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INTRODUCTION

In July 2011, a unanimous Seventh Circuit panel weighed in on an emerging issue of international law. In *Flomo v. Firestone National Rubber Co.*,[1] Judge Richard Posner, writing for the majority, held that corporations can be subjected to civil liability for international law violations in U.S. courts.[2] Violation of international law claims are brought under a 222-year-old statute enacted by the First Congress of the United States—the Alien Tort Statute ("ATS").[3] The Seventh Circuit's decision was significant in light of its stark contrast with the Second Circuit's recent decision *Kiobel v. Royal Dutch Petroleum Co.*[4] In *Kiobel*, the Second Circuit held that corporations cannot be

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[1] Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011). The joining judges were Judge Daniel A. Manion and Judge William J. Bauer.

[2] *Flomo*, 643 F.3d at 1021.

[3] 28 U.S.C. § 1350 (2006). The statute is also known as the Alien Tort Claims Act (ATCA).

[4] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117-18 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011).

subjected to potential liability under the ATS since that statute was not meant to extend to juridical persons.[5] The circuit split arises from scattered ATS litigation across the country, and more importantly, has caught the attention of the Supreme Court, which will hear an appeal from the Second Circuit's opinion later during the 2011 term.[6]

The U.S. Supreme Court has only ruled on the ATS once in the 2004 case of *Sosa v. Alvarez-Machain.*[7] *Sosa* required U.S. courts hearing ATS cases to engage in a merits review ensuring that the underlying breach of international law is in fact a well-established norm of international law.[8] However, the Supreme Court never ruled on who can be sued under the ATS, and the statute is silent on the matter. The significance of haling corporations into American courts by alleging violations of international law lies with the Court's requirement, under *Sosa*, to examine whether the underlying tort is a well-established norm of international law.[9] When a plaintiff sues a foreign public official for the commission of a tort, a court will consider whether certain torts such as torture, summary execution, and arbitrary detention constitute breaches of international law. But, when a plaintiff hales a corporation into court, the range of international torts the court can consider will be significantly larger—a mere function of the corporation's ability to perform actions on a much larger scale than a single individual. When a corporation can be sued under the ATS, the courts are free to consider whether large-scale torts such as child labor or cultural genocide are violations of international law.[10]

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

[6] *See* Tyler Giannini & Susan Farbstein, *Supreme Court Grants Cert in Kiobel, Deciding to Hear Corporate ATS Case*, INT'L HUMAN RIGHTS CLINIC (Oct. 17, 2011, 11:35 PM), http://harvardhumanrights.wordpress.com/tag/corporate-liability.

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

[8] *Id*. at 724.

[9] *Id*.

[10] See *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d. Cir. 2002), where Ecuadorian and Peruvian citizens brought ATS claims against the oil corporation for environmental damage and personal injury stemming from Texaco's oil activities in the region.

Revisionists argue that allowing American jurists to make these types of judgments moves the U.S. in the wrong direction.[11] Indeed, an important question remains whether domestic courts are the appropriate forum to bring corporations to liability. However, this question is easily answered by those who view international law as working in tangent with domestic law, such as Judge Posner. To these jurists, the issue at hand is one of remedies, and thus one which under international law is properly addressed at the domestic level.[12] It is undeniable that under the current state of affairs, the ATS is moving its way into the domestic courts one circuit at a time and bringing corporate liability with it.

This note examines the recent Seventh Circuit decision of *Flomo v. Firestone National Rubber*, and analyzes the Seventh Circuit's rationale for holding that corporations may be subjected to civil liability under the ATS. While the rationale employed is unconventional for this area of litigation, it comes as a new analysis and ultimately squares with other circuit opinions holding that corporations can be subject to liability under the statute. Part I of this note provides an historical background of the ATS, dating back to its inception in the Judiciary Act of 1789, fast-forwarding to its revival in 1980 with *Filartiga v. Pena-Irala*, and ending with more recent ATS litigation cases. Part II dissects the Seventh Circuit's decision in *Flomo v. Firestone* and the court's rationale for siding with the corporate liability camp over the corporate immunity camp. Finally, Section III argues that the Seventh Circuit's decision is legally correct in holding corporations subject to liability under the ATS.

[11] *See generally* Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117 (2011).

[12] Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013,1019 (7th Cir. 2011).

I. BACKGROUND

A. Introduction to the ATS & the Case that Launched its Modern Use

The Alien Tort Statute ("ATS") was born with the Judiciary Act of 1789.[13] The ATS provides that "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] Thus, the ATS allows non-U.S. citizens to seek financial redress from individuals within U.S. borders for violations of international law whether those individuals are U.S. citizens or not.[15]

1. Legislative History of the Act and the Absence of Reference to "Defendants"

While modern courts have sought clarification of the ATS's original intent in the legislative history of the statute, such history is scarce. However, the Congressional Resolution of 1781 is insightful.[16] The Resolution shows the First Congress' desire to acquire the

[13] Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (codified as amended at 28 U.S.C. § 1350 (2006).

[14] *See id*. The term "law of nations" is interchangeable with customary international law. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2nd Cir. 1980).

[15] On its face the ATS appears to be a jurisdictional statute only, but debate over whether the ATS provides foreign plaintiffs with an independent cause of action was resolved in *Sosa v. Alvarez-Machain* when the Supreme Court noted that, "the jurisdictional grant is best read as have been enacted on the understanding 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." 542 U.S. 692, 724 (2004). The Supreme Court's holding in *Sosa* now requires courts to entertain a merits review of the existence of a customary international law violation to establish jurisdiction and proceed in a case. *Id*. The standard for this merits review is discussed below in Part (I)(A)(4)(a) and the accompanying footnotes.

[16] For a complete discussion on the historical origins of the ATS, including the text of the 1781 Congressional Report, see William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L. & COMP. L. REV. 221 (1996).

authority to punish international law violations, which at the time, consisted of a few enumerated causes of action.[17] Originally, the intent was to authorize criminal sanctions for individuals committing these violations.[18] But, it followed that civil sanctions would be "an entirely logical addition."[19] The recommendations within the 1781 Congressional Resolution were historically succeeded by what became known as the Marbois affair.[20] In 1784, a French citizen publically assaulted the French Consul General, Francis Barbe Marbois, in Philadelphia.[21] The assailant was criminally punished under state law, but the U.S. Government had no federal recourse to offer the Consul General since it was limited by powers expressly delegated to it by Congress.[22] Four years later, in 1788, another similar incident occurred when a constable in New York City entered the Dutch Ambassador's home and attacked him.[23] The assailant in this attack was also criminally punished by the state court, but again no federal remedy was available to the Ambassador.[24] The incidents prompted recommendations to Congress by the Secretary General, John Jay, for explicit laws providing a federal remedy to the victims of such acts.[25] The numerous congressional recommendations of the 1780s were finally codified in the Judiciary Act of 1789.[26]

[17] *Id*.

[18] *Id*. at 226–27.

[19] *Id*. at 228.

[20] *Id*. at 229.

[21] *Id*.

[22] *Id*. at 229–30.

[23] *Id*. at 230.

[24] *Id*.

[25] *Id*.

[26] *Id*.; *see also* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 827 (3d ed. 2005) (noting that an apparent reason in enacting the ATS was to "uphold the standing of the United States as a new but reliable member of the international community" by affording foreign aliens redress if injured by a U.S. citizen or resident who was violating international law).

2. *Filartiga v. Pena-Irala* Resuscitates the ATS

Despite the ATS's animated history, for the first two hundred years of its existence, use of the Statute was sparse. ATS plaintiffs established jurisdiction under the act only twice.[27] This lack of use changed in 1980 when the now-celebrated case of *Filartiga v. Pena-Irala* launched a modern use of the statute.[28] In *Filartiga*, two Paraguayan plaintiffs filed a wrongful death suit against a former Paraguayan government official.[29] The plaintiffs, a political opponent of the Paraguayan government and his daughter, claimed that a government official had kidnapped, tortured, and murdered a seventeen-year old boy, who was the son and brother to the plaintiffs.[30] Their complaint alleged that the government official violated various international law statutes when he tortured the boy to death.[31] Their complaint sought compensatory and punitive damages

[27] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004); *see also* Kenneth C. Randall, *Federal Jurisdiction over International Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INTL. L. & POL. 1, 4, n. 15 (1985); *see also* Knowles, *supra* note 11, at 1127 (noting that the ATS was invoked two dozen times from 1789–1980, but established jurisdiction only twice).

[28] Knowles, *supra* note 11, at 1127.

[29] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d. Cir. 1980).

[30] Dr. Joel Filartiga had been a staunch opponent of the Paraguayan President Alfedo Stroesnner and of his government. *Id*. After Joelito Filartiga was murdered, Dolly Filartiga, Dr. Filartiga's daughter, fled to Washington D.C. and sought political asylum. *Id*. Dr. Filartiga followed and remained with her. *Id*. Thereafter, Americo Norberto Pena-Irala, Inspector General of Police in Asuncion, Paraguay, and suspected murderer of Dr. Filartiga's son, came to the United States on a visitor's visa. *Id*. at 879. He overstayed the visa and remained unlawfully in the United States with his girlfriend whom had also left Paraguay. *Id.* Upon finding out that Pena-Irala was within U.S. boundaries, Dr. Filartiga and his daughter notified the Immigration and Naturalization Service (INS) of Pena-Irala's illegal presence in the country. *Id.* The INS arrested Pena-Irala for unlawfully overstaying his visitor's visa, and while he awaited deportation back to Paraguay, Dr. Filartiga and his daughter filed a complaint. *Id*. at 878.

[31] The complaint included violations of the United Nations Charter, the Universal Declaration on Human Rights, the United Nations Declaration Against Torture, the American Declaration on the Rights and Duties of Man and other

of over $10,000,000.[32] The complaint established jurisdiction over the claim through 28 U.S.C. § 1331 and under the ATS.[33] While the district court denied jurisdiction and found for the defendant, on appeal, the Second Circuit reversed and remanded.[34]

> The Second Circuit held that the ATS provided U.S. courts with the jurisdiction to hear suits brought by foreign plaintiffs against foreign defendants for international law violations.[35] Writing for the unanimous Second Circuit Court of Appeals, Judge Kaufman explained that
>
> [a]lthough the Alien Tort Statute has rarely been the basis for jurisdiction during its history, in light of the foregoing discussion, there can be little doubt that this action is properly brought in federal court. This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations.[36]

While the *Filartiga* court noted that the ATS was written as a jurisdiction-granting statute, the court also embraced the statute's elements.[37] The elements, as highlighted by the court, are: (1) an action by an alien (2) for a tort (3) committed in violation of the law of nations.[38] Thus, a court is first required to determine on the merits whether the alleged violation in the complaint is in fact a recognized violation of customary international law or a breach of an international

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pertinent declarations documents, and practices that constitute customary international law, 28 U.S.C. § 1350 as well as United States Constitution Art. II, sec. 2 and the Supremacy Clause. *Id.* at 879.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 889.

[35] *Id.* at 887.

[36] *Id.*

[37] *Id.* ("[W]e believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.")

[38] *Id.*

treaty.[39] Indeed, in *Filartiga*, the court held that torture was a violation of international law.[40]

3. Opposition to and Congressional Approval of *Filartiga*'s Holding

The *Filartiga* decision drew fire from jurists who did not find it fit for American domestic judges to be determining which actions constituted violations of international law under ATS litigation.[41] While *Filartiga* gave renewed and modern life to the ATS, it was but one court and one holding—subject to interpretation and backlash. Originalists, also known as Revisionists, took issue with the correctness of Filartiga's holding.[42] In *Tel-Oren v. Libyan Arab Republic*, a D.C. Circuit case decided four years after *Filartiga*, Judge Bork objected to *Filartiga's* merits review process in his concurring

[39] The court engages in this determination in *Filartiga* as well as in *Flomo*. Compare the language in *Filartiga*: "[T]he treaties and accords cited above, as well as express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-à-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them." 630 F.2d at 884, with Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1024 (7th. Cir. 2011) ("[I]n short, we have not been given an adequate basis for inferring a violation of customary international law, bearing in mind the Supreme Court's insistence on caution in recognizing new norms of customary international law in litigation under the Alien Tort Statute").

[40] *Filartiga*, 630 F.2d at 885.

[41] *See generally* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (limiting violations of customary international law for purposes of ATS litigation to those existing in 1789 when the Act was enacted). For an additional perspective on Judge Bork's opinion on using international law to interpret constitutional provisions, see JEFFREY DUNOFF ET AL., INTERNATIONAL LAW NORMS ACTORS PROCESS: A PROBLEM ORIENTED APPROACH 296, (3d. ed. 2010) ("Judge Robert Bork argue[s] that the [Supreme] Court's citations to foreign and international law to the context of constitutional interpretation are 'risible,' 'absurd,' and 'flabbergasting.'").

[42] Dodge, *supra* note 16, at 223.

opinion.[43] Judge Bork argued that the ATS should be limited only to the causes of action that existed when the ATS was enacted in 1789.[44] A similar position would be adopted almost 20 years later by Justice Scalia in his concurrence in *Sosa v. Alvarez-Machain.*[45] The opposition to *Filartiga*'s holding stems from the understanding that the drafters of the ATS intended that causes of action be found in the federal common law of tort.[46] Judge Bork opposed expansion of ATS causes of action,[47] and Justice Scalia claims that *Erie Railroad Co. v. Tompkins* effectively kills the ATS unless Congress creates a cause of action for the statute.[48]

Despite these Revisionist positions in the case law, Congress passed the Torture Victim Protection Act (TVPA) in 1992.[49] The TVPA, an act similar to the ATS, not only codified the Second Circuit's holding in *Filartiga* by creating an express cause of action for victims of torture and extrajudicial killing, but extended the right to sue to U.S. citizens.[50] Furthermore, Congress intended for the TVPA to supplement the ATS, not to replace it.[51] The Congressional enactment of the TVPA is therefore, crucial to understanding the Congress' accepting view of the ATS, and its increasing incision into U.S. law.

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[43] *Tel-Oren*, 726 F.2d at 801(Bork, J., concurring).

[44] *See id*. at 815 (Bork, J., concurring).

[45] Sosa v. Alvarez-Machain, 542 U.S. 692, 746 (2004) (Scalia, J., concurring).

[46] *Id*. at 721.

[47] *Tel-Oren*, 726 F.2d at 813 (citation omitted) (Bork, J., concurring).

[48] *See Sosa*, 542 U.S. at 746.

[49] 106 Stat. 73 (1992).

[50] Dodge, *supra* note 16, at 224 n.18.

[51] Kadic v. Kardazic, 70 F.3d 232 (2d Cir. 1995), noting:Congress indicated that the Alien Tort Statute 'has other uses and should not be replaced,' because ['']Claims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Act]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.['']

4. The Supreme Court Examines the ATS: *Sosa v. Alvarez-Machain*

In addition to Congress' enactment of the TVPA, the U.S. Supreme Court was able to opine on the ATS in its 2004 case of *Sosa v. Alvarez-Machain*.[52] In *Sosa*, the Supreme Court examined the basis on which the ATS accords lower courts the jurisdiction to hear customary international law violation claims.[53] Far from overturning it, the Supreme Court gave the ATS a green light. In a sense, the majority was vying to keep the ATS alive while the concurrence militated for the statute's demise, or at the very least for congressional approval. The Supreme Court's *Sosa* holding set out the test that would be employed by subsequent reviewing courts.[54] Therefore, understanding *Sosa*'s holding and reasoning is important to understand the current debate surrounding corporate liability under the ATS.

a. The Holding

The Supreme Court acknowledged that the ATS was enacted to recognize private causes of action for violations of international law norms.[55] However, the Court found that the ATS allowed for an expansion of actions beyond those defined to be breaches of international law in 1789—piracy, infringement on rights of

[52] *Sosa* originated in the Ninth Circuit, and involved DEA agents who hired Mexican nationals (including Sosa) to capture a Mexican physician, Alvarez, who was wanted in the United States for the torture and murder of an American DEA official. 542 U.S. 692 (2004). Sosa and other men abducted Alvarez from his Mexico home and brought him across the border to El Paso where federal officers arrested him. *Id*. at 698. Alvarez went to trial on the charges and the district court granted his Motion for Acquittal. *Id*. Alvarez then brought suit against Sosa, five other unnamed Mexican officials, and five DEA officers under the ATS for violation of international law. *Id*. The district court granted Alvarez $25,000 in damages. *Id*. The Ninth Circuit affirmed, and the Supreme Court reversed. *Id*. at 699.

[53] *See generally id*. at 712–21 (Section III.A).

[54] *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3541, 177 L. Ed. 2d 1121 (2010).

[55] *Sosa*, 542 U.S. at 724.

ambassadors, and violations of safe conduct[56]—so long as lower courts were cautious when determining which causes of action are viable breaches of international law.[57] The Court stated: "[T]he judicial power [to recognize actionable international norms] should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[58] While the Supreme Court made clear that modern claims brought under the ATS go beyond 18th-century definition of international law violations, it set out a cautious standard for this merits review, limiting actionable international law violations to those adhering to a specific standard: "We think the courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[59] The Supreme Court further noted that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar § 1350 was enacted"[60] Accordingly, the Court gave the ATS a malleability to develop at the same pace that internationally accepted norms developed. It gave its approval without giving lower courts *carte blanche* to determine international law violations.

[56] *Id*.

[57] *Id*. at 729.

[58] *Id*.

[59] *Id*. at 725. The Court reiterated its position, stating, "Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id*. at 732.

[60] *Id*.

b. The Reasoning

Writing for the majority, Justice Souter laid out four principle reasons why the ATS accorded lower courts jurisdiction over international law violation claims.[61] First, he noted that when the ATS was enacted, the First Congress was aware of a limited set of actions that constituted the "law of nations."[62] These international law norms were recognized in federal common law at the time.[63] Next, Justice Souter relied on historic accounts to note that the ATS was meant to give civil remedies to common law claims arising from international law.[64] He reasoned that the ATS was "intended to have practical effect the moment it became law" even if the language in the statute was solely jurisdictional.[65] Justice Souter concluded that based on the response to the ATS, and to the historical debate surrounding it, the jurisdictional grant was enacted on the understanding that the common law could provide a cause of action based on the international law violations that existed at the time.[66] Thirdly, Justice Souter pointed out that Congress has not amended the ATS or limited civil common law power under it.[67] Finally, Justice Souter noted that domestic law recognizes international law,[68] and that international law is one of the few narrow areas where federal common law continues to exist.[69]

[61] *Id*. at 712–22.

[62] *Id*. at 715.

[63] *Id*.

[64] *Id*. at 721.

[65] *Id*. at 724.

[66] *Id*.; *see* Part (I)(A)(4)(c) below (discussing Scalia's opposing argument that *Erie* has repudiated common law as a cause of action in American jurisprudence).

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

[68] *Id*. at 729-30 (citation omitted).

[69] *Id*. at 730 (citing to Tex. Indus. Inc., v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981)).

c. The Concurring Opinion

The majority opinion's rationale in *Sosa* was by no means unanimous. Justice Scalia's concurrence is noteworthy because it sheds light on the academic debate that surrounds this piece of legislation.[70] In his concurring opinion, Justice Scalia, adopting an Originalist point of view, highlighted his concern that the ATS rests at odds with *Erie Railroad Co., v. Tompkins*.[71] According to Justice Scalia, the ATS is solely a jurisdictional statute and is itself useless without a congressional grant making international law violations actionable claims.[72] Justice Scalia explained that *Erie* did away with general common law, and that post-*Erie*, a few exceptions such as admiralty law and *Bivens* claims have been given the status of "federal common law."[73] To Justice Scalia, the real issue is whether the ATS should be a basis for a new type of federal common law as it can no longer exist under general common law and by itself does not create a cause of action: "The general common law was the old door. We do not close that door today for the deed was done in *Erie*. Federal common law is the new door. The question is not whether the door will be left ajar, but whether the Court will open it."[74] To Justice Scalia, the answer to that question is inevitably a negative one. Justice Scalia discussed how the only approximation to the creation of a new federal common law for ATS would be *Bivens*[75] and how even *Bivens* is "a relic of the heady days when this Court assumed common-law powers to create causes of action."[76] He also highlighted his concern for the Court to be the entity to develop new federal common law: "In

[70] *See generally* Knowles, *supra* note 11.

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

[72] *Sosa*, 542 U.S. at 747, 750.

[73] *Id*. at 741. Federal common law being judge-created law based on a congressional grant aiming to protect vital federal interests. *Id*.

[74] *Id*. at 746 (citations omitted).

[75] *See generally* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (creating a federal cause of action for civil rights violations).

[76] *Sosa*, 542 U.S. at 742.

holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives."[77] In short, the whole idea to Justice Scalia is "nonsense upon stilts."[78]

With Justice Scalia militating against the continued life of the ATS, *Sosa* created a standard on which lower courts could proceed to hear cases involving violations of international law.[79] The one thing *Sosa* made clear was that the violation must be recognized by civilized nations.[80] The norm must be entrenched in international law.[81] Yet, despite this caution-invoking standard, the Court still sanctioned the possibility of bringing ATS suits for the years to come.

B. The Rise of Corporate Liability under the ATS

One issue the Supreme Court definitely ruled on in *Sosa* was liability for corporations.[82] Like *Filartiga*, the defendant in *Sosa* was a former government official.[83] Therefore, the facts did not lend themselves to Supreme Court commentary over who a trespasser need be for purposes of ATS litigation. Yet, prior to the Supreme Court's holding in *Sosa*, foreign plaintiffs had already begun to bring suits against non-government actors.[84]

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[77] *Id*. at 747.

[78] *Id*. at 743.

[79] *Id*. at 724.

[80] *Id*.

[81] *Id*.

[82] In its infamous footnote, the Supreme Court noted that, "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." *Id*. at 732 n.20. As will be discussed below in Part (III)(B),this dicta did not definitely hold or exclude corporations from potential liability under the ATS.

[83] Filartiga v. Pena-Irala, 630 F.2d 876, 878(2d. Cir. 1980); *Sosa*, 542 U.S. at 692.

[84] *See, e.g.*, Aguinda v. Texaco, Inc., 303 F.3d 470 (2d. Cir. 2002).

1. *Doe I v. Unocal Corp.* and the Aiding and Abetting Cases

The first reported case in which foreign plaintiffs availed themselves of the ATS to sue corporations for international law violations was *Doe I v. Unocal Corp.*[85] In *Doe I*, the Ninth Circuit entertained a claim against a corporation for egregious violations of international conventions against forced labor and torture.[86] The Ninth Circuit found that genuine issues of material fact existed as to whether the corporation could have been liable for aiding and abetting government actions that subjected plaintiffs to forced labor, torture, rape, and summary execution.[87] The court also found that the corporation could be held liable for international law violations and remanded the case to the district court for that determination.[88] Consistent with the ruling in *Doe I*, the Second Circuit ruled in 2002, in *Khulumani v. Barclay National Bank Ltd.*, that the ATS confers jurisdiction over multinational corporations that collaborate with governments and aid and abet those governments in committing international law violations.[89]

2. Cases Seeking Direct Corporate Liability: State Action Not Required

All cases originally filed against corporate defendants were brought under the ATS, but the claim was that the corporations had aided and abetted some government actor to violate international law.[90] However, the foreign plaintiffs in a recent case, *Abdullahi v. Pfizer, Inc.*, brought claims alleging that the corporation itself had

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

[86] *Id.* at 936.

[87] *Id.* at 953.

[88] *Id.* at 963.

[89] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007) (also known as the South African Apartheid Litigation).

[90] *E.g. Doe I*, 395 F.3d 932.

violated international law.[91] The plaintiffs claimed that a pharmaceutical company had tested certain medication on village children without any parental consent, and that the nonconsensual testing violated international law.[92] Writing for the majority in *Abdullahi*, Judge Parker reiterated the Supreme Court's cautious merits review test which it laid out in *Sosa*:

> [R]emaining mindful of our obligation to proceed cautiously and self-consciously in this area, we determine whether the norm alleged (1) is a norm of international character that States universally abide by, or accede to, out of a sense of legal obligation; (2) is defined with a specificity comparable to the 18th-century paradigms discussed in *Sosa*; and (3) is of mutual concern to States.[93]

The majority found the pharmaceutical company to be potentially liable, but remanded the case to the district court for consideration of whether nonconsensual testing met the level of recognition of customary international law that *Sosa* requires.[94]

The dissent strongly critiqued the majority's omission of Pfizer's corporate identity when it considered whether ATS jurisdiction applied. The dissent proposed that the majority deviated from the Supreme Court's guidance in *Sosa* by doing so.[95] In his dissent, Judge Wesley stated:

> [T]he Supreme Court has required courts deciding whether a principle is a customary international law norm to consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the

[91] Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3541, 177 L. Ed. 2d 1121 (2010).

[92] *Id*. at 168.

[93] *Id*. at 174.

[94] *Id*. at 177.

[95] *Id*. at 194 (Wesley, J., dissenting).

> defendant is a private actor such as a corporation or individual." . . . [T]he majority's analysis would be no different if Plaintiffs had sued the Nigerian government, instead of, or in addition to, Pfizer. Such a broad, simplified definition ignores the clear admonitions of the Supreme Court—and conflicts with prior decisions of this Court—that a customary international law norm cannot be divorced from the identity of its violator.[96]

Judge Wesley's dissenting rationale in *Abdullahi* would be embraced by the Second Circuit one year later in *Kiobel v. Royal Dutch Petroleum Corp*.[97] Both cases attempted to bring the issue of corporate liability under the ambit of the Supreme Court's merits review.[98] As subsequent litigation demonstrates, the Supreme Court's merits review requirement coupled with its language in the infamous footnote twenty of the case would become the source of the current misconception that corporate liability needs to derive precedent from international law.[99]

The trend of holding private parties, such as corporations, directly liable for international law violations committed without the requirement of state action stems from *Tel-Oren v. Libyan Arab Republic*.[100] It was later expanded upon in *Kadic v. Karadzic*.[101] Both

[96] *Id.* at 193–94 (citation omitted).

[97] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 127-128 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011).

[98] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724. Both cases rely heavily, if not solely, on the Supreme Court's dicta in footnote twenty of the case. *Id*. at 732 n.20.

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

[100] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984). In *Tel-Oren*, the plaintiffs brought claims against the Palestine Liberation Organization which the D.C. Circuit held no to be a recognized state. *Id*. at 791. Because the PLO was not a recognized state, the defendants could not be acting under color of law in the manner in which the Paraguayan official had in Filartiga. *Id*. The court reasoned that there are a handful of crimes to which "the law of nations attributes individual responsibility," although it did not find non-state torture to be one of those crimes. *Id*. at 795; *see also* Kadic v. Karadzic, 70 F.3d 232, 243 (2d. Cir. 1995) (noting that

cases held that jus cogens[102] violations did not require state action. In *Kadic*, the court held:

> "[A]cts of rape, torture, and summary execution," like most crimes, "are proscribed by international law only when committed by state officials or under color of law" to the extent that they were committed in isolation, these crimes "are actionable under the Alien Tort [Claims] Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes."[103]

The court in *Doe I v. Unocal Corp.* found forced labor to be a variant of slavery so in the same vein as the *Kadic* holding, crimes of forced labor would not require state action.[104] By doing so, the Ninth Circuit began a trend that corporations may be directly liable under the ATS without aiding and abetting state action.

C. Current Decisions on Corporate Liability under the ATS: Who Said What and Why

1. *Kiobel v. Royal Dutch Petroleum Co.*: Corporate Immunity for International Law Violations

Kiobel v. Royal Dutch Petroleum. Co., is the most recent Second Circuit case where, in a detour from its previous precedent, the Second Circuit expressly held that customary international law did not extend

Filartiga found *official* torture to be a violation of customary international law) (emphasis in original).

[101] *Kadic*, 70 F.3d 232.

[102] Violations of *jus cogens* include slavery, genocide and war crimes. Courtney Shaw, *Uncertain Justice: Liability of Multinationals under the Alien Tort Claims Act*, 54 STAN. L. REV. 1359, 1362, 1370 nn.82, 83 (June 2002).

[103] *Kadic*, 70 F.3d at 243–44 (citation omitted).

[104] Doe I v. Unocal Corp., 395 F.3d 932, 946 (9th Cir. 2002).

to corporations.[105] In short, the Second Circuit concluded that because international law does not apply to corporations, the ATS could not be used as a basis to confer jurisdiction over corporations.[106] An appeal is currently before the Supreme Court, which will rule on the case this term.[107]

a. The Facts

In *Kiobel*, Nigerian plaintiffs filed a claim in the Southern District of New York against British, Dutch, and Nigerian corporations for allegedly aiding and abetting the Nigerian government in committing human rights abuses.[108] The corporations were present in the Ogoni region of Nigeria to explore and exploit oil.[109] The plaintiffs alleged that the corporate defendants hired the Nigerian government to clear out village opposition to gas exploration in the Ogoni region.[110] The plaintiffs also alleged that the corporations aided the government officials who engaged in extrajudicial killings; torture; cruel, inhumane and degrading treatment of villagers; property deprivation; and forced exile.[111] The district court dismissed certain counts on the grounds that the violations alleged did not meet the specificity requirement set forth in *Sosa* and certified an appeal for those issues not dismissed.[112] On appeal, the Second Circuit dismissed the plaintiffs' remaining claims on the grounds that corporations could not be held civilly liable under international law.[113]

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[105] *Kiobel v. Royal Dutch Petrolium Co.*, 621 F.3d 111, 123 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011).

[106] *Id*.

[107] *See* footnote 6 above.

[108] *Kiobel*, 621 F.3d at 123.

[109] *Id*.

[110] *Id*.

[111] *Id*.

[112] *Id*. at 124.

[113] *Id*.

b. Kiobel's Majority Opinion

Writing for the majority, Judge Cabranes set out several premises justifying what is essentially corporate immunity against ATS claims. First, the majority opinion stated that the corporation must be liable for the violation under international law standards.[114] The majority reasoned that the Supreme Court's holding in *Sosa* requires lower courts to look beyond domestic law and into international law to determine the possibility of corporate liability.[115] In looking to international law, the majority noted that international law historically has a penchant against instituting corporate liability for violations of customary international law.[116] The majority's main contention was that corporations cannot be liable for violations of international law because there is no standard for criminal corporate punishment in either international law or domestic laws.[117] As an example, the Judge Cabranes looked to international criminal tribunals including the

[114] *Id*. at 118; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

[115] "[I]n Sosa the Supreme Court instructed the lower federal courts to consider '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' . . . That language requires that we look to international law to determine our jurisdiction over ATS claims against a particular type of defendant such as corporations." *Kiobel*, 621 F.3d at 127(citations omitted). The *Kiobel* court additionally emphasizes the judicial precedent based on *Sosa* in looking to the particular defendant's identity: "We have looked to international law to determine whether state officials, private individuals, and aiders and abettors can be held liable under the ATS. There is no principled basis for treating the question of corporate liability differently." *Id*. at 130 (citations omitted).

[116] The court explained:

"customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations". *Id*. at 120. This proposition is vehemently rejected in the concurrence, which calls it internally and inherently inconsistent with prior Supreme Court decisions and prior case law. *Id*. at 152 (Leval, J., concurring).

[117] *Id*. at 147; *contra* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J.INT'L HUM. RTS. 304 (2008).

Nuremberg trials and highlighted the absence of holding corporations liable for international law violations in these tribunals.[118] The court highlighted that responsibility for customary international law violations cannot be "divorced" from individual moral responsibility.[119] The court also looked to international treaties noting that no treaty has codified corporate liability.[120] As a result, the majority concluded that sources of international law do not reveal corporate liability to be a customary international law norm recognized by civilized nations.[121] Because corporate liability is not a norm of customary international law, the court held the ATS to be inapplicable to the plaintiffs' claims against the corporate defendants.[122]

c. Kiobel's Concurring Opinion

The *Kiobel* decision was unanimous. However, Judge Leval wrote a lengthy concurrence in which he meticulously rejected each point the majority propounded in reaching its controversial conclusion. Judge Leval stated, "[a]ccording to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental

[118] *Kiobel*, 621 F.3d at 133, 136 (noting that the Nuremberg Tribunal, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda all confined tribunal jurisdiction to natural persons only). To the extent that that the majority opinion considered the lack of precedent for corporate accountability in *criminal* tribunals, the concurrence notes the irrelevancy of what happens in a criminal forum to the precedent for civil corporate liability under the ATS—a civil statute. *Id*. at 152 (Leval, J., concurring).

[119] *Id*. at 135.

[120] *Id*. at 137.

[121] *Id*. at 148–49.

[122] The court noted: "No corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot not, as a . . . result, form the basis of a suit under the ATS." *Id*.(emphasis in original).

human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form."[123] Judge Leval's position was that the ATS is an act that imposes *civil* liability, and that, therefore, global precedent for *criminal* corporate liability is irrelevant.[124] Civil liability for corporations is allowed because the punishment serves the end goal of compensating damaged victims.[125] On the other hand, the goal of criminal punishment is a punitive one, and criminal punishment of corporations cannot punish.[126] Accordingly, to Judge Leval, the majority's rationale was flawed, and corporate liability should attach under ATS.[127]

2. The D.C. Circuit's Decision in *Doe v. Exxon Mobil Corp.*

The year after the Second Circuit ruled in *Kiobel*, the D.C. Circuit took its turn to consider the issue of aiding and abetting liability for corporations in *Doe VIII v. Exxon Mobil Corp.*[128] The D.C. Circuit distinguished between the *Sosa* analysis required for international law norms and that of corporate liability.[129] Noting corporate liability to be a completely different issue from those considered in *Sosa*, the D.C. Circuit avoids considering the "wrong question" of whether customary international law establishes corporate liability as considered in *Kiobel*.[130] The D.C. Circuit identified corporate liability as an issue of agency law.[131] To the D.C. Circuit, the issue is whether corporations

[123] *Id.* at 149–50 (Leval, J., concurring).

[124] *Id*. at 169 (Leval, J., concurring).

[125] *Id*. (Leval, J., concurring).

[126] *Id*. at 152 (Leval, J., concurring).

[127] *See id*. at 196.

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

[129] *Id*. at 41.

[130] *Id*. ("Our conclusion differs from that of the Second Circuit in Kiobel because its analysis conflates the norms of conduct issue in Sosa and the rules for any remedy to be available in federal common law at issue here") (citation omitted).

[131] *Id*.

can be held liable to pay money damages for the violations of international law that their agents commit.[132] Labeling corporate liability as an accoutrement to causes of action under the ATS, the D.C. Circuit noted that because international law does not provide any civil remedies or private causes of action, federal courts must turn to federal common law to determine whether corporations can be held liable.[133] U.S. agency law provides for corporate liability.[134] Next, the D.C. Circuit considered the text of the ATS, which it noted "does not distinguish among classes of defendants."[135] The court also considered the historical context of the enactment of the ATS, and indicated that nothing suggests that the First Congress would have allowed corporations to escape the liability it was trying to impose on individuals under the ATS.[136] Instead, the Court highlighted, corporate liability was an accepted principle of tort at the time the ATS was enacted in 1789, and that therefore, corporate liability today is actually consistent with the original intent behind enacting the ATS.[137] The court also considered the fact that numerous international treaties provide that juridical actors such as corporations must comply with international law.[138] Finally, the D.C. Circuit claimed that *Kiobel* ignored the Supreme Court's holding in *Sosa* that federal common law would supply the remedy for ATS claims to the extent that the tort is determined by federal common law.[139] The D.C. Circuit's extensive analysis of corporate liability in *Doe v. Exxon Mobil Corp.* provided a sound basis on which the Seventh Circuit could follow.

[132] *Id*.
[133] *Id*. at 41–42.
[134] *Id*. at 56.
[135] *Id*. at 43.
[136] *Id*. at 47.
[137] *Id*.
[138] *Id*. at 48–49.
[139] *Id*. at 54–55.

II. *FLOMO V. FIRESTONE NATURAL RUBBER CO.*: THE SEVENTH CIRCUIT CHIMES IN

A. The Facts

On April 19, 2006, a case similar to the ATS suits filed around the country was transferred to the U.S. District Court for the Southern District of Indiana.[140] In that suit, twenty-three Liberian plaintiffs alleged international law violations of forced labor against Firestone Natural Rubber Company ("Firestone").[141] Firestone owned and operated approximately 118,000 acres of rubber tree plantations in Liberia.[142] It employed local natives to extract latex from the rubber trees.[143] These employees, known as tappers, had to meet a daily quota of 650 trees per day in order to keep their jobs, and so, the tappers required their children to help—anything to avoid "joining the ranks of the starving unemployed."[144] When the plaintiffs brought claims of human rights violations against Firestone, the district court dismissed all of the claims except for the children's claim brought by their parents as next friends that they were subjected to the "worst form" of child labor under various international conventions.[145] The district court held that this claim was actionable under the ATS. [146] Moreover, while the plaintiffs' claim on child labor proceeded, the Second Circuit decided *Kiobel*.[147] Firestone filed a motion for summary judgment, and absent any Seventh Circuit guidance on the issue,[148] the Southern

[140] Flomo v. Firestone Natural Rubber Co. ("*Flomo I*"), 744 F.Supp.2d 810 (S.D.Ind. 2010), *and* ("*Flomo II*"), No. 1:06-cv-00627-JMS-TAB, 2010 WL 4174583, at *1 (S.D. Ind., Oct. 19, 2010).

[141] *Flomo II*, 2010 WL 4174583, at *2.

[142] *Flomo I*, 643 F.3d at 1015.

[143] *Flomo II*, 2010 WL 4174583, at *2.

[144] *Id*.

[145] *Id*. at *3.

[146] *Id*.

[147] *Flomo I*, 744 F. Supp. 2d at 812.

[148] *Flomo II*, 2010 WL 4174583, at *2.

District of Indiana relied on *Kiobel*'s holding that corporations could not be sued under the ATS to grant the motion.[149]

B. The Appeal

On appeal, the Seventh Circuit engaged in a two-fold analysis, determining first, whether non-natural persons can be defendants under the ATS, and second, whether the evidence presented in the case could establish that Firestone had violated customary international law.[150] While the Seventh Circuit affirmed summary judgment for Firestone due to lacking evidence establishing international law violations at the level required by *Sosa*, [151] it expressly rejected the district court's holding that corporations could not be sued.[152] Judge Posner, writing for a unanimous court, stated, "[t]he factual premise of the majority opinion in the *Kiobel* case is incorrect."[153] The court specifically rejected *Kiobel*'s logic that corporations could not be liable for violations of international law because corporations have never been held *criminally* liable for such violations.[154] Judge Posner

[149] *Id*. In its supplemental opinion the district court also explained that Firestone was entitled to summary judgment because the Plaintiffs had not presented factual evidence that could establish a viable claim of "worst form" of child labor. *Flomo*, 744 F. Supp. 2d. at 816.

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

[151] *Id*. at 1024.

[152] *Id*. at 1025.

[153] *Flomo III*, 643 F.3d at 1017.

[154] *Id.* As a point of reference, the Second Circuit in *Kiobel* analogized to the Nuremberg Trials and to the lack of accountability for the corporations that aided Nazi Germany. *Id*. (citation omitted). The Seventh Circuit also looked at the Nuremberg trials and concluded: "If a corporation complicit in Nazi war crimes could be punished criminally for violating customary international law, as we believe I could be, then *a fortiori* if the board of directors of a corporation direct, the corporation's managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation could be civilly liable." *Id.* at 1018 (citation omitted); *see also* Doe v. Exxon Mobil Corp., 654 F.3d 11, 52 (D.C. Cir. 2011)

focused on the possibility of creating new precedent instead of relying on its absence.[155] He reasoned: "Suppose no corporation *had* ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be. Before the Nuremberg Tribunal was created there were no multinational prosecutions for aggression and crimes against humanity."[156]

In determining why corporations can be civilly liable for international law violations, Judge Posner laid out three main arguments.[157] First, Judge Posner contended that at least some historical precedent for civil corporate liability in international law exists.[158] Second, he stated that domestic law determines what remedies are available for customary international law violations.[159] Finally, Judge Posner reasoned that because domestic law does so, U.S. courts can consider civil and criminal liability for corporations in the U.S. as an analogous sibling to civil corporate liability under the ATS.[160]

After briefly recapping the Supreme Court's understanding of customary international law in *Sosa*, Judge Posner considered Firestone's argument that juridical persons' conduct can never be a violation of international law.[161] Firestone's basis for this argument was that corporations, unlike individuals, have never been subject to criminal liability under international law.[162] In fact, this argument

(noting that the "Allies determined that I.G. Farben had committed violations of the law of nations and therefore destroyed it.") (citation omitted).

[155] *Flomo III*, 642 F.3d at 1017.

[156] *Id*. (emphasis in original).

[157] *Id*. at 1018.

[158] *Id*. at 1021.

[159] *Id*. at 1020.

[160] *Id*.

[161] *Id*. at 1017 ("conduct by a corporation or any other entity that does not have a heartbeat…can never be a violation of customary international law, no matter how heinous the conduct").

[162] *Id*.

formed a bulk of the majority's opinion in *Kiobel*.[163] But Judge Posner was quick to point out that the factual premise of the *Kiobel* opinion was incorrect.[164] Judge Posner refuted the Second Circuit's example that German corporations assisting the Nazi war effort were never criminally tried, and that, as a result, no criminal liability precedent for corporations exists.[165] Notably, Judge Posner pointed out that the corporations were dissolved under authority of international law, and that the Allies' Control Counsel and Coordinating Committee ordered seizure of the corporations' assets and made some assets available to the victims for reparations.[166] Additionally, Judge Posner points to 18th-century *in rem* judgments against pirate ships to demonstrate some historical precedent for civil liability of corporations, if one is sought.[167] In conclusion, Judge Posner's first contention was that there is not a complete void of international precedent for corporate civil liability.[168]

Next, Judge Posner considered why criminal corporate liability compliments civil corporate liability in the U.S. The essence of the court's argument is that domestic law determines what kinds of remedies are available for international law violations.[169] Although the court acknowledged that criminal corporate liability is a uniquely Anglo-American concept, it dispensed with the notion of such liability

[163] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111,131–45 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011).

[164] *Flomo III*, 643 F.3d at 1017.

[165] *Id*.

[166] *Id*. (citation omitted).

[167] *Id*. at 1018. Admittedly, the argument is more of a reference than an analytical comparison.

[168] Judge Posner does admit that even in the complete absence of historical precedent for corporate civil liability, there is always "a first time for litigation to enforce a norm; there has to be." *Id*. at 1017.

[169] *Id*. at 1020; *see also* Doe VIII v. Exxon Mobil Corp., 651 F.3d 11, 22 (D.C. Cir. 2011); Abebe-Jira v. Negewo 72 F.3d 844, 848 (11th Cir. 1996) (noting that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law").

being anomalous.[170] Because we cannot imprison a corporation, courts will fine corporations that commit criminal acts—through their board of directors or other employees.[171] While criminal liability is critiqued, Judge Posner noted that we continue to use it in the United States and that we would use it even more if civil liability were unavailable.[172] He also noted that international resistance to corporate liability is quickly eroding.[173] According to Judge Posner, civil liability follows any action that is criminally liable, and, in the absence of the possibility of criminal liability, civil liability should be the very least imposed on corporations.[174] As a secondary policy consideration to support this point, Judge Posner pointed out that the possibility of suing a corporation makes available the resources to compensate the victims that would not be available were the corporations' board members the only potential defendants.[175]

In conclusion, *Flomo* emphasized that: (1) domestic tribunals such as U.S. courts are the proper forum for remedial considerations stemming from civil liability;[176] (2) that individual nations decide how to impose the substantive obligations set out in international law;[177] and (3) that even certain international treaties authorize domestic enforcement of customary international law violations, criminal and

[170] See Dodge, *supra* note 16 (noting that William Blackstone wrote extensively on England's criminal punishment for individuals committing customary international law violations as early as the eighteenth century).

[171] *Flomo III*, 643 F.3d at 1019.

[172] *Id*.

[173] *Id*.

[174] *Id*. at 1020 ("Justice Breyer has opined that 'universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.'") (citation omitted).

[175] *Id*.

[176] *Id*. (citing Kadic v. Karadzic, 70 F.3d 232, 246 (2d. Cir. 1995)).

[177] *Flomo III*, 643 F.3d at 1019 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422–23 (1965)).

civil.[178] Ultimately, the Seventh Circuit concluded that corporate liability is possible under the ATS, but that in this case the plaintiffs had not pleaded sufficient facts to establish the actual existence of forced labor on the rubber plantation.[179]

III. SIGNIFICANCE OF THE CIRCUIT SPLIT & WHY THE SEVENTH CIRCUIT RULED CORRECTLY

Aside from a reference or two, the Seventh Circuit does not attack *Kiobel*'s analysis head on. Instead, the Seventh Circuit choose a few limited points on which to base its opinion. These points are: (1) that international law supports civil liability for corporations through eroding resistance to criminal liability, the existence of which would necessarily entail an acceptance of international civil liability;[180] and (2) that international law requires enforcement in the domestic arena and sanctions domestic determination of remedies.

A. Eroding Resistance to criminal corporate sanctions may engender acceptance of civil corporate liability within the international community even if it does not exist today.

In *Flomo*, Judge Posner suggested that the reticence toward criminally and civilly prosecuting punishable corporations in the international sphere could stem from an historical desire to retain prosecution for the worst forms of international law violations.[181] As an example, he used the prosecution of Nazi war criminals during the

[178] *Flomo III*, 643 F.3d at 1019 (using as an example the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, arts. 2, 3).

[179] *Id*. at 1021.

[180] *Id*. at 1020 (citing Sosa v. Alvarez-Machain, 542 U.S.692, 763 (2004) (Breyer, J., concurring)).

[181] *Flomo III*, 643 F.3d at 1018 ("[I]t seems rather that the paucity of cases reflects a desire to keep liability, whether personal or institutional, for [international law] violations within tight bounds by confining it to abhorrent conduct-the kind of conduct that invites criminal sanctions").

Nuremberg Trials.[182] Judge Posner noted, "it was natural that a tradition would develop of punishing violations of customary international law by means of national or international criminal proceedings; it was a way of underscoring the gravity of violating customary international law."[183] However, the tradition to keep corporate liability separate from criminal prosecution of government officials[184] has begun to chip at the edges.[185] For example, criminal responsibility for non-state actors who aid and abet international law violations "has been accepted as one of the core principles of the post-World War II war crimes trials."[186] Furthermore, scholarship has revealed that the Statute of the International Criminal Court, the Rome treaty, omitted juridical persons from mandatory jurisdiction of the court for purposes for practical purposes.[187] Since few countries in the world currently allow criminal corporate responsibility, but all signing countries are bound by the Rome statute, criminal corporate responsibility under the Rome Treaty would have applied to countries where criminal corporate responsibility is not embraced.[188] As this is a difficult issue, the five-week period allotted to negotiating the Rome Treaty was insufficient to fully compromise on the matter.[189] This lead Professor Doug Cassel, to state that, "the opposition was not so much on principle as on grounds of practicality: there was no time during the

[182] *Id*.

[183] *Id*.

[184] *See* Cassel, *supra* note 117, at 44 (noting that the Nuremberg Charter allows the denomination of corporations or groups as criminal but not at the trial of an "individual."). Cassel also notes that most tribunals have jurisdiction over natural persons only. *Id*.

[185] *Flomo III*, 643 F.3d at 1019 ("It is neither surprising nor significant that corporate liability hasn't figured in prosecutions of war criminals and other violators of customary international law").

[186] Doe VIII v. Exxon Mobil Corp., 654 F.3d, 11, 30 (D.C. Cir. 2011) (citation omitted).

[187] Cassel, *supra* note 117, at 46.

[188] *Id*.

[189] *Id*.

five-week Rome conference to revise domestic legislation."[190] In short, the contention of *Kiobel* and the one that *Firestone* relies on (so did Exxon Mobil in the D.C. Circuit), is that international law does not apply to corporations absent certain exceptions.[191] To Judge Posner, this absence of prosecutorial zeal is not a sufficient basis on which to exonerate corporations from criminal and civil liability.[192] In fact, Judge Posner hypothesized: "Suppose it's the case that the only actionable violations of customary international law . . . are acts so maleficent that criminal punishment would be an appropriate sanction for the actors. It would not follow that civil sanctions would be improper."[193]

Additionally, while criminal corporate liability does not exist in many countries outside of the United States,[194] and while criminal liability is a peripheral form of social control in other countries, the resistance to apply criminal liability to corporations is eroding within

[190] *Id*. at 47.

[191] Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles Heel in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227, 283 (2011) (noting that "in the main, the law of nations, applies to nations, but in cases of certain grave acts (involuntary servitude, genocide) the law of nations applies to jus cogens offenses").

[192] Flomo v. Firestone Nat. Rubber Co. ("*Flomo III*"), 643 F.3d 1010, 1019 (7th Cir. 2011) ("That doesn't mean corporations are exempt from [customary international law]"); *see also* Jose E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 35 n.135 (2011) ("One need not agree with . . . expert opinions that the absence of explicit international law examples making corporations criminally liable establishes that no ATCA liability is possible . . . Even assuming that under the ATCA, this aspect of a viable claim is to be determined by international and not U.S. law, the question that might be posed is whether international law precludes finding corporate liability not whether it explicitly authorizes it.")(citations omitted).

[193] *Flomo III*, 643 F.3d at 1020.

[194] *See* Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 142, (October 2008) (noting that Germany, for example, only has administrative sanctions for corporate transgressions).

the international community.[195] Several international treaties and conventions now incorporate provisions for both criminal and civil responsibility.[196] Beginning with the OECD Convention against Bribery of Foreign Public Officials in International Business Transactions, a trend towards imposing criminal responsibility on corporations has been contagious.[197] This increased existence and acceptance of criminal liability for corporations leads to a similar acceptance of civil liability. In his concurring opinion in *Sosa*, Justice Breyer noted that "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well."[198]

Finally, criminal corporate responsibility is seen as a policy tool to provide some reparation where civil damages might not be available.[199] The Seventh Circuit differs in this respect from Judge Leval's concurrence in *Kiobel*, where Judge Leval claims that criminal punishment of corporations is irrelevant to ATS analysis because the goals of criminal punishment cannot apply to corporations.[200] The Seventh Circuit asserts otherwise.[201] From a policy perspective, the Seventh Circuit contends that in fact, civil damages require harm, and criminal punishment can provide justice in cases where no harm is materialized but where the conduct was nonetheless abhorrent.[202]

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[195] *Flomo III*, 643 F.3d at 1019; *see also* Cassel, *supra* note 117, at 48 (noting the emerging international law trend to impose criminal liability on corporate actors).

[196] *Flomo III*, 643 F.3d at 1020.

[197] Cassel, *supra* note117, at 48.

[198] *Flomo III*, 643 F.3d at 1020 (citation omitted).

[199] *Id*.

[200] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 167 (2d Cir. 2010) (Leval, J., concurring), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011); *see also* Part (I)(C) above.

[201] *Flomo III*, 643 F.3d at 1018 ("Criminal punishment of corporations that commit crimes is not anomalous merely because a corporation cannot be imprisoned or executed. It can be fined").

[202] *Id*. (noting examples such as fraud where shareholders cannot prove causation, or misrepresenting efficacy of drugs where buyers are not harmed because no other alternative drug could have worked anyway).

Criminal punishment cannot punish a corporation through imprisonment, but it can achieve a punitive end through fines.[203]

The erosion of criminal punishment of corporations demonstrates the trend amongst the international community that as a remedy, the international community does embrace criminal sanctions. If the international community embraces criminal sanctions, which have a higher threshold of acceptance, it only follows that it would also embrace civil liability.

B. International Law leaves the determination of remedies to the domestic sphere.

Notwithstanding the international community's increasing emphasis on criminal corporate responsibility, international law does leave the enforcement of international law violations to the domestic sphere.[204] This is Judge Posner's second point in *Flomo*. [205] To fully understand his analysis, it is critical to point out a much-discussed "distinction" that permeates ATS litigation cases.[206] This distinction involves separating a question of whether a norm is recognized and accepted as customary international law among nations,[207] and whether a remedy exists when corporations are the actors that happen

[203] *Id*. at 1019.

[204] DUNOFF, *supra* note 41, at 243 ("International law frequently says little about how governments should implement their international legal obligations").

[205] *Flomo III*, 643 F.3d at 1020 (citation omitted).

[206] See Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 18 (D.C. Cir. 2011) ("The dissent's objection to corporate liability . . . disregards both a fundamental distinction between causes of action based on conduct that violates [international law] and the remedy under domestic law, and a source of international law"); Flomo, 643 F.3d at 1019 ("We keep harping on criminal liability for violations of customary international law in order to underscore the distinction between a principle of that law, which is a matter of substance, and the means of enforcing it, which a matter of procedure or remedy").

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

to violate that norm.[208] As the D.C. Circuit noted, *Sosa* only touched on the first point.[209] Considering the first prong of the distinction, in *Sosa*, the Supreme Court highlighted the requirement that, to establish jurisdiction under the ATS, a reviewing court should determine whether a norm is one of customary international law—that is, "of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[210] Such a merits review requires a district court to consider whether state practice on the international level condemns the particular underlying tort. Thus, the merits review applies international law to the underlying *cause of action*—torture, extrajudicial killings, nonconsensual medical testing or forced labor, for example—but not to the prospective class of defendants.[211] This is distinct from determining whether corporations are subject to responsibility for violating these norms.[212]

The second prong of the distinction implicates some international law theory. International law does not operate in a vacuum.[213] It is a structure that governs individual sovereigns who keep that sovereignty with respect instead of being mandatorily subjected to it. As a result, international law depends on those sovereign nation states to implement it by incorporating it into their domestic law.[214] The Supreme Court in *Sosa* reiterated that remedies is a common area where domestic law and international law overlap: "The law of nations generally does not create private causes of action to remedy its

[208] *See generally Doe VIII*, 654 F.3d 11. This is precisely where the Kiobel court faltered in its analysis. The Second Circuit conflates the issue of merits review with that of determining liability for corporations. *Id*. at 41.

[209] *Id*. at 18.

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

[211] *Id*.

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

[213] *See* Flomo v. Firestone Nat. Rubber Co. ("*Flomo III*"), 643 F.3d 1010, 1015 (7th Cir. 2011) ("[c]ustomary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas.") (quoting Flores v. Southern Peru Copper Corp., 414 F.3d 233, 248–49 (2d. Cir. 2003)) .

[214] DUNOFF, *supra* note 41, at 239.

violations, but leaves to each national the task of defining remedies that are available."[215]

In *Doe VIII v. Exxon Mobil*, the D.C. circuit entertained a thorough analysis of the issue, noting that, "[t]he law of nations . . . creates no civil remedies and no private right of action that federal courts must determine the nature of any remedy in lawsuits alleging violations of the law of nations by reference to federal common law rather than customary international law."[216] Judge Rogers, writing the majority opinion, proceeded to cite Professor Louis Henkin, "a leading authority on international law" who stated, "International law itself does not require any particular reaction to violation of law . . . whether and how the United States should react to such violations are domestic, political questions: the court will not assume any particular reaction, remedy or consequence."[217] Because international law leaves the determination of remedies to the individual nation states, domestic law determines whether corporations are to be subject to liability under the ATS. Thus, a reviewing court would need to consider domestic, not international precedent for corporate liability in ATS litigation. Corporate liability is not such a tort; therefore, there is no need to consider whether state practice on the international level condemns or accepts corporate liability.

In *Flomo*, Judge Posner cited to specific examples that demonstrate that international law leaves the determination of remedies to the domestic sphere.[218] For example, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) provides that "in the event that, under the legal system of a Party [to the Convention], criminal responsibility is not applicable to legal persons, that Party *shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including*

[215] *Id*.

[216] *Doe VIII*, 654 F.3d at 42.

[217] *Id.* (citing to LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 245–46 (2d ed. 1996)).

[218] *Flomo III*, 643 F.3d at 1020.

monetary sanctions, for bribery of foreign public officials."[219] The language of the Convention demonstrates that nation states are to choose and impose the necessary sanctions on international law transgressions since international law does not do this itself. Thus, nation states look to their own domestic law, in this case, U.S. federal common law to do so.[220] As is seen in the OECD Convention, determining whether corporations are liable, criminally or civilly, is a remedial issue that is left to the nation states.[221]

The Seventh Circuit considered whether corporations are a class of defendants that the ATS can reach. Once the Seventh Circuit carved out this discreet issue, it is able to answer it quickly as the issue is rather straightforward. Under U.S. federal common law, corporations are liable for transgressions committed by their agents criminally and civilly.[222]

CONCLUSION

The Seventh Circuit's analysis of why corporations should be liable under the ATS is certainly unconventional: the decision is short; it is conspicuously void of *Erie* analysis and jurisdictional questions that occupy a place in other analyses; and it is considers policy implications. Nonetheless, the Seventh Circuit's decision in *Flomo* squares with those opinions that incorporate other branches of analysis such as the D.C. Circuit's recent decision in *Doe VIII v. Exxon Mobil Corp.*, and the Ninth Circuit's decision in *Abdullahi v. Pfizer, Inc*. The Seventh Circuit's holding can be seen as a unique outlook that really focuses in on the discreet issue of *why* corporations can be subject to liability under the ATS. And, while the court does not jump through the conventional hoops, it does cover all the bases.

The issue of corporate liability under the ATS is merely one consideration in the development ATS jurisprudence, yet it is such an

[219] *Id*.
[220] *Id*.
[221] *Id*.
[222] *Id*.

important consideration because it opens the door to possible expansion of international law by the domestic system. At the same time, international mechanisms for corporate accountability are few in number. The ATS might just be a way to encourage corporate responsibility. The Seventh Circuit's decision in *Flomo v. Firestone Natural Rubber Co.* correctly held corporations to be accountable for their international law transgressions under the ATS. *Flomo*'s conclusion is clear: holding that a corporation can be sued under the ATS is by no means an automatic guarantee that a plaintiff will collect damages from the corporation. Corporate liability under ATS is reserved for the most egregious violations of well-entrenched and internationally-recognized violations. Thus, the ATS simultaneously protects against completely barring foreign plaintiffs' claims while safeguarding against abuse of the statute. Notwithstanding that foreign plaintiffs now have an extra tool in their legal toolbox to seek reparation from corporations in certain U.S. circuits, uniformity among the circuits is required. This uniformity should come in the form of Supreme Court ruling that holds corporations liable under the ATS where the facts support such liability.