Hidden Renvoi: The Search for Corporate Liability in Alien Tort Statute Litigation

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*In its two most recent decisions regarding the Alien Tort Statute (ATS)—*Jesner v. Arab Bank *and* Kiobel v. Royal Dutch Petroleum*—the US Supreme Court failed to answer the specific question upon which it granted certiorari: whether the ATS permits suit against corporate defendants. These two cases reveal only that the ATS does not permit suits against foreign corporate defendants or suits for claims arising from conduct that takes place outside of the US. To frustrate the ATS saga further, the fractured Court in* Jesner *expressly declined to resolve the question whether international or domestic law should govern corporate liability. And only the plurality even entertained the issue that was central to the lower court's reasoning: whether the ATS required a customary international law norm of corporate liability or, instead, allowed plaintiffs to bring tort claims ipso facto under federal common law. The inarticulation leaves a gap in international law that the Supreme Court would do well to fill. The question has begun to percolate among the lower federal courts, and it has emerged in a case before the Canadian Supreme Court as well. (*Nevsun Res. v. Araya*, 2018 CarswellBC 1552 (Can.) (WL) (granting petition for review)).*

The question whether international or domestic law should govern the scope of corporate liability for violations of international human rights is plainly a choice-of-law question. Yet the ATS canon contains very little framing in this respect. This Note fills that gap by examining the issue with the analytical toolkit of conflicts law. Namely,

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it discusses how courts and litigants have borrowed choice-of-law concepts to characterize the question, and how that characterization influences outcomes. After an assessment of the state of debate, this Note argues that international law applies to ATS corporate liability and permits suit against a corporate defendant. Vis-à-vis general principles, an international law choice-of-law mechanism refers the question back to domestic law. The domestic court may then exercise its authority under domestic law to impose liability on a corporate defendant, if it so chooses. This reference back to the domestic system, in choice-of-law parlance, is known as renvoi.

INTRODUCTION

Enacted as part of the Judiciary Act of 1789, the Alien Tort Statute (ATS) provides that "[t]he 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."[1] With just this one sentence, the ATS opened federal courthouse doors to plaintiffs from across the globe, providing them with a judicial forum to vindicate violations of international law.[2] What the statute does not do, however, is answer the question of who can be sued. There, the statutory text is silent.

The failure to specify any eligible ATS defendant has led to especial controversy in the context of suits against corporations. Understandably so. Circuit courts, as well as academics and corporations themselves, have weighed in repeatedly on whether the ATS permits corporate liability. Unsurprisingly, the attention has produced sharp disagreement.[3]

Only recently has the US Supreme Court come close to answering the question of ATS corporate liability. Originally presented in 2013 with the simple question of whether a corporation could be held liable under the ATS, the *Kiobel* Court complicated matters by calling for a second round of oral arguments to address the separate issue of liability for extraterritorial conduct.[4] And the Court ultimately decided the case on those narrower grounds, holding that the presumption against extraterritoriality applied equally to the ATS,[5] and that the presumption was not rebutted.[6] Because the "relevant conduct" unfolded outside the US, and because the claims did not sufficiently "touch and concern" US

1. 28 U.S.C. § 1350 (2012).

2. ATS claims rarely involve an alleged treaty violation. Curtis A. Bradley, *State Action and Corporate Human Rights Liability*, 85 NOTRE DAME L. REV. 1823, 1824 (2010). Thus, in practice, ATS litigation concerns more specifically alleged violations of the "law of nations" (also known and referred to herein as customary international law). *See* Garcia v. Chapman, 911 F. Supp. 2d 1222, 1233 (S.D. Fla. 2012) ("The eighteenth-century phrase, 'law of nations,' means customary international law.").

3. *Compare* Brief for the Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Neither Party at *34–35, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16-499), 2017 WL 2806350 (arguing that ATS litigation "can exact a significant economic and reputational toll" that justifies precluding corporate liability entirely) *with* Amicus Curiae Brief of Procedural and Corporate Law Professors in Support of Petitioners at *9–10, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16-499), 2017 WL 2822779 (arguing for corporate liability "as a matter of fundamental fairness" and the rule of law).

4. *See* Kiobel v. Royal Dutch Petroleum Co. et al., 565 U.S. 1244 (Mar. 5, 2012) (No. 10-1491) (restoring case to calendar for re-argument).

5. The presumption against extraterritoriality reflects the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). The presumption's application protects against unwanted international friction that could result from a conflict between US and foreign law. *See id.*

6. Kiobel v. Royal Dutch Petroleum, 569 U.S. 108, 124–25 (2013) (*Kiobel II*). For a concise overview of the presumption against extraterritoriality in its current form, see William S. Dodge, *The Presumption against Extraterritoriality in Two Steps*, 110 AJIL UNBOUND 45 (2016).

territory, the *Kiobel* Court never came back around to the corporate liability question.

In *Jesner v. Arab Bank*, the Supreme Court granted certiorari to answer the specific question, left unresolved by *Kiobel*, "[w]hether the [ATS] categorically forecloses corporate liability."[7] But the Court again bucked the question. Deciding only that the ATS does not permit suit against *foreign* corporate defendants,[8] the *Jesner* Court explicitly left unresolved the question whether the ATS forecloses corporate liability altogether.[9] Answering that question will most likely involve addressing the related issue whether international or domestic law should govern the question of domestic corporate liability. It may also involve addressing the Second Circuit's lone view that a plaintiff must locate corporate liability under customary international law to bring ATS claims against corporate defendants.[10] The uncertainties left by *Jesner* therefore significantly undermine the credibility of pronouncements that the ATS has seen its final day, for there remains plenty left to litigate.[11]

Despite the ATS's old age, it was only in the last forty-some years that human rights attorneys excavated the statute from the Annals of Congress and dusted it off for modern use.[12] Accordingly, the ATS has gained a reputation for its rise from obscurity. In the famous words of Judge Friendly, the ATS is "a kind of legal Lohengrin . . . no one seems to know whence it came."[13] But in its expansive revival, the ATS became more associated with its magnitude, described thirty-eight years after Judge Friendly as a statute "unlike any other in

7. Petition for a Writ of Certiorari at *i, *Jesner*, 138 S. Ct. 1386.

8. *Jesner*, 138 S. Ct. at 1407 (holding "foreign corporations may not be defendants in suits brought under the ATS").

9. *See id.* at 1402–04, 1407 (plurality opinion); *see also id.* at 1410, n.* (Alito, J., concurring) ("Because this case involves a foreign corporation, we have no need to reach the question whether an alien may sue a United States corporation under the ATS.").

10. *See, e.g.*, Nahl v. Joude, 354 F. Supp.3d 489, 497 (S.D.N.Y 2018) (citing Balintulo v. Ford Motor Co., 796 F.3d 160, 165–66 (2d Cir. 2015)).

11. *See, e.g.*, Al Shimari v. CACI Premier Tech., Inc., 320 F. Supp. 3d 781, 782–83 (E.D. Va. 2018) (allowing ATS plaintiffs to proceed against corporate defendant and noting that *Jesner* only foreclosed corporate liability against foreign corporate defendants); Brill v. Chevron Corporation, No. 15-cv-04916, 2018 WL 3861659, at *4 (N.D. Cal. Aug. 14, 2018) (concluding that "[t]he question of whether *Jesner*'s holding on foreign corporations should be extended to a domestic corporation . . . can be left for another day"); *see also* Doe v. Nestle, 906 F.3d 1120, 1124 (9th Cir. 2018) (concluding "*Jesner* did not eliminate all corporate liability under the ATS . . . "); Estate of Alvarez v. Johns Hopkins University, No. TDC-150950, 2019 WL 95572, at *8 (D. Md. Jan. 3, 2019) (reasoning that domestic corporate liability advanced the purpose of the ATS without leading to the type of international discord warned against by the Court in *Jesner*).

12. The Second Circuit's 1980 decision in *Filártiga v. Peña-Irala*, is widely recognized as "the first ATS case" in modern history. *See* Nathan J. Miller, *Human Rights Abuses as Tort Harms: Losses in Translation*, 46 SETON HALL L. REV. 505, 507 (2016); *see also* Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1474 (2014) (describing *Filártiga* as "the case that launched the modern application of the ATS").

13. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (J. Friendly), *abrogated on other grounds by* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

American law and of a kind apparently unknown to any other legal system in the world."[14]

The contemporary debate over ATS corporate liability touches on its unique character. The human rights violations prosecuted under the ATS are undeniably serious. They deal with political kidnappings, torture, child slave labor, and a range of horrifying acts whose perpetrators the courts have dubbed *hostis humani generis*—i.e., the enemy of mankind.[15] But because litigating these issues under the ATS sweeps in parties and events that span the globe, foreign policy considerations have come to overshadow the human rights dimension. In such a context, the Court begins to consider the possibility of foreign entanglement, and sees tough calculus. Although holding actors of genocide and torture accountable is an uncontestable objective, jurists have questioned whether the US should even be in the business of providing a judicial forum for these types of cases.[16]

For foreign plaintiffs, the ATS is an attractive vehicle for litigating human rights claims. For one, the US court system may be the only avenue for justice, particularly if the defendant is in the US. For another, the US court system often provides a more plaintiff friendly substantive law, as well as higher damages awards, than foreign plaintiffs would receive at home.[17] Relatedly, the aim of maximizing recovery has led ATS plaintiffs to pursue corporations directly, in place of or in addition to individual corporate officers, as defendants.[18] But results have been mixed.[19] And the Supreme Court has cautioned repeatedly against liberal recognition of "new forms of liability" in ATS litigation.[20]

In 2018, the majority in *Jesner* decided only that the ATS did not permit suit against a *foreign* corporation, and it said almost nothing of domestic defendants. To frustrate the ATS saga further, the fractured Court expressly declined to resolve the question whether international or domestic law should govern the corporate liability question.[21] And only the *Jesner* plurality even entertained the issue that was central to the lower court's reasoning: whether the

14. Kiobel v. Royal Dutch Petroleum Co. (*Kiobel I*), 621 F.3d 111, 115 (2d Cir. 2010).

15. *See, e.g.*, *Kiobel II*, 569 U.S. 108, 128 (2013) (Breyer, J., dissenting) (quoting Sosa v. Alvarez–Machain, 542 U.S. 692, 732 (2004)); Filártiga v. Pena–Irala, 630 F.2d 876, 890 (2d Cir. 1980).

16. *See, e.g.*, *Kiobel II*, 569 U.S. at 123. ("[T]here is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.").

17. Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 723 (2012); *see also* Russell J. Weintraub, *Introduction to Symposium on International Forum Shopping*, 37 TEX. INT'L L.J. 463, 463 (2002).

18. *See, e.g.*, Transcript of Oral Argument at 62–64, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16–499), 2017 WL 4551614 (Justice Kagan and Mr. Paul Clement discussing whether individual corporate officers are sufficiently "deep-pocketed" to constitute "proper defendants" in ATS litigation).

19. *See Jesner*, 138 S. Ct. at 1403; *see also In re* Arab Bank, 808 F.3d 144, 151 (2d Cir. 2015) (holding that the ATS did not permit corporate liability "despite [the court's] view that *Kiobel II* suggests that the ATS may allow for corporate liability").

20. *See Jesner*, 138 S. Ct. at 1403.

21. *See id.* at 1402 (plurality opinion).

ATS required a customary international law norm of corporate liability or, instead, allowed plaintiffs to bring tort claims *ipso facto* under federal common law.[22]

The dispute over which source of law should govern the scope of ATS corporate liability is plainly a choice-of-law question because it asks the courts to choose between two laws, international and domestic.[23] Yet in both ATS jurisprudence and scholarship, there is a conspicuous absence of framing in this respect. Although courts have borrowed choice-of-law terminology to characterize the issue of ATS corporate liability, any conscious analysis in this respect appears to be missing.[24] This Note fills that gap by examining the issue in choice-of-law terms. Specifically, this Note argues that international law applies, and that it *permits* suit against a corporate defendant. Using general principles as a choice-of-law mechanism, international law simply refers the question back to domestic law. The court may then exercise its authority under domestic law to impose liability on a corporate defendant. In other words, the inquiry under international law reveals a "false conflict" because it produces the same outcome.[25] Whether one turns to international or US federal common law, for better or worse, the answer permits the imposition of direct corporate liability.

Part I addresses the current landscape over which the corporate liability question has unfolded. Beginning with *Filártiga* and arriving at *Jesner*, it reviews the seminal ATS cases necessary to discuss the search for corporate liability under the ATS. This Part also points out when the courts have applied choice-of-law concepts to other ATS issues, such as aiding and abetting liability.

Part II then turns to the field of conflict of laws. It begins by describing the theoretical evolutions in choice-of-law scholarship and jurisprudence. After providing this background information, Part II then zeroes in on the specific

22. *See id.* at 1400–01 (discussing whether there is a customary international law norm of corporate liability at all).

23. Childress, *supra* note 17, at 718. *See generally* Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1013 (1991).

24. *See, e.g.*, Doe VIII v. Exxon, 654 F.3d 11, 41 (D.C. Cir. 2011) (discussing "conduct-governing norms"). *But cf.* Brief for Respondents at *8, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491), 2012 WL 259389 (using choice-of-law principles to discuss the corporate liability question).

25. Conflict of laws scholars have identified a number of different "false conflict" types, such as when judges apply one law over another because applying the latter would not effectuate that law's purpose. *See, e.g.*, Tooker v. Lopez, 24 N.Y.2d 569, 576 (N.Y. 1969) ("If the facts are examined in light of the policy considerations which underlie the ostensibly conflicting laws it is clear that New York has the only real interest . . . ."). Because this approach, rooted in interest analysis, involves a sometimes-fraught exercise in determining a law's purpose (or purposes), it has not evolved without criticism. *See, e.g.*, Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197, 219–20 (1991) (arguing that interest analysis incentivizes judges to search for false conflicts). A more basic type of "false conflict," such as the one between international and federal common law that this Note identifies, arises when two different sources of law lead to the same result. *See generally* Peter Kay Westen, *False Conflicts*, 55 CALIF. L. REV. 74 (1967). To be sure, false conflicts can arise in various scenarios, the most obvious of which is perhaps when the laws of the different states are identical. *See id.* at 76–77.

choice-of-law devices that advocates have used to characterize ATS corporate liability. This Part highlights deficiencies in arguments on both sides of that debate. It concludes that international law should govern ATS corporate liability.

Part III then explains why international law permits imposing corporate liability under the ATS. This Part observes that, in the absence of a customary international law norm either for or against corporate liability, courts should—and often do—turn to general principles of international law. A body of case law, as well as international scholarship from the conflicts law field, supports the conclusion that international law's general principles contain a choice-of-law mechanism that refers back to domestic law on questions like direct corporate liability. This reference back to the domestic system is known, in choice-of-law parlance, as renvoi.

I.
LANDSCAPING THE DEBATE OVER ATS CORPORATE LIABILITY

Before moving into the knottier choice-of-law issues that this Note seeks to disentangle, it is worth turning to several key ATS cases that set the stage for discussion. Not only do these cases illustrate a remarkable revival of a once-forgotten statute, but they also begin to reveal diverging views on the role of international law in deciding ATS corporate liability. This Part will examine these seminal cases before addressing the circuit split over corporate liability that led to the Supreme Court's second undertaking of the issue in *Jesner*. In addition to providing historical background, Part I highlights other forms of liability that have received choice-of-law treatment—mainly, aiding and abetting liability and vicarious liability—which will help to tee up the discussion in Parts II and III.

A. Background

1. Filártiga*: The Revival of the ATS*

The ATS remained largely untouched for nearly two centuries after its enactment.[26] In the few known early cases, plaintiffs saw their claims dismissed for failing to allege an actual violation of "the law of nations." Then, in 1980, the ATS enjoyed its renaissance moment when the Second Circuit handed down its landmark decision in *Filártiga v. Peña-Irala*.[27] Surviving family members of Joelito Filártiga brought suit against Américo Noberto Peña-Irala, alleging that Peña-Irala had kidnapped and tortured Filártiga while serving as Inspector

26. In a review of the available case law, Professor Kenneth Randall found that in the first 191 years of the statute's existence, plaintiffs invoked jurisdiction under the ATS just twenty-one times. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4 n.15 (1985).

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

General of Police in Asunción, Paraguay.[28] The *Filártiga* court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties," and further held that the ATS provided federal jurisdiction for claims against alien defendants served with process in the United States.[29] The court explicitly left open the question, however, as to which body of substantive law would later govern the proceedings.[30] In other words, the *Filártiga* court limited its holding to subject matter jurisdiction while saving a broader question in choice-of-law for another day.[31]

Several months after the *Filártiga* court issued its opinion, the author, Judge Kaufman, took the slightly unusual step of writing about the case in the *New York Times*.[32] In the article, Judge Kaufman placed the court's decision in a larger context of increased international action toward prosecuting perpetrators of torture.[33] Notably, he did not hold back in describing how the court's decision fit within international law, writing that "[t]he enunciation of humane norms of behavior by the global community and the articulation of evolved norms of international law by the courts form the ethical foundations for a more enlightened social order."[34] From one perspective, these words appear shamelessly ambitious. Or perhaps foretelling. Few would deny that *Filártiga* heralded a sea change in human rights litigation. But under another, more modest view, Judge Kaufman was simply describing the role of jurists in the development of customary international law. That is, as the international community develops new customary international law norms, it is the province of the courts to identify those norms and enforce them.[35]

2. Unocal*: Choice of Law, Choice of Defendant*

In the years following *Filártiga*, several circuit courts attempted to flesh out the choice-of-law question that *Filártiga* left undisturbed.[36] But the next watershed occurred in *Doe I v. Unocal*[37] when, for the first time, a US district

28. *See id.* at 878–79. For a more detailed factual overview, see Harold Hongju Koh, Filártiga v. Peña-Irala: *Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, *in* INTERNATIONAL LAW STORIES 45–76 (John E. Noyes et al. eds., 2007).

29. *Filártiga*, 630 F.2d at 878.

30. *See id.* at 889.

31. *See id.*

32. Irving R. Kaufman, *A Legal Remedy for International Torture?*, Nov. 9, 1980.

33. *See id.*

34. *Id.*

35. This process of norm development and application is at the heart of the ATS debate today, and it is the focus of this paper, addressed in greater depth in Parts II and III.

36. *See, e.g.*, Hilao v. Marcos (*In re Estate of Marcos*), 25 F.3d 1467, 1475 (9th Cir. 1994); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); *see also* Kadic v. Karadžić, 70 F.3d 232, 238–39 (2d Cir. 1995).

37. Doe I v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), *dismissed in part*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated, reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *dismissed*, 403 F.3d 708 (9th Cir. 2005). For purposes of

court held that foreign plaintiffs could proceed against a corporate defendant under the ATS.[38] There, foreign Burmese plaintiffs brought suit against several oil and gas companies, alleging that they had assisted in state-sponsored assault, murder, rape, torture, and the forced labor of plaintiffs' family members in the course of constructing a pipeline.[39] Relying on the Ninth Circuit's decision in *In re Estate of Marcos*, the District Court determined that a violation of customary international law would be sufficient to create a cause of action under the ATS.[40] Denying Unocal's motion to dismiss, the court squarely rejected the argument that claims against private defendants for violations of international law were not actionable.[41]

The parties in *Unocal* ultimately reached an out-of-court settlement on the eve of a scheduled Ninth Circuit *en banc* hearing.[42] But the impact of the *Unocal* litigation was remarkable. First, although the plaintiffs had advanced claims under theories of both *direct* corporate liability and *aiding and abetting* liability, the case inspired subsequent litigation on the latter, "because few ATS corporate defendants were alleged to have committed international law violations directly."[43] In one of the more well-known cases that followed, a 2-1 decision by the Second Circuit allowed plaintiffs to proceed on a theory of aiding and abetting liability against corporations that had allegedly participated in human rights abuses during South Africa's apartheid.[44] Still, the two judges in the majority could not agree whether international law or federal common law was the proper vehicle for reaching this conclusion.[45]

Second, the scholarly attention to the ATS that followed *Unocal* was extensive. Professor Donald Childress notes that from 1980 to 1996 (the year *Unocal* was filed), there were only 222 law review articles published mentioning the ATS, whereas in the same span of time following the filing (from 1996 to

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this discussion, all references to "*Unocal*" will be to the District Court's 1997 decision unless otherwise noted.

38. Changrok Soh, *Extending Corporate Liability to Human Rights Violations in Asia*, 20 J. INT'L. & AREA STUD. 23, 31 (2013); *see also* Childress, *supra* note 17, at 713 n.21 (observing that "[t]he first case of a foreign citizen bringing a human-rights lawsuit against a multinational corporation in a U.S. court appears to be [*Unocal*]."). *See generally* Joshua E. Kastenberg, *Enforcing Internationally Recognized Human Rights Violations Under the Alien Tort Claims Act: An Analysis of the Ninth Circuit's Decision in* Doe v. Unocal Corp., 1 PIERCE L. REV. 133 (2003).

39. *Doe I*, 963 F. Supp. at 883.

40. *Id.* at 890.

41. *Id.* at 889–90.

42. Anthony J. Sebok, *Unocal Announces it Will Settle Human Rights Suit: What is the Real Story Behind its Decision?*, FINDLAW (Jan. 10, 2005), http://supreme.findlaw.com/legal-commentary/unocal-announces-it-will-settle-a-human-rights-suit.html [https://perma.cc/59FX-VBD5].

43. Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 366 (2011).

44. Khulumani v. Barclay Nat'l Bank, 504 F.3d 254, 264 (2d Cir. 2007) (vacating dismissal of ATS claims).

45. *See* Bradley, *supra* note 2, at 1832 (discussing *Khulumani*, 504 F.3d 254, and also noting that the Second Circuit later decided that international law applied in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009)).

2012), 1,686 such articles were published.[46] According to Professor Childress, *Unocal* altered ATS litigation strategies in a manner that shifted scholarly attention to issues like choice of law.[47] Few of the academic works that emerged during this time, however, presented the questions about the scope of liability in choice-of-law terms.[48] What is most apparent from this groundswell in the academic literature is that *Unocal* raised the stakes significantly. If ATS plaintiffs now had a better shot at haling deep-pocketed corporate defendants into court, human rights attorneys would likely be more willing, and financially able, to bring cases.[49]

3. Sosa *and* Kiobel*: the ATS Arrives at the Supreme Court*

a. The Impact of Sosa

The first major ATS decision at the Supreme Court arrived in *Sosa v. Alvarez-Machain*.[50] There, Humberto Alvarez-Machain brought suit under the ATS, alleging that Jose Francisco Sosa, a hired hand of the Drug Enforcement Agency, had violated customary international law by abducting Alvarez in Mexico and bringing him into the US to face trial for murder.[51] The *Sosa* decision is notable here for two reasons. First, it established a framework for recognizing new causes of action under the ATS.[52] Second, its now-famous footnote 20 provided cannon fodder for the choice-of-law debate over corporate liability.[53]

Although a 6-3 majority in *Sosa* established the framework for recognizing causes of action under the ATS, a unanimous court agreed in the basic judgment that Alvarez's abduction was not actionable under the ATS.[54] More significantly for future parties, the Court confirmed with one voice that the ATS is a "jurisdictional statute creating no new causes of action" but that it was

46. Childress, *supra* note 17, at 719.

47. *See id.*

48. Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 54–55 (2003) (arguing for the application of federal common law to effectuate congressional intent and protect federal interests); *cf.* Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1939 (2010) (rejecting choice-of-law framework and arguing that issues such as scope of secondary liability are best viewed as questions of domestic federal common law). *But see* Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 62 n.8 (2008) (listing scholarly works that have approached the question of aiding and abetting liability as a choice-of-law issue).

49. In fact, according to Professor Childress, the Unocal settlement monies, which totaled $30 million, were repurposed in this exact manner. *See* Childress, *supra* note 17, at 724 n.113; Philip A. Scarborough, Note, *Rules of Decision for Issues Arising under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 461 n.26 (2007).

50. 542 U.S. 692 (2004).

51. *Id.* at 697–98.

52. *Id.* at 732–33.

53. *See id.* at 732 n.20.

54. *Id.* at 699.

nevertheless "intended to have practical effect the moment it became law."[55] Writing for six Justices in Part IV of the opinion, Justice Souter explained that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."[56] Those paradigms included what Blackstone identified as the three major customary international law violations existing at the time of the ATS' enactment: violations of safe conduct, infringement of the rights of ambassadors, and piracy.[57] Adopting language from a Ninth Circuit opinion,[58] the Court announced the "specific, universal, and obligatory norm" standard that has since become the benchmark of the *Sosa* step one inquiry.[59] That is, the first step to bringing an actionable claim under the ATS is identifying a violation of a customary international law norm that comports with the historical paradigms underlying the ATS. The second step, as the *Sosa* Court advised, "involve[s] an element of judgment about the practical consequences" that flow from allowing plaintiffs to enforce that norm.[60]

The framework developed by *Sosa* supplied a set of limiting principles, but the opinion seems far from foreclosing actions against corporate defendants categorically. Still, litigants and legal scholars have both vehemently contested whether it did, relying heavily on footnote 20,[61] which the *Sosa* Court injected into its step one analysis. In that footnote, the Court touched on the distinction between private and state actors:

> A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–795 (C.A.D.C.1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadžić*, 70 F.3d 232, 239–241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).[62]

55. *Id.* at 724.
56. *Id.* at 732.
57. *Id.* at 715.
58. *Id.* at 732 (citing *In re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory.")).
59. *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1390 (2018).
60. *Sosa*, 542 U.S. at 732.
61. *See, e.g.,* Brief for Petitioners, *Jesner*, 138 S. Ct. 1386 (No. 16–499), 2017 WL 2687507 (citing footnote 20 seven times).
62. *Sosa*, 542 U.S. at 732 n.20 (original formatting maintained).

At first blush, this footnote might appear relatively innocuous or, as Judge Posner described, "enigmatic."[63] For one, the "related consideration" refers to the larger consideration "whether a norm is sufficiently definite to support a cause of action,"[64] which sheds no light on the source of law to apply in determining the corporate liability question. Secondly, the footnote seems to assume that there will be at least some cases where "international law extends the scope of liability for a violation of a given norm to the . . . corporation."[65] But the Court cited two opinions that did not pick up this more specific question. Instead, the majority opinion in *Kadic* and the concurrence in *Tel-Oren* considered whether private actors, as opposed to state actors, could ever be liable for certain offenses.[66] In other words, state action is sometimes an essential element of the human rights violation alleged.[67] This restraint on liability is well-established in both the federal and international dimensions.[68] Footnote 20 therefore seems to point more to a case-by-case specific inquiry than to any wholesale exclusion of liability.

At its core, *Sosa* simply supplied the framework for creating a cause of action under a merely jurisdiction-conferring statute. First, the alien plaintiff must identify a specific, universal, and obligatory norm within customary international law.[69] Second, the court must consider whether policy concerns caution against recognizing a cause of action for enforcement.[70] But at what point in the analysis should the courts consider the scope of liability for violating the identified norm? Troublingly, *Sosa* left this question unresolved.

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63. Flomo v. Firestone, 643 F.3d 1013, 1017 (7th Cir. 2011) ("The issue of corporate liability under the Alien Tort Statute seems to have been left open in an enigmatic footnote in [*Sosa*] (but since it's a Supreme Court footnote, the parties haggle over its meaning, albeit to no avail).").

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

65. *See id.* at 732 n.20.

66. *See* Kadic v. Karadžić, 70 F.3d 232, 239 (2d Cir. 1996) (holding that certain customary international law norms may be violated by either private or state actors); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 792–93 (D.C. Cir. 1984) (Edwards, J., concurring) (discussing the absence of international consensus on liability of private actors).

67. *See* Bradley, *supra* note 2, at 1824 (observing that enforcing the international prohibition on torture requires state action).

68. *Compare* Mohamad v. Palestinian Authority, 566 U.S. 449, 451 (2012) (holding that the term "individuals" in the Torture Victim Protection Act extended only to natural persons, and not corporations) *with Tel-Oren*, 726 F.2d at 806 n.14 (Bork, J., concurring) (describing limitations on liability for torture imposed by the United Nations General Assembly). *See also* Doe I v. Unocal, 963 F. Supp. 880, 891–92 (C.D. Cal. 1997) (observing that "slave trading is included in the 'handful of crimes' for which the law of nations attributes *individual* responsibility") (quoting *Tel-Oren*, 726 F.2d at 795 (Edwards, J., concurring) (emphasis added)).

69. *See Sosa*, 542 U.S. at 732.

70. *Id.* at 733 n.21 (2004) (indicating additional limitations on relief such as requiring that a foreign claimant first exhaust all available remedial options at home and requiring "case-specific deference to the political branches" where appropriate).

b. Unanswered Questions in Kiobel

In *Kiobel*, the Supreme Court appeared ready to settle the question whether customary international law recognizes corporate liability.[71] There, a group of Nigerian nationals residing in the US on political asylum brought suit against foreign oil companies, alleging that they had aided and abetted the Nigerian military and police in committing widespread, violent atrocities against the people of the Niger Delta.[72] The Second Circuit dismissed, holding that customary international law governed the scope of liability under the ATS and that it precluded corporate liability because there was no norm supporting it.[73] That decision, penned by Judge Cabranes, inspired a lengthy and forceful rebuke by a concurring Judge Leval. Although Judge Leval would have dismissed the complaint for failure to state a claim of entitlement to relief, he wrote adamantly that the majority distorted the relationship between international law and the federal judges faced with the corporate liability question.[74] Concluding that international law defers to domestic law on the issue, Judge Leval's opinion was unique in the choice-of-law sense and was much more like a dissent than a concurrence in its magnitude.[75]

The first round of oral argument before the US Supreme Court[76] involved combative discussion about whether the Court should distinguish between theories of liability in selecting the applicable sources of law for each in the ATS context.[77] For defendant Royal Dutch Petroleum, it was clear that international law must affirmatively recognize *any* theory of liability.[78] This was so because, as the company argued in its briefing, the substantive nature of asking "who is liable" fell under the *Sosa* step one inquiry. [79] Under the prodding of Justice Scalia, counsel for plaintiffs conceded that aiding and abetting liability "could be viewed as a conduct regulating norm" and therefore that its availability under

71. *Kiobel II*, 569 U.S. 108, 114 (2013).

72. *See id.* at 113.

73. *Kiobel I*, 621 F.3d 111, 126, 145 (2d Cir. 2010).

74. *Id.* at 149–54 (Leval, J., concurring).

75. *Id.* at 170–74.

76. In granting certiorari, the Court scheduled argument in *Kiobel* to be held in tandem with another case involving an ATS claim, *Mohamad v. Palestinian Authority*, which presented the question whether the Torture Victim Protection Act (TVPA) limited the meaning of "individual" to natural persons or included artificial entities like corporations. *See* Kiobel v. Royal Dutch Petroleum, 565 U.S. 961 (No. 10-1491) (Oct. 17, 2011) (cert. granted); Mohamad v. Rajoub, 565 U.S. 962 (No. 11-88) (Oct. 17, 2011) (cert. granted); *see also* Mohamad v. Palestinian Authority, 566 U.S. 449, 452–54 (2012). The Court later scheduled a second round of oral argument in *Kiobel*. *See* Kiobel v. Royal Dutch Petroleum Co., 565 U.S. 1244 (Mar. 5, 2012) (No. 10-1491).

77. Transcript of Oral Argument at 17–19, 37–39, 56, *Kiobel II*, 569 U.S. 108 (2013) (No. 10-1491).

78. *Id.* at 38.

79. Brief for Respondents at *21–23, *Kiobel II*, 569 U.S. 108 (2013) (No. 10-1491), 2012 WL 259389.

the ATS was subject to international law.[80] But counsel added that "international law places no restriction on the way domestic jurisdictions *enforce* international law."[81] Similarly, the Deputy Solicitor General stated at oral argument that vicarious corporate liability and direct corporate liability—but "[p]articularly the latter"—were questions of enforcement and thus were not subject to international law.[82]

The final opinion in *Kiobel*—after a second round of oral argument on the issue of extraterritoriality—said nothing about corporate defendants as a class. Affirming the Second Circuit's dismissal, the Court held only that the presumption against extraterritoriality applied to the ATS, and that plaintiffs' claims did not "touch and concern . . . the United States . . . with sufficient force to displace the presumption against extraterritorial application."[83]

In the aftermath of *Kiobel*, the legal community did not hesitate to spill ink on the case.[84] But legal scholars disagreed on just how much the Supreme Court's holding will limit the viability of ATS litigation going forward.[85] Whatever the overall effect, the direct impact of *Kiobel* on the corporate liability question was, at best, minimal. Entirely unresolved, the question whether corporate defendants were subject to liability under the ATS continued to percolate until it found its way back to the Court in *Jesner*.[86]

B. The Current Landscape

1. The Circuit Split

During the interim period between *Kiobel I* and *Kiobel II*, the D.C. Circuit, the Seventh Circuit, the Ninth Circuit, and the Eleventh Circuit all issued decisions allowing suits to proceed against corporate defendants under the

80. *Id.* at 56–57*; see also* Brief for Petitioners, at 39 n.31, *Kiobel II*, 569 U.S. 108 (2013) (No. 10-1491), 2011 WL 6396550 ("[W]hether particular behavior (*e.g.*, aiding and abetting a violation of international law) is sufficient to state a federal common law claim under the ATS is not necessarily governed by the same source of law as the question whether particular categories of private (or public) actors may be sued in tort under the statute.").

81. Transcript of Oral Argument (*Kiobel II*), *supra* note 77, at 55 (emphasis added).

82. *Id.* at 17.

83. *Kiobel II*, 569 U.S. at 125.

84. As of June 23, 2019, just over a thousand secondary sources available on Westlaw cited to the decision.

85. *Compare* Roger P. Alford, *Human Rights after* Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1091 (2014) ("The overwhelming majority of ATS claims will not satisfy [the touch and concern] test. As such, human rights litigation as currently practiced in the United States is dead.") *with* Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's* Filartiga, 89 NOTRE DAME L. REV. 1695, 1717 (2014) ("Although *Kiobel* suggests that there is an outer limit to ATS jurisdiction, that decision hardly amounts to the death knell of human rights litigation under the statute.").

86. *See* Jesner v. Arab Bank, 137 S. Ct. 1432 (No. 16-499) (April 3, 2017) (cert. granted).

ATS.[87] In *Doe VIII v. Exxon*, the D.C. Circuit ruled that a group of Indonesian villagers could proceed under an ATS claim alleging that Exxon security forces had committed murder, torture, sexual assault, battery, and false imprisonment while operating a natural gas extraction and processing facility.[88] In the court's view, corporate liability was a question entirely distinct from the "conduct-governing norms" that figure in step one of the *Sosa* framework.[89] The court further concluded that corporate liability was "consistent" with international law principles.[90] Just as international law provides plaintiffs with no right to sue natural persons or states, the court reasoned, it provides no right to sue a corporation.[91] Accordingly, the court concluded that "federal courts must determine the nature of any remedy . . . by reference to federal common law."[92]

Three days after *Doe VIII*, the Seventh Circuit issued its decision in *Flomo v. Firestone* with Judge Posner writing for a unanimous court.[93] Although affirming the lower court's dismissal in favor of Firestone Natural Rubber Company, the *Flomo* court went to some effort to explicate the case for corporate liability under the ATS.[94] Like the D.C. Circuit, the *Flomo* court concluded that corporate liability was not a question susceptible to the conduct-focused inquiry governed by customary international law under *Sosa*.[95] The question pertained rather to issues of enforcement. That is, although international law concerns itself with the substantive content of a human rights norm, whether individual nations ought to enforce those norms (and against whom) is a question left to their respective domestic courts.[96]

Not long after *Kiobel II*, the Fourth Circuit joined the majority view,[97] and the Ninth Circuit reaffirmed its position that the ATS permitted suit against corporations.[98] As in previous opinions, the Ninth Circuit in *Doe I v. Nestle*

87. *See* Doe VIII v. Exxon, 654 F.3d 11, 41–57 (D.C. Cir. 2011); Flomo v. Firestone, 643 F.3d 1013, 1016–21 (7th Cir. 2011); Sarei v. Rio Tinto, 671 F.3d 736, 747 (9th Cir. 2011); Baloco v. Drummond Co., Inc., 640 F.3d 1338, 1344–45 (11th Cir. 2011).

88. *See Doe VIII*, 654 F.3d at 14–15.

89. *Id.* at 41.

90. *Id.*

91. *Id.* at 42.

92. *Id.* at 41–42. In a vigorous dissent, then-Judge Kavanaugh disagreed. Citing to footnote 20, he interpreted *Sosa* to hold that "customary international law does in fact determine which categories of defendants may be liable in ATS cases on a norm-by-norm basis." *Id.* at 85. Accordingly, the absence of any norm of corporate liability under customary international law foreclosed plaintiffs' ATS claims against Exxon. *See id.* at 84–85.

93. *See* Flomo v. Firestone, 643 F.3d 1013, 1017 (7th Cir. 2011).

94. *See id.* at 1018–24.

95. *See id.* at 1019–20.

96. *See id.*

97. *See* Al Shimari v. CACI, 758 F.3d 516, 529–30 (4th Cir. 2014) (noting that "any substantive norm enforced through an ATS claim necessarily is recognized by other nations as being actionable" and allowing plaintiff to proceed against CACI corporation for allegedly directing its employees to torture prisoners at Abu Ghraib, a US operated military base).

98. *See* Doe I v. Nestle, 766 F.3d 1013, 1021–22 (9th Cir. 2014) (recognizing cause of action against corporate defendant accused of aiding and abetting child slavery).

adhered to its "norm-by-norm" approach to recognizing corporate liability.[99] In the first step of its analysis, the court turned to customary international law to assess "the nature and scope of the norm," which, in the case of child slavery before the court, applied with equal force to both state and non-state actors.[100] Secondly, the court looked to domestic tort law to determine whether plaintiffs could recover from a corporate defendant for violation of that norm.[101] The court then summarized: "This division of labor is dictated by international legal principles, because international law defines norms and determines their scope, but delegates to domestic law the task of determining the civil consequences of any given violation of these norms."[102]

The Second Circuit soon had a chance to revisit corporate liability, too. In *In re Arab Bank*, a group of US and foreign plaintiffs brought claims against Arab Bank, a Jordanian corporation, for allegedly maintaining bank accounts for terrorist organizations and facilitating payments to the families of martyred terrorists.[103] The Second Circuit did not shy away from reaffirming its precedent. As in *Kiobel I*, the court held that international law "must affirmatively extend liability to 'a particular class of defendant, such as corporations,' before that class of defendant may be held liable for conduct that violates a substantive norm of customary international law."[104] The heart of the court's reasoning rested on its reaffirmation that "[n]o corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights."[105] Recognizing its position in the circuit split, however, the court lamented that the Second Circuit "now appears to swim alone against the tide."[106] The court was concerned that the Supreme Court's interpretation of *Sosa* in *Kiobel II* appeared to align more closely with Judge Leval's concurrence in *Kiobel I*, which would "leav[e] domestic law to govern the available remedy and, presumably, the nature of the party against whom it may be obtained."[107]

2. Jesner *and the Foreclosure of Liability for Foreign Corporate Defendants*

Despite the apparent self-doubt that the Second Circuit expressed in *In re Arab Bank*, the US Supreme Court affirmed.[108] Writing for the majority in *Jesner v. Arab Bank*, Justice Kennedy concluded that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign

99. *See id.* at 1021.
100. *Id.* at 1022.
101. *See id*.
102. *Id.*
103. *See In re* Arab Bank, 808 F.3d 144, 149–50 (2d Cir. 2015).
104. *Id.* at 152 (citing to *Kiobel I*, 621 F.3d 111, 127 (2d Cir. 2010)).
105. *Id*. (quoting *Kiobel I*, 621 F.3d at 148) (emphasis in original).
106. *Id.* at 151.
107. *Id.* at 155.
108. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2018).

corporations."[109] This call for congressional action invoked both foreign-policy and separation-of-powers concerns.[110] As to the latter, the Court reasoned that just as extending liability to corporate defendants in *Bivens* actions was "a question for Congress," so it was in the ATS context as well.[111] And the Court considered the other political branches better positioned than the judiciary to weigh the foreign policy concerns that ATS litigation often presents.[112] Given the need for the "great caution" expressed in *Sosa*, these concerns made the propriety of imposing liability on a foreign corporation too uncertain.[113] In a separate part of the opinion—Part II-C, the only other part of the Court's reasoning to gain a majority—Justice Kennedy reiterated the cautionary mood of *Sosa* and warned that international friction would result from a contrary holding.[114]

Although the majority appears to have rested its decision within the second step of *Sosa*, the inquiry concerning "practical consequences," the plurality in *Jesner* gave meaningful accolades to the Second Circuit's analytical approach and conclusions.[115] In Part II-A, Justice Kennedy recognized the "considerable force and weight" of the approach taken by Judge Cabranes in interpreting footnote 20 and the *Sosa* framework.[116] He then observed that the plaintiffs in *Jesner* had shown "at most . . . corporate liability might be permissible under international law in *some* circumstances," which was insufficient to establish a customary international law norm of corporate liability under *Sosa* step one.[117] Still, this part of the plurality expressly declined to decide, as the Second Circuit did, that international law should govern the question.[118]

3. Choosing the Applicable Law

Jesner appears to be "something of a patchwork decision,"[119] and it is far from clear that it has shut the door on ATS corporate liability altogether.[120] The

109. *Id.* at 1403.
110. *Id.*
111. *Id.* at 1402–03 (quoting Correctional Serv. Corp. v. Malesko, 534 U.S. 61, 72 (2001)).
112. *See id.* at 1403.
113. *Id*. (internal citation omitted).
114. *Id.* at 1406–07.
115. The plurality includes Parts II.A, II.B.2, II.B.3, and III. Of most significance here, Part II.A focused on the Second Circuit's view but did not conclude which source of law applies to corporate liability. Part II.B.2 analogized ATS litigation to the TVPA. Part II.B.3 was more scattershot, discussing the adequacy of remedies available to ATS plaintiffs and questioning whether corporate liability would serve the purpose of the ATS. Part III then largely repeated the justifications for deference to Congress while explaining by example that there could be a number of approaches to resolving the question.
116. *Jesner*, 138 S. Ct. at 1400.
117. *Id.* at 1401 (emphasis added).
118. *See id.*
119. *See* Brill v. Chevron Corporation, No. 15 –cv–04916, 2018 WL 3861659, at *4 (N.D. Cal. Aug. 14, 2018).
120. *See* Doe v. Nestle, 906 F.3d 1120, 1124 (9th Cir. 2018) (concluding *Jesner* did not foreclose domestic corporate liability); Estate of Alvarez v. Johns Hopkins University, 373 F. Supp. 3d 639, 642–

size of its impact is open to question. For one, the singular conclusion in *Jesner* specifies only that "*foreign* corporations may not be defendants in suits brought under the ATS."[121] It provides no guidance on whether this holding forecloses domestic corporate liability. Moreover, the thrust of the Court's reasoning is tied up in the issue of foreign entanglement.[122] As lower courts may observe, those foreign policy concerns tend to dissipate when the defendant is a US corporation.[123] So too might the separation-of-powers concerns.[124] Decisions to impose liability on domestic defendants, like the decision in *Doe VIII v. Exxon*, may therefore still be good law.

The question then remains: which law governs? Given the *Jesner* Court's reasoning, it might seem fair that *domestic* law should govern *domestic* corporate liability. Because that would open up the door to corporate liability, we should expect domestic corporate defendants to continue arguing that international law governs. And because of the *Jesner* plurality's nods to Judge Cabranes,[125] corporate defendants will have significant firepower to make these arguments.

Even if we conclude that international law governs ATS corporate liability, there remains the pesky question as to what that means. Unless we believe corporate liability requires a customary international law norm, it does not necessarily follow that international law precludes domestic corporate liability. Although the Second Circuit has framed the question in terms of customary international law, there is no reason why other courts could not reframe the question more broadly to locate the answer within other tiers of international law. The *Jesner* Court declined to resolve what to do in the *absence* of a customary international law norm.

Part II applies choice of law to the corporate liability question, concluding that international law can reasonably govern. Part III will argue that the application of international law must necessarily involve all of its components, including its general principles. Part III then concludes that, in accordance with general principles, international law instructs federal courts to apply domestic tort law to the corporate liability question. This is the reference back contemplated by Judge Leval in *Kiobel I*, and in choice of law, it is called renvoi.

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644 (D. Md. Jan. 3, 2019) (responding to and rejecting arguments that the holding in *Jesner* applies to domestic corporations); Al Shimari v. CACI Premier Tech., Inc., 320 F. Supp. 3d 781, 787–88 (E.D. Va. June 25, 2018) (concluding that the exercise of jurisdiction over a corporate defendant did "not conflict with either the holding or the reasoning in *Jesner*").

121. *Jesner*, 138 S. Ct. at 1407 (emphasis added).

122. More specifically, the *Jesner* Court worried that the potential magnitude of foreign policy consequences that would result from imposing liability on a foreign corporation mandated judicial deference to Congress given "its expertise in the field of foreign affairs[.]" *See id*.

123. *See Estate of Alvarez*, 373 F. Supp. 3d at 648 (concluding that in suits against domestic corporations "the need for judicial caution is markedly reduced").

124. *Cf. id.* at 646 (observing that the need for "an amendment of the statute was thus advanced by only three Justices, and even then, that plurality did not reach a definitive conclusion on this issue").

125. *See Jesner*, 138 S. Ct. at 1400.

II.
ATS CORPORATE LIABILITY IS A CHOICE-OF-LAW QUESTION

The conflict of laws field, known elsewhere in the world as private international law, has been described as the law of multistate problems.[126] That is to say, a conflict of laws problem emerges any time a case involves contacts (e.g. parties or events) that are foreign to the forum court. Of all the possible issues, from the exercise of jurisdiction to the recognition of judgments, choice of law is perhaps the most well-known, primary issue in conflict of laws. In choice of law specifically, a forum court faces a fundamental choice between two or more laws, typically in conflict, from different legal systems. The court must then decide which of the potentially applicable laws should provide the rule of decision in the case before it.[127]

Part II of this Note begins by introducing the development of choice-of-law methodology in the US. The first Section provides some background and highlights key terminology and concepts, which will be relevant to later discussion. Section B uses choice-of-law concepts to lay out a three-part analytical structure for tackling the corporate liability question. Section C then applies these rules. Relying on examples from ATS cases, this Section illustrates how parties and judges both deploy escape devices like characterization and public policy to avoid applying the law that would otherwise apply. Section D then concludes that international law should apply to the corporate liability question, or that, at the very least, international law can reasonably apply.

A. Introduction to Choice of Law

The underlying legal principles in choice of law have been well documented. At least as early as the thirteenth century, choice of law emerged in Italy when the spread of commerce across different territorial jurisdictions in Europe increasingly led to disputes with interjurisdictional contacts.[128] As the field developed, it soon became clear that the principle of territorial sovereignty supplied the theoretical bases for resolving choice-of-law questions.[129] Early on,

126. *See, e.g.*, ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS (1965).

127. For an excellent overview of the different approaches to solving a choice-of-law problem, see Dennis J. Tuchler, *A Short Summary of American Conflicts Law: Choice of Law*, 37 ST. LOUIS U. L.J. 391, 397–404 (1993). For an example of choice-of-law analysis in practice, see Michael P. Cox, *Choice of Law: Conflicts Doesn't Have to Be a Dismal Swamp*, 15 THOMAS M. COOLEY J. PRACTICAL & CLINICAL L. 125 (2013).

128. *See* Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 301–302 (1953).

129. *See id.* at 307; *see also* Ernest G. Lorenzen, *Territoriality, Public Policy, and the Conflict of Laws*, 33 YALE L.J. 736, 737–38 (1924) (discussing the territorial nature of the Anglo-American conflict of laws system).

this principle branched into two distinct camps: "vested rights" and comity—i.e., the courtesy extended by one jurisdiction choosing to apply the law of another.[130]

In the US, Justice Joseph Story cemented the principle of comity into choice-of-law scholarship when he published his 1834 treatise *Commentaries on the Conflict of Laws*.[131] For Justice Story, a foreign jurisdiction was never entitled to have its law applied in another forum's court, because the sovereign had total power within its own borders but no power beyond those territorial limits.[132] But this lack of entitlement did not restrict a forum court's power to apply foreign law out of courtesy to a foreign sovereign. Justice Story also expressed the need for an "international basis for conflicts law" tied to comity, an ambition that would eventually yield to legal positivism and its inward-looking focus on the law as written, rather than as discovered.[133]

The principle of comity proved inseparable from the study of conflicts, but Justice Story's choice-of-law methodology eventually gave way to emerging developments in the twentieth century, including Professor Joseph Beale's theory of "vested rights"[134] and Professor Brainerd Currie's particularly influential governmental interest analysis.[135] The latter theory remains relevant today because its various offshoots dominate the modern field,[136] notwithstanding those states that still champion a more traditional approach.[137]

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130. The "vested rights" theory in choice of law, discussed below, was territorial in a more literal sense, obligating a court to apply the law of the place of the tort or contract. But theories rooted in comity underscored principles of territorial sovereignty to the extent that a sovereign could, but did not need to, apply another sovereign's law.

131. Yntema, *supra* note 128, at 307.

132. *See* Tuchler, *supra* note 127, at 396–97.

133. *See* Yntema, *supra* note 128, at 307.

134. Unlike Justice Story's approach under which one jurisdiction could choose to apply the law of another, the "vested rights" theory developed by Professor Joseph Beale was inflexibly territorialist, obligating a court to apply the law of the jurisdiction where the right of action had vested. Providing the foundation for the Restatement (First) of Conflict of Laws, authored by Professor Beale, the "vested rights" theory left a lasting mark on choice of law. *See* Hessel E. Yntema, *The Restatement of the Law of Conflict of Laws*, 36 COLUM. L. REV. 183 (1936). For a spirited defense of the "vested rights" approach, see Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987).

135. Responding to the failure of the traditional approach to yield its purported benefits of predictability and uniformity, Professor Brainerd Curie developed the governmental interest analysis toward the middle of the twentieth century. *See* Tuchler, *supra* note 127, at 400; *see also* Brainerd Currie, *Married Women's Contracts: A Study In Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958) [hereinafter Currie, *Married Women's Contracts*]; Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176 (1959) [hereinafter Currie, *Notes on Methods and Objectives*]. For an excellent overview of Professor Currie's approach that makes the case for its continuing relevance, see Herma Hill Kay, Comment, *Currie's Interest Analysis in the 21st Century: Losing the Battle, but Winning the War,* 37 WILLAMETTE L. REV. 123 (2001).

136. For an example of the different modern approaches applied to the same problem, see *In re* Air Crash disaster Near Chicago, 644 F.2d 594 (7th Cir. 1981).

137. According to the American Bar Association, "about ten or twelve" states still follow the Restatement (First) of Conflict of Laws. *See* William L. Reynolds & William M. Richman, *Multi-Jurisdiction Practice and the Conflict of Laws*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice/mjp_wreynolds [https://perma.cc/4DVU-MCMY].

Moreover, Professor Currie's approach remains especially relevant in the context of increasingly global litigation because it was the first to acknowledge and accommodate the reality that different jurisdictions will necessarily arrive at different conclusions about which law to apply.[138] It is also responsible for conceptualizing the difference between a "true" and a "false" conflict, even if more modern approaches resolve true and false conflicts differently.[139]

Although an understanding of the particulars of each choice-of-law approach is unnecessary to following the remaining discussion here, the problems that these approaches have in common are at the center of our inquiry.[140] The remainder of this Section discusses the specific choice-of-law problems that will be relevant to examining ATS corporate liability below.

One source of controversy, for example, is the true/false conflicts dichotomy. How do we separate the two? The distinction is somewhat elusive because the classic interest analysis model requires judges to examine the underlying policy of each law compared to the interest of each state in having its law applied based on the particular facts of each case.[141] Whether a true or false conflict exists, then, is a product of judicial inquiry into legislative intent, which is, for some, an exercise in futility.[142] For the purposes of this Note, a more simplified definition of "false conflict" will suffice. A false conflict exists where the choice of either law would produce the same outcome. [143]

Another early problem in conflicts law concerned the doctrine of renvoi.[144] Meaning to "send back" in French, the renvoi doctrine presents a problem that proceeds like this: State A decides to settle a dispute by reference to the law of State B whose law would, in turn, settle the dispute by reference to the law of

138. *See* Kay, *supra* note 135, at 132.

139. *See* Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1592–93 (1985); Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045 (1989). Today, the most widely adopted choice-of-law approach is the "most significant relationship" test of the Restatement (Second) of Conflict of Laws, though scholars have criticized this approach for its malleability and inconsistent application. *See, e.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992) ("Trying to be all things to all people, it produced mush.").

140. The themes of comity and territorial sovereignty, discussed above and on which these approaches rely on to varying degrees, are also relevant to the discussion, especially in light of the foreign entanglement concerns identified by the Supreme Court in ATS litigation. *See* discussion in Part I.B.2.

141. *See generally* Currie, *Married Women's Contracts*, *supra* note 135, at 232–33.

142. *See generally* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) (arguing that legislatures lack actual intent regarding the territorial scope of enacted statutes and, additionally, constructive intent provides too weak of a foundation for determining state interests).

143. Among the many scenarios that scholars have described as a false conflict, this is but just one. *See* Westen, *supra* note 25, at 76–77.

144. Joseph H. Beale, *The Conflict of Laws, 1886–1936*, 50 HARV. L. REV. 887, 889 (1937).

State A.[145] In both states, the forum is applying the *whole* law of the other (that which includes its choice-of-law rules) as opposed to the other's *internal* law (that which is substantive only, precluding choice-of-law considerations).[146] This scenario thus creates a sort of feedback loop, or *circulus inextricabilis*, with no logical offramp. Early conflict of laws scholars pointed out, however, that the renvoi doctrine does not necessarily present this logical fallacy.[147] The court in *Schneider's Estate* concluded that the ping pong problem described above was based on a "false premise" that the foreign choice-of-law rule would not refer back to the "internal law alone."[148] But though scholars took clear positions on the propriety of the renvoi doctrine, courts have not applied the doctrine consistently. For this reason, renvoi became known as one of the traditional "escape devices" deployed by courts seeking to forgo otherwise applicable law.[149]

Escape devices are tools that judges may use to "escape" applying the otherwise applicable law, and judges apply these devices inconsistently across jurisdictions. Just as the true/false conflict dichotomy produces a problematic question of characterization, so too do escape devices. How do we know whether an issue is substantive or procedural? Rights-based or remedial? Conduct-regulating or loss-allocating? And when is the application of one law so offensive to the public policy of the forum that a judge must ignore it? These questions are inherent in choice of law, and they are replete throughout the debate over ATS corporate liability.

B. Choice of Law in the Context of ATS Corporate Liability

The possibility that ATS corporate liability presents a choice-of-law question has received barely a nod in academic literature.[150] Given the post-*Sosa* debate, that gap is surprising.[151] In its most distilled form, the question of

145. For a more detailed summary of this same problem and greater discussion of the theoretical basis for the renvoi doctrine, see Ernst Otto Jr. Schreiber, *Doctrine of the Renvoi in Anglo-American Law*, 31 HARV. L. REV. 523, 524–25 (1917–1918).

146. *See id.* at 525–26 n.6.

147. Thomas A. Cowan, *Renvoi Does not Involve a Logical Fallacy*, 87 U. PA. L. REV. 34, 35 (1938).

148. *In re* Schneider's Estate, 96 N.Y.S.2d 652, 657 (1950) (quoting Erwin Griswold, Renvoi *Revisited*, 51 HARV. L. REV. 1165, 1186 (1938)).

149. *See* Tuchler, *supra* note 127, at 339 (explaining "[a]nother way around the strictures of First *Restatement* was *renvoi*"); *see also* Kramer, *supra* note 23, at 981.

150. At least one scholarly article describes the question in choice-of-law terms, but largely replays the debate over *Sosa* footnote 20's impact on corporate liability without developing the framework any further. *See* Odette Murray et al., *Exaggerated Rumours of the Death of An Alien Tort? Corporations, Human Rights, and the Remarkable Case of* Kiobel, 12 MELBOURNE J. INT'L L. 57, 72 (2011).

151. *See* Beth Stephens et al., *Understanding the Alien Tort Statute (ATS): The Analytical Framework*, *in* INT'L HUM. RTS. LITIG. IN U.S. CT.S 36 (2d ed., 2008) (Choice of law is "one of the most unsettled post-*Sosa* issues facing lower courts").

whether international or domestic law should govern the scope of liability is squarely within the ambit of choice of law.

The reasons for this gap are probably multi-fold. Perhaps one explanation is simply that a choice-of-law framework is undesirable in view of the complex policy dimensions that color the ATS corporate liability debate. Professor Ingrid Wuerth makes this point, arguing that corporate liability involves a "set of policy debates that should not be obscured through the veil of 'choice of law' questions."[152] Or perhaps the gap is attributable instead to the uncertainty of what a choice-of-law framework might look like in the context of ATS corporate liability. This Note does not purport to offer a specific reason. Instead, it discusses the question in the context of three choice-of-law escape devices—characterization, public policy, and renvoi—because resolving these issues has become more pertinent to interpreting the ATS as it is used in actual practice. Moreover, imagining the "correct" choice-of-law framework adds little value here because, for all their differences, the various methodologies "mandate an analytical inquiry which is basically the same."[153] It is not uncommon for courts deciding between state choice-of-law rules and federal choice-of-law rules to arrive at false conflicts.[154] Whether we apply an interest-balancing approach or a more traditional, content-blind process, it is far from guaranteed that a court would apply the approach in the same way and produce the same outcome.

Despite the many problems that lurk within the "dismal swamp" of conflicts scholarship,[155] the concepts underlying choice of law's escape devices can effectively describe how litigants and courts address and solve the problem of ATS corporate liability. The mode of analysis adopted by this Note is practicable for ATS litigants. It is also a more faithful adherent to the two-step framework laid out in *Sosa*. This is so because the *Sosa* framework essentially provides a limiting principle on ATS litigation that is triggered by the nature of the claims presented.[156]

In both steps of the *Sosa* inquiry, issues of characterization and public policy abound.[157] At its initial jurisdiction-conferring step, the court confronts an issue in characterization as it determines whether a defendant's conduct violates a customary international law norm.[158] Naturally, because all issues relating to conduct fall under this first step (which is governed by international

152. Wuerth, *supra* note 48, at 1964.

153. *In re* Air Crash disaster Near Chicago, 644 F.2d 594, 610 (7th Cir. 1981).

154. *See, e.g.*, *In re* Jafari, 569 F.3d 644 (7th Cir. 2009).

155. *See* William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953). For a particularly sour assessment of the state of conflicts scholarship, but one that bravely argues for a return to substantive justice, see Friedrich K. Juenger, *A Third Conflicts Restatement*, 75 IND. L.J. 403 (2000).

156. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732–33 (2004).

157. In *Jesner*, for example, Justice Kennedy pointed out that an international law limitation on liability under step one may be closely connected to a decision to defer to Congress under step two. He argued therefore that "[t]he two inquiries inform each other and are, to that extent, not altogether discrete." *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399 (2018).

158. *See Sosa*, 542 U.S. at 732.

law), disagreement arises about what is and is not "conduct." Next, step two of *Sosa* presents a question akin to the choice-of-law public policy inquiry. The essence of step two is determining whether it would be wise to recognize a cause of action for enforcement of a customary international law violation.[159] It does not question whether federal courts have the power to enforce human rights violations under international law or the power to hold corporations liable for tortious conduct, but only whether public policy commands against either.[160] This question is thus similar to asking whether, based on the nature of a given issue, the court should apply a public policy exception to reach a result that it could not under its otherwise applicable choice-of-law principles. Although public policy is a choice-of-law escape device, applying the device in the ATS context could in fact resemble Professor Wuerth's argument that the force of policy considerations requires rejecting a choice-of-law approach to resolving ATS corporate liability.[161]

After *Jesner*, it seems that *Sosa* step two puts its thumb on the scale for applying international law to a given issue, so long as we can assume applying international law would reduce the likelihood of international friction. For most issues falling outside of this framework, federal common law should apply. For example, it is well-established in choice of law that questions pertaining to remedy and procedure are the province of the forum court.[162] However, *Sosa* asks explicitly whether *international law* extends liability, which should be the starting point of analysis.[163] Putting all of the above considerations together, our guiding principles look like this:

> (1) *Sosa* instructs that international law must apply to at least some questions concerning the scope of liability;
>
> (2) If corporate liability is clearly a question of conduct, or a substantive norm, then international law should govern, per *Sosa* step one,
>
> (3) If corporate liability is clearly non-substantive—*i.e.*, a question of remedy or enforcement—then *Sosa* step one does not compel the application of international law; and
>
> (4) If corporate liability cannot be safely characterized either way, then we should still consider whether important policy considerations compel application of international law under *Sosa* step two.

The choice-of-law analysis in the following Section applies these principles to the corporate liability question.

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159. *See id.* at 733 n.21.
160. *See id.*
161. *See* Wuerth, *supra* note 48, at 1964.
162. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1971).
163. *See Sosa*, 542 U.S. at 732 n.20.

C. Application to ATS Corporate Liability

This Section illustrates the difficulties of relying on issues of characterization to determine litigation outcomes. It also showcases the ubiquity of the public policy exception. Subsection 1 encompasses the first two steps of the analytical structure described at the end of the previous section. It begins by analyzing corporate liability within the interrelated dichotomies of substance vs. procedure and rights vs. remedies. The analysis then borrows from New York's rules in asking whether the corporate liability question can be described in terms of conduct regulation or loss allocation. Subsection 2 then weighs the relevance of public policy to both choice of law and the ATS corporate liability debate.

1. Characterization

If an Alabama citizen enters into an employment contract with an Alabama rail company in Alabama, but is injured in a railroad accident while working in Mississippi, does the case sound in tort or in contract? The late nineteenth-century Alabama Supreme Court that confronted this question did not conceptualize it as a question of characterization, and therefore, applying the traditional territorial approach, it rejected out of hand any argument that the law of the place of contracting should apply to the dispute.[164]

A characterization issue arises whenever one must determine "the nature of the problem."[165] Asking whether a case sounds in tort or in contract is, therefore, not too different from asking whether two laws are in "true conflict" or whether a specific issue is substantive or procedural. The subsections that follow examine specific characterization issues that appear within choice-of-law questions such as ATS corporate liability: substance vs. procedure, rights vs. remedies, and conduct regulation vs. loss allocation. When an issue falls within the latter characterization of each dichotomy—i.e., procedure, remedy, and loss allocation—the court will apply forum law. If, however, the issue belongs among the former categories—i.e., substance, rights, and conduct regulation—, the court will apply the otherwise applicable law under its choice-of-law rules.

a. Substance vs. Procedure

The substance-procedure distinction should be familiar to anyone with a basic knowledge of Civil Procedure. After *Erie*, federal courts sitting in diversity

164. *See* Ala. Great S. R.R. Co. v. Carroll, 97 Ala. 126, 134 (1892) ("Up to the time this train passed out of Alabama no injury had resulted. For all that occurred in Alabama, therefore, no cause of action whatever arose.").

165. Joseph M. Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws: A Study of Problems Involved in Determining Whether or Not the Forum Should Follow Its Own Choice of a Conflict-of-Laws Principle*, 14 S. CALIF. L. REV. 221, 241 (1941) (emphasis removed).

must apply federal *procedural* law and state *substantive* law.[166] In attempts to refine the *Erie* doctrine, subsequent cases quickly made clear that the distinction between substance and procedure is often illusory.[167] For example, although a statute of limitations can be substantive for *Erie* purposes,[168] it is well established that the same issue is procedural for choice-of-law purposes.[169]

Procedural issues are indisputably governed by the law of the forum. The Restatement (Second) of Conflict of Laws adopts this view.[170] By contrast, the Second Restatement also sets out that substantive issues are governed by the otherwise applicable law under its choice-of-law rules.[171] But the Restatement does not create hard rules to facilitate determining whether a given issue belongs in either category, because what is procedural for local law purposes might not be for choice-of-law purposes.[172]

As the Second Restatement provides, whether an issue is substantive or procedural turns on the degree to which applying a particular law would interfere with judicial administrability.[173] As conflict of laws scholar Walter Wheeler Cook described it, the question is, "[h]ow far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?"[174] If the foreign law causes too great a disturbance to the functioning of a forum court, the issue will be deemed procedural and local law will apply.[175] Another formulation of the distinction, as articulated by Professor Morgan, would apply the otherwise applicable law to "matters of procedure as are likely to have a *material influence* upon the outcome of litigation."[176] This latter formula, of course, recalls the judicial test on whether a

166. *See, e.g.*, Gasperini v. Ctr. for Human., 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.").

167. *See, e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99, 109–10 (1945) (listing the cases in which it "put[] to one side abstractions regarding 'substance' and 'procedure' . . ."). As the *Erie* Court stated, "[t]he line between procedural and substantive law is hazy[.]" Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938).

168. *See Guaranty Trust Co*., 326 U.S. at 109–10.

169. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 729–30 (1988). *But see id.* at 736–37 (Brennan, J., concurring) (noting that "[s]tatutes of limitations . . . defy characterization as either purely procedural or purely substantive" but concluding that in-forum contacts are sufficient to create a procedural interest).

170. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 162, § 122 ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.").

171. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 162, § 122 cmt. b.

172. *See id.*; *see also* Grant v. McAuliffe, 41 Cal. 2d 859, 865 (Cal. 1953) (noting that "a statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made").

173. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 162, § 122 cmt. a.

174. WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 154, 166 (1942).

175. *See id.*; *accord* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 162, § 122.

176. Edmund M. Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 195 (1944) (emphasis added).

procedural rule was outcome-determinative, the inquiry that came to overlay the *Erie* doctrine.[177]

Turning back to the ATS, it seems evident that the question of corporate liability cannot be procedural for choice-of-law purposes. Especially under Professor Morgan's formula, whether a corporation can be sued under the ATS would have an obvious material influence in suits brought solely against corporate entities because a prohibitive rule would dispose of the litigation altogether. In such situations, a court would dismiss the case out of hand before reaching the merits of the plaintiffs' ATS claim. Nor does the issue seem procedural under the Second Restatement's formulation. This is so because whether an ATS defendant is a corporation or a natural person bears little influence on the functioning of "judicial machinery."[178] The essence of procedure is, after all, process. The examples contained in the Restatement—i.e., service of process, pleading rules, discovery—are fundamentally about administration and order, and they are defined more by their necessity than they are by any concern for their real-life impact on parties in litigation.[179] A rule of tort liability, by contrast, involves normative policy dimensions more susceptible to debate, such as deterring wrongful conduct, compensating for injury, or incentivizing economic activity.

But even if corporate liability is not clearly a procedural matter, the question remains whether it is truly one of substance. If so, *Sosa* step one requires applying international law.[180] To the extent that international law requires state action as an element of certain human rights violations (such as acts of torture) thereby foreclosing corporate liability, the question involves decisive, substantive content. But to what extent?

b. Rights vs. Remedy

Formulaically, the rights vs. remedy distinction both tracks and finds its origins in the substance vs. procedure distinction.[181] Thus, while the Second Restatement has classified available remedies as procedural for choice-of-law purposes,[182] it also uses the terminology interchangeably, distinguishing, for

177. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

178. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 162, § 122 cmt. a.

179. *See id.*

180. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 730 (2004).

181. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS, Introductory Note to ch. 12 (AM. LAW INST. 1934) (explaining rule that forum law governs procedural matters); *see also* Flomo v. Firestone, 643 F.3d 1013, 1019 (2011) (synonymizing procedure and remedy).

182. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 728 (1988) (citing to § 131 of the Second Restatement).

example, between "procedure" and "substantive *rights*."[183] Advocates also mix these terms,[184] as do judges.[185]

But understanding the issue in terms of rights vs. remedy may be more useful than the substance vs. procedure distinction, because the former terms appear more abundantly in ATS scholarship and jurisprudence. As Professor William Casto has argued, "The new cause of action envisioned by *Sosa* is unintelligible unless the well-established distinction between rights and remedies is kept clearly in mind."[186] According to Professor Casto, the federal courts' power to recognize a federal common law cause of action under *Sosa* "relates to the remedy" and is entirely separate from the *Sosa* step one inquiry as to whether a human rights violation has occurred in the first place.[187] Because concluding that liability is a remedial issue takes us swiftly past *Sosa* step one, it is unsurprising that ATS plaintiffs frequently argue that corporate liability is an issue of remedy.[188]

The respective opinions of Judge Cabranes and Justice Kennedy in *Kiobel I* and *Jesner* represent the strongest rebuke to the argument that corporate liability is a question of remedy. In *Kiobel I*, the Second Circuit concluded that corporate liability was not a remedial question.[189] Instead, reasoned Judge Cabranes, corporate liability concerned the conduct of a corporation's agents and, specifically, which actions taken by those agents would be sufficient to impute liability to the corporation as a whole.[190] The plurality in *Jesner* threw its support behind this latter position, arguing that it was "far from obvious" that corporate liability is a "mere question of remedy."[191]

Yet in *Jesner*, four Justices—compared to the three in the plurality—took the opposite view. Writing for the dissent, Justice Sotomayor stated that "*Sosa's* norm-specific first step is inapposite" to the question of ATS corporate liability.[192] Justice Sotomayor argued that *Sosa* did not require "sufficient

183. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 162, § 122 cmt. b, illus. 1 (emphasis added).

184. *See, e.g.*, Transcript of Oral Argument (*Kiobel II*), *supra* note 77 (Attorney for respondents comparing "a question of substance" with one of "domestic remedy").

185. *See, e.g.*, *id.* at 39, 41 (Justice Kagan observing that corporate liability "seems to be a question of enforcement, of remedy; not of substantive international law" and Justice Kennedy noting "there is a difference in substance and . . . remedy").

186. William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 638–39 (2006). Courts have also often framed the inquiry into corporate liability as whether it relates to remedy specifically. *See, e.g.,* Flomo v. Firestone, 643 F.3d 1013, 1019–20 (2011).

187. *See* Casto, *supra* note 186, at 639.

188. *See* Alan O. Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2173 (2012).

189. *Kiobel I*, 621 F.3d 111, 147 (2d Cir. 2010) ("[T]he liability of corporations for the actions of their employees or agents is not a question of remedy.").

190. *See id.*

191. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018) (plurality opinion).

192. *Id.* at 1420 (Sotomayor, J., dissenting).

international consensus" on corporate liability, because the issue fell under "the mechanisms of enforcing these norms," with which customary international law does not concern itself.[193] Instead, international law has left to states decisions on how to remedy violations of international human rights.[194] Comparing conduct prohibited by international law and forms of liability, the dissent argued, was like comparing apples and oranges.[195]

Justice Sotomayor's argument in *Jesner* has significant support from the circuit courts. In *Flomo*, for example, the Seventh Circuit held explicitly that the determination whether individual board members or the corporation itself should be held liable was a purely "remedial question[] for the tribunal, in this case our federal judiciary."[196] Likewise, in *Doe VIII v. Exxon*, the D.C. Circuit suggested that the Second Circuit had "conflate[d] the norms of conduct at issue in *Sosa* and the rules for any remedy to be found in federal common law."[197]

The argument that forms of liability are left purely to domestic law begins to break down, however, when we consider that certain international law violations preclude liability against nonstate actors. This is, in fact, the example invoked in *Sosa* footnote 20, which compares liability of private actors for torture and genocide.[198] If a defendant's identity can control whether it is capable of violating a substantive human rights norm at all, then the defendant's identity directly impacts the plaintiff's private right of action. In such a scenario, it is difficult to see how corporate liability could be "purely remedial." This is why federal courts, before *Jesner* at least, had adopted a "norm-by-norm" approach to resolving corporate liability.[199] But if corporate liability is remedial in cases where a norm does not require state action, how should corporate liability be characterized when a state action requirement precludes it?

Similar to the remedial approach, a rights-based understanding of corporate liability also produces questions that seem to undermine the rationale for its application. Simply put, international law does not extend a right to sue *any* class of defendant.[200] The ATS does not provide a right of action either. Instead, the

193. *Id.*
194. *Id.*
195. *Id.* at 1421.
196. Flomo v. Firestone, 643 F.3d 1013, 1019–20 (2011).
197. Doe VIII v. Exxon, 654 F.3d 11, 41 (D.C. Cir. 2011).
198. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).
199. *See, e.g.*, Doe v. Nestle, 766 F.3d 1013, 1021 (2014); *Doe VIII*, 654 F.3d at 85.
200. *See, e.g.*, *Doe VIII*, 654 F.3d at 42 ("There is no right to sue under the law of nations . . . ."); Brief of Amicus Curiae Earthrights International in Support of Petitioners at 18–19, *Jesner*, 138 S. Ct. 1386 (No. 16-499), 2017 WL 2822778 ("Since international law does not provide a right to sue *anyone* for customary international law violations, it cannot be expected to explicitly provide a right to sue a corporation."); *see also* L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 13 (6th ed. 1947) (explaining that "all rights which might necessarily have to be granted to an individual human being according to the Law of Nations are not, as a rule, international rights, but rights granted by Municipal Law in accordance with a duty imposed upon the State concerned by International Law").

most recognizable origin of the right is federal common law. This is at least the framework established by *Sosa*.[201]

c. Conduct Regulation vs. Loss Allocation

Another manner of characterizing the issue of ATS corporate liability involves the distinction between rules regulating conduct and rules allocating losses. Understanding the line between conduct regulation and loss allocation may be of particular importance going forward, because the first draft of the new Restatement (Third) of Conflict of Laws fully incorporates this distinction into its proposed rules.[202] Furthermore, conduct regulation is central to the first step of the *Sosa* framework, which asks whether certain conduct violates a customary international law norm, and jurists have thus framed the question with conduct regulation terminology.[203]

Conduct-regulating rules and loss-allocating rules differ fundamentally in their purposes and effects. Whereas the former is forward-looking (focused on deterring future conduct), the latter is backward-looking.[204] The draft of the Third Restatement provides that conduct-regulating rules are those "whose primary purpose is to impose liability for conduct deemed socially undesirable."[205] The draft specifies that the terrain of conduct regulation includes issues of tortious character of conduct, defenses that negate wrongfulness, and liability requirements.[206] Put more simply, conduct-regulating rules are "rules of the road."[207] By contrast, the "primary purpose" of loss allocating rules "is to

201. *See Sosa*, 542 U.S. at 724 ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action[.]").

202. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS §§ 6.01, 6.04 (AM. LAW INST., PRELIMINARY DRAFT 2016). The conduct regulation vs. loss allocation distinction is younger than substance vs. procedure or rights vs. remedies distinctions discussed thus far. Addressing the drafting of the Third Restatement, Professors Kermit Roosevelt III and Bethan Jones referred to the conduct regulation and loss allocating distinction as "one of the major advances of the last century of choice of law." *See* Kermit Roosevelt III & Bethan Jones, *The* Draft Restatement (Third) of Conflict of Laws*: A Response to Brilmayer & Listwa*, YALE L.J.F. 293, 309 (2018).

203. *See, e.g.*, Sarei v. Rio Tinto, 671 F.3d 736, 791 n.8 (9th Cir. 2011) (McKeown, J., concurring in part, dissenting in part) ("[M]uch of this debate boils down to the difficulty in deciphering where the *conduct-regulating* international norms end . . . .") (emphasis added); *Doe VIII*, 654 F.3d at 41 ("[C]orporate liability differs fundamentally from the *conduct-governing* norms at issue in *Sosa*.") (emphasis added).

204. Professor Michael Green defines conduct-regulating rules as those which "impose[] a duty of compensation as a means of discouraging people from engaging in the conduct that gave rise to the plaintiff's harm" whereas loss allocating rules simply assign the duty of compensation for other reasons. Michael S. Green, *The Return of the Unprovided-For Case*, 51 GA. L. REV. 763, 773–74 (2017). Although loss-allocating rules in some cases may focus on assigning responsibility among culpable parties, they may also emphasize the policy goal of compensating victims of wrongdoing. *See* Gregory S. Alexander, *Choice of Law Methodology and Conflicts Casebooks: Selected Problems*, 55 TEX. L. REV. 953, 960 (1977) (contrasting the loss distribution/compensation aim of comparative negligence rules with their conduct regulation/deterrence aim).

205. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS, *supra* note 202, §§ 6.01, 6.04.

206. *See id.* § 6.04.

207. GlobalNet Fin. v. Frank Crystal & Co., 449 F.3d 377, 384 (2d Cir. 2006).

assign loss . . . on the basis of considerations other than the mere wrongfulness of conduct."[208] These rules "prohibit, assign, or limit liability"[209] or involve "limiting damages," "vicarious liability rules, or immunities from suit."[210] Thus, conduct-regulating rules are prophylactic in effect, establishing boundaries that incentivize good behavior and prevent tortious conduct from occurring in the first place. Conversely, rules about loss allocation function retrospectively to divide up losses *after* a tort occurs.

The draft of the Third Restatement proposes an application of the loss application and conduct regulation distinction that is almost identical to the test as it evolved in New York's *Neumeier* rules. The gist of the rule is that the law of the state where the conduct or injury occurred will generally apply to issues of conduct regulation; further, the law of the state of conduct will generally also apply to issues of loss allocation when the case presents multistate contacts.[211] By very slight contrast, loss allocation under the *Neumeier* rules, while reflecting the general presumptions above, also involves a more complex, three-tiered framework.[212] This inquiry requires diving into interest analysis and evaluating the different contacts and interests within each jurisdiction.[213]

The similarities between the *Neumeier* framework and the Third Restatement framework are reflected in the case law. *Schultz v. Boy Scouts of America* is one such example. There, New Jersey plaintiffs brought suit against the Boy Scouts of America, a New Jersey charitable organization, alleging that a scoutmaster had abused children while camping in New York.[214] Although this egregious conduct had occurred in New York, the New York Court of Appeals applied New Jersey law in settling a question of charitable immunity, since the parties' common domicile was New Jersey and the disputed issue was "loss-allocating rather than conduct-regulating."[215] The parties' shared contact with New Jersey and the character of the immunity issue were sufficient to overcome presumptions that the law of the place of injury would apply.[216] In other words, New Jersey's interest in immunizing a charitable organization from tort liability

208. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS, *supra* note 202, § 6.01.

209. Padula v. Lilarn Properties Corp., 84 N.Y.2d 519, 522 (N.Y. 1994).

210. *GlobalNet Fin.*, 449 F.3d at 384 (internal quotations omitted).

211. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS, *supra* note 202, §§ 6.02, 6.03, 6.05, 6.06.

212. Neumeier v. Kuehner, 31 N.Y.2d 121, 128 (N.Y. 1972). Specifically, loss-allocating rules apply either: (1) the law of the common domicile of the parties, if there is one; (2) the law of the place of injury in cases where the parties are of different domiciles and the law of the place of injury favors its domiciliary; or (3) in all other cases, the law of the place of injury unless displacing the normally applicable law would advance "relevant substantive law purposes" without infringing on the needs of the interstate system or expectations of the parties. *See, e.g.*, Conti v. Doe, 17-cv-9268 (VEC), 2019 WL 952281, at *10-11 (S.D.N.Y. Feb. 17, 2019); Edwards v. Erie Coach Lines Co., 17 N.Y.3d 306, 321 (N.Y. 2011).

213. *See Edwards*, 17 N.Y.3d at 321.

214. Schultz v. Boy Scouts of America, Inc., 65 N.Y.2d 189, 192–93 (N.Y. 1985).

215. *Id.* at 200–02.

216. *See id.* at 201–02.

was greater than New York's interest in compensating out-of-state victims of sexual abuse or deterring this egregious conduct from occurring within its state.[217] A court adhering to the Third Restatement draft would likely reach an identical conclusion.[218]

Scholars have nevertheless decried the utility of the conduct-loss distinction. The troubling outcome in *Schultz* has aided their case, too. Shortly after the New York court issued its decision, for example, Professor Holly Sprague called the court's treatment of New York's interest "inadequate," and found that the relevant New York tort law could be just as easily described in terms of loss allocation—that is, as a decision to *bar* charitable immunity.[219] In a more forceful rebuke of *Schultz*, Professor Aaron Twerski called the court's dismissal of New York's interest "nonsensical."[220]

ATS litigation in the Second Circuit similarly illustrates the difficulties in drawing the line between conduct and losses. At least one New York federal court has applied the state's choice-of-law approach in the context of ATS litigation.[221] And other recent decisions within the Second Circuit have applied the state's approach in cases involving international contacts.[222] Most importantly here, the Second Circuit has explicitly affirmed the *Schultz* court's determination that charitable immunity is a loss allocation rule.[223] Two issues are worth flagging. First, if a defendant's immunity from suit influences its decisions about where and how it does business, how is the immunity question one of loss allocation and not of conduct? Second, if immunity from suit is a matter of loss allocation, how did *Kiobel I* conclude that the decision to protect corporations from tortious liability for human rights violations was not?[224]

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217. *See id*. at 201 ("[A]pplication of the law of New Jersey . . . would further that State's interest in . . . promoting the continuation and expansion of defendant's charitable activities in that State. Conversely, although application of New Jersey's law may not affirmatively advance the substantive law purposes of New York, it will not frustrate those interests because New York has no significant interest in applying its own law to this dispute.")

218. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS, *supra* note 202, § 6.02 ("When the relevant parties share a central [personal] link to a single state, that state's law will govern an issue of loss allocation.").

219. Holly Sprague, Comment, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CALIF. L. REV. 1447, 1468–69 (1986).

220. Aaron D. Twerski, *A Sheep in Wolf's Clothing: Territorialism in the Guise of Interest Analysis in* Cooney v. Osgood Machinery, Inc., 59 BROOK. L. REV. 1351, 1358 (1994).

221. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 681 (S.D.N.Y. 2006). In *Talisman Energy*, the court addressed whether a defendant oil company could be held vicariously liable for the conduct of its subsidiaries. *See id.* at 683. Because the issue of vicarious liability was one of loss allocation, the court applied the *Neumeier* framework to that issue. *See id.* at 688. It began with the presumption that the law of Sudan applied since the case involved parties with different domiciles, and due to plaintiffs' failure to supply the court with any adequate choice-of-law analysis of the issue, the court found "no reason" to apply domestic law instead. *See id.*

222. *See* Licci v. Lebanese Canadian Bank, 739 F.3d 45, 50–51 (2013) (examining the approach of the New York Court of Appeals toward conduct-regulating rules as a means of "ascertaining state law.") (internal quotation marks omitted).

223. Gilbert v. Seton Hall Univ., 332 F.3d 105, 109 (2003).

224. *See Kiobel I*, 621 F.3d 115, 128, 147 (2d Cir. 2010).

Under the Third Restatement's definitions, corporate liability first appears to be an issue of conduct regulation because it includes the issue of *identity*, which touches the "requirements for liability."[225] Furthermore, whether a corporation can be held liable under the ATS would presumably have some impact on its conduct because few businesses would choose not to reduce their liability exposure where feasible. Thus, it would follow that corporate liability should be determined at step one of the *Sosa* inquiry, requiring a customary international law norm of corporate liability before making corporate defendants liable under the ATS.[226]

While logically it might make little sense that a corporation's liability should be assessed differently from that of a charity—both are artificial entities—Professor Symeon Symeonides explains that the difference turns on the *purpose* of the particular rule because focusing on the *effect* would lead to rules in both buckets (conduct regulation and loss allocation simultaneously).[227] The purpose of charitable immunity is to unburden charitable organizations financially; any effect on conduct is incidental.[228] By contrast, in cases where "a *non*-immunity rule" makes liability available, Professor Symeonides notes that it is easier to argue that the rule applies to both conduct regulation and loss allocation.[229] On the one hand, the rule's conduct-regulation function incentivizes a certain standard of conduct, while on the other hand, its loss-distributing function imposes a financial burden and provides compensation for victims.[230] Crucially, immunity rules themselves do not *intend* to incentivize substandard conduct. Rather, they intend to incentivize charitable activity by making a non-profit entity's financial survival less uncertain.[231]

What Professor Symeonides' understanding of the Third Restatement suggests, then, is that *imposing* corporate liability involves both conduct and losses, whereas *shielding* a corporation from liability involves only losses. This does not solve our problem. Because the ATS corporate liability question essentially involves a decision whether to impose liability on corporations or shield them from it, the issue could fall in either camp. This leaves the characterization of corporate liability indeterminate.

Perhaps some insight about the character of corporate liability can be gleaned from analogizing to aiding and abetting liability. In the first round of oral arguments in *Kiobel II*, the attorney for plaintiffs stated that aiding and

225. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS *supra* note 202, § 6.04.

226. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

227. Symeon C. Symeonides, *The Third Restatement's First Draft on Tort Conflicts*, 92 TUL. L. REV. 1, 8–9 (2017).

228. *See id.* at 9.

229. *See id.* at 9 n.40.

230. *See id.*

231. This may be an unsafe assumption. For an opposing view, see Twerski, *supra* note 220, at 1358 ("The classic arguments against tort immunities are that they encourage lax standards of care and, concomitantly, lead to negligent conduct.").

abetting liability could be seen as a "conduct regulating norm, that it actually applies to the things that can be done to violate the norm."[232] This assessment is in line with the views of others who have examined the aiding and abetting liability question.[233] It is based on the observation that aiding and abetting speaks to affirmative conduct that a party takes in assisting the liability-generating actions of others.[234] Comparatively, corporate liability does not speak to affirmative conduct with the same clarity. Rather than applying to "the things that can be done to violate the norm," it applies to the identity that must be established to violate the norm.[235] In this regard, corporate liability is much more "ancillary" to primary conduct than is aiding and abetting a human rights violation.[236]

The purpose of a corporate liability rule in the ATS context appears to fall in both buckets. As a conduct-regulating device, corporate liability would incentivize corporations to adopt a greater standard of care in avoiding activities that risk contributing to human rights violations.[237] ATS cases presenting corporate liability questions often involve litigating the specific steps taken by the corporate defendant to avoid the alleged harm.[238] A rule imposing corporate liability could incentivize such corporations to take *even more* action to avoid engaging in egregious conduct that gives rise to liability. But corporate liability can also be described as a rule of loss allocation because the decision whether or not to shield a corporation from liability involves policy considerations, such as the promotion of commerce, which do not relate to the wrongfulness of the conduct.[239]

232. Transcript of Oral Argument (*Kiobel II*), *supra* note 77, at 56.

233. *See, e.g.*, Chimene L. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 64 (2008).

234. *See id.* at 64, 80–82.

235. *See* Transcript of Oral Argument (*Kiobel II*), *supra* note 77, at 56.

236. *See* Doe I v. Unocal Corp., 395 F.3d 932, 963–68 (9th Cir. 2002) (Reinhardt, J., concurring) (arguing that all forms of liability, including aiding and abetting, are ancillary to conduct).

237. *See* Symeonides, *supra* note 227, 11 n.46 (citing dram shop acts as an example of a conduct-regulating rule incentivizing business owners to act more carefully).

238. *See, e.g.*, Doe v. Nestle, 906 F.3d 1120, 1124–25 (9th Cir. 2018). Defendant Nestle has an entire website dedicated to its plan for sustainable cocoa farming, which includes a "Tackling Child Labour Report" visible on its main page. *See* NESTLE COCOA PLAN, http://www.nestlecocoaplan.com [https://perma.cc/LN87-ZUCK]. In briefing, plaintiffs argued that Nestle's publications were in fact intended to mislead and conceal its involvement. *See* Appellants' Opening Brief, at *27–29, *Doe*, 906 F.3d 1120 (No. 17-55435), 2017 WL 5186552. For Nestle's response, see Answering Brief of Nestlé USA, Inc., at *40, *Doe*, 906 F.3d 1120 (No. 17-55435), 2018 WL 841942 ("Publishing materials opposing child slavery simply cannot aid and abet the commission of that very crime.").

239. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS *supra* note 202, § 6.01(1).

2. The Public Policy Exception

The public policy exception is a tried-and-true escape device,[240] and its traditional construction entails applying forum law when failing to do so would offend a fundamental principle of justice in the forum.[241] The offense must therefore be serious. As Judge Cardozo explained, "mere differences of remedy do not count."[242]

Assuming *arguendo* that international law governs and precludes corporate liability, the question is whether precluding corporate liability would infringe on the United States' interest in holding corporations liable for tortious conduct, and whether that interest is great enough to justify applying domestic law instead. As discussed above, corporate liability serves at least two fundamental policy interests. For one, it aims to deter tortious conduct in the first place.[243] For another, it aims to compensate victims of tortious conduct after the fact.[244] ATS litigation accounts for both of these policy interests. In enacting the ATS, Congress sought to provide a remedy to foreign parties injured by conduct that violated customary international law.[245] The compensation aim is thus at the forefront of ATS policy. Arguably, the United States' interest in deterring tortious conduct applies with lesser force, as conflict of laws scholars have traditionally assumed that legislatures have a stronger interest in regulating the behavior of their own constituents.[246] But the conduct at the center of ATS litigation is unique because, unlike an act of negligence, it involves egregious human rights violations like genocide, torture, or child slavery, making ATS defendants the "enemy of all mankind."[247] Thus, there is an unusually strong interest in deterring the conduct of parties who would otherwise seek "safe harbor" within the United States.[248]

The broader ATS context requires reconsidering the traditional construction of the public policy exception. Rather than asking only whether applying foreign law would offend a policy of the forum, the inquiry should include whether applying forum law would in fact offend a policy of the forum. In other words, the central policy question here is whether permitting a cause of action against a corporate defendant would disturb US foreign relations, and if so, whether this policy interest supplants others.[249] If the ATS seeks to deter

240. *See, e.g.*, Paul v. National Life, 177 W. Va. 427, 433–34 (W. Va. 1986) (refusing to apply foreign guest statutes on grounds that they violated West Virginia's strong public policy of compensating injury caused by negligence).

241. *See, e.g.*, Loucks v. Standard Oil Co., 224 N.Y. 99, 111 (N.Y. 1918).

242. *Id.* at 112.

243. *See* discussion in Part II.C.1.c, *infra*.

244. *See id.*

245. *See generally* Stephens, *supra* note 12, at 1467.

246. *See, e.g.*, Currie, *Married Women's Contracts*, *supra* note 135, at 236–38.

247. Filártiga v. Pena–Irala, 630 F.2d 876, 890 (2d Cir. 1980).

248. *Kiobel II*, 569 U.S. 108, 127–28 (2013) (Breyer, J., dissenting).

249. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004).

conduct or compensate victims in tort, it does so because there is a need to avoid the "serious consequences in international affairs" that might ensue from failing to provide foreign parties relief in the US court system.[250] By itself, corporate liability is not incongruent with this purpose, but it also risks conflict in cases where the corporate defendant is foreign. The *Jesner* Court zeroed in on these potential consequences, noting that the Hashemite Kingdom of Jordan considered the lawsuit "an affront to its sovereignty" given the defendant bank's prominent role in the Jordanian economy and the extraterritorial scope of plaintiffs' allegations.[251] And the plurality even went so far as to suggest that imposing liability could harm economies in developing countries by disincentivizing global investment, thereby undermining US foreign policy.[252] Thus far, parties have had little success arguing that this reasoning mandates an equal prohibition on domestic corporate liability,[253] but given the scale of global commerce, as well as the Court's corporate-friendly track record, it does not strain credibility to imagine such an argument succeeding.

If corporate liability can both advance and harm US interests, it is worth turning to other policy considerations, such as the policy of judicial restraint that cautions against creating new rights of action under federal common law but only in limited circumstances. Under step two of *Sosa*, jurists must consider the "practical consequences" of recognizing a cause of action against a corporate defendant.[254] Indeed, the *Jesner* majority buttressed its reasoning with an entire section on this point, a consideration it suggested would apply to cases involving both foreign and domestic corporations.[255] But the *Jesner* Court never stated that international law should preclude corporate liability based on its alignment with forum policy. Rather, it concluded only that, in light of this cautionary principle and foreign-relations concerns, congressional approval was necessary before allowing ATS claims against foreign corporate defendants.[256] In other words, by deferring to Congress, the *Jesner* Court opted out of crafting a public policy exception based on the content of either domestic or international law.

An array of competing interests makes applying the public policy exception confusing in the ATS context, yet policy is at the heart of step two of the *Sosa* framework. Although an international law prohibition on corporate liability would conflict with domestic law and strong public policies supporting corporate liability, that conflict would vary with the nationality of the defendant party and

250. *See id.* at 715.

251. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407, 1430 (2018).

252. *See id.* at 1406.

253. *See, e.g.*, Estate of Alvarez v. Johns Hopkins University, 373 F. Supp. 3d 639, 646 (D. Md. Jan. 3, 2019).

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

255. *Jesner*, 138 S. Ct. at 1402–03 ("This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations.").

256. *See id.* at 1403.

the particular facts of the case. Therefore, due to the case-specific nature of this problem, courts cannot use the policy concerns identified in *Sosa* to justify an unbending rule for or against ATS corporate liability.

D. Choosing International Law

The analysis of characterization devices and public policy in Section C probably raises more questions than it answers. The resulting uncertainty cautions against applying forum law—i.e., domestic tort law principles imposing corporate liability—on the sole grounds that the issue is either procedural, remedial, or loss-allocating. Given the magnitude of the human rights at issue, as well as the greater potential for plaintiffs to recover for violations, the stakes are simply too high to have courts rely on characterization.

But public policy reasons are also insufficient to displace the "otherwise applicable law" because they are too numerous, and because they unfold differently in relation to the facts of each case. Congress enacted the ATS to prevent international friction.[257] In cases that involve international contacts on either side of the litigation, however, it may be impossible to arrive at a decision that does not upset at least one side.[258] This issue may be of significantly lesser concern in the wake of *Jesner*. But if *Jesner* had involved a domestic bank, rather than a Jordanian one, it is easy to imagine that a similar decision to refrain from imposing liability might risk upsetting US foreign policy commitments to combat terrorism.[259]

The analysis tends to support applying international law in view of the international character of the ATS and the absence of a compelling justification for applying domestic law. Although the rights vs. remedy and conduct regulation vs. loss allocation distinctions are murky, the substance vs. procedure distinction and the public policy exception offer stronger support for applying international law.[260] The identity of a perpetrator has practically no bearing on judicial administrability, but it has *some* bearing on the substantive elements of certain human rights norms. Even though the Court has only spoken to the defendant's identity in the context of state action requirements,[261] the distinction between corporations and natural persons arguably matters in international law

257. *See generally* Stephens, *supra* note 12, at 1471–74 (illustrating how the congressional decision to provide a remedy in the federal courts for international law violations, which involve foreign policy affairs, served diplomatic ends).

258. The same issue may be relevant in future suits against individual corporate directors given the possibility of interests stemming from ties between foreign states and individual foreign corporate directors.

259. Indeed, the US—via its executive branch—has continued to inform the U.S. Supreme Court of its position that the ATS supports corporate liability. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Neither Party at*17–18, *Jesner*, 138 S. Ct. 1386, 2017 WL 2792284 (arguing that permitting suit against corporate defendants in ATS litigation is consistent with international law).

260. See discussion in Parts II.C.1.a and II.C.2, *infra*.

261. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

more broadly given the scale of transnational human rights litigation, as well as the global push for corporate social responsibility.[262]

The application of international law is also faithful to the text of *Sosa*, at least to the extent that it does not support applying domestic law. A fair reading of footnote 20—which states only that courts must consider whether "*international law* extends the scope of liability for a violation of a *given norm* to the perpetrator being sued"—is that international law has *something* to say about the range of potential defendants in ATS suits.[263] If so, it follows logically that courts must consider whether international law permits crafting a federal common law cause of action against corporate defendants.[264] None of the characterization issues presented by ATS plaintiffs are so forcibly dispositive that they make this conclusion unreasonable. By contrast, the much-disputed footnote says nothing of domestic law or its application to the issue.

Applying international law to the corporate liability question requires us to broaden judicial interpretations of *Sosa* footnote 20. Although courts are split on whether *Sosa* requires a customary international law norm to impose corporate liability, the greater question is whether any tier of international law permits corporate liability. A narrower reading of *Sosa* would simply subvert international law fundamentals.[265]

A full application of international law includes consideration of its general principles. The argument that federal common law applies because no customary international law norm prohibits corporate liability skips this consideration. Although federal common law "operates interstitially" and courts may draw from different bodies of law, including international law, to craft pastiche-like causes of action,[266] it seems inefficient to ignore general principles in the first instance, only to return to them later in federal common law. Much like post-*Erie* federal common law operationalizes federal statutes by filling in their gaps, general principles have a role in fleshing out the interstices of international law.[267] Although they are secondary sources, they complement the primary sources of international law and represent widely accepted norms that have not

262. *See, e.g.*, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, *Report of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc, A/HRC/17/31, at 23 (Mar. 21, 2011) ("States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.").

263. *Sosa*, 542 U.S. at 732 n.20 (emphasis added).

264. *See id.*

265. *See infra* Part III.

266. Casto, *supra* note 186, at 639.

267. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. l. (AM. LAW INST. 1987).

"had sufficient application in practice to be accepted as a rule of customary law."[268]

Critics of this view equate the "gap-filling" use of general principles with norm creation itself.[269] Federal courts have long rejected the rigidly formalistic view of international law that these critics offer.[270] The International Court of Justice has also rejected this view, explicitly drawing from widely accepted principles of domestic legal systems to "fill in gaps left by the primary sources of treaty and custom."[271] Without general principles, international law bodies would have no recourse in situations of *non liquet*, where no law exists to govern a novel or unprecedented issue.[272] Even critics have acknowledged that without general principles, international law would lack the foundation necessary to litigate ATS claims against corporate defendants because "very few of the norms that ATS courts apply have been developed to the same level of detail and complexity as most areas of domestic law."[273]

Applying international law recognizes that the corporate liability question does not fit neatly into either substance or procedure, rights or remedies, or conduct or losses. Although it is far from being as "ancillary" a question as pre-trial discovery rules, for example, it does not require analyzing the actual substance of wrongdoing, from which questions on the perpetrator's identity can be cleanly resected.[274] In view of these defects in characterization, we cannot say that corporate liability *clearly* belongs in one basket versus the other, and so we should be hesitant to rely on how we classify the issue. Finally, the public policy exception is an unsatisfactory solution in the particular context of ATS litigation. Superseding foreign policy concerns often displace the more general policies underlying tort law, such as compensating for injury and deterring harmful conduct.[275] The specific purpose of the ATS to avoid international friction points toward applying international law.[276]

The current choice-of-law issues possible in ATS litigation cry out for more answers from the Supreme Court than its precedent in *Sosa*, *Kiobel*, or *Jesner* can provide. Although *Jesner* explicitly declined to decide whether international law governed corporate liability questions in the ATS context,[277] the cautionary

268. *Id.*

269. *See, e.g.*, Ku, *supra* note 43, at 391.

270. *See, e.g.*, Filártiga v. Peña-Irala, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) (on remand) ("[P]lainly international 'law' does not consist of mere benevolent yearnings never to be given effect.").

271. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 52 (1991).

272. *See* Guillaume Protière, *Les Principles Généraux dans la Jurisprudence Internationale: Éléments d'une Différenciation Fonctionelle*, REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ETRANGER, 259, 267 (2008); Peter Tzeng, *The State's Right to Property Under International Law*, 125 YALE L.J. 1805, 1818 (2016).

273. *See, e.g.*, Ku, *supra* note 43, at 391.

274. *See* discussion in Part II.C, *supra*.

275. *See* discussion in Part II.C.1.c, *supra*.

276. *See* Stephens, *supra* note 12, at 1471–74.

277. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018).

tone of the opinion, evinced by its discussion of *Sosa*, supports applying international law. To be sure, it is unclear how the Court will address questions pertaining to the scope of liability in the future. Therefore, at the very least, let us assume *arguendo* that international law applies to the question whether a corporate defendant may be held liable under the ATS for a violation of international human rights law.

III.
THE FALSE CONFLICT: CORPORATE LIABILITY IS CONSISTENT WITH INTERNATIONAL LAW

After accepting that international law might govern the corporate liability question, we must ask whether or not its application results in imposing liability. In choice of law, this inquiry requires the initial forward-looking step of imagining whether different outcomes would result from applying international law as opposed to applying federal common law.[278] ATS litigants have mostly argued that these different applications necessarily produce different results.[279]

Part III will demonstrate that ATS corporate liability in fact presents courts with a false conflict because, whichever law is applied, we arrive at the same result: corporate liability. Although international law lacks a domestic-equivalent rule that would affirmatively extend liability to corporate defendants, it does not foreclose liability. Instead, the route to corporate liability is more roundabout; international law, vis-à-vis its general principles, instructs the forum court to settle the corporate liability question by reference to domestic law. In this sense, the general principles operate as conflict-of-laws principles, and their reference back to domestic law satisfies the definition of renvoi.[280]

Part III proceeds in Section A by defining customary international law and general principles, highlighting the staggered authority between these two different sources of international law. Section B then illustrates how courts have applied international law to the corporate liability question in ATS cases. This Section argues that, in the absence of a customary international law for or against corporate liability, general principles should control the analysis, and that their application instructs judicial reference back to domestic law on the corporate liability question. The discussion in Section C draws on the relationship between

278. *See* Matter of Allstate Ins. Co., 81 N.Y.2d 219, 223 (N.Y. 1993) ("The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved.").

279. *Compare* Brief for Petitioners at *24-25, *Kiobel I*, 621 F.3d 111, 115 (2d Cir. 2010) (No. 06-4800), at *24–25, 2011 WL 6396550 (stating that federal common law provides for ATS corporate liability), *with* Brief for Respondents at *19–31, *Kiobel I*, 621 F.3d at 115 (No. 06-4800), 2012 WL 259389 (arguing that international law precludes ATS corporate liability). *But cf. Kiobel I*, 621 F.3d at 151 (Leval, J., concurring) (concluding that international law supports holding corporate defendants liable under the ATS).

280. *Renvoi* is the "doctrine under which a court in resorting to foreign law adopts as well the foreign law's conflict-of-laws principles, which may in turn refer the court back to the law of the forum." BLACK'S LAW DICTIONARY 1412 (9th ed. 2009).

general principles of international law and the development of the conflict of laws field. In concluding, it approaches renvoi from both a descriptive and a normative angle. That is, it concludes that not only is the reference back to domestic law renvoi in action, but that this is also exactly how our federal courts should be applying international law in the ATS context.

A. Potentially Applicable Sources of International Law

1. Customary International Law

The concept of customary international law, also referred to as the law of nations, traces back at least to as early as the Treaty of Verdun of 843.[281] The US Supreme Court has long considered itself "bound by the law of nations which is a part of the law of the land."[282] Today, it is well established that customary international law is defined by widespread state practice performed out of a sense of legal obligation (*opinio juris*).[283] Importantly, a state may opt not to observe customary international law on a specific topic when it has persistently objected to the practice prior to and during the emergence of the norm.[284] Thus, a norm of customary international law can differ from the more authoritative *jus cogens* norms—i.e., non-derogable principles of international law, which are more fundamental and "bind the community [of nations], whether or not it submits to them."[285]

Although scholars have at times made proposals for formal codification of customary international law, others have cautioned against this practice, observing that the law of nations is not static, but is preferably flexible.[286] Hence, the unfixed nature of customary international law allows new norms to emerge freely as they "gradually ripen[]" into more formal rules.[287] This hesitation to codify is aimed mostly at the process by which customary international law is

281. *See* L. OPPENHEIM, *supra* note 200, §§ 42, 62.

282. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (C.J. Marshall); *accord* Sosa v. Alvarez-Machain, 542 U.S. 692, 729–30 (2004).

283. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 267, at § 102 cmt. c (explaining that *opinio juris* may be demonstrated by explicit statements or "inferred from acts or omissions"); *see also* North Sea Continental Shelf (*Germany v. Denmark*), Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20, 1969).

284. *See* Joel P. Trachtman, *Persistent Objectors, Cooperation, and the Utility of Customary International Law*, 21 DUKE J. COMP. & INT'L L. 221, 221 (2010).

285. *See* F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 84 (1990).

286. *See* L. OPPENHEIM, *supra* note 200, §§ 33, 35, 36 (discussing and responding to objections to codification); Timothy Meyer, *Codifying Custom*, 160 U. PA. L. R. 995, 1002–10 (2012) (discussing the methods of and rationales behind codifying customary international law); *see also* Kathleen M. Kedian, Note, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of The Paquete Habana*, 40 WM. & MARY L. REV. 1395, 1406 (1999) (observing that "attempts to define customary international law remain largely unsuccessful because this area does not lend itself to static definition.").

287. *See* The Paquete Habana, 175 U.S. 677, 686 (1900); *see also Sosa*, 542 U.S. at 728 (citing H.R. Rep. No. 102-367, 102d Cong. (1st Sess. 1991).

established.[288] For example, recent preliminary reports of the United Nations International Law Commission addressing the formation and evidence of customary international law have merely reaffirmed the "'two-element' approach" of state practice and *opinio juris*.[289] The Commission has laid out, however, a non-exhaustive list of forms of state practice, which includes the following: (1) diplomatic acts and correspondence; (2) acts in connection with resolutions of international organizations or conferences; (3) acts in connection with treaties; (4) executive conduct; (5) legislative and administrative acts; and (6) decisions of national courts.[290] Some courts reviewing ATS cases, perhaps confused by the breadth of potential sources for establishing custom, have retreated from such specificity, offering only vague definitions of customary international law that flirt with inaccuracy.[291]

2. General Principles

Unlike customary international law, general principles are not primary sources of international law. Although jurists derive general principles from judicial activity and state practice across the world's various and diverse legal systems, general principles lack the binding force that customary international law possesses.[292] The ICJ Statute defines general principles broadly as those that are "recognized by civilized nations."[293] Notably, the ICJ statute does not relegate general principles to the category of "subsidiary means" that it prescribes to judicial decisions or scholarly works, which are used to *determine* primary law.[294] By contrast, the Restatement (Third) of Foreign Relations states

288. *See* Sir Michael Wood, International Organizations and Customary International Law, 2014 Jonathan J. Charney Distinguished Lecture in Public International Law Presented at Vanderbilt University Law School (Nov. 4, 2014), *in* 48 VAND. J. TRANSNAT'L L. 609, 612 (2015) (mentioning the "flexible process by which rules of customary international law are formed.") (internal quotations omitted).

289. *See* Sir Michael Wood, *The Current Work of the International Law Commission and the Role of Judges in Relation to International Custom*, *in* THE JUDGE AND INTERNATIONAL CUSTOM 182–183 (Liesbeth Lijnzaad & Council of Europe eds., 2016).

290. Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau, *Identification of Customary International Law* at 25, INT'L L. COMM'N, 67th Sess. (July 29, 2015).

291. *See, e.g.,* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 165 (5th Cir. 1999) (defining customary international law as "customary usage and clearly articulated principles of the international community").

292. In discussing forms of binding international law, for example, Professor Janet Levit describes general principles as "a true third," following treaties first and customary international law second. *See* Janet Koven Levit, *Bottom-Up Lawmaking: The Private Origins of Transnational Law*, 15 IND. J. GLOBAL LEGAL STUD. 49, 50–51 n.3 (2008).

293. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, JUNE 26, 1945, art. 38(1)(c), 59 Stat. 1055, 33 U.N.T.S. 933.

294. *See* ICJ Statute, art. 38(1)(d).

that "[g]eneral principles common to the major legal systems . . . may be invoked as *supplementary* rules of international law where appropriate."[295]

The level of authority that general principles possess in international law is unclear, but their gap-filling function is well recognized. As the Restatement indicates, their utility is context-dependent (capable of being invoked "where appropriate").[296] And as compared to customary international law, which depends on widespread state practice, a lesser showing is sufficient for establishing general principles under both the ICJ statute and the Restatement (requiring that the principles simply be "common to the major legal systems,"[297] or "recognized by civilized nations"[298]). The softer character of general principles has therefore permitted jurists to adopt a "pragmatic conception" of their role in decisional law.[299] Where primary sources are silent, jurists turn to general principles out of a need to "fill the gaps" within the primary sources of law.[300]

The confusion surrounding the level of authority of general principles may reflect their malleable nature. As Professor Oscar Schachter argued, there are different categories of general principles.[301] Moreover, the ICJ occasionally relies on general principles for legal authority without citing Article 38(1)(c), which provides the statutory basis for their consideration.[302] Finally, "[i]nternational practice may sometimes convert such a principle into a rule of customary law."[303] In a way, then, general principles even outgrow their shells by becoming sources of customary international law.[304]

B. Applying International Law

Given the sweeping parameters of international law, it is little wonder that there is such heated debate on whether corporate liability under the ATS is

295. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 267, § 102(4) (emphasis added). *See also Oppenheim, supra* note 200, § 19 (describing general principles as "merely supplementary to" the two principal sources of international law, custom and treaty.)

296. *See id.*

297. *See id.*

298. *See* ICJ Statute, art. 38(1)(c).

299. *See* Protière, *supra* note 272, at 268.

300. SCHACHTER, *supra* note 271, at 52; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 267, § 102, cmt. l ("General principles are a secondary source of international law, resorted to for developing international law interstitially . . . .").

301. *See* SCHACHTER, *supra* note 271, at 50 (defining five categories of general principles: (1) principles of municipal law "recognized by civilized nations"; (2) general principles of law "derived from the specific nature of the international community"; (3) principles "intrinsic to the idea of law and basic to all legal systems"; (4) principles "valid through all kinds of societies in relationships of hierarchy and co-ordination"; and (5) principles of justice founded on "the very nature of man as a rational and social being.") (internal quotations omitted).

302. *See id.* at 52.

303. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 267, § 102(2), cmt. l (discussing general principles, such as estoppel and the "obligation to repair a wrong").

304. *See Kiobel I*, 621 F.3d 111, 141–42 n.43 (2d Cir. 2010) (discussing ICJ statute); *see also* Doe VIII v. Exxon, 654 F.3d 11, 54–55 (D.C. Cir. 2011).

consistent with international law. Clearly, there are plenty of sources to produce disagreement.[305] Because most circuit courts to address the issue of corporate liability have considered it to be one of remedy belonging to domestic law, they have not taken the opportunity to explore corporate liability under international law fully, including by reference to its general principles.[306] The Second Circuit alone has adopted a unique position on international law that is remarkable in both its solitude and its confidence.[307]

In *Sosa*, the Supreme Court explicitly limited jurisdiction under the ATS for prosecuting violations of customary international law norms to those norms that are "specific, universal, and obligatory."[308] The *Sosa* Court ultimately concluded that the abduction and temporary detention (less than 24 hours) of a Mexican citizen brought into the US by the hired hand of the Drug Enforcement Agency did not meet this standard.[309] For one, the plaintiff's reliance on a survey of national constitutions, one ICJ decision, and miscellaneous federal court decisions could not persuade the Court that an international prohibition on arbitrary detention was more than aspirational.[310] For another, the Court pointed to the Restatement of Foreign Relations, which forbid *prolonged* detention, but not temporary detention.[311]

In *Kiobel I*, the Second Circuit applied this specific, universal, and obligatory standard to determine whether it could create a cause of action for suit against defendant oil companies alleged to have aided and abetted the Nigerian government in committing human rights abuses.[312] In holding that customary international law did not support corporate liability, the court relied heavily on the absence of criminal prosecutions of corporate defendants during the Nuremburg Trials, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, whose charters all limited jurisdiction to natural persons only.[313] Turning to international treaties as sources of customary international law, the court concluded that "the few specialized treaties imposing liability on corporations have not had such influence that a general rule of corporate liability has become a norm of customary international law."[314] The court found it dispositive that treaties

305. *See* discussion in Part III.A.1, *supra*.

306. *See* discussion in Part II.C.1.b, *supra*.

307. *See Kiobel I*, 621 F.3d at 126 (concluding that *Sosa* requires the identification of a customary international law norm supporting corporate liability to hold a corporation liable under the ATS). The plurality in *Jesner* appears to adopt this view, however. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1400 (2018).

308. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004) (quoting *In re* Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994)).

309. *See id.* at 737–38.

310. *See id*. at 736 n.27.

311. *See id.* at 737.

312. *Kiobel I*, 621 F.3d at 123, 126–27.

313. *Id.* at 132–37.

314. *Id.* at 139.

imposing corporate liability—such as the Convention Against Transnational Organized Crime or the Convention on Combating Bribery of Foreign Officials in International Business Transactions—even though "ratified by an 'overwhelming majority' of states," were limited in their subject matter and did not touch the human rights violations that are the focus of the ATS.[315] Finally, the court considered judicial decisions and scholarly works as evidence of customary international law.[316] But these sources fared no better, given the Second Circuit's own precedent and at least one scholar's admission that, under the dominant view, international law does not make private corporations its subjects.[317]

Even if the Second Circuit is correct that there exists no customary international law norm supporting corporate liability, that determination should not be the end of the inquiry. As the D.C. Circuit in *Doe VIII v. Exxon* explained, "the fact that the law of nations provides no private right of action to sue corporations addresses the wrong question and does not demonstrate that corporations are immune from liability under the ATS."[318] Indeed, as other courts have agreed, customary international law fails to provide plaintiffs with a right to sue corporations, just as it fails to provide them with a right to sue other juridical entities, natural persons, or states.[319] Yet hardly anyone today would contest the validity of ATS suits against natural persons.

As the D.C. Circuit has stated, the focus on customary international law ignores general principles of international law.[320] In *Doe VIII v. Exxon*, the court first located corporate liability under the rubric of general principles.[321] The court observed that "corporate liability is a universal feature of the world's legal systems," recognizing that "corporate legal responsibility is part and parcel of the privilege of corporate personhood."[322] The court then went one step further, recognizing not only that this widespread practice of imposing liability for the tortious conduct of corporate defendants created a general principle, but also that customary international law might draw on this general principle in supporting a corporate liability norm.[323]

In *Flomo*, the Seventh Circuit invoked historical examples to support imposing corporate liability as it launched a methodical attack on the Second Circuit's review of customary international law in *Kiobel I*.[324] Notably, the court

315. *Id.* at 138 (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233, 256 (2d Cir. 2003).
316. *See id.* at 143.
317. *See id*. (citing MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE 196 (2009)).
318. Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 42 (D.C. Cir. 2011).
319. *See, e.g.*, Flomo v. Firestone, 643 F.3d 1013, 1019 (7th Cir. 2011); *see also supra*, note 200.
320. *See Doe VIII*, 654 F.3d at 54–55.
321. *See id.* at 53.
322. *Id.*
323. *See id.* at 54.
324. *Flomo*, 643 F.3d at 1017–20.

pointed out that after World War II the allied powers acted under the authority of customary international law to dissolve German corporations like I.G. Farben and seize their assets to be used for reparations to Holocaust survivors.[325] Noting that there is a first for everything, the court also found it irrelevant that an international tribunal had never prosecuted a corporate defendant for international law violations.[326] Further, as evidence of liability against "an entity that does not breathe," the court highlighted *in rem* judgments against pirate ships.[327]

Ultimately, the *Flomo* court concluded that corporate liability is a matter of enforcement or remedy.[328] Its determination that "[i]nternational law imposes substantive obligations and [that] individual nations decide how to enforce them" was not extraordinary.[329] Nor was it remarkable when the court concluded that the same treaties, discredited by the Second Circuit, "explicitly authorize[d] national variation in methods of enforcing customary international law."[330] For one, the *Flomo* court was not the first to make these points.[331] For another, treaties often codify or reflect well established general principles, whether they do so explicitly or not.[332]

Judge Leval made an identical point in his *Kiobel I* concurrence.[333] There, he argued that treaties typically leave all questions on whether liability is appropriate to individual states, and he attributed such omissions to the varying character of the world's numerous legal systems.[334] But unlike the Seventh Circuit, Judge Leval anchored this practical assessment firmly within international law as the applicable source of law. That is, rather than announcing federal common law as the rule of decision, Judge Leval stated explicitly that the

325. *See id.* at 1017.

326. *See id*. at 1017–18.

327. *Id.* at 1021 (citing The Malek Adhel, 43 U.S. (2 How.) 210, 233–34 (1844); The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40–41 (1825)).

328. *See Flomo*, 643 F.3d at 1019–20.

329. *See id.* at 1020.

330. *See id.*

331. *Id.*

332. *See, e.g.*, Alice Edwards, *Temporary Protection, Derogation and the 1951 Refugee Convention*, 13 MELBOURNE J. INT'L L. 595, 628 (2012) (noting that provisions in the 1951 Refugee Convention "were intended to reflect general principles of international law relating to derogation" as they developed under international human rights law); Fiona de Londras & Suzanne Kingston, *Rights, Security, and Conflicting International Obligations: Exploring Inter-Jurisdictional Judicial Dialogues in Europe*, 58 AM. J. COMP. L. 359, 370 (2010) (describing respect for fundamental rights as "one of the general principles of EC [European Community] law inherent in the founding Treaties," even though the Treaty did not explicitly mention that principle); Cynthia R. L. Fairweather, Note, *Obstacles to Enforcing International Human Rights Law in Domestic Courts*, 4 U.C. DAVIS J. INT'L L. & POL'Y 119, 120 (1998) (observing that many U.N. human rights treaties have attempted to codify general principles of law but remain aspirational in nature).

333. *Kiobel I*, 621 F.3d 111, 173 (2d Cir. 2010) (Leval, J., concurring) ("Characteristically, multilateral treaties protecting human rights include few details. They generally define the rights and duties in question, and direct contracting States to protect such rights under their local laws by appropriate means.").

334. *See id.* at 175.

corporate liability question was "referable to the law of nations" but concluded that "the answer given by the law of nations . . . is that each State is free to decide that question for itself."[335] Functioning identically to the renvoi mechanism, the reference to international law refers the question back to the domestic system.[336]

For several reasons, the conclusion that international law refers the corporate liability question back to domestic law fits more comfortably within the rubric of general principles than it does within customary international law. For one, if the reference back exists within customary international law, it is troubling that the courts in agreement with Judge Leval's central conclusion that domestic courts ultimately determine corporate liability have not said so. For another, the *Flomo* court's view that corporate liability is permissible under international law because human rights treaties leave room for "variation[s]" in enforcement at the domestic level points to a choice-of-law general principle; it implies that some domestic systems will exercise an option not to enforce human rights norms violated by corporations.[337] Although treaties may serve as evidence of a customary international law norm, they may also contain general principles of international law. Without more evidence supporting a customary international law norm, the decision to refer questions regarding the scope of liability to domestic systems appears to depend on general principles instead.

It is also noteworthy that corporate liability itself is "an accepted principle of tort law throughout the world" because this supports the position that domestic legal systems choose to impose corporate liability.[338] Although the presence of this choice is widespread, it does not derive from the sense of obligation that creates customary law because it is voluntary.[339] The discussion in *Doe VIII v. Exxon* described the function of imposing corporate liability as a product of general principles while insisting that the *Kiobel I* court simply ignored general principles as a source of international law.[340] The harmony between scholarship and judicial precedent, however, reflects a broad consensus that there is a general principle of international law that entrusts domestic legal systems with the decision whether or not to impose corporate liability.[341] The same cannot be said

335. *Id.*

336. It is worth considering whether the reference back to domestic law that Judge Leval describes is one that truly stems from customary international law, or whether instead, there is a missing step in the analysis. That is, if customary international law is silent as to any norm of corporate liability—and also silent as to any norm of referring the question back to the domestic system—then the next step in analyzing international law would require turning to general principles.

337. *See* Flomo v. Firestone, 643 F.3d 1013, 1020 (7th Cir. 2011).

338. *See* Roger P. Alford, *Human Rights after* Kiobel: *Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1153 (2014); *see also* Brief for Petitioners (*Kiobel II*), *supra* note 80, at *45–46 (collecting sources in support of the argument that corporate liability is a general principle of international law).

339. *See supra* discussion in Parts III.A.1 and III.A.2.

340. *See* Doe VIII v. Exxon*,* 654 F. 3d 11, 55 (D.C. Cir. 2011).

341. *See id.* at 54.

for an international law norm of allowing domestic systems to settle the corporate liability question.

Applying a general principle of tort liability in the ATS context is congruous with international law.[342] Although courts have noted the "seeming absence" of a norm supporting corporate liability,[343] that absence is attributable not to any widespread refusal to hold corporations responsible for tortious conduct, but merely to the higher standard required to establish customary international law norms.[344] A corporate liability rule based on general principles is more appropriate because, by working to develop the law interstitially where primary sources are silent, it reflects the proper role of general principles in international law. [345]

C. Hidden Renvoi: The Reference Back to Domestic Law

The above observations point to a necessary conclusion: general principles of international law can operate as conflict-of-laws principles, referring back to domestic law on certain questions like corporate liability. This conclusion should not be surprising. After all, international law is often insufficiently developed to apply directly in the domestic context.[346]

Concluding that general principles include a renvoi mechanism that resolves the corporate liability question is consistent with the evolution of conflict of laws from general principles of international law. As the seventeenth century Dutch legal philosopher and professor Ulric Huber described, "conflicts law . . . is to be derived not merely from the civil law but from the needs and tacit consent of nations."[347] This assessment locates conflict of laws principles *beyond* domestic systems. Rather than focusing exclusively inward, courts have developed choice of law by reference to the sovereign powers of foreign legal systems, invoking universally shared principles like comity to settle cases.[348] As

342. It is also congruous with *Sosa*, which provided only that courts should consider whether *international law* permits suit against different classes of defendants. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004). The court in *Kiobel I* was the first to interpret *Sosa* in a manner that required a customary international law norm more specifically.

343. *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1405 (2018).

344. *See, e.g.*, J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 465–75 (2000) (examining difficulties of establishing customary international law's state practice and opinio juris requirements).

345. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 267, § 102(2), cmt. *l*.

346. *See* MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 336 (2008).

347. Yntema, *supra* note 128, at 306.

348. In the United States, Justice Story advocated for the view that the comity principle should aid in the development of conflict-of-laws systems internationally. *See* Yntema, *supra* note 128, at 307. In the European Union, member states have taken a more formal approach to developing a unified choice-of-law approach in Regulation 593/2008 (Rome I) governing contracts, and Regulation 864/2007 (Rome II) governing torts. *See* Regulation (EC) No 593/2008 of the European Parliament and of the Council (June 17, 2008); Regulation (EC) No 864/2007 of the European Parliament and of the Council

common approaches to resolving conflicts solidify, they may eventually become so prevalent as to form general principles of international law.[349]

In a late nineteenth century treatise, Professor Paul Pradier-Fodéré reinforced Huber's view on the relationship between conflict of laws and general principles of international law. He stated that "the majority of states have accepted and continue to accept each day, under the empire of necessity . . . certain common principles for resolving questions concerning a person's legal rights and duties . . . [and] we must not refuse to recognize a private international law comprised of these principles."[350] By arguing that the "majority of states" share certain common principles, Professor Pradier-Fodéré recalls the authority of general principles, which are based on practice in "major legal systems."[351] His conclusion that these principles make up a conflict-of-laws methodology offers authoritative support for invoking general principles as conflict-of-laws tools. Also writing in the nineteenth century, Justice Story had "hoped for" a more formal international conflict-of-laws system.[352] Although approaches vary greatly within the United States, an international system with choice-of-law general principles offers guidance in cases such as those involving ATS claims—cases whose contacts and parties span the globe.

In the absence of specific legislation, international convention, or well-defined custom or usage, domestic courts seeking to apply international law should turn to general principles to resolve legal questions because these principles supplement the higher-ranking sources of international law. If in such a situation there exists a general principle referring back to the domestic law of the forum to resolve the issue, then international law leaves the question open to the discretion of those courts. In choice-of-law terminology, this reference back to the domestic law of the forum can be described as renvoi, a process hidden from current debate.[353] And because the application of either international law or federal common law in the first instance would produce the same result—the availability of corporate liability in the domestic forum—we end up with a false

(July 11, 2007). Professor Ralf Michaels describes these developments in European choice of law as a rebellion against twentieth century paradigms, which in Europe focused on privatization and nationalization. *See* Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607, 1616–18 (2008).

349. Professor Lakshman Guruswamy explains that conflict of laws "becomes a source . . . of general principles of law" as a result of settling jurisdictional issues that arise in transnational litigation. *See* Lakshman D. Guruswamy, *Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?*, 7 MINN. J. GLOB. TRADE 287, 300–01 (1998).

350. P. PRADIER-FODÉRÉ, TRAITÉ DE DROIT INTERNATIONAL PUBLIC EUROPÉEN ET AMÉRICAIN, III 615 (3d ed. 1887) (translation from original, which reads: "[L]a majeure partie des Etats ont accepté et continuent d'accepter chaque jour, sous l'empire de la necessité . . . certains principes communs pour résoudre les questions relatives à la capacité juridique des personnes . . . [et] on ne doit pas refuser de reconnaître l'existence d'un droit international privé se composant de ces principes . . . .").

351. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 267, § 102(2).

352. Yntema, *supra* note 128, at 307.

353. *See* Kramer, *supra* note 23, at 980.

conflict. In either case, it is clear that the ATS does not preclude corporate liability.

CONCLUSION

Exposing the hidden renvoi of the ATS corporate liability question is useful because it offers a fresh explanation for jurisprudence that lacks clarity and that has declined to articulate the issue in choice-of-law terms. The decision whether international law or federal common law should govern the scope of liability under the ATS is inherently a matter of choosing applicable law. Thus, repackaging the question in choice-of-law terms reframes the debate more neatly than did the open-ended fight over *Sosa* footnote 20. Although in *Jesner* the Supreme Court appears to have short-circuited the debate,[354] the question of which law should govern corporate liability is likely to return in subsequent litigation.

Human rights attorneys bringing ATS cases may be reluctant to take on the field of conflict of laws, but it need not be overwhelming. The field is no longer the "dismal swamp" that Dean William Prosser once described it to be.[355] The field's core concepts and terminology have received enough attention to facilitate their use across legal domains. What conflict of laws offers is a set of trans-substantive tools that parties to ATS litigation can use to produce favorable outcomes.

Moving forward, parties in ATS litigation must prepare to argue for or against domestic corporate liability, and their arguments about whether international or domestic law governs should keep in mind the nature of ATS corporate liability. Just because a corporation could be held liable under the ATS does not mean that it should be. Even if Congress were to intervene on the corporate liability issue in a manner that overruled *Jesner*, there may be other reasons to limit the scope of liability, perhaps driven by foreign policy considerations in specific instances. As the attorney for plaintiffs in *Jesner* pointed out at oral argument, the courts are equipped with ample doctrinal measures to address concerns of foreign entanglement as they arise (*forum non conveniens*, political questions, extraterritoriality, etc.).[356] The principle of comity, which underpins much of conflict of laws, also supplies a limiting tool. Concerns over interference with foreign policy considerations may evaporate in the domestic context, but because ATS cases necessarily involve international contacts and issues of global importance—such as genocide, human trafficking, and terrorism—there may nevertheless be reason for judicial caution before straying too far from actual international practice.

354. See discussion in Part I.B.2, *supra*.
355. *See* William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).
356. *See* Transcript of Oral Argument (*Jesner*), *supra* note 18, at 11.

When federal courts in the United States decide cases of international dimension, they must be careful not to reach divergent results that risk promoting disuniformity between legal systems. At the international level, disuniformity produces friction.[357] This is one reason why *Sosa* expressed a "mood . . . of caution" throughout its development of the two-step framework for recognizing new causes of action under the ATS.[358] It is also why the *Jesner* plurality echoed the concerns about reciprocity expressed in the Court's *Kiobel II* decision.[359] Moreover, the objective of uniformity is central to the field of conflict of laws, and indeed is one of its chief goals, as mythical as it may seem to some.[360] In the ATS context, restraint could promote cohesion.[361]

The political and judicial future of ATS corporate liability is hardly clear. Since *Jesner*, however, the issue has already begun to percolate in the federal courts once more.[362] In future Supreme Court cases, courting a majority interested in foreclosing corporate liability might not prove too difficult, but identifying an agreed-upon rationale different from the foreign-relations and separation-of-powers concerns relied on in *Jesner* may prove a tougher challenge.[363] Interestingly, the dissenting opinion written by then-Judge

357. Anthony D'Amato, Comment, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT'L. L. 385, 402 (1985) (explaining that the application of customary international law is a method of "avoiding international friction and . . . accommodating the collective self-interest of all states").

358. *See* Flomo v. Firestone, 643 F.3d 1013, 1016 (7th Cir. 2011).

359. *See Jesner*, 138 S. Ct. at 1407–08.

360. *See* Currie, *Married Women's Contracts*, *supra* note 135, at 246.

361. While it is one thing to observe that international law leaves the corporate liability question to domestic legal systems, it is wholly another to survey those domestic legal systems and determine that there is an actual widespread practice of imposing corporate liability in ATS-equivalent claims. Moreover, if the Second Circuit is correct that the ATS is "of a kind apparently unknown to any other legal system in the world," perhaps judicial restraint is well advised. *See Kiobel I*, 621 F.3d 111, 115 (2d Cir. 2010). It is beyond the scope of this Note to test the size of that potential concern, though it appears a valid one.

362. *See* Estate of Alvarez v. Johns Hopkins University, 373 F. Supp. 3d 639 (D. Md. Jan. 3, 2019); Al Shimari v. CACI Premier Tech., Inc., 320 F. Supp. 3d 781, 787 n.6 (E.D. Va. 2018); Brill v. Chevron Corporation, No. 15–cv–04916, 2018 WL 3861659, at *4 (N.D. Cal. Aug. 14, 2018); *see also* Doe v. Nestle, 906 F.3d 1120, 1124–25 (9th Cir. 2018).

363. In *Doe VIII v. Exxon*, then-Judge Kavanaugh adopted the view that the ATS categorically forecloses suits against corporate defendants. *See* Doe VIII v. Exxon, 654 F.3d 11, 72 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part). But although the remaining conservative Justices came together in *Jesner* to foreclose liability against foreign corporate defendants, they did so for different reasons. For example, in *Jesner*, Justice Gorsuch would have decided the case on the broader grounds that ATS liability requires a U.S. defendant (though this did not answer the corporate liability question). *See Jesner*, 138 S. Ct. at 1418–19 (Gorsuch, J., concurring in part and concurring in the judgment). Or perhaps Justice Gorsuch would consider a decision extending liability to corporate defendants to fall within the framework of creating new causes of action, a judicial power established in *Sosa* that the *Jesner* majority challenged gently but one that Justice Gorsuch also took issue with in his concurrence. *See id.* at 1412–13. Of course, the Court's four liberals have come together for Justice Breyer's concurrence in *Kiobel II*, and again for Justice Sotomayor's dissent in *Jesner*. *See Kiobel II*, 569 U.S. 108, 126 (2013) (Breyer, J., concurring in the judgment) (arguing that the presumption against extraterritoriality did not apply to the ATS); *Jesner*, 138 S. Ct. at 1419 (Sotomayor, J., dissenting)

Kavanaugh in *Doe VIII v. Exxon* adopted two positions that could potentially conflict in a future case regarding domestic corporate liability. On the one hand, Justice Kavanaugh argued that ATS liability for corporate defendants should be categorically foreclosed.[364] On the other, he stated that courts must "heed Executive Branch statements of interest in ATS cases."[365] Thus far, the Executive has repeatedly weighed in on ATS cases before the Supreme Court, arguing in favor of ATS corporate liability.[366] In previous case law, executive opinion has proved influential.[367] But whether Congress or the Court will be the first to fortify ATS domestic corporate liability remains to be seen.

(arguing that the ATS did not foreclose liability against foreign corporate defendants). They should be reasonably expected to come together again.

364. *See Doe VIII*, 654 F.3d at 72 (Kavanaugh, J., dissenting in part).

365. *See id.* at 73.

366. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Neither Party (*Jesner*), *supra* note 259, at 16–17. Members of the Legislative Branch have also asked the Supreme Court to impose ATS corporate liability. *See, e.g.*, Brief of Amici Curiae United States Senators Sheldon Whitehouse and Lindsey Graham in Support of Petitioners, *Jesner*, 138 S. Ct. 1386 (No. 16-499), 2017 WL 2822776.

367. *See generally* Koh, *supra* note 28, at 45–76 (discussing executive influence on *Filártiga*).