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NOTE

SWIMMING UPSTREAM: THE SECOND CIRCUIT CONTINUES TO FALLACIOUSLY FIGHT THE TIDE AGAINST CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

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ABSTRACT

This Note addresses the Second Circuit's holding in In re Arab Bank *that the Alien Tort Statute does not allow for corporate liability for violations of the law of the nations. This holding was a result of applying purportedly binding precedent found in* Kiobel v. Dutch Petroleum Co. *The decision in* In re Arab Bank *furthered an interpretation of the Alien Tort Statute that has been opposed by the majority of circuits that have considered the issue. The Eleventh, Ninth, Seventh, and D.C. circuits have all held that corporations can be liable under the Alien Tort Statute. The circuits remain split on this issue despite the most recent Supreme Court ruling on Alien Tort Statute litigation,* Kiobel v. Dutch Petroleum Co.*, an appeal from the Second Circuit's holding against corporate liability. Although the Supreme Court granted certiorari on the issue, it ultimately heard the case on the issue of extraterritoriality and concluded that the presumption against extraterritoriality applied to the Alien Tort Statute. In deciding the case on that ground, the Supreme Court did not reach the issue of corporate liability. It therefore remains a topic of debate among the circuits.*

Several arguments support the majority's position that a proper reading of the Alien Tort Statute would allow corporate liability. A major argument urges courts to look to the original intent of the drafters and the historical backdrop of the Alien Tort Statute. An underlying premise of the Alien Tort Statute is that courts should supply relief to those who suffer from the often egregious conduct that makes up the claims. Such conduct has included extrajudicial killings, genocide, torture, terrorist attacks, rape, and human trafficking. Allowing these actions to go unpunished simply because they were perpetrated by a corporation would subvert the purpose of the Alien Tort

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Statute. It is additionally argued that while the law of the nations defines what constitutes a "violation," individual States are left to decide procedural questions such as who can be sued. The Second Circuit's recent decision in In re Arab Bank *to continue to follow its holding in* Kiobel v. Dutch Petroleum Co. *is evidence that it does not believe the Supreme Court has expressly ruled on the issue. This Note therefore suggests that the Supreme Court should consider the issue of corporate liability and expressly resolve the circuit split.*

I. INTRODUCTION

Acts of human cruelty saturate the nations with victims in search of justice. The law of the nations embodies universally-held principles of refuge and respite for those subjected to these actions. The Alien Tort Statute (ATS) can be utilized as a mechanism for providing this invaluable relief and justice. However, in *In re Arab Bank*, the Second Circuit maintained its stance that the ATS does not allow for corporations to be held liable for violations of the law of the nations.[1] In doing so, it fundamentally limited the potential for the ATS to effectively supply the remedy it purports to offer. With no power to hold corporations accountable, the ATS must operate with one hand tied behind its back. The ensuing analysis will demonstrate that the court's decision in *In re Arab Bank* to follow the holding of *Kiobel v. Dutch Petroleum Co.* (*Kiobel I*) on the issue of corporate liability needlessly perpetuated an improper reading of the ATS. Section II will explain the history behind ATS litigation, including a description of the circuit split and the Supreme Court's response. In Section III, the line of reasoning the majority utilized in *Kiobel I* will be critically analyzed. Several of the arguments surrounding corporate liability will be set forth and examined. This Note will then evaluate the Second Circuit's decision in *In re Arab Bank*. Finally, Section IV will suggest that the Supreme Court should evaluate ATS litigation again and come to a clear conclusion on the issue of corporate liability.

II. BACKGROUND

The development of ATS litigation has occurred in large part throughout the past 30 years.[2] As ambiguity has often surrounded its application, the Supreme Court first attempted to provide clarity in *Sosa v. Alvarez-*

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1. *In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 158 (2d Cir. 2015), *as amended* (Dec. 17, 2015).

2. 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, 357 (2011).

Machain.[3] After the *Sosa* decision, several questions remained topics of debate on the function of the ATS, including the issue of corporate liability. This section will examine the historical development of ATS litigation. It will then detail the current circuit split and the Supreme Court's response, as well as the Second Circuit's decision in *In re Arab Bank*.

A. The Alien Tort Statute

The Alien Tort Statute provides in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of the nations or a treaty of the United States."[4] Although the ATS was originally enacted in 1789, suits brought under it remained relatively inactive until the United States Court of Appeals for the Second Circuit decided *Filartiga v. Pena-Irala* in 1980.[5] *Filartiga* involved plaintiffs and a defendant who were all citizens of Paraguay.[6] It was alleged that, due to the doctor's outspoken activism against the government of Paraguay, Dr. Filartiga's son was kidnapped, tortured, and killed while living in the United States.[7] Based upon these facts, the Second Circuit held that the case could be heard under the ATS.[8] In its conclusion, the Second Circuit expressed the object behind the enactment of the ATS: "In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest."[9] The court considered the kidnapping and torture of Dr. Filartiga's son in light of these fundamental human rights and thereafter decided that these violations satisfied the requirements to hear a case under the ATS.

The Supreme Court later considered an ATS case as a matter of first impression in *Sosa v. Alvarez-Machain*.[10] In *Sosa*, the United States Drug Enforcement Administration approved a plan that involved hiring Mexican nationals to abduct a Mexican physician allegedly involved in a torture and murder in the United States.[11] The plan was carried out, and the plaintiff

3. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).
4. 28 U.S.C. § 1350 (2012).
5. Ku, *supra* note 2.
6. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
7. *Id.*
8. *Id.* at 890.
9. *Id.*
10. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).
11. *Id.* at 697-98.

was kidnapped and flown to the United States, where he was then arrested.[12] After examining the merits of the case, the Court ultimately held that the ATS was merely jurisdictional and did not create an action for claims under customary international law.[13] The Court noted the following:

> The statute "was enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations . . . based on the present-day law of the nations . . . rest[ing] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the 18th-century paradigms we have recognized [violations of safe conducts, infringement on the rights of ambassadors, and piracy]."[14]

The Court reasoned that there was not universal consensus on a violation of the law of the nations as to a claim for arbitrary arrest, and the ATS was therefore inapplicable to the case.[15] Since the relatively recent revival of ATS litigation, several questions have arisen as to its applicability, including the issue of whether a corporation can be held liable for violations of the law of the nations under the ATS.[16] The debate on this question resulted in a circuit split, with the Second Circuit concluding that corporations cannot be held liable[17] and the Seventh, Ninth, Eleventh, and D.C. Circuits holding the opposite.[18]

B. Circuits that Have Held in Favor of Corporate Liability

Several circuits that have considered the issue of corporate liability have concluded that the ATS does provide for holding corporations responsible. In 2008, the Eleventh Circuit in *Romero v. Drummond* held that the ATS

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12. *Id.* at 698.

13. Ku, *supra* note 2, at 361.

14. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 743 (9th Cir. 2011) (alteration in original) (quoting *Sosa*, 542 U.S. at 724-25).

15. *Sosa*, 542 U.S. at 762.

16. *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011); Flomo v. Firestone Nat. Rubber Co., LLC 643 F.3d 1013, 1021 (7th Cir. 2011); Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

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

18. *Sarei*, 671 F.3d at 748; *Flomo*, 643 F.3d at 1021; *Exxon Mobil Corp.*, 654 F.3d at 15; *Romero*, 552 F.3d at 1315.

does provide for corporate liability.[19] This case involved the torture and assassination of Colombian trade union leaders by a paramilitary force allegedly paid for by the defendant.[20] The court recognized that the ATS provides no express exception for corporations and reasoned from this that corporations can be held liable.[21] Because the cause of action complained of was torture, the court looked to both the ATS and the Torture Act.[22] It ultimately held that its precedent allowed for jurisdiction on complaints of torture against corporate defendants.[23]

The D.C. Circuit adopted a similar holding in *Doe v. Exxon Mobile Corp.*[24] The *Doe* case involved human rights abuses including genocide, extrajudicial killing, torture, crimes against humanity, sexual violence, and kidnapping.[25] The court looked to the text of the ATS, its legislative history, and the law of the nations in concluding that the ATS does allow for corporate liability.[26] In examining the history at the time of the creation of the ATS, the court acknowledged that corporate liability for torts was common in United States law.[27] It reasoned from this that the idea of corporate liability "would not have been surprising" to the drafters of the ATS.[28] The court also asserted that the law of the nations allows for corporate liability in cases of crimes against humanity such as genocide, piracy, and human trafficking.[29] While the court's judgment in this case was ultimately vacated after the Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (*Kiobel II*), it was vacated on extraterritoriality grounds that did not concern the issue of corporate liability.[30] The ruling of the D.C. Circuit on this issue therefore remains unchanged.

In *Flomo v. Firestone Co.*, the defendant corporation was charged with using Liberian children for dangerous labor on a rubber plantation.[31]

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19. *Romero*, 552 F.3d at 1315.
20. *Id.* at 1309.
21. *Id.* at 1315.
22. *Id.*
23. *Id.*
24. Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011).
25. *Id.* at 16.
26. *Id.* at 15.
27. *Id.* at 47.
28. *Id.* at 48.
29. *Id.* at 48.
30. Doe v. Exxon Mobil Corp., 527 F. App'x 7 (D.C. Cir. 2013).
31. Flomo v. Firestone Nat. Rubber Co., LLC 643 F.3d 1013, 1015 (7th Cir. 2011).

Although the Seventh Circuit ultimately affirmed summary judgment on other grounds, it strongly disagreed with the district court's ruling against corporate liability.[32] The court expressly rejected the reasoning of the Second Circuit's contrary opinion in *Kiobel I*, stating that its factual premise was incorrect.[33] It noted the illogical outcome of a holding that corporations are not subject to liability: "So, according to Firestone, a pirate can be sued under the Alien Tort Statute but not a pirate corporation."[34] Acknowledging "corporate tort liability is common around the world," the court ultimately reasoned that such a conclusion was not appropriate and that corporations may be held accountable for their actions.[35]

Similarly, the Ninth Circuit in *Sarei v. Rio Tinto, PLC* also held that corporations could be liable under the ATS.[36] This case involved an uprising against a mining group that ultimately resulted in the use of military force.[37] The court held that the claims of genocide and war crimes fall within the jurisdiction of the ATS.[38] It asserted that the focus of inquiry in ATS cases is on whether the violations constitute an international norm, not on the identity of the defendant.[39] In reaching its conclusion, the court looked to the legislative history of the ATS and concluded that there was no bar against corporate liability.[40] As the court in this opinion also expressly held that there was no bar to suit based on extraterritorial grounds, this judgment was also vacated after the Supreme Court's decision in *Kiobel II*, which found a presumption against extraterritorial application.[41]

C. The Second Circuit's Split from the Other Circuits

In a decision that caused a circuit split on the issue of corporate liability under the ATS, the Second Circuit in *Kiobel I* expressly found that corporations cannot be held liable for violations of the law of the nations

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32. *Id.* at 1025.

33. *Id.* at 1017.

34. *Id.*

35. *Id.* at 1019, 1025.

36. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011).

37. *Id.* at 742.

38. *Id.* at 744.

39. *Id.* at 748.

40. *Id.*

41. Rio Tinto PLC v. Sarei, 133 S. Ct. 1995 (2013); *see generally* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

under the ATS.[42] The plaintiffs in *Kiobel I* were Nigerian citizens who brought a class action against the defendants, several corporations engaged in oil exploration and production, alleging that the corporations aided and abetted the Nigerian government in violations of the law of the nations.[43] The defendants allegedly enlisted the government's aid to suppress a protest against oil exploration, and the violations of international law included the beating, raping, and arresting of residents and the destroying/looting of property.[44] The plaintiffs sued under the ATS, and the district court dismissed several claims but denied the defendant's motion to dismiss claims for aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture.[45] The district court then certified the entire order for interlocutory appeal.[46]

On appeal, the Second Circuit considered the issue of whether jurisdiction under the ATS extends to civil actions against corporations.[47] Its approach to analyzing this issue was twofold. It initially determined that international law, as opposed to domestic law, governed the issue.[48] It subsequently looked to sources of international law to determine that international law has never recognized corporate liability.[49] The court, therefore, found that corporations may not be held liable for violations of the law of the nations under the ATS.[50] The analysis that the court utilized in this case implicated many of the common arguments against allowing corporate liability.

The first step of the majority's analysis in *Kiobel I* was to determine whether international or domestic law governs the ATS.[51] In support of its conclusion that international law governs, the majority relied on footnote twenty in *Sosa v. Alvarez-Machain*.[52] In pertinent part, footnote twenty instructed lower federal courts to examine "whether *international law* extends the scope of liability for a violation of a given norm to the

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42. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 121 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

43. *Id.* at 123.

44. *Id.*

45. *Id.* at 124.

46. *Id.*

47. *Id.*

48. *Kiobel*, 621 F.3d at 126.

49. *Id.* at 125.

50. *Id.* at 149.

51. *Id.* at 125.

52. *Id.* at 127-28.

perpetrator being sued, if the defendant is a private actor such as a corporation or an individual."[53] According to the majority's interpretation of the footnote, the Supreme Court's specific reference to international law impliedly indicated that courts were bound to look to international law in order to determine the issue of corporate liability.[54] Following this line of reasoning, the court subsequently asserted that, in applying international law, courts could find no universal norm governing the issue of corporate liability.[55] Therefore, because the issue has not been resolved by a consensus in the international realm, an action for corporate liability cannot lie.

Once it established that international law governed the issue, the court's second prong of analysis involved looking to customary international law for guidance on corporate liability.[56] The court relied on a specificity requirement that "to attain the status of a rule of customary international law, a norm must be 'specific, universal, and obligatory.'"[57] With this language as its standard, the court then looked to international tribunals, international treaties, and works of publicists to search for an answer to the question of corporate liability.[58] It first noted that no international tribunal has held a corporation liable, specifically focusing on the International Military Tribunals at Nuremberg.[59] The court found it especially convincing that the Nuremberg trials only made an exception for individuals, often the chief officials of corporations, and did not find the corporations liable as entities.[60] It then went on to examine international treaties and works of publicists and ultimately concluded that there was not enough recognition of corporate liability in the realm of international law to satisfy the standard that such liability be "specific, universal, and obligatory."[61]

D. The Supreme Court's Decision in Kiobel II

After the Second Circuit's decision in *Kiobel I* created a circuit split, the Supreme Court granted certiorari.[62] While the Supreme Court initially

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53. *Id.* at 127 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)) (emphasis in original).

54. *Kiobel*, 621 F.3d at 128.

55. *Id.* at 141.

56. *Id.* at 131.

57. *Id.* at 131 (quoting *Sosa*, 524 U.S. at 732).

58. *Id.* at 136-45.

59. *Id.* at 132-35.

60. *Kiobel*, 621 F.3d at 133.

61. *Id.* at 145.

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

granted certiorari on the issue of corporate liability, it ultimately shifted its concern to what it considered a more pressing issue: extraterritoriality.[63] The Court's opinion in *Kiobel II* focused almost exclusively on this new issue of whether the presumption against extraterritoriality should be applied to the ATS.[64] The defendant in *Kiobel II* argued that the canon of statutory interpretation known as the "presumption against extraterritorial application" should control the outcome of the case.[65] This canon of interpretation states the following: "When a statute gives no clear indication of an extraterritorial application, it has none."[66] The Court examined the text, history, and legislative intent behind the ATS in an attempt to determine whether this canon of statutory interpretation should apply.[67]

In order to determine the legislative intent behind the passing of the ATS, the Court looked to two specific instances that occurred just before the formation of the ATS. Both of these instances involved foreign ambassadors; the Secretary of the French Legion was assaulted, and a Dutch Ambassador's home was invaded.[68] Significantly, both of these violations of law occurred within the physical territory of the United States.[69] The Court utilized these examples and reasoned that the legislative intent was not for the ATS to apply to violations occurring outside of the United States.[70] It ultimately concluded that nothing in the text or history of the ATS rebutted this presumption against extraterritorial application.[71] In closing, the Court stated that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[72] This statement implies that while the presumption against extraterritoriality shall govern cases arising under the ATS, it is possible for conduct occurring outside the territory of the United States to be so tied to the United States that the ATS would have jurisdiction over the conduct.

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63. *In re* South African Apartheid Litig., 15 F. Supp. 3d 454, 457 (S.D.N.Y. 2014).
64. *Kiobel*, 133 S. Ct. at 1664.
65. *Id.*
66. *Id.*
67. *Id.* at 1665-66.
68. *Id.* at 1666.
69. *Id.*
70. *Kiobel*, 133 S. Ct. at 1667.
71. *Id.* at 1669.
72. *Id.*

By focusing on the issue of extraterritoriality, the Supreme Court in *Kiobel II* did not directly address the issue of corporate liability.[73] Although this issue is the primary reason the case was brought before the Court, it was only mentioned in passing.[74] As a result, the Court has not expressly resolved the circuit split concerning the issue of corporate liability. The Second Circuit has exploited this ambiguity as support for continuing to treat its holding in *Kiobel I* as binding precedent. However, the Supreme Court's decision in *Kiobel II*, while not directly addressing the issue, implicitly overruled *Kiobel I*'s holding against corporate liability.[75]

E. In re Arab Bank

This Note addresses the Second Circuit's holding in *In re Arab Bank* that corporations may not be held liable under the ATS.[76] The plaintiffs in *In re Arab Bank* included aliens who were injured or captured by terrorists overseas, along with family members and estate representatives of those who were injured, captured, or killed.[77] They sought relief from the defendant, Arab Bank, for injuries sustained in terrorist attacks.[78] The defendant is headquartered in Jordan and has branches around the world, including New York.[79] The plaintiffs asserted that the defendant deliberately aided terrorist organizations in obtaining financing for these terrorist attacks.[80] The attacks were orchestrated by four Palestinian terrorist organizations, in part through promises of financial payments to the relatives of "martyrs" who were killed, injured, or captured while implementing the attacks.[81] The plaintiffs alleged that the defendant knowingly maintained accounts that the terrorist organizations used to solicit funds and also knowingly maintained accounts that proxy organizations and individuals used to raise funds for the terrorist

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73. *Id.*

74. *Id.* at 1663.

75. *See infra* Section III.B.

76. *In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 158 (2d Cir. 2015), *as amended* (Dec. 17, 2015).

77. *Id.* at 147.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 149.

organizations.[82] Additionally, the defendant allegedly played an active role in identifying the families of "martyrs" and facilitating payments to them.[83]

The plaintiffs filed five lawsuits against the defendant between 2004 and 2010, claiming violations of the Anti-Terrorism Act (ATA), the ATS, and federal common law.[84] In 2013, the district court dismissed the ATS claims on the basis of precedent set by *Kiobel I*.[85] At that time, the ATS claims were all that remained in three of the five lawsuits, and final judgment was entered accordingly.[86] As the two remaining actions contained both ATA and ATS claims, the court entered partial final judgment on the ATS claims.[87] In all five cases, the plaintiffs appealed their ATS claims and subsequently moved to consolidate their appeals.[88] These appeals are being considered by the Second Circuit in the main case.[89]

The court affirmed the district court's judgment dismissing the plaintiffs' ATS claims.[90] In reaching its decision, the court relied on the holding of *Kiobel I* that the ATS does not allow for corporate liability.[91] The court acknowledged the growing trend toward allowing corporate liability, but nonetheless determined that it was bound by the precedent of *Kiobel I*.[92] Its analysis in making this determination involved examining the effect of *Kiobel II*, the appeal from *Kiobel I* decided by the Supreme Court.[93] The court admitted that if *Kiobel I* and *Kiobel II* were inconsistent, *Kiobel I* would no longer be good law and its application would not be required.[94]

However, the court found that *Kiobel I* and *Kiobel II* were not inconsistent, as they were decided on different grounds.[95] While the Second Circuit in *Kiobel I* examined the question of corporate liability under the ATS and subsequently dismissed the plaintiffs' claims, the Supreme Court in *Kiobel II* affirmed the dismissal on the grounds of extraterritoriality,

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82. *In re Arab Bank*, 808 F.3d at 150.
83. *Id.*
84. *Id.* at 146-47.
85. *Id.* at 151; *see supra* Section II.C.
86. *Id.* at 151.
87. *Id.*
88. *In re Arab Bank*, 808 F.3d at 151.
89. *Id.*
90. *Id.*
91. *Id.* at 158.
92. *Id.*
93. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1660 (2013).
94. *In re Arab Bank*, 808 F.3d at 156.
95. *Id.* at 153.

finding that the actions did not sufficiently "touch and concern" the United States.[96] The court recognized that *Kiobel II*'s holding "cast a shadow" on *Kiobel I*, but it determined that this was not enough to overrule the precedent.[97] To support this reasoning, the court pointed to policy reasons including consistency in expectation of litigants and respect for the authority of three-judge panels.[98] The effect of this decision was to further the Second Circuit's position, as originally set forth in *Kiobel I*, that the ATS does not allow for corporate liability.

III. ANALYSIS

The court in *In re Arab Bank* concluded that it was bound to follow the precedent set forth by the Second Circuit in *Kiobel I* that the ATS does not allow for corporate liability. However, the holding set forth in *Kiobel I* was the first split from previous circuit court decisions that all ruled in favor of corporate liability.[99] Because this decision was the first of its kind, it received substantial criticism from those in favor of corporate liability.[100] The following section will set forth the arguments against the holding of *Kiobel I*. It will then establish that the court in *In re Arab Bank* was not actually bound to follow the precedent set by *Kiobel I*.

A. *A Finding Against Allowing Corporate Liability is an Improper Reading of the ATS*

Kiobel I's holding against allowing corporate liability for violations of the law of the nations represents a divergence from the marked majority.[101] The United States Court of Appeals for the Seventh Circuit in *Flomo v. Firestone Natural Rubber Co.* took the opposite stance and described *Kiobel I* as an "outlier" opinion.[102] In fact, the Second Circuit itself acceded this point in the main case: "Indeed, on the issue of corporate liability under the ATS,

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96. *Id.*

97. *Id.* at 155.

98. *Id.* at 157.

99. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

100. *See infra* Section III.A.

101. *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011); Flomo v. Firestone Nat. Rubber Co., LLC 643 F.3d 1013, 1021 (7th Cir. 2011); Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

102. *Flomo*, 643 F.3d at 1017.

Kiobel I now appears to swim alone against the tide."[103] In examining the reasons for this general consensus, the conclusion that corporate liability should be allowed under the ATS is inescapable.

1. Domestic Law v. International Law

The most immediate source for argument against *Kiobel I*'s holding appears in Judge Leval's strongly worded concurrence.[104] While he agreed with the majority's decision that the current complaint must be dismissed for lack of plausibly establishing the intent required in an aiding and abetting case, Judge Leval vehemently disagreed with the majority's rule against corporate liability.[105] He examined the issue of whether international law or domestic law governs ATS claims and concluded that the reason international law did not communicate an established norm on the issue of corporate liability was because it intended to leave such decisions to individual States.[106] He stated, "The position of international law on whether civil liability should be imposed for violations of its norms is that international law takes no position and leaves that question to each nation to resolve."[107] Judge Leval interpreted the silence of the law of the nations on an issue such as corporate liability as evidence that such issues should be subject to domestic law.

Judge Leval went on to use the example of the International Military Tribunals at Nuremberg to illustrate the absurdity of concluding that an action was not allowed simply because it had not reached the status of a universal norm.[108] Since the Nuremberg trials were the first instance in which courts recognized individual criminal liability for violations of the customary international law of human rights,[109] it would have been impossible for a universal norm to have existed before these trials. Additionally, it has been argued that, although the Nuremberg trials did not expressly subject corporations to adjudication, they implicitly allowed such a result.[110] This is evidenced by the order of dissolution applied against I.G.

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103. *In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 151 (2d Cir. 2015), *as amended* (Dec. 17, 2015).

104. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149-50 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

105. *Id.* at 155 (Leval, J., concurring).

106. *Id.* at 152.

107. *Id.*

108. *Id.* at 153.

109. *Id.* (Leval, J., concurring).

110. Doe v. Exxon Mobil Corp., 654 F.3d 11, 52 (D.C. Cir. 2011).

Farben, a major corporate offender in the Nazi regime.[111] While the corporation itself was not expressly put on trial, such an order was a result of the agreement that a corporation could and should be subjected to punishment for its actions.[112]

There have also been multiple interpretations of footnote twenty in the *Sosa* opinion. The majority in *Kiobel I* utilized this footnote to argue that international law governed the question of corporate liability. Another interpretation, however, urges that the majority in *Kiobel I* misinterpreted footnote twenty of the *Sosa* opinion.[113] This view argues that the footnote was not mandating that the lower courts look to international law, but rather was indicating "international law controls the question of whether the specific conduct alleged gives rise to liability if the defendant is a private nonstate actor."[114] This interpretation also supports Judge Leval's view that domestic law is responsible for determining specific enforcement issues such as corporate liability.[115]

The lack of a universal norm regarding corporate liability is not sufficient to determine that no such liability exists: "Given the impossibility of achieving a consensus on its implementation, holding the ATS inapplicable to a corporation acts to defeat the goals of international law."[116] In contrast to concluding that corporate liability is not allowed because it is not expressly set forth within customary international law, the appropriate conclusion is that domestic law should be responsible for enforcement issues where no mechanism is prescribed by a universal norm of customary international law.

The idea that specific questions of enforcement under the ATS should be left to domestic law has been supported in several opinions since *Kiobel I*.[117] In support of its conclusion that corporate liability under the ATS is possible, the Seventh Circuit in *Flomo v. Firestone Natural Rubber Co.* argued that while substantive obligations are implemented by international law, individual nations should decide how those obligations will be

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111. *Id.*

112. *Id.*

113. Joel Slawotsky, *The Conundrum of Corporate Liability Under the Alien Tort Statute*, 40 GA. J. INT'L & COMP. L. 175, 197 (2011).

114. *Id.*

115. *Id.* at 198.

116. *Id.* at 200.

117. *See* Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014); Flomo v. Firestone Nat. Rubber Co., LLC 643 F.3d 1013, 1020 (7th Cir. 2011).

enforced.[118] The United States Court of Appeals for the Ninth Circuit also voiced its agreement with this concept in *Doe I v. Nestle USA, Inc.*: "Determining when a corporation can be held liable therefore requires a court to apply customary international law to determine the nature and scope of the norm underlying the plaintiff's claim, and domestic tort law to determine whether recovery from the corporation is permissible."[119] International law's silence on the issue of corporate liability points to the conclusion that this body of law did not intend to be responsible for delineating the specifics of how each State should answer the question.

In 2007, the Second Circuit decided *Khulumani v. Barclay Nat. Bank Ltd.*, where it held that the district court had incorrectly concluded that aiding and abetting violations of the law of the nations was an insufficient basis for jurisdiction under the Alien Tort Claims Act (former name for the ATS).[120] In his concurring opinion, Judge Katzmann set out his interpretation of the appropriate procedure for analyzing cases under the ATS.[121] Utilizing the Supreme Court decision in *Sosa v. Alvarez-Machain*, Judge Katzmann determined that there were two separate steps involved in every ATS case:

> One is whether jurisdiction lies under the AT[S]. The other is whether to recognize a common-law cause of action to provide a remedy for the alleged violation of international law. Requiring this analytical separation in AT[S] litigation comports with the general principle that whether jurisdiction exists and whether a cause of action exists are two distinct inquiries.[122]

After clarifying this analytical distinction, Judge Katzmann went on to establish that the language of the ATS sets forth three required elements: "(1) an alien sues (2) for a tort (3) committed in violation of the law of the nations."[123] In Judge Katzmann's view, these three elements make up the jurisdictional portion of the ATS analysis.[124] In order to establish the third element, the court should look to international law to determine whether there is a violation of the law of the nations.[125]

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118. *Flomo*, 643 F.3d at 1020.

119. *Nestle USA, Inc.*, 766 F.3d at 1022.

120. Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007).

121. *Id.* at 265-66 (Katzmann, J., concurring).

122. *Id.* at 266.

123. *Id.* at 267.

124. *Id.*

125. *Id.* (Katzmann, J., concurring).

If all three elements are met, the court has federal subject-matter jurisdiction to hear a case under the ATS.[126] The next step would be for the court to look to federal common law and utilize its discretion in determining whether to recognize a cause of action.[127] Judge Katzmann applied this analysis in *Khulumani* and looked to international law to find an established norm for aiding and abetting liability.[128] The Second Circuit has continued to follow a similar pattern in its analysis of ATS cases. However, this process fails to recognize an important distinction that will often change the answer to the question of whether a court has jurisdiction under the ATS.

The Second Circuit's conclusion that corporate liability does not exist as a norm of the law of the nations rests upon the premise that corporate liability is the issue that demands a universal foundation in international law. With corporate liability framed as the underlying issue, the Second Circuit supports its position by scouring sources of international law to prove that no norm for corporate liability exists. From this the court reasons that the third element has not been met. There can be no jurisdiction under the ATS if there is no violation of the law of the nations, and there can be no violation of the law of the nations if there is no norm to be violated.

However, this is not the line of reasoning that the ATS demands to find that jurisdiction exists. The requirement that there be a "violation of the law of the nations" refers to the underlying offense committed against the plaintiffs. This requirement encompasses the types of actions that were first imagined by the framers of the ATS: (1) violations of safe conducts; (2) infringement on the rights of ambassadors; and (3) piracy.[129] Significantly, the focus of these violations is the conduct itself.

In framing the issue as one of corporate liability, the Second Circuit shifts the focus off the conduct and onto the perpetrator. The identity of the perpetrator is a question of a procedural nature that is distinct from the underlying offense. It is this underlying offense that the drafters intended as the subject of the requirement that there be a violation of the law of the nations. Consequently, focusing the issue on corporate liability results in a search for a norm that is not required for the court to have jurisdiction over the case. While international law is the appropriate source to look for a universal norm on the issue of the underlying offense, it is not the place to

126. *Khulumani*, 504 F.3d at 267.

127. *Id.*

128. *Id.* at 270.

129. *See supra* Section II.A.

look for the answer to corporate liability. As applied to *In re Arab Bank*, international law should have been utilized to find a universal norm of liability for facilitating terrorist attacks. Whether a corporation can be held liable for facilitating terrorist attacks, however, is an issue that should have been left to domestic law. If this procedure had been followed in *In re Arab Bank*, the court would have concluded that all three elements for jurisdiction under the ATS had been met.

Also concurring in the *Khulumani* case, Judge Hall took a position that supports leaving procedural questions to be governed by domestic law.[130] While in *Khulumani* the primary debate involved aiding and abetting liability, the principle can be analogized to the issue of corporate liability in that both issues concern questions other than the underlying offense. Judge Hall also looked to the Supreme Court decision in *Sosa* to determine the appropriate process for analyzing ATS cases: "As *Sosa* makes clear, a federal court must turn to international law to divine standards of primary liability under the AT[S]. To derive a standard of accessorial liability, however, a federal court should consult federal common law."[131] Judge Katzmann and the Second Circuit have generally operated under the theory that the answer to these procedural questions, in addition to the question concerning the underlying offense, must be found in international law.

If international law is the source that must be looked to, the standard that there be a "specific, universal, and obligatory" norm would apply to each question before jurisdiction could be found.[132] This, however, is not the conclusion required by the Supreme Court in *Sosa*: "*Sosa* does not require that every ancillary rule applied in an AT[S] case meet the level of international consensus required for the definition of the underlying violation."[133] Thus, an interpretation of the ATS that leaves decisions such as corporate liability to domestic law is both more feasible, more practical, and more in line with the Supreme Court's current interpretation.

> While it is demonstrably possible for nations to reach some consensus on a binding set of principles, it is both unnecessary and implausible to suppose that, with their multiplicity of legal systems, these diverse nations should also be expected or

130. *Khulumani*, 504 F.3d at 284 (Hall, J., concurring).

131. *Id.*

132. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 131 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)).

133. *Khulumani.* 504 F.3d at 286-87 (Hall, J., concurring) (quoting Beth Stephens, *Sosa v. Alvarez-Machain: "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK L. REV. 533, 558 (2004)).

> required to reach consensus on the types of actions that should be made available in their respective courts to implement those principles.[134]

The idea that victims subjected to underlying offenses clearly recognized in international law as violations of the law of the nations should be barred from relief based on the inability of the court to locate a universal norm on a procedural question subverts not only the logic and practicality of the ATS, but also the original intent of the drafters.

2. Intent of the Drafters

In the several circuits that have held in favor of allowing corporate liability, one pattern of analysis that has supported their conclusion has involved examining the intent of the drafters at the time of adopting the ATS.[135] In examining the history of the time and the legislative intent of those responsible for the ATS, the types of offenses that were originally imagined illuminate the drafters' purpose for the statute. Once the original purpose is established, the task of identifying the appropriate interpretation of the ATS, specifically in terms of corporate liability, becomes clearer. This line of reasoning focuses on the motivation behind allowing enforcement against violations of the law of the nations.

The ATS originally envisioned three main violations that would be allowed under its jurisdiction: violations of safe conducts, infringement on the rights of ambassadors, and piracy.[136] These violations were at the forefront of the minds of the drafters due to recent events involving ambassadors that had affected international relations.[137] The ATS was enacted as part of The Judiciary Act of 1789, largely in response to the United States' previous inability to respond to violations of the law of the nations.[138] Unfortunately, there is no formal legislative history for the ATS.[139] This often sends courts to the surrounding historical context during the time of the statute's adoption to search for clarification. One pertinent element of this historical context is that at the time of the statute's enactment in 1789, corporate tort liability was common in the United

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134. *Id.* at 286 (quoting Xuncax v. Gramajo, 886 F. Supp. 162, 180 (D. Mass. 1995)).

135. *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011); *see supra* Section II.B.

136. *Sarei*, 671 F.3d at 743.

137. *See supra* Section II.D.

138. *Exxon Mobil Corp.*, 654 F.3d at 45.

139. *Id.*

States.[140] As the D.C. Circuit pointed out in its analysis of a claim for corporate liability: "Clearly the Judiciary Act evidences that the First Congress knew how to limit, or deny altogether, subject matter jurisdiction over a class of claims and declined to do so with respect to torts in violation of the law of the nations and treaties when brought by aliens."[141] Thus, from both the text of the ATS itself and the time period surrounding its adoption, there is no historical implication that ATS jurisdiction was not intended to extend to corporations.

The circumstances surrounding the adoption of the ATS, particularly concern for international relations following the incidents with foreign ambassadors, reveal the drafters' concern with the status of the United States in the eyes of the world. Opponents of corporate liability often utilize the element of foreign relations that pervaded the construction of the ATS. They assert that allowing corporate liability under the ATS will further the international community's view of the United States as a "judicial imperialis[t]."[142] However, the recent Supreme Court decision in *Kiobel II* should serve to alleviate much of this concern. In holding that cases under the ATS are subject to a presumption against extraterritoriality, the Court ensured that the issues ultimately heard under this statute will have a nexus to the United States.[143]

The original intent of the drafters was to avoid the embarrassment of their inability to respond to violations of the law of the nations.[144] If a corporation committed such a violation within the territory of the United States today, the purpose of the drafters would be substantially served by an ability to sue under the ATS. If the actions did not occur in the territory of the United States, *Kiobel II* set forth that they must be sufficiently tied to the United States to overcome the presumption against extraterritoriality.[145] These standards serve as safeguards to ensure that the violation complained of has an appropriate nexus to the United States. Thus, an inability to respond to a violation of the law of the nations with a nexus to the United States would subvert the original intent of the drafters. The likely consequences to foreign relations of failing to react to a human rights violation with a nexus to the United States simply because the violation was

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140. *Id.* at 47.

141. *Id.* at 46.

142. Theresa Adamski, *The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations*, 34 FORDHAM INT'L L.J. 1502, 1540 (2011).

143. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2013).

144. *Id.* at 1668.

145. *Id.* at 1168-69.

committed by a corporation would therefore stand in opposition to the purpose of the ATS.

The Supreme Court did not weigh in on the interpretation of the ATS until its decision in *Sosa v. Alverez-Machain.*[146] In *Sosa*, the Court issued guidance on determining whether to allow a specific violation of the law of the nations to be brought under the ATS: "[F]ederal 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."[147] This guideline evidences that the Court desired to keep the focus of ATS litigation on the types of violations that were characterized as universally unacceptable. In doing so, the emphasis for consideration of an ATS case remains on the conduct and character of the violation, not the identity of the perpetrator.

The drafters chose to make this type of conduct their primary focus. By centering the initial question around the identity of the perpetrator and not around the actions that the perpetrators committed, the underlying reasoning behind allowing ATS litigation is diminished: "To distinguish between a private individual engaged in piracy and a corporation engaged in the same misconduct does not advance the statute's goals."[148] Translating these actions into their modern-day equivalents, it defies the intent of the drafters to shift the focus off of the conduct itself.

A situation that poignantly illustrates this was considered by the Ninth Circuit in *Doe I v. Nestle USA, Inc.*[149] In this case, the plaintiffs were three former child slaves who were subjected to forced labor on cocoa plantations in the Ivory Coast.[150] The children worked 14 hours a day, six days a week to harvest cocoa, were locked in small rooms at night, and were routinely whipped and beaten.[151] The defendant in this case was Nestle USA, Inc., a chocolate producer with firsthand knowledge that its product was being manufactured with the use of child slave labor.[152] When examining whether the corporation should be held liable under the ATS, the court readily approved allowance: "Indeed, it would be contrary to both the categorical nature of the prohibition on slavery and the moral imperative underlying

146. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

147. *Id.* at 732.

148. Slawotsky, *supra* note 113, at 195.

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

150. *Id.* at 1017.

151. *Id.*

152. *Id.*

the prohibition to conclude that incorporation leads to legal absolution for acts of enslavement."[153] This case presented just one scenario in which a rule against allowing corporate liability would subvert the original intent of the drafters of the ATS.

3. International Law and the Legacy of Nuremberg

In addition to the conclusion that individual States are responsible for responding to the issue of corporate liability, another compelling argument urges readers of the ATS to consider some of the purposes behind international law. The majority in *In re Arab Bank* took the position that the underlying actions committed against the plaintiffs must be left unpunished in this case due to the nature of the perpetrators against whom the suit has been brought.[154] The court reached this conclusion based on its ruling in *Kiobel I* that corporations cannot violate the law of the nations because the law of the nations has not recognized a norm for holding corporations accountable.[155] In doing so, the court overlooked both the purpose behind implementing the ATS and a major purpose behind international law itself. If the proper conclusion is that those who commit violations of the law of the nations may not be held accountable under the ATS if they are in a corporate form, the incentive for utilizing incorporation, as a mask for conducting business that infringes upon universally accepted norms of civilized behavior, is blatant.

In support of his pointed disagreement with the majority in *Kiobel I*, Judge Leval spurred this examination forward in his concurrence: "The majority's interpretation on international law, which accords to corporations a free pass to act in contravention of international law's norms, conflicts with the humanitarian objectives of that body of law."[156] The need for an ability to hold all perpetrators accountable is obviated upon a consideration of these humanitarian objectives. The International Military Tribunals at Nuremberg present a natural forum for discussion of the intent that commonly surrounds the implementation of international law.

The International Military Tribunals at Nuremberg represented a historical victory for human rights advocates and for the progression of international human rights law. It is thus natural that the achievements of

153. *Id.* at 1022.

154. *In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 151 (2d Cir. 2015), *as amended* (Dec. 17, 2015).

155. *Id.* at 152.

156. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 155 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013) (Leval, J., concurring).

the trials and the effect that they have had on international law should be examined to provide a clearer picture of the sentiments that have often surrounded human rights litigation. These trials served as an outlet for prosecuting individual actors who participated in the atrocities of the Nazi regime.[157] While no corporation was expressly subjected to the jurisdiction of the trials, the success of these trials implicated a step away from the traditional notion that only States themselves could be the subject of international law. The import of the Nuremberg trials illustrates the desire of the international realm to provide an outlet of relief for victims subjected to acts of blatant injustice: "Oppressed peoples, victims of war, and ethnic groups threatened with genocide now cry out for the prosecution of those who inflict suffering upon them. Beyond the construction of new legal institutions, Nuremberg reoriented international society to be more sensitive to injustice, less forgiving of lawlessness."[158] Thus, the overarching effect of the Nuremberg trials implied a fundamental shift in international law's perspective toward violations of the law of the nations.

In the years since the trials at Nuremberg, advocates of human rights litigation have looked to the effect of these trials in an effort to support a broad interpretation of international law's ability to hold violators accountable for their actions. These efforts have also found their way into ATS litigation. On a practical level, it has been argued that the International Military Tribunals at Nuremberg served to broaden the repertoire of universal norms required for jurisdiction under the ATS.[159] These trials have been looked to for support that norms are sufficiently "specific, universal, and obligatory" in the cases of crimes against humanity, war crimes, and forced labor.[160] Actions of this nature are consistent with the underlying premise of holding actors accountable for activities that are characterized as universally unacceptable.

The Second Circuit itself recognized these types of actions as violations of the law of the nations in *Kadic v. Karadzic*.[161] In this case, the plaintiffs and the defendant were citizens of Bosnia-Herzegovina.[162] Allegations against the defendant included crimes such as genocide, rape, forced

157. Henry T. King, Jr., *Robert Jackson's Vision for Justice and Other Reflections of a Nuremberg Prosecutor*, 88 GEO. L.J. 2421, 2434-35 (2000).

158. *Id.* at 2435-36.

159. Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 332 (2008).

160. *Id.* at 332-33.

161. Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995).

162. *Id.* at 236.

prostitution, forced impregnation, torture, assault and battery, summary execution, and wrongful death.[163] The defendant was the President of the Bosnian-Serb republic, and he commanded the military forces that committed these human rights violations.[164] Initially, the district court dismissed the case for lack of subject-matter jurisdiction.[165] In support of this conclusion, the court stated that "acts committed by non-State actors do not violate the law of the nations" and found that Karadzic's military forces was not recognized as a State.[166]

However, the Second Circuit ultimately reversed the district court's finding that there was a lack of subject-matter jurisdiction.[167] The court rejected the argument that norms of international law only bind States and those acting under color of a State's law.[168] Instead, they held that private actors could be liable under the ATS for certain violations of the law of the nations: (1) genocide; (2) war crimes; and (3) crimes against humanity.[169] In so holding, the court recognized that there are certain actions that are so unacceptable that jurisdiction should extend to them despite the traditional notion of State actors.

While this case was limited to individual non-State actors, its reasoning has implications that affect the argument in favor of corporate liability. In similar fashion to the effects of the Nuremberg trials, the Second Circuit's reasoning exhibits an acceptance of the underlying theory that certain actions should not go unpunished. The initial decision that individual, non-State actors can be held accountable for specified actions, while a narrow holding, was an early step in the direction toward broader recognition for responsibility for violations of the law of the nations. With the backdrop of universal jurisdiction and broader recognition of violations of human rights established by the Nuremberg trials and the increasing sentiment toward offering avenues of relief for the victims affected by these abuses, the justifications for ATS litigation offered by the international realm support an interpretation that would hold even a corporation responsible for its crimes.

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163. *Id.* at 236-37.

164. *Id.* at 237.

165. *Id.* at 236.

166. *Id. at* 237.

167. *Kadic*, 70 F.3d at 251.

168. *Id.* at 245.

169. *Id.* at 236.

4. Policy of Corporate Responsibility

In addition to the structural, contextual, and historical arguments in favor of allowing corporate liability, there have also been policy arguments that suggest support for the ability to hold corporations responsible for their actions. This line of reasoning examines the practical realities of a barrier to corporate liability. If responsibility for violations of the law of the nations is restricted to state actors or, in cases of exceptionally grievous violations, individual actors, the door is left ajar for corporations to violate the law of the nations in areas where their influence may be so great that the State cannot or will not practically keep these actions from being committed.[170] These tangible blockades serve as further support for allowing an avenue to punish corporations that may otherwise be left to their own devices.

The prevalence of corporations acting in the international realm results in resources and influence that can place them in a prominent position. With an increasing ability to operate on an international platform, large corporations gain the ability to influence States and individuals: "The inadequacy of State responsibility stems fundamentally from trends in modern international affairs confirming that corporations may have as much or more power over individuals as governments."[171] This power is accompanied by a parallel capacity to act in ways that violate the law of the nations. Additionally, as corporations gain both recognition and rights under the law, corresponding responsibility for their actions should increase.[172] There are therefore policy implications for the ATS to expand its jurisdiction to meet the needs of victims who are often subject to the power of corporations across the globe.

Opponents of corporate liability have argued that imposition of corporate liability under the ATS would hinder international business and the ability of corporations to expand and increase economic growth.[173] This line of reasoning expresses concern that allowing corporate liability will serve as a deterrent to corporations who will become overly-concerned with the possibility of suit.[174] The concern expressed by this argument anticipates

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170. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461-62 (2001).

171. *Id.* at 461.

172. Jennifer L. Karnes, *Pirates Incorporated?: Kiobel v. Dutch Petroleum Co. and the Uncertain State of Corporate Liability for Human Rights Violations Under the Alien Tort Statute*, 60 BUFF. L. REV. 823, 880 (2012).

173. *Id.* at 880-81.

174. *Id.*

that allowing corporate liability will swing the door open to an influx of attenuated suits that would prove the fear appropriate. However, both the Supreme Court's ruling on extraterritoriality and rules regarding aiding and abetting liability will still be in place to ease the worries of corporations doing business around the world.[175]

B. The Court Was Not Required to Follow Kiobel I's Holding

In reaching the conclusion that corporations cannot be held liable under the ATS, the court in *In re Arab Bank* communicated a constraint on its analysis due to the precedent of *Kiobel I*.[176] The court found that its holding against corporate liability in *Kiobel* I prevented it from now arriving at an opposite conclusion.[177] However, the court spent the bulk of its opinion discussing arguments that would appear to support the conclusion it purported to be incapable of reaching. It recognized that while it was required to follow the holding of *Kiobel I* as a general rule, there is an exception to this mandate.[178] This exception can be applied when an "intervening Supreme Court decision . . . casts doubt on our controlling precedent."[179] This doubt need only be expressed through a "conflict, incompatibility, or 'inconsisten[cy]'" between the two cases;[180] it is not a requirement that the Supreme Court case actually address the specific issue of the first case.[181] In order to determine whether such a conflict, incompatibility, or inconsistency was present, the court went on to compare *Kiobel I* with the Supreme Court decision in *Kiobel II*.[182] While pointing to several instances in the Supreme Court's opinion that appeared to affect *Kiobel I*, the court ultimately decided that this was not enough to support a finding that *Kiobel II* "overruled" *Kiobel I*.[183] However, an examination of *Kiobel II* leads directly to the conclusion that the court began to establish but refused to take to its logical end: the opinion of the Supreme Court in *Kiobel II* provided a sufficient "intervening Supreme Court decision" to

175. *Id.* at 881-82.

176. *In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 158 (2d Cir. 2015), *as amended* (Dec. 17, 2015).

177. *Id.*

178. *Id.* at 154.

179. *Id.* (quoting Wojchowski v. Daines, 498 F.3d 99, 106 (2d Cir. 2007)).

180. *Id.* at 155 (citing *Wojchowski*, 498 F.3d at 109).

181. *Id.* at 154-55 (quoting Union of Needletrades, Indust. & Textile Emps., AFL-CIO, CLC v. U.S. I.N.S., 336 F.3d 200, 210 (2d Cir. 2003)).

182. *In re Arab Bank*, 808 F.3d at 155-56.

183. *Id.* at 157.

allow the court in *In re Arab Bank* to decline to follow the precedent set by *Kiobel I*.

While the holding in *Kiobel I* was based upon corporate liability and the holding in *Kiobel II* was based upon extraterritoriality, several points in the Supreme Court's analysis lend weight to the proposition that the two decisions are inconsistent. The court in *In re Arab Bank* noted that the Supreme Court's decision in *Kiobel II* briefly touched on the concept of corporate liability. It did so by indicating that "mere corporate presence" would not suffice in a consideration of extraterritoriality.[184] It further acknowledged that this statement would seem to imply the possibility of circumstances in which corporate presence would be sufficient.[185] This concept runs afoul of the holding in *Kiobel I* that corporations cannot be held liable.[186]

The court then went on to point out that *Kiobel II* may be consistent with the argument in favor of corporate liability purporting that domestic law is the appropriate governing authority: "*Kiobel II* thus appears to reinforce Judge Leval's reading of *Sosa*, which derives from international law only the conduct proscribed, leaving domestic law to govern the available remedy and, presumably, the nature of the party against whom it may be obtained."[187] If *Kiobel II* supports the concept of domestic law as the appropriate place to look for an imposition of corporate liability, then *Kiobel I*'s analytical framework of looking to international law would be inconsistent with this principle. In a final argument that would appear to support an overruling of *Kiobel I*, the court noted that the restrictions articulated in *Kiobel I* and *Kiobel II*, when taken together, would combine to allow ATS suits against only "natural persons, and perhaps non-corporate entities, based on conduct that occurs at least in part within (or otherwise sufficiently touches and concerns) the territory of the United States."[188] The extent of these restrictions, according to the court, would exceed what the original drafters of the ATS likely intended.[189]

In a drastic shift in the line of reasoning, however, the court in *In re Arab Bank* turned from pointing out these arguments to its ultimate conclusion

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184. *Id.* at 155.

185. *Id.*

186. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

187. *In re Arab Bank*, 808 F.3d at 155.

188. *Id.* at 156.

189. *Id.*

that it was nonetheless required to follow the precedent set in *Kiobel I*.[190] The court originally articulated a conclusion that "The two decisions adopted different bases for dismissal for lack of subject-matter jurisdiction. Whatever the tension between them, the decisions are not logically inconsistent."[191] However, this purported conclusion is a direct contradiction of the conclusion the court came to after its comparison of the two cases: "*Kiobel II* suggests a reading that is at best 'inconsistent' with *Kiobel I*'s core holding, which along with the views of our sister circuits indicates that something may be wrong with *Kiobel I*."[192] In support of this untimely and illogical twist, the court cited its favor of ensuring the consistent expectations of litigants and respect for the authority of three-judge panels.[193] Ultimately, the court utilized these sparse policy arguments as a vehicle for supporting the holding of *Kiobel I*, despite its own acquiescence to both the trend and viability of allowing corporate liability under the ATS.

Although *In re Arab Bank* was decided after the Supreme Court's decision in *Kiobel II*, the court declined to examine the issue of extraterritoriality, invoking its discretion and stating that to decide such a complicated issue would be "unwise."[194] The holding of *Kiobel II* set forth that the presumption against extraterritorial application is present in cases falling under the ATS.[195] The terrorist attacks complained of in *In re Arab Bank* all occurred outside of the United States.[196] Presumably, this would result in an application of the statutory canon, and, in order for the presumption to be rebutted, it would have to be shown that the conduct sufficiently touched and concerned the United States. However, the court did not even consider this issue in its resolution of *In re Arab Bank*, noting that extraterritoriality was not the focus of the district court's decision or briefing on appeal and that affirming solely on the basis of corporate liability is the "simplest, most direct route . . . ."[197] The implications of this failure to consider an issue expressly ruled on by the Supreme Court highlight that the Second Circuit's concern has been and remains to be with the issue of corporate liability.

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190. *Id.* at 157.

191. *Id.* at 153.

192. *Id.* at 157.

193. *In re Arab Bank*, 808 F.3d at 157.

194. *Id.* at 158.

195. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2013).

196. *In re Arab Bank*, 808 F.3d at 147.

197. *Id.* at 158.

If the court had applied the presumption against extraterritoriality, it is quite possible that the case would have been dismissed on that jurisdictional ground. However, by deciding the issue of corporate liability first, the argument that the conduct sufficiently concerned the United States was not examined. While the Supreme Court in *Kiobel II* evidenced an assumption that the issue of extraterritoriality must be considered before the question of corporate liability is addressed, the Second Circuit in *In re Arab Bank* examined the case in the opposite order.[198] If the Second Circuit had followed the Supreme Court's line of analysis, *In re Arab Bank* may have been dismissed before even reaching the issue of corporate liability. While in the instant case that application would have resulted in the same conclusion, its implication is significant to future ATS litigation.

In examining the issue of corporate liability first, the Second Circuit's analysis could result in the dismissal of cases involving conduct that either occurred within the territory of the United States or sufficiently touched and concerned the United States. This is not the result implicated by the Supreme Court's reasoning in *Kiobel II*. The Second Circuit's continued focus on the issue of corporate liability not only decides the issue in opposition to the majority, but also sidesteps the main concern voiced by the Supreme Court.

C. The Supreme Court Should Expressly Rule on the Issue of Corporate Liability

The Second Circuit in *In re Arab Bank* was not required to follow the precedent set by *Kiobel I*. Despite setting forth several points that would support an overruling of its precedent in *Kiobel I*, the court ultimately rejected these arguments and found itself bound. In determining that it was constrained by such precedent, the court engaged in a cursory explanation that invoked a desire for internal consistency.[199] While consistency in judgment does provide a solid basis upon which future litigants may form their arguments, the benefits of this policy simply do not justify perpetuating a conclusion that has received widespread criticism and arguably has been implicitly rejected by the Supreme Court.

The court's holding in *In re Arab Bank* exemplifies the need for a Supreme Court decision that expressly rules on the issue of corporate liability. While this Note has argued that *Kiobel II* did in fact provide a sufficient "intervening Supreme Court decision" to find that the holding

198. *Id.* at 151.

199. *Id.*

against corporate liability in *Kiobel I* has been overruled,[200] it is clear from the Second Circuit's recent decision in *In re Arab Bank* that the Supreme Court's opinion on the issue of corporate liability remains ambiguous. An express decision on this subject will serve to satisfy the Second Circuit's concern for the consistent "expectation of litigants."[201] At the time of this writing, the plaintiffs in *In re Arab Bank* have submitted a petition for certiorari.[202] It remains to be seen whether the Supreme Court will hear the case.

IV. CONCLUSION

The Second Circuit's holding in *In re Arab Bank* has allowed a continued view on corporate liability under the Alien Tort Statute that is expressly rejected by the majority of circuits that have considered the issue.[203] In addition to constituting a split from the majority, this conclusion defies the original intent of the drafters.[204] The issue of whether a corporation may be held liable for an underlying offense, as opposed to the underlying offense itself, is an issue to be answered by domestic law, and it therefore does not need foundation as a universal norm of the law of the nations.[205] The theory behind allowing liability for violations of the law of the nations is that certain conduct is so universally unacceptable that it should not go unpunished. This principle should not be altered simply based on the character of the actors who commit these heinous actions. Victims who are subjected to these violations deserve justice whether the offender was a State, an individual, or a corporation. Holding that corporations cannot be liable for these violations subverts the object of adopting the ATS. As evidenced by the Second Circuit's decision in *In re Arab Bank* almost three years after the Supreme Court heard *Kiobel II*, the controversy surrounding the issue of corporate liability has not been sufficiently foreclosed. This dissension should therefore be ultimately and expressly resolved by a decision from the Supreme Court.

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200. *See supra* Section III.B.

201. *In re Arab Bank*, 808 F.3d at 157.

202. Petition for Writ of Certiorari, *In re Arab Bank*, 808 F.3d 144 (No. 16-499).

203. *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011); Flomo v. Firestone Nat. Rubber Co., LLC 643 F.3d 1013, 1021 (7th Cir. 2011); Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

204. *See supra* Section III.A.2.

205. *See supra* Section III.A.1.

This Note has argued that the Second Circuit's decision in *In re Arab Bank* has simply served to perpetuate a reading of the ATS that has been both expressly rejected by a majority of the other circuits that have considered the issue and implicitly rejected by the Supreme Court. Despite this virtual consensus on the need for corporate liability under the ATS, the Second Circuit refuses to change its position and continues to follow its prior precedent. This Note has set forth several of the primary arguments relied upon to support the idea of corporate liability under the ATS. It has argued that the proper jurisdictional analysis would look to the law of the nations only to find a universal norm for the underlying offense. After such a norm has been found, the analysis should then shift to domestic law to ascertain whether suit can be brought against a corporation. In following this pattern of analysis, the focus of inquiry is appropriately placed on the conduct.

The arguments in this Note have evidenced that the intent of the drafters at the time of the passing of the ATS would support the theory of corporate liability and that international law leaves questions such as the identity of the defendant to the discretion of individual States.[206] The International Military Tribunals at Nuremberg represented a shift in the attitude of international law toward a broader recognition of responsibility for violations of the law of the nations. Additionally, even if the procedural question of corporate liability was subject to the requirement of being considered a "specific, universal, and obligatory" norm, there is argument to be made that the law of the nations has allowed for corporate liability at the Nuremberg trials.[207] The increasing acknowledgement of corporate rights in domestic law, along with the power that corporations have attained on the international scale, provide policy implications in favor of supporting corporate liability under the ATS. Despite the prevalence of these arguments, the Second Circuit espoused an opposite conclusion in *Kiobel I*, and articulated in *In re Arab Bank* that the 2010 decision remains binding precedent in the face of the *Kiobel II* decision in 2013. This decision bars an entire category of plaintiffs from relief and justice simply because that atrocities committed against them were perpetrated by corporations.

The protections purportedly offered by both the law of the nations and the ATS require an ability to hold corporations liable for their actions. Creating what is essentially immunity for the actions of corporations is contradictory to the reasoning behind implementing these regulations. With the myriad of decisions involving enforcement required for the law of

206. *See supra* Sections III.A.1; III.A.2.

207. *See supra* Section III.A.1.

the nations to function effectively, the only feasible response is to leave these decisions to individual States. To effectively serve the indispensable purpose of safeguarding nations and individuals from atrocities, such as the terrorist attacks that were the subject of the case at hand, the jurisdiction of the Alien Tort Statute must extend to corporate liability.