See infra* Part IV.D.

[129] *See infra* Part IV.E.

[130] *See infra* Part IV.F.

[131] *See infra* Part IV.G.

[132] 28 U.S.C § 1350 (2006) ("The district courts shall have original jurisdiction in any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."); *see* Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 40 (D.C. Cir. 2011); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

[133] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989).

[134] Brief for the United States as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Shell (No. 10-1491), at 22, *available at* http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/.

[135] *See* Chevron, U.S.A., Inc. v. Natural Ress. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Even assuming that Congress did not expressly answer the questions of who can be a defendant, the Supreme Court requires only that a construction of the statute be "permissible." *Id.*

Furthermore, *Doe VIII* is correct in pointing out that corporate liability is consistent with footnote twenty of *Sosa*—the only guidance from the Supreme Court on the scope of the ATS.[136] The *Kiobel* majority misconstrued and misunderstood footnote twenty by assuming that the footnote requires both the violation and the violator of a customary international law norm to be recognized by international law.[137] Footnote twenty stands for the proposition—and supports the common understanding—that some parts of international law apply only to states, and thus plaintiffs can assert these claims only against the states themselves.[138] Thus, footnote twenty rightly concludes that once a court determines that a claim is cognizable under international law, the court must then determine whether that claim can be applied to states or private actors by looking to international law.[139] International law answers the question of what norms apply to states, and what norms apply to everyone else. The *Sosa* Court was discussing whether international law permits only states to be sued or whether private actors could also be sued, not whether international law governs an inquiry into *which* private actors could be sued.[140] Moreover, the footnote makes no

[136] Brief for the United States, *supra* note 134, at 18 (arguing that "the court of appeals misread footnote 20 to require not just an international consensus regarding the content of an international-law norm, but also an international consensus on how to enforce a violation of that norm.").

[137] *See Doe VIII*, 654 F.3d at 41; David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 364 (2011).

[138] *See* Brief for the United States, *supra* note 134, at 17 ("From *Sosa*'s footnote 20, it is clear that '*if* the defendant is a private actor,' . . . a court must consider whether private actors are capable of violating the international-law norm at issue. . . . The distinction between norms that apply only to state actors and norms that also apply to non-state actors is well established in customary international law.") (internal citations omitted); *see also* STEVEN R. RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 3–4 (2d ed. 2001) (explaining that "[t]he law is no stranger to the idea of holding individuals responsible for egregious conduct toward their fellow human beings").

[139] This was *Kadic*'s proposition. Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 2005).

[140] Brief for Petitioner, Petition for Writ of Certiorari, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011), at 20, *available at* http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/.

> It is wrong to suggest that footnote 20 supplies the answer to any issue other than the specific issue this Court was actually addressing. This is especially so given this Court's clear decision in *Sosa* that the ATS provides subject matter jurisdiction for federal common law causes of action for certain universally condemned international human rights

distinction between private actors that are individuals and private actors that are corporations, nor does it suggest that the two should be treated differently.[141] There is absolutely no distinction between corporations and private persons: all private actors are treated the same. Looking to international law for the cause of action is one thing, but determining who is liable for that cause of action is an entirely different question. The former is governed by the ATS's requirement to look to international law; the latter is not.[142]

Footnote twenty can be read in still another way: it could simply pose the question of "whether *international law* extends the scope of liability" to corporations, or whether some other law achieves that function.[143] Under this reading, the Court simply poses a question for lower courts to address: which law should govern the question of whether corporations can be sued? Thus, the text of the *Sosa* opinion and footnote twenty indicate that courts may to look to domestic law to determine whether corporations can be sued under the ATS.[144]

B. Holding Individuals but not Corporations Liable Under the ATS is a Major Conceptual Flaw

No court disputes that private actors are subject to liability.[145] Because corporations are defined as having a corporate personhood, they should not be treated any differently from private individuals.[146] In *Kadic*, the Second Circuit held that international law does not confine the reach of the ATS to states and instead expands that reach to private persons.[147] As the *Kadic* court states, domestic law is a more proper source than international law to answer this question.[148]

violations.

Id. at 32.

[141] *See* Sosa v. Alvarez-Machain, 552 U.S. 692, 732 n.20 (2004).

[142] *See Doe VIII*, 654 F.3d at 41; Scheffer, *supra* note 137. *Contra Kiobel*, 621 F.3d at 126.

[143] *See* Scheffer *supra* note 137.

[144] It should also be noted that footnote twenty of *Sosa* is only that: a footnote. The footnote is only dicta, and courts should take care in not placing too much stock in a few words buried within it, especially if its effect is to immunize a large group of potential defendants. *See* Ben. Nat'l Bank v. Anderson, 539 U.S. 1, 17 (2003) (stating that "[d]icta of course have no precedential value . . . even when they do not contradict . . . prior holdings of the Court").

[145] *See* Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 2005) (disagreeing with the previously held proposition by some courts that "the law of nations, as understood in the modern era, confines its reach to state action.").

[146] *See* Scheffer, *supra* note 137.

[147] *Kadic*, 70 F.3d at 239.

[148] *See infra* Part IV.A.

Under American law, corporations are treated as individuals and are thus held liable, as would any other natural person.[149] Indeed, most recently in *Citizens United v. FEC*, the Supreme Court held that both corporations and natural persons are legal persons.[150] In essence, the Supreme Court set forth a conception of corporate personhood permitting corporations to donate money to political campaigns just as individuals do.[151] Thus, if we recognize—indeed agree—that private individuals can be held liable for violations of the law of nations under the ATS and that, according to *Citizens United*, corporations are to be treated as individuals, then it seems to follow that corporations should be liable under the ATS.[152] The Supreme Court should be consistent in its application of corporate personhood outlined in *Citizens United* and hold that corporations can be sued under the ATS.

C. Holding Corporations Liable is Consistent with the Purpose of the ATS.

Courts should recognize corporate liability under the ATS because it was a principle of both U.S. (domestic) and international law at the time Congress passed the ATS and because corporate liability furthers the original purpose of the ATS. When Congress passed the ATS, corporate liability was well-established and recognized not only in the United States but also internationally—especially in British common law.[153] Specifically, corporations such as the East India Company were sued and found liable for the actions of their agents in international law disputes.[154] Furthermore, ship commanders sailing on the high seas were held liable for the acts of their sailors.[155] With the emergence of such principles, the United

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[149] *See* Citizens United v. FEC, 130 S. Ct. 876, 899–900 (2010).

[150] *Id.*

[151] *Id.*

[152] *See generally* Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 LAW & SOC'Y REV. 271 (2009).

[153] Doe VIII v. Exxon Mobil Corp. 654 F.3d 11, 48 (D.C. Cir. 2011) (stating that "[t]he notion that corporations could be held liable for their torts, therefore, would not have been surprising to the First Congress that enacted the ATS"); *see* Hotchkis v. Royal Bank of Scot., (1797) 2 Eng. Rep. 1202, 1203 (H.L.).

[154] Brief for Professors of Legal History, *supra* note 112, at 16; *see* Moodalay v. The E. India Co., (1785) 28 Eng. Rep. 1245, 1246 (Ch.) (stating that "[a]t the outset I thought the cases of a corporation and of an individual were different; but I am glad to have the authority of Lord Talbot, that they are not.").

[155] Brief for Professors of Legal History, *supra* note 112, at 23; *see, e.g.*, The Malek

States's domestic common law adopted corporate liability.[156] These examples demonstrate that corporate liability and agency law were defined principles of domestic and international law when Congress passed the ATS. Because corporate liability existed, the Founders decided not to explicitly exempt corporations from liability—otherwise they would certainly have done so in the statute.[157] Thus, it is well within the scope of the original statutory purpose to hold corporations liable under the ATS.[158]

Furthermore, corporate liability promotes the original purpose of the ATS, "to forestall the appearance of American complicity in violations of the law of nations."[159] Thus, Congress developed the ATS to give the United States legitimacy in the international realm.[160] The ATS provided a means to show the world that the United States could deal effectively with international issues. Today, the ATS can and should be a mechanism through which the United States demonstrates that it will not be complicit in violations of the law of nations—namely, human-rights abuses by corporations.[161] Holding corporations liable under the ATS is thus consistent with the original purpose of the ATS.

D. The Implications of a Contrary Holding are Squarely Against Public Policy.

In *Sosa*, the Supreme Court mandated that courts look to public policy when considering the scope of the ATS.[162] When examining public policy, the Supreme Court's decision counsels in favor of examining both the negative and positive consequences of recognizing a claim.[163] In terms of corporate liability, it is clear that the positive consequences of allowing corporations to be sued under

Adhel, 43 U.S. (2 How.) 210, 233–34 (1844); The Mariana Flora 24 U.S. (11 Wheat.) 1, 40–41 (1826).

[156] Brief for Professors of Legal History, *supra* note 112, at 29–31.

[157] Brief for Petitioner, *supra* note 140, at 29.

[158] *Doe VIII*, 654 F.3d at 48.

[159] Brief for Professors of Legal History, *supra* note 112.

[160] Sosa v. Alvarez-Machain, 542 U.S. 692, 716–17 (2004).

[161] *Compare* Brief for Petitioner, *supra* note 140, at 28, *with* Brief for Respondent, Petition for Writ of Certiorari, Kiobel v. Royal Dutch Petroleum Co., *cert. granted*, 2011 U.S. LEXIS 7522.

[162] *Sosa*, 542 U.S. at 732–33 ("[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts.").

[163] *Id.*

the ATS outweigh the negative consequences of holding corporations liable.

Holding that corporations *can* be liable for violations of the law of nations is different than holding that corporations *will* be liable.[164] Allowing plaintiffs to sue corporations under the ATS simply allows plaintiffs to bring the suit—it does not make corporations automatically liable. A corporation will only be required to pay damages if a court finds that it violated international law, which is by no means guaranteed. The law should not permit corporations to get away with violations of international law simply because they choose to form a corporation.[165] In fact, one of the primary purposes of forming a corporation is to *avoid* individual liability in favor of entity liability. The law should not limit liability for the sole reason that corporations would prefer to not pay damage awards. The United States should not limit liability for a wrong simply because the alleged wrongdoers—corporations, or any party for that matter—do not like the possibility that they will be hailed into court. Wrongful conduct is wrong regardless of the identity of the perpetrator. Addressing wrongdoing is precisely the purpose of statutes such as the ATS. To then retract that liability because it will be unfavorable for some of the wrongdoers would defeat the entire purpose of the statute.

Holding that corporations can be sued under the ATS allows domestic law to guide the behavior of corporations overseas.[166] Congress has expressly allowed for such extraterritorial control over U.S. citizens abroad.[167] This oversight is desirable because absent the extension of U.S. law to corporate entities abroad, corporations would be able to get away with human-rights abuses that were either unenforced or unrecognized under the laws of the country in which the corporations were operating.[168] Barring ATS litigation, corporations would be left only to the laws of the nations in which

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[164] *Infra* Part IV.

[165] *See* Kiobel v. Royal Dutch Shell Petroleum, 621 F.3d 111, 149–50 (2d Cir. 2010) (Leval, J., concurring) (stating that according to the majority-created rule "one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victim's claims for compensation simply by taking the precaution of conducting the heinous operations in the corporate form"); Khulumani v. Daimler Chrysler Corp., 504 F.3d 254, 289 (2d Cir. 2007) (Hall, J., concurring).

[166] *See* Holzmeyer, *supra* note 152.

[167] Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 28 (D.C. Cir. 2011) ("Congress in prescribing standards of conduct for American citizens may protect the impact of its laws beyond the territorial boundaries of the United States . . . .").

[168] *See* Holzmeyer, *supra* note 152.

they operate.[169] The courts of these nations are oftentimes susceptible to corruption and inaccessible to ordinary individuals.[170] Simply stated, just because a corporation must transact business does not mean that it has a "license to assist in violations of international law."[171] It is illogical to allow corporations to receive special treatment simply because they are corporations, and prevent them from answering to offenses that they or their agents commit abroad.

While some scholars argue that the individual managers of a corporation would still be liable even absent recognition of corporate liability under the ATS, this argument is misdirected.[172] In reality, liability of the corporations themselves is a more effective deterrent because "corporate agents are judgment-proof and cannot bear the costs of sanctions, and because corporate liability encourages shareholders to monitor corporate activities."[173] Disallowing corporate liability is contrary to established U.S. agency law, which allows entities to be held liable for the acts of their agents. The purpose of damages in a tort is to make the plaintiff whole.[174] Holding only managers liable under the ATS for decisions the entity makes as a whole would permit corporations to evade responsibility and would prevent the application of agency law—a reason for forming corporations in the first place.[175] Courts should afford plaintiffs complete redressability in their claims, and plaintiffs should be allowed to seek that redress from the entity that harmed them. Under U.S. agency principles, plaintiffs may sue those individuals or entities that can best compensate the plaintiff in order to make him or her whole. Plaintiffs under the ATS should be afforded the same opportunity.

Preventing corporations from being sued under the ATS is inconsistent with modern conceptions of justice. First, a rule that corporations cannot be sued under the ATS would be categorical, therefore applying to all ATS cases in which a corporation is a

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169 *See id.*

170 *Khulumani*, 504 F.3d at 289 (Hall, J., concurring).

171 *Id.*

172 *See Kiobel*, 621 F.3d at 120; *see also* Janine Stanisz, *The Expansion of Limited Liability Protection in the Corporate Form: The Aftermath of* Kiobel v. Royal Dutch Petroleum Co., 5 BROOK. J. CORP. FIN. & COM. L. 573, 598 (2011); Thompson, *supra* note 42.

173 Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 473 (2001).

174 *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979).

175 *See generally* Stanisz, *supra* note 172, at 598.

potential defendant.[176] Such a rule would prevent any corporation from ever being sued under the ATS. A categorical rule that disallows a suit completely is unfounded. It essentially allows corporations to commit human-rights abuses or ignore potential abuses because they are immunized from liability in the United States.[177] Natural persons who commit human-rights abuses are subject to liability, while corporations, composed of natural persons shielded by the corporate structure, are not. This reality produces an inequitable result, as among ATS defendants. Second, holding that corporations cannot be sued is inconsistent with domestic and international norms that require courts to provide plaintiffs with a meaningful remedy.[178] Preventing corporations from being sued under the ATS effectively limits a plaintiff's ability to obtain redress for his or her injuries. Thus, plaintiffs would only be able to obtain a judgment against an individual, which in turn would likely substantially reduce or inhibit a damages award.[179]

Holding that corporations cannot be sued under the ATS is also inconsistent with current jurisprudence because it is inconsistent with *Filartiga*.[180] In determining that corporations cannot be sued under the ATS, the *Kiobel* court explained that for liability to attach to an ATS claim, there must be a violation of international law that is *universally* recognized.[181] This is a misunderstanding of ATS jurisprudence. If courts must look to universal international law as *Kiobel* states, then ATS plaintiffs would always have to demonstrate that the defendants would be universally held liable under international law.[182] Thus, the *Filartiga* plaintiffs would have had to

[176] Brief for the United States, *supra* note 134, at 14.

[177] Of course, a corporation may be liable for human-rights abuses in the states in which they occur. Many of these states, however, are severely lax in enforcing human-rights norms; some states do not even have legal systems that recognize such rights.

[178] *Cf.* Brief for the United States, *supra* note 134, at 24.

[179] *See* Ratner, *supra* note 173, at 473.

[180] *See generally* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[181] *See* Kiobel v. Royal Dutch Shell Petroleum, 621 F.3d 111, 118 (2d Cir. 2010).

[182] Brief for International Law Scholars as Amici Curiae in Support of Petitioners at 15, Kiobel v. Royal Dutch Shell (No. 10-1491), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_law_scholars.authcheckdam.pdf; *see* Brief for Navi Pillay, The United Nations High Commissioner for Human Rights as Amici Curiae in Support of Petitioners (No. 10-1491), at 6, *available at* http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/ ("[T]he proposition that corporations are not accountable for violations of international human rights law ignores a fundamental principle of international law:

"demonstrate that torturers were universally held civilly liable in the courts of [all] third countries."[183] This threshold is too high and would alter years of ATS jurisprudence. It is inconsistent with the development of current domestic and international law and would essentially render hundreds of previous decisions bad law.[184] The much more reasoned approach to analyzing corporate liability under the ATS is found in domestic, not international law.

There is a strong policy rationale for clearly defining the standard for corporate liability under the ATS.[185] Currently, corporations are held to different standards in different circuits.[186] Accordingly, the lack of clarity "has thrown the circuit[s] into disarray."[187] Clearly defining the standard of liability would put corporations, individuals, and foreign nations on notice of the expectations and responsibilities of corporations engaging in activity abroad. Absent a universal norm, there is too much uncertainty on the part of both corporations and plaintiffs seeking to bring claims.[188] In addition, a clear definition would eliminate confusion and ambiguities on the standard, and therefore allow corporations a degree of comfort in knowing precisely what is expected of them and to what extent they can be held liable.[189] If corporate liability is recognized across the board, corporations and plaintiffs can move forward in addressing the necessary issues. Thus, the Supreme Court should address the issue and in doing so should clearly outline that corporations can be sued under the ATS.[190]

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the principle that victims of human rights violations are entitled to an effective remedy.").

[183] Brief for The United Nations High Commissioner for Human Rights, *supra* note 182, at 15.

[184] Circuit decisions permitting corporate liability under the ATS that would be overturned by such a Supreme Court case include Doe VIII v. Exxon Mobil Corp., 654 F.3d 11 and Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008).

[185] Telephone Interview with Alka Pradhan, Counsel, The Constitution Project (Oct. 20, 2011) (on file with author).

[186] *Compare* Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 50–51 (D.C. Cir. 2011), *with* Kiobel v. Royal Dutch Shell Petroleum Co., 621 F.3d 111 (2d Cir. 2010).

[187] Mark Hamblett, *Circuit Rejects Corporate Alien Tort Law Liability*, N.Y.L.J., Sept. 20, 2010.

[188] Telephone Interview with Alka Pradhan, *supra* note 185.

[189] Karen M. Borg & Merkys I. Gómez, *Alien Tort Statute: Should We Be Concerned?*, CORPORATE COUNSEL 2 (Aug. 2007), *available at* http://butlerrubin.com/web/br.nsf/0/CF4E3FBB296096518625732A005AE4CA/$FILE/W0052343.PDF.

[190] Telephone Interview with Alka Pradhan, *supra* note 185; *contra* Michael Garvey, *Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Legislative Prerogative*, 29 B.C. THIRD WORLD L.J. 381, 396 (arguing that the legislature is best

E. International Law Does Not Provide Rules of Decision-Making and Thus Courts Must Look to Domestic Law

Conceptually, it makes sense to look to domestic federal law to determine whether corporations can be held liable for a violation of the law of nations because domestic law provides rules of decision-making. *Sosa* was consistent with the proposition that "the cause of action in ATS cases is based on federal common law and that international law leaves the means by which international law obligations are to be implemented within States to each domestic legal system."[191] International law allows nations to decide for themselves how they will implement international law norms.[192] The idea that courts should look to domestic law to determine the claims recognizable under the ATS for the scope of those claims is consistent with international law.[193] Indeed, international law requires courts applying international law to look to domestic law for procedural and decision-making rules.[194] In other words, the ATS is a grant of jurisdiction in federal courts to aliens bringing a claim of a violation of the law of nations.[195] The law of nations formally indicates the wrongs that the community of nations recognizes, and the ATS makes those wrongs actionable in U.S. courts—it should not matter whether a corporation or an individual commits that wrong.[196] Thus, looking to domestic law to determine who can be sued allows those who have been injured by corporations the recourse they would receive had the injury been committed by an individual.

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equipped to answer the question of corporate liability). To the contrary, courts are well-equipped to answer these questions and indeed should answer the questions, especially when they have posed the questions.

[191] Brief for Petitioners, *supra* note 140, at 23.

[192] The Lotus Case, 1927 P.I.C.J. (Ser. A) No. 10, at 28 (Sept. 1927); *see* Brief for International Law Scholars, *supra* note 182, at 5.

[193] *See* Kiobel v. Royal Dutch Shell Petroleum, 621 F.3d 111, 152, 183–84 (2d Cir. 2010) (Leval, J., concurring); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 770, 778 (2d Cir. 1980) (Edwards, J., concurring); Brief for Professors of Legal History, *supra* note 112, at 3 (stating "[a] historical understanding of the legal system demonstrates that the norms that defined prohibited conduct under the ATS were drawn from the law of nations while enforcement questions, such as which particular defendant would be assessed damages, were drawn from the domestic common law").

[194] Brief for Petitioner, *supra* note 140, at 34 (stating that "[t]he drafters of the ATS understood that the rules of decision in ATS cases would be found in common law"); *see* The Lotus Case, 1927 P.I.C.J. (Ser. A) No. 10, at 28; *see* Sosa v. Alvarez-Machain, 542 U.S. 692, 730–31 (2004); Brief for International Law Scholars, *supra* note 182, at 5.

[195] *See Sosa*, 542 U.S. at 724 (citing historical proof).

[196] *See* Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 41 (D.C. Cir. 2011).

In addition, international law does not provide rules with sufficient clarity for determining all aspects of a violation of international law.[197] While the claim itself may be universally and specifically recognized as a violation of international law, the other rules involving such a claim—such as its scope and limits—may not be recognized with the same specificity and universality. This reality does not mean that all claims arising under international law lack sufficient definiteness—it simply means that courts must look elsewhere to determine the contours of its scope.[198] U.S. law adequately—in fact, exceptionally—determines the scope of claims that international law recognizes.[199] International law does not have the standards and procedural mechanisms necessary to guide such a decision.[200]

To determine what claims are recognized by the law of nations, and what the elements of those claims are, we must look to international law.[201] There, the inquiry under international law ends, and courts should return to domestic law to determine the rest of the case.[202] *Doe VIII* illustrates this proposition by noting that courts do not conceptualize a separate claim for "corporate battery."[203] Instead, the claim is always simply battery, and who pays damages is left to common law agency principles.[204] In other words, the question in this hypothetical and in the ATS choice-of-law question is, more appropriately, "*who* must pay damages?"[205]

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[197] *See* Michael Barsa & David Dana, *Three Obstacles of the Promotion of Corporate Social Responsibility by Means of the Alien Tort Claims Act: The* Sosa *Court's Incoherent Conception of the Law of Nations, the "Purposive" Action Requirement for Aiding and Abetting, and the State Action Requirement for Primary Liability*, 21 FORDHAM ENVTL. L. REV. 79, 99–100 (2010) (arguing that "while the Supreme Court in Sosa acknowledged that customary international law might evolve over time, it tried to anchor that evolution in a false sense of the 'certainty' of the 'law of nations' as it had been recognized under the eighteenth century natural law tradition. Contrary to the Court's assumption, the 'law of nations' was meant to be somewhat fluid and evolving from the very beginning.") (internal citations omitted).

[198] *Cf.* Barsa & Dana, *supra* note 197, at 90–91.

[199] *Cf. Doe VIII*, 654 F.3d at 43.

[200] *See Id.*

[201] *Id.* at 41.

[202] Other aspects of the case include procedural determinations and elements that international law cannot provide, such as who is a defendant. These domestic law determinations should not be inconsistent with international law.

[203] *Doe VIII*, 654 F.3d at 41.

[204] *See id.*

[205] *Id.* at 41; *see* Brief for Professors of Legal History, *supra* note 112 ("Courts historically used domestic law to address questions of allocating losses to juridical entities for violations of the law of nations.").

Thus, while there must be a violation of the law of nations to trigger the ATS and provide subject matter jurisdiction over the case, the federal common law supplies the rules "governing the scope of tort remedies and other rules governing ATS litigation."[206] Furthermore, it makes sense to apply federal domestic law to the inquiry because courts already look to federal law in such cases for procedural rules of decision-making.[207] By its express language, the ATS limits who can be a plaintiff and lets federal law—not international law—determine who can be a defendant by way of the limits of the rules of personal jurisdiction.[208]

F. Even Under International Law, Corporations may Still be Liable

Despite the fact that *Sosa* and policy principles mandate that courts look to domestic rather than customary international law to determine the scope of liability for corporations under the ATS, international law positively recognizes corporate liability.[209] First, customary international law recognizes juridical liability for entities such as corporations.[210] The International Court of Justice adjudicated a case involving a company, and thus implicitly acknowledged that corporations can be sued.[211] In addition, the International Court of Justice held that an international organization can sue a state.[212] If juridical entities such as international organizations can bring a claim, then it seems fair for juridical entities like corporations to be sued as well.[213] Second, general

[206] Brief for Petitioner, *supra* note 140, at 34; *see* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

[207] *See generally* Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457 (2007).

[208] *See generally id.*

[209] *See Doe VIII*, 654 F.3d at 53.

[210] *See generally* Harmony v. United States (The Malek Adhel), 43 U.S. (2 How.) 210, 233–34 (1844); The Mariana Flora, 24 U.S. (11 Wheat.) 1, 40–41 (1826); Moodalay v. The E. India Co., (1785) 28 Eng. Rep. 1245, 1246 (Ch.). Maritime law, a part of international law, recognizes liability for juridical entities such as ships. Brief for International Law Scholars, *supra* note 182, at 27. Today, "it is not uncommon for the human rights responsibilities of multinational corporations to be addressed and applied by intergovernmental organizations." *Id.*

[211] *See* Barcelona Traction, Light & Power, 1970 I.C.J. 3, 38–39 (Feb. 5). "Corporate personhood has been recognized by the ICJ upon considering the 'wealth of practice already accumulated on the subject in municipal law.'" *Doe VIII*, 654 F.3d at 53 (quoting *Barcelona Traction, Light & Power Co.*, 1970 I.C.J. at 38–39).

[212] *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179–80 (Apr. 11).

[213] The International Court of Justice recognized that the United Nations had a right to bring a claim against a state because of its uniquely international function

principles of law—a source of international law[214]—recognize corporate liability.[215] All legal systems of the world, including the United States, recognize corporate liability.[216] In fact, suits against corporations are "both commonplace and regularly exercised, including for conduct that occurs outside the home jurisdiction of a corporation."[217] Thus, general principles of law recognize that corporations can be sued. Third, treaties require the United States to uphold human rights.[218] Thus, international law requires that the United States implement laws and policies in accordance with human rights.[219] The ATS is one such law, and to be compliant with treaties, it must recognize corporate liability to protect human rights.

Furthermore, the ATS's grant of jurisdiction over corporations operating in foreign countries is consistent with jurisdictional principles in international law. International law recognizes that states may obtain jurisdiction over defendants in a number of ways without the defendant being present within that state.[220] According to the passive personality principle, states may obtain jurisdiction over defendants when those defendants harm nationals of the state.[221] Similarly, the protective principle recognizes jurisdiction over defendants who infringe on an important state interest.[222] Finally, the universal jurisdiction principle recognizes that jurisdiction is proper in some certain instances where the right infringed is universal in nature.[223] The ATS most properly fits within the protective principle.[224] If the United States asserts that human rights and foreign relations are important state interests, corporations clearly damage these important state interests when they fail to abide by

and because it should have a right to remedy a wrong. *See id.* at 184–85. Similarly, corporations have a unique international function and character that supersedes national boundaries, much like the United Nations. Thus, plaintiffs, like the United Nations, should be able to redress their injuries.

[214] *See* STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW 56–61 (2006).

[215] Brief for International Law Scholars, *supra* note 182, at 22.

[216] Brief for International Law Scholars in Support of the Petition for Writ of Certiorari, Kiobel v. Royal Dutch Petroleum Co., *cert. granted*, 2011 U.S. LEXIS 7522, at 16.

[217] *Id.* at 18.

[218] *Id.* at 17.

[219] *See id.*

[220] *See* MCCAFFREY, *supra* note 214, at 179–88.

[221] *See id.* at 188–89.

[222] *See id.* at 182–84.

[223] *See id.* at 184–88.

[224] *Cf. id.* at 188–89.

human-rights norms.

Finally, the *Kiobel* court erroneously determined that international law does not recognize corporate liability based solely on looking to criminal, not civil, tribunals.[225] In the context of the ATS, courts should look to *civil* liability.[226] Indeed, there is an enormous difference between criminal liability and civil liability, and the legal reasoning for applying one cannot necessarily apply in the context of the other.[227] Courts and scholars have rejected criminal liability of corporations in part because civil liability provides the most effective punishment for corporations—monetary damages—while other punishments—such as imprisonment—are more suitable for individuals in the criminal context.[228]

The Second Circuit erred when it looked to *The Nuremberg Trials* for direction on the issue of whether international law recognizes corporate liability.[229] In *Kiobel*, the Second Circuit examined the Nuremberg Court's dismissal of claims against I.G. Farben, a corporate entity that was sued for complicity in the Holocaust, as evidence that international law prohibits corporations from being sued.[230] Furthermore, the *Nuremberg* court was a criminal tribunal.[231] International law does not recognize corporate criminal liability.[232] Thus, the *Nuremberg* court did not have jurisdiction over the claims against the company for criminal violations. Despite the fact that the *Nuremberg* court did not exercise jurisdiction over corporations, it

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[225] Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 170 (Leval, J., concurring only in the judgment).

[226] *See id.*

[227] *Id.*

> Whereas criminal liability of corporations is unknown in much of the world, civil liability of corporations is enforced throughout the world. Whereas the imposition of criminal punishment on corporations fails to achieve the objective of criminal punishment, the compensatory purposes of civil liability are perfectly served when it is imposed on corporations. Whereas criminal prosecution of a corporation could misdirect prosecutorial attention away from the responsible persons who deserve punishment, imposition of civil compensatory liability on corporations makes possible the achievement of the goal of civil law to compensate victims for the abuses they have suffered.

Id.

[228] *Id.*

[229] *Contra id.* at 132–33.

[230] *Kiobel*, 621 F.3d at 170 (Leval, J., concurring in the judgment).

[231] *See id.* (majority opinion) at 155.

[232] Brief for The United Nations High Commissioner for Human Rights, *supra* note 182, at 23.

made clear that corporations could be held liable.[233] Thus, general principles of international law and legal history suggest that corporations can be used under international law.

G. Corporations Must Uphold Human Rights

The time is ripe for ensuring that human-rights standards are addressed globally. As corporations continue to invest in developing countries, the United States must perfect its stance on human-rights abuses in accordance with internationally accepted norms.[234]

First, corporations have a moral duty to abide by human rights, as do all other individuals.[235] If corporations are owed the same rights and protections as people,[236] they should owe moral duties to other people.[237] Like any individual, a corporation should be responsible for its conduct.[238] It must not kill, injure, or repress. Corporations should not be amoral. As an integral part of society, corporations must abide by society's moral measures. Indeed, at least one scholar has suggested that corporations should have a higher moral responsibility than individuals because they affect more people.[239] The law reflects our conceptions and standards of morality. Corporations are not immune from these moral compasses. Holding corporations liable for human-rights abuses under the ATS is an important step in solidifying and enforcing corporate morality, just like individual morality is codified and enforced.

Corporate liability under the ATS is also consistent with recent trends in international and global law.[240] Holding corporations liable under the ATS is necessary for the advancement and development of human-rights norms throughout the world.[241] Modern international law favors a determination that entities or individuals other than the

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[233] *Id.*

[234] *See* Ratner, *supra* note 173, at 447.

[235] *See generally* John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).

[236] *See* Citizens United v. FEC, 130 S. Ct. 876, 899–900 (2010).

[237] Ratner, *supra* note 173, at 503–04 ("[F]or instance, by working form a moral starting point that a corporation has a duty not to invest at all in a repressive society, or a duty to ensure that it does not in any way benefit from the government's lax human rights policy.").

[238] *See generally* Ruggie, *supra* note 235.

[239] Ratner, *supra* note 173, at 508.

[240] *See, e.g.*, *id.* at 475.

[241] *See* Ruggie, *supra* note 235.

states themselves owe human-rights duties to individuals.[242] To advance this developing norm in the international realm, ATS liability must extend to corporations. Corporations are an integral part of the human-rights discussion, and to permit ATS suits against them keeps them engaged in the discussion and the development of human-rights norms and jurisprudence.

Furthermore, international law now recognizes non-state and individual liability for human-rights abuses.[243] States are no longer the only actors that violate individuals' human rights.[244] Entities and natural persons can harm individuals just as much as states.[245] The law should respond to this reality. To achieve this, the law should be informed by the understanding that corporations, not states, may be in the best position to advance human-rights norms globally. The power of the nation-state is waning while the power of the corporation is ever-increasing. Corporations are multi-national and trans-national actors; they cross and transcend borders, laws, and norms. Because some corporations are true supra-national entities,[246] they should be required to uphold and protect liberties and rights that transcend national boundaries. Because they are in a far-reaching position, corporations may in fact be best suited to bring about real change to the way human-rights norms and law are respected and upheld across the globe.[247]

Critics argue that United States law should not mandate that corporations be "conscripted philanthropists."[248] One scholar, Donald Kochan argues that while human-rights abuses are certainly grave, the ATS is not the appropriate mechanism through which to hold corporations accountable.[249] He says that all abuses need not have specific remedies in American law.[250] He further argues that it is inappropriate for the government to affirmatively compel, "by coercive force," corporations to act in accordance with prescribed

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[242] Ratner, *supra* note 173.

[243] *Id.* at 469.

[244] *Id.* at 469 (arguing that "[t]he immense power of the state to cause harm to human dignity was revealed as never before in World War II and thus justified the continued concentration on rights of individuals against the state").

[245] *See id.* at 477–78.

[246] *See id.* at 447–48.

[247] *See id.* at 474.

[248] Donald Kochan, *Legal Mechanization of Corporate Social Responsibility Through Alien Tort Statute Litigation: A Response to Professor Branson With Some Supplemental Thoughts*, 9 SANTA CLARA J. INT'L L. 251, 254 (2011).

[249] *See id.* at 254–55.

[250] *See id.* at 255.

moral obligations.[251] These concerns are misplaced. Corporations owe a duty to individuals they affect. The ATS is simply a grant of jurisdiction, not a cause of action for breaches of that duty. It does not provide any remedy. Rather, it serves as a way for plaintiffs to get into U.S. courts with the possibility of holding corporations accountable for alleged abuses of rights, much like they are held accountable for abuses within the United States. If the United States is serious about human rights, it should not permit corporations to evade jurisdiction and liability for violating those rights.

V. THE REAL IMPLICATIONS OF CORPORATE LIABILITY UNDER THE ATS: THERE IS A WAY TO HAVE IT BOTH WAYS

The legal question of whether foreign plaintiffs can sue corporate defendants for violations of the law of nations under the ATS has been hotly debated and litigated in recent years and is the subject of a great scholarly divide.[252] The Supreme Court will answer this question in its discussion of the Second Circuit's holding in *Kiobel*, which the parties argued for the second time in late 2012.[253] Although courts and scholars have debated the liability issue extensively, there has been little discussion of the real implications of holding corporations liable under the ATS. Frequently, when practitioners discuss corporate liability, they argue that public policy considerations weigh for or against holding corporations liable under the ATS, and the inquiry ends there.[254] They oftentimes make projections that are unsubstantiated.[255] Some of these projections are quite severe and have created what amounts to nothing less than panic in the corporate world.[256] Gary Clyde Hufbauer and Nicholas

[251] *Id.* at 254.

[252] *See supra* Part IV.

[253] *See generally* Kiobel v. Royal Dutch Shell Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 2011 U.S. LEXIS 7522 (Oct. 17, 2011).

[254] *See, e.g.*, John B. Henry, *Fortune 500: The Total of Litigation Estimated at 1/3 Profits*, THE MET. CORP. COUNSEL (Feb. 1, 2008), http://www.metrocorpcounsel.com/pdf/2008/February/28.pdf; James E. Berger & Charlene C. Sun, *Corporate Liability Under the Alien Tort Statute*, PAUL HASTINGS, September 2011, *available at* http://www.paulhastings.com/assets/publications/2003.pdf?wt.mc_ID=2003.pdf (failing to address the implications for corporations that may be subject to liability under the ATS).

[255] HUFBAUER, *supra* note 22, at 1.

[256] *Id.* at 1 (stating that "[t]his one-sentence law . . . could plausibly culminate in a nightmare, more than 200 years after it was enacted" and "corporate lawyers would advise the targeted multinational corporations (MNCs) and many other firms to curtail their investments, not only in China but also in other (mainly developing)

K. Mitrokostas go so far as to say that

> [u]nless checked by Congress or the Supreme Court, trial lawyers will seek to expand the scope of ATS awards to such an extent that investment and trade in developing countries will be seriously threatened. The ultimate losers will be millions of impoverished people denied an opportunity to participate in global markets. Along the way, the United States will find itself at loggerheads with traditional allies, trading partners, and developing countries.[257]

It is important to note that if corporations are not abusing human rights abroad, they should not be worried about liability. This section attempts to deconstruct those notions and evaluate the real implications of holding corporations liable under the ATS. Overall, the threat to corporations is likely not as serious and adverse as many corporate leaders think, and in fact, corporate liability under the ATS can produce positive effects for corporations, human rights, and foreign relations.[258]

A. Procedural and Practical Limits

As a preliminary matter, and as discussed above, it is important to note that finding that corporations are subject to liability under the ATS does not mean that they inevitably will be found liable under the particular circumstances of a case. Allowing corporations to be sued in ATS actions merely opens the door to liability—and redressability—instead of closing it. Assuming corporations can be sued under the ATS, there will still be many obstacles a plaintiff must overcome in order to prove that a corporation is actually liable for a violation of the law of nations.

The number of claims brought under the ATS will not increase if the Supreme Court recognizes corporate liability.[259] According to *Sosa*, courts cannot invent new causes of action under the ATS.[260] Instead, they must recognize claims under international customary law as that law was perceived by the Founders.[261] Thus, the types of

countries with less than perfect observance of individual and labor rights and shortcomings in the realm of political and environment norms").

[257] *Id.* at 2.

[258] *See infra* Parts V.A–F.

[259] *Cf.* Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally Sue Locally: Trends and Out-of-Control Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 461 (2011).

[260] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004).

[261] *See id.*

claims that a plaintiff could potentially bring are inherently limited to only those recognized by international law.[262] This reality will severely limit the number and scope of suits that plaintiffs can bring under the ATS. Although the number of cases brought against corporate defendants for violations of the law of nations may increase if courts find that corporations can be sued, for all the reasons previously stated, there are many factors that will hinder plaintiffs from bringing these cases and ultimately prevailing.[263] As of 2011, there have been 155 ATS cases filed against corporations, eighty percent of which were filed in the past fifteen years.[264] On average, there are approximately six to ten new ATS claims filed each year against corporations.[265] Given that most circuits now allow corporations to be sued under the ATS, the number of suits will likely not increase substantially, if at all, even if the Supreme Court explicitly recognizes corporate liability. Corporate executives worry that if corporations are held liable under the ATS, plaintiffs will be more inclined to file frivolous lawsuits.[266] In reality, however, ATS cases will still be difficult to bring and to prove.[267] Accordingly, extending liability to corporations in all circuits would not significantly increase the number of claims plaintiffs bring against corporate defendants.[268]

Plaintiffs will also face considerable procedural and logistical bars to bringing and sustaining a claim against a corporate defendant.[269] In fact, federal courts regularly dismiss ATS cases before they actually reach trial.[270] As a result, few ATS claims involving corporate defendants make it past the summary judgment stage and almost none make it to trial, no less to the judgment stage.[271] Holding that corporations can be sued under the ATS does not eliminate the procedural rules already in place for litigation in

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[262] *See id.*

[263] *See supra* Part IV.

[264] Drimmer et al., *supra* note 259, at 461.

[265] *Id.* at 460.

[266] Berger et al., *supra* note 254, at 5.

[267] *See* Drimmer et al., *supra* note 259, at 460.

[268] *See id.*

[269] Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 981 (2004). It is nearly impossible to obtain figures on the exact number of ATS cases filed and those that are dismissed or settled before they reach trial.

[270] Rosaleen T. O'Gara, *Procedure Under the Alien Tort Statute*, 52 ARIZ. L. REV. 797, 798 (2011).

[271] Stanisz, *supra* note 172, at 598–99.

American courts.[272] First, in order to persist beyond summary judgment or motions to dismiss, a court must have personal jurisdiction over the corporate defendant.[273] This requirement, present in all U.S. cases, may limit the number of claims because U.S. courts do not always have personal jurisdiction over a corporate defendant.[274] Second, a plaintiff claiming a violation of the law of nations under the ATS against a corporate defendant will have to do so within the applicable statute of limitations.[275] Courts can borrow the statute of limitations from the TVPA, a similar state statute, or international law.[276] In most cases, courts will apply the statute of limitations from the TVPA to the ATS.[277] Thus, in some cases a plaintiff's claim will be dismissed simply because it was not—or could not have been—brought within the applicable statute of limitations period.

Third, a claim against a corporate defendant may be subject to the requirement that a corporation act in complicity with a state actor.[278] Some courts have not yet addressed whether corporations can be liable absent *any* state action.[279] In many cases, whether corporations can be held liable absent state action depends on the nature of the underlying claim.[280] Fourth, it is important to note that many of the claims against corporate defendants will involve political questions, which are non-justiciable in U.S. courts.[281] Thus, corporate

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[272] *See* 28 U.S.C. § 2072 (2006).

[273] Cleveland, *supra* note 269, 981. It is important to note that the court must have personal jurisdiction over the defendant in accordance with *American* law—not international law: the procedural rules that govern U.S. courts do not disappear simply because a plaintiff asserts a violation of international law.

[274] *See* Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702–03 (1989) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. . . . Thus, the test for personal jurisdiction requires that the maintenance of the suit . . . not offend traditional notions of fair play and substantial justice.") (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)) (internal quotations omitted).

[275] Cleveland, *supra* note 269, at 981. Again, note that the statute of limitations for a violation of *international* law is decided by looking to domestic law, because domestic law provides rules for decision-making. This reality further supports the argument that domestic law should govern the question of whether corporations can be sued under the ATS. *See id.*

[276] BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATIONS IN U.S. COURTS 148 (1996).

[277] *Id.* at 149.

[278] Cleveland, *supra* note 269, at 976.

[279] *Id.*

[280] *See id.*

[281] *Id.* at 981.

defendants will still be able to argue in each particular case that the judiciary is not the proper branch to address the plaintiff's claim.[282] Instead, the defendant can argue that the Executive branch is more properly equipped to handle matters of foreign law and international affairs.[283] Fifth, some scholars have suggested that a heightened pleading standard should apply to ATS cases involving corporations, which would help to filter out frivolous cases.[284] Regardless of whether a heightened standard applies, plaintiffs must still state a claim that is plausible on its face, in accordance with the Supreme Court's directive in *Twombly* and *Iqbal*.[285]

Finally, developing an ATS case is not easy.[286] In some ATS cases, the plaintiffs, their lawyers, and the defendants are in three entirely different locations and as a result gathering information before the plaintiffs file a suit can be prohibitively difficult.[287] Discovery after the complaint is filed is also challenging to obtain because of distance and the different, and often hostile, evidentiary rules in foreign countries.[288] Proving an ATS case at trial oftentimes requires proof by circumstantial evidence and expert testimony.[289] But even after a judgment is entered, plaintiffs may run into difficulty in collecting their damage award.[290] Many judgments in ATS cases have gone uncollected.[291] These procedural complications have the potential to limit—perhaps even severely—a plaintiff's claim under the ATS against a corporate defendant.

These procedural bars are subject to the premise that the

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[282] *See id.*

[283] STEPHENS & RATNER, *supra* note 276, at 144 ("To the extent foreign law may apply, the defendant may argue that the case should be dismissed to avoid becoming entangled in the difficulties of foreign law.").

[284] *See* Geoffrey M. Sweeney, *Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Proposal for Evaluating the Facial Plausibility of a Claim*, 56 LOY. L. REV. 1037, 1066–67 (2010); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007).

[285] *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

[286] *See* STEPHENS & RATNER, *supra* note 276, at 164.

[287] *See id.* ("[B]asic information about the plaintiffs, the defendant and the claim must be evaluated before deciding whether a lawsuit is legally justified and practically feasible.").

[288] *See id.* at 182, 186 ("Defendants have many ways to frustrate discovery.") ("Obtaining evidence from abroad can be a complex and time-consuming process, one that often results in clashes between U.S. and foreign authorities.").

[289] *See id.* at 200, 205.

[290] *See id.* at 218.

[291] *See id.*

plaintiff's action even gets to federal court.[292] First, foreign plaintiffs are not often in an ideal position to bring a claim against a corporate defendant in the United States.[293] The reality is that many of the potential plaintiffs in ATS actions are simply financially and logistically unable to bring a claim.[294] Sustaining an ATS claim against a corporate defendant requires, first and foremost, knowledge of the ATS and the potential recourse available to plaintiffs under the statute.[295] Without such knowledge, plaintiffs would not know to bring a claim in the first place. In addition, plaintiffs must have the financial resources to bring and sustain a claim.[296] While many non-profits may be willing to aid in this regard, it will not be easy for plaintiffs to get this financial support or provide it for themselves.[297] It is also important that, regardless of whether the plaintiffs are able to obtain outside counsel or help from a non-governmental organization (NGO), the costs of putting together a case, discovery, and producing testimony from distant countries will often be prohibitively high.[298]

Second, before a plaintiff can enter a U.S. court, he or she must have exhausted his or her remedies in his or her home state, and an action in that state must not be preferable to an action in the United States.[299] Plaintiffs will likely have difficulty sustaining and pursuing claims against corporate defendants without pooling resources together as a class in a class action.[300] To obtain class certification,

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[292] *See* O'Gara, *supra* note 270, at 798.

[293] *See id.*

[294] *Id.*

[295] *Id.*

[296] *See* STEPHENS & RATNER, *supra* note 276, at 161 (explaining that "[t]he fact that damage awards are usually difficult to collect also makes it hard for private attorneys to bring suits, since the work generally must be handled without fee").

[297] *See id.*

[298] *See* O'Gara, *supra* note 270, at 808–09. While corporations often lament about how much litigation costs them, it is important to keep in mind that plaintiffs must also bear the burden of their legal expenses.

[299] *See* Cleveland, *supra* note 269, at 981, 986 (noting that *forum non conveniens* principles must still apply); *see generally* Piper v. Reyno, 454 U.S. 235 (1981) (discussing the private and public interest factors weighing in a determination of an adequate alternative forum); *see* STEPHENS & RATNER, *supra* note 276, at 146 (stating that "[t]o prove that remedies in the country where the violations occurred need not be exhausted, plaintiffs must submit evidence showing that pursuit of a human rights claim would be futile, given the weakness of the local judiciary and its inability to handle such cases").

[300] The requirements of FED. R. CIV. P. 23 may not be met easily. Class certification requires numerosity, common questions of law or fact, typicality, and adequacy of representation. FED. R. CIV. P. 23. A recent discussion of some of the

plaintiffs would have to prove that there are common questions of law or fact, that the plaintiffs are too numerous for practical joinder, that the class's representative is adequate, and that the representative's claim is typical to the rest of the class members.[301]

Finally, it must be noted that corporations, by virtue of their size and power, possess enormous ability to effect change through political and media tactics.[302] Corporations often have the resources and the far-reaching ability to affect public perception through media outlets such as news, print, and the Internet.[303] Thus, corporations cannot claim that liability under the ATS will destroy their public image when they have the resources to potentially control their own image in the media.[304]

Essentially, that plaintiffs may sue corporate defendants does not mean that procedural and logistical restraints disappear. Thus, plaintiffs will still likely have a difficult time bringing and sustaining a claim against a corporate defendant for a violation of the law of nations.

B. Litigation Expenses

Skeptics believe that corporate liability under the ATS will have detrimental effects on corporations.[305] Scholars have posited that holding corporations liable will produce results that could, in essence, ruin the U.S. economy.[306] These arguments are severely misguided, misconceived, and far more dramatic than reality suggests.

Corporate litigation expenses will not dramatically increase as a result of allowing corporations to be sued under the ATS. There is no doubt that corporate litigation expense is already high.[307] In 2006, profits from Fortune 500 companies totaled approximately $610 billion, of which corporations spent nearly $210 billion on litigation.[308] Some scholars use this high figure as an argument for

elements of FED. R. CIV. P. 23 can be found in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011).

[301] FED. R. CIV. P. 23.

[302] Drimmer et al., *supra* note 259, at, 460–61, 474–79.

[303] *Id.* at 474–79.

[304] *Cf. id.*

[305] *See, e.g.*, HUFBAUER, *supra* note 22, at 1–2.

[306] Thompson, *supra* note 42, at 310–11.

[307] *Id.*

[308] *Id.* at 310–11; *see* Henry, *supra* note 254. Corporations spend an astronomical amount of money on litigation. It is unclear, however, how the global financial crisis

why corporations should not be held liable under the ATS.[309] But the data reflects *all* litigation expenses, even when the corporation itself initiates the suit against an individual or another corporation.[310] In addition, the data includes litigation expenses for valid claims in violation of the law.[311] Thus, while the data suggests that corporations are victims of predatory lawsuits that drain a large proportion of their total profits, the reality is that many of these suits are initiated by the corporations themselves.[312]

Some scholars project that allowing corporations to be sued will result in an additional $200 billion in litigation costs if all claims succeed.[313] Of course, not all claims will succeed. Furthermore, it should be noted that while corporations must pay their corporate counsel to defend against claims, plaintiffs must also bear the burden of their legal expenses when they sue a corporation. There is simply no data to suggest that holding corporations liable under the ATS will significantly increase this already astronomically high number. Finally, one author suggests that allowing corporate liability under the ATS shifts the costs too easily to shareholders of U.S. corporations.[314] Potential liability under the ATS is a factor—just like any other—that an investor should consider before investing in a multi-national corporation. Corporate liability should not be limited simply because its shareholders will have to bear the burden of that liability.

C. Settlement Expenses

There are additional arguments that corporations will suffer great loss at the hands of ATS liability. Commentators argue that allowing corporations to be sued under the ATS will produce such bad press for corporations that many will seek to settle cases immediately.[315] In fact, some corporations have settled ATS cases before the plaintiff files a complaint for fear that once a complaint is filed, the press will be so negative that it would severely impact the

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of 2008 changed the situation.

[309] Drimmer, *supra* note 259, at 460–61.

[310] *See* Henry, *supra* note 254.

[311] *Cf. id.*

[312] *Cf. id.*

[313] Drimmer *supra* note 254, at 460–61; *see generally* Gary Hufbauer & Nicholas Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT'L ECON. L. 246 (2004).

[314] Thompson, *supra* note 42, at 312.

[315] *Id.* at 312.

corporation.[316] According to these commentators, corporations may settle cases—even unmeritorious cases—because, regardless of merit, it would cost more to try the case.[317] Thus, corporations may pay huge sums of money to plaintiffs who do not even have legitimate cases, simply because those corporations are worried about the financial and public relations consequences of going to trial.[318] These assumptions are also unfounded. Despite the fact that most circuits recognize corporate liability, only six ATS cases are filed each year.[319] Because it is not likely that federal courts will be inundated with corporate ATS cases, for the reasons discussed above, it is unlikely that corporations will see a spike in settlement costs.

D. Investment Concerns

Similarly, opponents of corporate liability under the ATS argue that corporate liability will severely hinder foreign investment and will deter corporations from doing business in foreign countries.[320] In 2003, Hufbauer and Mitrokostas hypothesized that ATS litigation would prompt a "conservative" estimate of mass disinvestment in developing countries to the tune of $55 billion.[321] Hufbauer and Mitrokostas projected that this loss in foreign direct investment would cause a loss of 380,000 jobs and would "depress overall U.S. trade with target countries by 10 percent from current levels."[322] Nine years have passed and this doomsday prophecy has not come to fruition, despite the fact that most circuit courts today allow corporations to be sued. To the contrary, corporate liability will simply force companies to be more aware and attuned to human-rights abuses abroad and to steer clear of those abuses. There is simply no evidence to suggest that corporations will limit investment in foreign countries simply because they may be sued under the ATS.[323] Corporations take risks in order to make a profit. They will

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[316] Telephone Interview with Sander Bak, Partner, Milbank, Tweed, Hadley & McCoy, LLP (Oct. 26, 2011) (on file with author). It is important to note that there is little reliable information on how much is spent by corporations in settling ATS suits, partially because corporations settle these cases for the precise purpose of keeping the facts out of public view and partially because the settlements that are public do not yield much helpful information. *Id.*

[317] *Id.*

[318] *See* Drimmer, *supra* note 259, at 465.

[319] *Id.* at 461.

[320] Thompson, *supra* note 42, at 312.

[321] HUFBAUER, *supra* note 22, at 40.

[322] *Id.* at 42.

[323] Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability*

realize that the economic advantages of investing and operating in a foreign country outweigh the risk of being sued under the ATS.[324] Corporations engaged in activities in foreign nations will likely find that doing business in that particular country is still financially beneficial to the corporation because the benefits from doing business there outweigh the risks of being sued.[325]

Mere investment in an "authoritarian regime has never been sufficient ground for liability under the ATS" and thus will not deter companies from investing.[326] If corporations are not violating customary international law, they should not have to expend large sums of money in an effort to comply with such laws and norms. At the same time, allowing corporations to be sued will, to the extent that violations exist, create an incentive for corporations to implement internal compliance structures within the corporation to prevent and limit liability.[327] By doing so, corporations will not only bolster compliance with human rights abroad, but will also ensure that the corporation is a more sound and returnable investment for investors back home. Similarly, corporate constructive engagement—the idea that democracy and human rights are best transferred through the interaction between individuals and corporations from the U.S. and foreign countries—will sweeten the climate for investment.[328] Corporate adherence to international norms will create a more responsible and safe investment environment, while also increasing public relations internationally. Some scholars argue that investment is better promoted by corporations operating in these foreign countries and that in the long run, this openness will promote human rights.[329] This is a weak argument for why corporations cannot be held liable under the ATS. The point is not to discourage investment, but rather to encourage

Under the Alien Tort Statute Advances Constructive Engagement, 21 HARV. HUM. RTS. J. 207, 235 (2008) ("[N]either the Administration nor the business community has . . . presented any empirical . . . evidence suggesting that corporations will decline significant investment opportunities based on the possibility that they will be held liable if they aid and abet human rights abuses in implementing their projects.").

[324] *Id.*, at 235; *see supra* Part IV for a discussion of the barriers to bringing an ATS suit that make it difficult for a plaintiff to collect.

[325] *See supra* Part IV.

[326] Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1139–40 (2001).

[327] Cleveland, *supra* note 269, at 980.

[328] *See* Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 274 (2009).

[329] *Id.*

investment through promotion of human rights and compliance with international law.

E. Human Rights Implications

Holding corporations liable under the ATS will encourage the spread of democracy and human rights, help develop the law, provide an opportunity for social change, and encourage corporate compliance to the extent that common goals can be promoted. Affording disenfranchised individuals in foreign countries the ability to come into contact with the American judicial system provides the individual with an experience in which he or she is invited to become a *participant* in the law.[330] If we wish to export democracy as a foreign policy objective, the ATS is a perfect vehicle for doing so.

Corporate liability under the ATS will help to develop international and domestic law.[331] Thus, corporate liability will allow courts the opportunity to further develop the law in this area by examining the difficult issues corporate liability presents.[332] ATS suits have already helped to "identify which fundamental international rights norms require state action and which do not," and have "inspired the development abroad of mechanisms for human-rights enforcement."[333] It is time to move on and accept that corporate liability under the ATS exists and has in fact existed for years. It is time to deal with the implications of corporate liability.

Furthermore, allowing corporations to be sued under the ATS will enable the development of international law to the extent that individual plaintiffs are permitted to argue what they *perceive* that law to be.[334] Currently, international law is the product of states and intergovernmental organizations. Corporate liability under the ATS would give individuals a chance to engage in the development of international law by bringing lawsuits alleging violations of that law. After all, it is often these individuals who are affected by international norms of human rights, despite the fact that they oftentimes do not have a say in what those norms are.[335] Allowing corporations to be sued under the ATS will likely increase global familiarity with human-

[330] *Cf.* O'Gara, *supra* note 270, at 818.

[331] *See* Cleveland, *supra* note 269, at 975; Christiana Ochoa, *Identifying and Defining CIL Post* Sosa v. Alvarez-Machain, 74 U. CIN. L. REV. 105, 116 (2005).

[332] Cleveland, *supra* note 269, at 975.

[333] *Id.* at 976, 977.

[334] Ochoa, *supra* note 331, at 116.

[335] *Id.* at 116. Presently, a norm is only part of international law when *nations* are "persuaded by it." *See* Ramsey, *supra* note 328, at 275.

rights violations and may have the effect of producing wider social change and adherence to international and human-rights norms, because corporations extend across national and cultural boundaries.[336] In addition, corporate liability under the ATS will encourage corporations to develop—if they have not already—and enforce international law compliance rules and structures.[337] By using potential liability under the ATS as an incentive to implement international law compliance regimes, corporations will, in essence, become self-executing international law entities. The force of the ATS will ensure compliance.[338] Corporate liability under the ATS would, and indeed already does, have a direct impact on corporate behavior in many developing nations and defines the extent to which companies will engage with foreign governments and to what lengths those corporations will go to make a profit.[339] These human-rights implications provide a huge incentive for holding corporations accountable for their actions by allowing them to be sued under the ATS.

F. Foreign Affairs Implications

Corporate liability under the ATS will not severely damage U.S. foreign relations; to the contrary, it has the potential to facilitate better international relations between the United States and other countries. The United States often fails to comply with international legal norms.[340] Corporate liability under the ATS will demonstrate to the rest of the world that the United States is serious about promoting human rights, promoting the development of civil society abroad, and increasing constructive engagement.[341]

Corporate liability under the ATS will further the U.S. foreign policy goal of promoting human rights abroad.[342] One of the original purposes of the ATS was to increase the United States's prestige among nations.[343] Permitting corporations to be sued under the ATS

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[336] *See generally* Holzmeyer, *supra* note 152.

[337] Cleveland, *supra* note 269, at 980.

[338] Barsa & Dana, *supra* note 197, at 94; Herz, *supra* note 323, at 210.

[339] Barsa & Dana, *supra* note 197, at 87.

[340] *Cf.* Shirley V. Scott, *The Impact on International Law of US Noncompliance, in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 427–28 (Michael Byers ed., 2003).

[341] *Cf. id.*

[342] Cleveland, *supra* note 269, at 985.

[343] *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 782 (Edwards, J., concurring); D'Amore, *supra* note 26, at 597.

would further this original purpose. Specifically, allowing corporations to be sued pursuant to international law demonstrates to foreign nations that the United States is serious about human rights and regards highly international law, so much so that it will permit international law to govern actions against U.S. corporations. In addition, corporate liability under the ATS brings established international human-rights law norms into U.S. jurisprudence and encourages the development of law in accordance with international human-rights standards.

Furthermore, corporate liability will promote civil society abroad by encouraging constructive engagement.[344] One of the United States's foreign policy objectives is to encourage and promote democracy and civil society abroad. Proponents of the constructive engagement model argue that by virtue of operating in foreign and developing countries and interacting with locals, American corporations will convey to those countries and individuals democratic principles and the rule of law.[345] When corporations violate human rights, the engagement is inevitably unconstructive.[346] Thus, holding corporations liable under the ATS ensures that when individuals and nations come into contact with U.S. corporations abroad, those corporations actually promote and emulate democracy and human rights.[347] Holding corporations liable under the ATS would require corporate officials to explain to foreign governments why they cannot engage in certain illegal activities, thereby promoting constructive engagement and promoting the formation of democratic principles abroad.[348] Accordingly, holding corporations liable under the ATS is, in reality, a means through which the United States can promote the original purpose of the ATS and its foreign policy initiatives.

VI. CONCLUSION

Corporations should be held liable under the ATS for violations

[344] *See* Ochoa, *supra* note 329, at 116; Herz, *supra* note 323, at 209–10.

[345] Herz, *supra* note 323, at 209.

[346] *Cf. id.* at 237.

[347] *Id.* at 223.

[348] *Id.* at 228 (stating that liability "will compel companies to explain to government and military officials at all levels the reasons it cannot tolerate abuses," namely "that international law and the U.S. legal system forbid complicity in human rights violations; that if abuses occur, victims—even the most marginalized peasants—are entitled to present evidence in a U.S. court against even the most powerful multinational corporations ").

of the law of nations in accordance with the D.C. Circuit's holding in *Doe VIII*. The Supreme Court should adopt its holding because it is not only within the original meaning of the ATS, but it is also the correct rule under both international and domestic law. In determining this question, the Supreme Court should look to domestic, not international law. Contrary to what many have feared, permitting suits against corporations will not have severe and detrimental implications for corporations. Instead, holding that corporations can be sued under the ATS will have a profoundly positive impact on human rights and foreign policy without severely deterring corporate productivity and investment.