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CUTTING TO THE CHASE: CORPORATE LIABILITY FOR ENVIRONMENTAL HARM UNDER THE ALIEN TORT STATUTE, *KIOBEL*, AND CONGRESS

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Prospectors first discovered commercial quantities of oil in Nigeria over fifty years ago.[1] Today, the country's oil industry "accounts for over 95 percent of export earnings and about 40 percent of government revenues,"[2] but the environmental costs have been nearly as staggering as the financial benefits. For instance, a recent study by the United Nations Environment Programme ("UNEP") found that Shell and other oil firms contaminated nearly 400 square miles in the Niger Delta that will cost one billion dollars to clean up over the next thirty years.[3] As a consequence, numerous lawsuits have been filed against Shell for negligently cleaning up the spills and other environmental damage.[4]

Nigeria is not alone when it comes to multinational corporations causing environmental disasters. Other incidents include Union Carbide's 1984 toxic gas release in Bhopal, India; Texaco's 18 billion gallons of toxic

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[1] HUMAN RIGHTS WATCH, HRW INDEX NO. 1-56432-225-4, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES 25 (Jan. 1999).

[2] UNITED STATES ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: NIGERIA (2011), *available at* http://www.eia.gov/countries/analysisbriefs/Nigeria/nigeria.pdf.

[3] John Vidal, *Niger Delta Oil Spills Clean-up Will Take 30 Years, Says UN*, THE GUARDIAN (Aug. 4, 2011), http://www.theguardian.co.uk/environment/2011/aug/04/niger-delta-oil-spill-clean-up-un.

[4] *See, e.g.*, *Case Profile: Shell Lawsuit (Re Nigeria)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria. "In May 2008, four Nigerian fisherman and farmers from the villages of Goi, Ikot Ada Udo and Oruma [in the Niger Delta region], in conjunction with Friends of the Earth Netherlands/Milieundefersie and supported by Friends of the Earth Nigeria/ERA, started a legal case against Shell Nigeria and its parent company in the Netherlands." Chika Amanze-Nwachuku, *Pollution: Dutch Court to Hear Nigerians Suit Against Shell*, THIS DAY LIVE (Oct. 2, 2012), http://www.thisdaylive.com/articles/Pollution-dutch-court-to-hear-nigerians-suit-against-Shell/126561.

runoff into Ecuador's Lago Agrio which began in 1964 and continues to cause high levels of cancer; and Trafigura Corporation's 2006 dumping of hydrogen sulfide "slops" into the waters of Abidjan, in the Ivory Coast.[5] These cases underscore the tension between business and global trade on the one hand, and the need to preserve the environment and protect host communities on the other. Unfortunately, citizens of certain foreign countries cannot always rely on their own domestic court systems as a forum to enforce corporate social responsibility.[6] However, such a forum exists in the United States in the form of the Alien Tort Statute ("ATS"), also known as the Alien Tort Claims Act ("ATCA"), which gives U.S. district courts jurisdiction over "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."[7]

The Second Circuit Court of Appeals in *Kiobel v. Royal Dutch Petroleum Co.* recently cast doubt on whether the ATS can function as a viable enforcement mechanism against environmentally negligent corporations.[8] However, the Seventh Circuit in *Flomo v. Firestone Natural Rubber Co.*[9] and the D.C. Circuit in *Doe v. Exxon Mobil Corp.*[10] reached the opposite conclusion in two recent opinions, confirming a split among the circuits. In response, the United States Supreme Court granted *certiorari* in the *Kiobel* case, and, after twice hearing oral arguments,[11] is expected to render a final decision in June 2013.[12]

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[5] *See, e.g.*, *The World's Worst Environmental Disasters Caused by Companies*, BUSINESS PUNDIT (June 21, 2010, 12:29 PM) http://www.businesspundit.com/the-worlds-worst-environmental-disasters-caused-by-companies/.

[6] *See, e.g.*, MARK DAVID AGRAST ET AL., THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2012–2013 49, *available at* http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf. "Despite ongoing reforms, many countries [in Sub-Saharan Africa] lack adequate checks on executive authority, and government accountability is also weak. Many public institutions and courts throughout the region are inefficient and vulnerable to undue influence." *Id.*

[7] 28 U.S.C. § 1350 (2006).

[8] *See* 621 F.3d 111, 118 (2d Cir. 2010).

[9] 643 F.3d 1013, 1021 (7th Cir. 2011).

[10] 654 F.3d 11, 15 (D.C. Cir. 2011).

[11] *See, e.g.*, Sarah A. Altschuller, *A Surprise Twist: U.S. Supreme Court Will Rehear* Kiobel, CORPORATE SOC. RESPONSIBILITY & THE LAW (Mar. 5, 2012), http://www.csrandthelaw.com/2012/03/a-surprise-twist-u-s-supreme-court-will-rehear-kiobel/. The first hearing focused on the issue of corporate liability, but several Justices broached the subject of extra-territorial application of the ATS during questioning. *Id.* The second hearing focused exclusively on extraterritoriality, i.e., the extent to which the ATS applies when the tort occurs overseas. *Id.*

[12] *E.g.*, Pieter Bekker & Brittany Prelogar, *Dutch Court Orders Shell Nigeria to Compensate Nigerians for Oil Pollution Damage Caused by Third-Party Sabotage in Nigeria*, STEPTOE

This Note will argue that corporate social responsibility, particularly in the environmental context, should be a priority under the ATS. Corporate liability, as envisioned in *Flomo* and *Doe*, is essential for striking an appropriate balance between global trade, environmental protection, and the welfare of local communities. However, even with corporate liability intact, the ATS remains an imperfect mechanism for ensuring responsible environmental practices.

More can and should be done by the United States to help the ATS achieve greater relevance in this increasingly important field. The most direct options include amending the ATS to specifically permit environmental tort cases or the United States becoming a signatory to more stringent international environmental treaties. The trajectory of customary international law is such that environmental torts will likely be recognized sooner rather than later under the "law of nations," but this fact should not prevent the United States from taking a more proactive role. After all, Congress has passed bills that explicitly target corporate responsibility, such as the Foreign Corrupt Practices Act, which the government uses to hold companies liable for bribery abroad.[13] Is paying officials under the table for special treatment really that much more egregious than causing billions upon billions of dollars worth of environmental damage in foreign countries? The answer, of course, is no.

In addressing these issues, Part I of this Note provides an overview of the ATS, including the statute's history and development to the present day. Part II examines the current circuit split over whether corporations should be held liable under the ATS and advocates that the majority position, which endorses corporate liability, is the correct one. Part III discusses the application of the ATS to environmental disasters and the extent to which international law recognizes environmental torts. Finally, Part IV analyzes congressional attempts to regulate corporate behavior in foreign countries and urges the adoption of an amendment codifying corporate liability under the ATS.

& JOHNSON, LLP (Jan. 30, 2013), http://www.steptoe.com/publications-newsletter-714.html ("[*Kiobel*] is currently under review by the US Supreme Court, which is considering both the availability of corporate liability under the ATS and the statute's extraterritorial reach. A decision is expected by June 2013.") (citations omitted).

[13] 15 U.S.C. §§ 78dd-1, et seq. (2006); *see also* An Overview, *Foreign Corrupt Practices Act*, UNITED STATES DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/ (last visited Apr. 2, 2013) (explaining that Congress passed the Foreign Corrupt Practices Act to prevent certain persons from making illegal payments to foreign government officials).

I. OVERVIEW OF THE ATS

This section surveys the history of the ATS and provides an overview of how plaintiffs bring suit under the statute.

A. History

The ATS originated with the Judiciary Act of 1789.[14] Though no legislative history exists, the United States Supreme Court explained in *Sosa v. Alvarez-Machain* that Congress intended the statute to address a "narrow set of violations of the law of nations," which threatened "serious consequences in international affairs."[15] Among these were violations of safe conduct, infringement of the rights of ambassadors, and piracy, according to Blackstone's Commentaries.[16] Granting jurisdiction over such delicate matters to federal courts was part of a general scheme under the Judiciary Act to keep questions of international law away from the states.[17]

In practice, the ATS got off to a slow start: "during the nearly two centuries after the statute's promulgation, jurisdiction was maintained under the ATS in only two cases."[18] The first case, *Bolchos v. Darrel*, arose in 1795 in a South Carolina district court and involved the seizure of a vessel carrying slaves.[19] Bolchos alleged that Darrel wrongfully took possession of the slaves and brought suit to recover the profits from their sale.[20] The district court found that jurisdiction existed based in part on the ATS as a violation of a United States treaty with France.[21] The second case,[22] *Adra v. Clift*, involved a custody battle between the Lebanese Ambassador to Iran and his ex-wife, an Iraqi citizen then residing in

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[14] *See, e.g.*, CHARLES ALAN WRIGHT ET AL., 14A FED. PRAC. & PROC. JURIS. § 3661.1 (3d ed.) (2012).
[15] 542 U.S. 692, 715 (2004).
[16] *Id.*
[17] Helen Lucas, *The Adjudication of Violations of International Law Under the Alien Tort Claims Act: Allowing Alien Plaintiffs Their Day in Federal Court*, 36 DEPAUL L. REV. 231, 237 (1987).
[18] Taveras v. Taveraz, 477 F.3d 767, 771 (6th Cir. 2007).
[19] 3 F.Cas. 810, 810 (D.S.C. 1795) (No. 1,607).
[20] *Id.*
[21] *Id.*
[22] *See* Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (identifying *Bolchos v. Darrel* and *Adra v. Clift* as the only two district court cases involving the ATS between its enactment in 1789 and the modern era of ATS litigation marked by *Filartiga v. Pena-Irala*).

Baltimore, Maryland.[23] The ambassador claimed that his ex-wife had violated the law of nations by failing to deliver custody of their daughter as required by Islamic and Lebanese law.[24] The district court found that the defendant had committed such a violation by wrongfully withholding the child and breaching Lebanese passport control laws in her efforts to bring the child to the United States.[25]

Since *Filartiga v. Pena-Irala* in 1980, however, plaintiffs have invoked the ATS with increasing frequency, relying on a range of "law of nations" claims that go far beyond the original violations identified in *Sosa*.[26] In *Filartiga*, the Second Circuit held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights."[27] The plaintiff sued a Paraguayan government official under the ATS for torturing and killing the plaintiff's son as retribution for his longstanding opposition to the Paraguayan government.[28] In granting jurisdiction under the ATS, the court found that state-sanctioned torture had been universally condemned in "numerous international agreements" and renounced by "virtually all of the nations of the world (in principle if not in practice)."[29]

In addition to torture, courts have granted ATS jurisdiction for claims of forced labor,[30] genocide,[31] involuntary medical experimentation,[32] systematic denial of political and free speech rights,[33] and harmful effects

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[23] 195 F. Supp. 857, 859 (D.Md. 1961).
[24] *Id.* at 863.
[25] *Id.* at 863–65.
[26] *See, e.g.*, *Taveras*, 477 F.3d at 771 (citing ATS cases involving torture, genocide, summary executions, and other human rights abuses).
[27] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
[28] *Id.*
[29] *Id.* at 880.
[30] *See, e.g.*, Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997), *aff'd in part*, *rev'd in part by* 395 F.3d 932 (9th Cir. 2002) (permitting ATS jurisdiction over plaintiff Burmese villagers' claim of forced labor against defendant oil company).
[31] *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 232, 236 (2d Cir. 1995) (granting ATS jurisdiction over plaintiff Croat and Muslim citizens' genocide claims against defendant leader of the insurgent Bosnian-Serb forces).
[32] *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 168–69 (2d Cir. 2009) (granting ATS jurisdiction over plaintiff Nigerian children's claim that defendant pharmaceutical company engaged in involuntary medical experimentation).
[33] *See, e.g.*, Tachiona v. Mugabe, 234 F. Supp. 2d 401, 405, 434 (S.D.N.Y. 2002) (recognizing a cause of action against the Zimbabwe African National Union-Patriotic Front for denial of those rights, but dismissing those claims as against President Robert Mugabe and other government officials due to sovereign immunity).

of aerial pesticide fumigation.[34] By contrast, courts have denied jurisdiction for fraud,[35] libel,[36] maritime actions,[37] and certain environmental pollution claims,[38] among others.

B. Bringing Suit Under the Two Prongs of the ATS

The ATS offers plaintiffs the choice between bringing suit for a "violation of the 'law of nations' or a 'treaty of the United States.'"[39]

1. The First Prong of the ATS: "Law of Nations"

Under the first prong of the ATS, plaintiffs can bring suit for torts that violate the "law of nations," which is more commonly referred to as "customary international law."[40] Sources of customary international law include "the works of jurists, writing professedly on public law . . . or by the general usage and practice of nations . . . or by judicial decisions."[41]

Generally, this prong of the ATS is triggered when "there has been a violation by one or more individuals of those standards, rules, or customs that govern the relationships between states or between individuals and foreign states."[42] The test used to determine whether emerging customs constitute the "law of nations" involves analyzing their 18th century counterparts: "courts should require any claim based on the present-day law of nations to rest on a norm of international character *accepted* by the civilized world and *defined* with a specificity comparable to the features of the 18th-century paradigms [that the Supreme Court has] recognized."[43]

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[34] *See, e.g.*, Arias v. Dyncorp, 517 F. Supp. 2d 221, 221 (D.D.C. 2007).
[35] *See, e.g.*, IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (denying ATS jurisdiction for Luxembourg investment trust's claims for fraud against Bahamian corporation).
[36] *See, e.g.*, Akbar v. New York Magazine Co., 490 F. Supp. 60, 63 (D.D.C. 1980) (denying jurisdiction under ATS for lack of consistent international norms or treaties involving libel).
[37] *See, e.g.*, Dmaskinos v. Societa Navigacion Interamericana, S.A., 255 F. Supp. 919, 923 (S.D.N.Y. 1966) (denying jurisdiction under ATS for alleged violation of the Jones Act).
[38] *See, e.g.*, Flores v. S. Peru Copper Corp., 414 F.3d 233, 266 (2d Cir. 2003) (denying ATS jurisdiction for plaintiffs' right to life and health claims stemming from environmental damage).
[39] *See, e.g.*, Kathleen Jaeger, *Environmental Claims Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 519, 519 (2010).
[40] *Jurisdiction Under Alien Tort Claims Act*, 18B FED. PROC., L. Ed. § 45:2440 (2012).
[41] Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).
[42] *See* Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963).
[43] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) (emphasis added).

Put another way, courts address two issues when analyzing emerging norms of customary international law: (1) whether the norm has been universally accepted; and (2) whether it has been sufficiently defined.[44] Finally, courts must consider the "practical consequences" of making a cause of action available to litigants in federal court.[45]

2. The Second Prong of the ATS: "Treaty of the United States"

Under the second prong of the ATS, plaintiffs can sue for torts violating "a treaty of the United States."[46] Such treaties are "formal agreement[s] between the United States and one or more other sovereigns, entered into by the President and approved by two-thirds of the Senate."[47] Accordingly, "a treaty not ratified by the United States at the time of the alleged events cannot form a basis for an ATS claim."[48] Ratification is distinguished from signing as follows: "a State's *signing* of a treaty serves only to authenticate its text; it does not establish the signatory's consent to be bound. . . . A State only becomes bound by—that is, becomes a party to—a treaty when it ratifies the treaty."[49] Furthermore, ratified treaties must be either self-executing or implemented through an act of Congress for plaintiffs to rely on them under this prong of the ATS.[50] Finally, if the treaty provides a specific remedy for violations, then plaintiffs cannot rely on it to establish jurisdiction under the ATS.[51]

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[44] For example, in *Sosa v. Alvarez-Machain*, "the Court accepted that [while] a rule against arbitrary detention in some forms might command universal agreement, there was insufficient agreement that the specific conduct in *Sosa*, a detention for only one day, violated that rule." Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 362 (2011).

[45] Sosa v. Alvarez-Machain, 542 U.S. at 732–33.

[46] 28 U.S.C. § 1350.

[47] Abagninin v. AMVAC Chemical Corp., 545 F.3d 733, 737 (9th Cir. 2008) (citing U.S. Const. Art. II, §2, cl. 2, which outlines the requirements for ratifying a treaty).

[48] *Id.* at 738 (citations omitted).

[49] *See* Flores v. Southern Peru Copper Co., 414 F.3d 233, 256 (2d Cir. 2003) (emphasis in original) (internal quotations omitted).

[50] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. at 735 (finding the International Covenant on Civil and Political Rights to be insufficient under the second prong of the ATS despite having been ratified by the United States because it was not self-executing and had not been executed by separate legislation in the United States); *Flores*, 414 F.3d at 257 n.34 (comparing self-executing treaties, which immediately create enforceable rights and duties of individuals, with non-self-executing treaties, which require implementation by the government).

[51] *E.g.*, Upper Lakes Shipping Ltd. v. Int'l Longshoremen's Ass'n, 33 F.R.D. 348, 350 (S.D.N.Y. 1963) (denying jurisdiction under the ATS for alleged violations of a treaty between the United States and Canada concerning boundary waters that required contestants to submit to an international joint commission for adjudication).

II. CORPORATE LIABILITY

This section describes the corporate liability debate generally and then discusses the key cases—*Kiobel*, *Flomo*, and *Doe*—in detail, ultimately concluding that corporations should not be immune from suit under the ATS.

A. The Corporate Liability Debate

The corporate liability debate stems from a footnote penned by Justice Souter in the *Sosa* case.[52] In *Sosa*, the Supreme Court refused to recognize the plaintiff's abduction claim as a violation of the "law of nations" for the purposes of ATS jurisdiction.[53] In 1985, a Drug Enforcement Agency ("DEA") agent was abducted, tortured, and murdered while working in Mexico.[54] During the course of its investigation, DEA concluded that plaintiff Alvarez-Machain, a Mexican doctor, had played a role in interrogating the deceased agent, so the DEA concocted a plan to seize Alvarez-Machain and bring him to the United States.[55] After being extradited, Alvarez-Machain faced trial in federal court for the agent's murder but was ultimately acquitted.[56] Alvarez-Machain then sued those responsible for his extradition, claiming that Sosa violated the "law of nations" by abducting him.[57]

Addressing the ATS for the first time, the Supreme Court surveyed the statute's history and underpinnings to determine: (1) whether it could recognize emerging norms of international law as "law of nations" under the ATS without congressional action, and (2) if so, which norms should be recognized.[58] From this exercise the Court concluded that it could recognize emerging norms but only those "*accepted* by the civilized world and *defined* with a specificity comparable to the features of the 18th-century paradigms" identified by Blackstone, such as infringement of the rights of ambassadors and piracy.[59] Justice Souter then sought to elaborate on the "defined with specificity" element, noting: "the determination whether a norm is sufficiently definite to support a cause of action should (and,

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[52] Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).
[53] *Id.* at 739.
[54] *Id.* at 697.
[55] *Id.* at 697–98.
[56] *Id.* at 698.
[57] *Id.*
[58] *Sosa*, 542 U.S. at 712–25.
[59] *Id.* at 715, 724–25 (emphasis added).

indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."[60] Continuing in the same vein, Justice Souter made a brief but noteworthy foray into the issue of corporate liability, thereby giving rise to the current debate:

> 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. Compare *Tel-Oren v. Libyan Arab Republic* (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Kardzíc* (sufficient consensus in 1995 that genocide by private actors violates international law).[61]

Though *Sosa* did not involve corporate liability, Justice Souter may have been responding to the fact that early ATS cases focused on state actors while the "second wave" targeted U.S. and foreign corporations.[62] Applying the specificity and acceptance test to Alvarez's claim, the Court ultimately concluded that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."[63]

Prior to *Sosa*, most courts assumed that corporations could be liable under the ATS and refrained from addressing the question directly.[64] But, the Second Circuit challenged this longstanding consensus in *Kiobel v. Royal Dutch Petroleum*.[65]

B. Kiobel*: Customary International Law Does Not Support Corporate Liability*

In *Kiobel*, the Second Circuit denied ATS jurisdiction over plaintiff Nigerian villagers' human rights violation claims based on corporate liability concerns: "insofar as plaintiffs bring claims under the ATS against

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[60] *Id.* at 732–33.
[61] *Id.* at 732 n.20 (citations omitted).
[62] Ku, *supra* note 44, at 360.
[63] *Sosa*, 542 U.S. at 738.
[64] *See* Ku, *supra* note 44, at 366–67.
[65] *Id.* at 372.

corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs' claims fall outside the limited jurisdiction provided by the ATS."[66] Since 1958, defendant Royal Dutch Shell and its successor entities have exploited oil resources in the Ogoni region of Nigeria.[67] Responding to the environmental impact of Shell's operation, local residents formed a protest movement, which the Nigerian government attempted to suppress in 1993.[68] The plaintiffs ultimately sued Shell "under the ATS for aiding and abetting the Nigerian government in alleged violations of the law of nations," including extrajudicial killing; crimes against humanity; torture; inhuman and degrading treatment; arbitrary arrest and detention; violation of the rights to life, liberty, security, and association; forced exile; and, property destruction.[69] The district court for the Southern District of New York dismissed plaintiffs' claims for property destruction, forced exile, extrajudicial killing, and rights to life, liberty, security, and association on the grounds that they failed *Sosa*'s "defined with specificity" requirement.[70] However, the court granted jurisdiction over plaintiffs' claims for detention, crimes against humanity, torture, and inhuman and degrading treatment.[71]

The Second Circuit Court of Appeals, in reaching its conclusion that no corporate liability exists for human rights violations, first determined that customary international law governs the "scope of liability" (as described by the Supreme Court in footnote twenty of the *Sosa* opinion)—i.e., the identity of proper defendants—and then considered various sources of international law dealing with corporate liability in the human rights context.[72] Critical to the majority's determination that international law, as opposed to domestic law, governs the "scope of liability" was the International Military Tribunal at Nuremberg's ("Nuremberg Tribunal") finding that *individuals* could be held liable for human rights violations under international law.[73] The majority also described the "fundamental point" of *Sosa*'s footnote twenty as requiring courts to "look to customary international law to determine the scope of liability" and noted that this is true "not only when a court is questioning whether the scope of liability . . . includes private actors (as opposed to state actors), but also when

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[66] Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 120 (2d Cir. 2010).
[67] *Id.* at 123.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 124.
[71] *Id.*
[72] *Kiobel*, 621 F.3d at 125.
[73] *Id.* at 126–27.

a court is questioning whether the scope of liability . . . includes juridical persons (as opposed to natural persons)."[74] Finally, the court found its conclusion about international law governing the "scope of liability" to be consistent with Second Circuit precedent.[75]

The majority then turned to the sources of international law, beginning with the Nuremberg Tribunal, which it characterized as "the single most important source of modern customary international law concerning liability for violations of fundamental human rights."[76] Corporate liability was not recognized under international law at the time of the Nuremberg trials, the court argued, because the Nuremberg Tribunal "declined" to hold I.G. Farben, the "most nefarious corporate enterprise known to the civilized world," accountable for supplying the Nazi regime with Zyklon B and other chemical agents used in gas chambers of Auschwitz.[77] Instead, the Nuremberg Tribunal concerned itself exclusively with the prosecution of individuals, including twenty-four Farben company executives, which demonstrated that "liability under the law of nations . . . could not be divorced from *individual* moral responsibility," according to the court.[78]

The majority then surveyed international war crimes tribunals since the Nuremberg Tribunal, concluding that these too had "declined to hold corporations liable for violations of customary international law."[79] For instance, the drafters of the Rome Statute of the International Criminal Court considered but rejected France's proposal to extend criminal liability to corporations because "many national legal orders" still rejected such liability.[80]

Likewise, with respect to international treaties, the majority found that "the relatively few international treaties that impose particular obligations on corporations do not establish corporate liability as a 'specific, universal, and obligatory' norm of customary international law" as required by *Sosa*.[81] These included the Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively; Convention on Third Party Liability in the Field of Nuclear Energy; International Convention on Civil Liability for Oil Pollution Damage; Vienna Convention on Civil Liability for Nuclear Damage; Convention

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[74] *Id.* at 129 n.31.
[75] *Id.* at 128–30.
[76] *Id.* at 132–33.
[77] *Id.* at 135–36.
[78] *Kiobel*, 621 F.3d at 135 (emphasis in original).
[79] *Id.* at 136.
[80] *Id.* at 136–37.
[81] *Id.* at 141.

Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material; and Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources.[82] Characterizing these treaties as dealing with "specialized questions," the majority found that they not only failed to "codify an existing, general rule of customary international law," but also could not "be viewed as crystallizing an emerging norm of customary international law."[83] Instead, the court reasoned that the treaties "suggest a trend towards imposing corporate liability in *some special* contexts."[84]

Next, the majority reviewed the "works of publicists," concluding that these "authorities demonstrate that imposing liability on corporations for violations of customary international law has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*."[85] Central to this finding were affidavits filed in a separate case by two British professors, who "forcefully declared . . . that customary international law does not recognize liability for corporations that violate its norms."[86]

Finally, the majority responded to Judge Leval's concurring opinion, noting that Judge Leval conceded that "international law, of its own force, imposes no liabilities on corporations," but disagreed with the court's conclusion that "customary international law supplies the rule of decision."[87] The majority also sought to discredit two key opinions relied upon by Judge Leval in his concurrence: Attorney General William Bradford's 1795 opinion[88] that "a corporation can *sue* under the ATS," and Attorney General Charles L. Bonaparte's 1907 opinion that "a corporation can *be sued* under the ATS."[89]

Kiobel represents an unexpected and decisive departure from the *status quo* of assuming that corporations may be held liable under the ATS. This is so whether one reads *Kiobel* as barring corporate liability in all ATS cases or just those involving human rights violations.[90] Because

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[82] *Id.* at 138 n.40.
[83] *Id.* at 139.
[84] *Kiobel*, 621 F.3d at 141 (emphasis in original).
[85] *Id.* at 142, 145.
[86] *Id.* at 143.
[87] *Id.* at 145.
[88] *Id.* at 142 n.44 (citing 1 Op. Att'y Gen. 57, 58–59 (1795)).
[89] *Id.* (citing 26 Op. Att'y Gen. 250, 253 (1907)).
[90] Based on the facts, *Kiobel*'s holding appears limited to corporate liability in the human rights context; however, the majority's opinion frequently speaks of corporate liability in more general terms, including in the final holding: "[t]o summarize, we hold as follows . . . . [t]he concept of corporate liability for violations of customary international law has not

legal entities, such as corporations, tend to be responsible for the most significant instances of environmental degradation, *Kiobel* essentially nullifies the "law of nations" prong of the ATS as an avenue for corporate social responsibility in the environmental context.[91]

C. Flomo *and* Doe*: Rationalizing Corporate Liability Under the ATS*

Two courts—the Seventh Circuit and the District of Columbia Circuit—recently responded to *Kiobel*, establishing a clear split among the circuits.

1. *Flomo*

In *Flomo v. Firestone Natural Rubber Co.*, the Seventh Circuit held in an opinion written by Judge Posner that corporations could be liable under the ATS.[92] Firestone Natural Rubber Company ("Firestone") operated a 118,000-acre rubber plantation in Liberia, which employed twenty-three Liberian children who ultimately became the plaintiffs in this case.[93] Specifically, plaintiffs alleged that Firestone "utiliz[ed] hazardous child labor . . . in violation of customary international law."[94]

Judge Posner summarized Firestone's argument as thus: "because corporations, unlike individuals, have never been prosecuted for criminal violations of customary international law, there cannot be a norm, let alone a 'universal' one, forbidding them to commit crimes against humanity and other acts that the civilized world abhors."[95] Judge Posner then identified the circuit split, noting that "[a]ll but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable,"[96] and seized on *Kiobel* as the "outlier" case.[97]

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achieved universal recognition or acceptance as a norm in the relations of States with each other." *Kiobel*, 621 F.3d at 149.

[91] It is unclear whether *Kiobel*, if affirmed by the Supreme Court, would also extinguish the "treaty" prong of the ATS because the plaintiffs in that case proceeded under the "law of nations" prong and the majority focused its analysis on the same. *See infra* Part II.D (speculating on the Supreme Court's forthcoming ruling).

[92] Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1015 (7th Cir. 2011).

[93] *Id.* at 1015.

[94] *Id.*

[95] *Id.* at 1017.

[96] *Id.* (citations omitted).

[97] *Id.*

Judge Posner then assembled the majority's arguments for corporate liability, beginning with an assault on *Kiobel*'s faulty "factual premise."[98] Judge Posner found that, contrary to the *Kiobel* majority's view, the Nuremberg Tribunal under Control Council Law No. 9 determined that "I.G. Farben . . . had knowingly and prominently engaged in building up and maintaining the German war potential" and "ordered the seizure of all [Farben's] assets and that some of them be made available for reparations."[99] In addressing why corporations have rarely been prosecuted criminally, Judge Posner reasoned that criminal liability "would move quickly from periphery to center if corporate civil liability were unavailable."[100] Unlike criminal liability, the court stressed, "civil and corporate tort liability is common around the world."[101] From this the court inferred that "[i]f a corporation complicit in Nazi war crimes could be punished criminally for violating customary international law . . . then . . . if the board of directors of a corporation directs the corporations managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation can be civilly liable."[102]

In its next phase of argument, the court distinguished between a norm of international law, which assigns rights and duties, and "the means of enforcing it, which is a matter of procedure or remedy."[103] Describing the importance of this distinction in the starkest terms, Judge Posner noted:

> If a plaintiff had to show that civil liability for such violations was itself a norm of international law, *no claims under the Alien Tort Statute could ever be successful*, even claims against individuals; only the United States, as far as we know, has a statute that provides a civil remedy for violations of customary international law.[104]

Whether a corporation should be subject to tort liability, the court further clarified, is a "remedial question" for the federal judiciary "to answer in

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[98] *Flomo*, 643 F.3d at 1017.
[99] *Id.* (internal quotations omitted); *see also* Control Council Law No. 9, *Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof*, Nov. 30, 1945, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/01LAW06.pdf.
[100] *Id.* at 1019.
[101] *Id.* (citing PAULA GILIKER, VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE 46–50 (2010)).
[102] *Id.* (citations omitted).
[103] *Id.*
[104] *Flomo*, 643 F.3d at 1019 (emphasis added).

light of its experience with particular remedies and its immersion in the nation's legal culture, rather than questions the answers to which could be found in customary international law."[105] Simply put, "[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them."[106]

To quiet any lingering concerns, the court pointed to *in rem* judgments against pirate ships as evidence of liability for violations of customary international law against "an entity that does not breathe."[107]

Finally, with respect to defining the scope of corporate liability, the court accepted the plaintiff's concession that "corporate liability . . . is limited to cases in which the violations are directed, encouraged, or condoned at the corporate defendant's decisionmaking [sic] level."[108]

The court then proceeded to adjudicate the merits of the case, ultimately concluding that plaintiffs failed to provide "an adequate basis for inferring a violation of customary international law, bearing in mind the Supreme Court's insistence on caution in recognizing new norms of customary international law in litigation under the Alien Tort Statute."[109]

Flomo is a factually sound and well-reasoned response to *Kiobel*. It also represents an important step towards ensuring that foreign victims of environmental torts will be able to rely on the ATS. By leaving the remedy for international law violations to the federal judiciary, both the plaintiff and defendant can be assured that a fair-minded and experienced panel of judges will determine the scope of liability.

2. *Doe*

In *Doe*, the D.C. Circuit recognized corporate liability on the grounds that "neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations."[110] Prior to the suit, defendant Exxon Mobil Corporation ("Exxon") had been engaged in the extraction of natural gas in the Aceh province of Indonesia.[111] Conflict between

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[105] *Id.* at 1020 (citing Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995)).
[106] *Id.* (citing, *inter alia*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422–23 (1964)).
[107] *Id.* at 1021 (citing The Malek Adhel, 43 U.S. (2 How.) 210, 233–34 (1844); The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40–41 (1825)).
[108] *Id.* at 1020–21.
[109] *Id.* at 1024.
[110] 654 F.3d 11, 15 (D.C. Cir. 2011).
[111] *Id.*

local villagers and Exxon ensued, resulting in a lawsuit against the corporation for murder, torture, sexual assault, battery, and false imprisonment under the ATS and Torture Victim Protection Act ("TVPA").[112]

With respect to corporate liability, the court, echoing *Flomo*, began by emphasizing the important distinction between causes of action and remedies:

> It is clear from the fact that the law of nations, outside of certain treaties . . . creates no civil remedies and no private right of action that federal courts must determine the nature of any remedy in lawsuits alleging violations of the law of nations by reference to federal common law rather than customary international law.[113]

The majority maintained that *Sosa* "instructs that the substantive content of the common law cause of action . . . in ATS cases must have its source in customary international law," but did not address the question of "whether a corporation can be made to pay damages for the conduct of its agents in violation of the law of nations."[114]

The court then ascertained from historical sources that corporate liability is consistent with the purpose of the ATS.[115] Under the Articles of Confederation, the court noted, the federal government was unable to "remedy" violations of the law of nations.[116] In response, the Continental Congress adopted a resolution asking the States to provide "expeditious, exemplary, and adequate punishments" for violations of safe conduct, the immunities of ambassadors, and treaties, among others.[117] This resolution is considered the "direct precursor" to the ATS.[118] Concern over the

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[112] *Id.*

[113] *Id.* at 41–42. To support its assertion that international law creates no civil remedies, the court referenced, *inter alia*, the works of Professor Louis Henkin, "a leading authority on international law," who explains that "international law establishes rights, duties, and remedies for states against states . . . [but] does not require any particular reaction to violations of law." *Id.* (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 245–46 (1996)).

[114] *Id.* at 41.

[115] *Id.* at 43.

[116] *Doe*, 654 F.3d at 43.

[117] *Id.* at 43–44 (citing 21 Journals of the Continental Congress 1774–1789 1136–37 (Gaillard Hunt ed., 1912)).

[118] *Id.* at 44 (citing Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 477 (1989)).

States' ability to address violations of the law of nations, however, manifested itself during the Constitutional Convention, causing Alexander Hamilton to remark, "the federal judiciary ought to have cognizance of all causes [of action] in which the citizens of other countries are concerned."[119] Consequently, passage of the ATS in the Judiciary Act of 1789 filled the "gap" in federal subject-matter jurisdiction involving violations of the law of nations and treaties.[120] Thus, in summarizing the origins and purposes of the ATS, the court noted:

> [P]rior to the Constitutional Convention, when the new nation was at risk of losing respect abroad because it could not respond to violations of the law of nations, the Founders and the First Congress recognized that the inability to respond to such violations could lead to the United States' entanglement in foreign conflicts when a single citizen abroad offended a foreign power by violating the law of nations.[121]

Corporate liability would also be consistent with the ATS, the court explained, because corporate liability "in tort" was a prominent tort law concept by 1789.[122] Citing Lord Mansfield and early state Supreme Court cases, the court concluded that the notion of corporate liability "would not have been surprising to the First Congress that enacted the ATS."[123]

In its third phase of analysis, the court again approached *Kiobel* head-on, asserting that the law of nations does not condone corporate immunity for human rights violations.[124] For support, the court pointed to an International Criminal Tribunal for the Former Yugoslavia ("ICTY") holding, which defined crimes against humanity as requiring acts "instigated" by "any organization or group," as well as "numerous international treaties that explicitly state that juridical entities should be liable for violations of the law of nations."[125]

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[119] *Doe,* 654 F.3d at 45 (citing THE FEDERALIST NO. 80, at 494, 495 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888)).
[120] *Id.* at 45–46.
[121] *Id.* at 46.
[122] *Doe*, 654 F.3d at 47–48.
[123] *Id.*
[124] *Id.* at 48–49.
[125] *Id.* (citing Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber Opinion and Judgment, ¶¶ 654–55 (May 7, 1997); Brief of *Amici Curiae* International Law Scholars in Support of Plaintiffs-Appellants-Cross-Appellees at 7–10, Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268 (2d Cir. 2011)).

The court then charged defendant Exxon and the *Kiobel* majority with "misread[ing]" footnote twenty in *Sosa*.[126] Specifically, the court explained Justice Souter's comparison in footnote twenty of *Tel-Oren* and *Kadic* as confirming that, with respect to identifying proper defendants under the ATS, international law should only be consulted to the extent that it distinguishes between public and private actors.[127] Both cases, according to the court, "addressed whether certain forms of conduct were violations of international law only when done by a state actor . . . and not when done by a private actor."[128] However, the court noted that neither *Tel-Oren* nor *Kadic* "considered a dichotomy between a natural and a juridical person, even though *Tel-Oren* involved a juridical defendant, the Palestinian Liberation Organization."[129] Thus, the question addressed in footnote twenty was not whether corporations could be liable under the ATS, but rather whether "the violated norm is one that international law applies only against States" or against both States and "private actors."[130] The key takeaway from footnote twenty, then, is that, contrary to the *Kiobel* majority's view, *Sosa* does not provide conclusive guidance on which body of law courts must look to determine whether corporate liability exists in a given situation.[131]

Answering the question left open by footnote twenty, the court found that "technical accoutrements" to causes of action under ATS, such as corporate liability and agency law, should come from *federal common law*, not customary international law.[132] Support for this conclusion, the court found, derives from *Sosa*'s recognition that "the tort cause of action under the ATS is derived from federal common law."[133]

Even if international law did control the issue, the court continued, support for corporate liability exists in this body of law.[134] First, echoing the majority in *Flomo*, the court found that the Allies embraced corporate liability during the Nuremberg Tribunal proceedings with respect to I.G. Farben, a German company that supported the Nazi regime.[135] Like Judge

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[126] *Id.* at 50.
[127] *Id.*
[128] *Doe*, 654 F.3d at 50.
[129] *Id.*
[130] *Id.* at 51 (quoting Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 166 (2d Cir. 2010) (Leval, J., concurring)).
[131] *Id.*
[132] *Id.*
[133] *Id.* (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 720–21 (2004)).
[134] *Doe*, 654 F.3d at 51–52.
[135] *Id.* at 52.

Posner in *Flomo*, the court cited Council Control Law No. 9, which found that I.G. Farben "knowingly and prominently" supported the German war effort and resulted in the entity's dissolution.[136] Thus, according to the court, I.G. Farben's demise at the hands of the international community affirmed the existence of corporate liability in international law to the same extent that the Nuremberg trials established individual liability for crimes against humanity.[137] As the court put it:

> [T]he corporate death penalty enforced against I.G. Farben was as much an application of customary international law, on which Control Council Law No. 9 was based, as the sentences imposed by the tribunals themselves: the Allies determined that I.G. Farben had committed violations of the law of nations and therefore destroyed it.[138]

Second, the court found that *Kiobel* had overlooked "general principles" of law, which support corporate liability, as a "proper source" of customary international law in its analysis.[139] General principles, the court explained, "become international law by [their] widespread application domestically by civilized nations."[140] Evidence of corporate liability as a general principle of law arises from the fact that "no domestic jurisdiction exempts legal persons from liability," according to an amicus brief filed in the *Kiobel* litigation, and is confirmed by International Court of Justice rulings.[141]

Like *Flomo*, the majority's conclusion in *Doe* that corporations can be held liable under the ATS represents an important step towards holding corporations accountable for environmental damage in foreign countries. *Doe* compliments *Flomo* in challenging *Kiobel*'s premise that the Nuremberg proceedings were limited to individuals and expands the corporate liability analysis by delving deeper into the ATS's history and the

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[136] *Id.*
[137] *Id.*
[138] *Id.* (citing Brief of *Amici Curiae* Nuremberg Scholars in Support of Plaintiffs-Appellants-Cross-Appellees' Petition for Rehearing and for Rehearing En Banc at 11–12, Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268 (2d Cir. 2010)).
[139] *Id.* at 53.
[140] *Doe*, 654 F.3d at 54 (citing BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 24 (2006); H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 33–35 (1927); F.A. Mann, *Reflections on a Commercial Law of Nations*, 33 BRIT. Y.B.I.L. 20, 34–39 (1957)).
[141] *Id.* at 53 (citing Case Concerning The Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 38–39 (Feb. 20)).

Supreme Court's reasoning in *Sosa*. When adjudicating the corporate liability issue in *Kiobel*, the Supreme Court will be hard-pressed to ignore *Flomo* and *Doe*'s comprehensive and persuasive analyses.

D. How Should the Supreme Court Rule?

The three cases discussed above—*Kiobel*, *Flomo*, and *Doe*—took the following factors into consideration in analyzing corporate liability: the plain language of the statute; the history and purpose of the ATS; the Supreme Court's approach in *Sosa*; and customary international law. While the courts raised important arguments with respect to each factor, the most important factor and the one that should be central to the Supreme Court's analysis in the forthcoming *Kiobel* opinion is the *history and purpose* of the ATS—i.e., Congress's intent in passing the statute.

This is so for several reasons. First, the plain language of the ATS is vague, and the statute lacks a clear legislative history.[142] Second, in *Sosa* the Supreme Court focused extensively on history and purpose in concluding that the ATS gave federal courts jurisdiction over a limited set of claims without the need for further congressional action and in fashioning a rule for recognizing emerging norms of international law under the statute. Third, the circuit courts' inquiries into customary international law were inconclusive, with each side providing valid evidence in favor of or against corporate liability. Thus, focusing primarily on the history and purpose of the ATS offers the best rubric for deciding whether and to what extent corporations should be held liable under the statute.

Surveying the history and purpose of the ATS reveals that corporate liability is consistent with Congress's goals in passing the statute, as the court in *Doe* found.[143] Both the Supreme Court in *Sosa*[144] and the D.C. Circuit in *Doe*[145] identified the First Congress's desire to avert foreign affairs crises by providing adequate judicial remedies for violations of the law of nations and U.S. treaties as the primary impetus for passing the ATS. To support this position, both cases also made reference to several specific events that exemplified the purpose of the ATS in this context. For instance, in 1787, a New York policeman entered the residence of the Dutch Ambassador and arrested one of his servants, a violation over which

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[142] *See, e.g.*, *Doe*, 653 F.3d at 43 (noting the "brevity of the text of the ATS and the absence of a formal legislative history" and the lack of distinction "among classes of defendants").
[143] *See id.*
[144] Sosa v. Alvarez-Machain, 542 U.S. 692, 715–19 (2004).
[145] *Doe*, 654 F.3d at 46.

the federal government did not have jurisdiction.[146] As a result, the success of the Ambassador's claim depended on whether the common law recognized the intrusion as a breach.[147] The absence of a clear remedy for such a sensitive incident caused both James Madison and Alexander Hamilton to express concern over the likelihood of negative foreign affairs repercussions if the federal government did not offer appropriate redress for such violations.[148] Furthermore, in the "Sierra Leone Affair" of 1794, a U.S. citizen was accused of helping a French privateer attack and plunder the British colony of Sierra Leone during a war between Britain and France.[149] Attorney General William Bradford issued an opinion on the matter a year later, finding that the Sierra Leone Company could sue under the ATS.[150]

These examples illustrate that Congress's main purpose in passing the ATS was to avoid foreign affairs crises resulting from violations of the law of nations.[151] Corporate liability is consistent with this goal because corporations would have been just as capable of damaging international relations as an individual at the time of the ATS's passage.[152] As the court in *Doe* put it:

> The historical context, in clarifying the text and purpose of the ATS, suggests no reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e., corporations, to do so.[153]

This quote succinctly and elegantly captures the crux of the corporate liability issue. Since the passage of the ATS, U.S. corporations have multiplied and expanded their presence to countries around the world.[154] They

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[146] *Id.* at 45 (citing Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 641 (2002)).
[147] *Id.*
[148] *Id.*
[149] *Id.* at 23, 47.
[150] *Id.* at 47 (citing 1 U.S. Op. Att'y Gen. 57, 58–59 (1795)).
[151] *See supra* notes 144–45 and accompanying text.
[152] *See, e.g.*, *Doe*, 654 F.3d at 43.
[153] *Id.* at 47.
[154] *E.g.*, *Global Presence*, DUNKIN' DONUTS, http://www.dunkindonuts.com/content/dunkindonuts/en/company/global.html (last visited Apr. 2, 2013) (operating in 30 countries outside of the U.S.); *Global Presence*, RAYTHEON, http://www.raytheon.com/ourcompany/global/ (last visited Apr. 2, 2013) (doing business with customers in eighty nations while maintaining offices in nineteen); *Our Locations*, in *Our Story*, WALMART, http://corporate

provide a variety of services and goods in foreign consumer markets and employ thousands upon thousands of people abroad. While such corporations are in a position to help the United States achieve foreign policy goals by establishing close ties with host nations, they are also in a position to cause problems, not the least of which could be entangling the United States in an international relations crisis. Thus, ensuring that foreign nationals have sufficient redress in U.S. courts is just as important today as it was in 1789.

III. ENVIRONMENTAL CLAIMS UNDER THE ATS

Even if the Supreme Court upholds corporate liability in *Kiobel*, the question remains whether victims of *environmental harm* can rely on the ATS to hold corporations liable for their actions. This section examines the current status of environmental ATS cases under both prongs of the statute.

A. "Law of Nations"

The majority of environmental ATS cases fall under the "law of nations" prong,[155] yet none have been successful thus far.[156] This has forced commentators to conclude that, at least for the moment, international environmental law norms have not sufficiently crystallized to pass *Sosa*'s test.[157] As such, victims of environmental harm need to know when international environmental law norms will become sufficiently concrete. What

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.walmart.com/our-story/locations (last visited Apr. 2, 2013) (boasting operations in twenty-seven nations worldwide).

[155] *See, e.g.*, Jaeger, *supra* note 39, at 521 ("The large majority of ATS cases, including those concerned with environmental harm, were brought under the 'law of nations' prong of the ATS.").

[156] *See id.* at 526, 535. While none has yet been successful, it should be noted that litigation in *Sarei v. Rio Tinto, PLC*, a case involving allegations of environmental harm resulting from defendant's mining operations in Papua New Guinea, is ongoing in the Ninth Circuit where most recently the court referred the matter to mediation. *See* Sarah A. Altschuller, *Ten Years and Counting: Ninth Circuit Refers Sarei v. Rio Tinto to a Mediator*, CORPORATE SOC. RESPONSIBILITY & THE LAW (Nov. 2, 2010), http://www.csrandthelaw.com/2010/11/articles/litigation/alien-tort-statute/ten-years-and-counting-ninth-circuit-refers-sarei-v-rio-tinto-to-a-mediator/.

[157] *See, e.g.*, Jaeger, *supra* note 39, at 534 ("Applying *Sosa*'s standard to international environmental law norms it seems clear that they do not yet pass the test of universal recognition comparable to 18th century norms; for now they cannot support an environmental ATS claim under the 'law of nations' prong.").

follows is an assessment of several emerging environmental and human rights norms that have featured prominently in ATS environmental litigation involving corporations.[158]

1. Cross-Border Pollution

Cross-border pollution refers to the international environmental law principle that states are responsible for ensuring that the effects of natural resource exploitation within their borders do not cause environmental damage in other states.[159] Now considered part of customary international law, this principle has appeared in the 1941 *Trail Smelter Arbitration* between the U.S. and Canada, International Court of Justice opinions, Principle 21 of the 1972 Stockholm Declaration, and Principle 2 of the 1992 Rio Declaration.[160]

In *Amlon Metals, Inc. v. FMC Corp.*, a case involving allegedly toxic shipments of copper residue from the U.S. to the United Kingdom, the district court for the Southern District of New York held that plaintiff Amlon could not rely on Principle 21 to allege an ATS violation because it lacked specificity by only referring "in a general sense to the responsibility of nations."[161]

Likewise, in *Beanal v. Freeport-McMoran, Inc.*, which involved alleged environmental abuses by defendant mining corporation in Indonesia, the district court for the Eastern District of Louisiana held that while Principle 21 and Principle 2 were "sufficiently substantive" to establish "the basis of an international cause of action," they did "not constitute international torts for which there is a universal consensus in the international community as to their binding status and their content."[162] Furthermore, the court noted that these principles apply only to state action and

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[158] For some examples of ATS environmental litigation, see *id.* at 526–34 (discussing five separate cases involving corporations where the plaintiff alleged either environmental or human rights torts or both); Daniel Bodansky & Mary Manous, *International Environmental Law in U.S. Courts*, *in* INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL COURTS, at 243–45 (Michael Anderson & Paolo Galizzi eds., 2002).

[159] *See, e.g.*, SUMUDU A. ATAPATTU, EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW *xxiv*, 2 (Transnational Publishers, Inc., 2006) (citing Principle 21 of the Stockholm Declaration and discussing the emergence of cross-border environmental issues).

[160] *See id.* at *xxiv*, 2–5. The I.C.J. cases referred to above include the Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. 4, and the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226. *Id.* at 3–4.

[161] 775 F. Supp. 668, 669–71 (S.D.N.Y. 1991).

[162] 969 F. Supp. 362, 365, 383–84 (E.D. La. 1997).

thus, do not bind corporate entities.[163] On appeal, the Fifth Circuit affirmed the district court, finding that the plaintiff had failed "to show that [the principles] enjoy universal acceptance in the international community" as required by the ATS.[164] The court also concluded that the principles lacked specificity: "The sources of international law cited by Beanal and the *amici* merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts."[165]

Though the Fifth Circuit did not expressly address the lower court's finding regarding state action, it appears from the opinion that the court would not find a state action claim any more cognizable than the private action disposed of in the proceedings. However, the lack of clarity on this point and the fact that only one circuit has spoken on the subject perhaps leaves the door open to an aiding-and-abetting[166] or state action[167] claim under the right set of facts.

Such facts were at issue in *Arias v. Dyncorp* where Ecuadorian villagers brought an ATS suit for harm resulting from herbicide sprayed in Colombia by the defendant to eradicate cocaine and heroine farms.[168] Dyncorp had contracted with the U.S. State Department to provide these services as a part of Plan Colombia, a Congressionally approved counter-narcotics campaign.[169] Tragically, the spraying caused extensive damage to both crops and farm animals, forcing many inhabitants to flee their

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[163] *Id.* at 384.
[164] 197 F.3d 161, 167 (5th Cir. 1999).
[165] *Id.*
[166] Aiding and abetting is a theory used by ATS plaintiffs to hold "non-state actors" liable for tortious conduct committed primarily by state actors, especially when the latter will likely be protected by the act of state doctrine or Foreign Sovereign Immunities Act. *See generally* Ryan S. Lincoln, Note, *To Proceed with Caution? Aiding and Abetting Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 604 (2010). Both the Second and Ninth Circuits have recognized aiding and abetting as a means of holding corporations liable under the ATS. *E.g.*, *id.* at 605–10. *See also* Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007), and Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009).
[167] The state action theory arises when courts must decide whether private actors can be held liable under the ATS for violations of international law norms that traditionally applied only to state actors. *See, e.g.*, Jessica Priselac, Note, *The Requirement of State Action in Alien Tort Statute Claims: Does* Sosa *Matter?*, 21 EMORY INT'L L. REV. 789, 792 (2007). Specifically, the state action theory provides a mechanism for imputing the actions of private parties to a state. *Id.*
[168] 517 F. Supp.2d 221, 223 (D.D.C. 2007).
[169] *Id.*

homes.[170] In denying defendant's motion to dismiss, the court found that there was a genuine issue of material fact as to whether Dyncorp's actions violated "numerous treaties and international agreements."[171] Furthermore, the court found that the plaintiff had alleged sufficient facts to state a claim for state action based on the contract between the State Department and Dyncorp.[172]

The question derived from this case is whether plaintiffs could have sustained a cause of action under the ATS based on Principle 21 as opposed to specific "treaties and agreements." To the extent that a court would be willing to find that Principle 21 passed the *Sosa* test for specificity and acceptance, it appears from the approach to state action in *Dyncorp* that a corporation could be liable for cross-border pollution even though Principle 21 traditionally applies to only state actors.

Thus, the cross-border pollution principle appears to provide a possible avenue for plaintiffs but one limited to situations where the corporate defendant has been working closely with the government.

2. Sustainable Development

Sustainable development is an umbrella term covering certain substantive and procedural elements aimed at ensuring the responsible stewardship of natural resources and the environment.[173] These include, *inter alia*, the "rights of future generations; sustainable use of natural resources; equitable use of natural resources; . . . the integration of environment and development . . . [and] the right to participate in the decision-making process."[174] Sustainable development appears in international instruments ranging from the United Nations Convention on Law of the Sea ("UNCLOS") to the United Nations Framework Convention on Climate Change ("UNFCC").[175]

ATS plaintiffs have invoked the right to sustainable development and its elements in several cases against corporations to date. For example, in *Flores v. Southern Peru Copper, Corp.*, a case in which the defendant's mining operations allegedly caused environmental damage and lung disease, the district court for the Southern District of New York found that

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[170] *Id.* at 223–24.
[171] *Id.* at 227.
[172] *Id.* at 228.
[173] *See, e.g.*, ATAPATTU, *supra* note 159, at 93.
[174] *Id.*
[175] *Id.* at 140.

plaintiffs failed to "demonstrat[e] that high levels of environmental pollution within a nation's borders, causing harm to . . . development, violate well-established, universally recognized norms of international law."[176] Plaintiffs did not allege sustainable development violations on appeal.[177]

Commentators have responded to criticisms that sustainable development lacks a concrete definition by pointing out that the concept is an umbrella term and analyzing its legal status requires viewing each element in isolation.[178] Such an approach reveals that "some strands of sustainable development do indeed have normative effect."[179] For instance, Atapattu argues that the principle of integration, which includes environmental impact assessments, "has received sufficient state practice to be considered normative."[180] She also claims that the procedural elements of sustainable development—access to information, participation in the decision-making process, and the right to remedies—have attained the status of customary international law.[181] It is unclear whether an ATS plaintiff could bring suit for a violation of such norms. However, in *Sosa*, the Supreme Court "hinted that it might be amenable to recognizing an exhaustion requirement as implicit in the [ATS]."[182] The Ninth Circuit refused to recognize such a requirement in *Sarei v. Rio Tinto, PLC*, noting that the "Supreme Court has not addressed whether the methodology it employed in *Sosa* to identify some substantive international norms as falling within the [ATS's] jurisdictional grant is applicable to procedural and other nonsubstantive customary law norms."[183] Thus, it remains to be seen whether ATS plaintiffs could rely on certain elements of the right to sustainable development.

3. Rights to Life, Health, and the Environment

The rights to life, health, and the environment are first, second, and third "generation" human rights respectively that frequently arise in the context of environmental harm.[184] ATS plaintiffs have not fared

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[176] 253 F. Supp. 2d 510, 512, 525 (S.D.N.Y. 2002) (internal quotations omitted).
[177] Flores v. S. Peru Copper, Corp., 414 F.3d 233, 238 n.3 (2d Cir. 2003).
[178] *See, e.g.*, ATAPATTU, *supra* note 159, at 182.
[179] *Id.*
[180] *Id.* at 183.
[181] *Id.* at 184.
[182] Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1213 (9th Cir. 2007) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004)).
[183] *Id.* at 1213, 1221.
[184] *See, e.g.*, Jaeger, *supra* note 39, at 524–25.

well under these theories, but Jaeger argues that first generation human rights "are most likely to pass the *Sosa* standard of universal recognition among nations."[185]

In *Flores v. Southern Peru Copper Corp.*, the Second Circuit held that plaintiff's right to life and right to health claims were "insufficiently definite to constitute rules of customary international law."[186] Specifically, the court described these rights as "vague and amorphous" and "utterly fail[ing] to specify what conduct would fall within or outside of the law."[187]

Echoing these concerns, the district court for the Central District of California in *Sarei v. Rio Tinto, PLC* held that neither the right to life nor health constituted a "specific, universal, and obligatory norm of international law" and that plaintiffs' expert failed to "detail what type of conduct violates [them]."[188] Plaintiffs did not appeal the district court's findings on these issues.[189] Thus, to the extent that these rights do not become more concrete, it is unlikely that they will provide feasible avenues for recovery under the ATS.

Since *Sosa*, ATS plaintiffs alleging human rights violations have enjoyed a reasonable degree of success.[190] By contrast, "victims of environmental harms have been among the least successful."[191] The primary obstacle for environmental plaintiffs has been *Sosa*'s law of nations "definiteness" test.[192] This has prompted some commentators to dismiss environmental tort claims in ATS cases in favor of alternative recovery theories, such as "racial discrimination."[193]

B. "Treaty of the United States"

Instances of environmental ATS claims based on treaties of the United States are far fewer than those under the "law of nations."[194] As

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[185] *Id.* at 536.
[186] 414 F.3d 233, 254 (2d Cir. 2003).
[187] *Id.* at 254, 55.
[188] Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116, 1158, 1160 (C.D. Cal. 2002).
[189] Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1200 (9th Cir. 2007).
[190] *See* Sarah M. Morris, Note, *The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims After* Sarei *and* Sosa, 41 COLUM. HUM. RTS. L. REV. 275, 276 (2009).
[191] *Id.*
[192] *See, e.g.*, *id.* ("*Sosa's* strict standard means that such claims are unlikely to succeed in the future.").
[193] *See, e.g.*, *id.* (arguing that *Sosa*'s barriers to environmental tort are too high and that plaintiffs should proceed under customary international law's prohibition of racial discrimination instead).
[194] *See* Jaeger, *supra* note 39, at 522.

described above, "[s]uch treaties need to create binding obligations, clearly encompass conduct of private actors, and have been ratified by the United States (or else be self-executing)."[195] Despite the lack of case law, commentators maintain that treaty claims are preferable to their law of nations counterparts.[196] The following is a brief survey of U.S. environmental treaties that could serve as the basis for an ATS claim.

1. International Convention for the Prevention of Pollution from Ships

Commentators argue that the International Convention for the Prevention of Pollution from Ships ("MARPOL") could form the basis for an ATS claim because it applies to private actors and is sufficiently specific.[197] MARPOL is a "multilateral environmental instrument" that seeks to reduce various forms of pollution from ships.[198] One-hundred sixty-one countries were parties as of December 2001.[199] MARPOL is composed of twenty Articles, of which the first (oil), second (noxious liquids carried in bulk), third (harmful substances carried in packaged form), fourth (garbage from ships), and sixth (air emissions) have entered into force in the United States, and five Annexes.[200] Congress implemented MARPOL via the Act to Prevent Pollution from Ships ("APPS").[201]

In general, MARPOL "permits each state to control discharges by its own ships, wherever they may be, even on the high seas, and also allows a state to enforce the MARPOL standards against all ships in its own territorial waters."[202] Violating MARPOL or the APPS entails both civil

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[195] *Id.* at 535.

[196] *See* James Boeving, *Half Full . . . Or Completely Empty?: Environmental Alien Tort Claims Post* Sosa v. Alvarez-Machain, 18 GEO. INT'L ENVTL. L. REV. 109, 135–36 (2005) (explaining that courts would look more favorably on the specificity provided by treaties and opportunity to interpret their text).

[197] *See, e.g.*, Jaeger, *supra* note 39, at 535; Boeving, *supra* note 196, at 137.

[198] *Selected Multilateral Environmental Instruments in Force for the U.S.*, EPA, http://www.epa.gov/history/topics/coop/#marpol (last updated Feb. 15, 2013).

[199] *International Treaties and Agreements*, THE BORDER CTR., http://www.bordercenter.org/chem/treaties.htm (last visited Apr. 2, 2013).

[200] International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1340 U.N.T.S. 184; *see also* JAMES E. MCCARTHY, CONG. RESEARCH SERV. RL34548, AIR POLLUTION FROM SHIPS: MARPOL ANNEX VI AND OTHER CONTROL OPTIONS 3 (2008), *available at* http://www.policyarchive.org/handle/10207/bitstreams/20051.pdf.

[201] *See* Act to Prevent Pollution from Ships (APPS) 33 U.S.C. §§ 1901 et. seq. (2006); *see also* Marjorie A. Shields, *Construction and Application of Act to Prevent Pollution from Ships (APPS), 33 U.S.C.A. §§ 1901 et seq.*, 38 A.L.R. Fed. 2d 565 at § 2 (2009).

[202] *See* Shields, *supra* note 201, § 2.

and criminal penalties, and offending ships can be held liable *in rem*.[203] Anyone who is or could be "adversely affected" by an APPS violation can bring suit against the alleged transgressor.[204] Such transgressors typically include corporate vessel owners or ship management companies while the United States plays the role of plaintiff enforcer.[205]

As noted by Jaeger and other commentators, MARPOL appears to provide an avenue for recovery under the treaty prong of the ATS because its provisions are specific and cover private actors; however, it is not clear that many incidents would trigger its application.[206] For instance, most of the environmental ATS cases discussed above occurred outside of U.S. territorial waters and did not involve discharges or emissions from U.S. flag vessels. Thus, MARPOL represents a possibly effective but narrowly defined tool for ATS plaintiffs.

2. Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region

The Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region ("Cartagena Convention")[207] is "a comprehensive, umbrella agreement for the protection and development of the marine environment" in the Caribbean region.[208] The Convention was adopted in 1983 and entered into force three years later.[209] Under its umbrella are three protocols addressing "oil spills, specially protected areas and wildlife and land-based sources and activities of marine pollution."[210]

The first, the Protocol Concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region may be relevant to ATS plaintiffs. This protocol has been ratified by the United States, Mexico, Belize,

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[203] *Id.* (citing 33 U.S.C. § 1908).
[204] *Id.*
[205] *See, e.g.*, *id.* § 3 (citing, *inter alia*, U.S. v. Petraia Maritime, Ltd., 483 F. Supp. 2d 34 (D. Me. 2007); U.S. v. Royal Caribbean Cruises, Ltd., 24 F. Supp. 2d 155 (D.P.R. 1997); U.S. v. Ionia Management S.A., 498 F. Supp. 2d 477 (D. Conn. 2007)).
[206] *See supra* note 197 and accompanying text.
[207] Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Mar. 24, 1983, 1506 U.N.T.S. 157.
[208] *About the Cartagena Convention*, under *The Caribbean Environment Programme*, UNITED NATIONS ENV'T PROGRAMME, http://www.cep.unep.org/cartagena-convention (last visited Apr. 2, 2013).
[209] *About the Cartagena Convention*, *supra* note 208.
[210] *About the CEP*, under *The Caribbean Environment Programme*, UNITED NATIONS ENV'T PROGRAMME, http://www.cep.unep.org/about-us (last visited Apr. 2, 2013).

Guatemala, Nicaragua, Costa Rica, Panama, the Dominican Republic, Colombia, Venezuela, Guyana, and French Guiana, among others.[211] Like MARPOL, the oil spill protocol refers directly to private parties and is specific about what type of behavior constitutes a violation:

> 1. Each Contracting Party shall establish appropriate procedures to ensure that information regarding oil spill incidents is reported as rapidly as possible, and shall, *inter alia*:
>
> > (a) require its appropriate officials, masters of ships flying its flag and persons in charge of offshore facilities operating under its jurisdiction *to report to it any oil spill incident involving their ships or facilities*;
> >
> > (b) request masters of all ships and pilots of all aircraft operating in the vicinity of its coasts *to report to it any oil spill incident of which they are aware*.[212]

However, a defendant in an ATS claim would inevitably point out that this section of the protocol appears to bind Contracting Parties (states) as opposed to private actors themselves. Furthermore, the limited geographic area covered by the protocol and limited subject matter—oil pollution incidents involving vessels—indicate that the treaty would cover a narrow set of circumstances.[213] Thus, the Cartagena Convention's oil spill protocol may offer ATS plaintiffs some assistance but only under the right set of facts.

The other two protocols suffer from the same restraints. For instance, the Protocol Concerning Specially Protected Areas and Wildlife ("SPAW"), which the United States and at least ten other countries have ratified,[214] provides that each Party (state) shall take measures to protect designated wildlife areas, including "the regulation or prohibition of *industrial activities* and of other activities which are not compatible with the uses that have been envisaged for the area by national measures and/or

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[211] *See Ratification of the Cartagena Convention & Oil Spills Protocol*, UNITED NATIONS ENV'T PROGRAMME, http://www.cep.unep.org/cartagena-convention/convention-and-oil-spills.png/view (last visited Apr. 2, 2013).

[212] Protocol Concerning Co-Operation in Combating Oil Spills in the Wider Caribbean Region, Art. 5(1)(a)–(b), Mar. 24, 1983, 22 I.L.M. 240, 242 (1983) (emphasis added).

[213] *See id.* at Arts. 2, 3.

[214] *Ratification of the SPAW Protocol*, UNITED NATIONS ENV'T PROGRAMME, http://www.cep.unep.org/cartagena-convention/ratification-spaw.png/view (last visited Apr. 2, 2013).

environmental impact assessments."[215] Likewise, the Protocol Concerning Pollution from Land-Based Sources and Activities ("LBS Protocol"), which has been ratified by the United States and at least four other countries,[216] provides that Contracting Parties (states) must take extractive industries and oil refineries, among other priority source activities, into account when formulating pollution prevention measures.[217] More specifically, it requires states to conduct environmental impact assessments in conjunction with "affected persons" when the state has "reasonable grounds to believe that a planned land-based activity . . . is likely to cause substantial pollution."[218] Though perhaps less certain in terms of private party obligations than the oil spill protocol, these two protocols arguably offer ATS plaintiffs some protection from damage caused by mining and oil corporations. However, like the oil spill protocol, any such protection would be limited to a narrow set of facts and subject to certain defenses.

3. Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal

Though it has yet to be ratified by the U.S., the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal ("Basel Convention")[219] also shows promise for certain ATS plaintiffs.[220] Not only has the Obama Administration indicated a willingness to support ratification,[221] but it also appears that the convention

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[215] Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Art. 5(k) (1990), *available at* http://www.cep.unep.org/cartagena-convention/spaw-protocol/spaw-protocol-en.pdf (emphasis added).

[216] *Ratification of LBS Protocol*, UNITED NATIONS ENV'T PROGRAMME, http://www.cep.unep.org/cartagena-convention/ratification-lbs.png (last visited Apr. 2, 2013).

[217] Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Annex I (1999), *available at* http://www.cep.unep.org/cartagena-convention/lbs-protocol/lbs-protocol-english.

[218] *Id.* Art. VII.

[219] Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126.

[220] *Basel Convention Ratifications*, BASEL CONVENTION, http://archive.basel.int/ratif/convention.htm (last visited Apr. 2, 2013).

[221] *See, e.g.*, David E. Markert & David B. Weinberg, *Implications of the Obama Administration's National Strategy for Electronics Stewardship*, THE METRO. CORPORATE COUNSEL, Nov. 2011, at 18A, *available at* http://www.metrocorpcounsel.com/pdf/2011/November/18A.pdf (noting that the national strategy supports ratification of the Basel Convention).

constitutes "customary international law" sufficient for an ATS "law of nations" claim.[222]

The Basel Convention's goal is to protect people and the environment from the health hazards associated with the "generation, management, transboundary movements and disposal of hazardous and other wastes."[223] Specifically, the Convention provides for the behavior of private actors: "[f]or the purposes of this Convention . . . 'Person' means any natural *or legal person* . . . 'Exporter' means any person under the jurisdiction of the State of export who arranges for hazardous wastes or other wastes to be exported."[224] Furthermore, the convention is clear about what type of behavior constitutes a violation: "[e]ach Party shall take the appropriate measures to . . . ensure that persons involved in the management of hazardous wastes . . . take such steps as are necessary to prevent pollution due to hazardous wastes . . . and, if such pollution occurs, to minimize the consequences thereof for human health and the environment."[225] Thus, to the extent the U.S. decides to ratify the convention or the federal courts determine its provisions constitute customary international law, the Basel Convention could function as an extremely useful tool for ATS plaintiffs under the right set of facts.

IV. MEASURES THE U.S. CAN TAKE TO MAKE THE ATS MORE POWERFUL

As demand for natural resources grows, corporations will continue to expand their mining, oil, gas, and other extraction operations around the world. As discussed above, environmental damage is an unfortunate consequence of these activities. In some cases, victims will be able to seek remedies at home, but in others adequate relief will not be available due to rule-of-law shortcomings.

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[222] *See, e.g.*, Raechel Anglin, Note, *International Environmental Law Gets Its Sea Legs: Hazardous Waste Dumping Claims Under the ATCA*, 26 YALE L. & POL'Y REV. 231, 248, 255 (2007) (arguing that the Basel Convention's "broad acceptance by the international community" demonstrates an "international consensus" that exporting hazardous waste to developing countries is a violation of customary international law cognizable under the ATS).
[223] *Welcome to the Website of the Basel Convention!*, BASEL CONVENTION, http://archive.basel.int/index.html (last visited Apr. 2, 2013).
[224] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Art. 2 (2010), *available at* http://archive.basel.int/text/17Jun2010-conv-e.pdf (emphasis added).
[225] *Id.* Art. 4(2)(c).

The ATS provides a mechanism, albeit an imperfect one, to assist in addressing this problem. If maintained in its current form, the statute may eventually be capable of addressing environmental claims as emerging international law norms continue to crystallize. However, it is unclear when this will happen and what the scope of available environmental claims ultimately will be. Moreover, the Supreme Court may uphold corporate immunity under the ATS in its forthcoming *Kiobel* opinion. Given the severity of the problem and the likelihood of continued uncertainty, the U.S. should take steps to strengthen the ATS by amending the statute to include environmental torts.

Amending the ATS to include environmental torts would be the most effective way to encourage corporate responsibility and provide victims a fair opportunity to seek redress in U.S. courts. Taking such action would be consistent with Congress's 1992 torture amendment to the ATS and its efforts to curb bribery abroad through the Foreign Corrupt Practices Act.[226] Finally, a recent bill in the Canadian Parliament, C-323,[227] providing for environmental torts offers a possible model for an ATS amendment and underscores how seriously countries in which multinational extraction companies are based are taking this issue.

A. The TVPA as a Model for an Environmental Torts Amendment to the ATS

Codifying an environmental tort cause of action under the ATS would not be the first time Congress has amended the statute to address a specific concern. In 1992, Congress passed the Torture Victim Protection Act ("TVPA"), a note amendment to the ATS providing a civil cause of action in American courts for torture committed abroad.[228] The TVPA provides in relevant part:

> [a]n 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

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[226] Tort Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)); Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, et seq. (2006).
[227] An Act to Amend the Federal Courts Act (International Promotion and Protection of Human Rights), R.S.Q. c. C-323 (Can.) (proposed legislation), *available at* http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5160018&file=4.
[228] Emily M. Martin, Note, *Torture, Inc.: Corporate Liability Under the Torture Victim Protection Act*, 31 N. ILL. U. L. REV. 175, 177 (2010) (citing 28 U.S.C. § 1350).

> (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.[229]

The TVPA also explicitly requires the exhaustion of remedies to ensure that plaintiffs pursue recourse locally before bringing suit in an American court.[230] Finally, the TVPA contains a ten-year statute of limitations,[231] specific definitions for "torture" and other key terms and phrases,[232] and a provision for standing to sue for legal representatives of the victim under certain circumstances.[233]

According to TVPA's legislative history, the amendment serves three primary purposes: (1) to provide a clear grant by Congress for a private right of action for torture to avoid foreign policy separation of powers issues; (2) to offer remedies to both foreign aliens and U.S. citizens tortured abroad; and (3) to "carry out the intent of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," which the U.S. ratified in 1990.[234] By contrast, the ATS's legislative history is largely unknown.[235] As a result, courts have reached differing interpretations on how the two statutes interact.[236] "The majority view is that the TVPA and the ATS provide two distinct causes of action," allowing plaintiffs to bring claims under both the ATS and the TVPA simultaneously.[237] The minority view is that "claims for torture and extrajudicial killing must be brought exclusively under the TVPA."[238]

The TVPA provides both the rationale and roadmap for an environmental torts amendment to the ATS. For instance, the first purpose of the TVPA is directly applicable to environmental torts. Like concerns about meddling with foreign policy in the torture context, courts have declined to adjudicate environmental torts cases due to their belief that the executive

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[229] Torture Victim Protection Act of 1991 § 2(a)(1)–(2).
[230] Ekaterina Apostolova, Note, *The Relationship Between the Alien Tort Statute and the Torture Victim Prevention Act*, 28 BERKELEY J. INT'L L. 640, 648 (2010).
[231] Torture Victim Protection Act of 1991 § 2(c).
[232] § 3(a).
[233] Apostolova, *supra* note 230, at 651.
[234] *Id.* at 642.
[235] *Id.* "The Supreme Court stated that there is a poverty of drafting history of the ATS which makes it fair to say that a consensus understanding of what Congress intended has proved elusive." *Id.* n.8 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 718–19 (2004)).
[236] *Id.* at 643.
[237] *Id.* at 645.
[238] *Id.* at 643.

branch would be better suited to handle the issue.[239] To address these concerns, Congress should provide an express grant of jurisdiction to the courts via an environmental tort amendment to the ATS.

The TVPA's second purpose, which focuses on extending benefits to U.S. citizens, also resonates in the ATS context. While it does not appear that many U.S. citizens are in danger of becoming victims of environmental harm abroad, an environmental ATS amendment could extend benefits to U.S. corporate defendants. For instance, under the current ATS scheme, corporate defendants are subject to a great deal of uncertainty in terms of facing liability due to competing views on which body of law—federal common law or international law—controls in a given situation.[240] Amending the ATS, by contrast, would clarify such issues and offer a degree of consistency, thereby helping corporations structure their behavior to avoid violations.

The third purpose behind the TVPA is carrying out the intent of a specific multilateral torture prevention treaty and is also applicable in the environmental tort context. Over the past several decades, the United States has engaged with the international community to promote anti-pollution goals.[241] Amending the ATS to provide additional protections against a variety of environmental harms would help ensure compliance with these and other treaties.

The TVPA also provides the roadmap for an environmental ATS amendment. Like the TVPA, an environmental amendment would benefit from specific provisions addressing who can be sued, who has standing to sue, distinct types of violations with definitions, and a statute of limitations. The corporate liability debate discussed above is just one example of the confusion surrounding the application of the ATS in its current form. Amending the statute along the same lines as the TVPA would enhance fairness and efficiency by providing clear rules to address the complexities surrounding environmental claims.

B. The Foreign Corrupt Practices Act

The idea of amending the ATS also finds support in prior congressional efforts to regulate U.S. corporate behavior abroad. For instance,

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[239] *See, e.g.*, Jaeger, *supra* note 39, at 532–33 (explaining that the trial court in *Sarei v. Rio Tinto, PLC* dismissed the plaintiffs ATS claims, including allegations of environmental harm, based on the act of state doctrine).

[240] *Compare* Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2010) *with* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011); *see supra* Parts II.B–C.

[241] *See, e.g.*, *Selected Multilateral Environmental Instruments in Force for the U.S.*, EPA, http://www.epa.gov/history/topics/coop/ (last updated Feb. 15, 2013).

in 1977, Congress passed the Foreign Corrupt Practices Act ("FCPA")[242] "making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business."[243] According to the Department of Justice ("DOJ"), the FCPA resulted from United States Securities and Exchange Commission ("SEC") findings in the mid-1970s that "more than 400 U.S. companies had paid hundreds of millions of dollars in bribes to foreign government officials to secure business overseas."[244] Since then, the statute has resulted in numerous criminal and civil enforcement actions, as well as spurring self-imposed compliance programs to avoid such problems.[245]

There are five elements that must be met to constitute a violation of the FCPA: (1) an appropriate actor—e.g., any individual, firm, officer, director, employee, or agent acting on behalf of the firm; (2) corrupt intent; (3) payment or offer to pay money; (4) an appropriate recipient—e.g., a foreign official, political party, or party official; and (5) a business purpose in paying the bribe.[246]

The FCPA and an environmental torts amendment to the ATS share much in common. In both cases, corporations seeking greater profits cause harm to the populations of foreign countries by engaging in behavior that is prohibited in the United States. While graft likely occurs more frequently than corporate-induced environmental disasters, the latter arguably produce greater harm. At worst, systematic bribery reinforces social inequalities by ensuring that those in power stay there and diminishes competition, the cost of which is passed on to consumers in the form of less efficient solutions and more expensive goods.[247] By contrast, environmental disasters not only demolish irreplaceable natural resources but also act as the catalyst for violence and bloodshed.[248]

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[242] Foreign Corrupt Practices Act, 15 U.S.C. 78dd-1, et seq. (2006).
[243] *Foreign Corrupt Practices Act*, UNITED STATES DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/ (last visited Apr. 2, 2013).
[244] UNITED STATES DEP'T OF JUSTICE, *A Resource Guide to the Foreign Corrupt Practices Act* 3 (2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.
[245] *Id.* at 4–7.
[246] *See id.* at 10–21.
[247] *See, e.g.*, Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 800–01 (2011) (explaining that bribery raises transaction costs, reduces participation in markets where bribery is prevalent, and increases the cost of goods of end-user consumers).
[248] *See, e.g.*, Jaeger, *supra* note 39, at 527–28 (noting plaintiff Indonesian villagers claims in *Beanal v. Freeport-McMoran* included both cultural genocide and human rights abuses, along with environmental torts).

If Congress believed that the problems presented by bribery deserved codification on the basis of the resulting harm, then environmental torts should receive the same treatment. The FCPA demonstrates that Congress is capable of identifying unacceptable corporate behavior abroad and remedying it with legislative action.

C. Canadian Legislation as a Model for an Environmental ATS Amendment

Canada, which is home to a number of multinational mining corporations, has recently witnessed vigorous debate on several pieces of legislation aimed at holding corporations liable for environmental damage resulting from their activities abroad.[249] One of these bills, C-323 (formerly C-354), is modeled on the ATS[250] and codifies specific environmental and human rights torts.[251] Specifically, C-323 provides that the Federal Court's jurisdiction shall include all civil cases for violations of international law or a treaty of Canada commenced by non-citizens and committed abroad, including, *inter alia*:

> (m) wanton destruction of the environment that directly or indirectly initiates widespread, long-term or severe damage to an ecosystem, a natural habitat or a population of species in its natural surroundings;
>
> (n) transboundary pollution that directly or indirectly brings about significant harm to persons living in an adjacent state or territory;
>
> (o) the failure of a person or government agency with direct knowledge of an impending environmental emergency to immediately and adequately alert persons whose life,

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[249] *See, e.g.*, Catherine Wilmarth, *Mining Megaliths in the Argentine Andes: Where Will Victims of Environmental Degradation Find Justice?*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 959, 961 (2012).

[250] *See, e.g.*, Mary Dirmeitis, *Bill C-323: A Tough on Crime Idea We Actually Like*, THIS MAGAZINE (Nov. 1, 2011) http://this.org/blog/2011/11/01/corporate-accountability-bill-c-323/.

[251] An Act to Amend the Federal Courts Act (International Promotion and Protection of Human Rights), R.S.Q. c. C-323 (Can.) (proposed legislation), *available at* http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5160018&file=4.

> health or property is seriously threatened by the environmental emergency.[252]

These provisions provide a model for Congress to consider should it decide to amend the ATS. However, C-323 is far from perfect. For example, the bill fails to define "wanton destruction" or "significant harm," among other key terms. While measuring environmental harm is a difficult task, Congress would be wise to provide specific definitions, as it did in the TVPA, to avoid excessive litigation over the meaning of such terms.

None of the Canadian bills addressing environmental torts have thus far become law,[253] though C-323 is currently under consideration by Parliament.[254] Despite support from various environmental groups, such legislation has met with strong resistance from the ruling conservative party and mining industry factions.[255] They argued that the legislation would hurt Canadian companies by making them less competitive.[256] It is likely that an environmental ATS amendment would face similar opposition in the U.S., but the political ramifications of such an effort are outside the scope of this paper. Thus, C-323 provides a model for Congress in considering an environmental amendment to the ATS and demonstrates the seriousness with which similarly situated countries are approaching the issue of corporate responsibility in developing countries.

CONCLUSION

The ATS has the potential to ensure greater corporate social responsibility in the environmental context abroad. However, it is a flawed mechanism in its current state. Even if the Supreme Court finds that corporations can be held liable under the ATS, it is unclear when environmental tort claims will be recognized as violations of the "law of nations" or when the United States will ratify more stringent environmental treaties. On the other hand, if the Court upholds corporate immunity or determines

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[252] *Id.* § 1(2)(m)–(o).
[253] *See, e.g.*, Wilmarth, *supra* note 249, at 965 n.43 (noting that Bill C-300 was defeated in October 2010); Dirmeitis, *supra* note 250 (describing how Member of Parliament Peter Julian has "resurrected" his previous Bill C-354 as Bill C-323).
[254] *E.g.*, 41st Parliament, 1st Session (June 2, 2011–Present), *LEGISinfo*, PARLIAMENT OF CANADA, http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5138027&View=0 (last visited Apr. 2, 2013) (noting that Bill C-323 was introduced and had its first reading in the House of Commons on October 5, 2011).
[255] *See, e.g.*, Wilmarth, *supra* note 249, at 985.
[256] *Id.*

that the ATS does not apply to events occurring in other countries, the statute will essentially be rendered ineffective as a tool for international environmental enforcement. Thus, under either scenario, Congress should take direct action by amending the ATS to provide a remedy for corporate-induced environmental harm in U.S. courts. This approach is not only consistent with the history and purpose of the ATS, but it is also in line with previous efforts by Congress to discourage torture through the TVPA and bribery through the Foreign Corrupt Practices Act.