If the Question is Chocolate-Related, the Answer is Always Yes: Why *Doe v. Nestle* Reopens the Door for Corporate Liability of U.S. Corporations Under the Alien Tort Statute

Amanda A. Humphreville

*American University Washington College of Law*

Follow this and additional works at: https://digitalcommons.wcl.american.edu/aulr

Part of the Business Organizations Law Commons, and the Torts Commons

Recommended Citation


Available at: https://digitalcommons.wcl.american.edu/aulr/vol65/iss1/4

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.
If the Question is Chocolate-Related, the Answer is Always Yes: Why Doe v. Nestle Reopens the Door for Corporate Liability of U.S. Corporations Under the Alien Tort Statute

This comment is available in American University Law Review: https://digitalcommons.wcl.american.edu/aulr/vol65/iss1/4
IF THE QUESTION IS CHOCOLATE-RELATED, THE ANSWER IS ALWAYS YES: WHY DOE V. NESTLE REOPENS THE DOOR FOR CORPORATE LIABILITY OF U.S. CORPORATIONS UNDER THE ALIEN TORT STATUTE

AMANDA A. HUMPHREVILLE*

Corporate liability for U.S. corporations that commit violations of international norms overseas is a contentious issue among several circuit courts. Because the Supreme Court in Kiobel v. Royal Dutch Petroleum overlooked the corporate liability question and instead applied the presumption against extraterritoriality to the Alien Tort Statute, many circuit courts use this presumption as a bright-line rule, precluding corporate liability of U.S. corporations where the alleged conduct does not occur in the United States.

However, corporate liability and the presumption against extraterritoriality are distinct analyses. The Ninth Circuit recognized this in Doe I v. Nestle U.S.A., Inc. when it iterated a corporate liability analysis to be applied separately, but in addition to, the analysis of where the conduct occurred. The court created a norm-by-norm liability analysis that evaluates the specific norms alleged to have been violated to determine if they are applicable to corporations. The corporate liability analysis ensures that corporations are not given special treatment, that the United States does not become a safe harbor for violators, and that the reasons for passing the Alien Tort Statute are not subverted. Importantly,

* Associate Managing Editor, American University Law Review, Volume 65; J.D. Candidate, May 2016, American University, Washington College of Law; B.A. International Affairs, 2013, The George Washington University. I am sincerely grateful to the editors and staff of the American University Law Review for their hard work, especially to Angela Urbano whose feedback I would have been lost without. I would also like to thank Professor Stephen Vladeck for his invaluable guidance, my family and friends for their love and support, and Phil Sholts for his thoughtful advice and unending encouragement.
the Ninth Circuit's norm-by-norm analysis shows that international norms are applicable to corporations and gives plaintiffs hope of recovery.

TABLE OF CONTENTS

Introduction.................................................................................................................. 193

I. Background ............................................................................................................... 198
   A. The Alien Tort Statute Before Kiobel v. Royal Dutch Petroleum Co. .................................................. 198
   B. Kiobel and the Newly Restricted ATS ................................................................. 199
      1. Why and how the Supreme Court narrowed the ATS through Kiobel.......................... 201
      2. Breyer's concurrence rejected the use of the presumption against extraterritoriality to determine ATS jurisdiction.......................................................... 204
   C. Kiobel Caused a Circuit Split Regarding U.S. Corporate Liability for Extraterritorial Conduct............... 205
      1. The Second and Eleventh Circuits interpret Kiobel to mean that U.S. corporations may not be held liable under the ATS for extraterritorial violations ... 206
      2. The Fourth and Ninth Circuits interpret Kiobel to mean that U.S. corporations may be held liable under the ATS for extraterritorial violations .......... 207
         a. Lower courts are moving towards separating the corporate liability and presumption against extraterritoriality analyses .................................. 212

II. Analysis................................................................................................................... 214
   A. A Norm-by-Norm Analysis Should Be Adopted to Determine U.S. Corporate Liability under the ATS.... 216
      1. The Ninth Circuit’s norm-by-norm analysis ensures corporations are not given special treatment, as opposed to a per se rule prohibiting corporate liability under the ATS that the Second and Eleventh Circuits have seemingly adopted............... 217
      2. Courts should determine whether each norm at issue is applicable to the defendant-corporation to achieve uniform decisions.............................................. 219
   B. Jurisdiction for Corporate Liability Should Arise Under the ATS...................................................... 221
      1. A per se rule of corporate immunity would result in a non-uniform application of the law and would potentially interfere with foreign policy .......... 221
2. If U.S. corporate liability for overseas violations is precluded under the ATS, the statute would be almost ineffective ............................................................................................................................ 224
3. Basing corporate liability on the location of the conduct, rather than on the kind of violation, encourages corporations to circumvent liability by violating international norms in foreign countries, thereby essentially precluding U.S. corporate liability altogether ........................................................................................................ 226

C. The Negative Implications of Letting U.S. Corporations Evade Liability Through a Bright Line Corporate Immunity Rule Outweigh the Ease of Such a Rule ............ 227
1. The United States would become a safe haven for corporations in which to have a “presence” or incorporate to escape liability .......................................................................................... 228
2. Without the Ninth Circuit’s norm-by-norm analysis under the ATS, U.S. corporations can easily avoid both U.S. and international law, and plaintiffs would have very limited avenues for recovery .................. 229
3. In determining corporate liability under the ATS, the presumption against extraterritoriality should not be determinative, and its underlying principles should only be a consideration .................................................. 233

D. Kiobel Does Not Reject U.S. Corporate Liability for Violations of International Norms Committed Overseas .... 235
E. Recommendations ................................................................................................................. 236

Conclusion ................................................................................................................................. 237

INTRODUCTION

In the Ivory Coast, armed guards kept three children, all between the ages of twelve and fourteen, captive on cocoa farms, subjecting them to physical violence and unceasing psychological abuse. Constantly threatening the children with beatings using whips and tree branches, making the children drink urine, and cutting open the feet of those who tried to escape, their captors scared the child-slaves into staying on the farms. For fourteen long hours, six days a week, armed guards forced these children, as well as others as young as six years old, to cut, gather, and dry cocoa beans—back-breaking work that exposed them to extremely dangerous tools and chemicals. The underfed children received no reprieve at night when their captors forced them sleep in rooms crowded with other children. The cocoa beans the farmers forced the children to harvest
wound up in the hands of Nestle U.S.A., the corporation that provides the supports necessary to carrying out this injustice. Although Nestle U.S.A. is perpetuating child slavery in the Ivory Coast, certain U.S. courts would not hold Nestle liable simply because the child slavery is occurring outside of the United States.

As a result of a recent trend in circuit court holdings, U.S. corporations frequently escape liability for committing crimes such as child slavery and apartheid simply by virtue of incorporating in the United States and committing these crimes overseas. In Cardona v. Chiquita Brands Int'l, Inc., Chiquita allegedly reviewed, approved, and concealed money and weapons transfers to Colombian paramilitary groups with the intent that these groups would use them to commit war crimes. Yet, the U.S. Court of Appeals for the Eleventh Circuit did not hold Chiquita liable and dismissed the plaintiffs' claim because the court believed the conduct was not sufficiently connected to the United States. Similarly, in Balintulo v. Daimler A.G., Ford and IBM allegedly engaged in workplace discrimination that mimicked apartheid and transferred supplies to the South African government for use in carrying out apartheid. Ford and IBM were not held liable, and the U.S. Court of Appeals for the Second Circuit dismissed the case because the court also believed the conduct was not sufficiently connected to the United States.

Unlike the plaintiffs in Cardona and Balintulo, the plaintiffs in Doe I v. Nestle U.S.A., Inc., three victims of child slavery, have a chance of succeeding. The Alien Tort Statute (ATS) is a jurisdictional statute, giving federal jurisdiction over violations of international law while

1. Nestle and its co-defendants dominate the international cocoa industry through exclusive buy-sell relationships with Ivory Coast farms, where young children are forced into slavery to cultivate the cocoa. Doe I v. Nestle U.S.A., Inc., 766 F.3d 1013, 1017 (9th Cir. 2014). Through these relationships, Nestle effectively controls the production of Ivorian cocoa by providing financial and technical support to the farms and visiting several times per year. Id. Nestle was reportedly aware of the child slavery through international organizations' reports and its visits to the farms; however, Nestle continued to supply money, equipment, labor, and training despite knowing it would all be used to continue the practice of forced child labor. Id. Nestle even lobbied against congressional efforts to stop child labor, effectively guaranteeing the continued use of the cheapest labor available to produce cocoa—child slavery. Id. at 1017–18.

2. 760 F.3d 1185 (11th Cir. 2014).
3. Id. at 1194.
4. 727 F.3d 174 (2d Cir. 2013).
5. Id. at 179–80.
6. Id. at 194.
7. 766 F.3d 1013 (9th Cir. 2014).
authorizing judicial recognition of a limited number of federal common law causes of action for violations of international law.\(^8\) The Supreme Court’s application of the presumption against extraterritoriality\(^9\) in *Kiobel v. Royal Dutch Petroleum Co.*\(^10\) led some lower courts to preclude corporate liability under the ATS. However, the Nestle plaintiffs may be able to win their case because the U.S. Court of Appeals for the Ninth Circuit has since interpreted *Kiobel* as allowing corporate liability under the ATS.

In *Kiobel*, the Supreme Court granted certiorari to a Second Circuit decision that dismissed the plaintiffs’ complaint against foreign defendant-corporations alleging they aided and abetted the Nigerian government in violating the law of nations.\(^11\) The Second Circuit dismissed the plaintiffs’ case based on its conclusion that the ATS does not confer jurisdiction over claims against corporations, and that, therefore, corporations are not subject to liability under the ATS.\(^12\) While the Supreme Court granted certiorari to consider corporate liability under the ATS, the Court ultimately disregarded the question but for a brief mention at the conclusion of the majority opinion.\(^13\) Instead, the Court affirmed the Second Circuit’s decision based on “[w]hether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”\(^14\) After analyzing the ATS through the presumption against extraterritoriality\(^15\) and concluding that an ATS claim may not concern conduct occurring in another country, the Supreme Court stated that even where a claim touches and concerns the United States, “It must do so with sufficient force to displace the presumption.

---

9. See infra note 15 (explaining the presumption against extraterritoriality).
11. See infra note 46 (explaining that the law of nations is a body of law determined from the customs and practices of civilized nations and includes prohibitions against universally accepted crimes such as genocide and slavery).
13. See id. at 1669 (stating that “mere corporate presence” in the United States does not “touch and concern” U.S. territory sufficiently to displace the presumption against extraterritoriality when all relevant conduct occurs abroad; therefore, in such a situation, there can be no corporate liability).
14. Id. at 1663.
15. The presumption against extraterritoriality is a statutory canon of interpretation providing that a statute has no extraterritorial application when it does not clearly indicate application to U.S. conduct abroad. Id. at 1664.
against extraterritorial application,"16 and "mere corporate presence"17 does not suffice. The Court did not expand on this language. While Kiobel established that foreign corporations cannot be sued in federal courts for misconduct occurring abroad, it left open the question of whether U.S. corporations may be held liable under the ATS for conduct that occurs outside the United States.

Consequently, Kiobel led to a circuit split based on this unresolved issue—whether U.S. corporations may be held liable under the ATS for conduct occurring abroad. Some circuits have found that corporations cannot be held liable under the ATS because they understood Kiobel's application of the presumption against extraterritoriality to mean that no U.S. corporate liability for overseas conduct exists under the ATS.18 Although they are divided in their approaches, other circuits have held that corporations can be held liable under the ATS for extraterritorial violations of international norms.19 Notably, in finding corporate liability under the ATS, the Ninth Circuit developed a corporate liability analysis separate to any discussion of the presumption against extraterritoriality.

16. Id. at 1669.
17. Id.
18. See supra note 15 (explaining the presumption against extraterritoriality). The U.S. Court of Appeals for the Eleventh Circuit determined that presence in the United States—as in Kiobel—and being a U.S. corporation—as in Chiquita—made no difference and, as a result, being domestically incorporated does not sufficiently touch and concern the United States to dislodge the presumption against extraterritoriality. Therefore, the Eleventh Circuit found that the ATS does not apply extraterritorially. Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189 (11th Cir. 2014). The U.S. Court of Appeals for the Second Circuit concluded similarly, stating that because the alleged violations of the law of nations occurred outside the United States, the defendant-corporations cannot be liable under the ATS. Balintulo v. Daimler A.G., 727 F.3d 174, 188 (2d Cir. 2013).
19. See infra Part I.C.2 (explaining that the U.S. Court of Appeals for the Fourth Circuit resolved the case using the presumption against extraterritoriality as applied to the Alien Tort Statute (ATS), whereas the U.S. Court of Appeals for the Ninth Circuit developed and applied a norm-by-norm analysis to determine corporate liability under the ATS; see also infra notes 91–93 and accompanying text (describing the norm-by-norm analysis). Like the Second and Eleventh Circuits, the Fourth Circuit, in Al Shimari v. CACI Premier Technology, Inc., focused on the presumption against extraterritoriality in its liability analysis. 758 F.3d 516 (4th Cir. 2014) (holding that the plaintiffs' ATS claim of abuse and torture in Abu Ghraib prison by a U.S. military contractor sufficiently touched and concerned U.S. territory to rebut the presumption against extraterritoriality). However, unlike the Second and Eleventh Circuits, the court concluded that the defendant-U.S. corporation could be held liable under the ATS because its extraterritorial conduct sufficiently touched and concerned the United States.
As evidenced by *Chiquita, Balintulo, and Al Shimari v. CACI Premier Technology, Inc.*, attention post-*Kiobel* is focused on when the presumption against extraterritoriality may apply. The original question of corporate liability under the ATS, however, has been largely ignored. The only circuit court to address the corporate liability analysis separately from the presumption against extraterritoriality is the Ninth Circuit. In reaffirming its reasoning from *Sarei v. Rio Tinto, P.L.C.*, the Ninth Circuit established a norm-by-norm analysis to determine whether domestic corporations may be held liable for claims of violations of international legal norms under the ATS. The court separated its analysis of an ATS claim into two parts: whether international norms can provide the basis for ATS claims against corporations and whether the presumption against extraterritoriality from *Kiobel* bars recovery under those claims.

This Comment argues that the Ninth Circuit's norm-by-norm analysis of whether international norms apply to corporations, as well as to other groups, is the correct approach, ultimately allowing for the possibility of holding U.S. corporations liable for violations of international norms. The idea that corporations are not liable under the ATS unless violations of international norms occur in the United States by U.S. corporations provides incentives for corporations to incorporate elsewhere and to move their operations abroad. Such a loophole in an important statute raises the very concerns for which the ATS was enacted: foreign policy conflicts with other nations. Therefore, rather than adopting a bright-line rule based on the presumption against extraterritoriality detailing when corporations can and cannot be liable under the ATS, which might prevent recovery, this Comment recommends that the nature and scope of each norm alleged should be analyzed to determine whether that norm extends to U.S. corporations.

Part I of this Comment will provide a history of the ATS before *Kiobel* and will explain *Kiobel's* impact on ATS litigation in terms of the differing opinions from the circuit split that followed. Part I will also provide a brief overview of the current state of the ATS. Part II of this Comment will argue that a norm-by-norm analysis of international norms should be adopted when determining whether

20. 758 F.3d 516 (4th Cir. 2014).
21. 671 F.3d 736, 765 (9th Cir. 2011), vacated on other grounds, 133 S. Ct. 1995 (2013) (holding that, for an ATS claim of genocide and war crimes, each claim should be analyzed to determine whether corporations are subject to the international norms underlying that claim).
claims may be brought under the ATS and that jurisdiction for U.S. corporate liability should arise under the ATS, rather than complicating such litigation with other sources of law. Additionally, Part II will contend that the credible, possible consequences of letting U.S. corporations evade liability through the use of a bright-line rule, such as that adopted by the Second and Eleventh Circuits, outweigh the ease of such a rule. Finally, Part III will recommend that courts keep consistent with the notion of the universality of international norms by using the Ninth Circuit’s norm-by-norm analysis. Finding that universally applicable norms provide the basis for ATS claims against U.S. corporations for conduct abroad will ensure that U.S. corporations are not given special treatment.

I. BACKGROUND

A. The Alien Tort Statute Before Kiobel v. Royal Dutch Petroleum Co.

The Alien Tort Statute states: “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.” The ATS is jurisdictional, giving federal courts the ability to adjudicate alleged violations of international law, but it does not give rise to causes of action. It does, however, authorize judicial recognition of federal common law causes of action for violations of international norms.

For over thirty years, lower courts interpreted the ATS as giving rise to a remedy for international law violations. Regarded as the leading interpretation of the ATS since 1980, Filartiga v. Pena-Irala

---

22. Alien Tort Statute, 28 U.S.C. § 1350 (2012); see infra note 46 (explaining that the law of nations is a body of law determined from the customs and practices of civilized nations and includes prohibitions against universally accepted crimes such as genocide and slavery).


24. Sosa, 542 U.S. at 713; see Doug Cassell, Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open, 89 NOTRE DAME L. REV. 1773, 1774 (2014) (noting that the international norms must be universally accepted and defined).

25. See Robert C. Bird et al., Corporate Voluntarism and Liability for Human Rights in a Post-Kiobel World, 102 Ky. L.J. 601, 604–05 (2014) (explaining that before the 1980s, the ATS was not often litigated, citing only four court opinions and two opinions of the U.S. Attorney General to have addressed ATS issues).

26. 630 F.3d 876, 878 (2d Cir. 1980) (involving Paraguayan citizens who applied for permanent political asylum in the United States and filed an ATS claim of torture against another Paraguayan citizen in the United States on a visitor’s visa).
held that, regardless of nationality, enabling deliberate torture under color of authority—or acting with authority when, in reality, the actor has no authority—violates universal norms of the international law of human rights.\textsuperscript{27} Therefore, federal jurisdiction was provided under the ATS whenever an alleged torturer was sued in the United States.\textsuperscript{28} The Supreme Court bolstered, but also limited, this widely-held interpretation in \textit{Sosa v. Alvarez-Machain}.\textsuperscript{29} \textit{Sosa} reaffirmed that the ATS is a jurisdictional statute providing federal jurisdiction for a \textit{limited} number of federal common law causes of action arising from violations of international law.\textsuperscript{30} Even though \textit{Sosa} limited the reach of the ATS by emphasizing that the ATS does not make all violations of international law actionable,\textsuperscript{31} the lower courts' views did not change, and the ATS continued to be broadly applied.\textsuperscript{32}

\textbf{B. Kiobel and the Newly Restricted ATS}

Originally, the Supreme Court agreed to decide \textit{Kiobel} on the issue of corporate liability,\textsuperscript{33} but ultimately it did not even address that question.\textsuperscript{34} The Court unanimously held that a presumption of

\textsuperscript{27} \textit{Id.} at 878.

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} 542 U.S. 692, 697 (2004) (resolving that respondent Alvarez-Machain's claim under the ATS that the Drug Enforcement Administration initiated his abduction from Mexico for a criminal trial in the United States could not stand because the ATS does not create a cause of action for alleged violations of the law of nations under the ATS).

\textsuperscript{30} \textit{Id.} at 724.

\textsuperscript{31} \textit{Id.} at 725 (stating that claims based on the current law of nations must "rest on a[n international] norm . . . accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [(violation of safe conducts, infringement of ambassadors' rights, and piracy)] we have recognized").

\textsuperscript{32} \textit{See, e.g.,} Abdullahi v. Pfizer, Inc., 562 F.3d 163, 187 (2d Cir. 2009) (holding that the prohibition of medical experimentation on human subjects without their consent is a norm of customary international law, the violation of which creates a cause of action under the ATS); Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1246, 1252–53 (11th Cir. 2005) (allowing Guatemalan labor unionists to sue a Guatemalan banana plantation for its participation in state-sanctioned torture under the ATS and noting that new causes of action may be recognized under the ATS as time goes on); Doe v. Saravia, 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004) (declaring that state-sanctioned assassination is a crime against humanity, which is an international norm, the violation of which gives rise to a cause of action under the ATS).

\textsuperscript{33} The Second Circuit had dismissed the case based on its understanding that the law of nations does not recognize corporate liability. \textit{Kiobel v. Royal Dutch Petrol. Co.}, 133 S. Ct. 1659, 1660 (2013).

\textsuperscript{34} \textit{Id.}
extraterritoriality applies to the ATS and therefore bars claims by foreign nationals against foreign corporations for violations of the law of nations occurring in a foreign country. The Court made three major rulings. First, the presumption against extraterritoriality provides that when a statute gives no clear indication of an extraterritorial application, it has none, and it is applied to determine whether an Act of Congress regulating conduct applies abroad. Second, to make a claim under the ATS, the alleged violation must have definite content and be accepted among civilized nations, and the violations alleged must be specific, universal, and obligatory for federal courts to hear such cases. And third, to rebut the presumption against extraterritoriality, the statute must show a clear indication of extraterritoriality; however, the Court held that the ATS does not make such a showing.

Given Kiobel's particular facts, the Supreme Court focused on the location of the alleged conduct rather than on the identity of the perpetrator. The defendant, Shell Petroleum Development Company of Nigeria ("Shell") was a joint subsidiary of the Royal Dutch Petroleum Company and Shell Transport and Trading Company, incorporated in Nigeria. Residents protested the environmental effects of Shell's work in Ogoniland, and in response, Shell obtained the help of the Nigerian government to suppress the demonstrations. Nigerian police and military did so violently; they attacked villages by beating, raping, killing, and arresting residents, as well as destroying and looting property.

The plaintiffs, residents of Ogoniland, alleged that Shell and its parent companies aided and abetted the Nigerian government in committing these acts by providing Nigerian forces with food.

35. The presumption against extraterritoriality is applied to determine whether U.S. statutes regulating conduct apply abroad and provides that U.S. statutes are presumed to have no extraterritorial application. Id. at 1664. The presumption is rebutted when such statutes show a clear indication of extraterritoriality. Id. at 1665.
36. Id. at 1669.
37. Id. at 1664.
38. Id. at 1665.
39. Id.
40. The Second Circuit originally dismissed the case after finding that corporate liability does not exist under the ATS because there is no corporate liability under customary international law. Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 145 (2d Cir. 2010).
41. Kiobel, 133 S. Ct. at 1662.
42. Id.
43. Id.
transportation, and compensation, and by allowing the Nigerian military to use their property to stage attacks.\textsuperscript{44} The plaintiffs then moved to the United States and filed suit in the U.S. District Court for the Southern District of New York, alleging jurisdiction under the ATS and requesting relief\textsuperscript{45} under customary international law.\textsuperscript{46} The district court dismissed some of the claims, but would not dismiss the claims of crimes against humanity, torture and cruel treatment, and arbitrary arrest and detention.\textsuperscript{47}

The Second Circuit heard these remaining claims but dismissed the whole complaint on the grounds that the law of nations does not recognize corporate liability.\textsuperscript{48} Although the Supreme Court granted certiorari to consider that question, it later directed the parties to address the additional question of "[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."\textsuperscript{49} The Court only resolved this additional question of when the ATS may apply to actions carried out abroad.

1. Why and how the Supreme Court narrowed the ATS through Kiobel

The Court addressed the difficulty of applying the presumption against extraterritoriality—which generally applies to statutes regulating conduct—to a jurisdictional statute, but justified its application by reasoning that the principles underlying the presumption also underlie the ATS. The presumption is applied to determine whether U.S. statutes that regulate conduct (also referred

\textsuperscript{44} Id. at 1662–63.

\textsuperscript{45} Id. at 1663.

\textsuperscript{46} Customary international law is also referred to as the law of nations or international law. The law of nations is similar to common law in that it is determined from the customs and practices of civilized nations, which can make it difficult to determine exactly what actions violate the law of nations. \textit{See} Mark Nixdorf, Note, \textit{Substance over Form: Corporate Liability Under the Alien Tort Statute}, 78 BROOK. L. REV. 1553, 1556–57 (2013). Violations of international law include genocide, slavery, murder, torture or other inhuman punishment, prolonged arbitrary detention, systematic racial discrimination, and a consistent pattern of gross violations of internationally recognized human rights. \textit{Restatement (Third) of Foreign Relations Law} §702 (1987). While there are enumerated violations, the list is not exclusive because some rights may achieve customary international law status in the future. \textit{Id.} §702 cmt. a; \textit{see also} Sosa v. Alvarez-Machain, 542 U.S. 692, 760 (2004) (stating that courts may recognize new international norms if the norms are universally accepted and specifically defined).

\textsuperscript{47} \textit{Kiobel}, 133 S. Ct. at 1663.

\textsuperscript{48} Id.

\textsuperscript{49} Id.
to as substantive laws) apply abroad, and its purpose is to protect against disputes between U.S. laws and laws of other countries that could result in foreign policy implications. Therefore, to avoid foreign policy consequences unintended by the political branches, the presumption helps courts determine whether Congress expressly intended a statute to apply abroad. Even though the ATS does not directly regulate conduct, the Court determined that these cautionary principles underlying the presumption apply to the ATS and serve to caution courts considering causes of action brought under the ATS in order to avoid "the possibilit[y] of international discord."

The Court next addressed the possibility of rebutting the presumption against extraterritoriality. The logical interpretation of the ATS in litigation, according to the majority, is that for the plaintiffs to succeed in suing a foreign corporation for alleged violations that occurred abroad, the ATS itself would need to rebut the presumption against extraterritoriality with a showing of clear indication of extraterritoriality. For three reasons, the majority concluded that the ATS does not rebut the presumption. The first reason is the text of the statute: nothing in the text shows that Congress intended for causes of action arising under the ATS to have an extraterritorial reach.

50.  Id. at 1664.
51.  Id.
52.  Id. (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)) (stating that courts should be cautious in terms of foreign policy consequences and impingement on executive and legislative branches' management of foreign affairs). The caution expressed in Sosa and reiterated in Kiobel, regarding holding foreign corporations liable for violations committed overseas, was directed at avoiding unintended foreign policy consequences and avoiding impinging on the discretion of the executive and legislative branches in managing foreign affairs. However, this caution was expressed in a case where the facts exhibited almost no ties to the United States, other than that the plaintiffs lived in America.
53.  Id. at 1665.
54.  Id. The ATS was passed in response to two instances involving foreign ambassadors on U.S. soil; once passed, it was only applied to conduct that happened in the United States. Id. at 1666–67. However, in his 1795 opinion, Attorney General William Bradford, concerning Americans who joined a French fleet to invade Sierra Leone, implied, and the Solicitor General interpreted the opinion to say, that ATS suits could be brought against U.S. citizens for conduct that occurred in a foreign country. Id. at 1667–68. The Kiobel Court dismissed this by giving the principles underlying the presumption more weight than the Attorney General's opinion. Id. at 1668.
55.  Id. at 1665 (reasoning that the statute primarily covers violations of the law of nations; but, because such violations can occur within and outside of the United States, there is no implication of extraterritoriality; and secondarily, the phrase "any
The second reason is the historical background of the ATS. At the time of enactment, Congress intended the ATS to cover three violations of international law: violation of safe conducts, infringement of ambassadors’ rights, and piracy. The majority understood the first two violations not to have extraterritorial application because they apply to certain peoples’ rights when they are in the United States. While piracy generally occurs on the high seas, which are treated as foreign soil, “[a]pplying U.S. law to pirates . . . does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, [so it] . . . carries less direct foreign policy consequences.”

The third reason is that the ATS was not passed to make the United States a forum for the enforcement of international norms. According to the Court, Congress could not have intended such a purpose because it would provide for the undesirable result of allowing other nations to prosecute U.S. citizens for violations of the law of nations occurring in any country.

While Kiobel significantly changed litigation under the ATS, the majority opinion was vague and left open many questions that could arise in future ATS cases. The last paragraph of the majority opinion briefly mentions a new “touch and concern” test, which might “displace” the presumption. The Court stated that where claims touch and concern the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. The only explanation provided for this test is that because corporations are often present in many countries, “mere corporate presence” is not enough to satisfy the “touch and concern”

civil action” does not necessarily suggest application to torts committed abroad because terms like “any” do not rebut the presumption).

56. But see Bird et al., supra note 25, at 604–05 (stating that an absence of legislative history about the ATS and the lack of precedent since its enactment frustrated contemporary judicial interpretation of the statute until Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), which concluded that the statute was jurisdictional but allowed judicial recognition of a new, limited class of international norms that could be litigated under the ATS).

57. Kiobel, 133 S. Ct. at 1666.
58. Id.
59. Id. at 1667.
60. Id. at 1668. Out of embarrassment that no mechanism existed through which relief could be provided to foreign officials injured in the United States, Congress passed the ATS to ensure that the United States could adjudicate such incidents. Id.
61. Id. at 1669.
62. Id.
63. Id.
test. Overall, by applying the presumption against extraterritoriality to the ATS without considering the separate question of corporate liability, the Supreme Court narrowed the ATS's applicability by effectively holding that it no longer applies to foreign corporations that commit violations of international norms overseas.

2. Breyer's concurrence rejected the use of the presumption against extraterritoriality to determine ATS jurisdiction

Justice Breyer, along with Justices Ginsburg, Sotomayor, and Kagan, concurred with the judgment, but disagreed with the majority's reasoning. They would find jurisdiction under the ATS in three situations: (1) where the alleged tort occurred on U.S. soil; (2) where the defendant is a U.S. national; or (3) where the defendant's conduct substantially and adversely affects an important American national interest, which includes a distinct interest in preventing the United States from becoming a safe harbor, free of civil and criminal liability, for a torturer or other enemy.

Instead of applying the presumption against extraterritoriality, these concurring Justices would limit the jurisdictional scope of the ATS to "where distinct American interests are at issue," which would minimize foreign policy consequences. American interests include not becoming a safe harbor because under international law, all nations have the duty not to provide safe harbors for their own nationals who commit serious crimes abroad. Additionally, Justice Breyer argued that because other countries allow foreign plaintiffs to bring suits against their own nationals for unlawful actions abroad, the United States should allow the same. Finally, Breyer disagreed that pirates do not fall under the scope of the ATS and posited that

---

64. Id. Justice Kennedy's one-paragraph concurrence is equally vague, stating simply that the opinion leaves open several "significant questions regarding the reach and interpretation of the Alien Tort Statute." Id. Justice Kennedy further mused that, in the future, violations of international law might be alleged which will require "further elaboration and explanation" of the correct use of the presumption against extraterritoriality. Id.
65. Id. at 1671.
66. Id. at 1674.
67. Id. at 1674–75 (further stating that international norms have included a duty not to allow a nation to become a safe harbor for pirates or their equivalents, the United States has a strong interest in not becoming a safe harbor for violators of international norms, and nothing in the ATS or its history suggests that U.S. courts should ignore the victims of violations of international law).
68. Id. at 1675.
modern-day pirates are those who commit torture, genocide, and other violations of international law.\(^69\)

By applying the presumption against extraterritoriality to the ATS, the Supreme Court seemed to limit the ATS's applicability regarding violations of international norms committed abroad, unless the plaintiffs could successfully rebut the presumption against extraterritoriality. Because of the majority's lack of explanation of the new "touch and concern" test and Justice Breyer's concurring opinion arguing the presumption was wrongly applied, confusion resulted in the lower courts about whether \textit{Kiobel} actually limited the ATS's applicability. Additionally, discussion of the original issue of corporate liability under the ATS was seemingly abandoned.

C. \textit{Kiobel} Caused a Circuit Split Regarding U.S. Corporate Liability for Extraterritorial Conduct

In the wake of \textit{Kiobel}, the Supreme Court's vague opinion forced lower courts to interpret unclear comments regarding corporate liability under the ATS. Specifically, courts are split regarding whether U.S. corporations may be held liable under the ATS for alleged violations of international law carried out abroad.

A successful ATS claim against a U.S. corporation includes two elements: first, corporate liability itself, meaning whether the corporation may actually be held liable under the ATS; and second, whether the alleged conduct sufficiently touches and concerns the United States to displace the presumption against extraterritoriality. The majority of courts focus on how closely connected the alleged conduct is to the United States, using the presumption against extraterritoriality to determine whether the defendant-corporation may be held liable.\(^70\) In contrast, the Ninth Circuit's recently decided case, \textit{Nestle}, focused specifically on how to determine corporate liability. The questions of corporate liability and the presumption against extraterritoriality overlap in many cases, but they are distinct analyses. While most courts focus on the location of conduct to determine

\(^{69}\) \textit{Id.} Justice Breyer further analogized that a pirate's ship from a particular nation was within that nation's jurisdiction; therefore piracy is not unlike misconduct on land. \textit{Id.} at 1672.

\(^{70}\) \textit{See} Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189 (11th Cir. 2014) (taking into account whether any alleged conduct touched and concerned the United States with enough force to rebut the presumption against extraterritoriality); Balintulo v. Daimler A.G., 727 F.3d 174, 189 (2d Cir. 2013) (interpreting the holding of \textit{Kiobel} to automatically prohibit ATS jurisdiction when the alleged conduct of a corporation occurs outside the United States).
corporate liability using the touch and concern test, this Comment, in agreement with the Ninth Circuit, focuses on corporate liability as a separate question from the presumption of extraterritoriality.

1. The Second and Eleventh Circuits interpret Kiobel to mean that U.S. corporations may not be held liable under the ATS for extraterritorial violations.

The Second and Eleventh Circuits ruled that U.S. corporations may not be held liable for actions abroad.\footnote{Chiquita, 760 F.3d at 1189; Balintulo, 727 F.3d at 193.} Both circuits understood from \textit{Kiobel} that the location of the conduct is the main issue in ATS cases rather than the citizenship of the corporation being sued.\footnote{But see \textit{In re S. Afr. Apartheid Litig.}, 15 F. Supp. 3d 454, 465 (S.D.N.Y. 2014) (allowing the plaintiffs to amend their complaint to allege conduct that sufficiently touched and concerned the United States, thus opening the door for corporate liability under the ATS, albeit through the use of the presumption against extraterritoriality, rather than immediate dismissal of such cases).}

The Second Circuit interpreted \textit{Kiobel} to mean that, under the ATS, plaintiffs cannot sue multinational corporations in the United States for actions occurring overseas, regardless of the corporations’ citizenship or whether American interests are involved.\footnote{Balintulo, 727 F.3d at 193.} Despite an extreme allegation of helping to uphold the South African government’s apartheid regime, the court held that under \textit{Kiobel}, American interests are irrelevant because the rule for corporate liability only considers \textit{where} the alleged violations took place.\footnote{Id. at 190, 192 (holding further that Supreme Court precedent cannot be re-interpreted in light of irrelevant factual distinctions such as a defendant’s citizenship because the Court’s analysis focused solely on the location of the conduct).}

The court reiterated two reasons, originally explained by the Supreme Court, for its caution in granting ATS jurisdiction. Primarily, the court cautioned against infringing on the legislative and executive branches’ management of foreign affairs by hearing cases that involve foreign countries because of the risk of causing foreign policy consequences.\footnote{Id. at 187.} The court additionally cautioned that the ATS can force judges to create federal common law, causing potentially dangerous judicial interference in foreign policy.\footnote{Id.}

Similarly, in \textit{Cardona v. Chiquita Brands International, Inc.},\footnote{760 F.3d 1185 (11th Cir. 2014).} the Eleventh Circuit held that U.S. federal courts have no jurisdiction to...
hear cases regarding torts committed abroad.\textsuperscript{78} The Eleventh Circuit focused on the "touch and concern" test briefly mentioned in the \textit{Kiobel} opinion;\textsuperscript{79} although the Supreme Court did not specifically define this test, the Eleventh Circuit understood it to mean that U.S. corporate citizenship does not sufficiently touch and concern the United States if the relevant actions took place outside of the United States.\textsuperscript{80} The court ruled that the ATS does not apply to extraterritorial torts and that all relevant conduct took place outside the United States; therefore, the alleged torts did not touch or concern U.S. territory.\textsuperscript{81} The difference from \textit{Kiobel}—the corporations’ U.S. citizenship—did not, according to the Eleventh Circuit, change the Supreme Court’s interpretation of Congress’s intent regarding the extraterritoriality of the ATS; if Congress intended otherwise, a more specific statute would be in place clearly indicating its application outside of the United States.\textsuperscript{82}

2. \textit{The Fourth and Ninth Circuits interpret Kiobel to mean that U.S. corporations may be held liable under the ATS for extraterritorial violations}

In the wake of \textit{Kiobel}, the Fourth and Ninth Circuits agreed that corporations may be held liable under the ATS, but took different approaches to reach this conclusion. The U.S. Court of Appeals for the Fourth Circuit focused on the presumption against extraterritoriality by expanding on the Supreme Court’s “touch and concern” test briefly mentioned at the end of \textit{Kiobel}.\textsuperscript{83} In \textit{Al Shimari v. CACI Premier Technology, Inc.},\textsuperscript{84} the Fourth Circuit held that the plaintiffs’ claims touched and concerned the territory of the United States with sufficient force to rebut the presumption against

\textsuperscript{78} \textit{Id.} at 1189. Four thousand Colombian citizens sued Chiquita Brands International, Inc. and Chiquita Fresh North LLC for participating in a campaign of torture and murder in Colombia. \textit{Id.} at 1188. Chiquita allegedly reviewed, approved, and concealed payments and weapons shipments to Colombian paramilitary organizations, allegedly violating the ATS. \textit{Id.} at 1192 (Martin, J., dissenting).


\textsuperscript{80} \textit{Chiquita}, 760 F.3d at 1189 (emphasizing that the mere fact that a defendant is a U.S. corporation as opposed to a corporation who is present in the United States does not confer ATS jurisdiction because the difference does not indicate Congressional intent for the ATS to apply extraterritorially). The court explained that a more specific statute would be required if Congress intended otherwise, but "[t]here is no other statute" so "[t]here is no jurisdiction." \textit{Id.}

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Al Shimari v. CACI Premier Tech., Inc.}, 758 F.3d 516, 529 (4th Cir. 2014).

\textsuperscript{84} 758 F.3d 516 (4th Cir. 2014).
extraterritoriality. The plaintiffs, Iraqi citizens, sued a military contractor, alleging abuse and torture at the hands of U.S. military personnel in Abu Ghraib prison in Iraq. American citizens, under a contract between an American corporation and the U.S. government, carried out the violations at a military facility operated by the U.S. government, and the corporation facilitated these activities because managers knew about the misconduct and tried to cover it up while also encouraging it. The court reconciled the presumption and the “touch and concern” language to mean that the presumption bars jurisdiction unless a fact-based analysis shows a close connection to U.S. territory sufficient to displace the presumption.

While the Fourth Circuit focused on expanding the “touch and concern” test and the presumption against extraterritoriality, the Ninth Circuit adopted a norm-by-norm analysis to determine corporate liability, treating corporate liability as a separate analysis and not focusing on the presumption at all. Doe I v. Nestle U.S.A., Inc. is the most recent case law regarding U.S. corporate liability under the ATS, and the case specifically sets out steps to determine whether corporate liability may be achieved on a case-by-case basis. In contrast to the Fourth Circuit, the Ninth Circuit broke down its corporate liability analysis into two parts: first, under what

85. Id. at 520.
86. Id. at 521–22.
87. Here, the claims sufficiently touched and concerned the United States because of several factors: the plaintiffs alleged that U.S. citizens committed torture; CACI was incorporated in the state of Virginia; the torture allegedly occurred at a facility operated by U.S. government personnel; a government office in the state of Arizona issued CACI's military contract between CACI and the U.S. Department of the Interior; CACI collected payments by sending invoices to Colorado; the U.S. Department of Defense required CACI interrogators to obtain security clearances; and CACI managers in the United States allegedly knew of reports of misconduct abroad, tried to cover up these incidents, and encouraged such misconduct. Id. at 528–29. The Fourth Circuit, therefore, rejected the Second Circuit's “touch and concern” test “by considering a broader range of facts than the location where the plaintiffs' were injured. Id. at 529.
88. Al Shimari, 758 F.3d at 528 (“It is not sufficient merely to say that because the actual injuries were inflicted abroad, the claims do not touch and concern United States territory.”). The court also pointed out that the principle underlying the presumption—avoiding discord between U.S. laws and laws of other nations—did not exist in this case; because the ATS is jurisdictional, not a statute outlining conduct, international norms enforced under it are recognized as actionable by other nations so there is no potential for discord. Id. at 529–30.
90. 766 F.3d 1013 (9th Cir. 2014).
91. Id. at 1021–22.
circumstances corporations can be liable for ATS claims; and second, whether recovery is permissible using the touch and concern test. The Ninth Circuit adopted a norm-by-norm analysis of corporate liability, which analyzes each norm alleged to determine its nature and scope, and ultimately determines whether the corporation can be sued in federal court for that claim. The court adopted this approach instead of a per se rule of either corporate liability or corporate immunity under the ATS; as a result, the court implicitly emphasized that corporate liability and the presumption against extraterritoriality are different but related concepts, each presenting an obstacle to finding ATS liability.

In Nestle, former child slaves forced to harvest cocoa in the Ivory Coast brought action against multinational companies that essentially controlled Ivorian cocoa production. The plaintiffs alleged that the companies were liable under the ATS for aiding and abetting child slavery in the Ivory Coast. The district court dismissed the case for failure to state a claim after concluding that corporations cannot be sued under the ATS. On appeal, the Ninth Circuit held that there is no categorical rule of corporate immunity or liability under the ATS and that the universal norm of international law of the prohibition against slavery supported the plaintiffs’ ATS claim. The court explained that corporate liability does not depend on international precedent enforcing legal norms against corporations; rather, it is determined by a case-by-case analysis.

The Ninth Circuit took particular note of what gave rise to the allegations. The defendants dominated the international cocoa industry, which primarily depends on farms in the Ivory Coast.

92. *Id.* at 1022. The court only addressed the first question because it permitted plaintiffs to amend their complaint in light of *Kiobel,* allowing them to allege conduct that touches and concerns the United States. *Id.* at 1029 (Rawlinson, J., concurring in part and dissenting in part).

93. *Id.* at 1021.
94. *Id.* at 1017.
95. *Id.* at 1016.
96. *Id.*
97. *Id.* at 1018.
98. *Id.* at 1022.
99. *Id.* at 1021. However, universal and absolute norms can still be considered a precedential basis for ATS claims against corporations. *Id.*
100. *Id.* at 1022 (ruling that the determination of when a corporation can be held liable under the ATS involves two steps: (1) apply customary international law to determine the nature and scope of the norm underlying the plaintiff’s claim, and (2) apply domestic tort law to determine whether recovery from the corporation is permissible).
101. *Id.* at 1017.
While the defendants themselves did not own the farms, they had exclusive buy-sell relationships with the farmers and imported most of the Ivory Coast’s cocoa.\textsuperscript{102} Further, the defendants provided financial and technical support to the farms and visited them several times per year.\textsuperscript{103} These financial and technical provisions were used to enforce child slavery on the cocoa farms; the children were underfed, whipped and beaten, and forced to work fourteen hours a day for six days a week.\textsuperscript{104} Guards tortured children that tried to escape, using methods such as cutting their feet and forcing them to drink urine.\textsuperscript{105}

The plaintiffs’ case focused on the facts of the alleged violation. They set forth facts to prove that the defendants knew about the child slavery;\textsuperscript{106} continued to supply money, equipment, labor, and training, despite knowing it would be used to compel forced child labor; and successfully lobbied against congressional efforts to stop child labor, ensuring the adoption of a \textit{voluntary} enforcement system of choosing whether to certify products as slave-free, instead of Congress’s original proposal of such a system being \textit{required}.\textsuperscript{107} However, the defendants argued that the plaintiffs’ case was an improper extraterritorial application of federal law contrary to \textit{Kiobel} based on their further argument that there was no specific, universal, and obligatory norm preventing corporations from aiding and abetting slave labor.\textsuperscript{108}

The court based its reasoning on precedent regarding ATS liability generally and on precedent regarding corporate liability. First, the court explained its interpretation of ATS liability, relying on \textit{Filartiga} and \textit{Sosa}. \textit{Filartiga} indicated that the ATS is designed to open federal courts for cases regarding rights recognized by international law.\textsuperscript{109}

\begin{itemize}
\item \textsuperscript{102} \textit{Id.}
\item \textsuperscript{103} \textit{Id.} (stating that the financial assistance consisted of advanced payment for cocoa and spending-money for the farmers’ personal use, and the technical support consisted of equipment and training in growing and fermentation techniques, farm maintenance, and labor practices).
\item \textsuperscript{104} \textit{Id.} at 1017.
\item \textsuperscript{105} \textit{Id.}
\item \textsuperscript{106} The plaintiffs asserted that the defendants had such knowledge because of various reports and through their visits to the farms. \textit{Id.}
\item \textsuperscript{107} \textit{Id.} The Ninth Circuit stated that the defendants’ Congressional lobbying “in effect, guarantee[d] the continued use of the cheapest labor available to produce [cocoa]—that of child slaves.” \textit{Id.} at 1017–18.
\item \textsuperscript{108} \textit{Id.} at 1020.
\item \textsuperscript{109} \textit{Id.} at 1018.
\end{itemize}
Similarly, the Supreme Court in *Sosa* stated that federal courts can hear tort claims based on a limited set of violations of international law.  

Second, the court developed its corporate liability analysis by reaffirming its ruling in *Sarei* and the distinction between the functions of international and domestic laws. Because the main focus of international law is the conduct of states, the Ninth Circuit focused on whether the asserted norm is applicable to both state and private actors. The Ninth Circuit answered this issue using its norm-by-norm analysis from *Sarei*.

In *Sarei*, the Ninth Circuit required a norm-by-norm analysis to determine whether international law extends a norm against a specific act to the actor in question. Specifically, for each individual ATS claim, courts should look to international law to determine whether corporations are subject to the norms underlying that claim by performing a norm-by-norm analysis of corporate liability.

The universality of the norm in question determines whether corporations may be held liable for violating that norm: the international norm allegedly violated must be definite and universally accepted, and universal norms are applicable to corporations as well as individuals. The *Sarei* court reasoned that it would be inconsistent with the universality of such norms to allow entities to avoid liability by incorporating in a certain country.

---

110. *Id.* (stating that the Court in *Sosa* reasoned that federal common law creates tort liability for violations of international legal norms, and the ATS gives federal courts jurisdiction to hear these claims; therefore, ATS claims can invoke rights created by the law of nations).

111. *Id.* at 1020–21 (stating that if the defendant is a private actor, such as a corporation or individual, courts should consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued" (citing *Sosa* v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004))).

112. *Id.* at 1021. *Sarei* held that universal norms, which are applicable to all actors including states, individuals, and groups, provide the basis for ATS claims against corporations. *Sarei* v. Rio Tinto, P.L.C., 671 F.3d 736, 748 (9th Cir. 2011), *vacated on other grounds*, 133 S. Ct. 1995 (2013). To determine whether norms are universal, courts should consider whether the norm is limited to states and whether its application depends on the identity of the perpetrator. *Id.* at 760. The Ninth Circuit reasoned that universal norms are also applicable to corporations, and when the applicability of such norms depends on the identity of the victims (in other words, the court considers whether the norm protects the victims without regard to who or what entity commits the violation), corporations may be held liable. *Nestle*, 766 F.3d at 1021.

113. See *Sarei*, 671 F.3d at 760.


115. *Nestle*, 766 F.3d at 1021.

116. *Id.* (citing *Sarei*, 671 F.3d at 760).
Circuit further reasoned that to determine whether norms are universal, courts should consider whether the scope of the norms is limited to states—international norms that are universal, or applicable to private individuals or groups as well as to states and state actors, are also applicable to corporations.\textsuperscript{117} For example, the International Court of Justice determined that the international norm against genocide may be violated by a state, an amorphous group, or a private individual; because of the norm's universality, the Ninth Circuit extended the applicability to corporations.\textsuperscript{118} While the Ninth Circuit in \textit{Sarei} justified holding corporations liable by using examples of precedent applying international norms to corporations, it specifically stated that the absence of international decisions or precedent enforcing legal norms against corporations does not mean corporate liability for violations of international norms is impossible under the ATS.\textsuperscript{119}

The Ninth Circuit in \textit{Nestle} concluded its corporate liability analysis by establishing the distinction between the roles of international and domestic law.\textsuperscript{120} International law controls whether international legal norms provide bases for ATS claims against corporations, whereas domestic law governs questions about civil liability and litigation.\textsuperscript{121}

The Ninth Circuit's norm-by-norm analysis uses the universality of norms and case-specific facts to determine corporate liability before considering the presumption against extraterritoriality. Although the Fourth Circuit found corporate liability under the ATS, so far the Ninth Circuit is the only circuit court to separate the presumption against extraterritoriality and corporate liability analysis.

\begin{itemize}
  \item \textit{Lower courts are moving towards separating the corporate liability and presumption against extraterritoriality analyses}
\end{itemize}

Despite recent lower courts' primary focus on the presumption against extraterritoriality analysis, \textit{Doe I v. Exxon Mobil Corp.}\textsuperscript{122} implies a trend towards accepting corporate liability. In \textit{Exxon Mobil}, the court

\begin{footnotesize}
\begin{enumerate}
  \item Id. (citing \textit{Sarei}, 671 F.3d at 760, 765).
  \item \textit{Sarei}, 671 F.3d at 760. The prohibition against slavery, at issue in \textit{Nestle}, is a universal norm and can be applied to corporations. \textit{Nestle}, 766 F.3d at 1022 (recognizing the fact that private, non-state actors were held liable at Nuremburg for slavery, that certain statutes of International Criminal Tribunals use the language "persons responsible," and that it would be against the absolute and universal prohibition on slavery and the underlying moral imperative that justifies the prohibition to allow entities to escape liability by incorporating).
  \item \textit{Nestle}, 766 F.3d at 1022 (citing \textit{Sarei}, 671 F.3d at 760–61).
  \item Id.
  \item Id.
  \item 69 F. Supp. 3d 75 (D.D.C. 2014).
\end{enumerate}
\end{footnotesize}
implied that corporate liability and the "touch and concern" test are two different tests that must be applied when determining corporate liability under the ATS.123 Most importantly, when discussing whether liability existed for this particular case, the court did not mention the issue of corporate liability under the ATS.124 The court merely stated that liability for aiding and abetting is available under the ATS because it is established in the law of nations, implying that corporate liability was not a separate bar to ATS liability in this particular case.125

While lower courts are not producing uniform decisions, some are beginning to find U.S. corporations liable under the ATS for conduct that occurs abroad. Whether the alleged actions are sufficient to allow plaintiffs to succeed is still of much debate; however, this trend is significant because it sheds light on the future of ATS litigation. While to some, "mere corporate presence" might be too analogous to U.S. corporate citizenship to displace the presumption,126 to others, including federal courts, U.S. residency in addition to a violation of a universally applicable international norm supports the notion that U.S. corporations themselves can be sued under the ATS in federal courts.127 Therefore, contrary to some scholarly opinion, the use of

123. Id. at 96 (alleging that management decisions related to Exxon's activities in Indonesia were made in the United States, officials in the United States implemented decisions to hire more security for Exxon's facilities in Indonesia, and that Exxon provided support to their military personnel; but the plaintiffs did not state where Exxon planned or authorized the support, or if any support came from the United States).

124. See id. at 93-94.

125. See id. While Ninth Circuit decisions are not controlling in the District of Columbia, applying the Ninth Circuit's norm-by-norm analysis would strengthen the District Court's conclusion that U.S. corporate liability was available under the ATS by establishing the reasoning behind such liability. But see In re S. Afr. Apartheid Litig., 56 F. Supp. 3d 331, 338-39 (S.D.N.Y. 2014) (holding that no relevant corporate conduct touched or concerned the United States, dismissing the claim for lack of jurisdiction under the ATS because of Balintulo's binding precedent), aff'd, Balintulo v. Ford Motor Co., 796 F.3d 160, 171 (2d Cir. 2015) (failing to decide whether "customary international law recognizes the asserted liability of the Companies").


127. See Exxon Mobil, 69 F. Supp. 3d at 97 (allowing the plaintiffs to amend their complaint following Kiobel to allege conduct sufficiently touching and concerning the United States); In re S. Af., 56 F. Supp. 3d at 339 (same); Joel Slawotsky, Corporate Liability Under the Alien Tort Statute: The Latest Twist, LAW AT THE END OF THE DAY (Apr. 26, 2014), http://lcbackerblog.blogspot.com/2014/04/joel-slawotsky-on-corporate-liability.html (mentioning the possibility that U.S. residency precludes U.S.
the ATS to litigate overseas human rights violations is still relevant, and other avenues of litigation need not be explored.\textsuperscript{128}

Despite the ATS's jurisdictional nature, the Supreme Court applied the generally conduct-related presumption of extraterritoriality to the jurisdictional statute, which served to limit the pre-\textit{Kiobel} functions of the ATS and caused a circuit split. The Supreme Court's limitations emphasized caution to lower courts deciding ATS jurisdiction in light of concerns regarding unwanted foreign policy consequences and intruding on the political branches' power over foreign policy decisions. Therefore, because these concerns—the very principles underlying the presumption against extraterritoriality—apply to the ATS, the Court ruled that the presumption applies to the ATS.\textsuperscript{129} Since \textit{Kiobel} created confusion among lower courts, only two circuits, the Fourth and Ninth, allow for U.S. corporate liability. The Ninth Circuit's approach of separating the analysis of corporate liability from the presumption against extraterritoriality should be adopted because a corporation's liability should not depend on, and is not related to, the location of its actions.

II. ANALYSIS

This Part argues that the Ninth Circuit's norm-by-norm analysis used in \textit{Nestle} is the best approach to determine whether U.S. corporations may be held liable for alleged violations of international norms occurring outside the United States. The Ninth Circuit's universality test\textsuperscript{130} ensures that domestic corporations are held accountable for their actions abroad.\textsuperscript{131} A blanket rule against corporate liability, as adopted in the Second and Eleventh Circuits, confines the applicability of the ATS to very narrow circumstances and allows U.S. corporations to freely violate international law

\begin{itemize}
\item \textsuperscript{128} See Roger P. Alford, \textit{The Future of Human Rights Litigation After Kiobel}, 89 \textit{Notre Dame L. Rev.} 1749, 1754 (2014) (arguing that \textit{Kiobel} severely limited the usefulness of the ATS because the presumption against extraterritoriality essentially precludes most litigation under the statute).
\item \textsuperscript{129} See supra Part I.B.1 (explaining in detail the Supreme Court's justification for applying the presumption against extraterritoriality to the ATS).
\item \textsuperscript{130} See Sarei v. Rio Tinto, P.L.C., 671 F.3d 736, 760, 765 (9th Cir. 2011), \textit{vacated on other grounds}, 133 S. Ct. 1995 (2013) (declaring the universality test, which states that international norms that are universal, or applicable to private individuals and/or groups as well as to states and state actors, are also applicable to corporations).
\item \textsuperscript{131} \textit{Infra} Part II.A.1.
\end{itemize}
overseas. Such limited use of the ATS severely reduces the statute’s effectiveness—Congress would not have passed the ATS if it intended the chances of use to be negligible. Additionally, the norm-by-norm analysis complies with the jurisdictional purpose of the ATS. Unlike the presumption against extraterritoriality, which determines the existence of jurisdiction by looking at whether a statute regulates conduct abroad, the norm-by-norm approach determines whether the norm is internationally definite and accepted under Sosa and, if so, whether it is universally applicable to state and non-state actors (including corporations). By adjudicating U.S. corporations’ overseas misconduct, federal courts will not impinge on any foreign policy issues or interfere with another nation’s laws—one of the reasons for passing the ATS; when a U.S. corporation violates international norms, federal courts should have jurisdiction because domestic U.S. interests are strongly implicated and international norms are universally accepted. Further, the ATS should remain the primary method of adjudicating alien torts to ensure equal treatment of foreign corporations with a presence in the United States and U.S. corporations.

From a policy standpoint, this Part argues that U.S. corporations that know of or encourage violations of international norms must be held accountable in federal courts under the ATS. Under Kiobel, U.S. corporations would escape liability under the ATS for violating international norms by virtue of being corporations. The Ninth Circuit reasoned that such circumvention of liability is contrary to the universality of international norms that are recognized as federal

133. See Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1663 (2013) ("Congress did not intend the [ATS] to be stillborn." (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004))); id. at 1669 (Kennedy, J., concurring) ("Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the [Torture Victim Protection Act] nor by the reasoning and holding of today’s case [concerning the ATS]; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.").
134. Id. at 1664.
137. Infra Part II.B.3.
138. The majority in Cardona v. Chiquita Brands International, Inc. says this circumvention of liability is a foreign policy issue rather than a legal issue, and is not for courts to decide or consider. 760 F.3d 1185, 1191 (11th Cir. 2014).
common law claims under the ATS. Further, circumvention of liability by incorporating in the United States would effectively mean that the Supreme Court's caution against becoming a safe harbor for those who violate international norms, expressed in Breyer's concurrence in *Kiobel*, would be ignored. Finally, although there are many convincing arguments that *Kiobel* pushed ATS litigation to state courts and state law, this would likely result in little conformity in the application of various states' laws. In turn, this would create larger foreign policy implications than would simply allowing federal courts to apply one federal law in a uniform, cautious manner.

A. A Norm-by-Norm Analysis Should Be Adopted to Determine U.S. Corporate Liability under the ATS

Allowing corporations to escape liability for violating international norms by virtue of where they incorporate is contrary to the universality of international norms. A norm that is universally accepted among nations; sufficiently definite and specific; and universally applicable to states, individuals, and groups, should also be applicable to all corporations. *Kiobel* restated that federal courts may only recognize causes of action under the ATS based on "definite norms" of international law, reiterating the rule established

140. *Infra* Part II.C.1.
141. *Infra* Part II.C.2.
142. *See Sarei*, 671 F.3d at 760, 765. In 2015, the Ninth Circuit denied a rehearing en banc of *Nestle*. The accompanying dissent contained two principal critiques of the majority's reaffirmation of *Sarei*'s corporate liability analysis: first, the majority's reasoning, that corporations are liable because slavery is categorically prohibited as an international norm, means that "any norm 'categorical' enough to give rise to an ATS claim . . . necessarily gives rise to corporate liability"; and second, the rule that precedent holding corporations liable for violations of international norms is not necessary for a valid claim of corporate liability under the ATS conflicts with *Sosa*'s warning that federal courts should cautiously recognize violations of international norms as new causes of action under the ATS. *Doe I v. Nestle U.S.A.*, Inc., 788 F.3d 946, 955 (9th Cir. 2015) (Bea, J., dissenting). However, a corporation is not automatically rendered liable just because a norm is universal and applicable to all actors; rather, only the possibility for corporate liability exists. Additionally, allowing recognition of an ATS claim without specific precedent holding a corporation liable for such a violation does not get rid of the requirement that courts should only recognize new ATS claims cautiously; it is merely one step in the norm-by-norm analysis that allows courts to contemplate holding a corporation liable under the ATS. Further, because there is currently no precedent holding corporations civilly liable for a violation of an international norm, requiring such precedent would eliminate corporate liability and prevent courts from progressing the law.
in Sosa. Examples of established international norms include genocide, slavery, torture, and apartheid. Allowing corporations to circumvent liability by virtue of where they incorporate is unfair because it means that international norms are universally applicable to every violator except corporations—this arguably ignores the purpose and concept of universality.

1. The Ninth Circuit's norm-by-norm analysis ensures corporations are not given special treatment, as opposed to a per se rule prohibiting corporate liability under the ATS that the Second and Eleventh Circuits have seemingly adopted.

The Ninth Circuit's reaffirmation of its fact-specific corporate liability analysis in Sarei leads to better, more appropriate, and consistent results than a bright-line rule. Under the Second and Eleventh Circuits' reasoning, corporations get special treatment regarding liability under the ATS when the alleged conduct occurs outside the United States because the presumption against extraterritoriality is understood to preclude such corporate liability entirely. However, the facts of Chiquita and Balintulo are very similar to those of Nestlé, and the violations of international norms alleged are also similar.

The severity of each of the international norms implicated in Balintulo, Chiquita, and Nestlé, as well as the facts of these cases, are strikingly similar; yet, two different outcomes resulted. First, the violation of international norms against apartheid, torture and murder, and child slavery are all equally shocking and impart severe consequences on victims. Second, the facts of each case are analogous. In Balintulo, the plaintiffs alleged that the defendants' subsidiaries aided and abetted the South African government's regime of apartheid by selling cars to the apartheid security forces and computers to the government, which were used to carry out
geographic segregation. In *Chiquita*, the plaintiffs alleged that Chiquita reviewed, approved, and concealed payments and weapons shipments to Colombian paramilitary organizations that were then used to carry out a campaign of torture and murder. In *Nestle*, the plaintiffs alleged that the defendants provided financial support, technical equipment, labor, and training to the Ivorian farmers, all of which were used to enforce child slavery on cocoa farms effectively controlled by the defendants. In each case, plaintiffs alleged that U.S. corporations knowingly sold goods to foreign nationals, which were used to carry out violations of international norms. Despite the similarities, both the Second and Eleventh Circuits dismissed the cases. The courts in *Balintulo* and *Chiquita* determined that there is no possibility of U.S. corporate liability for extraterritorial conduct under the ATS. In contrast, even the Supreme Court in *Sosa* said that, other than the three international norms the ATS was created to cover, courts have the ability to recognize new norms if they are sufficiently accepted and specifically defined.

Applying the Ninth Circuit’s norm-by-norm analysis to both cases, it is clear that these international norms (apartheid, torture, and murder) apply to U.S. corporations under the ATS, and U.S. corporations, therefore, are susceptible to liability for violating such norms. The Third Restatement of Foreign Relations Law of the United States lists the prohibitions against both torture and systematic racial discrimination as international norms. Further, these norms are generally accepted among civilized nations and courts have applied them to non-state actors. Therefore,

152. *Chiquita*, 760 F.3d at 1188.
154. See *Chiquita*, 760 F.3d at 1189 (determining that the fact of incorporation in the United States did not affect ATS liability for extraterritorial torts); *Balintulo*, 727 F.3d at 192 (asserting that even U.S. corporations cannot be liable for violations of international law committed abroad because vicarious corporate liability is unavailable under the ATS).
156. See *Nestle*, 766 F.3d at 1028 (allowing the plaintiffs to amend their complaint based on *Kiobel*, which permits the inference that Nestle is more likely to be held liable under the ATS because it is a U.S. corporation).
158. See Nixdorf, *supra* note 46, at 1556–57 (detailing the framework of what constitutes international law, which includes the customs and usages of civilized nations); see also Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530 (4th Cir. 2014) (allowing allegations of torture against U.S. corporations to be heard under
corporations can be held liable under the ATS for violating the international norms against apartheid and torture because such norms are universal, according to Nestle, meaning they are applicable to corporations. Contrasted with the actual results of Chiquita and Balintulo, the Ninth Circuit analysis ensures that U.S. corporations are held responsible for actions they commit and does not allow them to escape the possibility of liability simply by virtue of being corporations.

Therefore, it is reasonable that a universally accepted international norm should apply to corporations as well as individuals, groups, and states. In this way, the outcome under the Ninth Circuit is fairer to plaintiffs and to the United States' interests because its norm-by-norm nature produces consistent but flexible outcomes.

2. Courts should determine whether each norm at issue is applicable to the defendant-corporation to achieve uniform decisions

Determining whether each norm at issue is applicable to the defendant-corporation allows for uniform decision-making because this practice will create precedent and because courts may look to precedent to determine whether the relevant norms are universal. Although Sarei specifically stated that “the proper inquiry is not whether there is a specific precedent,” the inverse implication is that when there is precedent extending prohibition of an international norm to the perpetrator-defendant, it can be trusted and followed. Further, when there is a lack of precedent holding

---

159. See generally Doug Cassel, Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open, 89 NOTRE DAME L. REV. 1773 (2014) (arguing in favor of ATS jurisdiction over individual American nationals for overseas human rights torts, such as corporate executives); Alison Bensimon, Note, Corporate Liability Under the Alien Tort Statute: Can Corporations Have Their Cake and Eat It Too?, 10 Loy. U. Chi. Int’l L. REV. 199 (2013) (asserting that U.S. federal courts should be able to find corporations liable under the ATS for violating international law abroad); Nixdorf, supra note 46 (contending that claims of U.S. corporate liability are available under the ATS because the substance of the abuse is more important than the form of the perpetrator).


161. See Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2014) (stating that a relevant 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 . . . corporation”). The Court in Sosa found that there was no private cause of action (against an individual) in part because there was no precedent to hold an individual
corporations liable for certain norms, analyzing each norm allows courts to draw inferences in order to establish either new international norms or newly-applicable norms to corporations.\textsuperscript{162} this provides a degree of flexibility that a bright-line rule would not.

As an example of making such an inference, the Ninth Circuit reasoned that liability for violations of international norms does not depend on the identity—individual, group, or corporation—of the perpetrator, but rather on the identity of the victims, analogizing war crimes from the Geneva Conventions with universal and definite international norms.\textsuperscript{163} The Geneva Conventions protect the victims of war crimes and do not differentiate between public and private actors; instead, they focus on what protections are given to the victims.\textsuperscript{164} Civilized nations universally accept war crimes as violations of international norms.\textsuperscript{165} Therefore, because international norms against war crimes are universally applicable to whomever commits them, regardless of whether it is a private or public entity,\textsuperscript{166} other universal and definite international norms are applicable to whomever violates them.\textsuperscript{167}

A lack of U.S. precedent holding corporations liable under the ATS should not preclude that possibility in the future. When Congress enacted the ATS, its focus was on three international norms, but it could not have imagined the degree to which international liability would grow.\textsuperscript{168} The same idea, of not requiring precedent in order to find corporations liable under the ATS, was extended to international tribunals in \textit{Sarei}: just because an international tribunal has not held a corporation criminally liable under international law does not mean it could not or would not do so in the future.\textsuperscript{169} The flexibility of allowing corporations to be held

---

\textsuperscript{162} See \textit{Sarei}, 671 F.3d at 760–61 ("We, however, believe the proper inquiry is not whether there is a specific precedent [of international institutions holding corporations liable for war crimes], but whether international law extends its prohibitions to the perpetrators in question.").

\textsuperscript{163} \textit{Id.} at 765. \textit{Sarei} held a non-U.S. corporation liable, which further supports the proposition that U.S. corporations can be held liable under the ATS.

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} \textit{Doe I v. Nestle U.S.A., Inc.}, 766 F.3d 1013, 1022 (9th Cir. 2014).

\textsuperscript{168} \textit{Sarei}, 671 F.3d at 761.

\textsuperscript{169} \textit{Id.} However, the court did point to one example of a German corporation that was held \textit{civilly} liable under customary international law for helping build and
liable for violations of international norms with or without precedent allows for the real possibility of holding corporations liable for such violations and should be adopted in the corporate liability analysis.

B. Jurisdiction for Corporate Liability Should Arise Under the ATS

1. A per se rule of corporate immunity would result in a non-uniform application of the law and would potentially interfere with foreign policy

A per se rule of corporate immunity under the ATS for actions that occur overseas might force alleged violations of the law of nations to be raised in state courts, under state law, or in federal courts using foreign diversity jurisdiction. This would result in different applications of the different laws, and might cause unintended foreign policy consequences. Precedent, legislative history, and an analysis of choice of law arguments are illustrative of such an outcome.

Currently, under federal law and based on precedent from various circuit courts, the results of corporate liability cases under the ATS are not uniform. This is not to suggest that a shift to state court litigation should occur, but that adoption of the Ninth Circuit's two-part test, the norm-by-norm analysis followed by determining whether recovery is permissible, would solve this uniformity issue most effectively. Four circuit courts have come to two opposite results using the same Kiobel rationale, and lower courts are also at odds.170 Whereas the Second and Eleventh Circuits have held that there can be no corporate liability under the ATS,171 the Fourth and Ninth Circuits have held that U.S. corporations can be held liable under the ATS.172 This means that the plaintiffs currently amending their complaints (which courts are allowing because of Kiobel) cannot be certain of their chances of succeeding because of the different, vague tests used by the different circuit courts. For example, in In re South African Apartheid Litigation, the judge originally held, before Kiobel, that corporate liability was not possible under the ATS, and then held

170. See supra Part I.C (detailing the difference between the Second and Eleventh Circuits' views—which reject corporate liability for extraterritorial conduct under the ATS—and the Fourth and Ninth Circuits'—which advocate such liability—and pointing out similar reasoning in lower court cases).


the opposite after *Kiobel* and let plaintiffs amend their complaint. However, the same or similar plaintiff might experience a different outcome by bringing a case under the Ninth Circuit’s jurisdiction, where the controlling law is now *Nestle*.

The legislative history of the ATS indicates that the statute was meant to prevent unintended foreign policy consequences and to provide uniformity through cautious adjudication using federal law. First, Congress passed the ATS to prevent unintended foreign policy consequences, so violations of international norms committed abroad arising under any statute other than the ATS would directly contravene Congressional intent. The foreign policy concerns underlying the ATS are the reasons for its limited reach in recognizing only international norms that are specific, universal, and obligatory. Second, the idea that federal courts must exercise such a high degree of caution when deciding ATS cases makes it less desirable that state courts should hear such cases because they might not have the sophistication or familiarity with federal law to exercise the same amount of caution. Further, if state tort law was used as an alternative to federal law, the outcome of such suits would differ from state to state, causing confusion and non-uniformity in the types of cases that the Supreme Court emphasized require cautious decision-making. Additionally, Congress has not limited the ATS’s substantive or jurisdictional reach, but did enact other separate statutes, which allow the United States to prosecute and victims to obtain damages from foreign persons who commit violations of serious crimes (such as torture and genocide) against foreign victims abroad. This is telling of at least some legislative intent to allow corporate liability under the ATS.

173. See, e.g., *In re S. Afr. Apartheid Litig.*, 56 F. Supp. 3d 331, 332–33 (S.D.N.Y. 2014) (holding that the presumption against extraterritoriality barred jurisdiction over the plaintiffs’ ATS claims), aff’d, *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 171 (2d Cir. 2015). Ultimately, the court dismissed the plaintiffs’ case because the complaint did not allege conduct that sufficiently touched and concerned the United States under *Balintulo*. Id. at 338–39.

174. See *supra* Part I.B.1 (detailing the legislative history of the ATS and the original reasons for which it was passed).

175. See *supra* Part I.B.1 (detailing the reasons a statute was needed to help the United States avoid unintended foreign policy consequences).


177. See *id.* at 1677 (Breyer, J., concurring).
Using the logic that international law should be the source of corporate liability would also cause possible foreign policy consequences because U.S. corporations would not be held liable for extraterritorial violations of international law. Civilized nations must widely accept a certain practice or conduct for it to become customary international law, but there is no historical practice of holding corporations liable for violations of international law. The Second Circuit argued that the practice of holding corporations liable for violating international law must be customary international law for corporate liability to be cognizable under the ATS. However, prohibited conduct is what constitutes customary international law, not the procedural aspect of who may be held liable for violating it. Further, the lack of alternative sources of law that can adequately address violations of international norms means that, if the Second Circuit’s original line of reasoning is followed, U.S. corporations would automatically escape liability for harming citizens of other nations, and the ATS would have narrow applicability.

Further, looking to international law as the source of corporate liability under the ATS would result in the absence of a universality requirement, meaning that fewer corporations would be held liable. Although international law is the source of the violation, using it as the source of liability would exclude corporations from being held liable for violations of international law, contradicting the Ninth Circuit’s requirement that each international norm alleged is applicable to corporations if it is universally applicable to individuals, groups, and states. Using international law as the source of liability under the ATS would effectively create a bright-line rule of corporate immunity—an unfair result and one undesirable under the Ninth Circuit’s corporate liability analysis.

178. See supra note 46 (describing customary international law).
179. Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 127, 132, 137 (2d Cir. 2010). The Second Circuit’s opinion was technically affirmed by the Supreme Court’s decision in Kiobel; however, because its corporate liability analysis was not explicitly rejected or accepted, it is still a valid argument.
180. See infra Part II.B.2.
181. Doe I v. Nestle U.S.A., Inc., 766 F.3d 1013, 1022 (9th Cir. 2014) (ruling that norms that are universal, or applicable to all actors, can provide the basis for ATS claims against corporations).
182. Alternatively, using state law to adjudicate violations of international law would be an inadequate option as well. In Doe I v. Exxon Mobil Corp., the plaintiff’s failure to exhaust local remedies in Indonesia before bringing an action in federal court in the United States was not a bar to ATS liability. 69 F. Supp. 3d 75, 90 (D.D.C. 2014). The inference can be made that plaintiffs do not need to exhaust
2. If U.S. corporate liability for overseas violations is precluded under the ATS, the statute would be almost ineffective

Together, Kiobel and Sosa severely limited the application of the ATS, rendering it applicable only to individual perpetrators, who could be members of a corporation, as long as the conduct alleged was not extraterritorial.\(^{183}\) Kiobel significantly limited available legal remedies for violations of human rights norms by foreign corporations because of the presumption against extraterritoriality.\(^{184}\) Even before Kiobel, the Court in Sosa found no specific, universal, and obligatory norm that held foreign corporations liable for violations of international law.\(^{185}\) If that limitation on foreign corporations is combined with the inability to hold U.S. corporations liable for overseas conduct, the pool of people subject to liability under the ATS becomes very limited; it would, further, be more difficult to prove individual liability of an employee or director of a corporation rather than liability of the corporation as a whole. It does not seem reasonable to assume that Congress passed the ATS with the intent that its applicability be so limited when viewed in light of the reasons for passing the statute.\(^{186}\)

Corporate liability can exist under the ATS when extraterritorial conduct is involved. The presumption of extraterritoriality that the Supreme Court outlines in Kiobel is based on the idea that Congress legislates with respect to domestic matters rather than foreign.\(^{187}\) However, the presumption against extraterritoriality is not related to the analysis of corporate liability, and Congress enacted the ATS with foreign, not just domestic, matters in mind because of: (1) its local remedies in the United States before bringing a federal claim. This assertion is further supported by Professor Roger P. Alford, who argues that although alternative sources of law exist, they do not provide the same direct relief as the ATS, and the possibility of success under sources such as state laws is slim. Alford, supra note 128, at 1749; see infra notes 228–36, 238 and accompanying text (detailing Alford’s arguments regarding alternative sources of law, including state statutes that regulate unfair business and consumer fraud).

\(^{183}\) See Bird et al., supra note 25, at 608–09.
\(^{184}\) See id. at 617.
\(^{185}\) Id. at 608.
\(^{186}\) See supra Part I.B.1 (detailing the reasons for passing the ATS). Piracy was a violation of the law of nations at the time the ATS was passed; because piracy necessarily occurs in foreign territory but, at the same time, is grounds for ATS jurisdiction, it does not logically follow that the presumption against extraterritoriality should prevent ATS liability for corporations that act similarly to pirates in that they commit the same kinds of acts. Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1672–73 (2013) (Breyer, J., concurring).
reference to aliens, treaties, and the law of nations; the purpose of addressing violations of the law of nations and therefore judicial remedies for international laws; and one of the three original violations Congress passed the ATS to combat, piracy, occurs abroad. Further, the ATS is meant to address international law because it has historically been used to apply universally accepted international norms to violators who attempt to avoid liability by doing business in the United States.

Therefore, several inferences can be made regarding the extraterritorial application of the ATS. First, holding U.S. corporations liable for violations of international norms committed overseas does not involve the types of serious international affairs conflicts Congress may have imagined at the time of enactment. Congress necessarily intended the ATS to have some international application because of its wording, purpose, and reasons for enactment, and when a U.S. corporation is held liable by the U.S. Government for inflicting harm on foreigners, it does not logically follow that foreign policy is implicated. Second, because Congress passed the ATS with at least some extraterritorial application in

188. Alien Tort Statute, 28 U.S.C. § 1350 (2012) ("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." (emphasis added)).
190. Kiobel, 133 S. Ct. at 1673 (Breyer, J., concurring); see supra note 186 (explaining that piracy occurs abroad, so the ATS should apply abroad).
192. See Irit Tamir, Child Laborers Bring Case Against Food Companies: "You're Enabling Enslavement", POLITICS OF POVERTY (Sept. 26, 2014), http://politicsofpoverty.oxfamamerica.org/2014/09/child-laborers-bring-case-food-companies-youre-enabling-enslavement (stating that finding the defendants in Doe I v. Nestle U.S.A., Inc. liable could impact how wages and working conditions factor into companies' business models, but not contemplating any impact such a finding would have on U.S. foreign policy); see also William O'Brien et al., Ninth Circuit to Corporations—No Blanket Immunity for Violations of International Law, MCKENNA LONG & ALDRIDGE LLP (Sept. 23, 2014) (on file with author) (listing several implications of Nestle on ATS corporate liability, none of which include an impact on U.S. foreign policy). It could be argued that because corporations that would be found liable under the ATS are likely employing foreign actors to achieve their foreign business objectives—such as in Nestle, which involved the conduct of Ivory Coast officials—foreign policy is implicated. However, U.S. courts will only be looking at what the U.S. corporation did or directed and any ruling against the corporation would not necessarily have any effect on the foreigners involved, thereby implicating only U.S. interests and not causing any foreign policy consequences for the U.S. government.
mind, excluding U.S. corporations from liability under the ATS would render the statute relatively ineffective. For example, in both Balintulo and Chiquita, U.S. corporations entirely escaped liability for violating the international norms of apartheid and torture, respectively. However, if the Second and Eleventh Circuits applied the Ninth Circuit’s reasoning, the plaintiffs would have had recourse and the corporations would have faced responsibility for committing such heinous human rights violations. Therefore, because Congress intended the ATS to apply internationally and could not reasonably have intended the statute to have very limited application, corporate liability under the ATS may exist where U.S. corporations commit violations of international norms in foreign countries.

3. **Basing corporate liability on the location of the conduct, rather than on the kind of violation, encourages corporations to circumvent liability by violating international norms in foreign countries, thereby essentially precluding U.S. corporate liability altogether.**

Applying the presumption of extraterritoriality to ATS litigation creates an incentive for U.S. corporations to move their operations overseas. The presumption of extraterritoriality assumes that statutes that do not clearly indicate application abroad are not applicable outside of the United States. However, the presumption would be overcome if violations of international norms occurred in the United States. If courts ignore the first half of the Ninth Circuit’s analysis—the determination of applicability of the norm to the corporation—because the conduct occurred outside the United States, they will create an incentive for corporations to violate international norms overseas instead. Foreign companies that do business in the United States will be able to use Kiobel to escape liability, and, at the same time, Kiobel encourages U.S. corporations to move their operations outside the United States so they can do the

193. See supra Part I.C.1 (explaining how these corporations escaped liability under the ATS).
194. See supra Part II.A.1 (describing that by applying the Ninth Circuit’s norm-by-norm analysis to Balintulo and Chiquita, cases very similar to Nestle, the defendant-U.S.-corporations would face liability for their actions under the ATS).
195. Kiobel, 133 S. Ct. at 1664.
196. See id. at 1669 (ruling that ATS jurisdiction did not exist because all relevant conduct took place outside the United States, therefore implying that if relevant conduct occurred in the United States, the Court might have found jurisdiction); see also Cardona v. Chiquita Brands Int’l, Inc., 760 F.3d 1185, 1189 (11th Cir. 2014) (same); Balintulo v. Daimler A.G., 727 F.3d 174, 189–90 (2d Cir. 2013) (same).
same. Additionally, the purpose of the ATS is to prevent conflicts of foreign policy. If it is perceived that U.S. law encourages U.S. corporations to carry out violations of international norms overseas to avoid liability, the legislative intent behind the ATS is subverted.

C. The Negative Implications of Letting U.S. Corporations Evade Liability Through a Bright Line Corporate Immunity Rule Outweigh the Ease of Such a Rule

Even though a bright-line rule precluding U.S. corporate liability when all relevant conduct occurs overseas would result in easy application and uniform decisions, the negative implications of letting U.S. corporations evade liability must be understood to outweigh the ease of such a bright-line rule. The United States will become a safe harbor for corporate criminals if “mere corporate presence,” including incorporation, in the United States is enough to preclude corporate liability. Without the possibility of recovery against U.S. corporations under the ATS, plaintiffs are faced with limited alternative methods of recovery that provide dubious

198. See Redford, supra note 191 (“[T]he majority’s reasoning overlooks the strong reasons against holding U.S. companies to a higher standard than foreign companies who do business . . . here.”).
200. Although not the focus of this Comment, helpful context is provided by understanding that most courts have focused on a version of a bright-line rule in trying to determine whether the alleged conduct sufficiently touched and concerned the United States to displace the presumption. See Nestle, 766 F.3d at 1022 (remanding to the District Court to determine, under domestic law, whether recovery from the corporation is permissible in terms of, for example: joint or several liability, damages computation, and proximate causation); Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75, 97 (D.D.C. 2014) (allowing plaintiffs to amend their complaint to restate their ATS claims and allege additional facts showing their claims sufficiently touch and concern the United States to displace the presumption). The Exxon court, by allowing the plaintiffs to amend their complaint, implied that what had previously been alleged—only U.S. corporate citizenship—would not be sufficient to touch and concern the United States. Exxon Mobil, 69 F. Supp. 3d at 96; see also In re S. Afr. Apartheid Litig., 56 F. Supp. 3d 351, 353 (S.D.N.Y. 2014), aff’d, Balintulo v. Ford Motor Co., 796 F.3d 160, 171 (2d Cir. 2015). On the other end of the spectrum are the circumstances in Al Shimari, where the court found sufficient connection to the United States. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 520 (4th Cir. 2014); see supra Part I.C.2 (explaining the details of Al Shimari). The circumstances of this case obviously implicated U.S. territory and citizens sufficiently to allow jurisdiction under the ATS, but when compared to cases such as Exxon, In re South African, Balintulo, or Chiquita, the facts seem to be on the extreme end of the spectrum of conduct that touches and concerns the United States. See supra Part I.C (detailing the facts of each case).
201. Kiobel, 133 S. Ct. at 1669.
202. See infra Part II.C.1.
prospects of success. The presumption of extraterritoriality does not directly apply to the ATS, so the presumption should not be determinative of corporate liability under the ATS; rather, its principles should only be a consideration in the corporate liability analysis. Finally, Kiobel does not necessarily reject U.S. corporate liability for extraterritorial violations of international law because the Supreme Court did not explicitly reject or accept the Second Circuit's original reasons for dismissing the case, and the Court did not fully explain the meaning or application of its new "touch and concern" test.

1. The United States would become a safe haven for corporations in which to have a "presence" or incorporate to escape liability

The United States' interest against becoming a safe harbor for violators of international norms should be treated as a jurisdictional interest, which, therefore, justifies the use of the ATS, a jurisdictional statute. Nothing in the statute or in United States history suggests that U.S. courts should ignore international crime victims. Justice Breyer's concurrence in Kiobel states that liability under the ATS should occur, among two other situations, where the defendant's conduct substantially and adversely affects an important U.S. national interest, including a distinct interest in preventing the United States from becoming a safe harbor, free of criminal and civil liability, for a torturer or other enemy. Justice Breyer additionally argued that the proper restriction on the use of the ATS should be providing jurisdiction only where distinct American interests are at issue, rather than only providing jurisdiction where the conduct occurs in the United

203. See infra Part II.C.2.
204. The ATS is a jurisdictional statute, whereas the presumption against extraterritoriality is applied to determine whether a statute regulating conduct applies abroad. Kiobel, 133 S. Ct. at 1664.
205. See infra Part II.C.3.
206. See infra Part II.C.4.
207. Kiobel, 133 S. Ct. at 1674 (Breyer, J., concurring); see also Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530 (4th Cir. 2014) (using the Torture Victim Protection Act and 18 U.S.C. § 2340A to demonstrate that Congress intended to prevent the United States from becoming a criminal and civil safe harbor for torturers and other violators, and inferring that the same congressional intent applies to the ATS because the Supreme Court knew about these statutes when it decided Kiobel and mentioned its new "touch and concern" test).
208. Kiobel, 133 S. Ct. at 1671 (Breyer, J., concurring) (proposing to also find jurisdiction under the ATS where: (1) the alleged tort occurs on U.S. soil, or (2) the defendant is a U.S. national).
209. Id.
210. See id. at 1674.
States, because the latter option leaves courts to decipher what conduct sufficiently touches and concerns the United States.\footnote{Kiobel} Without such a safe harbor rule, U.S. corporations could easily evade liability under the ATS merely by violating international law abroad.\footnote{Redford}

Further, international norms have historically included the duty to prevent a nation from becoming a safe harbor for pirates and their modern-day equivalents.\footnote{Filartiga and In re Estate of Marcos, Human Rights Litigation} held that the ATS claim in each case was proper, even though the alleged conduct occurred overseas by foreign persons, because the defendants were in the United States for a period of time before being sued.\footnote{Kiobel} The courts conferred jurisdiction in each case in part because of America's interest in not providing safe harbor for such defendants, thereby ensuring defendants would not be free of all liability.\footnote{Kiobel} While both of these cases were decided before Kiobel, in neither case were the foreign defendants in the United States for very long before the plaintiffs filed suit; thus, while the Court in Kiobel stated that "mere... presence" of corporations is not enough connection to the United States to satisfy the presumption against extraterritoriality, mere presence of individuals in the United States sufficed before the Court ever applied the presumption. Treating the United States' strong interest against becoming a safe harbor for criminals as a justification for ATS application accords with the jurisdictional nature of the statute and is therefore a strong justification for U.S. corporate liability under the ATS.

2. Without the Ninth Circuit's norm-by-norm analysis under the ATS, U.S. corporations can easily avoid both U.S. and international law, and plaintiffs would have very limited avenues for recovery.

Without the Ninth Circuit's norm-by-norm analysis under the ATS, U.S. corporations would have a simple and effective way of avoiding U.S. and international law. Further, without the possibility of recovery

\footnote{Kiobel did not explain what conduct would sufficiently touch and concern the United States to rebut the presumption against extraterritoriality. See id. at 1669.}
\footnote{Redford, supra note 191.}
\footnote{Kiobel, 133 S. Ct. at 1674.}
\footnote{25 F.3d 1467, 1469 (9th Cir. 1994) (involving a successful ATS claim by Filipino citizens against the former president of the Philippines for death by torture that allegedly occurred abroad, where the former president had been living in Hawaii for only one month before being sued).}
\footnote{Kiobel, 133 S. Ct. at 1675 (citing Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) and In re Estate of Marcos, 25 F.3d at 1469, 1475).}
\footnote{Id.}
under the ATS, there are few alternative avenues of recovery for plaintiffs to pursue, and these sparse options would provide only limited success.

Chiquita provides an example of how easily U.S. corporations can evade repercussions for violating international norms. Chiquita was a U.S. corporation, and the ATS was intended to create a cause of action for torts committed by Americans outside the United States. The plaintiffs alleged that Chiquita committed a violation of international law, actionable under the ATS, by authorizing payments to paramilitary groups in Colombia used to torture the plaintiffs. The majority's decision to dismiss the case, therefore, leaves innocent people without recourse against U.S. corporations that engage in violations of international norms abroad.

Scholars have suggested that Kiobel substantially limited plaintiffs' abilities to file ATS claims in federal court. For example, Professor Donald Childress argues that it is unlikely that most plaintiffs would succeed in suing a U.S. corporation under the ATS for conduct committed outside the United States for two reasons. First, Childress asserts that U.S. domicile is closer to "mere corporate presence," which does not overcome the presumption against extraterritoriality, than to conduct, which does. Second, he reminds us that the presumption is about the location of the conduct, not the identity of the defendant. While the arguments seem persuasive, it is difficult to believe that Congress would have passed a statute with the intent that it apply only to a very small area of the law. Further, because the presumption does not neatly apply to a jurisdictional statute like the ATS, it should not be applied so rigidly as to be the sole determinant of corporate liability under the ATS.

220. Childress, supra note 126.
221. Id.
222. Id.
223. See supra Part II.B.2.
224. See infra Part II.C.3.
Childress further argues that plaintiffs would not prevail under the ATS even when the injury occurred abroad but some tortious conduct occurred in the United States that itself violated the law of nations. He concludes that plaintiffs can only proceed under the ATS when they are injured in the United States, or when substantial activities occur in the United States that violate the law of nations even though the injury happened abroad. However, if the Supreme Court’s “touch and concern” language in Kiobel literally meant that conduct must touch the United States, which Childress implies, extraterritoriality would not be an issue to rebut and the presumption would not apply, ultimately invalidating any party’s use of the argument that the ATS does not apply extraterritorially, as well as the Supreme Court’s mention of the touch and concern test.

Alternatives to the ATS exist, but there are few and provide only uncertain success for plaintiffs. Alternatives include the Torture Victim Protection Act (TVPA), the Racketeer Influenced and Corrupt Organizations Act (RICO), and state laws, including state statutes that regulate unfair business practices and consumer fraud. However, these alternatives present plaintiffs with little chance of success. Under the TVPA, claims must be brought against individuals acting under the color of authority of the foreign state, meaning that corporations or corporate officials who conspired or acted with foreign governments are excluded from TVPA liability.

225. Childress, supra note 126 (positing that a claim that a U.S. corporate official directed corporate agents in a foreign country to take action that allegedly violated the law of nations would be unsuccessful unless the action of directing corporate officials to carry out the illegal conduct violates an international norm).

226. Id.

227. See Oona Hathaway, Kiobel Commentary: The Door Remains Open to "Foreign Squared" Cases, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases (explaining that, regarding the meaning of touch and concern, “[i]t cannot be that the claim must literally ‘touch’ U.S. soil, for then extraterritoriality would clearly not be at issue”); Kristen Linsley Myles & James Rutten, Kiobel Commentary: Answers . . . and More Questions, SCOTUSBLOG (Apr. 18, 2013, 2:07 PM), http://www.scotusblog.com/2013/04/commentary-kiobel-answers-and-more-questions (“[I]f conduct violating the law of nations takes place in the United States, the presumption against extraterritoriality is irrelevant because the conduct would not be extraterritorial in the first place.”).

228. Alford, supra note 128, at 1749.

229. Id. at 1756.
Success under RICO is not as unreachable as under the TVPA, but it is uncertain. Courts either treat RICO as focusing on the location of the enterprise or both the location and impact of the conduct of the enterprise. Because the presumption against extraterritoriality applies to RICO claims and it is unclear how RICO would apply to a domestic enterprise whose effects are felt abroad, a plaintiff's success would be as uncertain under RICO as it currently is under the ATS.

While plaintiffs succeed more easily under state statutes regulating unfair business practices and consumer fraud, they would not directly recover for their actual injuries. Claims in such cases are based on injuries to competitors of defendant-corporations or to consumers deceived by misrepresentations about the corporation's human rights record, rather than on injuries to the foreign human rights victims. Therefore, while plaintiffs in these cases are likely to prevail, the victims themselves will not directly recover as they would if they prevailed on an ATS claim.

One scholar further suggests that federal common law claims under the ATS could be brought in federal court exercising diversity jurisdiction or state court exercising general jurisdiction. However, the Supreme Court applied the presumption to a jurisdictional statute in Kiobel only because of the importance of avoiding adverse foreign policy consequences of adjudicating violations of international norms; therefore, it is possible that an attempt to circumvent this rule by bringing such causes of action under diversity or general jurisdiction would be treated similarly or be considered

230. See id. at 1757 (describing the uncertainty about whether the presumption against extraterritoriality, as applied to Racketeer Influenced and Corrupt Organizations Act (RICO) claims, requires evidence of a domestic enterprise or of a pattern of domestic racketeering activity).
231. Id. "To state a claim under RICO, plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Id. at 1756.
232. Id. at 1757.
233. See id. at 1759 (explaining such success in Doe v. Unocal, where the plaintiffs succeeded after alleging that a California corporation was involved in unfair business practices when it subjected villagers in Burma to forced labor, murder, rape, and torture; the court held that such a claim could be brought for injuries outside the United States as long as some wrongful conduct occurred within the state, such as fundamental policy decisions (internal citations omitted)).
234. Id. at 1760.
235. See id. at 1761 (citing an example of labor groups successfully suing Nike for contracting with sweatshop suppliers, where the sweatshop laborers were not the direct beneficiaries of the settlement).
236. Id. at 1769.
illegal as a direct contravention of Kiobel. Further, while it may be true that state courts exercising general jurisdiction create and apply federal common law, the Court's emphasis in Sosa and Kiobel on the limited circumstances in which causes of action can be recognized under federal common law under the ATS suggests that state courts would be unfit to hear such claims.

3. In determining corporate liability under the ATS, the presumption against extraterritoriality should not be determinative, and its underlying principles should only be a consideration

The presumption against extraterritoriality is traditionally applied to substantive statutes so it should not determine corporate liability under the ATS, a jurisdictional statute. Additionally, the principles underlying the presumption—avoidance of unintended foreign policy consequences and infringement on the executive and legislative branches' management of foreign affairs—should be a consideration in, but not determinative of, corporate liability.

Courts apply the presumption against extraterritoriality to determine whether an Act regulating conduct applies abroad, reflecting the idea that Congress legislates with domestic, not foreign, matters in mind. Even the majority in Kiobel recognized that the ATS is a jurisdictional statute that does not regulate conduct—it only allows federal courts to recognize and hear certain limited causes of action based on universal norms of international law. In light of this discrepancy, the majority justified its application of the presumption against extraterritoriality to the ATS by reasoning that the principles underlying the presumption apply to the ATS and serve to warn courts to be cautious when considering whether causes of action can be brought under the statute. However, the majority's use of the presumption does not work because the

237. See Sosa v. Alvarez-Machain, 542 U.S. 692, 731 n.19 (2004) (explaining that while grants of jurisdiction to federal courts under the ATS allow limited development of federal common law, the same is not true for jurisdiction granted under federal question jurisdiction); see also Alford, supra note 128, at 1769 ("If the Sosa causes of action do not create federal question jurisdiction, there is no reason to think those same federal causes of action could be brought under diversity jurisdiction.").
238. Alford, supra note 128, at 1769.
240. Id.
241. Id.
242. Id. at 1672 (Breyer, J., concurring).
243. Id. at 1665.
244. Id.
presumption is generally applied to the substantive content of laws regulating conduct, and there are strong indications that the ATS was enacted with foreign matters in mind, not just domestic.

Therefore, because the presumption of extraterritoriality does not directly apply to the ATS, the principles underlying it should be only a consideration in the determination of corporate liability, rather than determinative of it. The principles underlying the presumption relate to its purpose: protecting against disputes between U.S. law and the laws of other countries. To prevent unintended foreign policy consequences, it is important to be able to determine whether Congress expressly intended an Act to apply abroad. Additionally, the presumption works to prevent impingement by courts on the executive and legislative branches' management of foreign affairs. The court in Al Shimari recognized that the principle of avoiding unintended foreign policy consequences is irrelevant where the plaintiffs are claiming violations of international norms because the ATS is jurisdictional rather than conduct-related, and, therefore, any claims asserted under the ATS are recognized by other nations, eliminating the possibility of foreign policy consequences.

The Ninth Circuit, in discussing whether the plaintiffs' claims are barred by the presumption, references the alarming vagueness of the Supreme Court's discussion of extraterritorial ATS claims. In pointing out that *Kiobel* makes clear that the general principles underlying the presumption against extraterritoriality apply to ATS claims, but leaves

---

245. *Id.* at 1664; see also Hathaway, *supra* note 227 (stating that courts have typically applied the presumption against extraterritoriality to the substantive content of laws); Myles & Rutten, *supra* note 227 (explaining that the presumption is substantively applied to determine whether a federal statute regulates conduct abroad).

246. *Kiobel*, 133 S. Ct. at 1672; see *supra* Part II.B.1 (detailing why the ATS was passed with foreign matters in mind); cf. Hathaway, *supra* note 227 (arguing that the majority opinion in *Kiobel* ignored the rationale that piracy, one of the original ATS claims accepted by the Supreme Court, was a violation of the law of nations and that allowing such a claim only enforced international law and did not impose the sovereign will of the United States on foreigners who committed violations abroad; therefore, adjudicating universally recognized norms under the ATS is comparable and the ATS should not be limited by the presumption).


248. *Id.*

249. *Id.*

250. See *Al Shimari v. CACI Premier Tech.*, Inc., 758 F.3d 516, 529–30 (4th Cir. 2014) (further illustrating that there is no issue of bringing foreign defendants to U.S. courts to litigate conduct committed abroad when the defendants are U.S. citizens).

important questions about extraterritorial ATS claims unresolved[,]"\textsuperscript{252} the Ninth Circuit seems to have understood that these principles should be considered when deciding whether the alleged conduct displaces the presumption, but should not be determinative of whether the international norm at issue applies to corporate liability.\textsuperscript{253}

D. Kiobel Does Not Reject U.S. Corporate Liability for Violations of International Norms Committed Overseas

Following \textit{Kiobel}, an understanding spread throughout the lower courts that the presumption against extraterritoriality, as applied to the ATS, rejected the argument that ATS suits could be brought against U.S. corporations for overseas violations of international law.\textsuperscript{254} This was derived from the more general notion that \textit{Kiobel} unanimously rejected the more than thirty-year interpretation that the ATS allowed global remedies for international law violations.\textsuperscript{255} Further, because the Supreme Court stated that “relief for violations of the law of nations occurring outside the United States is barred,” it followed that extraterritoriality depended on the location of the conduct rather than the citizenship of the defendant.\textsuperscript{256} Therefore, claims against U.S. corporations for extraterritorial violations would likely be barred as well.\textsuperscript{257}

However, this argument ignores the fact that the Court conditioned the presumption on whether the alleged conduct sufficiently touches and concerns the United States\textsuperscript{258} and also ignores the specific facts of the case: none of the parties in \textit{Kiobel} had a connection to the United States.\textsuperscript{259} Further, this argument conflates the separate issues of corporate

\textsuperscript{252} Id.
\textsuperscript{253} See \textit{id.} The Ninth Circuit was likely implying that the presumption and its underlying principles should only be \textit{considered} in the second step of the circuit’s two-step analysis.
\textsuperscript{254} See Meir Feder, \textit{Why the Court Unanimously Jettisoned Thirty Years of Lower Court Precedent (and What That Can Tell Us About How to Read Kiobel)}, SCOTUSBLOG (Apr. 19, 2013, 11:30 AM), http://www.scotusblog.com/2013/04/commentary-why-the-court-unanimously-jettisoned-thirty-years-of-lower-court-precedent-and-what-that-can-tell-us-about-how-to-read-kiobel (claiming that, after \textit{Kiobel}, because the extraterritoriality analysis depends on the location of the conduct rather than the citizenship of the defendant, ATS suits against U.S. corporations for committing violations of international law overseas are essentially barred).
\textsuperscript{255} Id.
\textsuperscript{256} \textit{Id.} (quoting \textit{Kiobel v. Royal Dutch Petrol. Co.}, 133 S. Ct. 1659, 1669 (2013)).
\textsuperscript{257} Id.
\textsuperscript{258} \textit{Kiobel}, 133 S. Ct. at 1669.
\textsuperscript{259} Id. at 1662.
liability and the presumption against extraterritoriality, treating them as intertwined in one analysis rather than as distinct questions. While the presumption against extraterritoriality analysis might ultimately free a corporation of liability, the initial corporate liability analysis must be performed first to give the ATS its full strength and uphold the supporting legislative intent. Therefore, ATS claims against U.S. corporations for extraterritorial violations of international norms are not necessarily barred following Kiobel.

E. Recommendations

The Ninth Circuit’s norm-by-norm analysis should be adopted in determining corporate liability under the ATS. If a court observes that a norm applies to states, individuals, and groups, then the norm is universal; therefore it is applicable to corporations. Universal norms can provide the basis for ATS claims against U.S. corporations. To determine whether a norm is universal, courts should consider: (1) whether the norm is limited to states, and (2) whether the application depends on the perpetrator’s identity. Universal norms are applicable to corporations, and when the applicability of the norm depends on the victims’ identities, corporations may be held liable. In sum, the test that should be applied is whether international law extends an international norm against an act to the perpetrator in question, because it is inconsistent with the universality of international norms to allow avoidance of liability just by incorporating.

Further, the presumption against extraterritoriality should apply in the norm-by-norm analysis only to the extent the reasons underlying it are implicated, that is, when the adjudication of an ATS claim will interfere with the laws of another nation. However, when a U.S. corporation violates international norms, a strong connection with the United States exists, and corporations must not be allowed to escape liability based on a presumption not normally applied to jurisdictional statutes. Therefore, displacement of the presumption against extraterritorial application should not be a determinant of whether a corporation is liable. This proposition follows from the fact that the only international implication of U.S. corporate liability for extraterritorial violation of international norms would be that federal courts would stop the harm caused to citizens of another country by a U.S. entity.

Finally, Justice Breyer’s test from his concurrence in Kiobel should be an element of determining U.S. corporate liability once the norm-by-norm analysis has been performed. Finding ATS liability where: (1) the alleged tort occurs in the United States; (2) the defendant is a U.S. citizen; or (3) the defendant’s conduct substantially and
adversely effects an important U.S. interest, including the interest in not becoming a safe harbor for those who violate international law, effectively helps adjudication of whether the alleged conduct should fall under U.S. jurisdiction.

CONCLUSION

Due to Kiobel’s vague language, a circuit split emerged between the Second and Eleventh Circuits, and the Fourth and Ninth Circuits. While the Second and Eleventh Circuits interpreted Kiobel to preclude domestic corporate liability when the relevant conduct occurred outside the United States, the Fourth and Ninth Circuits held that there can be liability for U.S. corporations that extraterritorially violate international norms. The Fourth Circuit expanded on the Supreme Court’s “touch and concern” test by analyzing whether the alleged conduct had sufficient connections to the United States to overcome the presumption. The Ninth Circuit instead adopted a norm-by-norm analysis to determine whether each alleged universal norm applies to corporations; if so, corporations face ATS liability, and may ultimately be held liable under the ATS for that claim if a court then determines that recovery is permissible.

U.S. corporate liability should be determined using a norm-by-norm analysis to ensure uniformity and that corporations are not given special treatment. Further, jurisdiction for extraterritorial torts committed by U.S. corporations should arise under the ATS; otherwise the ATS would be almost ineffective, courts would make non-uniform decisions that could interfere with foreign policy, and without corporate liability under the ATS, an incentive is created for U.S. corporations to simply move or keep their operations overseas instead of stopping practices that violate international norms. The policy implications of letting U.S. corporations escape liability are also substantial. The United States would become a safe haven for corporations that violate international law, and plaintiffs would be left with limited, and most likely ineffective alternatives for recovery.

260. See supra Part I.C (detailing the circuit split that emerged after Kiobel between the Second and Eleventh, and the Fourth and Ninth Circuits).
261. See supra Part I.C.1 (detailing how the Second and Eleventh Circuits reasoned that U.S. corporations may not be held liable under the ATS for overseas violations of international law).
262. See supra Part I.C.2 (detailing how the Fourth and Ninth Circuits concluded that U.S. corporate liability for overseas conduct exists under the ATS).
263. See supra Part I.C.2 (explaining the Fourth Circuit’s decision in Al Shamari).
264. See supra Part I.C.2.a (explaining the Ninth Circuit’s decision in Nestle).
Due to the Ninth Circuit's unique approach to corporate liability under the ATS, the three former child slaves have hopes of being vindicated after suffering forced child slavery and constant threats of torture. If the norm-by-norm analysis is applied in the future, U.S. corporations will likely be forced to acknowledge and take responsibility for the shocking crimes they commit overseas. The victims of a campaign of torture and murder in Colombia caused by Chiquita, and the victims of apartheid in South Africa caused by IBM and Ford, will never directly recover under the ATS for the injustices they suffered. However, there is increased likelihood of success for the victims of child slavery in the Ivory Coast because the Ninth Circuit's norm-by-norm corporate liability analysis will allow the possibility of holding U.S. corporations liable whenever U.S. interests are involved, resulting in the most comprehensive, fair, and uniform outcomes.