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Striking a Balance to Reform the Alien Tort Statute: A Recommendation for Congress

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STRIKING A BALANCE TO REFORM THE ALIEN TORT STATUTE: A RECOMMENDATION FOR CONGRESS

Anthony Blackburn*

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INTRODUCTION

Globalization offers seemingly endless supply of new opportunities and the world seems to have shrunk, while concurrently, experiencing a swell of global litigation. In the United States there has been an up rise against corporate wealth.[1] Outsourcing has increased corporate wealth, while also creating human rights concerns. In these times of increased global transactions, many legal questions arise. One question, among many: which jurisdiction is appropriate to adjudicate cases against multinational and transnational corporations?

The Supreme Court granted *certiorari* to hear *Kiobel v. Royal Dutch Petroleum* and address, *inter alia*, the issue of corporate liability in suits by aliens alleging an international

1. Times Topic: Occupy Wall Street, N.Y. TIMES (Dec. 21, 2011, 12:53 PM) http://topics.nytimes.com/top/reference/timestopics/organizations/o/occupy_wall_street/index.html?scp=1-spot&sq=occupy%20wall%20street&st=cse.

tort, under the Alien Tort Statute.[2] However, in deciding this case the Supreme Court did not directly answer the question, and instead, held that "the presumption against extraterritoriality applies to claims under the [Alien Tort Statute], and that nothing in the statute rebuts that presumption."[3] This presumption and corporate liability are not mutually exclusive. Thus, it seems, in regards to corporate liability (an unanswered question), a conflict pairing between fairness and efficiency remains. And while a corporation may not be recognized as a "judicial person" under international customary law (and thus, not liable under the Alien Tort Statute), the United States may want to lead the field in this area.

Some scholars argue that in light of the global recession, U.S.-based corporations cannot afford to squander needed financial resources on litigation.[4] Additionally, the failure to exercise judicial restraint under the Alien Tort Statute poses significant problems for U.S. corporations.[5] One study found that Fortune 500 companies spend, on average, one-third of their profits on litigation expenses.[6] Almost all 500 of those companies maintain a presence in the United States.[7] However, the *Kiobel* decision, it seems, allows greater judicial deference in Alien Tort Statute cases, requiring more than "mere corporate presence" to support jurisdiction.[8]

The Alien Tort Statute has been the source of numerous articles, commentary, and litigation; however, this Comment seeks instead to replace the statute. This Comment, unconventionally takes a macro, survey approach, using cases

2. Kiobel v. Royal Dutch Petroleum, THE OYEZ PROJECT AT IIT CHI.-KENT COLL. OF L., http://www.oyez.org/cases/2010-2019/2011/2011_10_1491 (last visited Nov. 18, 2011).

3. Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 1669 (2013).

4. 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. & COM. L.J. 293, 308 (2011).

5. *Id.*

6. *See id.* at 311; John B. Henry, *Fortune 500: The Total Cost Of Litigation Estimated at 1/3 Profits*, THE METRO. CORP. COUNSEL (Feb. 1, 2008, 1:00 PM), http://www.metrocorpcounsel.com/articles/9493/fortune-500-total-cost-litigation-estimated-one-third-profits.

7. Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227, 228 (2011).

8. Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 1669 (2013).

to illustrate current and past problems relating to the Alien Tort Statute, and possibly endeavors to do too much in its recommendation, but the Author hopes, at the very least, that this Comment will increase the amount of discourse regarding a congressional reform.

I. THE ALIEN TORT STATUTE: 28 U.S.C. § 1350

The Alien Tort Statute, 28 U.S.C. § 1350, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[9]

The Alien Tort Statute (ATS) confers federal subject matter jurisdiction when three independent conditions are satisfied: (1) an alien sues, (2) for a tort, (3) that violates the law of nations or a treaty ratified by the United States.[10] In enacting this legislation, the goal was to remedy a narrow set of actions that violated the law of nations, but plaintiffs have recently used the ATS to hold private and government actors responsible for the torture and murder of their citizens, and to impose liability on American, foreign, and multinational corporations for human rights violations committed by their employees.[11] Unfortunately, the thirty-three-word statute has failed to provide clarity on the scope of the law, and the Courts have failed to provide consistent direction for parties to follow.[12] The following case, *Sosa v. Alverez-Machai*, illustrates how the Supreme Court has approached an ATS claim.

A. Sosa v. Alvarez-Machain

Mexican drug traffickers captured, brutally tortured, and murdered Enrique Camarena-Salazar, an agent of the U.S.

9. 28 U.S.C. § 1350 (2011).

10. *Id.*; *see* Filartiga v. Pena-Irala, 630 F.2d 876, 887–88 (2d Cir. 1980); Viet Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 115–16 (2d Cir. 2008).

11. *See* Peter Henner, *Human Rights and the Alien Tort Statute: Law, History and Analysis* 33 (ABA 2009); Gerard Morales & Kate Hackett, *Human Rights Litigation Under the Alien Tort Statute Beware of Business Arrangements with Foreign Actors That Have Poor Human Rights Records*, 21 PRAC. LITIG., 39 (2010).

12. 14A ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3661.1 (4th ed. 2013).

Drug Enforcement Agency (DEA).[13] The United States indicted Alvarez, a doctor, for allegedly treating Camarena to prevent his death to prolong the torture and interrogation.[14] The DEA hired a group of Mexicans to kidnap Alvarez, as there was no official way to ensure his transfer to the United States.[15] After abducting Alvarez and holding him over night, the hired kidnappers flew him to the United States.[16]

The district court granted Alvarez's motion for judgment of acquittal ending the criminal prosecution.[17] With the conclusion of the prosecution, Alvarez filed a civil suit against Jose Francisco Sosa, one of the kidnappers who detained him.[18] He also named several DEA agents and the United States government in the lawsuit.[19] Relying on the ATS, the district court ruled in favor of Alvarez and ordered Sosa to pay $25,000 for arbitrary arrest and detention. The District court also dismissed the false arrest claim against the U.S. government.[20] On appeal, a three-judge panel of the Ninth Circuit affirmed the ATS judgment against Sosa but reinstated the claim against the U.S. government.[21]

Subsequently, the Supreme Court held that a detention of a foreign national, who was transferred to the custody of law enforcement officials in less than one day, did not clearly violate any norms of customary international law; therefore, the plaintiff failed to establish a cause of action under the ATS.[22]

13. The facts and procedural history are detailed in the first of the two Alvarez-Machain Supreme Court decisions, United States v. Alvarez-Machain, 504 U.S. 655, 657–59 (1992), and summarized in the recent opinion, Sosa v. Alvarez-Machain, 542 U.S. 692, 697–98 (2004).

14. Beth Stephens, *Sosa v. Alvarez-Machain "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 539 (2005).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Alvarez-Machain v. United States, 266 F.3d 1045, 1064 (9th Cir. 2001), *reh'g en banc granted*, 284 F.3d 1039, 1040 (9th Cir. 2002).

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

1. Ambiguity in the Interpretation of the Alien Tort Statute

Prior to *Sosa*, some commentators read the ATS as a jurisdictional grant and nothing more.[23] Under this reading, a federal claim under the ATS must identify the source of a private right to sue to make out a cause of action.[24] *Filartiga*[25] held that the ATS merely provides federal jurisdiction over international law claims.[26] The court reasoned that the ATS does not grant new rights to aliens, but simply allows adjudication of the rights already recognized by international law.[27] This approach assumes international law can independently support a cause of action in federal court.[28] An alternative approach located a new cause of action within the statute itself.[29] The *Sosa* court addressed this matter.

The Supreme Court focused closely on the words of the statute as well as the intent behind the law.[30] The Court ultimately held that the ATS does not create a statutory cause of action and merely grants subject matter jurisdiction.[31] Further, the Court instructed district courts to exercise caution when deciding to hear claims allegedly based on the present day law of nations under the ATS.[32] The Court required that any claim based on present day law of nations must also rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the eighteenth-century paradigms.[33]

Moreover, under the *Sosa* holding, District Courts must determine issues of international law.[34] This will, inevitably, require District Courts to use their own judgment regarding whether it is good policy to make a cause of action available

23. Stephens, *supra* note 14, at 542.
24. *Id.*
25. Filartiga v. PeZa-Irala, 630 F.2d 876 (2d Cir. 1980).
26. Stephens, *supra* note 14, at 542.
27. *Id.*
28. *Id.*
29. *Id.* at 543.
30. *Id.*
31. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).
32. *Id.* at 725.
33. *Id.*
34. *Id.* at 724.

to federal litigants.[35]

When deciding whether a court should have jurisdiction under the international norm clause of the ATS, in absence of any treaty, or of any controlling executive or legislative act or judicial decision, a court must resort to the customs and usages of civilized nations.[36] As evidence thereof, the court must survey works of jurists and commentators for actual substantive law. The court, therefore, must consider whether the claims "identify a specific, universal and obligatory norm of international law."[37] Further, in order to trigger ATS jurisdiction, "civilized nations" must generally accept a clearly and unambiguously defined international norm.[38]

The Court agreed that modern application of the ATS requires caution for several reasons.[39] First, the eighteenth century understanding of both federal common law and the role of federal courts had changed.[40] Second, federal courts avoid recognizing new causes of action where Congress has not provided clear guidance.[41] Third, the Constitution delegates foreign affairs to the political branches and these cases often stray into this realm.[42] Finally, Congress does not broadly support the idea that private rights of action provide the appropriate enforcement mechanism for international law norms.[43]

The Supreme Court recognized that post-*Erie* federal common law includes international law, and remains within the area of federal control.[44] *Erie* did not strip federal courts of the power to recognize common law claims based in international law.[45] Consistent with this analysis, lower courts addressing the choice-of-law question have generally

35. *Id.* at 732–33.
36. *Id.* at 734.
37. *See* MILLER, *supra* note 12, at § 3661.1.
38. Stephens, *supra* note 14, at 551.
39. *Id.* at 550.
40. *Id.* at 546–47.
41. *Id.* at 547.
42. *Id.*
43. *Id.*
44. *Id.* at 548 n.77 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) ("Erie did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-Erie understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.")).
45. *Id.* at 548.

held that ATS claims involve federal common law.[46]

2. Corporate Liability Post-Sosa

Several business groups filed amicus briefs claiming that creating United States jurisdiction for corporate liability would hurt U.S. business around the world.[47] While the dispute raised legal issues not present in *Sosa*, they are central to post-*Sosa* litigation.[48] First, do we apply a particular international norm to private legal entities such as corporations?[49] Second, what is the proper standard for vicarious liability, as many corporate cases involve allegations that corporations aided and abetted human rights violations committed by others?[50]

In *Sosa*, the Court indicated that international law determines which actors are bound by particular international law norms.[51] The Court also recognized that some international norms apply to private actors—possibly corporations as well as individuals.[52] After the Nuremberg Tribunal ruled that legal persons are equally subject to norms that apply to individuals, international tribunals began to apply human rights and humanitarian norms to corporations.[53] Organizations with the purpose to commit or facilitate crimes detailed in the Charter have faced criminal liability.[54] That being said, recent cases have answered in the negative, insulating corporations from liability.[55] Ultimately, the Circuits have taken varying approaches to the questions

46. *Id.* at 556.

47. *Id.* at 555. The arguments generally advanced by U.S. businesses are discussed below. *See generally infra* section V.A.

48. Stephens, *supra* note 14, at 555–56.

49. *Id.* at 556.

50. *Id.*

51. *Id.*

52. *Id.* (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)). *Cf.* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), *with* Kadic v. Karadzic, 70 F.3d 232, 239–41 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

53. Stephens, *supra* note 14, at 557.

54. Judicial Decisions, *International Military Tribunal (Nuremberg), Judgment and Sentences*, Oct. 1, 1946, 41 AM. J. INT'L L. 172 (1947).

55. *See generally* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 118, 120 (2d Cir. 2010) *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011).

of corporate liability, but many jurisdictions relied upon *In re Agent Orange* to answer this question.[56]

B. In Re Agent Orange

During the Vietnam War, the United States and South Vietnamese militaries used various chemical herbicides, referred to collectively as "Agent Orange," to strip jungle foliage in order to prevent ambushes by enemy troops.[57] The United States eventually suspended this tactic after studies suggested that by-products created in the manufacture of Agent Orange, like dioxin, caused serious health problems.[58]

In January 2004, a putative class of Vietnamese nationals sought recovery in federal court for personal injuries and damage to the Vietnamese environment allegedly caused from Agent Orange.[59] Plaintiffs alleged that the Agent Orange manufacturers violated the ATS by conspiring with, as well as aiding and abetting, the U.S. government in waging chemical warfare in contravention of international legal norms.[60] The courts rejected these claims.[61] While holding that there was no violation of international law, Judge Weinstein took a broad approach to justiciability, recognized corporate liability under international law and the ATS, and rejected any defense for contractors based on the argument that they were following government orders.[62]

Defendants used several theories to defeat the claim. First, the case encroached upon the president's power to wage war and conduct foreign relations, and was thus nonjusticiable.[63] Second, international norms did not prohibit the use of Agent Orange during the Vietnam War, or alternatively, if the norm did prohibit the use of Agent

56. *See generally* Anthea Roberts, *The Agent Orange Case Vietnam Ass'n for Victims of Agent Orange/dioxin v. Dow Chemical Co.*, 99 AM. SOC'Y INT'L L. PROC. 380 (2005).

57. *Id.* at 380.

58. *Id.*

59. *In re* Agent Orange, 373 F. Supp. 2d 7, 15 (E.D.N.Y. 2005), *aff'd*, Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 555 U.S. 1218 (2009).

60. *Viet. Ass'n for Victims of Agent Orange*, 517 F.3d at 108.

61. *Id.*

62. Roberts, *supra* note 56, at 385.

63. *Id.*

Orange, the norm did not meet the required definiteness and universality necessary for an ATS claim.[64] Third, international law did not recognize corporate liability.[65] Fourth, the government contractor defense[66] or the defense of superior orders[67] protected the defendants from liability.[68] Finally, the ten-year statute of limitations generally applied in ATS cases barred the claims.[69]

All parties accepted that the court could not apply international law retroactively.[70] Thus, as described in *Sosa*, the court assessed the legality of Agent Orange against the treaties and customary international law in force during the Vietnam War.[71] The issues addressed below illustrate the approach taken by the Second Circuit; unfortunately, the United States Supreme Court denied a petition for *writ of certiorari* and circuits have approached these issues with different legal tools.[72]

1. The Justiciability of the Alien Tort Statute Claim Exemplified by the Agent Orange Case

The court held that the use of executive power, even in wartime, did not extinguish justiciability.[73] According to Judge Weinstein, the defendants' argument that plaintiffs' claims addressed military and diplomatic matters constitutionally committed to the political branches did not render claims nonjusticiable.[74] Judge Weinstein stated that merely because a "case may call for an assessment of the President's actions during wartime is no reason for a court to

64. *Id.*

65. *Id.*

66. *See infra* section I.B.4.

67. Often known as the Nuremberg Defense, this defense is a plea in the court of law that the solider should not be held liable because she was following the orders of a superior officer. *See generally* L.C. Green, Superior Orders in National and International Law, (A.W. Sijthoff International Publishing Co., Netherlands, 1976).

68. Roberts, *supra* note 56, at 385.

69. *Id.*

70. *Id. at* 383.

71. *Id.*

72. Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 55 U.S. 1218 (2009).

73. *In re* Agent Orange, 373 F. Supp. 2d 7, 64 (E.D.N.Y. 2005), *aff'd sub nom*. Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008).

74. Roberts, *supra* note 56, at 382.

abstain."[75] The court, however, directed federal courts to be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs," thus suggesting a deferential case-by-case analysis.[76]

2. Application of International Law and the Use of Agent Orange

Whether an alleged norm of international law can form the basis of an ATS claim depends on whether it is defined with the specificity of familiar paradigms and whether the foundational international norm is accepted by civilized nations.[77] In *Flores v. Southern Peru Copper Corp.*,[78] the plaintiffs sought recovery for respiratory illnesses allegedly linked to the defendant's mining, refining, and smelting operations in Peru[79]. They asserted a cause of action based on deprivation of the rights to life, health, and sustainable development in violation of customary international law.[80]

In analyzing whether the plaintiffs' claims were actionable under the ATS, the Second Circuit considered whether a claim could be based on a "customary international law rule against *intra* national pollution."[81] After analyzing a wide variety of sources and evidence of purported international law, the court concluded that an ATS claim was not actionable.[82]

Under similar analysis, Judge Weinstein completely rejected plaintiffs' claim that use of Agent Orange violated international law and was actionable under the ATS.[83] He held that the prohibition on the use of poison and poisoned weapons contained in the 1907 Hague Regulations did not apply because "poison" and herbicides, aimed at plants, had

75. *Id.*
76. *Id.* at 381–82.
77. *Viet. Ass'n for Victims of Agent Orange*, 517 F.3d at 117.
78. 343 F.3d 140 (2d Cir. 2003).
79. *Id.* at 143.
80. *Id.*
81. *Id.* at 161.
82. *Id.* at 162–65 (examining sources that included (i) treaties, conventions, and covenants; (ii) non-binding declarations of the United Nations General Assembly; (iii) other non-binding multinational declarations of principle; (iv) decisions of multinational tribunals; and (v) affidavits of international law scholars).
83. Roberts, *supra* note 56, at 383.

different and ambiguous conceptual definitions.[84]

3. Corporate Liability Under the Alien Tort Statute

Although U.S. law recognizes the idea that corporations might be civilly or criminally liable, scholars and jurists contest the existence of corporate liability under international law and the ATS.[85] Many argue that international law does not generally recognize corporate liability.[86] Judge Weinstein noted that during discussions for the newly created International Criminal Court, negotiating states rejected the possibility of extending liability to corporations.[87] Despite this, Judge Weinstein relied on fairness and logic, concluding that the courts should extend the same liability applicable to individuals under ATS to corporations.[88] The court stated that:

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

84. *Id.* "The law of nations has become synonymous with the term customary international law, which describes the body of rules that nations in the international community 'universally abide by, or accede to, out of a sense of legal obligation and mutual concern.'" Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116 (2d Cir. 2008) (quoting Flores v. S. Peru Copper Corp., 414 F. 3d 233, 248 (2d Cir. 2003)). "In ascertaining whether a rule constitutes a norm of customary international law, courts have traditionally consulted 'the works of jurists, writing professedly on public law; the general usage and practice of nations; or judicial decisions recognizing and enforcing that law.'" *Id.* "Sources of international law generally include: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law." *Id.*

85. Roberts, *supra* note 56, at 383.

86. *Id.* at 384.

87. *Id.*

88. Mara Theophila, *"Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After Kiobel v. Royal Dutch Petroleum Co.*, 79 FORDHAM L. REV. 2859, 2886 (2011).

corporation can be brought to justice.[89]

The court extended liability under international law and ATS to corporations, noting "limitations on criminal liability of corporations do not necessarily apply to civil liability of corporations."[90]

4. Governmental Liability and Government Contractor Defense Discussed in the Agent Orange Case

The Eleventh Amendment offers sovereign immunity to the U.S. government.[91] After a survey of international law, Judge Weinstein held the government contractor defense, peculiar to U.S. law, was not a defense for violations of human rights and international law.[92] The court held that authorization by the head of government does not provide immunity for a private defendant to harm individuals in violation of international law.[93]

5. The Choice of Law Problem Inherent in Applying a Statute of Limitations in the Agent Orange Case

The ATS does not have an explicit statute of limitations.[94] This creates yet another choice of law problem.[95] The majority of courts hold that if a federal substantive rights statute enacted before passage of the general federal statute of limitations for civil actions does not specify a statute of limitations, a court applies the statute of limitations from the forum state, unless there is a federal law

89. *In re* Agent Orange, 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005).

90. Roberts, *supra* note 56, at 384 (discussing the International Criminal Court's decision not to include judicial persons in the definition of similar violations). "A corporation is not immune from civil legal action based on international law." *In re* Agent Orange, 373 F. Supp. 2d at 58, *aff'd sub nom.* Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008).

91. *See generally* Hans v. Louisiana, 134 U.S. 1 (1890).

92. Roberts *supra* note 56, at 385. "A primary driver behind the Court's refusal to recognize the government contractor defense in this context appears to be the Zyklon B case from the Nuremburg war crimes tribunal, in which two businessmen were found guilty and sentenced to death for supplying Zyklon B to Nazi concentration camps with knowledge that it was being used to kill human beings." *Id.* at 384 (citing Zyklon B Case (Trial of Bruco Tesch and Two Others), U.N. War Crimes Commission, Law Reports of Trials of War Criminals (Vol. 1), at 93 (1947)).

at 382.

94. 28 U.S.C.A. § 1350 (West 2010).

95. *In re* Agent Orange, 373 F. Supp. 2d at 61.

which clearly more applicable than available state statutes, and when the federal policies at stake and the practicalities of litigation require adherence to the federal law over state statutes.[96] Here, most courts would have borrowed the statute of limitations from the substantially similar Tortured Victims Protections Act, discussed below.[97]

Moreover, federal common law provides that when no specific statutory limitation is applicable, federal courts may create applicable statutes of limitations, tolling provisions, and bases for application of laches.[98] Instead, Judge Weinstein came to the provisional conclusion, subject to reconsideration, that the court could apply no statute of limitations to war crimes and other violations of international law.[99] Thus, the question remains as to whether federal court hearing an ATS claim should apply federal common law, state law, the Torture Victim Protection Act, or Judge Weinstein's analysis, and whether the federal common law provision of equitable tolling applies.

C. Kiobel v. Royal Dutch Petroleum Co.

The ATS offers an opportunity for foreign plaintiffs to seek legal ruling in the U.S. for alleged human rights abuses.[100] Increasingly, these claims allege that corporations are complicit in the violation of international law overseas.[101] Before 2010, U.S. courts used ATS claims to hold corporations liable.[102] Yet, in *Kiobel v. Royal Dutch Petroleum Co.*,[103] the U.S. Court of Appeals for the Second Circuit held that foreign plaintiff may not rely on the ATS for redress against corporations.[104]

On October 17, 2011, the Supreme Court granted certiorari to hear *Kiobel v. Royal Dutch Petroleum*.[105] In this

96. 28 U.S.C.A. § 1658; North Star Steel Co. v. Thomas, 515 U.S. 29, 35 (1995); *In re* Agent Orange, 373 F. Supp. 2d at 60.

97. *See generally* 199 JAMES L BUCKWALTER, A.L.R. FED. 389 (originally published in 2005).

98. *In re* Agent Orange, 373 F. Supp. 2d at 61.

99. *Id.*

100. Theophila, *supra* note 88, at 2859.

101. *Id.*

102. *Id.*

103. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 118, 126 (2d Cir. 2010).

104. *Id.*

105. *Kiobel v. Royal Dutch Petroleum*, THE OYEZ PROJECT AT IIT CHI.-KENT

case, Esther Kiobel and the other petitioners, nationals of Nigeria, alleged that either they or their relatives suffered human rights abuses including torture, unlawful detention, property theft, exile, and murder inflicted by the Nigerian government.[106] The petitioners maintain that the respondent, Shell Petroleum Development Company of Nigeria, Ltd., was complicit in the government's violation of its citizen's human rights.[107]

In *Kiobel*, the Court considered the capacity of federal courts to entertain suits under the Alien Tort Statute.[108] In February 2012, and again in October 2012, the United States Supreme Court heard argument in *Kiobel*.[109] *Kiobel* raised the issues of whether: (1) corporate civil tort liability under the Alien Tort Statute is an issue of subject matter jurisdiction; (2) whether under the Alien Tort Statute, corporations are immune from tort liability for violations of the law of nations, such as torture, extrajudicial executions, or genocide; and (3) whether the Alien Tort Statute allow courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.[110] In short the Court held that the presumption against the extraterritorial application of U.S. law applies to claims under the Alien Tort Statute, and nothing in the text, history, or purposes of the statute rebuts that presumption.[111] The Court, in Roberts Opinion, stated that the presumption might possibly be overcome "where the claims touch and concern the territory of the United States."[112] But, that the domestic impact would have to be of "sufficient force" to displace the presumption.[113]

However, many commentators have noted that with this holding the Supreme Court left many questions

COLL. OF L., http://www.oyez.org/cases/2010-2019/2011/2011_10_1491 (last visited Nov. 18, 2011).

106. *Id*.

107. *Id*.

108. *Id*.

109. *Id*.

110. *Id*.

111. *Kiobel v. Royal Dutch Petroleum*, SCOTUS BLOG, http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/.

112. Lyle Denniston, *Opinion Recap: Backing Off Of Human Rights Cases*, SCOTUS BLOG (Apr. 17, 2013, 3:11 PM), http://www.scotusblog.com/2013/04/opinion-recap-backing-off-of-human-rights-cases/.

113. *Id.*

unanswered.[114]

1. The Lingering Matter of Corporate Liability

The Supreme Court did not decide the issue of corporate liability.[115] Nevertheless, a general discussion follows: International law, not domestic law, governs the scope of liability for violations of customary international law under the ATS.[116] The law does not leave the responsibility of defining those who are subjects of international law to individual states; rather, international law defines the concept of the international person.[117] The courts must rely on international law to determine whether it has jurisdiction over an ATS claim against a particular class of defendants, like corporations.[118] Corporate liability is not a rule of customary international law applicable under the ATS because there is no obligatory norm recognizing corporate liability. In order to impose liability for violations of customary international law on corporations, there must be evidence that the nations of the world recognize such liability in a discernible way.[119] Until such a norm emerges, the ATS does not imbibe federal courts with subject matter jurisdiction over claims against corporations.[120]

The Court's opinion leaves open many questions. The court did not address the issue for which it granted certiorari: whether corporate liability is permitted under the ATS.[121] Nor did it address whether aiding-and-abetting liability is permitted. Also, left unanswered is whether applying the ATS extraterritorially would itself violate international

114. *See generally Kiobel v. Royal Dutch Petroleum*, SCOTUS BLOG, http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/; Katie Redford, *Commentary: Door Still Open For Human Rights Claims After Kiobel*, SCOTUS BLOG (Apr. 17, 2013, 6:48 PM), http://www.scotusblog.com/2013/04/commentary-door-still-open-for-human-rights-claims-after-kiobel/.

115. *See generally* Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013).

116. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 118, 126 (2d Cir. 2010).

117. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt II, introductory note (1987); *Kiobel*, 621 F.3d at 126.

118. *Kiobel*, 621 F.3d at 127.

119. *Id.* at 145.

120. *Id.* at 149.

121. Kristin Linsley Myles, *Kiobel Commentary: Answers … And More Questions*, SCOTUS BLOG (Apr. 18, 2013, 2:07 PM), http://www.scotusblog.com/2013/04/commentary-kiobel-answers-and-more-questions/.

law.[122] Federal courts, however, have a new tool in which to dispose of ATS cases, as well as common legal tools that were previously used.[123]

II. COMMON RESPONSES TO ALIEN TORT STATUTE CLAIMS

Defendants in ATS cases often argue that imposition of liability under the ATS interferes with the foreign policy powers held by the political branches of the government.[124] In asserting this defense, corporations often rely on the act of state doctrine, the political question doctrine, comity, and the foreign affairs doctrine.[125]

Generally, violations of international law are only recognized when a party acts "with or under the authority of a foreign state."[126] The state doctrine defense refers to foreign state's immunity from prosecution.[127] Recently, however, courts have heard and decided cases alleging claims under the ATS without requiring that the charged party acted under the color of state law.[128] Moreover, the enactment of the Federal Sovereign Immunities Act greatly diminished a plaintiff's ability to recover directly from a government because it grants immunity to foreign states.[129] Instead, plaintiffs can only recover when claims successfully show that private actors assisted a foreign government engaged in violations of international law.[130]

The political question doctrine requires a court to decline to hear a case if the issues raised involve judgment in an area assigned to the political branches of government.[131] Similarly, a defendant can allege a comity defense when the applicable U.S. and foreign law that govern the conduct are in

122. *Id.*
123. *See supra* section II.
124. Morales & Hackett, *supra* note 11, at 39, 46.
125. *Id.*
126. *Id.* at 41.
127. *Id.* at 45.
128. *Id.* at 39; *see generally* Henner, *supra* note 11.
129. Morales & Hackett, *supra* note 11, at 45.
130. *Id.*
131. *See generally* Morales & Hackett, *supra* note 11, at 46; Baker v. Carr, 369 U.S. 186 (1962); Doe v. Israel, 400 F. Supp. 2d 86, 111–12 (D.C. Cir. 2005) (holding that the political question doctrine precluded the court from having jurisdiction in an ATS action by Palestinians against Israel because ruling on the questions presented would draw the court into foreign affairs).

true conflict.[132] In regards to the foreign affairs doctrine, state laws may not intrude "into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[133] Other popular defenses include attacking either lack of subject matter or personal jurisdiction, *forum non conveniens*, and failure to state a claim.[134]

A. Subject Matter Jurisdiction

When asserting that the plaintiffs lack subject matter jurisdiction, defendants will typically argue that the plaintiff's complaint does not actually allege a violation of international law that meets the standard set by the Supreme Court in *Sosa*.[135] Some circuits only require a "colorable or arguable claim arising under federal law to establish federal question subject matter jurisdiction."[136] In order to show subject matter jurisdiction under the ATS, some circuits require plaintiffs to plead a violation of the law of nations, rather than merely a violation of international law.[137] In *Sarei v. Rio Tinto PLC*,[138] the court addressed the ATS and its jurisdictional requirements.[139] It held that subject matter existed under the ATS provided the plaintiffs allege "a nonfrivolous claim by an alien for a tort in violation of international law."[140]

B. Failure to State a Claim

Courts regularly dismiss cases under the failure to state a claim defense when there is an inadequately plead violation

132. Morales & Hackett, *supra* note 11, at 46.

133. Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1171 (C.D. Cal. 2005) (quoting Zschernig v. Miller, 389 U.S. 429, 432 (1968)).

134. Morales & Hackett, *supra* note 11, at 46.

135. *See generally Mujica*, 381 F. Supp. 2d at 1171; John Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1004 (S.D. Ind. 2007).

136. *Bridgestone Corp*., 492 F. Supp. 2d at 1004 (holding that "doubtful validity or even invalidity of such claim does not undermine the courts subject matter jurisdiction").

137. Morales & Hackett, *supra* note 11, at 46; *see* Bigio v. Coca-Cola Co., 239 F.3d 440, 447–49 (2d Cir. 2000) (dismissing for lack of subject matter jurisdiction because plaintiff failed to allege that the corporate defendant could be responsible for the Egyptian government's seizure of private property).

138. Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007) *reh'g en banc*, 550 F.3d 822 (9th Cir. 2008).

139. *See* MILLER, *supra* note 12, at § 3661.1.

140. *Id.*

of the law of nations.[141] For example, in *Bridgestone Corp.*,[142] the court dismissed claims of forced labor based on the ATS because the allegations in the complaint failed to state conditions of forced labor in "any specific, universal, and obligatory norm of international law."[143] After the Supreme Court's decisions in *Ashcroft v. Iqbal*[144] and *Bell Atlantic v. Twombly*[145], requiring the complaint to be plausible on its face and requiring the court to ignore the plaintiff's legal conclusions when testing the sufficiency of the allegations, defendants are likely to find significant success with the defense.[146]

C. Forum Non Conveniens

Defendants have also found success using *forum non conveniens* as a defense.[147] Under this doctrine, the court will weigh the private and public interests that favor an alternative forum and determine whether it should dismiss the case to allow judgment in the foreign forum.[148]

Now, courts have the presumption against extraterritoriality in deciding whether the claim should be heard in the U.S. Courts.[149] Left unanswered is whether applying the ATS extraterritorially would itself violate international law.[150] Nevertheless, the Courts may use these legal tools to dispose of ATS claims, but still the application of the ATS is ambiguous, and thus Courts use the TVPA to fill in some of the blanks.[151]

141. Morales & Hackett, *supra* note 11124, at 46–47.
142. 492 F. Supp. 2d 988.
143. Morales & Hackett, *supra* note 11, at 46–47; *see Bridgestone Corp*., 492 F. Supp. 2d at 1016.
144. 129 S. Ct. 1937 (2009).
145. 550 U.S. 544 (2007).
146. *See generally Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561–62 (2007).
147. Morales & Hackett, *supra* note 11, at 47.
148. *Id.*
149. *See generally supra* section I.C.
150. *See generally supra* section I.C.
151. *See generally supra* section III.

III. INTERPLAY BETWEEN THE ALIEN TORT STATUTE AND THE TORTURE VICTIM PROTECTION ACT

The TVPA provides a cause of action for both United States nationals and aliens for extrajudicial killing and for torture, stating:

> (a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.
>
> (b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.
>
> (c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.[152]

The TVPA creates a substantive cause of action, unlike the ATS that addresses jurisdiction.[153] The exhaustion-of-remedies provision "ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred."[154] Additionally, the TVPA imposes a ten-year statute of limitations to claims, so that the courts "will not have to hear stale claims."[155] These provisions promote the development of substantive remedies in other countries while also protecting U.S. courts from unwarranted burdens.[156]

The precise relationship between the Torture Victim Protection Act (TVPA) and the ATS remains unclear.[157]

152. 199 JAMES L. BUCHWALTER, A.L.R. FED. 389 (originally published in 2005) [hereinafter TVPA].

153. Ekaterina Apostolova, *The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L L. 640, 641 (2010).

154. *Id.* (citing H.R. Rep. No. 102-367, at 5 (1991)).

155. *Id.* (citing H.R. Rep. No. 102-367, at 4); *see* TVPA, *supra* note 152, at § 2(c).

156. *Id.*

157. *Id.* at 652.

Historically, Congress codified the TVPA as a note to the ATS, which implies intent for them to interact closely.[158] The legislative history specifically states that the ATS "has other important uses and should not be replaced."[159] Courts do not agree on the appropriate interaction between the statutes and have interpreted this interaction differently.[160] The majority view interprets the TVPA and ATS as offering different and unrelated causes of action for torture and extrajudicial killing, where the TVPA supplements the lack of details in the ATS.[161] Courts typically borrow the statute of limitations from the TVPA but ignore the exhaustion of remedies requirement it contains.[162]

Generally, Circuit Courts have refused to apply the exhaustion-of-remedies requirement from the TVPA to the ATS.[163] Judge Cudahy in *Enahoro*, however, argued that such an application would be justified to ensure consistency and prevent a situation where an American victim of torture would be bound by the requirements while a foreign plaintiff avoided them through the ATS.[164] Despite this argument, no court has imported TVPA's exhaustion of remedies requirement into the ATS.[165]

Since the ATS does not contain an express statute of limitations, courts consider alternative sources of law that allow for the imposition of a statute of limitations.[166] They look to the closest federal or state-law analogue.[167] Courts have found that since both the ATS and the TVPA were enacted to protect human rights, provide for a civil action to do so, and were codified in the United States Code, they are similar enough for the purposes of applying the statute of limitations.[168] The Senate Report states that the TVPA's

158. *See generally id.* at 641.
159. H.R. Rep. No. 102-367, at 3.
160. Apostolova, *supra* note 153, at 652.
161. *Id.*
162. *Id.*
163. *Id.* at 648.
164. *Id.* (citing Enahoro v. Abubakar, 408 F.3d 877, 890 (7th Cir. 2005) (Cudahy, J., dissenting in part)).
165. *Id.* at 649.
166. *Id.*
167. Reed v. United Transp. Union, 488 U.S. 319, 324 (1989) (proclaiming the rule that "statutes of limitation are to be borrowed from state law").
168. Arce v. Garcia, 400 F.3d 1340, 1345–46 (11th Cir. 2005).

statute of limitations allows for equitable tolling.[169] In light of Congress' expressed intent, equitable tolling applies to the TVPA and, therefore, equitable tolling is also applied to the ATS.[170]

Thus, the interplay between the two statutes causes almost as much ambiguity as clarity; yet, another problem that should be solved with a congressional reform.

IV. A RECOMMENDATION FOR CONGRESS

Congress should amend the Alien Tort Statute to read as follows:

> (a) JURISDICTION.—The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.
>
> (b) LIABILITY.—A cause of action arises under the law of nations or a treaty of the United States.
>
> (1) "Persons" include judicial persons.
>
> (2) The law of nations or a treaty of the United States governs the scope of liability.
>
> (c) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred or in the place which venue is most proper; UNLESS such exhaustion would be Dangerous; or Futile.
>
> (d) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose; SUBJECT to equitable tolling.
>
> (e) PLEADING.—In alleging a violation of law of nations, a party must state with particularity the facts constituting such violation.
>
> (f) CHOICE OF LAW.—In the absence of the law of nations or a treaty of the United States, the court shall apply traditional choice of law rules, incorporated by federal common law.

169. Apostolova, *supra* note 153, at 650 (citing S. Rep. No. 102-249, at 11 (1991)).

170. *Id.*

> (g) LAW OF NATIONS.—For the purpose of this title, a "law of nations" is one that the international community of states has generally accepted:
>
> (1) in the form of customary law resulting from a general and consistent practice of states followed by states from a sense of legal obligation;
>
> (2) by international agreement; or
>
> (3) by derivation from general principles common to the legal systems of the world.

V. CONGRESS SHOULD AMEND THE ALIEN TORT STATUTE TO PROVIDE CLARITY

Congress needs to inter the thirty-three-word, 200-year old, Alien Tort Statute. Courts trying to interpret or apply this statute have encountered complications regarding choice of laws, statute of limitations, jurisdictional issues, conflict of laws, scope of liability, and a frightening *Erie* problem. These complications have led to inconsistent and misapplied law.[171] Simply put, this statute is outdated, ambiguous, and, as seen above, inconsistently applied.[172]

The most effective solution would come from a Congressional amendment of the ATS that clearly explains what constitutes a violation.[173] Such an amendment should provide enough guidance to allow parties to understand the risks of ATS litigation.[174] This section highlights issues that need clarification that Congress should consider and issues that the proposal in this Comment attempts to address.

A. Congress Should Extend Liability to Corporations While Amending Other Aspects of the Alien Tort Statute to Restrict Frivolous Litigation

Corporations argue that international law does not generally recognize corporate liability.[175] Some scholars, however, have analyzed the Nuremberg Tribunal and argued that it expanded the concept of "persons" to legal persons as

171. *See supra* section I.
172. *See supra* section I.
173. Thompson, *supra* note 4, at 317–18.
174. *Id.* at 318.
175. Roberts, *supra* note 56, at 384.

well as individuals.[176] A simple search yields massive amounts of literature attempting to answer questions of corporate liability under customary international law. This Comment, however, focuses on a congressional recommendation for change. Thus, this analysis will focus on policy implications and what Congress "ought" to do.

Scholars give several policy reasons for advocating that the Supreme Court should generally deny corporate liability, mainly arguing that holding otherwise would severely hamper U.S. business around the world.[177] First, hearing ATS suits in U.S. courts negatively impacts corporations, taxpayers, and international trade.[178] Second, allowing corporate liability clogs the federal courts.[179] Finally, a regime of corporate ATS liability discourages corporations from operating in locales where corporate activity could have the most substantial positive impact.[180] These scholars also argue that plaintiffs should seek remedy from the individuals responsible for specific acts, rather than corporations that spread the cost of the litigation onto people with no responsibility for the act.[181]

Scholars also argue that the uncertainty of whether an investment will lead to substantial future ATS liability may force a corporation to decide to refrain from entering the transaction out of concern that a party to the transaction is currently violating the law of nations.[182] With the threat of costly and public litigation, corporations may decline to invest in a location and thus reduce economic efficiency.[183]

On the other hand, many strong arguments support corporate liability. Judge Weinstein relied on general principles of fairness and logic when he ruled corporations should be liable under the ATS.[184] It seems fundamental to some Americans to hold corporations responsible for committed torts. Additionally, shareholders would consider social responsibility before investing if they knew the

176. Stephens, *supra* note 14, at 557.
177. *Id.* at 555–56.
178. Thompson, *supra* note 4, at 308.
179. *Id.*
180. *Id.*
181. *Id.* at 311–12.
182. *Id.* at 312–13.
183. *Id.*
184. Theophila, *supra* note 88, at 2886.

corporations they were investing in might be liable under the ATS. This might encourage corporations to evaluate their actions and to act responsibly and ethically—a desirable result.[185] Such a progressive result will reward companies for conscientious and responsible conduct. In *Citizens United*,[186] the Supreme Court granted corporations what some consider unprecedented rights, (i.e., First Amendment rights).[187] Some would argue that responsibilities should come with these rights.[188] Moreover, corporations have more resources, i.e., money, staff, and insurance, available to help victims of egregious crimes.

Even if litigation may be more appropriate in another jurisdiction, the question of corporate liability and ultimately holding corporations liable does not exclude the defenses to the ATS that would relocate the litigation to a more suitable jurisdiction. Finding that corporations are not liable under the ATS may dwarf progress in this field, and instead the United States should lead the international field in corporate liability allowing victims compensation for egregious crimes.

In amending the ATS, Congress should consider the arguments of both sides and strike a balance between the competing interests. Following America's ideas about fundamental fairness and a desire for corporate social responsibility, Congress should extend liability to corporations. The important considerations of foreign trade as well as economic and judicial efficiency should prompt Congress to amend other aspects of the ATS to restrict frivolous claims.

B. Congress Should Apply Federal Common Law, Including Customary International Law, to Alien Tort Statute Claims

Federal courts have never definitively resolved the choice-of-law question for ATS cases.[189] Most commentators agree that international law and the United States'

185. Thompson, *supra* note 4, at 312–13.

186. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)

187. Katherine Gallagher, *Achieving Corporate Accountability for Egregious International Law Violations Through the Alien Tort Statute: A Response to Professor Branson*, 9 SANTA CLARA J. INT'L L. 261, 271 (2011) (citing *Citizens United*, 558 U.S. 310).

188. *Id.*

189. *In re* Agent Orange, 373 F. Supp. 2d 7, 83 (E.D.N.Y. 2005) (citing Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105 n.12 (2d Cir. 2000)).

international agreements are laws of this country and supreme over the law of the fifty States.[190] After surveying international law, courts should apply U.S. federal common law's traditional rules regarding choice and conflict of laws.

Some scholars read *Sosa* as adopting federal choice of law rules to causes of action applying international law, because the majority's analysis consistently assumes that federal common law includes customary international law.[191] Scholars also allege that because all three branches of our national government play a role in the recognition or creation of substantive international rules of law, *Erie*[192] does not apply to these claims.[193] Additionally, international law is analogous to maritime law, an area in which Congress and courts have expressly authorized the continuation of federal common law.[194]

When there is a conflict of choice of law and there is no such statutory directive, the Second Restatement of Conflict of Laws gives factors to consider in choosing which law to apply.[195] Looking at the factors it seems as though federal common law should be applied. Recalling that federal common law encompasses international law, the needs of the international system are better served by applying U.S. federal common law, rather than inconsistent national law.[196]

190. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1987).

191. *The Supreme Court-2003 Term, Leading Cases*, 118 HARV. L.REV. 436, 453–56 (2004).

192. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

193. *In re* Agent Orange, 373 F. Supp. 2d at 83.

194. *See generally* Gercey v. U. S., 409 F. Supp. 946 (1976), *aff'd*, 540 F.2d 536 (1976), *cert. denied* 430 U.S. 954 (1977); 28 U.S.C.A. § 1333 (West 2010). Suits in admiralty are governed by federal substantive and procedural law. *Id.*

195. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969).

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

196. *See generally In re* Agent Orange, 373 F. Supp. 2d at 84 (citing

Regarding the protection of justified expectations, the certainty, predictability and uniformity of result, and the ease in the determination and application of the law to be applied, federal common law (encompassing international law, and surveying national law) will satisfy these needs more effectively.[197] Finally, this field of law is founded on the idea that violations of international law may be remedied through tort litigation.[198] This idea is furthered by the application of international law in this context, even when it is international criminal law, as long as it is similar to domestic tort law.[199] Thus, the court should next apply traditional rules dealing with conflict of laws and often apply the law of the location of the wrong.[200]

Further, courts are not precluded from referring to appropriate state or national law for analogies to fill in procedural, and even substantive, gaps left in international law.[201] But courts should be careful to apply the laws of the forum in a way that does not subordinate or ignore principles of international human rights law.[202] The *Sosa* court specifically rejected the state choice of law rules when it rejected the headquarters doctrine, because the flexibility present in the choice of law methodology may lead to results that conflict with federal policy.[203]

Court should apply customary international law when determining the scope of liability. The court in *Presbyterian Church*[204] correctly looked to the Rome Statute of the International Court of Justice and adopted its standard as the proper standard for aiding and abetting liability.[205] Under this standard, aiding and abetting liability exists "when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969)).

197. *Id.*

198. *Id.*

199. *Id.*

200. Branson, *supra* note 7, at 238.

201. *In re* Agent Orange, 373 F. Supp. 2d at 84–85.

202. Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 317 (2005).

203. *In re* Agent Orange, 373 F. Supp. 2d at 83.

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

205. *Id.* at 259.

commission of that crime."[206] Thus, under international customary law, a plaintiff must prove that a collateral participant had knowledge that the primary violator was breaking the law, in addition to proving a primary violation and proving that the collateral participant rendered substantial assistance to the primary violator.[207]

Different jurisdictions have different approaches to linking liability of a subsidiary company to the umbrella company, a form of "veil-piercing." Some courts have ruled that the law of the place of the alleged wrong should govern the veil-piercing question.[208] Defendant corporations may argue for the internal affairs choice of law doctrine to ensure the laws of a corporations domicile apply.[209] Some states, however, have laws which are much more conducive to isolating corporations from veil-piercing laws than others.[210] To apply internal affairs choice of law or to apply state law will produce inconsistent results. Thus, again, the court should look to international law, followed by federal common law and a survey of traditional approaches. Only if traditional approaches to choice of laws indicate that the forum state's law should govern, should the court apply such law.

C. Congress Should Clarify the Jurisdictional Grant and the Source of Claims for the Alien Tort Statute

The Act permits aliens to take advantage of this significant grant of subject matter jurisdiction provided only that the alien, and thus the court, obtain territorial, personal, jurisdiction over the defendant.[211] The court announced that the ATS merely grants jurisdiction.[212] To avoid confusion and offer more clarification a congressional amendment should codify *Sosa*'s announcement that the ATS merely grants

206. *Id.* (citing Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Appeal Judgment, ¶ 102(ii) (Int'l Crim. Trib. for the Former Yugoslavia Feb. 24, 2004)).

207. Branson, *supra* note 7, at 233.

208. *See generally* Doe v. Unocal Corp., 27 F. Supp. 2d 1174, 1187–90 (C.D. Cal. 1998), *aff'd*, 24 F.3d 915 (2001).

209. Branson, *supra* note 7, at 237–38.

210. *Id.* at 238–39.

211. *See* 28 U.S.C.A. § 1350 (West 2010); Filartiga v. Pena-Irala, 630 F.2d 876, 887–88 (2d Cir. 1980); Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116 (2d Cir. 2008).

212. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

jurisdiction, and codify that the cause of action arises under the international customary law.

While corporations would like an exhaustive list of causes of action, allowing them to operate with higher levels of certainty, this approach would not allow for dynamic and progressive flexibility. Thus, Congress should merely codify the standard for defining the "law of nations" rather than codify an exhaustive list of actionable claims.

D. Congress Should Enact a Heightened Pleading Standard for Alien Tort Statute Claims

Providing jurisdiction under the ATS for suits against corporations may clog federal dockets by inviting lawsuits with questionable legal merit. With the expansion of the permissible bases for litigation, plaintiffs will be less constrained by the pleading requirements of Rule 11(b)(2) of the Federal Rules of Civil Procedure.[213] Further, the publicity generated by an ATS accusation is not good for any corporation.[214] This pressures a corporation to either settle the claim, regardless of the merits, or suffer the negative publicity inherent in litigation.[215] A settlement is not ideal because it suggests that the wrong occurred and that the corporation is trying to avoid losing at trial.[216] However, actually going to trial risks constant and long lasting negative publicity.[217]

Courts have adopted different requirements for pleading in regards to subject matter jurisdiction. Some circuits only require a "colorable or arguable claim arising under federal law to establish federal question subject matter jurisdiction."[218] Other circuits hold that it is not sufficient for plaintiffs to merely plead a colorable violation of international law, but they must adequately plead a violation of the law of nations to establish subject matter jurisdiction under the ATS.[219]

213. Thompson, *supra* note 4, at 308.
214. *Id.* at 314.
215. *Id.*
216. *Id.*
217. *Id.*
218. *See* John Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1004 (S.D. Ind. 2007) (holding that "doubtful validity or even invalidity of such claim does not undermine the courts subject matter jurisdiction").
219. *See* Bigio v. Coca-Cola Co., 239 F.3d 440, 447–49 (2d Cir. 2000)

The Federal Rules of Civil Procedure established a heightened pleading standard for plaintiffs alleging securities fraud against companies.[220] It seems that congress reasoned that the court required a heightened standard in such instances because such allegations have a sizeable negative impact on the reputation of a company. This heightened standard, codified in Rule 9(b), requires pleadings to state facts with particularity.[221] ATS litigation, involving allegations of torture and other awful acts, similarly destroys a company's reputation. Therefore, just as in securities fraud, Congress should raise the pleading standard for ATS claims.

E. Congress Should Incorporate an Exhausted Remedies Clause into the Alien Tort Statute

The courts have venue restrictions and *forum non conveniens* as tools to dismiss actions that should be brought in another jurisdiction. When an alternative forum exists, the court selects the appropriate forum by weighing the interests of the parties against the public interests that support adjudication in the alternative forum.[222]

Congress should also add an Exhaustion of Remedies clause to the ATS. This provision would avoid exposing U.S. courts to unnecessary burdens, and encourage the development of meaningful remedies in other countries.[223] Justice Stevens, in oral arguments for *Sosa*, discussed that many jurists take the position that international law principles already require exhausted remedies.[224] Although this principle is implicit to international law, it is not always given acknowledgement.[225] Further, almost all jurisdictions apply Statute of Limitations found in the TVPA and thus it seems reasonable to also apply the Exhausted Remedies

(dismissing for lack of subject matter jurisdiction because plaintiff failed to allege that the corporate defendant could be responsible for the Egyptian government's seizure of private property).

220. FED. R. CIV. P. 9.

221. *Id.*

222. Morales & Hackett, *supra* note 11, at 47.

223. Apostolova, *supra* note 153, at 641 (citing H.R. Rep. No. 102-367, at 4 (1991)); *see* TVPA, *supra* note 152, at § 2(c).

224. *Sosa v. Alvarez-Machain*, THE OYEZ PROJECT AT IIT CHIC.-KENT COLL. OF L., http://www.oyez.org/cases/2000-2009/2003/2003_03_339 (last visited Nov. 18, 2011).

225. *See generally supra* section III and accompanying footnotes.

clause. In cases where the court applies the Exhausted Remedies clause, courts should excuse exhaustion if a return to the country of torture would be futile or dangerous, as seen in TVPA claims.[226] Therefore, exhaustion of remedies should be made an explicit part of the ATS.

F. Congress Should Incorporate a Statute of Limitations into the Alien Tort Statute

Almost all courts apply the TVPA Statute of Limitations.[227] This ensures that courts "will not have to hear stale claims."[228] What about Judge Weinstein's holding that announced the Statute of Limitations does not apply to *Jus Cogens* law?[229] The court could have arrived at a similar and fair result if it had applied the doctrine of equitable tolling. The Senate Report states that the TVPA's statute of limitations allows for equitable tolling.[230] Since courts apply the TVPA's statute of limitations, they should apply the doctrine intended to accompany it. Thus, for clarity and direction, Congress should explicitly codify the TVPA statute of limitations as part of the ATS and allow for equitable tolling.

G. Congress Should Codify the Standard Used to Define International Law

Courts have defined the term "law of nations" with consistency and competence. In sum, courts have held that "a rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law, (b) by international agreement, or (c) by derivation from general principles common to the major legal systems of the world."[231] A general and consistent practice of states, motivated by a sense of legal obligation, creates

226. *See* MILLER, *supra* note 12, at § 3661.1.

227. Roberts, *supra* note 56, at 383.

228. Apostolova, *supra* note 153, at 641 (citing H.R. Rep. No. 102-367, at 4); *see* TVPA, *supra* note 152, at § 2(c).

229. *In re* Agent Orange, 373 F. Supp. 2d 7, 61 (E.D.N.Y. 2005) *aff'd sub nom.*, Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008) (defining *Jus Cogens* law).

230. Apostolova, *supra* note 153, at 650 (citing S. Rep. No. 102-249, at 11 (1991)).

231. *In re* Agent Orange, 373 F. Supp. 2d at 131.

customary international law.[232] International agreements create law for the states that sign the agreements, and when such agreements are widely accepted and intended for states generally, may lead to the creation of customary international law.[233] The general principles found in most major legal systems may be used as supplementary rules of international law, even if they are neither considered customary law nor articulated in an international agreement.[234]

Most jurisdictions rely on the standard discussed in *Sosa*, finding that an international rule must "identify a specific, universal and obligatory norm of international law."[235] Some jurisdictions have added that a rule of international law must be of mutual concern to States.[236] Under this analysis, common law often provides a cause of action for the relatively small number of international law violations.[237] Congress should codify current case law in this area, and thus create a more clear and consistent approach to some of the many ambiguities that the ATS poses.

CONCLUSION

The ambiguity of the Alien Tort Statute has evoked a landslide of articles, commentary, and litigation. This Comment seeks to replace the statute with one that properly addresses the ambiguity. The proposed statute seeks to strike a balance between competing interests. In so doing, the proposed statute extends liability to corporations, yet, uses other amendments to decrease litigation, liability, and corporate exposure to reputational harm. Adding an exhausted-remedies clause, a statute of limitations, heightened pleading standards, and codified definitions will decrease uncertainty of doing business abroad and even the playing field on a global scale. Congress should consider

232. *Id.*
233. *Id.*
234. *Id.*
235. *See* MILLER, *supra* note 12, at § 3661.1.
236. *Id.* (citing Abdullahi v. Pfizer, Inc., 562 F.3d 163, 174–190 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3541 (2010)). In 2009, the Second Circuit applied this three-part test for whether the ATS created a private right of action for violation of the law of nations. *Id.* The court held that nonconsensual administration of experimental drugs met all three prongs of the test. *Id.*
237. Stephens, *supra* note 14, at 551 (citing Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)).

amending the Alien Tort Statute.