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Scope of Liability under the Alien Tort Statute: The Relevance of Choice of Law Doctrine in the Aftermath of Kiobel v. Royal Dutch Petroleum

Jon E. Crain*

Recently Judge José A. Cabranes, of the United States Court of Appeals for the Second Circuit, issued a decision that drastically undermined the efficacy of the Alien Tort Statute (ATS). Writing for the majority in Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), Judge Cabranes ruled that corporate entities cannot be held liable under the ATS. This Comment will examine the choice-of-law aspect of that decision, and argue that Judge Cabranes erred in interpreting the ATS to mandate application of customary international law (CIL).*

I. Introduction

> I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country . . . corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed.[1]

Many readers might assume that this quotation is contemporary. From Enron to Lehman, the past decade has provided numerous examples of corporate corruption and malfeasance.[2] President Lincoln's

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1. Letter from Abraham Lincoln to William F. Elkins (Nov. 21, 1864), *in* ARCHER H. SHAW, THE LINCOLN ENCYCLOPEDIA (1950).

2. Susan Koniak et al., Op-Ed., *How Washington Abetted the Bank Job*, N.Y.

recognition of the threats posed by such malfeasance shows that it has been an issue since the formative days of the United States. The significance of that issue has expanded substantially since those days. In 2009, forty-four of the one hundred largest economic entities in the world were corporations. In the same year, Wal-Mart's revenues exceeded the GDP of 174 countries.[3] The emergence of corporate entities of this size exacerbates the potential harm caused by corporate malfeasance. Civil liability to individuals harmed by corporate malfeasance may be the best means of controlling these corporations and thus deterring corruption.[4] In September, 2010, the United States Court of Appeals for the Second Circuit narrowed the extent of that liability in *Kiobel*, which declared that corporations are not cognizable defendants in ATS suits. This Comment argues that it did so erroneously.

The ATS, enacted in 1789, confers federal subject matter jurisdiction to hear claims brought by aliens that arise under the "law of nations," or, in modern language customary international law (CIL): "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[5] Since 1980, this concise statute has generated controversy and precipitated substantial confusion.[6] Much of the controversy stems from the unique nature of the statute, as no other country has a comparable law. Additionally, it stems from the fact that the litigation of extraterritorial tortious conduct perpetrated by defendants not based in the United States may infringe the sovereignty of the country in which the conduct occurred and from which the defendant resides. From a domestic viewpoint, such litigation raises further issues concerning the proper allocation of judicial resources. Over the past forty years, courts have struggled to interpret and apply the ATS, due largely to these issues.

TIMES, Apr. 4, 2010, at WK10.

3. Tracey Keys & Thomas W. Malnight, Strategy Dynamics Global Ltd., *Corporate Clout: The Influence of the World's Largest 100 Economic Entities*, SCRIBD, http://www.scribd.com/doc/47360746/Corporate-Clout-World-s-Largest-Economic-Entities-Presentation (last visited Mar. 31, 2012).

4. *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996).

5. 28 U.S.C.A. § 1350 (West 2011).

6. *See* 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3661.1 (3d ed. 1998) (finding "controversy in virtually every instance in which the [ATS] has been considered," and noting that "critical questions" remain unanswered about the scope of the ATS).

Nevertheless, it has been used increasingly to litigate alleged violations of human rights and environmental law, especially in the Second Circuit—where *Kiobel* was decided.[7] Still, no comprehensive analytical approach to the ATS exists. Furthermore, many issues remain unresolved in ATS jurisprudence.

> Because appellate review of ATS suits has been so uncommon, there remain a number of unresolved issues lurking in our ATS jurisprudence—issues that we have simply had no occasion to address in the handful of cases we have decided in the thirty years since the revival of the ATS.[8]

Kiobel addressed "one such unresolved issue: Does the jurisdiction granted by the ATS extend to civil actions *brought against corporations* under the law of nations?"[9] The ATS states only that federal courts can hear certain tort claims—it fails to dictate who those tort claims can be brought against.[10] *Kiobel*, for the first time, explicitly resolved the issue, holding that corporations are not cognizable defendants in ATS suits. Before *Kiobel*, courts heard ATS cases against any defendant over whom the court could gain personal jurisdiction, including corporations. Scholars both lauded and derogated the inclusion of corporations as the statute's most critical impact.[11] For this reason, the *Kiobel* decision

7. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (only ATS case to reach the Supreme Court); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (first modern ATS decision). Other Second Circuit ATS cases include: Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009); Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007); Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003); Bigio v. Coca-Cola Co., 239 F.3d 440 (2d Cir. 2000); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Kadic v. Karadzĭć, 70 F.3d 232 (2d Cir. 1995).

8. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117 (2d Cir. 2010), *reh'g denied en banc*, 642 F.3d 379 (2d Cir. 2011).

9. *Id.* (emphasis added).

10. It "does not specify *who* is liable." *Id*. at 121 (emphasis added).

11. *See, e.g.*, Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971 (2004); Luis Enrique Cuervo, *The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea*, 19 TULANE ENVTL. L.J. 151 (2006); Lorelle Londis, Comment, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141 (2005).

substantially threatens the efficacy of the ATS.

The decision hinges on which body of law should govern the scope of liability under the ATS, or, more specifically, which body of law should determine whether corporations can be held liable under the ATS. CIL is clearly the body of law that must be violated in order for an ATS claim to lie. It does not necessarily follow, however, that CIL should provide the scope of liability available under the ATS. Judge Cabranes ruled that CIL (which does not hold corporations liable for tort violations) limits ATS subject matter jurisdiction to claims brought against individuals and states.[12] In heated contrast, Judge Leval argued that domestic federal common law (which allows for corporate liability) should be utilized to decide who can be held liable.[13] This Comment discusses the debate between Judge Cabranes and Judge Leval from a choice-of-law perspective.

Part I will examine the genesis of the ATS and outline the development of ATS jurisprudence, highlighting its uncertainty. Part II dissects the debate between Judge Cabranes and Judge Leval. Part III will briefly explain relevant choice-of-law theory, and outline the choice-of-law issues presented by the ATS. Part III then critiques the choice-of-law analysis in *Kiobel*. It then suggests that courts adopt an approach to guide similar issues arising in the future. Courts should (1) recognize the choice-of-law issues inherent in the ATS, and (2) resolve those issues by consulting the law that most accords with the underlying purpose of the ATS. This Comment will conclude by positing that, under this approach, the *Kiobel* court should have applied domestic federal common law, and ruled that corporations can be held liable in ATS claims. Such a ruling comports with the purpose underlying the ATS.

II. Brief History of ATS Litigation and the Limited Role of Choice of Law Doctrine

In 1781, the Continental Congress adopted a resolution encouraging states to enact legislation addressing several "specific offences 'against the law of nations,'" including "'violations of safe conducts' and

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

13. *Id*. at 149-96 (Leval, J., concurring). Judge Leval wrote a concurrence (both opinions agreed that the specific tortious conduct alleged did not rise to the level of a violation of CIL), but Judge Leval disagreed sharply with Judge Cabranes' determination that corporations could not be held liable under the ATS. *See id*. at 182-84.

'infractions of the immunities of ambassadors and other public ministers,'" and "infractions of treaties and conventions to which the United States are a party."[14] The resolution recommended that the states "authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen."[15] Commentators have interpreted the resolution as one aimed at ensuring that the United States complies with international norms by providing redress to foreigners harmed by United States citizens.[16] Ultimately, the resolution precipitated the enactment of the ATS in 1789, and so provides the initial guidance in determining Congress' intent.[17]

No record of the congressional debate exists, thereby making it difficult to determine any legislative intent.[18] There is, however, consensus based on (1) the language of the 1781 resolution and the ATS, and (2) scholarly commentary and historical context from the time period.[19] Congress enacted the ATS to ensure that the nation and its citizens complied with the law of nations. "Virtually every commentator on the Statute has tied it to the Framers' desire to avoid embroiling the nation in conflicts with foreign states arising from U.S. mistreatment of foreign citizens."[20] The ATS, therefore, was designed as a means for the

14. Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT'L ECON. L. 193, 223 (2005) (quoting 21 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 1136-37 (Gaillard Hunt ed. 1912)).

15. *Id.*

16. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 475 (1989) ("The Alien Tort Statute was a direct response to what the Founders understood to be the nation's duty to propagate and enforce those international law rules that directly regulated individual conduct.").

17. Trnavci, *supra* note 14, at 223.

18. Burley, *supra* note 16, at 463 ("In the end, however, definitive proof of the intended purpose and scope of the Alien Tort Statute is impossible."); Trnavci, *supra* note 14, at 226-27.

19. *See, e.g.*, Trnavci, *supra* note 14, at 215 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *68) ("Offenses against the law of nations can rarely be the object of the criminal law of any particular state . . . . But where the individuals of any state violate this general law, it is then the interest as well as the duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained.") (internal quotation marks omitted).

20. Burley, *supra* note 16, at 465 (citing Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L. L. 62 (1988); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 489-98 (1986); Edwin D. Dickinson, *The Law of*

young and vulnerable nation to comply with the norms of international conduct, by providing a forum in the federal courts to remedy U.S. mistreatment of foreign citizens.[21]

There are several theories as to why Congress provided that forum. One suggests that Congress intended only to protect foreign ambassadors in the wake of an embarrassing 1784 attack on a French ambassador in Philadelphia.[22] Another posits that Congress was compelled by a sense of chivalrous duty: "Their motives derived not only from a negative calculation of the immediate national security consequences if they did not comply, but also from a positive conception of conduct befitting a civilized nation."[23] A third, the "denial of justice theory,"[24] holds that the statute derived from a desire to avoid adjudication in state courts. At the time, Congress viewed state courts as provincial, discriminating against foreigners, and therefore incapable of providing impartial decisions.[25] James Madison clearly articulated this concern: "We well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us."[26] Discriminatory judgments would both embarrass and endanger the young nation.

Whichever theory one uses, scholars generally accept that Congress intended to provide a forum for redress to aliens injured by a violation of some international rule, so long as that rule was understood to bind "individuals for the benefit of other individuals[,which] overlapped with the norms of state relationships."[27] In the first 191 years following

Nations Is Part of the National Law of the United States, 101 U. PA. L. REV. 26, 44-45 (1952); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 19-22 (1985); John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 VAND. J. TRANSNAT'L L. 47 (1988)). *See also* Philip A. Scarborough, Note, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 464 (2007).

21. *See* Trnavci, *supra* note 14, at 224 n.133 (listing supportive secondary authorities).

22. *See, e.g.*, Flores v. S. Peru Copper Corp., 414 F.3d 233, 242 n.13 (2d Cir. 2003) (citing Casto, *supra* note 20, at 499).

23. Burley, *supra* note 16, at 464.

24. *Id.* at 465.

25. *Id.*

26. Trnavci, *supra* note 14, at 227 (quoting 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (Jonathan Elliot ed., 2d ed. 1881)).

27. Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004).

enactment, only two ATS actions were brought.[28] This changed, however, when the "birth of the modern line of [ATS] cases," [29] occurred with a 1980 case from the United States Court of Appeals for the Second Circuit case, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

In *Filartiga* both parties were Paraguayan citizens. The plaintiffs alleged that the defendant, as Inspector General of Police in Paraguay, and acting under the color of state authority, tortured and killed their son Joelito Filartiga.[30] Judge Kaufman held that the ATS provided jurisdiction over a case involving torture perpetrated by a state official that violated the law of nations.[31] *Filartiga* began a wave of ATS litigation involving violations of human rights and environmental norms (the two main areas in which CIL operates).

In 2004, the Supreme Court decided its only ATS case, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The plaintiff, Humberto Alvarez-Machain, was a Mexican national whom other Mexicans, including Sosa, abducted in the course of a U.S. DEA operation.[32] The DEA had him abducted so that he could stand trial in the United States for the torture and murder of a DEA agent.[33] The court acquitted Alvarez-Machain, and he brought suit under the jurisdiction provided by the ATS.[34] The district court granted Alvarez' motion for summary judgment against Sosa and awarded $25,000 in damages.[35] The United States Court of Appeals for the Ninth Circuit affirmed the relevant portion of that decision.[36] After decades of calls for Supreme Court clarification of the ATS, the Court granted certiorari.[37]

The majority decision, written by Justice Souter, set forth two important (and surprising) clarifications. Before *Sosa*, most commentators interpreted the ATS only as a jurisdictional statute that

28. *See* 14A WRIGHT ET AL., *supra* note 6, at § 3661.1.

29. *Sosa*, 542 U.S. at 724-25.

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

31. *Id*. at 880.

32. *See Sosa*, 542 U.S. at 697-99.

33. *Id*. at 698.

34. *Id*. Defendants included both the United States and Sosa. *Id*. The ATS was used only to invoke jurisdiction over the Mexican parties; jurisdiction over the U.S. was provided by the Federal Tort Claims Act, which waives sovereign immunity in certain situations. *Id*.

35. *Id*. at 699.

36. *Id*.

37. *See* Sosa v. Alvarez-Machain, 540 U.S. 1045 (2003).

created no new cause of action.[38] "Instead, the Court recognized that the ATS, in addition to conferring jurisdiction on federal courts for cases within its ambit, also recognized limited common law causes of action for aliens seeking to sue in American federal courts."[39] Although the ATS did not "create" causes of action, it, therefore, does facilitate recognition of causes of action based on certain international norms, recognizing such claims as sounding in federal common law.[40]

Second, the Court, considering ATS' historical origins, outlined a new test for determining which rules of CIL could provide federal causes of action under the ATS: to be actionable a claim must rest on an international norm "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" that Congress recognized, namely violations of safe conducts, infringements on the rights of ambassadors, and piracy.[41] To qualify as CIL for the purpose of ATS claims, a rule must be "specific, universal, and obligatory."[42] "In short, customary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[43] Violations of CIL, under this test, include torture, genocide, and crimes against humanity.

Sosa clarified the substantive law that must be violated in order for the ATS to provide jurisdiction. Violation of a specific, universal, and obligatory norm of CIL results in a federal cause of action cognizable under the subject-matter jurisdiction grant of the ATS.[44] It did not, however, define potential defendants of such claims. Most importantly, it left open the question of whether corporations could be held liable for violations falling within the parameters set forth by the Court.

Kiobel addressed that question, and, in doing so, highlighted the evolution of ATS jurisprudence.[45] Earlier cases focused only on whether there was a violation of CIL; *Kiobel* recognizes two inquiries embedded in ATS litigation.[46] First, a court must determine whether the defendant

38. Scarborough, *supra* note 20, at 468.

39. *Id*.

40. *See Sosa*, 542 U.S. at 713 (quoting Casto, *supra* note 20, at 479-80).

41. *Id*. at 725.

42. *Id*. at 732 (quoting Hilao v. Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1475 (9th Cir. 1994)).

43. Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003).

44. *Sosa*, 542 U.S. at 732 (quoting *In re* Estate of Marcos, 25 F.3d at 1475).

45. Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 120 (2d Cir. 2010).

46. *Id*. at 128.

falls within the scope of liability created by the ATS.[47] This is the "who" question.[48] One commentator describes this as the "threshold" test.[49] Second, the court must determine whether a violation of CIL has occurred.[50] This is the "what" question.[51] The next section discusses the *Kiobel* decision and critiques its choice of law for the threshold question under the ATS: in answering the "who" question *Kiobel* consulted the wrong law.

III. The *Kiobel* Decision

Kiobel was brought in 2002 and now reflects a decade of groundbreaking ATS jurisprudence. It was one of the first cases to determine that the allegations set forth in the complaint satisfied the *Sosa* standard.[52] Now, the Second Circuit's ruling that corporations are not proper defendants in ATS cases makes it a landmark case.

Since 1958, Shell Petroleum Development Company of Nigeria, Ltd. ("SPDC") has conducted oil production and exploration operations in the Ogoni region of Nigeria.[53] SPDC is a subsidiary of the *Kiobel* foreign defendants: Royal Dutch Petroleum Company ("Royal Dutch"), incorporated in the Netherlands, and Shell Transport and Trading Company PLC ("Shell"), incorporated in the United Kingdom.[54] In response to the environmental degradation SPDC's operations caused, the people of Ogoni organized the "Movement for Survival of Ogoni People," a resistance group.[55] The *Kiobel* plaintiffs, members of the group, alleged that in 1993 the defendants solicited Nigerian government aid to quell the resistance and actively facilitated the ensuing two years of attacks, murders, looting, and destruction committed by government agents.[56] "Specifically, plaintiffs allege[d] that defendants, *inter alia*, (1)

47. *Id*.

48. Kenneth Anderson, *Extra Thoughts on Today's 2nd Circuit ATS Decision*, OPINIO JURIS (Sept. 17, 2010, 10:49 PM), http://opiniojuris.org/2010/09/17/extra-thoughts-on-todays-2nd-circuit-ats-decision/.

49. *Id*.

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

51. Anderson, *supra* note 48.

52. *See Kiobel*, 621 F.3d at 125-26.

53. *Id.* at 123.

54. *Id*.

55. *Id.*

56. *Id.*

provided transportation to Nigerian forces, (2) allowed their property to be utilized as a staging ground for attacks, (3) provided food for soldiers involved in the attacks, and (4) provided compensation to those soldiers."[57]

The plaintiffs filed a putative class action in the Southern District of New York.[58] The defendants moved to dismiss the suit for failure to state a claim, relying on *Sosa*.[59] In 2005, Magistrate Judge Pitman issued a Report and Recommendation recommending denial of that motion for procedural reasons—the defendants raised their *Sosa* arguments too late.[60] District Judge Wood heard *Sosa* arguments and allowed supplemental briefs before ruling on the defendants' objections to the Magistrate Judge's Report.[61]

Relying on *Sosa*, Judge Wood dismissed the claims that CIL did not define with sufficient particularity: aiding and abetting; property destruction; forced exile; extrajudicial killing; and interfering with the rights to life, liberty, security, and association.[62] Judge Wood denied the defendants' motion regarding the other claims, which she found satisfied the *Sosa* standard: aiding and abetting; arbitrary arrest and detention; crimes against humanity; and torture or other cruel, inhuman, and degrading treatment.[63] Judge Wood's decision was then certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[64] This certification recognized the "importance of the issues presented and the substantial grounds for difference of opinion."[65]

The Court of Appeals reversed the partial denial of the motion to dismiss.[66] Judge Cabranes, writing for himself and Judge Jacobs, held that CIL, not domestic law, determines the scope of liability under ATS, because the ATS only confers jurisdiction where violations of CIL are found.[67]

57. *Id.*

58. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 459 (S.D.N.Y. 2006).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id. at* 463-65, 467.

63. *Id.*

64. *Id.* at 467-68.

65. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 124 (2d Cir. 2010).

66. *Id.* at 149.

67. Much of Judge Cabranes' decision focuses on supporting the proposition that corporations cannot be held liable under CIL. *See generally id.* This discussion focuses

> But the substantive law that determines our jurisdiction under the ATS is neither the domestic law of the United States nor the domestic law of any other country. By conferring subject matter jurisdiction over a limited number of offenses defined by *customary international law*, the ATS requires federal courts to look beyond rules of domestic law.[68]

Judge Cabranes thus recognized the choice-of-law issue presented by the ATS, and resolved that issue by simply consulting the language of the statute. He essentially viewed it as an issue of statutory interpretation: because ATS jurisdiction rests on violations of CIL, CIL defines both substantive liability and permissible defendants. The ATS "imposes liability only for a 'violation of the law of nations,' and thus it leaves the question of the nature and scope of liability—who is liable for what—to customary international law."[69] Judge Cabranes noted that previous decisions finding corporations liable were not dispositive on the issue of corporate amenability to tort actions under CIL.[70] He rested on two arguments: (1) that in non-ATS cases courts have interpreted CIL to define liability for violations of its norms, and (2) that ATS precedent is consistent with such an interpretation.[71]

The first point he made was that CIL speaks affirmatively on the issue of permissible defendants and excludes corporations.[72] He cites the decisions of the Nuremburg trials to support his contention. The International Military Tribunal at Nuremburg explicitly rejected the

solely on *Kiobel*'s analysis of which law should determine the scope of liability: CIL or domestic law. It is essentially undisputed that CIL does not recognize corporations as juridical entities. *Id*. at 119 ("[T]he 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 with the individual men and women who have perpetrated it.").

68. *Id*. at 117-18 (emphasis in original).

69. *Id*. at 122 (internal citations omitted) (citing 28 U.S.C. § 1350 (2006)).

70. *Id*. at 124-25 ("'[W]hen questions of *jurisdiction* have been passed on in prior decisions *sub silentio,'* the Court 'has never considered itself bound when a subsequent case finally brings the jurisdictional issue before it.'") (emphasis added) (quoting Hagans v. Levine, 415 U.S. 528, 533 n.5 (1974)).

71. *See generally id*.

72. *Id*. at 125-26.

defendants' argument that international law acts only upon states, and does not act upon individuals.[73] In so doing, the Tribunal, which acted as body of CIL, affirmatively resolved the issue of "who" could be held liable for violations of its norms. Judge Cabranes interpreted this as a declaration by CIL that *it alone* governs the issue of who can be subject to it. Judge Cabranes argued that, because CIL purports to define "the subjects of international law," only CIL can define the scope of liability for violations of its norms.

Judge Cabranes' second point was that "*Sosa* and [o]ur [p]recedents [r]equire [u]s to [l]ook to [i]nternational [l]aw to [d]etermine the [s]cope of [l]iability."[74] Several cases, including *Sosa*, seem to support his position.[75] However, no previous case addressed the issue except in passing, and those that did address it had no actual choice-of-law analysis. He relied most heavily on two statements in *Sosa*. First, "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 an individual."[76] According to Cabranes, this implies that CIL (i.e., international law) is the source of law that determines the scope of liability in ATS cases.[77] Second, Justice Breyer's concurrence in *Sosa* noted that "[t]he norm of international law must extend liability to the *type of perpetrator* (e.g., a private actor) the plaintiff seeks to sue."[78] Taken together, these quotations do provide guidance, and perhaps represent Cabranes' strongest argument. Neither, however, comes in the context of any actual choice-of-law analysis, and both are only dictum.

Judge Cabranes cited a few other cases that seem consistent with his position. He argued that, in *Filartiga*, the court "looked to international law to determine our jurisdiction and to delineate the type of defendant who could be sued."[79] It is certainly true that the court looked to CIL to determine *jurisdiction*. The ATS, however, mandates that violations of CIL are what create federal jurisdiction, and it is *silent* on all other

73. *Id.* at 127 (citing *The Nuremberg Trial (United States v. Goering*), 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946)).

74. *Id.* at 127.

75. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 727-28 (2004).

76. *Kiobel*, 621 F.3d at 126 (quoting *Sosa*, 542 U.S. at 732 n.20).

77. *Id.*

78. *Id.* at 127-28 (quoting *Sosa*, 542 U.S. at 760 (Breyer, J., concurring)).

79. *Kiobel*, 621 F.3d at 128 (citing Filartiga v. Pena-Irala, 630 F.2d 876, 880, 889 (2d Cir. 1980)).

issues.[80] The Second Circuit's decision to look to CIL on the jurisdictional issue cannot be read as an endorsement that CIL should determine the scope of liability issue. Furthermore, Judge Cabranes' statement that the Court looked to CIL to determine "the type of defendant who could be sued"[81] does not represent a fair reading of the case. The language in *Filartiga* which he relies on in support of this contention is: "[i]n light of the universal condemnation of torture in numerous international agreements . . . we find that an act of torture *committed by a state official* against one held in detention violates . . . the law of nations."[82] That quotation shows only that the court looked to CIL ("universal condemnation of torture in numerous international agreements") to find that torture is cognizable under the ATS.[83] It did not look to it to find *who* can be held liable for torture; that issue was not addressed. In order for the quotation to reflect Judge Cabranes' position, the quotation would have to read: "in light of the universal condemnation of torture *perpetrated by state officials*, we find an act of torture committed by a state official to be a violation of the law of nations."

Judge Cabranes goes on to cite several cases;[84] however, almost all of the citations suffer from the same underlying problem: just because they talk about individuals does not mean they address the question of corporate liability—they simply reflect the facts of the case. The citations that do address the issue do not come from the majority opinion.[85] In any event, the cases cited in the discussion regarding choice of law in ATS jurisprudence illustrate the substantial confusion and lack of certainty by which courts have navigated ATS litigation. As such, no precedent mandates a certain outcome on this issue; courts have simply not addressed the issue with anything resembling an adequate level of analysis.

In sum, Judge Cabranes failed to set forth a convincing argument that the ATS mandates looking to CIL to determine the "who" issue. His

80. *See* 28 U.S.C.A. § 1350 (West 2011).

81. *Kiobel*, 621 F.3d at 128 (citing *Filartiga*, 630 F.2d at 889).

82. *Id.* (emphasis in original) (quoting *Filartiga*, 630 F.2d at 880).

83. *Id.* (quoting *Filartiga*, 630 F.2d 880).

84. *Id.* Among the cases cited were: Flores v. S. Peru Copper Corp., 414 F.3d 233, 254-66 (2d Cir. 2003); Kadic v. Karadzĭć, 70 F.3d 232 (2d Cir.1995); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984).

85. *Id.* ("We have repeatedly emphasized that the scope of the [ATS's] jurisdictional grant should be determined by reference to international law." (quoting Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 269 (2d Cir. 2007) (Katzmann, J. concurring))).

entire argument rested on his determination that the language of the ATS requires that CIL determine *all* ATS issues. While he must be commended for recognizing that the "who" question must be addressed, neither the language of the ATS, nor the nature of CIL, lead to such a conclusion. Judge Leval concurred in the judgment but sharply disagreed with Cabranes' analysis of the corporate defendant issue.[86] He did not explicitly perform any choice-of-law analysis, but his discussion focused on factors that courts traditionally use in choice-of-law analysis.[87] As such, using the terminology of choice of law would make his argument more coherent.

Judge Leval argued that international law takes no position on the scope of liability issues.[88] He argued that CIL provides the norms and domestic law provides the remedies, or at least against whom the remedies are available.[89] This is the strength of Leval's position—he recognized that the "who" and the "what" question are conceptually separable, and can be addressed by separate bodies of law.[90] Furthermore, the argument is consistent with CIL's purpose to protect human rights and the ATS's purpose to provide a forum for remedy when those rights are violated.[91] He interpreted precedent, namely *Sosa*, as making it "clear that a damage remedy does lie under the ATS."[92] He then focused on policy—that there *should* be a way to hold corporations liable for violations of the norm of CIL.[93]

86. *Id*. at 150 (Leval, J., concurring).
87. *Id*. at 149.
88. Specifically, Judge Leval contends:

> 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. International law, at least as it pertains to human rights, consists primarily of a sparse body of norms, adopting widely agreed principles prohibiting conduct universally agreed to be heinous and inhumane. Having established these norms of prohibited conduct, international law says little or nothing about how those norms should be enforced.

Id. at 152.

89. *Id*.
90. *Id*.
91. *Id*.
92. *Id*. at 153.
93. *See id*. at 150.

Judge Leval presented the more persuasive argument because it uses the choice-of-law analytical tools, although without explicitly acknowledging them. He recognized that the choice exists. He looks to the purpose of the ATS and its policy implications to make the determination. His argument would be stronger if he stated it in choice-of-law terms. The next section will elaborate how that might be done.

IV. Choice-of-Law Doctrine and the ATS

Choice-of-law doctrine is a unique and amorphous[94] body of legal principles that attempt to guide courts in deciding which law to apply when more than one body of laws speaks to the issue at hand.[95] It does not select jurisdiction, but simply speaks to the law that a given jurisdiction should apply. There is no uniform choice-of-law principle—issues are adjudicated on a case-by-case basis, and different forums tend to espouse different guiding principles.[96] This Part will first briefly review relevant choice-of-law jurisprudence. It will then examine the choice-of-law issues presented by the ATS, and assert two fundamental conclusions. First, the concise language of the ATS does not address which body of law should decide issues arising in ATS claims, and therefore courts need to engage in choice-of-law analysis when new issues arise. Second, the choice-of-law approach taken in a 2002 Southern District of New York case—that district courts should decide ATS choice-of-law issues by reference to the body of law whose outcome comports with the remedies the ATS was intended to provide—is the approach that all courts should adopt.[97]

Choice-of-law theory provides no hard rules. It does, however, provide a set of principles that allow us to evaluate the underlying judicial, economic, and social policies that speak to any decision about the law to apply.[98] In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), the

94. 16 AM. JUR. 2D *Conflict of Laws* § 1 (1998) ("Probably no area of law has been and continues to be more confused and confusing than that of conflict of laws.").

95. *Id.* at Summary (describing choice of law theory as addressing "the problem of what law governs in a given legal situation when there is a conflict between the law of one state or country and that of another.").

96. *See generally* DAVID P. CURRIE ET AL., CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS (8th ed. 2010) (illustrating the range and depth within the choice of law field).

97. Tachiona v. Mugabe, 234 F. Supp. 2d 401, 410 (S.D.N.Y. 2002).

98. *See generally* CURRIE ET AL., *supra* note 96 (including sections on statutory solutions, the relationship between constitutions and conflicts of laws, and an entire

Supreme Court addressed choice-of-law issues arising under a statute similar to the ATS. That discussion elucidates the choice-of-law jurisprudence relevant to the ATS.

The Jones Act holds that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."[99] Like the ATS, therefore, it is a statute that provides for subject matter jurisdiction of a specific type of tort. In *Laurtizen*, the plaintiff was a Danish seaman who, while temporarily in New York, joined the crew of a Danish ship owned by the defendant, who was also a Danish citizen.[100] The plaintiff was then injured in Havana, and brought suit against the ship owner in the Southern District of New York under the jurisdiction provided by the Jones Act.[101] A central issue in the case was whether Danish law (which limited remedy to the amount of damages incurred by the plaintiff in the twelve weeks following the injury), or U.S. law (which allowed for comprehensive remedy making the plaintiff whole) should be applied to determine the available remedy.[102] Both the district court and the United States Court of Appeals for the Second Circuit ruled that U.S. law applied, pursuant to the language of the Act, and held for the plaintiff.[103] The Supreme Court then granted the defendants a writ of certiorari, and reversed.[104]

At the outset, Justice Jackson, writing for the majority, noted that "allowance of an additional remedy under our Jones Act would sharply conflict with the policy and letter of Danish law."[105] In the same way, to consult U.S. domestic law in answering the "who" question set forth by the ATS would conflict with CIL's approach to the "who" question. For this reason, Justice Jackson's choice of law analysis, as described below, will provide the reader with a basic understanding of choice-of-law analysis as it should apply to the ATS.

chapter devoted to the difficulties of international conflicts).

99. Jones Act, 46 U.S.C.A. app. § 688 (1920) (current version at 46 U.S.C.A. § 3104 (West 2011)).

100. Lauritzen v. Larsen, 345 U.S. 571, 573 (1953).

101. *Id.*

102. *Id.* at 575-77.

103. *Id.* at 573-74.

104. *Id.* at 574, 593.

105. *Id.* at 575.

Justice Jackson first looked to the legislative history underlying the Jones Act, and concluded that it favored the application of Danish law over U.S. domestic law.[106] In particular, he noted that the Act was enacted within the context of a patchwork of maritime statutes with which it must be considered consistent. Jackson argued that these statutes, which usually "give no evidence" as to whether they should be applied to foreign transactions, are almost universally understood to apply only to "cases within the jurisdiction" of the United States.[107] "By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."[108] Jackson concluded that the legislative history indicated an intent that the application of the statute not extend beyond the scope of traditional U.S. maritime law.

The traditional practices of maritime law, according to Justice Jackson, mandate that "if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting."[109]

He then outlined the other factors which should be considered in "determining what law determines standards for adjudication in U.S. federal courts."[110] The factors are: (1) place of the wrongful act; (2) law of the flag (the nationality of the ship in maritime context); (3) allegiance or domicile of the injured party; (4) allegiance of the defendant; (5) place of contract; (6) inaccessibility of foreign forum; and (7) the law of forum.[111] Justice Jackson found that the factors show "an overwhelming preponderance in favor of Danish law."[112]

> The parties are both Danish subjects, the events took place on a Danish ship, not within our territorial waters. Against these considerations is only the fact that the

106. *Id*. at 577 ("But Congress in 1920 wrote these all-comprehending words, not on a clean slate, but as a postscript to a long series of enactments governing shipping.").

107. *Id*. at 577-78.

108. *Id*. at 577.

109. *Id*. at 578 (quoting Regina v. Jameson, (1896) 2 Q.B. 425 at 430 (Eng.)).

110. Tracey Bishop Holton, *Causes of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International Law*, 21 CAUSES OF ACTION 2d 327 at § 8 (2010) (originally published in 2003).

111. *Id*. (citing *Lauritzen*, 345 U.S. at 583-90).

112. *Lauritzen*, 345 U.S. at 592.

> defendant was served here with process and that the plaintiff signed on in New York, where the defendant was engaged in our foreign commerce. The latter event is offset by provision of his contract that the law of Denmark should govern.[113]

While the majority of the decision addressed these factors, legislative intent seemed to play the most substantial role in his ultimate determination.

Lauritzen provided a list of factors to be considered *in maritime* choice-of-law analysis, and thus provided insight into the application of choice of law doctrine unique to the ATS.[114] The subsequent utilization of these factors illustrates the fluidity of choice-of-law doctrine. First, that list is in no way comprehensive or guiding, often one factor can carry the day despite weighing against all other factors. The Supreme Court noted this in *Hellenic Lines Ltd. v. Rhoditis*, stating that the factors are "not [] mechanical," and "not intended as exhaustive."[115] Moreover, "[t]he significance of one or more factors must be considered in light of the national interest served by the assertion of Jones Act jurisdiction."[116] Second, this overriding requirement that any decision comport with the legislative history and intent underlying the statute in question has resulted in changes to the factors. In fact, the *Hellenic Lines* decision also added an eighth factor: "the shipowner's base of operations."[117] Furthermore, the Second Circuit has refused to give credence to the last three factors, finding them almost universally irrelevant.[118]

Of course, the context of the ATS exacerbates this fluidity, because the *Lauritzen* factors are grounded in maritime law. Still, the factors are relevant in that they illustrate the importance of reaching a decision that comports with the purpose of the statute in question and that considers the level of contacts between the forum, the parties, and the facts at hand.

113. *Id.*

114. *See* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 382 (1959) (holding that the *Lauritzen* factors apply in all maritime cases).

115. Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 308-9 (1970).

116. *Id.* at 309.

117. *Id.*

118. *See* Reino de España v. Am. Bureau of Shipping, 729 F. Supp. 2d 635, 638-39 (S.D.N.Y. 2010) (citing Carbotrade S.p.A. v. Bureau Veritas, 99 F.3d 86, 91 (2d Cir. 1996) ("[A]pprovingly citing scholarship for the proposition that the last three factors serve no relevant purpose and have been denigrated.")).

Having developed a basic understanding of the framework that guides choice-of-law determinations similar to that posed by the ATS, this Comment will now turn to a discussion of the choice-of-law issues presented by the ATS, and argue that the *Kiobel* decision's underlying weakness is its interpretation that choice-of-law analysis is not necessary due to the plain language of the ATS. The ATS, as many commentators and cases have acknowledged, is a statute rife with choice-of-law issues.[119] This is a result of two factors. First, the statute consists of a single sentence—its plain language fails to comprehensively lay out which law should apply to various steps in adjudication of ATS claims. The plain language simply states that a tort that violates CIL can be litigated in federal court. This does not clarify whether courts shall apply federal law, international law, the domestic law where the wrong occurred, or state law to issues such as scope of liability, procedural issues, issues of equity, etc. Second, the ATS comes with virtually no legislative history or early case law to clarify how adjudication should proceed.[120] As a result of this lack of guidance, contemporary courts have struggled to recognize the available choice-of-law issues inherent to the ATS, and to subsequently navigate those choices. Still, some case law, at the very least, confirms that choice of law is an important consideration in ATS cases.

First, the Second Circuit in *Filartiga* explicitly recognized the choice-of-law issues underlying the ATS.

> Pena . . . confuses the question of federal jurisdiction under the Alien Tort Statute, which requires consideration of the law of nations, with the issue of the choice of law to be applied, which will be addressed at a

119. *See, e.g.*, Holton, *supra* note 110 (compiling sources). *Compare* Xuncax v. Gramajo, 886 F. Supp. 162, 180-83 (D. Mass. 1995) (holding that international law provides substantive law for ATS cases), *with* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777-82 (D.C. Cir. 1984) (Edwards, J., concurring) (suggesting that, while international law triggers jurisdiction under ATCA, tort laws of forum state might provide substantive causes of action), *and* Trajano v. Marcos (*In re* Estate of Marcos), 978 F.2d 493, 503 (9th Cir. 1992) (approving district court procedure that based jurisdiction on international law but applied tort law of state where underlying events occurred). *See also* Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980) (holding that ATS establishes causes of action for violations of international law but requiring the district court to perform a traditional choice-of-law analysis to determine whether international law, law of forum state, or law of state where events occurred should provide substantive law in such an action).

120. *See* discussion *supra* Part I.

> later stage in the proceedings. The two issues are distinct. Our holding on subject matter jurisdiction decides only whether Congress intended to confer judicial power, and whether it is authorized to do so by Article III. The choice of law inquiry is a much broader one, primarily concerned with fairness, consequently, it looks to wholly different considerations.[121]

The court then noted that this analysis might very well require the court to apply Paraguayan law.[122] In the same, vein, the United States Court of Appeals for the Ninth Circuit in, *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 503 (9th Cir. 1992), upheld jurisdiction under the ATS and then applied Philippine law to the issue of damages. In *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), the court found that the liability of the defendant was established under Guatemalan law, but that the defendant was liable to the plaintiff for defamation pursuant to Kentucky state law.

One case provides arguably the most valuable insight into the choice-of-law analysis, and provides the guiding doctrine which all courts should adopt. In *Tachiona v. Mugabe*, "the court sought to harmonize cases eschewing appropriate choice of law analysis."[123] The court advocated a flexible approach to choice-of-law issues in ATS cases, as a result of "the practical and jurisprudential complexities that inhere in discerning, construing and enforcing substance rules formulated by foreign courts, legislative and administrative bodies."[124]

> Were the federal courts obliged to give unremitting recognition and deference to the substantive laws and defenses compelled by municipal law under a choice of law analysis, in some instances such application of foreign law could frustrate the right of action the [ATS] was designed to confer upon the victims of international lawlessness.[125]

121. *Filartiga*, 630 F.2d at 889 (internal citations omitted) (citing Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Lauritzen v. Larsen, 345 U.S. 571 (1954)).

122. *Id.* at 889 n.25.

123. Holton, *supra* note 110, at § 8.

124. *Id.*

125. Tachiona v. Mugabe, 234 F. Supp. 2d 401, 415 (S.D.N.Y. 2002).

A flexible approach would allow courts to draw rules of decision "from: federal common law; the forum state; the foreign jurisdiction most affected; international law; or a combination of these sources"[126] *if they provide a remedy adequate to* "*redress the international law violations in question*."[127] This approach is wise for two reasons: (1) it recognizes the complexity inherent in ATS choice of law, and allows federal courts flexibility in addressing that complexity, and (2) it provides a guiding principle by which to navigate ATS choice of law that conforms with the purpose and plain language of the ATS: the provision of forum, and thus remedy, where there has been a violation of CIL by a United States citizen or entity.

The difficulty underlying ATS choice of law is certainly evidenced by the strongly-worded disagreement between two respected jurists that we find in *Kiobel*.[128] This disagreement suggests that the language of the ATS fails to address the issue, and that there is a tangible conflict about which body of law should apply to the scope of liability determination. Choice-of-law theory provides valuable insight into that determination. It seems clear that the ATS allows for a choice of law, at least in regards to the scope of liability issue.[129] As described above, Judge Cabranes'

126. *Id*. at 411.

127. *See id*. at 418. (emphasis added).

128. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111,122-23 (2d Cir. 2010) (Judge Cabranes notes "the passion with which Judge Leval disagrees with our holding . . . he calls our reasoning 'illogical' on nine separate occasions . . . he calls our conclusions 'strange,' . . . he repeatedly criticizes our analysis as 'internally inconsistent.'") (internal citations omitted).

129. *See e.g.*, Presbyterian Church of Sudan v. Talisman Energy Inc., 582 F.3d 244, 261 n.12 (2d Cir. 2009) ("We will also assume, without deciding, that corporations . . . may be held liable for the violations of customary international law that plaintiffs allege."); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254,282-83 (2d Cir. 2007) (Katzmann, J., concurring) (noting that, because defendants did not raise the issue, the court need not reach the question of corporate liability); *Khulumani*, 504 F.3d at 321-25 (Korman, J., concurring in part and dissenting in part) (expressing the view that corporations cannot be held liable under the ATS); Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1143-45 (C.D. Cal. 2010) (holding that there is no corporate liability under the ATS because CIL determines the scope of jurisdiction, without an explicit choice of law analysis); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (holding that ATS provided SMJ over an American oil corporation, based on the allegation of a violation of CIL). For the most comprehensive discussion of the choice-of-law issue presented in *Kiobel*, see Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105 n.12 (2d Cir. 2000) (discussing the choices of law available in ATS jurisprudence, including federal common law, state law, and CIL, and noting that as long as a forum's rule does not violate binding

argument stems from a statutory interpretation that the language of the ATS dictates that CIL determines all issues. Conversely, Judge Leval's argument touches on many arguments that are relevant in a choice-of-law determination, although he never explicitly acknowledges the consideration of any choice-of-law principles.

The major weakness underlying the debate in *Kiobel* is that Judge Cabranes and Judge Leval do not meet within the same framework. Judge Cabranes simply argued that CIL should apply, based on the nature of CIL and ATS precedents. Judge Leval, conversely, focused on his interpretation of the underlying humanitarian issues and results that will stem from not recognizing corporate liability. The lack of a guiding framework resulted in the harsh disagreement between the two; they were essentially attempting to adjudicate on different playing fields. An acknowledgement of the framework for choice-of-law set forth in *Tachiona* would allow courts to adjudicate ATS decisions in accordance with the purpose of the statute, and with a framework for a constructive debate.

The purpose of the ATS was most likely to assure the international community that the United States would comply with the law of nations. Since enactment, CIL has evolved to focus on gross humanitarian and environmental offenses. While the nature of CIL has changed, the need for the United States to remedy violations perpetuated by both its citizens and its corporate entities still exists. The *Kiobel* decision eliminates the ability of the federal system to hold corporations accountable for CIL-based torts. It is these torts, and the lack of remedy for their victims, that often provides the strongest impetus for the international community to view the United States negatively. As the world grows increasingly interdependent, it is not wise to eliminate one of the few remaining means of forum available to remedy such violations. Courts should adopt the choice-of-law standard articulated above, and focus on the provision of remedy for actual violations of CIL. The language of the ATS allows for the provision, and the underlying purpose demands it.

V. Conclusion

Kiobel signifies an acknowledgment that ATS litigation involves a

norms of international law, notions of comity and the structures of the international and federal systems should give deference to the forum's particular embodiment of the international principle).

choice between a scope of liability as dictated by domestic law or as dictated by CIL. Choice-of-law theory provides insight into that decision. A petition for certiorari was filed July 12, 2011, and granted on October 17, 2011. On February 28, 2012, the Court heard oral arguments.[130] On Monday, March 5, the Court restored the case to the argument calendar—at the time of publication oral arguments are pending on the issue of extraterritoriality.[131]

The Court should recognize the choice-of-law issues inherent in ATS cases, and establish a guiding framework for navigating those issues. This Comment recommends that it accord with the jurisprudence set forth in *Tachiona* and adopt a flexible standard. This standard will require courts to acknowledge the choice of laws available to them, and at the same time provide guidance that comports with the plain language purpose of the ATS: the provision of a forum and potential remedy for violations of CIL by United States citizens and entities. As corporations become more and more powerful, it is important that we not reduce our ability to hold them liable for gross violations of universally accepted norms.

130. Lyle Denniston, Kiobel *to be Expanded and Reargued*, SCOTUSBLOG (Mar. 5, 2012, 2:01 PM), http://www.scotusblog.com/?p=140230.

131. *Id.*