NOTE

Domesticating the Alien Tort Statute

Michael L. Jones[*]

ABSTRACT

The Alien Tort Statute allows aliens to sue for violations of the law of nations. The statute does not specify whom the aliens are allowed to sue. There is not much history surrounding the statute, as it lay dormant for nearly two centuries. The ambiguities of the statute and the lack of history have led to widely differing views of how to interpret the statute, especially concerning corporate liability. Some circuits have turned to international law to determine whether corporations are subject to suit under the Alien Tort Statute, while others have turned to historical context and domestic law. The Supreme Court was recently unwilling to address the problem. However, corporate liability in diversity jurisdiction cases went through a similar process in the 19th century, with the Supreme Court eventually recognizing that corporations can be held liable under diversity jurisdiction. This Note suggests a similar resolution for the Alien Tort Statute, arguing that it is consistent with the First Congress's intent.

INTRODUCTION

The First Congress enacted the Alien Tort Statute ("ATS") as part of the Judiciary Act of 1789,[1] but it went practically untouched for nearly two centuries.[2] As one federal judge remarked: "This old but little used section is a kind of legal Lohengrin; although it has been with us since the first

* J.D., 2016, The George Washington University Law School.

1 Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (current version at 28 U.S.C. § 1350 (2012)).

2 *See* Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1470 (2014); *infra* Section II.A.

July 2016 Vol. 84

Judiciary Act, no one seems to know whence it came."[3] This history, or lack thereof, set up a particularly complicated problem when considering the unelaborate text of the ATS, which provides federal courts with 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."[4] Most notably, the statute names the plaintiff—an alien—but fails to describe any limitations on the type of defendant that can be sued.[5]

When federal courts resurrected the statute in the late twentieth century, they used it to establish jurisdiction over suits between aliens involving conduct occurring outside of the United States.[6] As cases continued, suits expanded from state actors to private actors,[7] and then from individuals to multinational corporations.[8] The Supreme Court recently held, in *Kiobel v. Royal Dutch Petroleum Co.*,[9] that the presumption against extraterritorial application prevents certain kinds of ATS suits, such as those between aliens concerning foreign conduct.[10] But this ruling notably dodged an important question: are corporations subject to suit under the ATS?

This Note proposes that the ATS should include corporate liability, but only against U.S. corporations. First, while the First Congress may not have contemplated corporations committing law of nations violations, subjecting them to suit under the ATS is consistent with the original aim of the statute—to redress injuries caused by U.S. citizens against foreign individuals. Second, the Court has already confronted a similar ambiguity in nineteenth century diversity jurisdiction cases.[11] In those cases, diversity jurisdiction was not explicitly mentioned in the statute, but the Court read corporate liability into the statute because such liability was consistent with the intent of the First Congress.[12] With the ATS, the Court should follow diversity jurisdiction's path and recognize corporate liability.

Part I provides historical context for the ATS in an attempt to explain its ambiguous language. Part II describes the modern development of ATS

---

3 IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (citation omitted).

4 28 U.S.C. § 1350 (2012).

5 *See id.*

6 *See infra* Section II.A.

7 *See infra* Section II.B.

8 *See infra* Section II.B.

9 Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013).

10 *See infra* Section II.A.

11 *See infra* Part III.

12 *See infra* Part III.

cases as a whole, with a focus on cases concerning corporate liability. Part III compares the path corporate liability is currently taking under the ATS to the path it took two centuries prior under diversity jurisdiction. Part IV argues for recognizing corporate liability under the ATS while limiting that liability to U.S. corporations.

I. HISTORICAL CONTEXT OF THE ATS

A statutory analysis always begins with the text of the statute.[13] The ATS, unfortunately, does not provide much textual substance: "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."[14]

While it is quite clear that the statute imagines "an alien" as the plaintiff, it gives no indication as to appropriate defendants.[15] Moreover, as the Supreme Court has observed, "there is no record even of debate on the section," leading to a "poverty of drafting history."[16] Thus, it is important to look to general "history and practice" to illuminate questions that remain about the ATS.[17]

A. Leading Up to the Enactment of the ATS

Before the First Congress enacted the Judiciary Act of 1789, the Founders were concerned that the Articles of Confederation did not provide a method of addressing law of nations violations by citizens of the United States.[18] James Madison expressed this concern in Federalist No. 42: "The[] articles [of confederation] contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations."[19] If U.S. citizens were not held accountable for such violations, it could be devastating for diplomatic relations, as Alexander Hamilton noted in Federalist No. 80: "The Union will undoubtedly be answerable to

---

13 Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 173 (2009).

14 28 U.S.C. § 1350 (2012).

15 Despite this fact, some scholars have attempted a very thorough textual analysis of this statute. *See, e.g.*, Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 515–21 (2011) [hereinafter Bellia & Clark, *The Alien Tort Statute*].

16 Sosa v. Alvarez-Machain, 542 U.S. 692, 718 (2004).

17 *Id.* at 714.

18 *See* THE FEDERALIST NO. 42, at 254 (James Madison) (Bantam Classic ed., 1982); *see also* THE FEDERALIST NO. 80, at 484 (Alexander Hamilton) (Bantam Classic ed., 1982).

19 THE FEDERALIST NO. 42, at 254 (James Madison) (Bantam Classic ed., 1982).

foreign powers for the conduct of its members."[20] These concerns were fueled by past incidents where the federal government was forced to rely on the states to address law of nations violations.[21] When the Founders later met at the Constitutional Convention, Edmund Randolph's opening speech expressed how Congress could not "prevent a war" because it could not "cause infractions or treaties, or the law of nations, to be punished."[22]

The time period's common understanding of the law of nations required the Founders to provide a means for aliens to seek redress for injuries inflicted upon them by U.S. citizens. This understanding is reflected in Emmerich Vattel's treatise, *The Law of Nations*,[23] which was well known to the Founders[24] and has been cited approvingly by the Supreme Court in ATS cases.[25] Vattel describes how "[p]rivate persons who are members of one nation, may offend and ill-treat the citizens of another, and may injure a foreign sovereign,"[26] and if that were to happen, "the nation or the sovereign ought not to suffer the citizens to do an injury to the subjects of another state, much less to offend that state itself."[27] In such a case, the offended state should appeal to the offender's sovereign for redress.[28] If the offender's sovereign fails to provide such redress, it could be held accountable for the injuries caused by its citizens.[29] Based on Vattel's understanding of the law of nations, the Founders would have wanted a means for injured foreign citizens to hold U.S. citizens accountable. Without a provision similar to the ATS, foreign sovereigns

---

20 THE FEDERALIST NO. 80, at 484 (Alexander Hamilton) (Bantam Classic ed., 1982).

21 *See, e.g.*, Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784) (convicting defendant after he physically attacked the Consul General of France to the United States).

22 Edmund Randolph, *Opening Speech at the Constitutional Convention*, DECLARINGAMERICA.COM, http://declaringamerica.com/randolph-opening-speech-at-the-constitutional-convention-1787-summary/ (last visited July 31, 2016).

23 EMMERICH DE VATTEL, THE LAW OF NATIONS (Philadelphia, T. & J. W. Johnson & Co. 1863).

24 Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 15–16 (2009) [hereinafter Bellia & Clark, *Federal Common Law of Nations*] ("In 1775, Benjamin Franklin wrote to thank Charles Dumas, American agent in the Hague, for 'the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations.' A copy, Franklin explained, 'has been continually in the hands of the members of our [Continental] Congress.'" (alteration in original)).

25 Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1666 (2013); Sosa v. Alvarez-Machain, 542 U.S. 692, 714–16 (2004) (citing Vattel three separate times).

26 VATTEL, *supra* note 23, bk. 2, ch. 6, § 71, at 161.

27 *Id.* § 72, at 161.

28 *Id.* § 76, at 162.

29 *Id.* § 77, at 162.

could hold the U.S. responsible for injuries inflicted by its citizens, embroiling it in an unwanted war.

B. Judiciary Act

To quell the concerns over the federal government's inability to address violations of the law of nations, the First Congress enacted the Judiciary Act of 1789, giving federal courts jurisdiction over these cases. Section 13 gave the Supreme Court original jurisdiction over suits involving ambassadors.[30] Section 9 gave district courts original jurisdiction over admiralty and maritime cases.[31] Section 11 gave circuit courts diversity jurisdiction over all civil cases where an alien is a party and the amount in controversy exceeds $500.[32] As Professors Bellia and Clark aptly put it, "[h]ad Congress stopped there, it would have omitted an important category of law of nations violations that threatened the peace of the United States: personal injuries that US citizens inflicted upon aliens resulting in less than $500 in damages."[33] The amount in controversy requirement is important because it effectively eliminated the vast majority of cognizable tort suits of the time period.[34]

To fill the jurisdictional hole, the First Congress included the ATS as part of the Judiciary Act of 1789, allowing for jurisdiction "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[35] The ATS worked to prevent the situation Vattel envisioned, where a foreign sovereign held an offender's state responsible for an injury suffered by a foreign citizen because the offender's state did not afford the foreign citizen a means to seek reparations.[36]

C. Early Treatment of the ATS

There are only three early sources that discuss the ATS, but all three contemplate U.S. citizens as defendants. The first case to address the ATS, *Moxon v. Fanny*,[37] arose in 1793 in Pennsylvania. In that case, a French

---

30 Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

31 *Id.* § 9.

32 *Id.* § 11.

33 Bellia & Clark, *The Alien Tort Statute*, *supra* note 15, at 509.

34 Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 900 (2006).

35 Judiciary Act of 1789 § 9.

36 VATTEL, *supra* note 23, § 77, at 163.

37 Moxon v. Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895).

crew seized a British ship in U.S. waters, and the vessel's owners sued for its return.[38] The court dismissed the case, holding that the judiciary is not "the proper department of the neutral state to inquire into and vindicate this offence."[39] Later in the opinion, the court briefly mentioned that the suit could not survive under the ATS, because a suit "cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for."[40] Although the court focused on the remedy sought rather than the citizenship of the parties in the case, it still did not think a case could proceed against a foreign defendant under the ATS.[41]

The next case arose two years later in South Carolina: *Bolchos v. Darrel*.[42] Bolchos, a French privateer, captured on the high seas an enemy Spanish vessel containing slaves and sailed it into port in South Carolina.[43] Darrel, a U.S. citizen and agent of the slaves' owner, seized the slaves and sold them, causing Bolchos to bring suit for compensation.[44] Because "the original cause arose at sea," the court had jurisdiction, as "every thing dependent on it is triable in the admiralty."[45] Even if the claim arose from the seizure on land, then "the [Judiciary Act] gives this court . . . jurisdiction . . . where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States."[46] *Bolchos*, like *Moxon*, did not focus on the citizenship of the parties in the case. Still, even though the courts did not rest their reasoning on the citizenship of the defendants, it is noteworthy that the *Moxon* court did not think an ATS case could proceed against an alien but the *Bolchos* court held one could proceed against a U.S. citizen.[47]

The same year that *Bolchos* was decided, Attorney General William Bradford wrote an opinion in response to information that American citizens joined in a French plunder of a British colony in Sierra Leone.[48] He concluded that, although there was doubt about the availability of

---

38 *Id.* at 942.

39 *Id.* at 947.

40 *Id.* at 948.

41 *See id.* at 943, 947–48 ("Neither does this suit for a specific return of the property appear to be included in the words of the judiciary act . . . .").

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

43 *Id.* at 810.

44 *Id.* at 811; Bellia & Clark, *The Alien Tort Statute*, *supra* note 15, at 459 ("Darrel, apparently a US citizen, seized the slaves on behalf of Savage.").

45 *Bolchos*, 3 F. Cas. at 810.

46 *Id.*

47 *See id.*; Moxon v. Fanny, 17 F. Cas. 942, 943, 948 (D. Pa. 1793) (No. 9,895).

48 Breach of Neutrality, 1 Op. Att'y Gen. 57, 58 (1795).

criminal prosecution, federal courts would have jurisdiction under the ATS for a civil suit:

> 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 . . . .[49]

None of these three early references to the ATS explicitly limits the ATS to U.S. citizens or expand its scope to aliens. Even so, in the two references that contemplated a suit successfully proceeding under the ATS, the suit involved a U.S. defendant. Unfortunately, these three sources contain the only specific discussion of the ATS in its early history.

II. MODERN ATS LITIGATION

A. *Resurrection of the ATS*

The ATS lay dormant for nearly two centuries[50] until the 1980 decision in *Filartiga v. Pena-Irala*.[51] The *Filartiga* court concluded that the defendant "violate[d] universally accepted norms of the international law of human rights," giving the court jurisdiction under the ATS.[52] This case marked the first time an appellate court upheld a claim invoking the court's jurisdiction under the ATS, leading the Supreme Court to later deem it "the birth of the modern line of [ATS] cases."[53] Not only did *Filartiga* resurrect the ATS, but it did so in a suit involving an alien defendant.[54] Even though the court did not specifically consider the citizenship of the defendant, the court expanded the scope of the ATS beyond what was previously recognized in the statute's early treatment by applying it against an alien defendant.[55]

Most of the ATS cases brought in the 1980s and early 1990s were claims against state actors,[56] including the defendant in *Filartiga*.[57] Those

---

49 *Id.* at 58–59.

50 One exception is *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), a child custody suit in which the ATS was the basis for jurisdiction, but *Adra* did not mention corporate liability.

51 Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

52 *Id.* at 878.

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

54 *Filartiga*, 630 F.2d at 878.

55 *See supra* Section I.C.

56 Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort*

few that were brought against corporate defendants were dismissed on other grounds, never reaching the question of corporate liability under the ATS.[58] Before courts directly addressed corporate liability under the ATS, they first extended ATS liability from state to private actors. In *Kadic v. Karadzic*,[59] the Second Circuit considered a suit by citizens of Bosnia-Herzegovina involving various atrocities.[60] The defendant claimed immunity from suit as a private actor,[61] arguing that only state actors were subject to suit under the ATS.[62] The court disagreed, holding that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or *only as private individuals*."[63]

Once private actors became subject to suit, it was not long before corporations became defendants. The first time a court invoked ATS jurisdiction over a corporate defendant was in *Doe v. Unocal Corp.*,[64] two years after the *Kadic* decision. In allowing the action to proceed against Unocal Corporation, the court held that private actors could be held liable under the ATS, relying heavily on the *Kadic* decision.[65] However, the court did not specifically distinguish between corporations and natural persons as private actors, so the issue of corporate liability went largely unaddressed.[66]

Corporate liability under the ATS was directly addressed for the first time in two separate district court cases in the Second Circuit. In the first of those two cases, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[67] the court concluded that a corporation is capable of violating the law of nations, relying largely on international precedent,[68] as well as shaky

---

Statute: A Flawed System of Judicial Lawmaking, 51 VA. J. INT'L L. 353, 364 (2011).

57 *Id.* at 364.

58 *Id.* at 365 nn.72–73 (collecting cases).

59 Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

60 *Id.* at 236–37.

61 An interesting defense, given that he also claimed to be "President of the self-proclaimed Republic of Srpska." *Id.* at 239.

62 *Id.*

63 *Id.* (emphasis added).

64 Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part and rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

65 *Id.* at 892 (citing *Kadic*, 70 F.3d at 239, 243).

66 *Id.*

67 Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

68 *See id.* at 315–18 (finding evidence of corporate liability in the context of international tribunals, treaties, and organizations).

U.S. precedent.[69] *In re Agent Orange Product Liability Litigation*,[70] which marked the second time a court explicitly examined corporate liability, rejected the interpretations of international precedent used in *Talisman*.[71] Still, the court did find, as did the court in *Talisman*, that "[t]he potential liability of corporations under the ATS has been widely recognized or assumed by federal courts."[72] The judge concluded that "[l]imiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world."[73] The *Talisman* and *Agent Orange* courts essentially backed into finding corporate liability. Both courts resolved the question of corporate liability by looking to past practice, even though the question of corporate liability was not raised in previous cases.[74]

B. Sosa *and the ATS*

The 2004 case *Sosa v. Alvarez-Marchain*[75] was the first time the Supreme Court addressed the ATS,[76] interpreting it as "a jurisdictional statute creating no new causes of action."[77] The Supreme Court determined that "the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[78] The First Congress, in the Court's view, considered only three offenses to be torts in violation of the law of nations: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[79]

While the Supreme Court went through great effort to discuss the types of claims cognizable under the ATS, it failed to discuss any limitations on the types of parties subject to the ATS. However, in a footnote, the Court

---

[69] *Id.* at 312 (reasoning that "[t]he fact that the Second Circuit did not address an obvious jurisdictional question *sua sponte* indicates that it had no reservations about the [ATS] reaching the acts of corporations").

[70] *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

[71] *See id.* at 54–59.

[72] *Id.* at 58.

[73] *Id.*

[74] *Id.* at 56–59; Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 312 (S.D.N.Y. 2003).

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

[76] Bellia & Clark, *The Alien Tort Statute*, *supra* note 15, at 462.

[77] *Sosa*, 542 U.S. at 724. This case resulted from the Drug Enforcement Agency hiring Mexican nationals to abduct a Mexican physician in Mexico and fly him to El Paso, Texas, where he could be arrested. *Id.* at 697. The physician was acquitted of his crimes and later sued his captors under the ATS for a violation of the law of nations. *Id.*

[78] *Sosa*, 542 U.S. at 698.

[79] *Id.* at 715 (relying heavily on Blackstone's Commentaries).

said that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[80] Even though this language is confined to a footnote, it became the foundation for later circuit courts to justify limiting the ATS to individuals.[81]

C. The Kiobel *Decisions*

The question of corporate liability reached a federal court of appeals for the first time in *Kiobel v. Royal Dutch Petroleum Co.*[82] The Second Circuit broke from the decisions of its lower courts[83] and found that corporate liability does not exist under the ATS.[84] On appeal, the Supreme Court affirmed the Second Circuit's dismissal of the suit but did so on other grounds, leaving alone the question of corporate liability.[85]

1. Appellate Review in the Second Circuit

The Second Circuit's holding that corporate liability does not exist under the ATS is based on two points. First, the *Kiobel* court determined that international law, as opposed to domestic law, governs the question of *who* can be sued by relying on a footnote in the Supreme Court's decision in *Sosa* and precedent within the Second Circuit.[86] In a *Sosa* footnote, the Supreme Court posited that a further question to be decided later would be "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[87] The court in *Kiobel* took this footnote to "require[] that [they] look to *international law* to determine [their] jurisdiction over ATS claims against a particular class of defendant, such as corporations."[88]

Second, the court found that corporate liability is not a norm of

---

80 *Id.* at 732 n.20.

81 *See, e.g.*, Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 127–31 (2d Cir. 2010), *aff'd on other grounds*, 133 S. Ct. 1659 (2013).

82 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *aff'd on other grounds*, 133 S. Ct. 1659 (2013).

83 *See supra* Section II.A.2.

84 *Kiobel*, 621 F.3d at 149.

85 Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1663 (2013).

86 *See Kiobel*, 621 F.3d at 127–31.

87 Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004); *Kiobel*, 621 F.3d at 127.

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

customary international law.[89] To start, the court surveyed international tribunals and, similar to previous courts, looked closely at the Nuremberg trials.[90] The court found that in the Nuremburg trials, and even in tribunals since, there had been no corporate liability for violations of customary international law.[91] Then, the court looked to international treaties.[92] Explicitly disagreeing with the *Talisman* court's analysis of international treaties, the *Kiobel* court found that the only treaties imposing corporate liability were not signed by the United States and had very limited scope of application, failing to rise to the level of customary international law.[93]

2. Dodging the Question

In *Kiobel*, the Supreme Court addressed the ATS for the second and most recent time, but without addressing corporate liability.[94] After the Second Circuit dismissed the suit, holding that corporate liability does not exist under the ATS,[95] the Supreme Court initially granted certiorari to hear that question.[96] The Court heard arguments on that issue, and then directed the parties to file supplemental briefs and heard oral argument again on a second question: "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."[97]

The Supreme Court decided the case on the second question and avoided the first question, the question concerning corporate liability.[98] The Court found that "the principles underlying the presumption against extraterritoriality . . . constrain courts exercising their power under the ATS" for two reasons.[99] First, "nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach."[100] Second, neither "does the historical background against which the ATS was enacted overcome the presumption against

89 *Id.* at 118–20.
90 *Id.* at 118–20, 126–27.
91 *See id.* at 132–37.
92 *See id.* at 137.
93 *See id.* at 138.
94 *See generally* Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013).
95 *Kiobel*, 621 F.3d at 148–49.
96 *Kiobel*, 133 S. Ct at 1663.
97 *Id.* (alteration in original) (citation omitted).
98 *Id.*
99 *Id.* at 1665.
100 *Id.*

application to conduct in the territory of another sovereign."[101]

D. Current Circuit Splits

The D.C. Circuit took up the question of corporate liability under the ATS the year after the Second Circuit's *Kiobel* decision. In *Doe v. Exxon Mobil Corp.*,[102] the D.C. Circuit found that corporate liability does exist under the ATS.[103] The court came to this conclusion by distinguishing *Sosa* as inapplicable to corporate liability and further finding support from the historical context and purpose of the ATS, as well as international law.[104] First, the court found that "customary international law does not provide the rule of decision" because "corporate liability differs fundamentally from the conduct-governing norms at issue in *Sosa*."[105] The *Sosa* decision, the D.C. Circuit reasoned, was limited to addressing acceptable causes of action an alien could bring, a holding that does not pertain to classes of defendants.[106] Second, because the court was not bound by international law for the question of corporate liability, the D.C. Circuit turned to the text of the ATS and noted that "the phrase 'any civil action' is inclusive and unrestricted."[107] However, because the text is unelaborate and there is no formal legislative history, the court turned to the historical context of the ATS and concluded that "corporate liability is consistent with the purpose of the ATS [and] with the understanding of agency law in 1789 and the present."[108]

In *Sarei v. Rio Tinto, PLC*,[109] the Ninth Circuit, like the Second Circuit, looked to international law to determine whether corporations

---

101 *Id.* at 1666.

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

103 *Id.*

104 *See id.* at 41. This decision was later vacated "in light of intervening changes in governing law regarding the extraterritorial reach of the Alien Tort Statute." Doe v. Exxon Mobil Corp., 527 F. App'x 7 (D.C. Cir. 2013) (citing Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659 (2013)).

105 *Doe*, 654 F.3d at 41.

106 *See id.* at 41, 43 (rejecting the Second Circuit's *Kiobel* decision because it misinterpreted footnote 20 in *Sosa*).

107 *Id.* at 43.

108 *Id.* at 41, 43–48 (describing the historical context and precedent for applying the ATS).

109 Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) (en banc). This was the second time the Ninth Circuit heard the case en banc, the first being in Sarei v. Rio Tinto, PLC (*Sarei II*), 550 F.3d 822 (9th Cir. 2008) (en banc). That case, however, did not reach the merits of the ATS claims. *Id.* at 825.

could be held liable under the ATS.[110] There, residents of Papua New Guinea sued the Rio Tinto mining group under the ATS for international law violations.[111] However, the Ninth Circuit broke from the Second Circuit's approach, finding that the court "cannot be bound to find liability only where international fora have imposed liability."[112] Instead, the proper inquiry is whether the norm in international law is "universal."[113] The *Sarei* opinion was later vacated in light of the Supreme Court's decision in *Kiobel*, but in *Doe I v. Nestle USA, Inc.*,[114] the Ninth Circuit reaffirmed most of the *Sarei* court's corporate liability findings as unaffected by *Kiobel*.[115]

The Seventh Circuit reached the question of ATS corporate liability in *Flomo v. Firestone Natural Rubber Co., LLC*.[116] Twenty-three Liberian children, who worked on Firestone Natural Rubber Company's rubber plantation, sued the corporation for utilizing hazardous child labor in violation of customary international law.[117] Judge Posner, writing for the majority, sought to reject the Second Circuit's finding in *Kiobel* for two reasons. First, there was international precedent for the prosecution of corporations for violations of the law of nations because "the allied powers dissolved German corporations that had assisted the Nazi war effort."[118] Second, looking to international law for precedent asks the wrong question—Judge Posner made a "distinction between a principle of [customary international] law, which is a matter of substance, and the means of enforcing it, which is a matter of procedure or remedy."[119] Thus, it is up to domestic courts to determine how to enforce those violations, a point that is "supported by treaties that explicitly authorize national

---

110 *Sarei*, 671 F.3d at 758–70. This analysis came after first concluding that there was nothing in the text of the statute barring corporate liability. *See id.* at 748.

111 *Id.* at 742–43; *see also Sarei II*, 550 F.3d at 825 (involving allegations that the Rio Tinto mining group enlisted the government of Papua New Guinea to displace villages, raze forests, and secure the mine through military force).

112 *Sarei*, 671 F.3d at 761.

113 *Id.* at 760, 768 (finding that the claims for genocide and war crimes were universally recognized, while the claims for racial discrimination and crimes against humanity were not).

114 Doe I v. Nestle USA, Inc., 766 F.3d 1013 (9th Cir. 2014).

115 *Id.* at 1020–23 (failing to mention *Kiobel* at all in its discussion of corporate liability under the ATS).

116 Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013 (7th Cir. 2011).

117 *Id.* at 1015.

118 *Id.* at 1017.

119 *Id.* at 1019.

variation in methods of enforc[ing]" customary international law.[120]

In *Romero v. Drummond Co.*,[121] the Eleventh Circuit considered ATS corporate liability for the first time in a suit by union leaders against Drummond, Ltd., a mining company in Colombia.[122] The complaint alleged that Drummond hired paramilitary forces to torture three union leaders, including Juan Aquas Romero, and kill another three union leaders, all in violation of the ATS.[123] In deciding that corporate liability exists under the ATS, the Eleventh Circuit first reasoned that "[t]he text of the Alien Tort Statute provides no express exception for corporations."[124] Second, citing *Aldana v. Del Monte Fresh Produce, N.A., Inc.*,[125] the court found that "the law of [the Eleventh] Circuit is that [the ATS] grants jurisdiction from complaints of torture against corporate defendants"—precedent to which the court was bound.[126] This was despite the fact that the *Aldana* court never considered the question of ATS corporate liability.[127]

III. A PATH TRAVELED ONCE BEFORE

Though the Constitution and the Judiciary Act of 1789 granted diversity jurisdiction to federal courts, neither addressed the issue of corporate liability.[128] Despite this fact, corporations sued and were sued for two decades without facing the issue of corporate liability.[129]

The Supreme Court finally reached the question of corporate liability in diversity jurisdiction in *Bank of the United States v. Deveaux*.[130] The plaintiff, a bank created by Congress and headquartered in Philadelphia, sued citizens of Georgia in a Georgia federal court. In deciding the

---

[120] *Id.* at 1020 (collecting treaties supporting national variance in enforcement of customary international law).

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

[122] *Id.* at 1308–09.

[123] *Id.*

[124] *Id.* at 1315.

[125] Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005).

[126] *Romero*, 552 F.3d at 1315 (citing *Aldana*, 416 F.3d at 1242).

[127] *See generally Aldana*, 416 F.3d 1242.

[128] U.S. CONST. art. III, § 2; Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (current version at 28 U.S.C. § 1350 (2012)).

[129] *See, e.g.*, Head v. Providence Ins. Co., 6 U.S. (2 Cranch) 127 (1804); Graves v. Boston Marine Ins. Co., 6 U.S. (2 Cranch) 419 (1804); *see also* Frederick Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202, 211 (1946).

[130] Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809).

question of jurisdiction, Chief Justice Marshall looked to "the character of the individuals who compose the corporation."[131] In doing so, he explicitly rejected the idea of a corporation as a citizen for jurisdictional purposes because a corporation is an "invisible, intangible, and artificial being, [a] mere legal entity," and thus, "cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name."[132] Practically speaking, in order for a federal court to have diversity jurisdiction over a corporation, no person composing the corporation could share citizenship with any member of the opposing party, making it very difficult for corporations to sue or be sued in federal court.[133]

Over thirty years later, the Supreme Court overruled *Deveaux* in *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*[134] and found that "a corporation created by and doing business in a particular state, is . . . capable of being treated as a citizen of that state, as much as a natural person."[135] This new interpretation of corporate liability eliminated the complete diversity problems that were created when reading *Deveaux* together with other Supreme Court precedent, but it also went a step further and directly recognized the citizenship of corporations as independent of their members.

The Supreme Court changed course again in *Marshall v. Baltimore & Ohio Railroad Co.*[136] and found that "'those who use the corporate name, and exercise the faculties conferred by it,' should be presumed conclusively to be citizens of the corporation's State of incorporation."[137] This marked a return to the *Deveaux* reasoning that the Court must look to a corporation's members for citizenship (because a corporation cannot itself be a citizen) but preserved the practical effects of *Letson* by assuming that, for jurisdictional purposes, all members of a corporation were citizens of the

---

131 *Id.* at 92.

132 *Id.* at 86. Under *Strawbridge v. Curtiss*, a Supreme Court case decided three years prior to *Deveaux*, diversity jurisdiction required complete diversity. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806).

133 James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1428 (1964).

134 Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844).

135 *Letson*, 43 U.S. (2 How.) at 558.

136 Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314 (1854).

137 Carden v. Arkoma Assocs., 494 U.S. 185, 188 (1990) (quoting *Marshall*, 57 U.S. (16 How.) at 329 (1854)) (explaining the Court's ruling in *Marshall*).

state that created the corporation.[138]

This decision lasted until Congress passed legislation in 1958 amending the jurisdiction of federal courts in many areas, including corporate liability under diversity jurisdiction.[139] Specifically, it amended section 1332 of title 28 to include corporate liability in diversity jurisdiction, deeming corporations as citizens of the state where "it has its principal place of business."[140]

IV. IDENTIFYING THE ATS DEFENDANT

A. *Including Corporations*

There is a circuit split concerning the authority governing the question of corporate liability—some circuits rely on international law, while others rely on historical context or past practice.[141] Yet the circuits relying on customary international law have expanded the authority of the law of nations too far. Instead, courts should resolve the question of corporate liability under the ATS similarly to how the Court resolved the question of corporate liability under diversity jurisdiction.

1. *Turning Away from International Law*

The Second and Ninth Circuits have used international law to determine whether corporations can be held liable under the ATS.[142] In arriving at this approach, they rely heavily on footnote twenty of the *Sosa* opinion, which reads in relevant part: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[143]

However, the distinction here is not between corporations and individuals, but between state and private actors. This interpretation is supported by the subsequent citation in *Sosa*, using parentheticals to compare *Tel-Oren v. Libyan Arab Republic*[144]—"insufficient consensus in

---

[138] *Marshall*, 57 U.S. (16 How.) at 325–29. This assumption was not rebuttable by evidence to the contrary. *See, e.g.*, Covington Drawbridge Co. v. Shepherd, 61 U.S. (20 How.) 227, 233 (1857).

[139] Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (codified as amended at 28 U.S.C. §§ 1331–1332 (2012)).

[140] *Id.*

[141] *See supra* Section II.D.

[142] *See supra* Section II.C.1, Section II.D.

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

[144] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

1984 that torture by private actors violates international law" —with *Kadic*—"sufficient consensus in 1995 that genocide by private actors violates international law."[145] The Court is comparing courts' recognition of private actors as subject to suit, not recognition of types of private actors. This is understandable, as the distinction between state actors and private actors played a large role in ATS cases.[146]

Moreover, looking to international law is also inconsistent with the intent behind the ATS. The First Congress wanted to provide a redress for aliens when U.S. citizens violated the law of nations.[147] There is no evidence to suggest that a violation would invite war from a foreign sovereign when committed by an individual, but, if committed by a corporation, the foreign sovereign would be apathetic.[148] It follows that the First Congress would have been just as invested in protecting foreign sovereigns from offenses by corporations as it was in protecting foreign sovereigns from offenses by individuals. For example, it did not seem to matter to Attorney General Bradford that a corporation, rather than an individual, might sue American citizens under the ATS.[149] He did not suggest that a federal court would have to look to international law to see if the corporation could sue.[150]

2. *Following Diversity Jurisdiction's Path*

There are many similarities between the ATS and diversity jurisdiction, including their origin—both in the Judiciary Act of 1789. Section 9 of the Judiciary Act includes the ATS,[151] and just two sections later, section 11 describes diversity jurisdiction.[152] Most relevant to this

---

145 *Sosa*, 542 U.S. at 732 n.20.

146 *See supra* Section II.B.

147 *See supra* Section I.A.

148 Doe v. Exxon Mobil Corp., 654 F.3d 11, 47 (D.C. Cir. 2011) ("The historical context, in clarifying the text and purpose of the ATS, suggests no reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e., corporations, to do so.").

149 Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795) ("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 . . . .") (first emphasis added).

150 *See generally id.*

151 Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (current version at 28 U.S.C. § 1350 (2012)).

152 *Id.* § 11.

discussion, neither section makes any reference to corporations or corporate liability. However, because diversity jurisdiction was far and away more popular than ATS jurisdiction, litigants exposed this hole in diversity jurisdiction much more quickly. Over the course of the next 150 years, the Supreme Court attempted to reconcile this silence using 3 different approaches to corporate liability in cases concerning diversity jurisdiction, each approach replacing the one before it.[153] The final approach allowed corporate liability under diversity jurisdiction by finding corporations to be citizens of the state in which they were incorporated.[154]

Corporations were subject to suit as if they were citizens even though there was no language in the Judiciary Act permitting corporate liability in diversity jurisdiction.[155] In reaching this conclusion, the Court found that a corporation "cannot be wielded to deprive others of acknowledged rights" simply because it is not an individual but a legal representation of individuals.[156] The Court sidestepped the lack of statutory language by resting the citizenship of the corporation on the reasoning that the "persons who act under [corporations], and use this corporate name, may be justly presumed to be resident in the State which is the necessary *habitat* of the corporation."[157] Even though corporations are not explicitly mentioned in the Judiciary Act, they are subject to suit because they are comprised of individuals, who are presumed to be citizens of the state of incorporation.[158]

The ATS, unfortunately, did not receive nearly as much attention until the late twentieth century. Now that ATS litigation has increased, history is beginning to repeat itself. Initially, there was a period when corporations were sued under the ATS and litigants did not question corporate liability.[159] Once parties began raising the issue, courts began reacting with different solutions.[160] The main difference here is that the Supreme Court has not had 150 years of precedent to consider the issue, but that is exactly the point—it should not have to. Instead of stumbling through various interpretations of the ATS as it pertains to corporate liability, the Court should rely, by analogy, on its reasoning in *Marshall*. Individuals should not be able to escape liability under the ATS by acting through

153 *See supra* Part III.

154 Marshall v. Baltimore & Ohio R. Co., 57 U.S. (16 How.) 314, 327–28 (1854).

155 *See* Judiciary Act of 1789 § 11.

156 *Marshall*, 57 U.S. (16 How.) at 327.

157 *Id.* at 328.

158 *See id.*

159 *See supra* Part III.

160 *See id.*

corporations.

B. Limiting Corporate Liability to U.S. Corporations

Federal courts initially resurrected the ATS to hear cases between aliens.[161] The statute's text requires that the plaintiff be an alien, but imposes no explicit limitation on the defendant.[162] However, granting federal courts jurisdiction to hear cases against foreign corporations would be inconsistent with the original intent of the First Congress when enacting the ATS.

The First Congress "recognized that the inability to respond to [law of nations] violations could lead to the United States' entanglement in foreign conflicts when a single citizen abroad offended a foreign power by violating the law of nations."[163] James Madison expressed this fear in his work *Vices of the Political System of the United States*:

> As yet foreign powers have not been rigorous in animadverting on us. This moderation however cannot be mistaken for a permanent partiality to our faults, or a permanent security agst. [sic] those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring on the whole.[164]

Federal courts had no reason to hear a suit between aliens, as the U.S. would not be implicated in the law of nations violation at issue. Quite the contrary, presiding over such a case might actually violate the territorial sovereignty of another nation, which itself would embroil the U.S. in a foreign controversy.[165] Instead, as Vattel describes, "every defendant ought to be prosecuted before his own judge," who "is the judge of the place where that defendant has his settled abode, or the judge of the place where the defendant is."[166] In essence, the dispute should be resolved by the defendant's nation or the nation where the dispute took place. If a foreign court, such as a U.S. federal court, were to step in instead, "a sovereign has a right to treat those as enemies who attempt to interfere in his domestic

---

161 *See supra* Section II.A.

162 *See* Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (current version at 28 U.S.C. § 1350 (2012)).

163 Doe v. Exxon Mobil Corp., 654 F.3d 11, 46 (D.C. Cir. 2011).

164 JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES (1787), *reprinted in* THE FOUNDERS' CONSTITUTION VOLUME 1: MAJOR THEMES 147, 166–167 (Robert A. Rutland et al. eds., 1987).

165 VATTEL, *supra* note 23, bk. 2, ch. 8, § 103.

166 *Id.*

affairs."[167]

The few historical references to the ATS are consistent with this interpretation. In *Bolchos*, an ATS suit could proceed against a U.S. citizen and, in *Moxon*, the court did not think it could rely on the ATS in a suit against an alien.[168] Furthermore, Attorney General Bradford only spoke about punishing U.S. citizens, not aliens, even after noting that aliens were just as complicit in the crimes:

> It is stated by the memorialists that certain *American citizens* trading to the coast of Africa, on the 28th of September last, voluntarily joined, conducted, aided, and abetted a French fleet in attacking the settlement, and plundering or destroying the property of British subjects on that coast.
>
> . . . [S]uch acts of hostility committed by *a citizen* are an offence against this country, and punishable by the laws of this country.[169]

While there does not appear to be any specific rejection of a suit between aliens under the ATS, the only known suits of the time period were against U.S. citizens,[170] and Bradford, when given the opportunity to group aliens into a suit against U.S. citizens under the ATS, did not do so.[171]

C. The ATS Defendant

The Court should interpret the ATS to permit suits against U.S. corporations but not foreign corporations. The Court has already read corporate liability into diversity jurisdiction, a similarly ambiguous jurisdictional statute, in order to prevent injustice.[172] Further, limiting ATS liability to individuals would not accurately reflect the concerns of the Framers.[173] Corporations can drag the United States into international disputes just as individuals can.[174] However, the Court should refrain from expanding corporate liability under the ATS to foreign corporations. Such an expansion would be inconsistent with the original purpose of the ATS—to provide redress to aliens in order to prevent angering foreign sovereigns.

---

167 *Id.* ch. 4, § 57.

168 *See supra* Section I.C.

169 Breach of Neutrality, 1 Op. Att'y Gen. 57, 58 (1852) (emphasis added).

170 *See* Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607); Moxon v. Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895).

171 *See* Breach of Neutrality, 1 Op. Att'y Gen. 57, 58 (1795).

172 *See supra* Part III.

173 *See supra* Part I.

174 *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 47 (D.C. Cir. 2011).

Allowing aliens to sue aliens in U.S. courts would embroil the United States in foreign controversies, the exact opposite of the intent behind the ATS.[175]

CONCLUSION

The ATS is an incredibly ambiguous statute that has only just recently started receiving the attention of federal courts. Because of the dearth of drafting history, it is difficult to arrive at the exact meaning of the statute. In a separate, but similar, context, the Court recognized corporate liability in diversity jurisdiction absent specific statutory language permitting it. Here, however, with the help of documents providing historical context, the intent of the First Congress in enacting the ATS becomes clear—to provide redress for aliens against U.S. citizens for law of nations violations. This intent is best acknowledged through a judicial decision explicitly detailing that U.S. citizens, not aliens, are subject to suit under this law, but the term "citizen" encompasses more than just individuals; it includes corporations as well.

---

[175] *See supra* Part I.