Brooklyn Law Review

Volume 78 | Issue 4 Article 9

2013

Substance over Form: Corporate Liability Under the Alien Tort Statute

Mark Nixdorf

Substance over Form

CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

INTRODUCTION

The Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*[1] should have ended the long struggle by lower courts throughout the United States to determine whether corporations are subject to civil liability under the Alien Tort Statute (the ATS).[2] The ATS provides U.S. courts with jurisdiction to hear civil cases brought by foreign plaintiffs for violations of "the law of nations or a treaty of the United States."[3] Litigants often used the law to file claims in the U.S. against multinational corporations for allegedly aiding and abetting foreign governments in the commission of human rights violations,[4] such as "genocide, extrajudicial killing, torture, crimes against humanity, sexual violence, and kidnap[p]ing."[5] In this regard, the ATS was a powerful tool.

Courts, however, have inconsistently interpreted the scope of the ATS. In 2008, the Eleventh Circuit became the first federal appellate court to expressly articulate a basis for corporate liability under the ATS,[6] and district courts throughout the country had already generally reached the same conclusion.[7] But in the landmark 2010 decision, *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit held that "the law of nations" does not recognize civil liability of corporations

---

[1] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148-49 (2d Cir.), *reh'g denied* 642 F.3d 268 (2d Cir. 2010), *reh'g en banc denied*, 642 F.3d 379 (2d Cir.), *petition for cert. filed*, 2011 WL 2326271 (June 6, 2011) (No. 10-1491), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011) (No. 10-1491), 133 S. Ct. 1659 (2013).

[2] *See infra* Parts III and IV.

[3] 28 U.S.C. § 1350 (2006). The ATS is also referred to as the Alien Tort Claims Act or the ATCA.

[4] *See infra* Parts III and IV.

[5] Doe v. Exxon Mobil Corp., 654 F.3d 11, 16 (D.C. Cir. 2011).

[6] *See* Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

[7] Mara Theophila, Note, *"Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After* Kiobel v. Royal Dutch Petroleum Corp., 79 FORDHAM L. REV. 2859, 2881-82 (2011).

for human rights violations; therefore, plaintiffs are unable to bring ATS claims against corporations in U.S. courts.[8] Although *Kiobel* significantly limited the scope of the ATS, other federal appellate courts subsequently issued contrary opinions, thereby maintaining the ATS as a potential path for civil liability claims against corporations. For example, in 2011, the D.C. Circuit held in *Doe v. Exxon Mobil Corp.* that the ATS permits civil liability against corporations.[9] Just three days after that decision, the Seventh Circuit, in *Flomo v. Firestone Natural Rubber Co.*, reached a similar conclusion.[10] Shortly thereafter, the Ninth Circuit similarly found in favor of corporate liability under the ATS in *Sarei v. Rio Tinto*.[11] With *Kiobel* creating a Circuit split, the rulings in *Exxon*, *Flomo*, and *Rio Tinto* made the Second Circuit an outlier.

However, given its prominent role in the history of ATS litigation, the Second Circuit's ruling was significant and necessitated review by the Supreme Court.[12] In June 2011, the *Kiobel* respondents filed a petition for a writ of certiorari,[13] which the Court granted in October 2011.[14] During the first round of oral argument, which addressed "whether corporations could be sued under [the ATS]",[15] the justices expressed concern about the lack of a U.S. nexus.[16] In *Kiobel*, Nigerian plaintiffs brought suit against defendant corporations, incorporated in the Netherlands and the United Kingdom, for alleged human rights violations that occurred in Nigeria. During arguments, Justice Alito asked, "What business does a case like that have in the courts of the United States?"[17] In March 2012, the Supreme Court ordered the parties to file supplemental briefs on the extraterritorial application of the ATS; something that had not been considered by the courts below.[18] The Supreme Court specifically requested further guidance on "whether

---

[8] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148-49 (2d Cir.), *reh'g en banc denied*, 642 F.3d 379 (2d Cir.), *reh'g denied* , 642 F.3d 268 (2d Cir. 2010), *petition for cert. filed*, 2011 WL 2326271 (June 6, 2011) (No. 10-1491), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011) (No. 10-1491), 133 S. Ct. 1659 (2013).

[9] *Exxon Mobile*, 654 F.3d at 15;

[10] *See* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011).

[11] *See* Sarei v. Rio Tinto, 671 F.3d 736, 747-48, 764 (9th Cir. 2011).

[12] *See infra* Parts I.B and IV.

[13] Petition for Writ of Certiorari, *Kiobel*, 2011 WL 2326271 (No. 10-1491).

[14] *See Kiobel*, 132 S. Ct. 472 (2011).

[15] Marcia Coyle, *Supreme Court Orders Reargument in Alien Tort Statute Case*, BLOG OF LEGAL TIMES (Mar. 5, 2012, 3:47 PM), http://legaltimes.typepad.com/blt/2012/03/supreme-court-orders-reargument-in-alien-tort-statute-case.html.

[16] *Id.*

[17] *Id.*

[18] *Id.*

and under what circumstances the [ATS] allows [U.S.] courts to recognize a cause of action for violations of the law of nations occurring" outside the United States.[19]

The Court heard argument on the issue of extraterritoriality on the first day of the October 2012 term.[20] The Court contended with fifty supplemental amicus briefs filed on the issue;[21] an amount that, when compared to the thirty-six amicus briefs filed on the issue of corporate liability, indicated the close attention paid to this facet of the case.[22] On April 17, 2013, the Supreme Court issued a much anticipated and long-awaited opinion. The Court unanimously upheld the Second Circuit ruling and denied the Nigerian petitioners access to U.S. federal courts under the ATS. Surprisingly,[23] the Court based its decision on the presumption against the exterritorial application of statutes and did not address whether corporate liability is permitted under the ATS.[24]

Although the Supreme Court's ruling in *Kiobel* severely restricts the applicability of the ATS to human rights violations committed abroad, the question of corporate liability under the ATS remains unanswered. This note argues that if and when lawsuits falling within the newly defined limits of the ATS are brought against corporations, U.S. courts should hold them accountable. In particular, this note finds that the courts adhering to the *Kiobel* line of jurisprudence mistakenly focus on the *form* of the perpetrator committing the human rights violations rather than the *substance* of the abuse. This results in a misinterpretation of international law, one that exempts corporations from civil liability under the ATS.

---

[19] Louis M. Solomon, *Extraterritoriality Becomes Focus of* Kiobel *Supreme Court; Are We Headed for* Morrison II*?*, CADWALADER INT'L PRAC. LAW BLOG (Apr. 4, 2012), http://blog.internationalpractice.org/international-practice/extraterrritoriality-becomes-focus-of-kiobel-supreme-court-are-we-headed-for-morrison-ii.html.

[20] John Bellinger, Kiobel*: Supplemental Briefs on Extraterritoriality Are In . . .*, LAWFARE (Aug. 14, 2012, 10:52 PM), http://www.lawfareblog.com/2012/08/kiobel-supplemental-briefs-on-extraterritoriality-are-in/.

[21] *Id.*

[22] *Id*.

[23] Stephanie Safdi, *Corporate Accountability for Human Rights:* Kiobel*'s Call to Action*, HUFFINGTON POST (Apr. 18, 2013, 4:12 PM) http://www.huffingtonpost.com/stephanie-safdi/kiobel-human-rights_b_3111575.html ("What is particularly striking about yesterday's decision is that the question of extraterritorial applicability was never even an issue in the lower courts.").

[24] Kristin Linsley Myles, Kiobel *Commentary: Answers . . . and More Questions*, SCOTUSBLOG (Apr. 18, 2013, 2:07 PM), http://www.scotusblog.com/2013/04/commentary-kiobel-answers-and-more-questions/.

This note is divided into five parts. Part I focuses on the foundations of the ATS: the context in which the ATS was passed, the birth of ATS litigation, and an introduction to the law of nations. Part II highlights the Supreme Court's decision in *Sosa*, which shaped the modern framework of ATS lawsuits. This modern framework, however, has been inconsistently applied and Part III illustrates the need for further jurisprudential guidance. Part IV summarizes the line of jurisprudence espoused in *Exxon*, *Flomo* and *Rio Tinto* to demonstrate that the Second Circuit wrongly decided *Kiobel*. Lastly, Part V synthesizes and analyzes the various arguments made throughout the history of ATS litigation. This Part argues that the ATS supports claims of corporate liability and, derivatively, that the U.S. judiciary can be a forum that offers protection from human rights abuses.

I. THE ALIEN TORT STATUTE

Pursuant to the ATS, "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."[25] Thus, absent an alleged treaty violation, a plaintiff must allege a violation of the law of nations to invoke jurisdiction under the ATS.[26] An understanding of "the law of nations" reveals the statute's reach.

A. The Law of Nations

In *Paquete Habana*, the Supreme Court established a framework to determine what constitutes the "law of nations," explaining: "[i]nternational law is part of our law, and . . . where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . ."[27] Of course, even with this working definition, determining "what offenses violate customary international law . . . is no simple task."[28] The Second Circuit has explained:

> Customary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas.

---

[25] 28 U.S.C. § 1350 (2006).

[26] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004) ("In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.").

[27] The Paquete Habana, 175 U.S. 677, 700 (1900).

[28] Flores v. S. Peru Copper Corp., 414 F.3d 233, 247 (2d Cir. 2003).

> Furthermore, the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source. All of these characteristics give the body of customary international law a "soft, indeterminate character . . . ."[29]

At the time the ATS was enacted, "the principal violations of customary international law were 'piracy, mistreatment of ambassadors, and violation of safe conducts.'"[30] Today, the law of nations is also violated by genocide, slavery, torture, prolonged arbitrary detention, and systematic discrimination on the basis of race.[31]

The law of nations, while often lauded for its humanitarian objectives, also raises concerns. Judge Posner explained:

> The concept of customary international law is disquieting in two respects. First, there is a problem of notice: a custom cannot be identified with the same confidence as a provision in a legally authoritative text, such as a statute or a treaty. (Modern common law doesn't present that problem; it is a body of judge-created doctrine, not of amorphous custom.) Second, there is a problem of legitimacy—and for democratic countries it is a problem of democratic legitimacy. Customary international legal duties are imposed by the international community (ideally, though rarely—given the diversity of the world's 194 nations—by consensus), rather than by laws promulgated by the obligee's local community.[32]

It is important to take these concerns into account when determining the appropriate scope of the ATS.

B. Historical Context of the ATS

The First Congress of the United States passed the ATS "as part of the Judiciary Act of 1789."[33] There is little surviving legislative history regarding the ATS; it is generally believed, however, that the law was intended to assure foreign governments that the United States "would not tolerate flagrant violations of the 'law of nations,'" especially breaches concerning

---

[29] *Id.* (citation omitted) (quoting LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 29 (1995)).

[30] Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011).

[31] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

[32] *Flomo*, 643 F.3d at 1016.

[33] GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, at 3 (2003).

diplomats and merchants.[34] Records indicate that "two incidents of assault against foreign ambassadors on U.S. soil" motivated the United States, a burgeoning country at the time, "to display American leadership in defending international standards of good behavior." [35] Recognizing the important role of the judiciary in foreign affairs, the First Congress promulgated the Judiciary Act of 1789 in order "to provide a federal forum to discharge the duty of the nation, to avoid potentially hostile state courts, and to promote uniform interpretation when dealing with violations of the law of nations."[36]

The ATS remained "dormant" for nearly 200 years[37] until 1978, when *Filartiga v. Pena-Irala*[38] "ushered in the modern era of ATS litigation."[39] In *Filartiga*, the Second Circuit relied on ATS-based jurisdiction to adjudicate the claims of two Paraguayan nationals against a former Paraguayan government official for alleged acts of torture and murder in violation of international law.[40] In essence, *Filartiga* held

> that the ATS provides jurisdiction over (1) tort actions, (2) brought by aliens (only), (3) for violations of the law of nations (also called "customary international law") including, as a general matter, war crimes and crimes against humanity—crimes in which the perpetrator can be called "*hostis humani generis*, an enemy of all mankind."[41]

Prior to *Filartiga*, "the ATS was rarely invoked by plaintiffs."[42] The "general view" was that the ATS only provided power "to adjudicate violations of the law of nations as the term was understood in 1789" and other violations for which Congress

---

[34] *See id.*

[35] *Id.*

[36] Brief of Amici Curiae of Professors of Federal Jurisdiction & Legal History in Support of Plaintiffs-Appellants Seeking Petition for Rehearing En Banc at 2, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (Nos. 06-4800, 06-4876).

[37] Theophila, *supra* note 7, at 2864. The ATS was invoked twice shortly after its passage. *Id.* at 2863-64 ("First, in *Bolchos v. Darrel*, the U.S. District Court for the District of South Carolina assumed that the ATS provided a supplemental basis for jurisdiction over an admiralty suit for damages brought by a French privateer against a mortgagee of a British slave ship. Furthermore, in 1795, Attorney General William Bradford advised the State Department on whether American citizens who took part in the destruction of a British slave colony could be subject to criminal liability. Although Bradford expressed doubt regarding the citizens' criminal culpability, he opined that a federal court would be willing to entertain the foreign plaintiffs' civil liability under the ATS." (footnotes omitted)).

[38] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[39] Theophila, *supra* note 7, at 2864.

[40] *Filartiga*, 630 F.2d at 878.

[41] *Kiobel*, 621 F.3d at 116 (footnote omitted) (citing *Filartiga*, 630 F.2d at 878).

[42] HUFBAUER & MITROKOSTAS, *supra* note 33, at 3.

"specifically create[d] additional causes of action."[43] In *Filartiga* however, the Second Circuit adopted a more "expansive" interpretation of the ATS, one that provided "jurisdiction over violations of international law *in light of evolving jurisprudence*."[44]

C. The Initial Surge and Early Litigation Under the ATS

Since *Filartiga*, plaintiffs have filed hundreds of lawsuits claiming jurisdiction under the ATS.[45] Initially, actions were brought under the ATS against individuals.[46] In the 1990s, however, plaintiffs began bringing ATS suits against corporations conducting business in developing nations.[47] "[F]rom 1996 to [2002], more than 100 ATS suits ha[d] been brought against American companies in connection with nondomestic operations."[48] This surge in litigation raised a number of concerns about the scope of the ATS, particularly among large multinational corporations facing potential liability.

Gary Clyde Hufbauer and Nicholas K. Mitrokostas envision a "nightmare scenario" in which "100,000 class action Chinese plaintiffs" file suit against a collection of multinational corporations "in a federal court for abetting China's denial of political rights, for observing China's restrictions on trade unions, and for impairing the Chinese environment."[49] The authors surmise that the prospect of damages nearing $30 billion would force corporations into enormous settlements, and that corporations would "curtail their investments, not only in China but also in other (mainly developing) countries with less than perfect observance of individual and labor rights and shortcomings in the realm of political and environmental norms."[50]

---

[43] *Id.* at 3-4 (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984)).

[44] *Id*. at 4.

[45] *See* Lisa Ann T. Ruggiero et al., *ATS Corporate Liability After* Kiobel, LAW360 (Aug. 2, 2011, 2:07 PM), http://www.law360.com/articles/261968/ats-corporate-liability-after-kiobel ("This seminal decision opened the floodgates for hundreds of lawsuits claiming jurisdiction via the ATS over the past 30 years.").

[46] *See* Frank Cruz-Alvarez & Laura E. Wade, *The Second Circuit Correctly Interprets the Alien Tort Statute:* Kiobel v. Royal Dutch, 65 U. MIAMI L. REV. 1109, 111 (2011).

[47] Ruggiero et al., *supra* note 45.

[48] *Id*.; *see, e.g.*, Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (Burmese villagers filed suit in September 1997 against Unocal and their parent company, the Union Oil Company of California, under the ATS. The suit was filed for alleged human rights violations, including forced labor, in the construction of the Yadana gas pipeline project in Myanmar).

[49] HUFBAUER & MITROKOSTAS, *supra* note 33, at 1.

[50] *Id.*

The ultimate effect, they explain, would be a chill on international trade and the rise of a powerful anti-globalization force.[51]

While perhaps hyperbole, Hufbauer and Mitrokostas's "nightmare scenario" provides a helpful context for understanding the issues courts face when applying the ATS. Courts are tasked with providing adequate relief to plaintiffs without stymieing international commerce or hindering international relations.

II. THE SUPREME COURT RESPONDS

Amid the flurry of litigation, the Supreme Court weighed in on the scope of the ATS for the first time in 2004.[52] In *Sosa v. Alvarez-Machain*, the Supreme Court attempted to significantly restrict the scope of ATS jurisdiction, but it provided little guidance on the application of the law's mandate. The respondent, Alvarez, had brought a claim under the ATS for arbitrary arrest and detention.[53] Alvarez had been indicted in the United States for torturing and murdering a Drug Enforcement Agency ("DEA") officer.[54] Unable to secure Alvarez's extradition, the DEA paid Jose Francisco Sosa, a Mexican national, to kidnap Alvarez and to "bring him to the United States for trial."[55]

Once in the United States, Alvarez brought suit in the U.S. District Court for the Central District of California, claiming that he was illegally detained and his arrest by Sosa constituted a violation of the law of nations because the warrant only authorized his arrest in the United States.[56] The district court "awarded summary judgment and $25,000 in damages to Alvarez on the ATS claim."[57] "A three-judge panel of the Ninth Circuit then affirmed the ATS judgment,"[58] and, later, as they sat en banc to review, a divided court upheld the decision.[59] The Supreme Court reversed, however, holding that the ATS only provides a cause of action for violations of those international norms "defined with a specificity comparable to the features of . . . 18th-century paradigms."[60] The Court found

---

[51] *Id.* at 1-2.
[52] *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[53] *Id*. at 698.
[54] *Id*. at 697-98.
[55] *Id*. at 698.
[56] *Id*. at 697.
[57] *Id*. at 699.
[58] *Id*.
[59] *Id*.
[60] *Id*. at 725.

that here, "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."[61]

Adopting the *Filartiga* ruling, the Court rejected Sosa's argument that the scope of international law violations cognizable in ATS litigation was limited to those recognized in 1789.[62] The Court did, however, repeatedly emphasize the need for judicial caution in recognizing any new cause of action under the law of nations.[63] The Court explained "that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[64] Ultimately, the Court concluded that lower courts should "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to [the modest number of violations recognized at the time the ATS was enacted]."[65] The Court stated that its holding was consistent with the rulings of previous courts that had addressed the issue. For example, the Court highlighted the *Filartiga* court's observation that, "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[66]

The Court explained that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts."[67] In footnote twenty of the opinion, the Court further posited that 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."[68] These two passages of dictum, referencing corporations only in a footnote, have been the focal points of prolonged debate[69] over whether the ATS extends liability to

---

[61] *Id*. at 738.
[62] *Id*. at 712.
[63] *Id*. at 725-28.
[64] *Id*. at 729.
[65] *Id*. at 724-25.
[66] *Id*. at 732 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980)).
[67] *Id.* at 732-33 (footnote omitted).
[68] *Id.* at 732 n.20.
[69] *See infra* Part III.

corporations even though the text of the statute is silent on limits to the applicable class of defendants.

III. THE COURTS STRUGGLE TO APPLY *SOSA*

Despite the Supreme Court's strong caution for "vigilant doorkeeping," the lower courts' inconsistent application of the *Sosa* precedent evidences its inability to provide adequate guidance. Some courts simply assumed *sub silencio* that corporations were subject to liability under the ATS, while others used a variety of principals from international law, domestic law, or a combination of both.[70] Conversely, courts denying corporate liability under the ATS have consistently held that customary international law does not recognize civil liability for corporations and, thus, plaintiffs could not invoke jurisdiction under the ATS in U.S. courts for claims against corporations.[71] As a result, plaintiffs were left to pursue civil claims against corporations only where the alleged human rights violations occurred, often in developing countries.[72]

A. The Calm Before the Storm—Courts Find Corporations Can Be Held Liable under the ATS

1. *Khulumani v. Barclay National Bank Ltd.* (2007)

In *Khulumani*, foreign plaintiffs claimed that a group of corporate defendants had "actively and willingly collaborated with the government of South Africa" to sustain apartheid in violation of international law.[73] The district court "held that the plaintiffs failed to establish subject matter jurisdiction under the [ATS]" and dismissed the lawsuit.[74] Expressing fear about the potential chill on international commerce that holding corporations liable under the ATS could instill, the district court found that "customary international law" did not recognize causes of action for the plaintiffs' claims.[75] On appeal, two of the three judges joined to reverse the lower court's dismissal of the ATS claim.[76]

---

[70] Theophila, *supra* note 7, at 2880-81; *infra* Part III.A.

[71] *See infra* Part III.B.

[72] Ruggiero et al., *supra* note 45.

[73] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 258 (2d Cir. 2007), *aff'd sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008).

[74] *Id.* at 259.

[75] *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 553-54 (S.D.N.Y. 2004), *aff'd in part*, *vacated in part*, *and remanded sub nom.* Khulumani v. Barclay Nat'l Bank, 504 F.3d 254 (2d Cir. 2007), *aff'd sub nom.* Am. Isuzu Motors, Inc. v.

The Second Circuit in *Khulumani* interpreted *Sosa* as requiring a two-part inquiry.[77] First, the court must determine "whether jurisdiction lies under the [ATS]," which requires a showing of a violation of the law of nations.[78] The second inquiry "is whether to recognize a common-law cause of action to provide a remedy for the alleged violation of international law."[79] Each of the judges expressed a different view on the issue of corporate liability under the ATS pursuant to this test.

Judge Katzmann applied international law to both parts of the inquiry. He first noted that, because the defendants did not raise the issue, the court was not required to address the question of whether corporations may be held liable for violations of customary international law.[80] However, Judge Katzmann then observed that the Second Circuit has "repeatedly treated the issue of whether corporations may be held liable under the [ATS] as indistinguishable from the question of whether private individuals may be."[81] This is significant, because the Second Circuit already held in *Kadic v. Karadzic* that "certain activities are of 'universal concern' and therefore constitute violations of customary international law not only when they are committed by state actors, but also when they are committed by private individuals."[82] Further, while he approved the district court's use of international law for the aiding and abetting analysis, Judge Katzmann nevertheless disagreed with its conclusion that international law does not recognize a cause of action for aiding and abetting.[83]

Conversely, Judge Hall reached the same result, but only applied international law to the first part of the inquiry regarding "whether jurisdiction lies under the [ATS]," and relied on federal common law to derive a standard for the aiding and abetting cause of action.[84] According to Judge Hall, the standard for civil aiding and abetting should be derived

---

Ntsebeza, 553 U.S. 1028 (2008), *remanded sub nom*. In re South African Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009), *motion to dismiss denied in part*, No. 02 MDL 1499 (SAS), 2009 WL 3364035 (S.D.N.Y. Oct. 19, 2009).

[76] *Khulumani*, 504 F.3d at 260.

[77] *Id.* at 266 (Katzmann, J., concurring).

[78] *Id.*

[79] *Id.*

[80] *Id.* at 282-83.

[81] *Id.* at 282.

[82] Kadic v. Kardzic, 70 F.3d 232, 239-40 (2d Cir. 1996)).

[83] *Khulumani*, 504 F.3d at 268-69 (Katzmann, J., concurring).

[84] *See id.* at 287-89 (Hall, J., concurring) ("I share Judge Katzmann's understanding . . . that . . . corporate actors are subject to liability under the [ATS].").

from section 876(b) of the Restatement (Second) of Torts, which requires a *mens rea* of only of knowledge rather than purpose.[85] In dissent, Judge Korman focused on corporate liability under the ATS and found that international law does not recognize corporate liability.[86] Thus, the claims should be dismissed under the first part of the inquiry for want of jurisdiction.[87]

2. *Presbyterian Church of Sudan v. Talisman Energy Inc.* (2009)

In this case, a group of Sudanese plaintiffs filed suit against Talisman Energy, Inc., claiming "that they [were] victims of human rights abuses committed by the Government of the Sudan" and that Talisman aided and abetted the Sudanese Government in committing these abuses.[88] In district court, the plaintiffs claimed that Talisman violated customary international law relating to genocide, war crimes, and crimes against humanity.[89] Surprisingly, the Second Circuit did not discuss the substance of whether corporations can be held liable under the ATS.[90] In fact, the court openly stated:

> We will . . . assume, without deciding, that corporations such as Talisman may be held liable for the violations of customary international law that plaintiffs allege. Because we hold that plaintiffs' claims fail on other grounds, we need not reach, in this action, the question of 'whether international law extends the scope of liability' to corporations.[91]

Instead, the court targeted the plaintiffs' failure to meet their burden of proof on their claim of accessorial liability. The court officially adopted Circuit Judge Katzmann's proposal in *Khulumani* and applied international law, holding that "under international law, a claimant must show that the defendant provided substantial assistance with the purpose of facilitating

---

[85] *Id.* at 287-89.

[86] *Id*. at 326 (Korman, J., dissenting).

[87] *Id*.

[88] Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247 (2d Cir. 2009).

[89] *See* Presbyterian Church of Sudan v. Talisman Energy, Inc. 453 F. Supp. 2d 633, 639 (S.D.N.Y. 2006), *judgment entered sub nom.*, No. 01-CV-9882-DLC, 2006 WL 3469542 (S.D.N.Y. Dec. 1, 2006), *aff'd*, 582 F.3d 244 (2d Cir. 2009).

[90] It is worth noting that the Second Circuit had, in the past, decided ATS cases involving corporations without addressing the issue of corporate liability. *See, e.g.*, Flores v. S. Peru Copper Corp., 414 F.3d 233, 241 (2d Cir. 2003) *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000)

[91] *Talisman Energy, Inc.*, 582 F.3d at 261 n.12 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)).

the alleged offenses."[92] The court found that the plaintiffs did not present evidence showing that Talisman *purposely* harmed them and affirmed the district court's dismissal.[93]

Illustrating the need to address the issue of corporate liability under the ATS, when the Presbyterian Church of Sudan filed a writ of certiorari to the United States Supreme Court, Talisman also filed a conditional cross-petition for a writ of certiorari demanding that the Court first determine whether federal courts have subject matter jurisdiction under the ATS in order to impose liability on corporations for violations of customary international law.[94] Despite the request for further guidance, the Supreme Court denied certiorari and left the issue unresolved.[95]

3. *Romero v. Drummond Co.* (2008)

In *Romero v. Drummond Co.*, a Colombian labor union, its leaders, and relatives of its deceased leaders brought an ATS action in the Northern District of Alabama against the mining company Drummond.[96] The plaintiffs alleged that, under the direction of corporate executives in the United States, the company "hired paramilitaries affiliated with the United Self-Defense Forces of Colombia to torture" and assassinate union leaders.[97] On appeal in the Eleventh Circuit, the defendants argued that the district court lacked subject matter jurisdiction because the ATS did not allow suits against corporations.[98]

The court supported its ruling that the ATS granted subject matter jurisdiction on two grounds.[99] First, the court felt bound by its decision in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*,[100] which simply assumed that a corporate entity could be held liable without any discussion of the issue.[101] Second, the court noted that the text of the ATS "provides no express exception for corporations."[102] Thus, the Eleventh Circuit

---

[92] *Id.* at 247, 258.

[93] *Id.* at 247-48.

[94] *See* Conditional Cross-Petition for Writ of Certiorari, Presbyterian Church of Sudan v. Talisman Energy, Inc., 131 S. Ct. 79 (2010) (No. 09-1262).

[95] *Talisman Energy, Inc.*, 131 S. Ct. at 79 (mem.).

[96] Romero v. Drummond Co., 552 F.3d 1303, 1309 (11th Cir. 2008).

[97] *Id*. at 1308-09.

[98] *Id.* at 1315.

[99] *Id.*

[100] *Id.*

[101] *See* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1250 (11th Cir. 2005).

[102] *Romero*, 552 F.3d at 1315 (citation omitted).

established corporate liability under the ATS and relied only on the court's silence in past cases and the text of the statute without performing any substantive analysis of customary international law. The Eleventh Circuit subsequently cited *Romero* in *Sinaltrainal v. Coca-Cola Co.*, to find that "corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations,"[103] thus solidifying corporate liability under the ATS in the Eleventh Circuit.

B. Changing Tides—Courts Find Corporations Cannot Be Held Liable Under the ATS

Until 2010, not a single Circuit excused corporations from civil liability for violations of the law of nations under the ATS.[104] In September 2010, however, three courts precluded "plaintiffs from asserting an ATS claim against any corporation within their jurisdictions."[105] These cases represented a sea change in the evolution of ATS litigation, and compelled subsequent courts finding in favor of ATS-based corporate liability to defend and propound their positions.

1. *Kiobel v. Royal Dutch Petroleum Co.* (2010)

In *Kiobel*, Nigerian residents claimed that oil corporations "aided and abetted the Nigerian government in committing [human rights abuses]."[106] Oil exploration and production companies had been operating in Nigeria and causing environmental damages since 1958.[107] In response, local residents organized an opposition movement.[108] The plaintiffs alleged that in 1993 some of these corporations obtained aid from the Nigerian government to quell the civilian opposition.[109] In particular, the plaintiffs alleged that for two years the Nigerian military:

---

[103] Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009) (citing *Romero*, 552 F.3d at 1315), *abrogated by* Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012).

[104] Theophila, *supra* note7, at 2892.

[105] *Id.* (the Second Circuit, the U.S. District Court for the Central District of California, and the U.S. District Court for the Southern District of Indiana.)

[106] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011) (No. 10-1491).

[107] *Id.* at 123.

[108] *Id.*

[109] *Id.*

> [S]hot and killed Ogoni residents and attacked Ogoni villages—beating, raping, and arresting residents and destroying or looting property—with the assistance of defendants. Specifically, the plaintiffs allege that defendants, *inter alia*, (1) provided transportation to Nigerian forces, (2) allowed their property to be utilized as a staging ground for attacks, (3) provided food for soldiers involved in the attacks, and (4) provided compensation to those soldiers.[110]

Despite the apparent connection between the defendant, Royal Dutch Petroleum, and the serious allegations, the Second Circuit held that suits for violations of "the law of nations" under the ATS could not be initiated against corporations under the ATS.[111] Following the directions of *Sosa* footnote twenty to consider the type of defendant, "[t]he *Kiobel* court held that because corporate liability is not a universal and well-defined norm of international law, federal courts do not have subject matter jurisdiction over corporations pursuant to the ATS."[112] In short, the Second Circuit "eliminated the most common type of ATS cases."[113]

The majority in *Kiobel* applied only international law to the analysis of "whether corporations can be subject to liability" under the ATS.[114] Accordingly, the court "consider[ed] . . . the sources of international law [to] reveal . . . that those sources lead inescapably to the conclusion that the customary international law of human rights has not to date recognized liability for corporations that violate its norms."[115] Relying on the guidance for "authoritative . . . sources of international law identified in Article 38 of the Statute of the International Court of Justice,"[116] the majority focused on the following three bodies of law to determine that international law does not recognize corporate liability: (1) international tribunals, (2) international treaties, and (3) works of scholars.[117]

First, in analyzing law from international tribunals, the court stated at the outset "that no international tribunal of which [it was] aware ha[d] *ever* held a corporation liable for a violation of the law of nations."[118] The court's discussion began

---

[110] *Id.*
[111] *Id.* at 120.
[112] Ruggiero et al., *supra* note 45 (emphasis added).
[113] *Id.*
[114] *Kiobel*, 621 F.3d at 125.
[115] *Id.*
[116] *Id.* at 132.
[117] *See id*. at 132, 137, 145.
[118] *Id.* at 132.

with an analysis of the Nuremberg Tribunal,[119] which it considered "the single most important source of modern customary international law concerning liability for violations of fundamental human rights."[120] The court explained "that the London Charter, which established the [Nuremberg Tribunal], granted . . . jurisdiction over *natural persons only*."[121] The court based this finding on language from the London Charter "granting the tribunal jurisdiction to try and punish *person* . . . whether as *individuals* or as *members* of organizations . . . ."[122] The court further noted that although the London Charter "granted the International Military Tribunal the authority to declare organizations 'criminal,'" and, indeed, both the SS and the Gestapo were later indicted, the actual purpose "of declaring an organization criminal was merely to facilitate the prosecution of *individuals* who were members of the organization."[123] Lastly, the court observed that the Nuremberg Tribunal charged "[t]wenty-four executives of [IG] Farben," a corporate entity intimately involved with the actions operations of the Nazi party, but did not charge or indict the corporation itself.[124] The court found this history of the Nuremberg Tribunal to indicate that international law does not recognize corporate liability.[125] Further, international tribunals since Nuremberg, such as the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court, also limited jurisdiction to "natural persons."[126] Based on these findings, the Second Circuit found that past international tribunals' treatment of corporate liability failed to establish that corporate civil liability is a recognized norm of customary international law.[127]

Second, the court's analysis of international treaties focused largely on rebutting the findings by the district court in *Talisman*

---

[119] The Nuremberg Trials were a series of military tribunals for the prosecution of political, military, and economic leaders of Nazi Germany. The trials were held in Nuremburg, Germany by the allied forces of World War II. *See* STEPHAN LANDSMAN, CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES (2005).

[120] *Kiobel*, 621 F.3d at 132-33.

[121] *Id.* at 133.

[122] *Id.* at 133-34 (2d Cir. 2010) (citations omitted) (quoting Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the London Charter) art. 6, Aug. 8, 1945, 59 Stat. 1547, 82 U.N.T.S. 288).

[123] *Id.* at 134.

[124] *Id.* at 134-35.

[125] *Id.* at 143-46.

[126] *Id.* at 136.

[127] *Id.* at 137.

that the recognition of corporate liability in a vast number of treaties supports similar recognition by the law of nations.[128] The majority rejected the finding, noting that although many "treaties suggest a trend towards imposing corporate liability in some special contexts, no trend is detectable outside such narrow applications in specialized treaties, and there is nothing to demonstrate that corporate liability has yet been recognized as a norm of the customary international law of human rights."[129]

Third, the majority examined scholarly work about corporate liability.[130] It found that "most proponents of corporate liability under customary international law discuss the subject as merely a possibility or a goal, rather than an established norm of customary international law."[131] In sum, the majority did not find any basis in international law to recognize corporate civil liability for human rights violations.

2. The *Kiobel* Line of Jurisprudence

Although *Kiobel* was the first Circuit Court decision to expressly reject corporate liability under the ATS, both the Central District of California and the Southern District of Indiana almost simultaneously refused to extend civil liability to corporations in *Doe v. Nestle, S.A.*[132] and *Viera v. Eli Lilly & Co.*,[133] respectively. Further, the Second Circuit followed its *Kiobel* decision several months later with *Liu Bo Shan v. China Construction Bank Corp.*, where it applied *Kiobel* as precedent, thus signifying a commitment to its earlier ruling.[134]

In *Doe v. Nestle, S.A.*, Malian plaintiffs brought claims under the ATS, alleging that several international corporations aided and abetted their forced labor in cocoa fields in Cote D'Ivoire.[135] The court dismissed the claim, finding that corporations are not subject to ATS liability and that "the extent that corporations should be liable . . . is a matter best left for Congress to decide."[136] In *Viera v. Eli Lilly & Co.*, Brazilian residents filed a complaint against "six U.S.

---

[128] *Id.* at 138.
[129] *Id.* at 141 (emphasis omitted).
[130] *Id.* at 142.
[131] *Id.* at 144 n.48.
[132] 748 F. Supp. 2d 1057, 1126-28 (C.D. Cal. 2010).
[133] No. 1:09-CV-0495-RLY-DML, 2010 WL 3893791, at *2-4 (S.D. Ind. Sept. 30, 2010).
[134] Liu Bo Shan v. China Constr. Bank, 421 F. App'x 89, 91 (2d Cir. 2011).
[135] *Nestle, S.A.*, 748 F. Supp. 2d. at 1064.
[136] *Id.* at 1144.

corporations . . .[,] claiming to have suffered injury as a result of localized environmental pollution emanating from manufacturing sites located in [two Brazilian cities]."[137] The court applied *Kiobel's* reasoning and dismissed the ATS claims.[138] Similarly, *Liu Bo Shan v. China Construction Bank Corp.* involved an appeal by a former employee of the defendant corporation who claimed that the defendant fabricated charges against him after he released the results of a damaging audit report. The plaintiff alleged that, as a result of the fictitious charges, Chinese police tortured, beat, sexually assaulted, and arbitrarily detained him for a prolonged period of time. Nonetheless, the Second Circuit found itself bound to the *Kiobel* precedent.[139] These cases signified, at least initially, a broad acceptance of the *Kiobel* reasoning.

IV. A NEW LINE OF JURISPRUDENCE EMERGES SUGGESTING *KIOBEL* WAS WRONGLY DECIDED

Although *Kiobel* may have snuffed ATS corporate liability in the Second Circuit, the D.C. Circuit, the Seventh Circuit, and the Ninth Circuit subsequently sided with the Eleventh Circuit, each finding that a corporation can be subject to liability under the ATS.[140] Confronted by the Second Circuit's bold opposition, the circuit courts in this line of jurisprudence bolstered the analysis in support of corporate liability under the ATS, which was rather haphazardly assumed pre-*Kiobel*. In particular, the alternative line of ATS jurisprudence recast pre-existing interpretations of both *Sosa* and international law to show that the Second Circuit wrongly decided *Kiobel*. Despite the widening circuit split, the Supreme Court did not seize the opportunity to intervene on the issue of corporate liability under the ATS and ruled instead on other grounds.

---

[137] *Viera*, 2010 WL 3893791, at *1.

[138] *Id.* (finding the Second Circuit's reasoning "persuasive").

[139] *Liu Bo Shan*, 421 F. App'x at 90-92.

[140] Moreover, in *Aziz v. Alcolac, Inc.*, the Fourth Circuit heard oral argument on May 12, 2011 in which the plaintiffs alleged that an American chemical manufacturer sold a chemical used to manufacture mustard gas that was used by the Iraqi government forces against the Kurds living in northern Iraq. 658 F.3d 388, 390 (4th Cir. 2011). The Fourth Circuit rendered its decision on September 19, 2011, finding "that the ATS imposes liability for aiding and abetting violations . . . but only if the attendant conduct is purposeful." *Id.* However, the panel declined to consider the issue of corporate liability because plaintiffs "failed to plead facts sufficient to support the intent element of their ATS claims." *Id*.

A. Judge Leval's Kiobel *Concurrence*

Although Judge Leval concurred with the *Kiobel* judgment, his lengthy analysis functions predominately as a dissent.[141] Noting that "[t]he majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights,"[142] Judge Leval opined that corporations could be held liable for violations of the law of nations, but dismissed the plaintiffs' complaint for failure to state a legally cognizable claim.[143] His concurrence provides a thorough critique of the majority opinion that has resonated in subsequent Circuit decisions.[144] His opinion focuses on three points: (1) the majority's ruling leads to illogical results in opposition to the objectives of international law, (2) the majority opinion fails to show that international law does not recognize civil liability for corporations, and (3) *Sosa* footnote twenty supports a finding for corporate liability under the ATS.

1. Illogical Results in Opposition to the Objectives of International Law

Judge Leval dissected the practical effect of the majority's rule.[145] The rule only provides relief for victims of a narrow class of atrocities "*against the corporation's employees*, natural persons who acted in the corporation's behalf, *but not against the corporation* that commanded the atrocities and earned profits by committing them."[146] As a result, corporations earning profits while committing human rights abuses are "free to retain those profits without liability."[147] Under the majority's rule, he found that "[s]o long as they incorporate, . . . businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy—all without civil liability to victims."[148] He concluded that such a "free pass to

---

[141] *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149-96 (2d Cir. 2010) (Leval, J., concurring), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011) (No. 10-1491).

[142] *Id.* at 149.

[143] *Id.* at 153.

[144] *See, e.g.*, Flomo v. Firestone Natural Rubber Co., 646 F.3d 1013, 1019 (7th Cir. 2011); Doe v. Exxon Mobil Corp., 654 F.3d 11, 51 (D.C. Cir. 2011).

[145] *Kiobel*, 621 F.3d at 150-51 (Leval, J., concurring).

[146] *Id.* at 151.

[147] *Id.*

[148] *Id.* at 150.

act in contravention of international law's norms . . . conflicts with the humanitarian objectives of that body of law."[149]

2. No Proof that International Law Does Not Recognize Civil Liability for Corporations

Judge Leval contended that the majority's reliance on international tribunals to determine the reach of international law was misplaced.[150] He noted that "international tribunals that have been established to date with jurisdiction over private persons have concerned themselves only with *criminal* punishment."[151] He demonstrated "the fallacy of the majority's argument that the restriction of *criminal* punishments for violations of the law of nations to natural persons reflects an intention in international law to immunize juridical entities form *civil* compensatory liability"[152] by highlighting the differences in criminal and civil law.[153]

An "indispensable element to the justification of criminal punishment is criminal intent," and thus, because a juridical entity cannot form such intent, "it is an anomaly to view a corporation as criminal."[154] Further, "criminal punishment does not achieve its principal objectives when it is imposed on" a corporation as opposed to a natural person.[155] For example, criminal punishment seeks to inflict "punitive suffering" on the criminal in order to: (1) "give society the satisfaction of retribution," (2) "disable the offender from further criminal conduct during imprisonment," (3) "change a criminal's conduct" by arousing a sense of "repentance," and (4) "dissuade others . . . from criminal conduct."[156] Because a corporation has no soul, the benefits obtained from suffering are unavailing and imprisonment is clearly not an option.[157]

Accordingly, the only punishment available is a monetary penalty that would tax the corporation's owners, creditors, or

---

[149] *Id*. at 155.
[150] *Id*. at 163.
[151] *Id.* (emphasis added).
[152] *Id.* (emphasis added).
[153] *Id.* at 166 ("The reasons why the jurisdiction of international criminal tribunals has been limited to the prosecution of natural persons, as opposed to juridical entities, relate to the nature and purposes of *criminal* punishment, and have no application to the very different nature and purposes of civil compensatory liability.").
[154] *Id.* at 166-67.
[155] *Id.* at 167 (emphasis omitted).
[156] *Id.*
[157] *See id.* at 168.

customers, but would "fail to hurt the persons who were responsible for the corporation's misdeeds."[158] Thus, inflicting criminal punishment on a corporation accomplishes no penal objective.[159] Conversely, "[a] principal objective of civil tort liability is to compensate victims of illegal conduct for the harms inflicted on them . . . ."[160] Further, "[b]ecause the corporation, and not its personnel, earned the principal profits from the violation of the rights of others," the corporation is the suitable entity to compensate those victims.[161]

Further, international law provides the norms of conduct and prohibits certain acts such as genocide, torture, slavery and war crimes, but allows each state to make its own determination concerning civil liability.[162] The ATS is the United States' mechanism to enforce violations of international law through the imposition of civil liability.[163]

3. *Sosa* Footnote Twenty Supports a Finding for Corporate Liability

In contrast with the majority opinion, Judge Leval's concurrence finds that footnote twenty of Justice Souter's opinion in *Sosa* supports corporate liability rather than eliminates it.[164] In considering "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued," the majority's interpretation suggests that courts should distinguish between natural persons who can be civilly liable and corporations who cannot.[165] Judge Leval alternatively concluded that a contextual reading reveals "the passage [to] mean[] the contrary."[166] Footnote twenty refers to concerns, raised in the *Tel-Oren v. Libyan Arab Republic*[167]

---

[158] *Id.*

[159] *Id.*

[160] *Id.* at 169.

[161] *Id.* Judge Leval also notes "unlike the case with corporate criminal liability, which does not exist in many nations of the world, it is the worldwide practice to impose civil liability on corporations." *Id.*

[162] *Id.* at 172-73 ("While international institutions have occasionally been established to impose criminal punishments for egregious violations of international law, and treaties often impose on nations the obligation to punish criminal violations, the basic position of international law with respect to civil liability is that States may impose civil compensatory liability on offenders, or not, as they see fit." (footnote omitted)).

[163] *Id.* at 175.

[164] *Id.* at 163-64.

[165] *Id.* (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)) (internal quotation marks omitted).

[166] *Id*. at 164.

[167] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

and *Kadic v. Kardzic*[168] opinions, that certain conduct constitutes violations of the law of nations only when done independently of a State, "while other noxious conduct violates the law of nations regardless of whether done by a State or a private actor."[169] The appropriate distinction is between private and state action rather than distinctions among private actors, such as corporations and individuals.[170]

B. Three Circuit Courts Find in Favor of Corporate Liability under the ATS

Soon after the Second Circuit ruling in *Kiobel* was released, three circuit courts found in favor of corporate liability under the ATS. These opinions build upon arguments identified in Judge Leval's *Kiobel* concurrence and justify the position that the Second Circuit was an outlier. In particular, the circuit courts upholding corporate liability under the ATS focus on the distinction between international law's norms of conduct and the states' enforcement of civil liability. International law identifies which acts are prohibited—e.g., genocide, slavery, war crimes, and piracy—while remedial actions are left up to the individual states—e.g., civil liability through the ATS for the United States.

First, the D.C. Circuit found in favor of corporate liability in *Doe v. Exxon Mobil Corp.*, where Indonesian villagers alleged that members of the Indonesian military, hired by Exxon Mobil to guard a natural gas facility, committed "human rights abuses . . . includ[ing] genocide, extrajudicial killing, torture, crimes against humanity, sexual violence, and kidnaping."[171] The court "recogniz[ed] that corporate liability differs fundamentally from the conduct-governing norms at issue in *Sosa*, and consequently customary international law does not

---

[168] Kadic v. Kardzic, 70 F.3d 232, 239-40 (2d Cir. 1996)

[169] *Id*. at 165.

[170] *Id.* ("Far from implying that natural persons and corporations are treated *differently* for purposes of civil liability under ATS, the intended inference of the footnote is that they are treated *identically*. If the violated norm is one that international law applies only against States, then '*a private actor, such as a corporation or an individual*,' who acts independently of a State, can have no liability for a violation of the law of nations because there has been no violation of the law of nations. On the other hand, if the conduct is of the type classified as a violation of the norms of international law regardless of whether done by a State or a private actor, then '*a private actor such as a corporation or an individual*,' has violated the law of nations and is subject to liability in a suit under the ATS.").

[171] Doe v. Exxon Mobil Corp., 654 F.3d 11, 15-16 (D.C. Cir. 2011).

provide the rule of decision."[172] Judge Rogers, writing for the majority, explained that *Sosa* provides that customary international law should inform the substantive causes of action in ATS cases. "[F]ederal courts," however, "must determine the nature of any remedy in lawsuits alleging violations of the law of nations by reference to federal common law . . . ."[173]

Next, the Seventh Circuit harped on the distinction between norms of conduct and enforcement in order to hold corporations liable under the ATS. In *Flomo v. Firestone Natural Rubber Co.*, twenty-three Liberian children charged Firestone with utilizing "hazardous child labor" on a rubber plantation in Liberia in contravention of customary international law.[174] Although the court ultimately dismissed the claim on grounds that the asserted child labor did not violate customary international law, the court indicated that corporations could be held liable under the ATS.[175] Analogous to the D.C. Circuit reasoning, the Seventh Circuit "underscore[d] the distinction between a principle of law, which is a matter of substance, and the means of enforcing it, which is a matter of procedure or remedy. . . . International law imposes substantive obligations and the individual nations decide how to enforce them."[176]

Lastly, seven out of the eleven Ninth Circuit judges sided with Judge Leval's concurrence in *Sarei v. Rio Tinto, PLC*, which was a suit brought against the Rio Tinto mining company for its alleged role in genocide, war crimes, crimes against humanity, and racial discrimination against residents of the island of Bougainville in Papua New Guinea.[177] Again, the majority homed in on the distinction between the customary norms identified by international law and the enforcement

---

[172] *Id*. at 41.

[173] *Id.* at 41-42 ("That the ATS provides federal jurisdiction where the conduct at issue fits a norm qualifying under *Sosa* implies that for purposes of affording a remedy, if any, the law of the United States and not the law of nations must provide the rule of decision in an ATS lawsuit."). The court also noted "[o]ur conclusion differs from that of the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, because its analysis conflates the norms of conduct at issue in *Sosa* and the rules for any remedy to be found in federal common law at issue here; even on its own terms, its analysis misinterprets the import of footnote 20 in *Sosa* . . . ." *Id.* at 41 (citation omitted).

[174] Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1015 (7th Cir. 2011).

[175] *Id.* at 1025.

[176] *Id.* at 1019-20 (citation omitted).

[177] Sarei v. Rio Tinto, PLC, 671 F.3d 736, 742-44, 747 (9th Cir. 2011) (citing Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 153 (2d Cir. 2010) (Leval, J., concurring), *cert. granted* 132 S. Ct. 472 (Oct. 17, 2011) (No. 10-1491)), *vacated*, Rio Tinto, PLC v. Sarei, 2013 WL 1704704 (U.S. Apr. 22, 2013).

through civil actions provided by domestic law.[178] Thus, the clear distinction between norms and enforcement proved to be a compelling argument.

C. The Supreme Court Abstains from Weighing In

Confronted by the lower courts' inconsistent rulings concerning corporate liability under the ATS, the Supreme Court granted cert in *Kiobel* to settle the issue.[179] Unfortunately, the Court found ground to rule elsewhere and decidedly left the issue open.[180] Pursuant to a canon of statutory interpretation called the "presumption against extraterritorial application," the Court held that the ATS did not confer subject matter jurisdiction in this case, and thus eliminated the petitioners' access to U.S. courts.[181]

The presumption against extraterritorial application "provides that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none.'"[182] The Court found that "nothing in the statute rebuts that presumption" and because "all relevant conduct took place outside the United States," the petitioners could not pursue their claim.[183] The Court noted that "even where the claims touch and concern the territory of the Unites States, they must do so with sufficient force to displace the presumption against extraterritorial application."[184] The Court, however, did not define "sufficient force."[185] Justice Kennedy acknowledged the narrow holding in *Kiobel* where the petitioner, respondent, and all relevant conduct were foreign and thus the opinion left open "a number of significant questions."[186] He explained that where a lawsuit's key elements bear a closer U.S. nexus, "proper implementation

---

[178] *Id.* at 748; *see also id*. at 770 (Reinhardt, J., concurring) ("Domestic law therefore governs how international norms are enforced under the ATS.").

[179] *See supra* Introduction.

[180] *See id*.

[181] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

[182] *Id*. at 1664 (quoting Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2878 (2010)).

[183] *Id*. at 1669.

[184] *Id.*

[185] *See id.* Justice Alito wrote in his concurrence that sufficient force to rebut the presumption against extraterritoriality exists only where "the *domestic conduct* is sufficient to violate an international law norm that satisfies Sosa's requirements of definiteness and acceptance among civilized nations." *Id*. (Alito, J. concurring) (emphasis added).

[186] *Id*. at 1669 (Kennedy, J., concurring).

of the presumption against extraterritorial application may require some further elaboration and explanation."[187]

In contrast, Justice Breyer agreed with the holding because the allegations in *Kiobel* "lack[ed] sufficient ties" to the United States, but disagreed with applying the presumption against extraterritoriality.[188] Justice Breyer found that the ATS could apply where:

> (1) the alleged conduct occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.[189]

Although not directly addressing the issue of corporate liability, Justice Roberts, writing for the majority, indicated that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[190] Given that the term "presence" was not defined, it is likely that plaintiffs "domiciled or headquartered in the United States remain fair game in ATS suits, even if those suits challenge purely extraterritorial conduct by the corporations or their subsidiaries."[191] Should a court find that being domiciled or headquartered in the U.S. has "sufficient force" to rebut the presumption against extraterritoriality, a determination of corporate liability under the ATS would be necessary.

V. CUMULATIVE EVIDENCE SUGGESTS THAT THE SECOND CIRCUIT RULED INCORRECTLY

The three consecutive findings in favor of corporate liability under the ATS by circuit courts—all of which reiterated a consistent doctrinal approach supported by law, logic, and policy—suggest that the Second Circuit's ruling in *Kiobel* was an outlier. The Second Circuit misinterpreted precedent and defied the objectives of international law in order to support an unsubstantiated policy agenda that insulates corporations from liability. The rationale espoused by Judge Leval's *Kiobel*

---

[187] *Id.*

[188] *Id*. at 1671 (Breyer, J., concurring).

[189] *Id*.

[190] *Id*. at 1669 (majority opinion). One might argue that this language represents an implicit acknowledgment of corporate liability under the ATS by the Court.

[191] Myles, *supra* note 24 (emphasis added).

concurrence, and adopted and enhanced by the subsequent Circuit Courts, recognized the flawed analysis lingering in the Second Circuit.

A. The Kiobel *Majority Opinion Begs for Review*

At the outset, two early passages in the *Kiobel* majority opinion reveal Judge Cabranes's ulterior motives and his own reservations about the decision. First, Judge Cabranes describes a muddled jurisprudential environment, one backed by strong economic incentives to soften the blow of his decision:

> Such civil lawsuits, alleging heinous crimes condemned by customary international law, often involve a variety of issues unique to ATS litigation, not least the fact that the events took place abroad and in troubled or chaotic circumstances. The resulting complexity and uncertainty—combined with the fact that juries hearing ATS claims are capable of awarding multibillion-dollar verdicts—has led many defendants to settle ATS claims prior to trial. Thus, our Court has published only nine significant decisions on the ATS since 1980 (seven of the nine coming in the last decade), and the Supreme Court in its entire history has decided only one ATS case.[192]

The combination of "complexity and uncertainty" with the threat of large settlements is not a reason to create precedent that defies the objectives of international law and that promotes corporate profit over the ability of victims of human rights abuses to obtain redress. Further, Judge Cabranes closes his introduction, stating, "we are confident that if our effort is misguided, higher judicial authority is available to tell us so."[193] Such words suggest a court that is begging for review by the Supreme Court. Unfortunately, the Supreme Court did not take advantage of its opportunity to tell the Second Circuit that its "effort [was] misguided."[194]

B. Misapplication of International Law

The essence of the majority opinion in *Kiobel* is that *Sosa's* footnote twenty commands lower courts to make a determination as to whether the type of defendant—individual, corporation, or state—can be liable for violations of international law.[195] Then, by looking at sources of international law, the

---

[192] *Kiobel*, 621 F.3d at 116-17 (footnotes omitted).
[193] *Id.* at 123.
[194] *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).
[195] *Kiobel*, 621 F.3d at 128.

majority instructs lower courts to see if liability for that type of defendant has become a specific, universal, and obligatory norm of international law.[196] In espousing such a construct, the majority opinion incorrectly focuses on the form of the defendant rather than the substance of the violation. As a result, it misinterprets binding precedent and establishes a framework that is misaligned with the goals of international law. Further, the *Kiobel* majority fails to pass its own test, drawing erroneous conclusions from incorrect sources.

1. Incorrect Focus on the Form of the Defendant Rather than the Substance of the Violation

In *Sosa*, the Supreme Court assumed that the First Congress's intent in enacting the ATS was to provide redress for conduct "threatening serious consequences in international affairs"[197]—e.g., infringements of ambassadorial rights and piracy.[198] The Court's application of this standard to Alvarez-Machain's claim emphasized the substance of the conduct rather than the form of the perpetrator. The Court focused on whether "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment . . ." violated customary international law,[199] thereby centering the crux of its debate on what type of conduct fit within the class so heinous as to be protected by the law of nations.

Looking towards the end of *Sosa* footnote twenty, which considers "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,"[200] the Court "compare[s] *Tel-Oren* (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic* (sufficient consensus in 1995 that genocide by private actors violates international law)."[201] This citation suggests that *Sosa's* footnote twenty does not stand for the proposition that corporations are not liable for violations of international law. Rather, it simply implies that a finding of an international law violation is dependent upon the actor—when committed by a state actor as opposed to a non-state

---

[196] *See supra* Part III.B.1.
[197] Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004).
[198] *See id*.
[199] *Id.* at 738.
[200] *Id.* at 732 n.20.
[201] *Id.* (citations omitted).

actor, "such as a corporation or individual."[202] The Court emphasized the distinction between "*private*," non-state actors, and "*public*," state actors. And, as argued in a *Kiobel* amicus brief, "certain egregious conduct violates international human rights standards, whether committed by State or non-State actors."[203]

The Second Circuit *Kiobel* majority opinion exhibited a "[f]ailure [t]o [u]nderstand '[n]orms' as '[s]tandards of [c]onduct.'"[204] The majority incorrectly asked whether it was a "norm" for corporations to be prosecuted for violations of human rights.[205] This reasoning, however, misses the point that certain types of conduct, such as genocide, torture, and slavery, fall within a class of activity so heinous that it is proscribed by international law.

By misinterpreting footnote twenty and placing an emphasis on the form of the defendant, the majority's efforts were misguided. In an attempt to determine whether international law recognizes civil liability for corporations at all, the majority asks the wrong questions and gets the wrong answers[206] because

> it is wrong to conclude from the alleged absence of human rights cases against corporations that they are exempt from human rights norms. International law never defines the means of its domestic implementation, leaving sovereign States a wide berth in assuring that the law is respected and enforced in accordance with its own law and traditions.[207]

Highlighting the flaw in this line of reasoning, Judge Posner makes the point in *Flomo*:

> If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the Alien Tort

---

[202] *Id.*

[203] Brief of Amici Curiae International Law Scholars in Support of Petitioners at 7, Kiobel v. Royal Dutch Petroleum Co., (No. 10-1491) [hereinafter International Law Scholars Brief].

[204] Theophila, *supra* note 7, at 2902.

[205] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 127-28 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011) (No. 10-1491).

[206] *See* International Law Scholars Brief, *supra* note 203, at 2-3 ("The majority below reached its conclusion only by looking for the wrong kinds of evidence of international law, inferring from the absence of cases imposing corporate civil liability for human rights violations that no norm imposes or allows such liability. That technique betrays a basic misunderstanding of international law and this Court's decision in *Sosa v. Alvarez-Machain* . . . . The *Kiobel* court's methodological error has substantive consequences and leads the panel to miss the consistent principles of international law that recognize corporate liability and the obligation of States to provide a meaningful remedy for all violations of human rights, no matter who or what violates them." (citation omitted)).

[207] *Id.* at 4-5.

> Statue could ever be successful, even claims against individuals; only the United States, as far as we know, has a statute that provides a civil remedy for violations of customary international law.[208]

International law focuses on determining what conduct violates the law of nations.

That international criminal tribunals such as the one at Nuremberg were given the authority to adjudicate and enforce penalties for criminal conduct does not mean that civil remedies for the same conduct do not, or should not, exist. With the ATS, "the First Congress of the United States exercised the sovereign discretion protected by international law by empowering the federal courts to hear aliens' civil actions for those violations of international law that take tortious form . . . *without specifying the types of defendants who might be sued*."[209]

2. Erroneous Conclusions Drawn From Incorrect Sources

"Although . . . international *criminal* tribunals distinguish between natural and juristic persons *for purpose of criminal liability* . . . , [n]othing in international law . . . precludes the imposition of civil or tort liability for corporate misconduct . . . ."[210] As Judge Leval made abundantly clear, there are numerous reasons why corporations are not charged with criminal liability.[211] Thus, it is improper to draw the conclusion from the lack of available criminal charges that corporations are not similarly subject to civil charges. Ambassador David J. Scheffer further explained the absence of liability for corporations with his observations regarding the legislative history of the Rome Statute which established the International Criminal Court. During the drafting of the law, negotiators: 1) intentionally excluded corporations from criminal liability for practical considerations

---

[208] Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1019 (7th Cir. 2011)

[209] International Law Scholars Brief, *supra* note 203, at 6 (emphasis added); s*ee also* Brief of Amici Curiae Professors of Legal History William R. Casto et al. in Support of Petitioners at 8, Kiobel v. Royal Dutch Petroleum Co., (No. 10-1491) ("The text of the ATS reflects congressional intent to provide aliens a civil remedy for violations of the law of nations. The ATS restricts the jurisdiction to causes arising under 'the law of nations or a treaty of the United States' where the plaintiff is 'an alien.' While the text of the ATS specifies what conduct comes within its reach (violations of the law of nations or a treaty of the United States), it expressly does not limit suits against any class of defendant, including corporations. Had Congress intended to exempt particular defendants from ATS suits, it would have done so explicitly." (citations omitted)).

[210] International Law Scholars Brief, *supra* note 203, at 7-8.

[211] *See supra* Part IV.A.2.

having nothing to do with customary international law, and 2) deliberately avoided the issue of civil liability for tort actions by multinational corporations because civil claims were beyond the jurisdiction of the International Criminal Court.[212]

The Court in *Sosa* recognized that the ATS relies on the juxtaposition of international law and domestic common law. International law defines customary norms of regulated conduct, while domestic common law governs enforcement of tort remedy.[213] The First Congress must have expected domestic common law to govern secondary matters in order to give the statute practical effect "because internationally constituted tribunals did not exist when the ATS was adopted."[214] International law is used to establish substantive norms and domestic law provides the remedy for their violation.[215]

By misinterpreting the meaning of *Sosa* footnote twenty, the Second Circuit *Kiobel* majority "conflate[s] the jurisdictional and cause of action aspects of an ATS suit."[216] In civil actions under the ATS: the ATS provides subject matter jurisdiction, the law of nations (or treaty law) determines the substantive norms, and domestic federal common law provides the cause of action.[217] Once the federal courts are provided with jurisdiction via a breach

---

[212] Brief of Ambassador David J. Scheffer, Northwestern University School of Law at 2-3, as Amicus Curiae in Support of the Issuance of a Writ of Certiorari, *Kiobel*, (No. 10-1491) ("The negotiators' decision . . . to exclude corporations had nothing to do with customary international law and everything to do with a complex and diverse application of *criminal* (as opposed to civil) liability for corporate conduct in domestic legal systems around the globe. Given that diversity, it was neither possible to negotiate a new standard of criminal liability with universal application in the time frame permitted . . . , nor plausible to foresee implementation . . . when confronted with such differences in criminal liability for juridical persons. Additionally, the negotiations . . . steered clear of *civil* liability for tort actions by multinational corporations because civil liability falls outside of the jurisdiction of the International Criminal Court. Thus, no conclusion can be drawn . . . that would preclude national courts from holding corporations liable in civil damages for torts committed on national or foreign territory.").

[213] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) ("The jurisdictional grant [the ATS established] is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

[214] Brief of Amici Curiae Professors of Legal History Barbara Aronstein Black et al. in Support of Petitioners at 12, *Kiobel*, (No. 10-1491).

[215] *See* Andre Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AM. J. INT'L L. 760, 795 (2007) ("Since international law determines only general principles, leaves much of the detail of the fashioning of relief to the domestic level, and relies on domestic law to supplement it with necessary detail and to adjust it to the domestic context, different states will inevitably come up with different responses.").

[216] Odette Murray et al., *Exaggerated Rumours of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of* Kiobel, 12 MELB. J. INT'L L. 57, 75 (2011) (emphasis omitted).

[217] *Id.*

of a customary norm as defined by international law, the issue of corporate liability is governed by domestic federal common law. It would be naive to expect international law to define universally accepted rules on "standards of proof, rules of evidence, theories of vicarious liability and doctrines of veil piercing, agency, *respondeat superior*, proof of causation and calculation of damages."[218] International law leaves such causes of action to the domestic law of each state.[219] The issue of corporate liability is not a norm of conduct, but rather a method of allocating losses to corporate principals for agents' torts and is thus governed by domestic federal common law.[220] It should come as no surprise that U.S. federal common law has a longstanding tradition of holding corporations civilly liable.[221] Therefore, it is only proper that corporations are likewise liable under the ATS.

C. Denial of Corporate ATS Liability Feels Wrong

If states and private persons can be found liable for violating the law of nations, why should corporations be exempt? A failure to hold corporations accountable for their actions not only defies logic, but also undermines the effectiveness of international law in achieving its goals.

Judge Weinstein best summarized the argument on principles of fairness and logic in *In re Agent Orange Product Liability Litigation*, a case brought by Vietnamese nationals against U.S.-based corporations that provided the U.S. government with the Agent Orange that was sprayed over Vietnam from 1961 to 1975.[222] Judge Weinstein wrote:

> Limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world. Our vital private activities are conducted primarily under corporate auspices, only corporations have the wherewithal to respond to massive toxic tort suits, and changing personnel means that those individuals who acted on behalf of the corporation and for

---

[218] *Id.* at 78-79.

[219] *Id.*

[220] Brief of Amici Curiae Professors of Legal History Barbara Aronstein Black et al. in Support of Petitioners at 2-3, *Kiobel*, (No. 10-1491).

[221] *See* Brief of *Amicus Curiae* the United States Supporting Petitioners at 25, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (No. 10-1491).

[222] Nguyen Thang Loi v. Dow Chem. Co. (*In re* Agent Orange Prod. Liab. Litig.), 373 F. Supp. 2d 7, 27 (E.D.N.Y. 2005), *aff'd sub nom.* Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008).

> its profit are often gone or deceased before they or the corporation can be brought to justice.[223]

The notion that corporations are not subject to the same liability as people are under the ATS is particularly perplexing in light of *Citizens United v. Federal Election Commission*, in which the Supreme Court held that corporations have the same First Amendment right to fund political speech as natural persons.[224] One would think that with rights come responsibilities.

The Second Circuit majority in *Kiobel* provides no compelling reason for abandoning a fundamental goal of international law: to provide the protections for citizens around the world from heinous atrocities.[225] The majority opinion alludes to the fact that corporations face potential liability for large settlements or court sanctioned damages,[226] but it fails to elaborate on any type of economic catastrophe that could possibly warrant a denial of human rights protections, if one is even possible. In *Flomo*, Judge Posner makes the valid point that "[b]usinesses in countries that have and enforce laws against child labor are hurt by competition from businesses that employ child labor in countries in which employing children is condoned."[227] If bona fide businesses are adversely affected with or without civil liability from the ATS, a decision based on policy considerations should support a system that provides the greatest protections for human rights under international law.

In addition, there are two protections that mitigate against the "nightmare scenario" offered by Hufbauer and Mitrokostas.[228] First, *Sosa* already provides "that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[229] Thus, by "vigilant doorkeeping," the courts are instructed to limit conduct that gives rise to jurisdiction under the ATS. *Sosa* explains that this process requires "an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." Under the current framework, it is possible for

---

[223] *Id.* at 58 (citation omitted).

[224] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342-43 (2010).

[225] *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 154-55 (2d Cir. 2010) (Leval, J., concurring), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011) (No. 10-1491) (describing the shift in the focus of international law post World War II towards humanitarian objectives and identifying repugnant acts that should be condemned by international law).

[226] *Id.* at 116-17.

[227] Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011).

[228] *See supra* Part I.C.

[229] Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

courts to limit the type of conduct giving rise to jurisdiction under the ATS on policy considerations without completely eliminating civil liability for corporations. Second, while the standard is not yet settled, a stringent requirement for aiding and abetting can significantly limit the scope of corporate liability. For example, Judge Katzmann's concurrence in *Khulumani* concluded that aiding and abetting requires a *mens rea* of purpose and an *actus reus* of "substantial assistance."[230] Thus, corporations conducting bona fide operations in high-risk nations would be protected from frivolous lawsuits. Only if their actions and intent show a clear connection to the human rights abuses would they be subject to civil liability under the ATS. There is ample room for the law to protect international commerce and human rights simultaneously.

CONCLUSION

The Second Circuit's decision in *Kiobel* derailed a long history in our nation's court system protecting victims of human rights violations. The Court based its decision on a misapplication of international law in support of unsubstantiated policy considerations. It misinterpreted *Sosa* to instruct lower courts to determine whether international law recognizes liability for the form of the defendant rather than the substance of the conduct, and defied the objectives of international law in doing so. Further, the *Kiobel* decision fails because the court reaches its conclusion through an investigation of international *criminal* law, which sheds little if any light on the issue of *civil* liability. The Supreme Court's refusal to settle the issue of corporate liability under the ATS is unfortunate. But, to the extent future ATS cases are brought against corporations, courts should follow the line of jurisprudence coming out of the circuit court decisions issued subsequent to *Kiobel* that largely adopt Judge Leval's concurrence.

Mark Nixdorf †

---

[230] Khulumani v. Barclay Nat'l Bank , 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring) (internal quotation marks omitted); s*ee also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) (stating that the *mens rea* for aiding and abetting liability under the ATS is purpose and the *actus reus* is "practical assistance to the principal which has a substantial effect.").

† J.D., Brooklyn Law School, 2013; B.S., Tulane University, 2007. I would like to thank the members of the *Brooklyn Law Review* for their thoughtful insights and guidance. I would also like to thank my beautiful fiancée, Morgan Jelling, and my family for their love and support. And of course, thanks to my beloved dog, Nola, for keeping me company throughout this process.