Article

Preserving the Province of the Legislature: A Proposal to Amend the Alien Tort Statute

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ABSTRACT

On October 1, 2012 the U.S. Supreme Court heard the second round of oral arguments in Kiobel v. Royal Dutch Petroleum Co. on the question of whether and under what circumstances the Alien Tort Statute (ATS) should recognize private causes of action for violations of the law of nations occurring in another sovereign country. This subject attracts intense discussions because the ruling on this matter threatens to affect continued human rights litigation in U.S. courts and corporate liability for human rights abuses occurring abroad. This Article follows the debates surrounding the ATS and ultimately proposes a modest amendment to the statute resolving matters of proper defendants, theories of liability, pleadings, extraterritoriality, the political question doctrine, exhaustion, and enumerates international norms that should be granted as private causes of action under the ATS. In brief, this Article contributes to the foundation for resolving the growing challenges surrounding the ATS and nominates practical solutions to implement the statutes without disturbing the principle of separation of powers, as a variety of courts have already done in the context of the ATS.

I. INTRODUCTION

On October 1, 2012, the U.S. Supreme Court heard the second round of oral arguments in *Kiobel v. Royal Dutch*

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Petroleum.[1] The Court limited the arguments to the question of "whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, 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 U.S.."[2] The ultimate answer to this question, rendered on April 17, 2013, was that the Alien Tort Statute (ATS) would not apply extraterritorially because nothing in the statute rebuts the presumption against extraterritoriality.[3] This holding threatens to upset a number of precedents established by more than thirty years of human rights litigation in U.S. federal courts and the viability of bringing future tort actions against perpetrators of human rights violations abroad.[4] Consequently, the court's rejection of extraterritorial causes of action under the ATS demonstrates an urgent need for a pragmatic and modern amendment by Congress that will preserve the status of the U.S. as a leader in human rights litigation.

This Article proceeds as follows. Part II introduces the complex history of the ATS, demonstrating its various roles during enactment, nearly two-hundred-year dormancy, and revival in *Filártiga v. Peña-Irala*.[5] It further considers the first time the U.S. Supreme Court addressed the ATS in *Sosa v. Alvarez-Machain*, when the Court held that actionable ATS claims must allege "specific, universal and definable" international norms.[6] Part III discusses the divergent circuit courts' interpretations of the ATS, which ultimately leaves the question of corporate liability unresolved. Part IV examines Senator Feinstein's failed proposal in amending the ATS and the political backlash she received from human rights organizations. Finally, Part V proposes a practical amendment to the ATS to resolve questions on proper defendants, theories of liability, pleadings, extraterritoriality, the political question doctrine, exhaustion, and specifically enumerated international

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1. Transcript of Oral Argument at 3, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (Oct. 1, 2012) (No. 10-1491).

2. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738, 1738 (2012) (mem.) (restoring the case to calendar for reargument).

3. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1660 (2013).

4. In the first round of oral arguments, Justice Scalia noted that Congress could pass a statute tomorrow indicating whether international norms applied to corporations under the ATS and creating a private cause of action. Transcript of Oral Argument at 31, *Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (Feb. 28, 2012) (No. 10-1491).

5. Filártiga v. Peña-Irala, 630 F.2d 876, 876 (2d Cir. 1980).

6. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

norms that would be granted as private causes of action under the ATS.

II. BACKGROUND

The ATS was passed by the First Congress as a part of the Judiciary Act of 1789 and simply provided 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."[7] Over time, scholars have proposed several theories regarding the drafters' original intent and the remedies provided for, including the protection of foreign diplomats, civil recovery in prize cases,[8] protection of aliens in cases against U.S. citizens, obligations of upholding international law as if a new nation established it, and providing for universal jurisdiction in appropriate cases in U.S. courts.[9]

It is widely accepted that one seminal event – referred to as the "Marbois Affair" – was a precursor to the drafting of the original ATS. In 1784, a French citizen – Chevalier De Longchamps – assaulted Francis Barbe Marbois, the French Consul General, in Philadelphia.[10] When Marbois complained of this assault to members of the Continental Congress, they replied that "its authority was limited by 'the nature of a federal union in which each State retains a distinct and absolute sovereignty in all matters not expressly delegated to Congress leaving to them only that of advising in many of those cases in which other governments decree.'"[11] After efforts

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7. 28 U.S.C. § 1350 (2002).

8. During the late 18th Century, the drafters were familiar with disputes involving the capture of vessels during wartime, thus "some argue that the phrase 'tort only' was meant to cover prize claims involving damage or injury to property." JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 32118, THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS 9 (2003) (citing Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995)).

9. Here, universal jurisdiction is referred to as "[a] broader version of the state responsibility theory, one that would not rest on alienage jurisdiction or require a U.S. connection to the tortious activity giving rise to a suit, presumes that the courts of all nations have jurisdiction to address certain breaches of the law of nations." JENNIFER K. ELSEA, THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS 10 (2003); *see also* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 447 (1995).

10. Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae Supporting Respondents at 6, Sosa, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 419425.

11. *Id.* at 7 (citing 28 JOURNALS OF THE CONTINENTAL CONGRESS 1785, at

compelling the states to enact statutes that grant protection to foreigners proved unavailing, the First Congress took action to grant federal courts jurisdiction over such claims.[12]

The statute remained dormant for nearly two hundred years until 1980, when the Second Circuit revived the ATS in *Filártiga*.[13] At that time, World War II and the creation of the United Nations significantly altered the understanding of international human rights law. This change created a timely setting for the revival of the ATS.[14]

In *Filártiga*, two Paraguayan citizens, Dr. Joel Filártiga and his daughter, Dolly Filártiga, brought a lawsuit in the U.S. against Americo Norberto Peña-Irala, a former police inspector from Paraguay residing in the U.S.. Pena-Irala was accused of torturing and killing Dr. Joel Filártiga's son, Joelito Filártiga.[15] On appeal to the Second Circuit, the court applied the ATS and held that the deliberate torture committed under the color of official authority violated established norms of international human rights law.[16] The Second Circuit also held that the ATS provided federal jurisdiction where the defendant could be found and served with process within the border of the U.S.[17] This decision effectively affirmed that the ATS provided jurisdiction for torts committed anywhere in the world against aliens in violation of the law of nations,[18] and likewise held that the ATS grants jurisdiction over certain claims against private actors, regardless of whether they acted under color of law.[19] Specifically, the court determined that "[t]he liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after

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314 (J.C. Fitzpatrick ed., 1933)).

12. *See* BETH STEPHENS ET. AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 5-6 (2d ed. 2008).

13. *See id.*

14. *Id.* at 7–8.

15. *Filártiga*, 630 F.2d at 877.

16. *Id.*

17. *Id.* at 880 (referring to the *Paquete Habana*, which held that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." The Paquete Habana, 175 U.S. 677, 700 (1900)).

18. *Filártiga* defined the law of nations as "works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Id.* (internal quotation marks omitted).

19. Specifically, the Court held that war crimes and genocide did not require state action. *See* Kadic v. Karadzic, 70 F.3d 232, 242 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 116 S.Ct. 2524 (1996).

World War II."[20] This court also determined that liability under color of law could be derived by establishing the actions of a *de facto* state.[21] This decision ultimately paved the way for litigating claims against corporations under the ATS.[22]

In addition, in 1992, Congress passed the Torture Victims Protection Act (TVPA), which provided civil liability and an explicit cause of action in U.S. courts for acts of torture.[23] The statute incorporated elements of the decision in *Filártiga* alongside provisions from the Convention Against Torture (CAT):[24]

> [a]n individual who, under actual or apparent authority, or color of law, of any foreign nation— (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.[25]

Congress passed the TVPA by an overwhelming majority that sought "to ensure that torturers within their territories are held legally accountable for their acts," as well as "[make] sure that torturers and death squads will no longer have a safe haven in the United States."[26] Congress responded to criticism from the D.C. Circuit Court in *Tel-Oren*,[27] which held that Congress must provide an explicit grant of a cause of action for torture victims seeking to bring claims that otherwise might be feared to violate separation of powers and affect foreign affairs. Congress affirmed the legislative history of the TVPA, granting

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20. *Kadic*, 70 F.3d at 243.

21. *See id.* at 244-45 (citing Ford v. Surget, 97 U.S. (7 Otto) 594, 620, (1878) (Clifford, J., concurring)).

22. Following *Kadic*, other courts held that corporations could be sued for genocide, war crimes, crimes against humanity and for abuses committed in conjunction with state officials. STEPHENS ET. AL., *supra* note 12 at 15.

23. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (codified at 28 U.S.C. § 1350 (2006).

24. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

25. *Id.*

26. S. Rep. No. 102-249, at 3 (1991).

27. Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S. Ct. 1354 (1985).

this power and seeking to expand the remedies available under Section 1350.[28] In so doing, Congress unambiguously indicated that the TVPA would not replace the ATS.[29]

In 2004, the Supreme Court issued its first decision related to the ATS in the case of *Sosa v. Alvarez-Machain*, holding that claims under the ATS must allege a "specific, universal and definable" international norm.[30] In 1985, an agent of the Drug Enforcement Administration (DEA) was captured in Mexico, interrogated, tortured, and murdered. The DEA believed that during the agent's torture, a Mexican physician, Dr. Humberto Alvarez-Machain, was present and acted to prolong the agent's life in order to extend the interrogation.[31] Thereafter, in 1990, a federal grand jury indicted Alvarez, and the U.S. District Court for the Central District of California issued a warrant for his arrest.[32] After a failed extradition attempt, Alvarez was kidnapped from Mexico by Jose Francisco Sosa, a Mexican national, and other U.S. government agents acting with the approval of the DEA.[33] Alvarez subsequently brought and won a motion to dismiss his indictment on the basis of a violation of the extradition treaty between the U.S. and Mexico. This decision was ultimately affirmed by the Ninth Circuit.[34] In 1993, Alvarez initiated a civil action against Sosa, unnamed Mexican civilians, the U.S., and the DEA agents involved in abducting him and bringing him to the U.S.[35] Alvarez brought suit for damages under the Federal Tort Claims Act (FTCA) and alleged false arrest under the ATS, as a violation of the law of nations.[36] The District Court granted the Government's motion to dismiss the FTCA claim, but awarded $25,000 in damages related to Alvarez's ATS claim.[37] The Ninth Circuit

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28. *See* S. Rep. No. 102-249, at 5 (1991).

29. *Id.* at 4 (stating that "[t]he TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of title 28 of the U.S. Code, derived from the Judiciary Act of 1789 (the Alien Tort Claims Act) which permits Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations.' (28 U.S.C. §1350). Section 1350 has other important uses and should not be replaced.").

30. *Sosa*, 542 U.S. at 732 (quoting *In re Estate of Marcos Human Rights Litigation,* 25 F.3d 1467, 1475 (C.A.9 1994)).

31. *Id.* at 697.

32. *Id.* at 698.

33. *Id.* at 699.

34. *Id.*

35. *Id.* at 698.

36. *Id.*

37. *Id.* at 699.

affirmed the ATS judgment, but reversed the FTCA claim.[38]

The Supreme Court subsequently granted petition for *certiorari* on the claim of false arrest against the U.S. government and Sosa under the ATS.[39] In addressing the claim of false arrest against the U.S. government, the Court held that the FTCA bars all claims of injuries that occur in a foreign country. It also indicated that the claim against Sosa could not be affirmed because a "single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, does not violate any well-defined norm of customary international law to support the creation of a federal remedy."[40] Despite declining to grant relief to Alvarez, this decision made several key holdings regarding the ATS, including: (1) the ATS was enacted with the purpose of using common law powers to recognize international norms; (2) modern courts have authority to recognize common law claims for violations of international norms; (3) a limited set of modern international norms is actionable under the ATS when they are "of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms"; and (4) federal courts should be cognizant of the risks to foreign affairs powers and the executive branch.[41]

III. THE ATS AND CORPORATIONS

Following the *Sosa* decision, federal courts considered a number of ATS cases against both individuals and corporations. The first major case against a corporation was *Doe v. Unocal*,[42] which alleged murder, rape, forced labor, and torture in connection to Unocal's construction of a gas pipeline through the plaintiffs' region in Myanmar.[43] The plaintiffs brought this suit against Unocal and its joint venture partners – a French oil firm, Total, and the Myanmar Oil and Gas Enterprise – for entering into a joint venture with the Burmese military, which they knew had a long history of committing

38. *Id.*

39. *Id.*

40. *Id.* at 738.

41. STEPHENS ET AL., *supra* note 12, at 19-20 (citing *Sosa*, 542 U.S. at 712–728).

42. Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), vacated, 403 F.3d 708 (9th Cir. 2005).

43. STEPHENS ET. AL., *supra* note 12, at 312.

human rights violations.[44] Though these cases posed a perfect test case for a decision on the viability of corporate liability under the ATS, they were settled in 2004 just prior to an *en banc* rehearing before the Ninth Circuit.[45]

Since the *Unocal* litigation, cases against multinational corporations have become a growing trend. [46] In fact, the majority of ATS cases are now brought against corporations,[47] and almost all rely on theories of aiding and abetting, joint venture, agency, or other theories of derivative liability.[48] However, pleading complicity under the ATS has resulted in vastly divergent decisions issued by federal courts due to disagreements about the applicable legal standards.[49] For example, in *Flomo v. Firestone Natural Rubber Co.,*[50] and *Doe VIII v. Exxon Mobil Corp.*,[51] both the Seventh Circuit and the District of Columbia Circuit, respectively, recently held that corporations could be proper defendants under the ATS because nothing in the history of the ATS suggests that corporations should be immune from liability.[52] The Eleventh Circuit also supported this argument in *Presbyterian Church of Sudan v. Talisman Energy*, *Inc.*, when it held that because courts have permitted cases to go forward against corporate defendants since *Kadic*, the ATS extends to corporations.[53] In *Talisman*, the court relied on precedent that failed to dismiss suits against corporations, rather than on precedent that analyzed

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44. *Id.*

45. Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005).

46. *See* Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 460 (2011) (citing Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, AM. LAW., October 12, 2010), *available at* http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202473215797.

47. *Id.* at 460

48. STEPHENS ET. AL., *supra* note 12, at 314.

49. Drimmer et. al., *supra* note 45 at 465 (citing Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 62 (2008)).

50. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011).

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

52. Angela Walker, *The Hidden Flaw in Kiobel: Under the Alien Tort Statute the Mens Rea Standard for Corporate Aiding and Abetting Is Knowledge*, 10 NW. U. J. INT'L HUM. RTS. 119, 120 (2011) (citing *Flomo*, 643 F.3d at 1021); *Doe VIII*, 654 F.3d at 11.

53. *See* Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 368-70 (2011); *see also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 308-13 (S.D.N.Y. 2003).

how private corporations could be held liable under international law, avoiding the issue of how international law supports corporate liability under the ATS.[54] The adopted approach of these circuits demonstrates that subject-matter jurisdiction is derived from the absence of precedents rejecting corporate liability under international law, creating a massive problem of judge-made law.[55]

In 2010, the Second Circuit rejected the approaches taken by the Eleventh and D.C. Circuits. In *Kiobel*, Nigerian plaintiffs brought a class action suit against Dutch, British, and Nigerian corporations claiming they engaged in aiding and abetting the Nigerian government in committing human rights violations in connection with oil exploration and production in their country.[56] The U.S. District Court for the Southern District of New York dismissed the claims on the basis that customary law did not specifically define the alleged violations of international law consistent with *Sosa*.[57] On review, the Second Circuit held that the ATS does not confer jurisdiction over claims against corporations and that corporate defendants are not subject to ATS liability because they are not subject to it under customary international law.[58] More specifically, the court concluded that "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."[59] Moreover, the Second Circuit emphasized that "corporate liability is not recognized as a specific, universal, and obligatory norm"[60] as required by *Sosa*. Ultimately, the

54. Ku, *supra* note 53, at 368–69.

55. *See id*. at 394 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring).

56. Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010), *cert. granted,* 133 S. Ct. 1659.

57. Kiobel v. Royal Dutch Petroleum, 456 F. Supp. 2d 457, 467 (S.D.N.Y. 2006).

58. *Kiobel*, 621 F.3d at 145.

59. *Id.* at 120. Here, the court also cautioned that it decided the question not of whether corporations are immune from liability, but rather whether customary international law extends liability of "a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.*

60. *Id.* at 145 (citing *Sosa,* 542 U.S. at 732). The court also cited to the Nuremberg Tribunal in support of this finding: "[f]rom the beginning, however, the principle of individual liability for violations of international law has been limited to natural persons—not 'juridical' persons such as corporations—because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an 'international crime' has rested solely

Supreme Court held that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[61] Furthermore, the Supreme Court held that "[i]f Congress were to determine otherwise, a statute more specific than the ATS would be required." [62] However, as the circuit split regarding ATS jurisdiction demonstrates, the divide in judicial opinions "reveals that many federal judges still maintain a broad conception of federal judicial discretion under the ATS."[63] Not only is corporate liability under the ATS undefined, the ATS has left many other fundamental questions unanswered, such as: (1) what forum is proper for ATS cases; (2) whether the ATS should apply extraterritorially; (3) whether the political question doctrine should apply, and if so, how; and (4) whether the statute grants jurisdiction over private actors who commit violations with or without the aid of state officials.[64] In fact, oral arguments in *Kiobel* before the Supreme Court demonstrated these very debates.[65] Therefore, as cautioned by the majority opinion of the court in *Sosa*, "the possible collateral consequences of making international rules privately actionable argue for judicial caution"[66] Given that *Sosa* states "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases,"[67] demonstrating the unwillingness of the Court to extend the ATS to corporations, the time is ripe for a legislative amendment to the ATS by Congress.

IV. SENATOR FEINSTEIN'S FAILED PROPOSAL TO AMEND THE ATS

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with the individual men and women who have perpetrated it. As the Nuremberg tribunal unmistakably set forth in explaining the rationale for individual liability for violations of international law: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'" *Id.* at 119. In response to Judge Leval's separate opinion, the court noted: "there would need to be not only a few but so many sources of international law calling for corporate liability that the norm could be regarded as 'universal'. As it happens… the ATS, the remedy Congress has chosen, simply does not confer jurisdiction over suits against corporations." *Id.* at 121.

61. Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 1669

62. *Id.*

63. Ku, *supra* note 53 at 395.

64. STEPHENS ET. AL., *supra* note 12 at 15.

65. *See generally*, Transcript of Oral Argument, Kiobel v. Royal Dutch Petroleum,133 S. Ct. 1659 (2012) (No. 10-1491).

66. *Sosa*, 542 U.S. at 727.

67. *Id.*

On October 17, 2005, Senator Diane Feinstein introduced the Alien Tort Statute Reform Act (ATSRA) to the Senate Judiciary Committee in response to the Supreme Court's holding in *Sosa*.[68] Specifically, she criticized the decision for ambiguities regarding "which international law claims by foreigners should be heard in a U.S. district court, and the standard of liability for U.S. companies facing . . . human rights charges."[69] Concerned with what *Sosa* might mean for corporate liability, Senator Feinstein commented "[t]here are estimates that dozens of existing alien tort suits claim damages—collectively—in excess of $200 billion dollars. That's an extraordinary sum that rightly concerns the U.S. business community, particularly given numerous inconsistent federal courts verdicts handed down in the past two decades."[70] Effectively, she noted that ATSRA would "deter[] private plaintiffs from filing sweeping and specious claims simply because a corporation has a U.S. legal nexus and deep pockets."[71]

The language of the proposed ATSRA statute provided:

> The district courts shall have original and exclusive jurisdiction of any civil action brought by an alien asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort. The district courts shall not have jurisdiction over such civil suits brought by an alien if a foreign state is responsible for committing the tort in question within its sovereign territory.[72]

In addition, ATSRA imposed a ten-year statute of limitations, an exhaustion requirement, as well as eliminated contingency fee arrangements and required plaintiffs to prove human rights violations with specific intent.[73] Arguably, the most damaging requirements of ATSRA to human rights litigation were the elimination of aiding and abetting liability

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68. 151 Cong. Rec. 22, 858 (statement of Sen. Dianne Feinstein) Congressional Record, 109th Congress. October 17, 2005.

69. *Id.*

70. *Id.* at 22859.

71. *Id.*

72. Alien Tort Statute Reform Act, S. 1874, 109th Cong. §1350 (a) (2005).

73. *Id.* at § 1350 (f–h).

as a claim and the stripping of the courts' jurisdiction over any case where the President or a designee certifies that to proceed with the suit would have a negative impact on foreign policy interests in the U.S..[74] Without doubt, the ATSRA would have severely limited ongoing and future litigation of ATS claims.[75] Consequently, after receiving heavy criticism from human rights advocates and organizations, Senator Feinstein withdrew the proposal.[76]

V. AMENDING THE ALIEN TORT STATUTE

A. DEFENDANTS, THEORIES OF LIABILITY AND PLEADING REQUIREMENTS

Under current ATS precedent, a defendant may be either a former government official or a non-state perpetrator who may or may not have acted in coordination with state actors.[77] International human rights instruments vary on whether state action is required for purposes of accountability. However, a number of important treaties and norms apply liability to private actors irrespective of state action, covering abuses such as slavery, piracy, war crimes, crimes against humanity, and gender-based abuses under the Convention Eliminating All Forms of Discrimination Against Women (CEDAW).[78] With regard to corporate defendants, the Supreme Court has only held that mere corporate presence is not sufficient to render a corporation a proper defendant under the ATS.[79] However, while the circuit courts are split on the issue of corporate liability, claims involving direct actions against corporate employees not involving aiding and abetting remain undisputed.[80] Finally, actions against states are generally barred in U.S. courts under the Foreign Sovereign Immunities

74. *See* Daniel Swearingen, *Alien Tort Reform: A Proposal to Revise the Alien Tort Statute*, 48 HOUS. L. REV. 99, 120 (2011).

75. *See id*.

76. *Id*. at 102 (citing Eliza Strickland, *Was DiFi Batting for Big Oil?,* E. BAY EXPRESS, Nov. 9, 2005, http://www.eastbayexpress.com/eastbay/was-difi-batting-for-big-oil/Content?oid=1079606).

77. However, in order to proceed with suit, a court must have personal jurisdiction over the defendant. *See* STEPHENS ET AL., *supra* note 12 at 247.

78. *Id*. at 251.

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

80. STEPHENS ET AL., *supra* note 12 at 313 (citing Wiwa v. Royal Dutch Petroleum, 226 F.3d 88 (2d Cir. 2000); Flores v. Southern Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003)).

Act (FSIA); however, "tortious acts committed by foreign states outside the United States rarely fit any of the FSIA exceptions . . . ."[81]

Kadic established that a showing of acting under color of law is not required, as long as violations can be shown to have furthered acts of genocide, war crimes or crimes against humanity.[82] In addition, actions under color of law could be derived from establishing *de facto* state action.[83] For instance, in *Doe v. Unocal*, "plaintiffs alleged that the private defendants jointly participated with Burmese government officials to engage in forced labor and other human rights violations . . . [t]he court found this sufficient to impose liability for international law violations requiring state action."[84] However, one must question whether it is fair to maintain sovereign immunity as a defense in ATS cases, but not apply it to private actors, such as corporations that assist state actors.

The ruling in *Kiobel* has failed to fully resolve whether corporations should be proper defendants under the ATS and, if so, under what approach. Courts have grappled with the various readings of the famed footnote 20 in the *Sosa* decision, which states:

> 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.[85]

Recently, in *Ali Shafi v. Palestinian Authority*,[86] the District of Columbia District Court adopted the approach of determining liability through a specific norm recognized under international law.[87] In other words, one must look to see whether there is an international norm holding a type of actor liable for the harm alleged. This approach eliminates the issue of a multi-step analysis that would first consider an

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81. STEPHENS ET. AL., *supra* note 12, at 93.

82. Kadic v. Karadzic, 70 F.3d 232, 242 (2d Cir. 1995).

83. *Id*. at 244.

84. STEPHENS ET AL., *supra* note 12, at 253.

85. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004) (comparing Tel–Oren v. Libyan Arab Republic, 726 F.2d 774, 791–795 (C.A.D.C.1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic* 70 F.3d at 239–41 (sufficient consensus in 1995 that genocide by private actors violates international law)).

86. Ali Shafi v. Palestinian Auth., 642 F.3d 1088 (D.C. Cir. 2011).

87. *See id*. at 274.

international norm, determine whether it applies to certain actors, and then consider the issue of liability.

An amendment that would clarify the various readings of *Sosa* would identify that the ATS is properly applied to both persons and entities. However, this raises the next question regarding what should be required to establish a theory of liability. Though few would argue with the fact that corporations should be held accountable for committing human rights violations abroad, aiding and abetting liability – the primary allegation against corporations – poses serious concerns regarding liability for actions with attenuated connections to the corporations.

It is a well-known fact that corporations often function through subsidiaries. Often the only ties corporations may have to subsidiaries are financial ones. In arriving at a sensible solution regarding what a plaintiff must prove in order to obtain a remedy under the ATS, one must balance two concerns. First, there is the potential harm of permitting widespread forum shopping by reaching into the corporate pockets of almost any parent company abroad. Second, there is the risk of inhibiting valid ATS claims from proceeding. This Article proposes that a plaintiff must prove knowledge, rather than specific intent in order to justify an ATS claim. This would require that the plaintiff meet a heightened standard by pleading specific facts that allege the corporation had knowledge of the human rights violations either before or during the alleged violations.

The principle of *respondeat superior* liability is very well established in international law. For example, the Nuremberg and Tokyo trials famously utilized the command responsibility doctrine, which ruled out the defense against committing crimes against humanity based on the orders of a superior.[88] In *Ford v. Garcia*,[89] and its companion case, *Arce v. Garcia*,[90] victims of extrajudicial execution and torture sued Salvadoran generals under these theories utilizing the TVPA and the ATS.[91] The TVPA also supports command responsibility finding

88. STEPHENS ET. AL., *supra* note 12 at 263.

89. Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002).

90. Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006).

91. It should be noted that in the underlying proceedings in the *Ford* litigation, after the defendants argued that they should not be held responsible for human rights violations because they were doing their best amid a situation of overall "chaos" in El Salvador, the jury held that defendants were not liable under the command responsibility doctrine. However, the plaintiffs in *Arce* prevailed (despite similar "chaos" arguments

liability for: "(a) persons who 'ordered, abetted, or assisted' in the violations; (b) 'anyone with higher authority who authorized, tolerated or knowingly' ignored the acts; or, (c) commanders whose troops acted 'pursuant to a policy, pattern and practice' or committed acts 'about which [the commander] was aware and which he did nothing to prevent.'"[92]

In light of the historical acceptance of *respondeat superior* liability, a practical solution to the knowledge requirement would be akin to the Restatement (Second) of Torts Section 876(b), which recognizes aiding and abetting as follows:

> For harm resulting to third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[93]

This model represents a less stringent approach than that proposed by the Second Circuit in *Talisman*, which held that **"**absent proof that Canadian corporation provided substantial assistance to the Government of the Sudan with the purpose of aiding government's unlawful conduct, Canadian corporation could not be held liable under ATS for aiding and abetting Sudanese government's violations of the international norms prohibiting genocide, war crimes, and crimes against humanity."[94]

To counterbalance the knowledge requirement, Congress should enact heightened pleading standards to avoid the risk of holding parent companies liable for attenuated conduct occurring in connection with a subsidiary, and to deter "fishing expeditions against corporate entities . . . to abuse judicial process in order to pursue political agendas."[95] This is not to say

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made by the defendants) after showing that the defendants either knew or should have known of the violations but failed to prevent or punish them.

92. 28 U.S.C. § 1350.

93. STEPHENS ET. AL., *supra* note 12 at 266 (citing Restatement (Second) of Torts § 876 (1979)).

94. *See generally Talisman*, 582 F.3d 244, *supra* note 53.

95. In re Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1275 (S.D. Fla. 2006).

that corporations should not continue to engage in due diligence, or be permitted to set up paper companies to shield themselves from liability. Rather, this requirement would deter the filing of frivolous law suits, which often exceed tens of millions of dollars in remedies.

To fully explain an effective approach to heightened pleading requirements, it is first necessary to consider the current pleading standards. Under the current *Iqbal*[96] and *Twombly*,[97] pleading requirements, a complaint must present a "showing rather than a mere blanket assertion, of entitlement to relief," thus plaintiffs "must plead enough facts to state a claim of relief that is plausible on its face," by "nudg[ing] their claims across the line from conceivable to plausible."[98] Plausibility is defined "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" even if "actual proof of those facts is improbable, and that a recovery is very remote and unlikely."[99] Furthermore, the *Iqbal* court stated that "when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."[100] As a result, the *Iqbal* court provided a two-pronged approach to pleadings. First, a court must accept all "factual allegations" as true. Second, only "plausible" claims to relief can withstand a 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure.[101]

One scholar proposes a logical application of modern pleading standards to ATS suits:

> To state an ATS accomplice liability claim, plaintiffs must show that the parallel conduct between defendant corporations and state actors was the result of either an explicit or tacit agreement, rather than a coincidence. This implies that separate actions taken by the defendants and the state actors toward a common goal—parallel conduct—would be insufficient to satisfy

96. Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009).

97. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555–56 (2007).

98. *Id.* at 547.

99. *Id.* at 556 (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)); *Iqbal,* 129 S. Ct. at 1949.

100. *Iqbal,* 556 U.S. at 664.

101. *Id.* at 663-64.

this element.[102]

Under this proposal, a plaintiff would have to first show that discovery would reveal evidence of an actual or implicit agreement to commit human rights violations, foreclosing the issue of frivolous suits, yet maintaining fairness to parties with legitimate claims.[103]

B. EXTRATERRITORIALITY

The heart of the *Kiobel* decision is the issue of extraterritoriality. Though the U.S. Department of Justice argued that the ATS should not apply to claims that take place abroad and have no connection to the U.S. other than the defendant's presence, the court adopted a more stringent approach:[104]

> The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches "*any* civil action" suggest application to torts committed abroad; it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality.[105]

During oral argument in *Kiobel,* Justice Kennedy expressed this same concern by stating that "[n]o other nation in the world permits its courts to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses

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102. Amanda Sue Nichols, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 FORDHAM L. REV. 2177, 2207-08 (2008).

103. Though this application seems logical, the Second Circuit has not complied with the modern pleading standards. For example, "a closer look at these decisions reveals that the courts do not always implement *Iqbal's* two-pronged approach of ignoring all 'conclusory' allegations or legal conclusions." Jordan D. Shepherd, *When Sosa Meets Iqbal: Plausibility Pleading in Human Rights Litigation*, 95 MINN. L. REV. 2318, 2337 (2011) (citing Kiobel, 621 F.3d at 191, *supra* note 56; Lev v. Arab Bank, PLC, No. 08 CV 3251(NG)(VVP), 2010 WL 623636, at *3 (E.D.N.Y. Jan. 29, 2010)).

104. Transcript of Oral Argument at 41, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Oct. 1, 2012).

105. *Kiobel*, 133 S. Ct. at 1665.

to which the nation has no connection."[106] However, the requirement that the statute apply exclusively to claims that occurred in the U.S. would strip the ATS of its purpose. Consequently, it would inhibit the U.S. from remaining a forum for litigating international human rights cases that otherwise would not be heard abroad.[107] Therefore, an amendment to the statute must not have an extraterritorial prohibition.

C. FOREIGN POLICY CONSIDERATIONS AND POLITICAL QUESTION DOCTRINE

The *Sosa* Court warned that because "many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."[108] Although the political question doctrine is one possible defense against ATS litigation, the Supreme Court specified that the political question doctrine may apply only under a certain set of delineated exceptions, such as: determination of when war begins or ends; issues relating to the ratification and interpretation of treaties; and challenges to a president's war powers.[109] Consequently, no case has ever been dismissed under this doctrine.[110] Nevertheless, it is a realistic possibility that litigation involving foreign plaintiffs and defendants for events that occurred on foreign soil could raise foreign policy issues. However, an approach akin to Senator Feinstein's proposal as previously discussed which grants the executive branch exclusive power to take away a case at any time from federal courts would unnecessarily deprive litigants of their fundamental rights. Therefore, it is vital that "the protection of human rights is not committed exclusively to the political branches of the government."[111]

As a result, an amendment would have to exclude the power of the executive branch to decertify cases from going forward on foreign policy grounds. In order to retain control,

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106. Transcript of Oral Argument at 3-4, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Feb. 28, 2012).

107. *Kiobel,* 133 S.Ct. at 1665.

108. *Sosa,* 542 U.S. at 727-28.

109. STEPHENS ET. AL., *supra* note 12, at 339 (citing ERWIN CHEMERINSKY, FEDERAL JURISDICTION 155–58 (4th ed. 2003)).

110. *Id*. at 338.

111. Curiae at 603, Filártiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), reprinted in 19 I.L.M. 585, 585 (1980).

Congress should, instead, enumerate specific international norms that could be litigated under the statute. The enumeration of these norms would set out that certain violations are so important that foreign policy considerations cannot preclude their application in U.S. courts.

D. EXHAUSTION

Another way to minimize potential foreign policy conflicts for human rights violations that occur on foreign soil is to impose an exhaustion requirement. Ideally, the plaintiffs should adjudicate their claims at the location in which the violations took place, so long as remedies are adequate and available there. This would promote judicial efficiency, especially if the witnesses and evidence are only available abroad. Indeed, the TVPA imposes such a requirement: "A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."[112] One drawback of an exhaustion requirement is that remedies are often not available in locations where the conduct took place, for reasons of civil instability, corrupt judicial systems, or conduct taking place in *terra nullius*. For these reasons, a case might rightfully be allowed to proceed elsewhere. In fact, the drafters of the TVPA were concerned with the very same issues and concluded that the requirement would "ensure[] that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred."[113] Given that TVPA suits are seldom dismissed on exhaustion grounds (because few defendants are able to demonstrate adequate and available remedies in the place where the human rights violations occurred), ATS suits would follow.[114] As a result, such a requirement would also promote judicial efficiency and deter forum shopping.

In a dissenting opinion in *Sarei v. Rio Tinto,*[115] Judge Bybee presents further persuasive justifications for an exhaustion requirement. He argues that "exhaustion is not a prerequisite to the exercise of jurisdiction, but rather 'one

112. 28 U.S.C. § 1350.

113. STEPHENS ET. AL., *supra* note 12, at 402 (citing H.R. REP. NO. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87–88).

114. *Id*. at 403–04.

115. Sarei v. Rio Tinto, 487 F.3d 1193, 1224–46 (9th Cir. 2007) (Bybee, J., dissenting).

among related doctrines-including abstention, finality, and ripeness-that govern the timing of federal-court decision making.'"[116] Furthermore, Bybee indicates that he regards exhaustion to be an accepted principle of comity and contends that relaxing it would induce "frequent and deliberate flouting of administrative processes."[117]

E. ENUMERATED NORMS UNDER AN ATS AMENDMENT

A clearly defined set of international norms would foreclose the court debates regarding jurisdiction or expanding definitions of accepted universal human rights. Justiciable claims under the ATS should include: extrajudicial killings, torture, cruel and inhuman or degrading treatment, genocide, slavery, slave trading, forced disappearances, and crimes against humanity.

F. EXTRAJUDICIAL KILLINGS

Extrajudicial killings and summary executions are well-recognized as actionable offenses under international law, have been enumerated by Congress in the TVPA, and are recognized as an exception under the Foreign Sovereign Immunities Act (FSIA).[118] In addition, the Second Protocol of the Geneva Convention states that "[n]o sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality."[119] Article Six of the International Covenant of Civil and Political Rights (ICCPR)[120] similarly states, "every human being has the inherent right to life." Furthermore, the ICCPR states that this " right shall be protected by law," and no "one shall be arbitrarily deprived of his life."[121] However these definitions lack the necessary specificity. The TVPA provides the best

116. *Id.* at 1225.

117. *Id.* at 1226.

118. STEPHENS ET. AL., *supra* note 12, at 148 (citing 28 U.S.C. § 1605(a)(7)).

119. *See* Protocol Additional to the Geneva Convention of 12 August 1949; Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144 reprinted in 16 I.L.M. 1442 (1977) (hereinafter "Protocol II").

120. International Covenant on Civil and Political Rights adopted Dec. 19, 1966, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368, 370 (hereinafter "ICCPR").

121. *Id.*

practical definition to use in an ATS amendment:

> For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensible by civilized peoples. Such term, however, does not include any such killing that, under international law; is lawfully carried out under the authority of a foreign nation.[122]

Furthermore, the legislative history of the TVPA emphasized the importance that Congress assigned to prohibitions against summary execution, and that it intended to offer this remedy even while other countries do not.[123] Therefore, extrajudicial killings and summary executions must remain as an actionable norm under an ATS amendment.

G. TORTURE AND CRUEL AND INHUMAN OR DEGRADING TREATMENT

Torture is by far the most recognized violation of international law.[124] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[125] the Geneva Conventions,[126] and the Universal

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122. STEPHENS ET. AL., *supra* note 12, at 149 (citing 28 U.S.C. § 1350).

123. "Despite universal condemnation of these abuses, many of the world's governments still engage in or tolerate torture of their citizens, and state authorities have employed extrajudicial killings to execute many people. For 1990 alone, Amnesty International reports over 100 deaths attributed to torture in over 40 countries and 29 extrajudicial killings by death squads . . . Judicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. Consequently, the Torture Victim Protection Act (TVPA) is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad." S. REP. NO. 102-249, at 3–4 (1991).

124. STEPHENS ET. AL., *supra* note 12, at 140.

125. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 24.

126. *See, e.g.,* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 3,12, 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 3, 17, 87 Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3, 32, 37, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Declaration of Human Rights (UDHR),[127] all prohibit the practice. As previously discussed, *Filártiga* effectively adopted the terminology included in the CAT, which defined torture as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[128]

The TVPA adopted the language of the CAT, stressing that the TVPA was intended to provide a civil cause of action in U.S. courts for torture committed abroad in order to effectively ensure "that torturers and death squads will no longer have a safe haven in the United States."[129] However, the TVPA's definition of mental suffering could potentially eliminate other forms of mental torture covered by the CAT. For example, in 2002, a memorandum from the Department of Justice "narrowly defined torture as requiring specific intent to inflict severe pain and limited to acts that result in death, organ failure, or serious impairment of bodily functions. The memo also defined mental torture as acts that result in permanent emotional trauma."[130] This Article advocates for the full adoption of the CAT and its definitions rather any narrowly-defined definition meant to avoid liability under the statute. Given that there is wide international and domestic acceptance

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127. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 5, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

128. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 24, art. 1. Implemented by regulations 8 C.F.R. §§ 1208.16, 1208.18 (2000).

129. S. Rep. 102-249 at 3 (1991).

130. STEPHENS ET. AL., *supra* note 12, at 143 (citing Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzalez, Counsel to the President, re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *available at* http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf.

of this norm, torture must give rise to a cause of action under any amendment to the ATS fully consistent with the CAT.

H. GENOCIDE

The international community – including the U.S. – accepts the definition of "genocide" set forth in the Genocide Convention:

> [A]ny of the following acts committed with intent to destroy, in whole, or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[131]

This definition is specific, universal, and obligatory, and was accepted by the Genocide Convention Implementation Act of 2000.[132] Importantly, this internationally recognized norm does not require either state action or action under the color of law, and it holds private actors accountable.[133] Given the wide acceptance of the norm against genocide, the crime must remain actionable under an ATS amendment.

I. SLAVERY AND SLAVE TRADING

A variety of international conventions have recognized prohibitions on slavery, including the Hague Convention,[134] the Slavery Convention,[135] the Convention Concerning the Abolition

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131. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 102 Stat. 2045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

132. 18 U.S.C. §§ 1091– 1093 (2000).

133. STEPHENS ET. AL., *supra* note 12, at 157.

134. International Convention with Respect to the Laws and Customs of War on Land (Hague II), July 29, 1899, 32 Stat. 1803, T.S. No. 403; Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

135. Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

of Forced Labor,[136] the Universal Declaration of Human Rights,[137] and the International Covenant on Civil and Political Rights.[138] Article 1 of the Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[139] Though the prohibition is widely recognized, the amendment should adopt the definition set out by the ICCPR, Article 8, which states:

> (1) No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. (2) No one shall be held in servitude. (3)(a) No one shall be required to perform forced or compulsory labour; (b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court; (c) For the purpose of this paragraph the term 'forced or compulsory labour' shall not include: (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations.[140]

The prohibition of slavery and slave trading has roots in a demonstrated, long-standing and accepted history, which is why it is critical to include it as part of an ATS amendment.

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136. ILO Convention Concerning the Abolition of Forced Labour (No. 105), June 25, 1957, 320 U.N.T.S. 291.

137. Universal Declaration of Human Rights, *supra* note 127, art. 4.

138. International Covenant on Civil and Political Rights, *supra* note 116, art. 6.

139. M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL. 445, 467 (1991) (citing International Covenant on Civil and Political Rights, *supra* note 116 art. 8).

140. International Covenant on Civil and Political Rights, *supra* note 116 art. 8.

J. FORCED DISAPPEARANCE

Forced disappearance has been a historic tool utilized in times of war.[141] The practice is acknowledged in several international law instruments, including the U.N. Resolution on Disappeared Persons,[142] the Convention on Enforced Disappearances,[143] and the Inter-American Convention on Forced Disappearances of Persons,[144] which have not been ratified by the U.S.[145] Forced disappearance is an offense that is wholly distinct from any other enumerated crime. It is generally defined as "(a) abduction by a state official or by persons acting under state approval or authority; and (b) refusal by the state to acknowledge the abduction and detention."[146] These elements clearly satisfy the requirements of a specific, obligatory and universal actionable norm as required by *Sosa*.[147] Thus, these elements should be adopted in the amendment.

K. CRIMES AGAINST HUMANITY

Some scholars criticize the lack of specificity surrounding the definition of crimes against humanity.[148] However, the historical importance of this norm should not be overlooked when amending the ATS. Crimes against humanity were first recognized in the Nuremberg Charter, which held Nazi war criminals accountable for violations against civilian populations.[149] They are now recognized in a myriad of U.N.-established criminal tribunals, such as the International Criminal Tribunal for Rwanda and the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former

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141. STEPHENS ET. AL., *supra* note 12, at 167.

142. G.A. Res. 33/173, U.N. Doc. A/RES/33/173 (Dec. 20, 1978).

143. G.A. Res. 61/177,, U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

144. Inter-American Convention on the Forced Disappearance of Persons preamble, June 9, 1994, 33 I.L.M. 1529.

145. STEPHENS ET. AL., *supra* note 12.

146. Forti v. Suarez-Mason, 694 F. Supp. 707, 711 (N.D. Cal. 1988).

147. *Sosa*, 542 U.S. at 732.

148. *See*, e.g., CARL SCHMITT, THE CONCEPT OF THE POLITICAL 54 (George Schwab trans., 1996) ("To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human . . . .").

149. STEPHENS ET. AL., *supra* note 12, at 161.

Yugoslavia.[150] Article 7 of the International Criminal Court Statute provides the following comprehensive definition for crimes against humanity:

> [A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[151]

In light of the events surrounding the Nuremberg and Tokyo Tribunals, it is imperative that an ATS amendment includes crimes against humanity to serve as a backdrop in reinforcing the other enumerated norms, as well as protecting other important rights set out by the Rome Statute. This Article proposes that the ATS amendment adopt the definition of crimes against humanity that was adopted by the International Criminal Court Statute.[152]

CONCLUSION

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150. *Id.* (citing Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 6, U.N. Doc S/RES/955 (Nov. 8, 1994); Statute of the International Criminal Tribunal for the Former Yugoslavia , S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

151. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90, entered into force July 1, 2002.

152. *See* Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT'L L. & POL'Y 119, 162 (2007) (claiming that the ICC contains "the most definitive description of war crimes ever enunciated by an international body).

The ATS requires a pragmatic amendment due to systemic confusion in federal courts regarding the definition of international norms and their theories of liability. The decision in *Kiobel* has already demonstrated that a restriction on extraterritorial application of the ATS would severely hinder continued human rights litigation in the U.S. If Congress remains silent, litigation regarding which norms are actionable under the ATS, and how those norms apply, will not stop. It is absolutely necessary that Congress set out clearly definable standards that will take into account modern trends in ATS litigation, preserving a plaintiff's right to bring an action forward while deterring frivolous suits. As this Article discussed, an amendment to the ATS should include an exhaustion requirement, a heightened pleading standard for alleging complicity in corporate actions consistent with *Iqbal* and *Twombly*, extraterritorial application, and clearly definable enumerated norms which include extrajudicial killings, torture, cruel and inhuman or degrading treatment, genocide, slavery, slave trading, forced disappearances, and crimes against humanity. Such an amendment will follow a similar course as the TVPA, which has both clearly established language and legislative history used by advocates on both sides of its litigation. It is the province of Congress to speak on what the law is, not for courts to guess or contort its meaning using outdated statutory language.