RELIEVING THE VIGILANT DOORKEEPER: LEGISLATIVE REVISION OF THE ALIEN TORT STATUTE IN THE WAKE OF JUDICIAL LAWMAKING

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I. INTRODUCTION

To the victims of international human rights abuses, hope of judicial redress in United States federal courts hinges on the outcome of a pending U.S. Supreme Court case. In *Kiobel v. Royal Dutch Petroleum Co.*,[1] the Court will consider whether corporations may be sued in U.S. courts for extraterritorial violations of international law under the Alien Tort Statute (ATS).[2] The petitioners are Nigerian citizens alleging that a subsidiary of Royal Dutch Shell aided and abetted human rights abuses committed by the Nigerian government, including torture, crimes against humanity, and

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[1] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *reh'g en banc denied*, 642 F.3d 379 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 248 (2011), *cert. granted*, 132 S. Ct. 472 (2011).

[2] Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 76–77 (1789), codified at 28 U.S.C. § 1350 (2006) (also known as the Alien Tort Claims Act). Congress has made only minor amendments to the ATS since its passage. *See, e.g.*, JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 32118, THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS 5–7 (2003), *available at* http://www.policyarchive.org/handle/10207/bitstreams/1864.pdf [hereinafter ELSEA, ALIEN TORT STATUTE] (summarizing these textual changes).

arbitrary arrest and detention.[3] The reasons for pursuing a judgment against a multinational corporation rather than against several employees or even a subsidiary are numerous: often a corporation is easier to identify than its agents, has deeper pockets, and may be willing to settle earlier to avoid tarnishing its brand name by becoming entangled in lengthy litigation.[4]

While a pro-defendant ruling in *Kiobel* might leave victims of human rights abuses without a means of redress against multinational companies, some worry that a pro-plaintiff ruling will open the floodgates, resulting in a surge of claims under the ATS. This concern led the Supreme Court to advise lower courts analyzing ATS claims to engage in "vigilant doorkeeping."[5] But as the suits brought under the ATS continue to involve new actors, alleged violations, and more complex jurisdictional questions, the case law has become increasingly muddled.[6] Furthermore, there is growing concern that corporations will continue to exist on the legal periphery.[7] For example, in *Kiobel* the Second Circuit majority was skeptical of whether international law provided for corporations to be sued for committing human rights violations, even if the violations were serious atrocities.[8] These uncertainties call for Congress to be the voice on what constitutes a cognizable claim under the ATS, which until now, has been left to judges attempting to "breathe life into a [224]-year-old statute utilizing a murky historical record and uneven record of precedents."[9]

Enacted by the First Congress as part of the Judiciary Act of 1789, the single sentence of the ATS reads, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[10] However, while "the [ATS] identifies who the plaintiff must

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[3] *Kiobel*, 621 F.3d 111.

[4] *See* Douglas M. Branson, *Holding Multinational Corporations Accountable? An Achilles Heel in Alien Torts Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227, 228–29 (2011).

[5] Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

[6] *See infra* Section II.B.

[7] *See Kiobel*, 621 F.3d 111 at 149–50 (Leval, J., concurring).

[8] *See Kiobel*, 621 F.3d 111 at 118 (majority opinion); *see also* Lyle Denniston, Kiobel: *Made Simple*, SCOTUSBLOG (July 6, 2012), http://www.scotusblog.com/2012/07/kiobel-made-simple/ (explaining that the Supreme Court left open the question of whether a corporation can be sued under the ATS in *Sosa v. Alvarez-Machain*).

[9] Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT'L L. & POL'Y 119, 167 (2007).

[10] *See* Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 76–77 (1789), codified at 28 U.S.C. § 1350 (2006) (also known as the Alien Tort Claims Act); *see also* ELSEA, ALIEN TORT

be—the plaintiff must be an alien—it does not identify who the defendant may be,"[11] or other key components, such as what conduct is grounds for an ATS suit or where the alleged conduct must have occurred.[12] However, these issues are quickly coming to the forefront. In *Kiobel*, the Court has ordered briefing and is now considering an even broader issue—"whether American courts might ever hear disputes under the [ATS] for human rights abuses abroad, whether the defendant was a corporation or not."[13] Based on the first oral argument in *Kiobel*, held on February 28, 2012, of particular concern to the Supreme Court Justices seem to be "foreign-cubed cases,"[14] defined as those cases which involve "non-U.S. plaintiffs, non-U.S. defendants, and non-U.S. conduct."[15] These cases are "made possible in part by U.S. rules of personal jurisdiction that permit the assertion of jurisdiction over physically present defendants and over certain other defendants with minimum contacts in the forum."[16] In *Sosa v. Alvarez-Machain*,[17] the Court asserted that the ATS survived the *Erie Railroad Co. v. Tompkins*[18] test, "which held that federal courts lack authority to derive 'general' common law, because there remain 'limited enclaves in which federal courts may derive some substantive law in a common law way.'"[19] As Professor Chimène Keitner eloquently states:

> From the perspective of the presumption against extraterritoriality, the new question presented in *Kiobel* is whether that process of derivation itself transforms international law into U.S. law in a way that prohibits application of the resulting rules to conduct that occurred abroad, even if

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STATUTE, *supra* note 2 and accompanying text.

[11] Adam Liptak, *Court Debates Rights Case Aimed at Corporations*, N.Y. TIMES, Feb. 29, 2012, at A19 (quoting Edwin S. Kneedler, a deputy solicitor general).

[12] *See* 28 U.S.C. § 1350.

[13] Adam Liptak, *Supreme Court Seeks Clarification on Jurisdiction in a Human Rights Case*, N.Y. TIMES, Mar. 6, 2012, at A15.

[14] John B. Bellinger III, *Kiobel: Supplemental Briefs on Extraterritoriality Are In...*, LAWFARE BLOG (Aug. 14, 2012, 10:52 PM), http://www.lawfareblog.com/2012/08/kiobel-supplemental-briefs-on-extraterritoriality-are-in/ [hereinafter Bellinger, *Kiobel: Supplemental Briefs*].

[15] Chimène I. Keitner, *The Reargument Order in* Kiobel v. Royal Dutch Petroleum *and Its Potential Implications for Transnational Human Rights Cases*, ASIL INSIGHTS (Am. Soc'y of Int'l L., D.C.), Mar. 21, 2012, at 3, *available at* http://www.asil.org/pdfs/insights/insight120321.pdf.

[16] *See id.* (citing Burnham v. Superior Court of California, 495 U.S. 604 (1990)).

[17] Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

[18] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[19] *See* Keitner, *supra* note 15, at 4 (citing *Sosa*, 542 U.S. at 729).

the parties are subject to the personal jurisdiction of U.S. courts.[20]

In potentially answering the questions presented in *Kiobel*—whether corporations may be defendants under the ATS and whether the ATS reaches conduct outside of the country—the Court has the opportunity to overturn decades of precedent. If either question is answered in the negative, far fewer ATS claims will likely be filed in U.S. courts, as the vast majority of recent ATS cases involve both corporate defendants and extraterritorial acts. Take, for example, the following list of transnational corporations sued under the ATS in cases filed since 2000:[21]

- Blackwater, for allegedly injuring and killing Iraqi civilians; committing war crimes and summary execution; and negligent hiring, training, and supervision;[22]
- Caterpillar, for allegedly selling bulldozers to the Israeli military, which used them to demolish Palestinian homes;[23]
- Chiquita, for allegedly paying Colombian paramilitary groups to keep the company's banana plantations free of labor opposition and social unrest;[24]
- Coca-Cola, for allegedly assisting Columbian paramilitaries in murdering several union members;[25]
- DynCorp, for allegedly causing massive health problems, deaths, and environmental damage to agriculture while performing aerial spraying of herbicides on the Colombian side of the Ecuador/Colombia border as part of the U.S. government's cocaine and opium eradication program;[26]
- Exxon Mobil, for allegedly committing "murder, torture, sexual assault, battery, and false imprisonment" while securing its

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[20] *Id.*

[21] The list is generally taken and expanded upon from a list of corporate ATS cases compiled by the Am Law Daily. *See Corporate ATCA Cases*, AM LAW DAILY, http://amlawdaily.typepad.com/ATS%20Cases.pdf (last visited Feb. 16, 2013).

[22] *In re* Xe Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 576 (E.D. Va. 2009).

[23] Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *aff'd on other grounds*, 503 F.3d 974 (9th Cir. 2007).

[24] Julin v. Chiquita Brands Int'l, Inc. (*In re* Chiquita Brands Int'l, Inc.), 690 F. Supp. 2d 1296 (S.D. Fla. 2010).

[25] Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009), *abrogated on other grounds by* Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1706 n.2 (2012) (holding that corporations cannot be held liable under the Torture Victim Protection Act).

[26] Arias v. Dyncorp, 517 F. Supp. 2d 221 (D.D.C. 2007).

natural gas extraction facility in Indonesia;[27]

- Nestle, for allegedly buying cocoa from and providing services to Cote d'Ivoire cocoa farmers who engaged in forced child labor, slavery, torture, and inhuman treatment;[28]
- Pfizer, for allegedly working in partnership with the Nigerian government and failing to secure the informed consent of children or their guardians who were enrolled in a dangerous clinical trial of the drug Trovan;[29]
- Wal-Mart, for allegedly failing to adequately monitor its suppliers who were committing labor abuses in Bangladesh;[30] and
- Yahoo!, for allegedly providing the Chinese government with Internet records leading to the identification and alleged torture of a human rights activist.[31]

While not exhaustive, this list of cases helps to demonstrate how a ruling barring ATS claims against corporate defendants or involving extraterritorial conduct will substantially change the course of ATS litigation, since, as will be explained later, the ATS is primarily used by plaintiffs in situations in which customary international law or other federal statutes may not provide a cause of action.[32] Additionally, it is worth noting that these cases have resulted in little precedent: most resulted in settlement, were dismissed on jurisdictional grounds, or are stayed pending a decision in *Kiobel*.[33]

There is also a lack of consensus as to what conduct constitutes a "*jus cogens*" violation, which is a violation that is acknowledged by the international community of states as a norm that may not be violated by any state "through international treaties or local or special customs or even general customary rules not endowed with the same normative force."[34] Though the *Kiobel* decision may provide clarification on issues such as the

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[27] Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011).

[28] Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1064–67 (C.D. Cal. 2010).

[29] Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

[30] Doe v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009).

[31] Wang Xiaoning v. Yahoo!, Inc., 2007 U.S. Dist. LEXIS 97566, No. C 07-2151 CW (N.D. Cal. 2007).

[32] *See infra* Section II.B.

[33] *See Corporate ATCA Cases*, *supra* note 21.

[34] Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶153 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998), *available at* http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf.

scope of defendants and conduct liable under the ATS, it is unlikely to establish clear guidance as to all the complex issues that have been resolved without uniformity in the lower courts.[35] As it stands now, the *Sosa* Court's cautionary advice that courts engage in "vigilant doorkeeping"[36] has resulted in vastly different case resolutions, leaving both plaintiffs and defendants oblivious as to what situations warrant action under the ATS.[37]

According to the U.S. Chamber of Commerce's Institute for Legal Reform, roughly 150 ATS cases were brought against corporations from 1789 to 2010.[38] Regardless of the relatively small number of cases brought forward, corporations fear the potential consequences of an adverse holding in *Kiobel*. "[M]ore than two-dozen multinational corporations, business groups, and . . . countries" back Royal Dutch Shell in *Kiobel*, arguing that if corporations can be sued under the ATS, "it will exacerbate what they characterize as the existing flood of litigation."[39] However, Paul Hoffman, human rights lawyer and petitioner's counsel in *Kiobel*, replies that the filing of ATS cases against corporations has been more of a "trickle" than a flood.[40] Furthermore, the fear that courts will be flooded with ATS claims is unfounded, since only corporations with sufficient contacts in the United States will be sued in U.S. courts,[41] and under *Sosa*,[42] "only violations of legal rules that are sufficiently specific, universal and obligatory can be pursued under the statute."[43] And even then, courts have the added safeguards of "daunting pleading and evidentiary hurdles" that often prevent plaintiffs from surviving summary

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[35] *See* Denniston, *supra* note 8 (noting that lower courts have been issuing conflicting decisions concerning the liability of corporate defendants under the ATS).

[36] Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

[37] *See* Denniston, *supra* note 8.

[38] Jonathan Drimmer, U.S. Chamber Inst. for Legal Reform, Think Globally, Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases 5 (2010), *available at* http://www.instituteforlegalreform.com /sites/default/files/thinkgloballysuelocally.pdf.

[39] Nina Totenberg, *Human Rights Victims Seek Remedy at High Court*, NPR (Feb. 28, 2012), http://www.npr.org/2012/02/28/147507940/human-rights-victims-seek-remedy-at-high-court.

[40] *Id.*

[41] *See* Keitner, *supra* note 15.

[42] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

[43] Oona A. Hathaway, *A Permissible and Effective Way*, N.Y. Times (Feb, 29, 2012, 12:12 PM), http://www.nytimes.com/roomfordebate/2012/02/28/corporate-rights-and-human-rights /an-effective-way-to-hold-corporations-liable.

judgment.[44]

This Note argues that whatever clarification the *Kiobel* decision provides is likely to be too limited to resolve all of the uncertainties created by divergent court decisions in ATS litigation, and, thus, Congress should act in order to amend the ATS. Congress should clarify the defendants, conduct, and jurisdiction subject to ATS claims in U.S. courts rather than relying on judicial lawmaking. The following sections will assess the open questions that make the ATS deserving of clarification and recommend legislation and revisions to the ATS that are also workable standards for courts in the event that Congress chooses not to act.

Section II of this Note will discuss the early legislative history of the ATS, early litigation under the ATS, and contemporary understandings of the scope of the ATS. Section III will examine Senator Dianne Feinstein's proposed Alien Tort Statute Reform Act,[45] discuss its strengths and shortcomings, and detail the benefits of legislative action in general. Section IV will suggest that lawmakers strike a balance between the interests of potential defendants and human rights organizations by revising the ATS to require a nexus between the ATS violation and U.S. sovereign responsibility using Professor Thomas Lee's safe-conduct theory.[46] It will also discuss how the safe-conduct theory may be extended to corporate conduct through increased use of treaties and corporate governance. Finally, Section V will conclude this Note.

II. HISTORICAL BACKGROUND OF THE ATS

The Constitution grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[47] Congress responded by including the ATS in the Judiciary Act of 1789, giving U.S. district courts "original jurisdiction of any civil action by an alien for a tort . . . in violation of the law of nations or a treaty of the United States."[48] The history of the ATS does not necessarily illuminate its meaning, for two primary reasons. First, there is

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[44] *See id.*

[45] Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005).

[46] Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 880 (2006).

[47] U.S. CONST. art. I, § 8, cl. 10.

[48] *See* Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 76–77 (1789), codified at 28 U.S.C. § 1350 (2006) (also known as the Alien Tort Claims Act); *see also* text accompanying *supra* note 2.

little information about the First Congress's specific legislative intent in enacting the ATS,[49] and looking to the general intentions behind the Judiciary Act of 1789 is not particularly helpful, as the Act served an extremely broad function—providing for the composition and procedures of the federal judiciary.[50] Second, early case law under the ATS is sparse, as the statute "lay virtually dormant from its founding-era passage until the 1970s, when human rights groups representing victims of oppressive regimes began taking advantage of the law's broad language."[51] Thus, the sparse legislative history and lack of early case law leaves the ATS open to interpretation.

A. ORIGINS OF THE ATS AND EARLY LEGISLATION

The most widely accepted understanding is that the ATS was "intended by its 18th-century drafters to allow ambassadors and other foreign nationals to sue in federal courts for assaults or other offenses committed in violation of international law—acts that might cause diplomatic friction for the new American republic if left unaddressed by state courts."[52] At the time, violations of the law of nations were actionable at common law, and such offenses were thought to include violations of safe-conducts, infringements of the rights of ambassadors, and piracy.[53] In 1781, the Second Continental Congress "passed a resolution recommending that the states provide for a mechanism for the punishment of violations of the law of nations."[54] However, the Continental Congress itself had limited power to provide remedies for law of nations violations.[55]

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[49] *See infra* notes 52–69 and accompanying text.

[50] *See* Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 24 (2011).

[51] Mike Sacks, *Corporate Personhood Case Forces Supreme Court to Hack New Path*, HUFFINGTON POST (Feb. 27, 2012, 4:14 PM), http://www.huffingtonpost.com/2012/02/27/corporate-personhood-supreme-court-alien-tort-statute_n_1305226.html.

[52] *E.g.*, John B. Bellinger III, *A Noble Cause That Goes Too Far*, WASH. POST, Feb. 24, 2012, at A15 [hereinafter Bellinger, *Noble Cause*].

[53] *See* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 489–90 (1986) (discussing Blackstone's conception of the principal offenses against the law of nations).

[54] NIELS BEISINGHOFF, CORPORATIONS AND HUMAN RIGHTS: AN ANALYSIS OF ATCA LITIGATION AGAINST CORPORATIONS 113, (Peter Lang 2009), *available at* http://goo.gl/NAf5X.

[55] *See* Casto, *supra* note 53, at 490 ("[T]he Continental Congress had virtually no legislative powers.").

Scholars Gary Clyde Hufbauer and Nicholas K. Mitrokostas speculate that, in enacting the ATS, the First U.S. Congress sought to show European powers that the United States would act to prevent and provide remedies for breaches of customary international law, especially breaches concerning diplomats and merchants, after two famous founding-era "incidents of assault against foreign ambassadors on U.S. soil."[56] In 1784, Charles Julian de Longchamps, a French citizen, committed an assault and battery on Francis Barbe Marbois, the French Consul General and Secretary of Legation, in the streets of Philadelphia.[57] The Pennsylvania Supreme Court tried de Longchamps, finding him guilty of state common law crimes based on common law violations of the law of nations, but only after there was an international uproar over the inability of the Continental Congress to enforce the law of nations.[58] Additionally, in 1787, in the midst of state ratification conventions debating the Constitution and only fifteen months before the enactment of the ATS, John Wessel, a city constable, went to the residence of Pieter Johan van Berckel, the Dutch minister to the United States, and arrested one of his servants.[59] Ultimately, state law found Wessel guilty of violating the law of nations and provided the remedy, since the national government was not authorized to provide a remedy.[60]

Since a cause of action for law of nations violations was available under state law, the concern was not that state law was not capable of providing a remedy, but "that the federal government could not *guarantee* that a state would provide a forum to vindicate the rights of the offended alien."[61] On this view, the young United States government was signaling that it was not only willing, but determined, to commit its courts to enforce causes of actions for law of nations violations against aliens.[62]

Another theory is that the ATS was enacted "as a means of facilitating cross-border commerce in an anarchic world system of

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[56] GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 3 (2003), *available at* http://www.piie.com/publications/chapters_preview/367/iie3667.pdf.

[57] *See* Casto, *supra* note 53, at 491; *see also* Respublica v. De Longchamps, 1 U.S. 111, 111 (1784).

[58] Casto, *supra* note 53 at 492–93.

[59] *See id.* at 494.

[60] *Id.*

[61] Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 465–66 (2007) (emphasis added).

[62] *See* Hufbauer & Mitrokostas, *supra* note 56.

independent sovereigns."[63] Juridical entities, such as pirate ships and the East India Company, were subject to tort liability before the enactment of the ATS.[64] However, "under traditional state-based principles of international law" and without a "centralized enforcement authority," the safe-conduct obligation was enforceable only by an "offended sovereign's right to make war in the event of a breach."[65] Thus, the safe-conduct promise constituted a contract between the sovereigns, lessening the risk of war, and ensuring the U.S. courts would provide a means of redress in the event of injury inflicted abroad.[66]

In 1795, the Attorney General William Bradford was asked whether criminal prosecution was available against Americans who had taken part in the French plunder of a British slave colony in Sierra Leone.[67] Bradford was unsure but asserted that a tort action could be brought in federal court:

> But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.[68]

The *Sosa* Court interpreted Bradford's opinion to signal that he "understood the ATS to provide jurisdiction over what must have amounted to common law causes of action."[69]

The earliest case relying on the ATS was for an act of piracy.[70] In 1795, a French captain seized a Spanish ship bearing slaves and brought the ship into a South Carolina port.[71] The ship was carrying slaves that a

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[63] *See* Lee, *supra* note 46, at 880.

[64] *See, e.g.*, Skinner v. East India Co., (1666) 6 State Trials 710 (H.L.) 711 (Eng.); *see also* Susan Farbstein, Tyler Giannini & Anthony Clark Arend, Debate, *The Alien Tort Statute and Corporate Liability*, 160 U. PA. L. REV. PENNUMBRA 99 (2011), http://www.pennumbra.com /debates/pdfs/ATS.pdf [hereinafter Farbstein & Giannini, Closing Statement] (Farbstein & Giannini, Closing Statement).

[65] Lee, *supra* note 46, at 880–82.

[66] *Id.* at 882.

[67] Sosa v. Alvarez-Machain, 542 U.S. 692, 721 (2004) (citing 1 U.S. Op. Att'y Gen. 57 (1795)).

[68] 1 U.S. Op. Att'y Gen. 57, 59 (1795) (emphasis in original).

[69] *See Sosa*, 542 U.S. at 721.

[70] Linda A. Willett et al., *The Alien Tort Statute and Its Implications for Multinational Corporations*, BRIEFLY: PERSPECTIVES ON LEGISLATION, REGULATION, AND LITIGATION (National Legal Center for the Public Interest, D.C.), Sept. 2003, at 4.

[71] *Id.* (citing Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607)); *see also* Melvin H. Jackson, *Privateers in Charleston 1793-1796*, SMITHSONIAN STUDIES IN HISTORY AND TECHNOLOGY (Smithsonian Institute Press, D.C.), 1969, 1 at 42–83, *available at*

Spanish citizen had mortgaged to a British citizen.[72] Once the ship was in port, the British citizen's agent seized and sold the slaves; the captain sued the seizer of the slaves, demanding either the return of the slaves or payment as restitution.[73] The state common law court dismissed the action, holding that jurisdiction belonged to the district court in the admiralty because "the original cause arose at sea."[74] The seizer of the slaves claimed the district court did not have jurisdiction because the seizure was made on land; but the district court, fearing that if it "should refuse to take cognizance of the cause, there would be a failure of justice,"[75] noted that the ATS gave the district court in admiralty "concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States."[76] Under the law of nations, "the seizure of slaves on board an enemy ship on the high seas was declared to be part of a permissible 'prize' of war."[77] While the law of nations would adjudge neutral property to be restored to its neutral owner, and, thus, the slaves returned to the seizer of the slaves, the court noted as controlling a U.S. treaty with France, which directed that the slaves—or money from their sales—had to be restored to the captain because the French treaty stipulated that the property of friends [here France] found on board enemy vessels [those of Spain] was to be forfeited.[78] Thus, the case was resolved in accord with the terms of the treaty, and the ship and slaves were awarded to the captain as lawful prizes of war.[79] *Bolchos* was significant in "establish[ing] the precedent of providing a judicial forum for foreigners in order to enforce international law as it related to the conduct of individuals,"[80] but also in that the court considered both customary international law and treaty law as applicable to suits brought under the ATS.[81]

After *Bolchos*, the ATS laid nearly dormant in case law for almost

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http://www.sil.si.edu/smithsoniancontributions/HistoryTechnology/pdf_hi/SSHT-0001.pdf (providing details of the voyage).

[72] Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1,607).

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] ANIS F. KASSIM, THE PALESTINE YEARBOOK OF INTERNATIONAL LAW 1989 273 (1989), *available at* http://goo.gl/Abuvb.

[78] *Id.*; *see also* Beisinghoff, *supra* note 54, at 115.

[79] *See* KASSIM, *supra* note 77, at 273.

[80] Willett, *supra* note 70, at 4.

[81] *See* KASSIM, *supra* note 77 at 273.

170 years.[82] While the ATS did not make an appearance in courts during that time, in 1907, Attorney General Charles J. Bonaparte discussed the remedies that Mexican citizens might have for an American corporation's diversion of water from the Rio Grande, in violation of a treaty between the United States and Mexico.[83] Bonaparte asserted that the "statutes thus provide a forum and a right of action,"[84] likely intending that Mexican citizens would be able to bring a claim against the American corporation in U.S. courts under the ATS.[85]

The next major case under the ATS involved an international custody dispute.[86] In *Abdul-Rahman Omar Adra v. Clift*,[87] a 1961 federal case, the district court determined it had jurisdiction over a claim by a Lebanese national that his ex-wife, an Iraqi residing in the United States, and her husband, a U.S. citizen, violated the law of nations by refusing to deliver the parties' daughter to the plaintiff father, who had been awarded custody by a foreign court.[88] Ultimately, the court found that the father was entitled to custody of his daughter under foreign law and that the mother and stepfather had abducted the daughter in violation of the law of nations. However, the finding withstanding, the father was denied custody, because the court believed leaving the daughter in the mother's custody was in the daughter's best interests.[89] The court noted that "[d]espite [the ATS's] age, only six cases and one opinion of Attorney General Bonaparte . . . are cited in the annotations."[90] However, it believed jurisdiction under the ATS was proper, and noted that "[t]he importance of foreign relations to our country today cautions federal courts to give weight to such considerations and not to decline jurisdiction given by an Act of Congress unless required to do so by dominant considerations."[91]

Overall, it appears the First Congress intended for U.S. courts to have jurisdiction over offenses recognized by many early nations, such as

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[82] Lincoln Caplan, *Corporate Abuse Abroad, A Path to Justice Here*, N.Y. Times, Mar. 4, 2012, at SR10.

[83] 26 U.S. Op. Atty. Gen. 250, 252 (1907).

[84] *Id.* at 253.

[85] Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 596 (2002).

[86] *Id.* at 587.

[87] Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961).

[88] *Id.* at 859.

[89] *Id.* at 864, 866–67.

[90] *Id.* at 863.

[91] *Id.* at 865.

piracy and violations of ambassadorial rights,[92] but the relatively few cases brought in the first centuries after the ATS was enacted leave the outer limits of the legislation unclear.

B. CONTEMPORARY UNDERSTANDINGS OF THE SCOPE OF THE ATS

From the time of the ATS's enactment in 1789 until 1980, plaintiffs asserted jurisdiction under the ATS in twenty-one cases.[93] However, jurisdiction was sustained only in the two cases discussed above:[94] *Bolchos*[95] in 1795 and *Abdul-Rahman Omar Adra* in 1961.[96] Though not a case against a corporation, the landmark 1980 case *Filartiga v. Pena-Irala*[97] "opened the floodgates," and set the stage for later plaintiffs seeking to hold corporations liable under the ATS.[98] In *Filartiga v. Pena-Irala*, the United States Court of Appeals for the Second Circuit held that jurisdiction in the federal courts over a suit between two aliens was proper.[99] Additionally, it held: (1) that the ATS was a constitutional use of Congress's power because the law of nations is part of the federal common law and thus a claim based on the ATS constituted a federal question,[100] and (2) that contemporary law of nations includes a prohibition on state-sanctioned torture, as evidenced by multilateral treaties and domestic prohibitions on torture.[101]

Filed in 1997, *Doe v. Unocal Corp.* was the first case to bring an ATS claim against a corporation that survived a motion to dismiss.[102] The plaintiffs in *Unocal* were Burmese villagers who alleged that Unocal, through the use of private military, intelligence, or police forces, "used and continue[d] to use violence and intimidation to relocate whole villages and force farmers living in the area of the proposed pipeline to work on

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[92] *See* Casto, *supra* note 53 at 489.

[93] *See* PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE: LAW, HISTORY AND ANALYSIS 43 (2009).

[94] *Id.*; *see also supra* Section II.A.

[95] Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1,607).

[96] Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961).

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

[98] WILLIAM J. ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILARTIGA V. PENA-IRALA 5–6 (2007), *available at* http://goo.gl/gTdy7.

[99] *Filartiga*, 630 F.2d at 878.

[100] *Id.*

[101] *Id.* at 883–85.

[102] Farbstein & Giannini, Closing Statement, *supra* note 64.

the pipeline and pipeline-related infrastructure."[103] Unocal firmly argued that "it shouldn't be held liable for alleged abuses by the soldiers but acknowledged that they had a role in securing the pipeline corridor."[104] After eight years of litigation, the plaintiffs "settled with Unocal out of court for an undisclosed sum just prior to a jury being empanelled in a California state case that paralleled the federal [ATS]-based case."[105]

Between the early 1990s and the 2005 settlement in *Unocal*,[106] "about three dozen similar suits [were] filed . . . against other major U.S. corporations, including ChevronTexaco Corp., Ford Motor Co., and IBM Corp."[107] However, none of those suits "moved as far along in the judicial system as the *Unocal* suits."[108] *Unocal* marked a turning point in ATS litigation against corporations in that the battleground "was not whether corporations could be held accountable for violations of international law, but rather under what legal standard."[109] The court focused on the standard for corporations that aid and abet violations of international law, and debated "questions that became central to many corporate ATS cases in subsequent years: whether the mens rea for aiding and abetting should be drawn from international law or federal common law, and whether the applicable standard should be purpose or knowledge."[110]

The Supreme Court has only considered the ATS once before, "stepping into the fray in 2004"[111] while deciding *Sosa v. Alvarez-Machain*.[112] However, that case did not involve a corporation, and the Court primarily addressed the kinds of offenses that could trigger an ATS claim, rather than against which actors an ATS claim could be brought.[113] The Court left open the latter issue by noting in footnote 20 that, in imposing liability, it may be relevant to consider "whether international law extends the scope of liability for a violation of a given norm to the

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[103] Doe v. Unocal Corp., 248 F.3d 915, 920 (9th Cir. 2001).

[104] Lisa Girion, *Unocal to Settle Rights Claims*, L.A. Times, Dec. 14, 2004, at A1.

[105] Armin Rosencranz & David Louk, *Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 CHAP. L. REV. 135 (2005) (citing Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *district court opinion vacated*, 403 F.3d 708 (9th Cir. 2005)).

[106] *Id.*

[107] *See* Girion, *supra* note 104.

[108] *Id.*

[109] Farbstein & Giannini, Closing Statement, *supra* note 64.

[110] *Id.* (internal citations omitted).

[111] Sacks, *supra* note 51.

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

[113] *Id.* at 737–38.

perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[114] The circuits are split in their interpretations of this issue.

Three United States courts of appeals, including the Seventh Circuit in *Flomo v. Firestone Natural Rubber Co.*,[115] the D.C. Circuit in *John Doe VIII v. Exxon Mobil Corp.*,[116] and most recently, the Ninth Circuit in *Sarei v. Rio Tinto*,[117] have disagreed with the Second Circuit's holding in *Kiobel*,[118] finding that "the question of corporate liability is up to individual countries to determine and that the U.S. domestic law has long held corporations to account for the wrongs they commit."[119] Additionally, the Fifth and Eleventh Circuits have assumed that corporations are proper defendants under the ATS.[120] Therefore, five of the eleven federal circuit courts are in accord on this issue.

The Second Circuit, on the other hand, is an outlier, focusing on footnote 20 in *Sosa*,[121] and taking it to mean that courts must look to international law, not domestic law, for evidence as to whether or not corporations can be held liable for violations of the laws of nations.[122] Then, explaining that corporations have never been prosecuted, criminally or civilly, for violating customary international law, the Second Circuit concluded that there is no principle of customary international law that binds a corporation.[123] Because the statute only specifies who the plaintiff must be,[124] similar designation in the statute is needed as to who the defendant may be.

Sosa also presented but did not directly address the question of extraterritoriality because the alleged law of nations violations occurred in

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[114] *Id.* at 732 n.20; *see also id.* at 760 (Breyer, J., concurring) ("The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue.").

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

[116] Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011).

[117] Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011).

[118] *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *reh'g en banc denied*, 642 F.3d 379 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 248 (2011), *cert. granted*, 132 S. Ct. 472 (2011).

[119] Sacks, *supra* note 51.

[120] *See* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 163 (5th Cir. 1999); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

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

[122] *See Kiobel*, 621 F.3d at 128–30.

[123] *See id.* at 143–45.

[124] Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 76–77 (1789), codified at 28 U.S.C. § 1350 (2006) (also known as the Alien Tort Claims Act).

Mexico.[125] The United States argued, "the presumption against extraterritoriality applies to the ATS" and that the First Congress drafted the ATS to "open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations."[126] On the other hand, "[t]he *amici* professors of federal jurisdiction and legal history in *Sosa* argued that the First Congress intended the ATS to reach torts that occurred abroad"[127] and cited Attorney General William Bradford's opinion stating that injured companies or individuals could bring a civil suit for violations abroad under the ATS in U.S. courts.[128]

The primary argument against extraterritorial application of the ATS is that it "is contrary to the position of many foreign governments and inconsistent with international law principles of jurisdiction."[129] "In the past decade, the governments of Australia, Canada, China, Colombia, El Salvador, Germany, Indonesia, Israel, Papau New Guinea, Nigeria, South Africa, Switzerland, and the United Kingdom have objected formally to the extraterritorial application of the ATS,"[130] largely citing concerns about interference with sovereignty.[131]

However, some authors of the amicus briefs on the extraterritoriality issue suggest that sovereignty concerns are unfounded. For instance, "in both *Kiobel* and *Sosa*, the European Commission submitted *amicus* briefs confirming that ATS jurisdiction over foreign violations is 'likely to encounter relatively little resistance in the international community,' so long as it is exercised consistent with universal jurisdiction and domestic remedies are exhausted."[132] The primary argument for extraterritorial

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[125] Keitner, *supra* note 15. The term "extraterritoriality" refers to the applicability or exercise of a sovereign's laws outside of its territory.

[126] *Id.* (quoting Brief for the United States as Respondent Supporting Petitioner, 2003 U.S. Briefs 339 at *48–*49 (Jan. 23, 2004) (internal citation omitted)).

[127] *Id.* (citing Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents, 2003 U.S. Briefs 339 at *23–*25 (Feb. 27, 2004)).

[128] *Id.*

[129] John B. Bellinger III, *Stop Press: Supreme Court Orders Kiobel Reargued to Address Extraterritoriality*, LAWFARE BLOG (Mar. 5, 2012, 7:03 PM), http://www.lawfareblog.com /2012/03/stop-press-supreme-court-orders-kiobel-reargued-to-address-extraterritoriality/ [hereinafter Bellinger, *Court Orders Kiobel Reargued*].

[130] Brief for BP America et al. as Amici Curiae Supporting Respondents at 4, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011) (No. 10-1491), 2012 WL 3276506 at *5.

[131] *Id.* at 4, 2012 WL 3276506 at *6 (using Germany, the United Kingdom, and the Netherlands as examples).

[132] Sarah Cleveland, *Online* Kiobel *Symposium: The Alien Tort Statute and the Foreign Relations Fallacy*, SCOTUSBLOG (July 13, 2012, 1:04 PM), http://www.scotusblog.com /2012/07/online-kiobel-symposium-the-alien-tort-statute-and-the-foreign-relations-fallacy/.

application of the ATS is that it furthers the United States' interest in protecting human rights.[133] For example, Argentina submitted a brief in *Kiobel* arguing that U.S. ATS cases "were important sources of international assistance for victims during the darkest days of Argentina's dictatorship and during its transition to democracy."[134] Furthermore, the brief asserts that concerns about a flood of ATS litigation are groundless "given the universal nature of the limited set of norms that *Sosa* protects and the fact that virtually all nations have legislated them domestically."[135]

On balance, it seems that while extraterritorial application of the ATS is valid in certain circumstances, the ATS's extraterritorial scope should be at least somewhat limited to claims with a substantial nexus to the United States. Determining what establishes that nexus should be left to the legislative branch, as it involves international law considerations and, as applied to corporations, agency law.

III. THE ALIEN TORT STATUTE REFORM EFFORTS

The majority of modern discourse about the scope of the ATS concludes that while the ATS may be a useful tool for U.S. courts, its use raises separation-of-powers concerns:

> The U.S. government can and should be a strong voice for redress of human-rights abuses around the world. But these lawsuits, which are being brought under the 200-year-old Alien Tort Statute, are likely to cause friction between foreign governments and the Obama administration. Congress should step in and clarify the types of human-rights cases that may be heard.[136]

A congressional amendment is unlikely prior to the *Kiobel* decision,[137] but past Supreme Court decisions have prompted Congress to consider enacting legislation, whether to simply clarify the Court's ruling or to reverse it.[138] One study found that Congress "considers an average of

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[133] *See* Bellinger, *Court Orders Kiobel Reargued*, *supra* note 129.

[134] Brief for the Gov't of the Argentine Republic as Amici Curiae Supporting Petitioners at 2, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011) (No. 10-1491), 2012 WL 2165334 at *2.

[135] *Id.* at 4, 2012 WL 2165334 at *4.

[136] John B. Bellinger III, *The U.S. Can't Be the World's Court*, WALL ST. J. (May 27, 2009), http://online.wsj.com/article/SB124338378610356591.html [hereinafter Bellinger, *U.S. Can't Be the World's Court*].

[137] *See* Bellinger, *Court Orders Kiobel Reargued*, *supra* note 129 (noting that an opinion is likely to come down early in 2013, at the beginning of the 113th Congress).

[138] *See* Leon Friedman, *Overruling the Court*, AM. PROSPECT (Dec. 19, 2001),

5 bills for each Supreme Court decision."[139] Another study found that "about one out of every ten Supreme Court statutory interpretation cases spurs Congress to issue legislation reversing or modifying the case."[140] Given that *Kiobel* involves the interpretation of a 224-year-old statute that has been the basis of increased litigation over the last few decades, it seems a prime case for Congress to address.

A. SENATOR FEINSTEIN'S ALIEN TORT STATUTE REFORM ACT

If Congress drafts an amendment, it would be wise to take notice of the short-lived Alien Tort Statute Reform Act (ATSRA),[141] introduced to the Senate and quickly withdrawn by Senator Dianne Feinstein. Feinstein introduced ATSRA following the *Sosa* decision, "because the Supreme Court had failed to clear up the 'inherent vagaries in the law' in *Sosa*."[142] However, she withdrew the ATSRA within a week due to "concerns raised by human rights advocates."[143]

While the ATSRA purported to clarify the ATS, it would have eviscerated the statute, overly narrowing its scope. The ATSRA "offered sweeping changes to the nature of ATS litigation," as it "adopted and possibly exceeded in severity many of the reforms desired by even the most vociferous critics of ATS litigation."[144] The ATSRA section 1350(a) redefined the jurisdiction of district courts:

> The district courts shall have original and exclusive jurisdiction of any civil action brought by an alien asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort. The district courts shall not have jurisdiction over such civil suits

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http://prospect.org/article/overruling-court.

[139] Michael Williams, Kiobel*: A Blessing in Disguise?*, VIEW FROM LL2 (Aug. 30, 2012), http://viewfromll2.com/2012/08/30/kiobel-a-blessing-in-disguise/ (citing Danette Brickman, Congressional Reaction to U.S. Supreme Court Decisions: Understanding the Introduction of Legislation to Override (unpublished manuscript), *available at* http://goo.gl/7NI36).

[140] *Id.* (citing Nancy Staudt et al., *Judicial Decisions as Legislation* (unpublished manuscript), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=nancy_staudt).

[141] Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005).

[142] Daniel Swearingen, *Alien Tort Reform: A Proposal to Revise the Alien Tort Statute*, 48 HOUS. L. REV. 100, 117 (2011) (citing 151 CONG. REC. 22, 860 (2005)).

[143] Letter from Dianne Feinstein, U.S. Sen., to Arlen Specter, U.S. Sen. (Oct. 25, 2005), *available at* https://www.earthrights.org/campaigns/senator-feinstein-puts-brakes-anti-atca-bill-s-1874.

[144] Swearingen, *supra* note 142, at 117–18.

> brought by an alien if a foreign state is responsible for committing the tort in question within its sovereign territory.[145]

This section alone would prevent almost all ATS cases against corporations from going forward. Most of the ATS violations alleged against corporations are based on a theory of aiding and abetting, in which the corporation is not a direct participant but actively, knowingly, or intentionally assists another party in committing the crime.[146] Furthermore, plaintiffs often allege that the corporation aided and abetted the foreign state that is the direct participant in the ATS violation.[147] Therefore, both the "direct participant" requirement and prohibition on jurisdiction over torts committed by a foreign state would bar ATS claims based on aiding and abetting liability and establish a higher standard for plaintiffs to meet. Additionally, requiring that the plaintiff prove the defendant acted with "specific intent to commit the alleged tort"[148] is always a difficult evidentiary hurdle, but may be even more difficult when the defendant is a corporation, as a multinational corporation may refute having control of or knowledge of the actions of its officers or subsidiaries.[149] Finally, while the limited causes of actions include crimes that are indisputably atrocious, they fail to mention "a number of causes of action previously recognized by courts under the ATS."[150]

The *Unocal* case[151] demonstrates how the ATSRA would foreclose many claims brought under the ATS. In *Unocal*, plaintiffs alleged the defendant energy company aided and abetted the Myanmar Military in committing human rights abuses, including forced relocation, forced labor, rape, torture, and murder.[152] However, these causes of action "would have been completely foreclosed under the ATSRA because the direct perpetrators of the atrocities were employed by Myanmar, a foreign government,"[153] and *Unocal* could not be held liable under an aiding and abetting theory of liability.

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[145] S. 1874, *supra* note 141.

[146] *See, e.g.*, Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (alleging corporation aided and abetted Myanmar Military in committing human rights abuses).

[147] *See, e.g.*, Wang Xiaoning v. Yahoo!, Inc., 2007 U.S. Dist. LEXIS 97566 (alleging corporation aided and abetted Chinese government identify and torture a dissident).

[148] S. 1874, *supra* note 141.

[149] *See* Branson, *supra* note 4 at 237.

[150] Swearingen, *supra* note 142, at 119 (listing war crimes, crimes against humanity, and forced labor as examples of omitted causes of action).

[151] Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

[152] *See Unocal*, 395 F.3d at 936–40, 947.

[153] Swearingen, *supra* note 142, at 120.

Under ATSRA section 1350(e), the president or his or her designee has the ability to prevent a U.S. court from hearing any ATSRA claim if he or she "adequately certifies to the court in writing that such exercise of jurisdiction will have a negative impact on the foreign policy interests of the United States."[154] As foreign policy interests are an oft-cited reason for preventing U.S. courts from adjudicating ATS cases,[155] this provision is unsurprising. However, it also has the potential to seriously curtail ATS litigation, as some administrations may believe any ATSRA case will have a negative impact on foreign policy interests. As the Second Circuit stated in *Khulumani v. Barclay National Bank Ltd.*, "to give dispositive weight to the Executive Branch's views [about adjudication of an ATS claim] would likely raise serious separation-of-powers concerns."[156] The Bush and Obama Administrations have been criticized for invoking the executive privilege, abusing it to a degree that may be considered unconstitutional.[157] Section 1350(e) of ATSRA would provide another situation for such potential abuse by the executive branch.

Taken as a whole, the ATSRA "provides some specificity and clarity as to what claims may be made, but it does so in a way that removes the teeth from the statute and favors corporate interests."[158] While the current case law does not provide predictability for either plaintiffs or defendants, passing reform mirroring the ATSRA would almost entirely eviscerate the ATS.

B. THE NECESSITY OF LEGISLATIVE REFORM

Human rights advocates believed that Feinstein's proposed ATSRA "would have had the effect of restricting the ATS's utility as a tool for human rights activists seeking justice for victims of the most heinous crimes known to humanity."[159] However, then the question turned to whether any ATS reform might provide greater redress to victims of human rights abuses, as some argued "that any attempt to legislatively

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[154] *See* Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005).

[155] Cleveland, *supra* note 132.

[156] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 263 n.14 (2d Cir. 2007) (per curiam).

[157] *See* Ross Douthat, *All the President's Privileges*, N.Y. TIMES, June 24, 2012, at SR13.

[158] Swearingen, *supra* note 142, at 122.

[159] Ariel Meyerstein, *The Law and Lawyers as Enemy Combatants*, 18 U. FLA. J.L. & PUB. POL'Y 299, 329 (2007) (citing 151 CONG. REC. S11,434 (daily ed. Oct. 17, 2005) (statement of Sen. Feinstein)).

refine the statute may wreak havoc on its effectiveness."[160]

In *Kiobel*,[161] the Supreme Court will consider whether U.S. district courts should serve as the venue for ATS claims at all, particularly when there is only a weak or nonexistent connection to the United States.[162] Even if the *Kiobel* Court decides the issue of extraterritoriality favorably for human rights victims, the plaintiffs still have numerous hurdles to clear, as the Court will consider:

> (1) Whether the issue of corporate civil tort liability . . . is a merits question or instead an issue of subject matter jurisdiction; (2) whether corporations are immune from tort liability for violations of the law of nations . . . ; and (3) whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.[163]

Of course, the more detrimental the *Kiobel* decision for victims of human rights abuses, the more human rights advocates are likely to lobby Congress to weigh in and potentially breathe life into the ATS by clarifying how it should be applied by U.S. courts. Additionally, while a Supreme Court decision would provide guidance for lower courts hearing ATS cases, it likely will not answer all the questions left open by recent ATS litigation in the lower courts and will leave different jurisdictions with vastly divergent precedent to apply. Thus, legislative action is necessary to provide clarity for courts, lawyers, and parties.

IV. "VIGILANT DOORKEEPING" THROUGH LEGISLATIVE ACTION

Regardless of when *Kiobel* is decided, the legislative branch may step in and either codify the Supreme Court's decision or overturn it with an amendment. It is "[a] common assumption of ATS analysis . . . that the statute is essentially about a range of violations of substantive international law as set forth in treaties or the law of nations."[164] However,

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[160] Swearingen, *supra* note 142, at 123–24 (citing EARTHRIGHTS INT'L, IN OUR COURT: ATCA, *SOSA* AND THE TRIUMPH OF HUMAN RIGHTS 22–23 (2004)).

[161] *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *reh'g en banc denied*, 642 F.3d 379 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 248 (2011), *cert. granted*, 132 S. Ct. 472 (2011).

[162] Bellinger, *Kiobel: Supplemental Briefs*, *supra* note 14.

[163] *Kiobel v. Royal Dutch Petroleum*, SCOTUSBLOG.COM, http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/ (last visited Feb. 16, 2013).

[164] *E.g.*, Lee, *supra* note 46, at 834.

there are many divergent theories as to what actions constitute violations of substantive international law and what violations of treaties or law of nations should be punishable by U.S. courts.[165] In *Sosa v. Alvarez-Machain*, the Supreme Court concluded, in keeping with the decision of many lower court rulings, that the "law of nations" part of the ATS targeted violations that the First Congress would have had in mind when it enacted the ATS, including piracy, infringements of ambassadorial rights, and violations of safe conducts.[166] While the First Congress appeared to have been concerned with these three categories of violations, the violations were likely not all of the possible violations to be addressed by the single sentence of the ATS.[167]

One way to permit suits against corporations while avoiding excessive litigation is for courts to use Professor Thomas Lee's safe-conduct theory to validate ATS claims. This would allow U.S. courts "to extend jurisdiction over suits seeking redress of injuries to the person or property of aliens where the injuries have a U.S. sovereign nexus."[168] Lee's theory of the ATS suggests that, inasmuch as remedies for piracy and offenses against ambassadors were specifically provided for in other parts of the Judiciary Act, the ATS was intended to provide a remedy solely for the violation of safe-conduct.[169] A safe-conduct violation, Lee explains, was analogous to an "alien tort," which was understood to mean "a personal noncontract action 'whereby a man claims a satisfaction in damages for some injury done to his person or property.'"[170]

Lee argues that a strict originalist application of the safe-conduct theory is "unworkable" because of the "exponential proliferation of today's safe-conduct equivalent—the passport—in light of transportation technologies, the extent of globalization, and the dramatic increase of world population."[171] Instead, he argues that, with a flexible originalist approach, we can interpret the ATS today as intended to provide "redress [for] torts against aliens committed under circumstances implicating U.S. sovereign responsibility, that is, where tortfeasors are acting under the color of U.S. law or sovereign action," or where "the United States has

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[165] *See id.* at 903.

[166] Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004).

[167] *Id.* at 718–20.

[168] Lee, *supra* note 46, at 900.

[169] *Id.* at 846–48.

[170] *Id.* at 879 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 117 (photo. reprint 1983) (1769)).

[171] *See id.* at 905.

undertaken a sovereign obligation to prevent harm to the alien plaintiff."[172] While this approach seems like it would dramatically decrease the number of corporations and conduct that would be subject to suit under the ATS, it depends on both the definition of "tort," which at the founding was construed broadly as "a noncontract injury to person or property,"[173] and how readily a court would find a sovereign nexus in cases of corporate wrongdoing.

According to Lee, safe-conduct violations included three types of injuries.[174] "The first category was wartime injury to the person or property of an enemy alien who was either (1) granted an express safe-conduct document . . . or (2) even without a safe-conduct document, entitled to an implied safe conduct under the law of nations or a treaty of the United States . . . ."[175] The second category was "injury to the person or property of a friendly or neutral alien, whose sovereign was 'in amity, league or truce' with the [United States], in violation of a term of the treaty memorializing the relationship."[176] The third and broadest category encompassed a "general implied safe conduct,"[177] which "required neither an express safe-conduct document nor a specific treaty term from which to infer a safe-conduct obligation, but rather was a unilateral commitment by a sovereign to protect the person or property of any alien whose sovereign the host country was not at war."[178] In other words, a "general implied safe conduct" covered any injury to the person or property of a friendly or neutral alien as an international law violation.[179] Under this definition, the ATS allowed an alien to sue "for a tort only in violation of the law of nations or a treaty of the United States."[180]

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[172] *Id.* at 903, 906.

[173] *See id.* at 838.

[174] *Id.* at 836.

[175] *Id.*

[176] *Id.* (quoting 21 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 1136 (Gaillard Hunt ed., 1912)).

[177] *Id.* at 837 (quoting 21 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 1136 (Gaillard Hunt ed., 1912)).

[178] *Id.*

[179] *Id.*

[180] *Id.*; Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 76–77 (1789), codified at 28 U.S.C. § 1350 (2006) (also known as the Alien Tort Claims Act).

A. INCORPORATING A SOVEREIGN NEXUS REQUIREMENT INTO ATS REFORM

Applying the safe-conduct theory to modern ATS litigation would strike a balance for courts. First, it would allow victims to seek redress for safe-conduct violations in U.S. courts, as the First Congress intended.[181] Second, it would also provide a crucial gate-keeping function, by narrowing the scope of ATS claims to those involving safe-conduct violations committed only in circumstances with a U.S. sovereign nexus.[182] While Lee realizes that "it is neither possible nor imperative to redress every safe-conduct violation today," he suggests that there are four broad situations in which courts may find a U.S. sovereign nexus.[183] Situations in which the United States signals its intent to protect alien plaintiffs, creating a sovereign nexus, include circumstances in which: (1) the alien is harmed on U.S. territory; (2) the alien is harmed in an area with a U.S. military presence implying a promise of safety; (3) the tortfeasor acts on behalf of the U.S. government; and (4) the tortfeasor violates a treaty to which the United States is a signatory.[184] This section will provide a description of each category and examples of cases that would fall into each category.

1. Torts Occurring in U.S. Territory

Under Lee's theory, a U.S. sovereign nexus is most clearly implicated when a tort takes place on U.S. territory with governmental involvement or acquiescence.[185] Governmental involvement may be found where a U.S. official, either at the federal, state, or local level, commits a tort or possibly where a governmental body authorizes action that constitutes a tort against an alien.[186] Since Lee's other proposed categories involve extraterritorial torts, his proposition that courts should find a U.S. sovereign nexus when the tort takes place on U.S. territory is probably the least contentious of his proposals. For instance, in *Norex Petroleum Ltd. v. Access Industries Inc.*,[187] the U.S. Court of Appeals for the Second Circuit

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[181] Lee, *supra* note 46, at 901–02.

[182] *Id.* at 905–07.

[183] *Id.* at 905–06.

[184] *Id.*at 906

[185] *See id.*

[186] *See id.*

[187] Norex Petroleum Ltd. v. Access Indus. Inc., 631 F.3d 29 (2d Cir. 2010).

interpreted the Supreme Court decision in *Morrison v. National Australia Bank, Ltd.*[188] as one creating a bright-line rule regarding the extraterritorial application of a statute:[189] "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[190]

However, courts have been reluctant to hold government actors liable under the ATS, even when the alleged tort occurred on U.S. soil. In *Lopez v. Richardson*,[191] an alien brought suit against a police officer for torture, cruel, inhuman, and degrading treatment of a minor, and arbitrary detention, in violation of the law of nations.[192] The *Lopez* court argued that if the ATS were to apply to domestic situations, "then every encounter of an alien with a police officer will become not just a 'federal case,' but an 'international case,'" and courts would have to look at whether the plaintiff's cause of action constituted not only a constitutional claim "but also whether the actions state a claim under international law."[193] Thus, the court concluded, while "nothing in the language of the [ATS] . . . precludes its use against domestic U.S. actors, there are obvious reasons why allowing domestic actors to be held liable under the [ATS] would result in a significant change to the legal landscape."[194] However, under Lee's theory, the courts would not have to look to international law but instead could rely on whether the alleged violation was a violation of federal law.[195] In turn, Lee's approach would resolve one of the concerns of the *Lopez*[196] court.

Lesser courts have also expressed opposition to ATS domestic suits under the theory that "any party asserting jurisdiction under the [ATS] must establish, independent of that statute, that the United States has *consented* to suit."[197] In *Goldstar (Panama) S.A. v. United States*,[198] the court held that in order for the United States to have consented to suit, it

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[188] Morrison v. Nat'l Austl. Bank, Ltd., 130 S. Ct. 2869 (2010) (barring all federal securities fraud suits in the U.S. for securities traded on a foreign stock exchange).

[189] *See Norex*, 631 F.3d at 32.

[190] *See Morrison*, 130 S. Ct. at 2878.

[191] Lopez v. Richardson, 647 F. Supp. 2d 1356, 1363–64 (N.D. Georgia 2009).

[192] *Id.* at 1358.

[193] *Id.* at 1364

[194] *Id.* at 1363–64.

[195] Lee, *supra* note 46, at 834.

[196] *Id.*

[197] Goldstar (Pan.) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992) (emphasis added).

[198] *Id.*

must have waived sovereign immunity.[199] The court further concluded that the United States does not waive sovereign immunity by being a signatory to a non-self-executing treaty,[200] such as the Hague Convention, or breaching a standard, unless federal law explicitly authorizes a cause of action.[201] Thus, this consent requirement could prove to be a significant obstacle to holding domestic actors liable under the ATS.

Goldstar also stated that government action may also be shielded from ATS liability through the discretionary function exception.[202] This exception is "when 1) the relevant conduct involves an element of judgment or choice on the part of the Government actor and 2) the conduct involves considerations of public policy."[203]

While there appear to be many carved-out exceptions exempting domestic actors from ATS liability, courts should be hesitant of permitting these defenses frequently so as not to decrease accountability of U.S. officials. Case law dealing with torts and the ATS in U.S. territory is less developed since most aliens allege extraterritorial torts.[204] However, this category remains important, as it creates protections for aliens that, for the most part, are absent in U.S. federal law. Additionally, from a policy standpoint, it seems rational to hold U.S. federal officials responsible for obeying U.S. federal law on U.S. soil. Therefore, Congress should advise the judicial branch to apply these exemptions sparingly, or better yet, enact legislation detailing the limited circumstances in which an exemption may apply so that they are not overused.

2. Extraterritorial Torts in Areas with a U.S. Military Presence

The second situation in which a U.S. sovereign nexus is implicated is when tortfeasors are acting under the color of U.S. law or sovereign action

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[199] *Id.* at 968.

[200] The Supreme Court has explained the difference between "self-executing" and "non-self-executing" as follows: "What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a 'non-self-executing' treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress." Medellin v. Texas, 552 U.S. 491, 505 n.2 (2008). In other words, non-self-executing treaties are not judicially enforceable without the enactment of legislation.

[201] *Id.* at 968–69 (non-self-executing treaty refers to a treaty that has been ratified but further requires enactment of specific legislation in order to be judicially enforceable).

[202] *Id.* at 969–70.

[203] *Id.* at 970 (citing Berkovitz v. United States, 486 U.S. 531, 536–37 (1988)).

[204] *See* DRIMMER, *supra* note 38, at 5 (noting that "cases have arisen in roughly 60 different countries, most commonly from the Middle East, South America, Africa, and Asia").

"extraterritorially in places where the significant presence of U.S. troops implies a promise of safety."[205] This situation is exemplified in regions where there is a U.S. military presence and private military contractors acting on behalf of the U.S. government commit the tort.

For instance, in *Ibrahim v. Titan Corp.*,[206] Iraqi nationals brought suit against American contractors for alleged torture and mistreatment in Iraq,[207] but the claims were ultimately dismissed because of the rule established by the U.S. Court of Appeals for the District of Columbia Circuit in *Saleh v. Titan Corp.*:[208] "During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted."[209] This ruling is highly controversial, however, as some believe the panel "ran roughshod over the millennia-old prohibition on abusing prisoners, the centuries-old maxim that every right has a remedy, decades of precedent holding that Congress—not the Courts—is responsible for creating immunities, and recent crystal-clear Department of Defense regulations affirming that private contractors remain responsible for their wrongful conduct."[210]

Additionally, in *Jama v. United States Immigration and Naturalization Service*, aliens in an immigration holding facility in the United States brought suit under the ATS, alleging maltreatment against the contractors who operated the facility.[211] However, the Court concluded that the plaintiff's ATS claims against the facility did not meet the rigorous *Sosa*[212] requirements because they had risen to the level of *jus cogens* violations.[213]

This category of establishing a U.S. sovereign nexus is also

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[205] *See* Lee, *supra* note 46, at 906.

[206] Ibrahim v. Titan Corp., 556 F. Supp. 2d 1 (D.D.C. 2007), *aff'd in part, rev'd in part sub nom*; Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009).

[207] *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d at 2.

[208] *Saleh v. Titan Corp.*, 580 F.3d at 1.

[209] *Id.* at 9.

[210] Maxwell S. Kennerly, *Conservative Judicial Activists on the Federal Court of Appeals for D.C. Dismiss Abu Ghraib Lawsuit*, LITIGATION & TRIAL: THE LAW BLOG OF PLAINTIFF'S ATTORNEY MAX KENNERLY (Sept. 14, 2009), http://www.litigationandtrial.com/2009/09/articles/series/special-comment/conservative-judicial-activists-on-the-federal-court-of-appeals-for-d-c-dismiss-abu-ghraib-lawsuit/.

[211] Jama v. United States INS, 343 F. Supp. 2d 338, 347 (D.N.J. 2004).

[212] Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004).

[213] *See Jama*, 343 F. Supp. 2d at 360–61.

exemplified by the litigation involving DynCorp International LLC.[214] DynCorp is a private military contractor employed by the U.S. government in conflicts abroad.[215] Under the safe-conduct theory, DynCorp could be held accountable for its actions. DynCorp has allegedly committed human rights abuses while working under contracts awarded by the United States in areas with significant U.S. military presence.[216] For instance, the U.S. government recently "awarded DynCorp a contract worth nearly $250 million to advise the Iraqi government on setting up effective law enforcement, judicial and correctional agencies," despite the company's long history of alleged human rights abuses.[217] Lawsuits filed against DynCorp have alleged: that "herbicides spread by DynCorp in Columbia were drifting across the border, withering legitimate crops, causing human and livestock illness, and . . . killing children;"[218] that "DynCorp police trainers in Bosnia were paying for prostitutes and participating in sex trafficking;"[219] and that DynCorp employees in Kosovo were engaging in "illegal and inhuman behavior [and] were purchasing illegal weapons, women [and] forged passports," and billing the U.S. Army for unnecessary repairs to ensure a padded payroll.[220] Finally, perhaps more embarrassing than actionable, *Wikileaks* published a diplomatic cable sent from the U.S. embassy in Afghanistan to Washington discussing the "Kunduz DynCorp Problem."[221] The cable read: "In a May 2009 meeting interior minister Hanif Atmar expresses deep concerns that if [sic] lives could be in danger if news leaked that foreign police trainers working for US commercial contractor DynCorp hired 'dancing boys' to perform for them."[222]

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[214] Arias v. Dyncorp, 517 F. Supp. 2d 221 (D.D.C. 2007).

[215] *CSC/DynCorp.*, CORPWATCH, http://www.corpwatch.org/section.php?id=18 (last visited Feb. 16, 2013); *see also* JENNIFER K. ELSEA, MOSHE SCHWARTZ & KENNON H. NAKAMURA, CONG. RESEARCH SERV., RL 32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES (2008), *available at* http://www.fas.org/sgp/crs/natsec/RL32419.pdf [hereinafter ELSEA ET AL., PRIVATE SECURITY CONTRACTORS IN IRAQ] (discussing how the United States depends on private contractors to provide security in unstable and hostile environments abroad).

[216] *CSC/DynCorp.*, *supra* note 215.

[217] *Id.*; *see also* ELSEA ET AL., PRIVATE SECURITY CONTRACTORS IN IRAQ, *supra* note 215.

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] Jason Linkins, *Wikileaks Reveals That Military Contractors Have Not Lost Their Taste for Child Prostitutes*, HUFFINGTON POST (Dec. 8, 2010, 9:09 PM) http://www.huffingtonpost.com/2010/12/08/wikileaks-reveals-that-mi_n_793816.html.

[222] *Id.*

The Congressional Research Service Report states that "U.S. government agencies establish baseline standards in contracts, by specifying performance standards, experience requirements, and/or precise qualifications to be met" and that the International Peace Operations Association (IPOA), of which DynCorp is a member, has a system to review complaints against its members and sanction those who have violated its Code of Conduct.[223] While it is unclear what action, if any, the IPOA has taken against DynCorp, IPOA's Code of Conduct may be more of a "window dressing" than an actual means of enforcement.[224] Numerous human rights cases alleging violations committed by DynCorp. have made and are making their way through the U.S. court system.[225] Though DynCorp has agreed to pay settlements in many of these suits, it continues to be awarded U.S. government contracts.[226] One issue is that some of the alleged human rights abuses are not *jus cogens* violations and probably would not be punishable under the ATS if the courts look to international law standards.[227] Another issue is that even though DynCorp recently signed the International Code of Conduct for Private Security Service Providers in Geneva,[228] the company will likely not be held liable for violating its provisions given that U.S. courts have been reluctant to enforce international treaties.[229]

This category, where tortfeasors are acting under color of U.S. law or extraterritorially in places where there are significant numbers of U.S. troops, is one in which legislative reform is particularly warranted, as the immunity of private military contractors acting at the direction of the U.S. government to ATS suits seems especially unjust. The safe-conduct theory of the ATS would allow U.S. courts to get around these barriers, since according to these allegations, DynCorp is a tortfeasor acting under the

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[223] ELSEA ET AL., PRIVATE SECURITY CONTRACTORS IN IRAQ, *supra* note 215, at 39.

[224] David Isenberg, *The Contractors that Couldn't Shoot Straight?*, HUFFINGTON POST (Apr. 18, 2010, 11:35 PM), http://www.huffingtonpost.com/david-isenberg/the-contractors-that-coul_b_542306.html.

[225] *See supra* notes 218–2222 and accompanying text.

[226] *See Company Profile DynCorp International*, CROCODYL (May 19, 2010, 11:25 PM), http://www.crocodyl.org/wiki/dyncorp_international.

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

[228] David Isenberg, *It's Déjà vu for DynCorp All Over Again*, HUFFINGTON POST (Dec. 6, 2010, 8:47 AM), http://www.huffingtonpost.com/david-isenberg/its-dj-vu-for-dyncorp-all_b_792394.html.

[229] Frederic L. Kirgis, *International Agreements and U.S. Law*, ASIL INSIGHTS (Am. Soc'y of Int'l L., D.C.), May 1997, at 3, *available at* http://www.asil.org/insigh10.cfm.

color of U.S. law.[230] The sovereign nexus is satisfied because DynCorp is contracted by the government.[231] Additionally, the sovereign nexus requirement is met because in most of these cases, there was and continues to be a U.S. military presence in the country where the harm occurred,[232] which creates an implied promise of safety on behalf of the United States. Many human rights organizations find these overseas harms most offensive, since the U.S. government seems to act as an enabler.[233] It would also benefit the U.S. government in the court of public opinion to allow victims to sue these kinds of corporations in U.S. courts, rather than to continually reward the tortfeasors with multimillion-dollar contracts and immunity from liability. The legislature should create a check on the executive branch by amending the ATS to reach human rights abuses committed by private military contractors, as they should not receive carte blanche to cause harms outside the scope of their employment simply because they are also engaged in work for the U.S. government.

3. Torts Committed by Nationals Acting at the Behest of the U.S. Government

The third situation implicating a sovereign nexus is where the tortfeasor is a "U.S. or foreign national plausibly acting at the behest of the U.S. government."[234] Courts would likely use a similar plausibility standard to that employed by courts evaluating an ATS claim under the theory of aiding and abetting liability: one requiring plaintiffs to show that the tortfeasors acted with purpose and the knowledge that their actions were authorized by the U.S. government.[235] A major barrier to liability in this situation is the D.C. Circuit's ruling in *In re Iraq and Afghanistan Detainees Litigation*,[236] in which, citing the Westfall Act,[237] the court

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[230] *See CSC/DynCorp., supra* note 215.

[231] *See id.*

[232] Hugh Bronstein, *Colombia, U.S. Sign Military Cooperation Deal*, REUTERS (Oct. 30, 2009), http://www.reuters.com/article/2009/10/30/us-colombia-usa-bases-idUSTRE59T1S720091030 (describing that the United States has 800 military members and 600 military contractors on bases in Colombia).

[233] *See, e.g., CSC/DynCorp., supra* note 215.

[234] Lee, *supra* note 46, at 906.

[235] *See* Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244, 259 (2d Cir. 2009) ("we hold that the mens rea standard for aiding and abetting liability in ATS actions is purpose").

[236] *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007).

[237] Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub.L. No. 100-694 (codified at 28 U.S.C. §§ 2671, 2674, 2679).

declared that federal employees and officials have immunity from common law tort claims based on officials' acts committed "while acting within the scope of office" under the ATS.[238] However, the court said it did not intend to immunize officials from actions—such as torture—based on violations of the law of nations, but rather to protect them in routine acts or omissions.[239]

Additionally, relief may be possible in situations in which an alien "has no other means of redress" and "there is no danger of intrusion" upon the governmental body's internal system of justice.[240] In *Padilla v. Yoo*, the plaintiff was a U.S. citizen designated an enemy combatant, who was allegedly "detained without being charged, was subjected to extreme isolation . . . , and was interrogated under threat of torture, deportation and even death."[241] The court determined that the acts of federal officials were subject to judicial review.[242] Although the fact that the plaintiff in *Padilla* was a U.S. citizen may have been influential, the court's holding did not turn on that fact.[243] The plaintiff sought to hold John Yoo, who was Deputy Assistant Attorney General at the Department of Justice's Office of Legal Counsel, liable for allegedly "formulating unlawful policies for designation, detention, and interrogation of suspected 'enemy combatants' and [for] issuing legal memoranda designed to evade legal restraints on those policies and to immunize those who implemented them."[244] However, the Ninth Circuit reversed the district court's ruling, holding that "it was not clearly established in 2001–03 that the treatment to which Padilla says he was subjected amounted to torture."[245] The ruling provides further support for the idea that plaintiffs alleging that government actors engaged in wrongful acts have difficulty holding the government actors liable, particularly when the alleged conduct is not clearly unlawful or the connection between the wrongful act and the plaintiff's harm is tenuous.

Sosa may also fall into this category, since the plaintiff, Sosa, was a Mexican national alleged to have acted as an agent of the U.S.

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[238] *See In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d at 110, 119.

[239] *See id.* at 110–11.

[240] Padilla v. Yoo, 633 F. Supp. 2d 1005, 1021, 1025 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012)

[241] *Id.* at 1013.

[242] *Id.* at 1027.

[243] *See id.* at 1030.

[244] *See* Padilla v. Yoo, 678 F.3d 748, 752 (9th Cir. 2012).

[245] *Id.* at 764.

government.[246] Under the safe-conduct theory, Alvarez-Machain would have a claim against Sosa, who aided in the kidnapping, arrest, and arbitrary detention of Alvarez-Machain at the behest of the U.S. government.[247] However, in *Sosa*, the Court found that the alleged offenses did not raise to the level of customary international law violations.[248] Therefore, precedent would suggest officials would be subjected to liability for a narrower, more serious set of offenses than the broader set Lee suggested.[249]

4. Torts Violating Treaties to Which the United States is a Signatory

Lee suggests, less explicitly, that courts may also look to treaties to determine whether the United States has undertaken a sovereign obligation to prevent harm to the alien plaintiff,[250] an approach that adheres to a rather literal interpretation of the ATS.[251] In some instances the same obligation may exist under the other three categories but also be memorialized by a treaty. Establishing the contours of this category would be difficult but imperative to assisting courts in evaluating ATS claims.

The case law regarding enforcement of treaties creates numerous obstacles. First, even when the United States is a signatory to a treaty, which is all that seems to be required by the simple wording of the ATS, courts have repeatedly held that non-self-executing treaties[252] are not binding as a matter of international law.[253] For instance, in *Sosa*, Alvarez-Machain alleged that his abduction was an "arbitrary arrest" within the meaning of the Universal Declaration of Human Rights and article nine of the International Covenant on Civil and Political Rights.[254] However, the Court found that these treaties were only ratified "on the express

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[246] Sosa v. Alvarez-Machain, 542 U.S. 692, 692 (2004).

[247] *Id.*

[248] *Id.* at 738.

[249] Lee, *supra* note 46, at 906.

[250] *See* Lee, *supra* note 46, at 906–07.

[251] *See* Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 76–77 (1789), codified at 28 U.S.C. § 1350 (2006) (also known as the Alien Tort Claims Act). ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations *or a treaty of the United States*.") (emphasis added).

[252] *See supra* text accompanying note 200.

[253] Kirgis, *supra* note 229.

[254] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) (citing the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) and the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171).

understanding that [they were] not self-executing and so did not [themselves] create obligations enforceable in the federal courts."[255] Thus, although not always the case, treaties are often viewed as statements of a general commitment to particular policies rather than as binding documents.[256] Additionally, some courts still look to whether the principles in treaties enjoy international consensus to determine whether such treaties should be enforced under the ATS.[257] Also, courts do not necessarily agree that corporations can be bound by international law or treaties.[258] Other courts have been hesitant to enforce the more general provisions of treaties if they do not have specific proscriptions for state or corporate conduct.[259] Even if treaties should be enforced as creating a sovereign obligation, there would likely be strong pushback from the federal government in enforcing non-self-executing treaties, of which there are many more than self-executing treaties.[260] Furthermore, even if a treaty is self-executing, the government often may argue that there is a separation-of-power issue.[261]

B. APPLYING THE SAFE-CONDUCT THEORY TO CORPORATE CONDUCT

In enacting reform using the safe-conduct theory, the fourth category of Lee's safe-conduct theory—where a tortfeasor violates a treaty to which the United States is a signatory[262]—should be expanded to reach corporate conduct, when the corporation has sufficient contacts to be subject to suit in the United States. As it currently stands, Lee's safe-conduct theory is too narrow; Lee's categories address government actors and only cover corporate action contracted by the federal government. In footnote 20 of the *Sosa* opinion, the Supreme Court stated that in imposing liability, it may be relevant to consider "whether international law extends the scope

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[255] *Id.*at 735.

[256] *See Guidance on Non-Binding Documents*, U.S. STATE DEP'T, http://www.state.gov/s/l/treaty/guidance/ (last visited Feb. 16, 2013) (suggesting ways to make it clear that an international agreement is non-binding).

[257] *E.g.*, Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 384 (E.D. La. 1997).

[258] *Id.* (noting that the principles of treaties "apply to 'members of the international community' rather than non-state corporations").

[259] *See, e.g.*, Flores v. Southern Peru Copper, 414 F.3d 233, 240 (2d Cir. 2003).

[260] *See* Kirgis, *supra* note 229 (explaining that while courts only enforce self-executing treaties and those implemented by legislative acts, there are other non-self-executing treaties with indirect effects on courts).

[261] *See* Brief for the United States as Respondent Supporting Petitioner at 16, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581 at *16.

[262] *See supra* Part IV.A.

of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual."[263] Judge Leval's concurring opinion in *Kiobel* points out that the majority opinion wrongly took this footnote to mean that "the answer may be different depending on whether the actor is a natural person or a corporation" when "the passage means the contrary."[264] In fact, according to Judge Leval, the "intended inference of the footnote is that [natural persons and corporations] are treated *identically*."[265] Furthermore, Judge Leval asserts that the majority unnecessarily looked for an international consensus regarding an imposition of liability on corporations, when "[c]ivil liability *under the ATS* for violation of the law of nations is not awarded because of a perception that international law commends civil liability throughout the world," but instead is awarded in U.S. courts because it is left "to each State to resolve questions of civil liability, and the United States has chosen through the ATS to impose civil liability."[266] The idea that an international consensus is necessary for the imposition of liability would result in nearly all violations lacking a means of redress, since international law provides little to no guidance as to how norms should be enforced and instead leaves enforcement almost exclusively to individual nations.[267]

Furthermore, corporate liability can be traced further back than the days of the First Congress. For example, the East India Company was held liable for the torts of its corporate agents and "incorporation did not shield [it] . . . from liability for the actions of its agents."[268] In 1666, Thomas Skinner sued the East India Company in London for "'robbing him of a ship and goods of great value, . . . assaulting his person to the danger of his life, and several other injuries done to him' by Company agents," alleging a violation of the law of nations, since the robbery occurred on the high sea.[269] The House of Lords ordered the East India Company to

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[263] Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004); *see also id.* at 760 (Breyer, J., concurring) ("The norm must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue.").

[264] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 163–64 (2d Cir. 2010) (Leval, J., concurring), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *reh'g en banc denied*, 642 F.3d 379 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 248 (2011), *cert. granted*, 132 S. Ct. 472 (2011).

[265] *Id.*at 165 (emphasis in original).

[266] *Id.* at 175.

[267] *Id.* at 152.

[268] Brief of Amici Curiae Professors of Legal History Supporting Petitioners at 16–17, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011) (No. 10-1491).

[269] *Id.* at 17 (citing The Case of Thomas Skinner, Merchant v. East India Company, (1966)

pay Skinner £5,000 for his losses and damages, "fear[ing] that failure to remedy acts 'odious and punishable by all laws of God and man' would constitute a 'failure of justice.'"[270]

The fact that there is a more extensive list of cases holding corporate officers liable than those holding corporations liable for violations of international law may be attributable to the different structures of early and modern corporations.[271] For instance, Professor Christopher D. Stone explains that wrongs of early corporations "were all easily ascribed to, and gave rise to actions against, the *individual* townsman or guildsman—the individual toward whom the law in other respects was orienting."[272] For example, "it would hardly have occurred to [a person who was harmed by having purchased unclean meat] that he seek redress against anyone other than the butcher," since the butcher had "personally purchased the animal in the first place; he had slaughtered it, salted or otherwise prepared it; he had personally negotiated for its sale."[273]

In contrast, many of today's corporate wrongs are more comparable to the collapse of a bridge, which raises the question "*who* was at fault?"[274] "More complicating still, even where the wrongful act could be traced to some particular tangible human, he was increasingly not, as in some of the early cases, a well-to-do (read, suable) executive, but a railroad porter or a dock worker."[275] This contrasts greatly with the corporate defendants of modern ATS litigation, who are unquestionably better positioned to shoulder settlements or judgments than are their corporate officers.[276]

Having established that it would be illogical and inconsistent to exclude corporations from liability under the ATS, the question becomes how to sort through the ATS cases to address those that rightfully belong in U.S. courts. The most effective means of imposing direct obligations on corporations would be through treaties to which the corporations themselves are signatories.[277] This is not outside the realm of possibility,

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6 State Trials 710, 711, 719 (H.L.)).

[270] *Id.*

[271] CHRISTOPHER D. STONE, CORPORATE RESPONSIBILITY: LAW AND ETHICS 23 (2004).

[272] *Id.* at 12.

[273] *Id.* at 12–13.

[274] *Id.* at 23.

[275] *Id.*

[276] *See* DRIMMER, *supra* note 38, at 5 (finding that settlements have ranged from $15.5 to $30 million and judgments have ranged from $1.5 to $80 million).

[277] If Corporations were themselves signatories, then they would fall under Lee's fourth

as the United Nations Commission on Human Rights already considers corporations as having an obligation to honor human rights-related treaties in the adopted set of Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Life.[278] Furthermore, corporations are granted "rights under international law, including those arising out of international treaties."[279] For instance, under the European Convention for the Protection of Human Rights and Fundamental Freedoms and North American Free Trade Agreement, corporations may file claims for infringements on the corporation's rights.[280] If corporations invoke international law to their benefit, they should also be subject to its obligations, for "[t]o vest corporations with rights, such as filing claims, yet simultaneously exonerate them for tort damage created by violating international law makes little sense and may potentially encourage violations of international law."[281]

Other scholars have suggested that corporations be required to adopt corporate ethical codes, or codes of conduct, defining the responsibilities of organizations to stakeholders and articulating the ethical parameters of the organization.[282] For instance, "Stuart Eizenstat, the deputy treasury secretary in the Clinton administration, proposes establishing a 'Code of Conduct' for multinational companies, based on the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinationals."[283] Through the Code of Conduct, there would be a "set of standards for business conduct in a variety of areas including employment and industrial relations, human rights and the environment" and the Code "would clarify what counts as 'aiding and abetting' a brutal regime."[284] The United Kingdom adopted this type of an agreement, called the UK Corporate Governance Code, which "sets out good practice covering

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category. *See supra* Part IV.A.4.

[278] U.N. Econ. & Soc. Council, Comm. On Human Rights, Sub-Comm. on the Promotion and Protection of Human Rights, *Economic, Social, and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,* U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

[279] Joel Slawotsky, *Corporate Liability in Alien Tort Litigation*, 1 VA. J. INT'L L. ONLINE 27, 39 (2011), *available at* http://www.vjil.org/assets/pdfs/vjilonline1/1/Slawotsky__Post-Production_.pdf.

[280] *Id.*

[281] *Id.* at 40.

[282] *Politics & Economy: Global Business vs. Global Justice: The Alien Tort Claims Act Overview*, PBS (Jan. 9, 2004), http://www.pbs.org/now/politics/alientort.html.

[283] *Id.*

[284] *Id.*

issues such as board composition and effectiveness, the role of board committees, risk management, remuneration, and relations with shareholders" and requires listed companies "either to comply with the provisions of the Code or explain to investors in their next annual report why they have not done so."[285] However, even in a government with a corporate Code of Conduct, some corporations could choose not to voluntarily adopt the good practices.

In the absence of the adoption of a United Nations treaty binding corporations or a corporate Code of Conduct, courts should more readily look to whether there is a "sufficient nexus between the defendant and the United States" such that application of the ATS to its conduct "would not be arbitrary or fundamentally unfair."[286] Therefore, the court may look to whether the corporation is incorporated in the United States, how substantially its operations abroad contribute to its U.S. revenues, and whether the defendant is subject to jurisdiction in the forum. A myriad of other factors may also be relevant, but the general concept of applying a sufficient contacts test may keep suits against corporations without any kind of U.S. nexus out of U.S. courts.

Finally, while idealistic, it is worth mentioning that other scholars believe that corporations will engage in greater self-regulation, if not because of legal ramifications, because of the beating their brand names may take through public debate and the increasingly popular avenues of social media if they fail to do so.[287] Studies have shown that "[n]egative information about businesses tends to spread faster than positive" information, and that it spreads more widely and quickly than ever before.[288] Ironically, many of the corporations who have received attention for alleged ATS violations have subsequently adopted socially responsible practices, even when it seemed likely that the court would rule in their favor.[289]

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[285] *Corporate Governance*, FINANCIAL REPORTING COUNCIL, http://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance.aspx (last visited Feb. 16, 2013).

[286] United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990) (citation omitted) (discussing this nexus test in the criminal context).

[287] Anthony Ewing, *The Future of Corporate Human Rights Accountability*, LOGOS INSTITUTE (July 23, 2009), http://logosinstitute.net/blog/2009/07/23/the-future-of-corporate-human-rights-accountability/.

[288] Andreas B. Eisingerich & Gunjan Bhardwaj, *Does Social Responsibility Help Protect a Company's Reputation?*, MIT SLOAN MGMT. REV. (Mar. 23, 2011), http://sloanreview.mit.edu/the-magazine/2011-spring/52313/does-social-responsibility-help-protect-a-companys-reputation/.

[289] Ewing, *supra* note 287.

A case against Yahoo! demonstrates that companies may be proactive even without a judgment against them.[290] In *Wang Xiaoning v. Yahoo!, Inc.*, a U.S.-based non-governmental organization, Human Rights in China, brought to light information about the technology company's policies which resulted in persecution of Chinese citizens.[291] Human Rights in China discovered one of the reasons for plaintiff Wang Xiaoning's prison sentence included Yahoo! (Hong Kong) Holdings' supplying the Chinese Communist party with Wang Xiaoning's account information and e-mail content after Xiaoning edited an online journal advocating a multiparty system, used a fake name to disseminate political writings via e-mail, and used e-mail to communicate with an overseas dissident political party to discuss the establishment of a new Chinese political party.[292] Xiaoning's wife then filed a lawsuit in the United States against Yahoo!, alleging that if Yahoo! had not provided this information to the Chinese government, her husband would not have faced a prison sentence.[293]

The case had many weaknesses. Yahoo! claimed its employees were obeying Chinese law by complying with China's State Security Bureau's order directing them to turn over electronic documents and that all Yahoo! e-mail users in China agree to terms of service which inform users that their actions may be disclosed if required by law.[294] Despite the potential for Yahoo! to succeed in the suit, Yahoo! was proactive in adopting new practices so as not to attract more negative attention.[295] Weeks after its annual shareholders meeting in which the matter was discussed, Yahoo! hired an ethics chief officer, whose only responsibilities are to "ensure the compliance with corporate best practices and oversee[] data privacy and corporate social responsibility efforts."[296] Additionally, it established "much stricter policies governing its interactions with repressive governments, working to keep personally identifying information out of

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[290] *See* Wang Xiaoning v. Yahoo!, Inc., 2007 U.S. Dist. LEXIS 97566, No. C 07-2151 CW (N.D. Cal. 2007).

[291] Rebecca MacKinnon, *Shi Tao, Yahoo!, and the Lessons for Corporate Social Responsibility* 5 (U. H.K., 2007), *available at* http://rconversation.blogs.com /YahooShiTaoLessons.pdf.

[292] *Id.*

[293] *Id.* at 6.

[294] *Id.* at 8–9.

[295] *E.g.*, Elinor Mills, *Yahoo Hires Ethics Chief Officer*, CNET (June 28, 2007, 1:15 PM), http://news.cnet.com/8301-10784_3-9736895-7.html.

[296] *Id.*

their hands."[297] Yahoo! settled the case for an undisclosed amount, but it also made a commitment to develop more ethical business practices and provided guidance for other technology companies offering their services in China to avoid these issues.[298]

Following Yahoo!'s lead, Google went a step further by shutting down its search service on the Chinese mainland and shifting it to Hong Kong, following a cyber attack that it believed was launched by the Chinese government and meant to gather information on Chinese human rights activists, part of a trend of growing internet censorship in China.[299] Unlike Yahoo!, Google was not facing accusations of complicity with the Chinese government, but it was unwilling to continue its self-censored service in China.[300] Well-known bloggers commended Google for the move, saying it signaled that Google was not willing to treat Chinese users as "second-class citizens" by providing only censored internet.[301]

The experiences of Yahoo! and Google in China draw attention to corporations' policy towards social responsibility—or lack thereof—a factor that seems to be increasingly important to consumers and would ideally motivate corporations to consider human rights while operating in other countries.

V. CONCLUSION

Kiobel has prompted the Supreme Court to heed its own cautionary words to engage in "vigilant doorkeeping"[302] as it ascertains the contours of the ATS. However, when this crucial gate-keeping function involves the interpretation of a 224-year-old statute with little legislative history, and requires balancing foreign policy interests, separation of powers, corporate protections, and most importantly, the rights of victims of human rights abuses, the task seems better suited to Congress. Legislative action is the most effective way to address the muddled case law and establish what constitutes a cognizable claim under the ATS. By requiring

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[297] Robert McMahon & Isabella Bennett, *U.S. Internet Providers and the "Great Firewall of China,"* COUNCIL ON FOREIGN RELATIONS (Feb. 23, 2011), http://www.cfr.org/china/us-internet-providers-great-firewall-china/p9856 (quoting U.S. Rep. Chris Smith (R-NJ)).

[298] Ewing, *supra* note 287.

[299] Tania Branigan, *Google Angers China by Shifting Service to Hong Kong*, GUARDIAN (Mar. 23, 2010), http://www.guardian.co.uk/technology/2010/mar/23/google-china-censorship-hong-kong.

[300] *Id.*

[301] *Id.*

[302] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

that there be a nexus between the safe-conduct violation and U.S. sovereign responsibility, concerns about a lack of connection between the alleged tortfeasor and the United States, such that the alleged tortfeasor should be subject to suit in the United States, are largely diminished.

Permitting corporations to be sued under the ATS is an "effective way to address the problem of corporate participation in violations of international law of the worst kind, including the universally condemned acts of torture, genocide, crimes against humanity, war crimes, extrajudicial killing, piracy, and slavery."[303] If we exclude corporations from suit under the ATS, corporations will often escape responsibility, as there "is usually no recourse available in the country where the abuses took place, often because the government participated."[304] Additionally, given the recent ruling in *Citizens United*[305] that corporations are considered natural persons for purposes of political speech, it is unjust that corporations should be granted "categorical corporate immunity from suit," especially when "principles of corporate liability are well-established under our law. In exchange for rights, corporations accept certain responsibilities, including liability for harms committed by their agents."[306] Finally, from a simple policy standpoint, many of the cases that have been brought under the ATS have shed light on particularly horrific crimes U.S. corporations have committed abroad, and "are, sadly, not unique."[307] As corporations have been granted "increasingly extensive rights," and are able to "use their limitless supplies of money to influence a democratic electoral system," they should not be shielded from "pay[ing] damages to the families of those they've tortured and murdered."[308]

"Relief from suffering, and accountability for human rights violations, should not depend on whether an individual or a corporation is responsible for the abuse."[309] The First Congress made no such distinction in 1789 and accordingly granted U.S. federal courts jurisdiction over "any

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[303] Hathaway, *supra* note 43.

[304] *Id.*

[305] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[306] Susan Farbstein & Tyler Giannini, *Liability for Harms*, N.Y. TIMES (Mar. 6, 2012), http://www.nytimes.com/roomfordebate/2012/02/28/corporate-rights-and-human-rights/rights-come-with-responsibility [hereinafter Farbstein & Giannini, *Liability for Harms*].

[307] Vincent Warren, *The Right Thing To Do*, N.Y. TIMES (Feb. 29, 2012, updated Nov. 16, 2012), http://www.nytimes.com/roomfordebate/2012/02/28/corporate-rights-and-human-rights/siding-with-the-plaintiffs-is-the-right-thing-to-do.

[308] *Id.*

[309] Farbstein and Giannini, *Liability for Harms*, *supra* note 306.

civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[310] As actors whose power and influence often surpass that of many nation states, corporations should not be able to disregard these responsibilities simply because they are corporations or commit their torts abroad. Ideally corporations could be subject to suit in U.S. courts regardless of where the tort occurs, and implementing the safe-conduct theory satisfies both sides of the debate by allowing liability where the United States has made to foreigners some implied promise of safety, and corporations interfere with the fulfillment of that promise. Perhaps the United States cannot be the "world's court,"[311] but it can promote human rights by prompting Congress to amend the ATS to provide specific causes of action for some of the worst atrocities.

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[310] *See* Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 76–77 (1789), codified at 28 U.S.C. § 1350 (2006) (also known as the Alien Tort Claims Act) and text accompanying *supra* note 2.

[311] Bellinger, *U.S. Can't Be the World's Court*, *supra* note 136.