§ 1[a] Summary and Comment

The Alien Tort Statute (ATCA or ATS), 28 U.S.C.A. § 1350, allows for district courts of the United States judicial system to have authority over civil action brought by an alien for a tort. This applies only if the claim proves a violation of the Law of Nations or any Treaty that the United States is an actor in. Determination of said violation is dependent on the judge’s discretion at the district court.

§ 1[b] Introduction—Legislative History and Intent

The limit of the statute’s scope concerns “the customs and usages of civilized nations, that are specific, universal, and obligatory, and accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” (Flomo).

The Alien Tort Claims Act (ATCA or ATS) was drafted in the Judiciary Act of 1789, and originally did not concern human rights. Rather, it only provided a rule with which original jurisdiction could be applied for aliens alleging torts that either violated treaties or laws in the United States. The first two hundred years of the ATCA were very uneventful, supporting original jurisdiction in a small amount of cases, none of which broadened, narrowed, or challenged the meaning or scope of the act. However, in 1980 this changed with Filartiga v. Pena-Irala, where plaintiffs filed a lawsuit asserting that they were tortured by Paraguayan officials, and the court held that “deliberate torture perpetrated under the color of official authority violates universally accepted norms of international human rights law, and that such a violation of international law constitutes a violation of the domestic law of the United States,” giving rise to a claim under the ATCA whenever the perpetrator is properly served within the borders of the United States.” This was the first case that tied accepted norms of human rights law to the ATCA, and with that many more cases were found to have original jurisdiction. In sum, the progression of the ATCA has been greatly broadened since its birth, and has evolved to address concerns of human rights in foreign countries, and deliver fair trials to plaintiffs that could potentially face unfair trials or biased treatment in their native countries. Even though it may seem like the United States should not have the jurisdiction to try these cases, the ATCA is integral to upholding norms of human rights internationally, and providing an unbiased adjudication for parties to allege torts of human rights violations.

§ 2[a] Law of Nations

In the case of Aldana v. Del Monte Fresh Produce, N.A., Inc., a few Guatemalan labor unionists are suing the company that owns the subsidiary, Bandegua, that operates a banana plantation that is based in Guatemala, although the company’s main base is located in Delaware. They first claim human rights violations under the customary law of nations due to the detention for eight hours of these unionists while being held at gunpoint until they agreed to leave Guatemala at the request of officials of Del Monte. They also claim that the district mayor actively participated in this aggression. The court’s decision outlines how the timeline of the hostage situation (how it was under 24 hours) does not make that aspect of the claim applicable under the Alien Tort Statute; thus, there is a narrowing of the definition with regards to hostage situation under the ATS.

Additionally, in Jama v. U.S.I.N.S. v. Esmor Correctional Services, Inc., undocumented aliens were arrested and detained in an I.N.S. facility pending their political asylum approval, where the management of said facility was contracted out to a company called Esmor Correctional
Services, Inc. The plaintiffs of the case claimed that during their time within this detention facility, there were frequent subhuman living conditions and treatment of the detainees. Some of the conditions and actions executed by the guards were: prevention of religion practice, forty detainees held in one dormitory with the beds placed on unsanitary floors often near unclean toilets and showers, and sexual harassment from the guards patrolling the living areas. The court’s decision on this case held that the plaintiff’s claims against the guards and officers of the facility could not be argued under the (ATCA) because the alleged conduct of the guards did not violate customary international law. The court also speculated that even if the plaintiffs could sue under the ATCA, Esmor would be exempt from liability due to the fact that they were contracted out for the facility’s management, which under current law does not make them government employees and thus claims brought against them under the ATCA would not be upheld. These final holdings on this case with regards to the ATCA provide a narrowing scope in terms of who can be held liable under the ATCA as well as the actions that serve as a basis for a violation of customary international law.

In 2010, the U.S. Court of Appeals, Second Circuit, heard the case of Kiobel v. Royal Dutch Petroleum Co.. In this case, the plaintiffs- resident of Nigeria- claimed that British, Nigerian, and Dutch corporations aided and abetted the Nigerian government in violating the law of nations as they participated in oil exploration and production. Citing Filartiga v. Pena–Irala, “It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accord, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS]”. Accordingly, the court next addressed the question of whether or not the plaintiff brought a triable suit under the Alien Tort Statute against the corporation that sufficed a violation of customary international law. Via The Nurnberg Trial (U.S. v Goering), “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” In its analysis, the court reasons that violations of the law of nations can be charged against individuals and states, but not against corporations.

Then, in 2013, the U.S. Court of Appeals, Ninth Circuit, heard the case of Sarei v. Rio Tinto, PLC. This case involved the conduct of the defendant, Rio Tinto mining group, in Papua New Guinea and the 1980’s uprising against the group, which resulted in the use of military force and many deaths. The issue at point in Sarei was whether or not ATS bars corporate liability, and if not, does corporate liability extend to the allegedly violated internationally accepted norm? Here, the court reasoned that the Alien Tort Statute’s explicit reference to the law of nations indicates that “we must look beyond the law of the United States to international in order to decide what torts fall under its jurisdiction grant”(id).

For claims brought against the defendant in the 2011 case of Flomo v. Firestone Nat. Rubber Co., LLC, the U.S. Court of Appeals, Seventh Circuit, determined that under the ATS, a corporation could be held liable for acts violating the statute. In this case, the plaintiffs- 23 Liberian children- charged the Firestone Natural Rubber Company with employing hazardous child labor on the plantation directly in violation of the law of nations. Here, the court had to address two questions, one of which was whether the plaintiffs presented a triable issue for the court in regards to whether ot not the defendant violated “customary international law”? Importantly, for the ATCA, the court noted that, first, conventions not ratified by all nations may still serve as evidence of the law of nations, and second, that the U.S. enacted legislation making violations of customary international law actionable in U.S. courts: it is the Alien Tort Statute”(id); thus making those treaties and conventions not ratified by the U.S. “not unenforceable” in U.S. courts.

Additionally, Abebe-Jira v. Negewo is an important case for understanding the scope and application of the ATCA in regards to international human rights violations. This case is an appeal to a case in 1990 where former prisoners in Ethiopia filed a lawsuit against an official of the Ethiopian government, named Negewo, alleging that he was responsible for their torture and other cruel acts in violation of the ATCA. Negewo was found guilty, and later appealed that the ATCA lacked subject jurisdiction, but the case was affirmed in satisfying subject jurisdiction and in violating the law of nations. The ATCA was found to “[provide] a private right of action for violations customary of international law.” Concerning the law of nations, and its application in the ATCA, it is clear that the plaintiffs satisfy the three requirements of the ATCA with ease. Obviously, the first two elements are true because the plaintiffs were aliens when they sued (even though they are United States citizens now), and they are alleging a tort. However, the third element regarding violation of law is more complicated to prove. For this the court turned to Filartiga v. Pena–Irala, which describes a similar case, where torture was officially characterized by the law of nations, but not does not necessarily provide a right of action for the ATCA. However, in dicta from this case it was construed that the ATCA does not grant new rights to aliens, but rather “opens the federal courts for adjudication of the rights already recognized by international law.” The ACTA merely needs a violation of the law of nations, and torture satisfies this because of the precedent set in Filartiga.

§ 2 [b] Extraterritoriality

While there is sufficient evidence to suggest a violation
of the customary law of nations, it has been argued that certain claims do not “touch and concern” the United States with sufficient force. This reasoning narrows the scope to which the ATCA/ATS can be applied considering the phrase “touch and concern” hinges upon the discretion of the presiding judge. The threshold of “sufficient force” required to determine whether an issue can truly be tried in the United States judicial system relates to the level to which the plaintiff, defendant, and/or the actions alleged pertain to matters on U.S. soil and/or citizenship. The court’s opinion in Kiobel serves as precedent for determining that U.S. law does not apply outside of the United States. This opinion eliminated the ability of companies being held liable for actions in U.S. courts so long as the correspondence did not occur on United States soil. Moreover, the court opined, an international company's basing in the United States doesn't preclude non-liability.

In regards to extraterritoriality, the court recognizes that Sarei v. Rio Tinto, PLC concerns conduct which occurred outside of the United States. To the defendant's argument, the court points out that “the seminal and most widely respected applications of the statute relate to conduct that took place outside the United States. See Kadic v. Karadzic; Marcos I; Filartiga v. Pena–Irala”. And even though Morrison states that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none" 130 S.Ct. at 2878., it does not, however, require that Congress use the precise word ‘extraterritorial’ in a statute to establish such applicability. It required only that there be a ‘clear indication,’ stating that such an indication may come from either the text or the context of the statute" Id. at 2883. Similarly, vis-à-vis Filartiga, 630 F.2d at 885, the court ruled that “common law courts of general jurisdiction regularly have adjudicate[d] transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred” (id). And, "Sosa clearly contemplated that courts would at least have subject-matter jurisdiction, under appropriate circumstances, to hear cases brought under the ATS in which foreign plaintiffs allege that they have been wronged by their (foreign) governments"(id). Finally, by 550 F.3d at 824., for ATS cases the court must carefully consider the question of prudential exhaustion “with respect to claims that do not involve matters of 'universal concern'”(id). Still, it is clear in Baker v. Carr, “Congress expressly enacted the ATS to provide a forum for resolution of tort claims”(id).

Additionally, the opinion of Khulumani v. Barclay Nat. Bank Ltd discusses whether or not the ATCA has jurisdiction and whether the defendants are liable to legal consequences, and also shows that the South African government interfered in this adjudication in the United States, claiming that they deserved to handle the remedies of apartheid problems directly and in their own country. The Khulumani court referenced Sosa v. Alvarez-Machain to substantiate that South Africa had jurisdiction in this case by asserting that “the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” Some of the judges presenting dissenting opinions argued that this appellate case was definitely better handled in the other branches of United States government, and by being adjudicated in South Africa would avoid collateral consequences and problems in the comity of nations. However, the political question doctrine was eventually determined not to apply, which greatly broadened the scope and application of the ATCA, showing that cases that may be more fairly adjudicated in the United States court have a right to under the ATCA.

Similarly, via Flomo v. Firestone Nat. Rubber Co., LLC, the court rejects the defendant's argument that the statute has no extraterritorial application, except those that occur on the high seas. In this case, the court extrapolates the courts have been applying the statute extraterritorially since the beginning", and that “[t]o deny extraterritorial application [would be] superfluous, given the ample tort and criminal remedies against, for example, the use of child labor (let alone its worst forms) in this country"(id).

The plaintiffs in Balintulo v. Ford Motor Co. allege they were victims of apartheid-era violence in South Africa, and assert that Ford's conduct sufficiently displaces the ATS's presumption against extraterritoriality, by alleging that Ford's actions were conducted specifically to aid the apartheid and suppress opposition and furthermore that Ford was solely responsible for aiding and abetting the suppression of its own workforce in South Africa. In regards to IBM, the plaintiffs assert the IBM employees trained South African government employees to use their hardware and software to denationalize black South Africans and that IBM designed specific technologies that were essential for racial separation under apartheid and the denationalization of black South Africans. The court ruled that the plaintiffs failed to show that Ford and or IBM's actions “touch and concern” the United States sufficiently in order to form a basis under the ATS.

§ 2[c] Aiding and Abetting

In Khulumani v. Barclay Nat. Bank Ltd, the holding of this case proves that aiding and abetting is covered within the ATCA, and further serves as good precedent for other cases where aiding and abetting is being connected to the ATCA. More specifically, three groups of plaintiffs brought action on behalf of individuals allegedly injured by apartheid practices in South Africa alleged that “Apartheid needed the cooperation, financing and supplies from the defendant financial institutions and companies and/or their predecessors or successors to ensure that they had the technology, equipment, systems, infrastructures and
weaponry to insure that their system could function," and therefore the defendants aided and abetted in the practice of apartheid and indirectly violated the basic human rights of South African citizens.

The plaintiffs in Balintulo v. Ford Motor Co. allege they were victims of apartheid-era violence in South Africa, and sued under the Alien Tort Statute (ATS) alleging that corporations Ford Motor Co. and IBM "aided and abetted" crimes prohibited under the law of nations. The court ruled that the plaintiffs failed to show that Ford and or IBM aided and abetted South Africa's violations of the law of nations, and therefore their claims cannot form the basis under the ATS. In Linde v. Arab Bank, PLC plaintiffs brought claims under the Anti-Terrorism Act (ATA) and the Alien Tort Claims Act (ATCA) alleging the Arab Bank aided and abetted through their involvement in suicide bombings, and other terrorist attacks in Israel, the West Bank, and Gaza. Under the Anti-Terrorism Act (ATA) and the Alien Tort Claims Act (ATCA), American and foreign victims of terrorist attacks brought actions, against Jordanian bank alleged to have provided banking and administrative services to terrorist organizations. The defendants failed to produce necessary and relevant paperwork claiming that they are protected under the foreign bank secrecy objection, which the court continuously overruled. Defendants noncompliance with producing documents and choosing when to cooperate are evidence of their bad faith and their attempt to not disclose the activities of their bank.

§ 2[d] Jus Cogens and Diplomatic Immunity

In Sarei v. Rio Tinto, PLC, pertaining to comity, the court looks to Id. at 1030–3. That "in holding that the jus cogens violations alleged do not require exhaustion, the district court balanced the multiple concerns animating the comity doctrine"(id). In Sarei, the court decides upon specific claims which the district court held were universally considered matters of concern- that is, genocide, war crimes, crimes against humanity, and racial discrimination. In all of these cases, the court deciphers that corporate liability may be applicable if claims are brought under the ATS. In its holding in Sarei, the court finds that the complaint adequately alleged two of the aforementioned jus cogens violations: genocide and war crimes.

Regarding diplomatic immunity, Tachiona v. Mugabe provides an important exception for ATCA applicability when concerning foreign leaders. Robert Mugabe, the president of Zimbabwe, was the foreign leader in question, and the plaintiffs stated that they were "victims of torture and terror" from the Zimbabwe government, specifically concerning Mugabe and others official's actions, and they brought a class action suit against Mugabe and his political party under the ATCA. The plaintiffs asserted that Mugabe and other high ranking officials terrorized the competing political party with a campaign of terror that included murder, terrorism, and rape. The main legal issue of the case concerns whether Mugabe and other Zimbabwean government officials violated the Alien Torts Act. The first two conditions were clearly met. However, the third facet is more complicated to determine because of the difficulty in proving whether Zanu-PF (the ruling party of Zimbabwe controlled by Mugabe) engaged in actions that violate international law.

Moreover, the court referenced Filartiga to illustrate the need for courts to “interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today”, meaning that when state actions violate human rights, international action is necessary. Because of the organized violence of the Zanu-PF, and the ample evidence of terror that the plaintiffs presented, the third facet of the ATCA was satisfied. However, the court ruled that the president and foreign minister were entitled to immunity under United Nations policy, and therefore rendered the ATCA inapplicable. This is significant because it illustrates an important exception to the ATCA, showing that if high ranking government officials are the defendants in ATCA jurisdiction cases, the emphasis from the court may be put on sustaining peace between nations over individual human rights' issues. This case illustrates that the ATCA is by no means extensively structured or defined to adjudicate problems of foreign human rights issues, but rather shows that United States’ courts are faced with considerable discretion to determine jurisdiction, and decide if a case can damage foreign policy on a global scale.

§ 2[e] Corporate Liability

In Kiobel v. Royal Dutch Petroleum Co., the court was faced with the question of whether or not the Alien Tort Statute bars corporate liability. In its holding, the court stated that “to assume that corporations must be subject to liability under the ATS (as they are domestically under “municipal law”) is incorrect”(id). It reasoned, first, that “subject matter jurisdiction requires that federal courts look beyond the domestic rules of law in ATS cases in order to examine the specific and universally accepted rules that the nations of the world treat as binding in their dealings...
with on another"(id). However, the court also reasoned that while corporations may be liable under domestic law, that doesn't necessarily mean that they're liable under customary international law. Accordingly, the court held that in bringing a claim against a corporation under the ATS, the plaintiffs had failed to allege a violation of customary international law, and therefore, their claims fell outside of the scope of the Alien Tort Statute. Moreover, the deciding court, in response to Judge Leval's concurrence, found that (1) in an ATS suit, only those international norms that are “specific, universal, and obligatory” may be applied; (2) in order to support Leval's proposed rule, there would need to be “many sources of international law calling for corporate liability for the norm to be regarded as ‘universal’”(id); (3) “no corporation has ever been subject to any form of liability under the customary international law of human rights, and thus the ATS, the remedy Congress has chosen, simply does not confer jurisdiction over suits against corporations; and (4) to enact to enact a civil remedy for violations of customary international law is a matter to be determined by each State; the United States has done so in enacting the ATS. But the ATS does not specify who is liable”(id).

In addition, in Flomo v. Firestone Nat. Rubber Co., LLC, the defendant, Firestone, argues that (1) because it is a corporation, it cannot be in violation of customary international law, regardless of the extent of heinous conduct; and (2) that there is no precedent for a corporation being held liable under ATS and therefore, via customary international law, a norm doesn't exist which forbids them from “committing crimes against humanity and other acts that the civilized world abhors.” Here, the court the concedes to the fact that no corporation may have ever been punished for violating the law of nations; however, that by no means designates that any legislation now would be an issue, nor that corporations are exempt from the law. The court extenuates this point by citing the fact that no multinational trials for crimes were held prior to the Nuremberg Tribunal. Moreover, as in the concurring opinion in Kiobel, because the ATS is civil, corporations can be held civilly liable. In addition, the liability of corporations “for such violations is limited to cases in which the violations are directed, encouraged, or condoned at the corporate defendant's decision-making level”(id). In other words, the court held that corporations can be held liable for violations of the Alien Tort Statute. The court also rejected two arguments promulgated by the defendant against liability.

Finally, in Sarei v. Rio Tinto, PLC, in regards to corporate liability, the court determines that the ATS contains no language or legislative history that bars corporate liability under the statute. In this conclusion, the court cites Sosa. “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”(id). However, “where no norm of international law that is “specific, universal and obligatory” has been sufficiently alleged to give rise to a cause of action, the ATS claim must be dismissed and we need not reach the question of corporate liability”(id).

§ 4 Summary

Considering the new contributions to the scope of the Alien Tort Statute from the previously discussed cases, we propose a that if the petitioning alien's claims fall under the jurisdiction of the Alien Tort Statute and the defendant's actions violate the law of nations, then an individual, any state actor, or a corporation may be liable under the ATS jurisdiction, unless diplomatic immunity excludes them from liability. However, the tort must occur in that jurisdiction which “touches and concerns” U.S. territory with sufficient force or state–sponsored actions. Moreover, the defendant's conduct must meet the threshold of aiding and abetting with full knowledge and intent or as violating the jus cogens norm prohibiting war crimes, genocide, or “other crimes against humanity”.

5 
THE EQUILIBRIUM
Sarah Amouzandeh
Political Science

Sarah Amouzandeh recently graduated from UC San Diego with a degree in Political Science from Earl Warren college. While at UC San Diego, Sarah co-founded Women in Politics and worked at a law firm in downtown San Diego. She also completed a yearlong public service program with JusticeCorps at the Hall of Justice downtown where she helped pro se litigants file restraining orders and paperwork in Small Claims Court. After graduating, Sarah is now taking a year off before law school and is exploring Corporate Law as a Legal Department Assistant at General Atomics. When Sarah is not working she enjoys runs on the beach, listening to the Eagles, and trying out new recipes.

Melani Mattson
Political Science & Public Health

Melani Mattson recently graduated from UC San Diego with degrees in Political Science and Public Health. Her interest in policy and legal analysis stemmed from her experience with the UCDC program where she spent a semester as a Public Policy Intern with the AIDS Institute, a policy advocacy organization for those with HIV/AIDS and Hepatitis C. She hopes to continue work in the health policy discipline and continue her education with a Masters in Public Policy.
Conor Orton
Political Science

Born in Petaluma, California, Conor Orton is currently a junior at University of California, San Diego in Eleanor Roosevelt College, and plans to graduate in 2020. He is majoring in Political Science and minoring in Business, and after college hopes to go to law school. Additionally, he plays for the UC San Diego Men’s Soccer team as a goalkeeper, and loves to watch soccer in his free time as well. Some hobbies of his include reading, watching television shows, and hanging out with his friends on the soccer team. His favorite artists/bands are Tame Impala, Frank Ocean, and Alt-J.

Cailen Rodriguez
Political Science & International Relations

Cailen is a third year Political Science/International Relations major with a minor in Law & Society. Her primary interests are international and national security, foreign policy, and political analysis. As she is finishing her degree in June, she plans to spend this upcoming year in Europe further studying international affairs. One of the hallmarks of her personality is saying “I have so much to do” and then taking a 4 hours nap. Anyway, what was I saying? Oh yeah. Go Tritons!