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The Expansion of Limited Liability Protection in the Corporate Form: The Aftermath of *Kiobel v. Royal Dutch Petroleum Co.*

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THE EXPANSION OF LIMITED LIABILITY PROTECTION IN THE CORPORATE FORM: THE AFTERMATH OF *KIOBEL V. ROYAL DUTCH PETROLEUM CO.*

Corporate alien tort was always a foundling doctrine. It came into the world as the presumed child of the 2nd U.S. Circuit Court of Appeals' decision in Kadic v. Karadzic *in 1995, but its birth was never confirmed by a definitive appellate review. Now, in* Kiobel v. Royal Dutch Shell*, the 2nd Circuit has declared the doctrine dead. The human rights lawyers who had adopted it are in a state of mourning.*[1]

INTRODUCTION

Royal Dutch Shell plc, Exxon Mobil Corporation, and BP p.l.c. were each listed in the top five of Fortune Magazine's world's biggest companies of 2010 in terms of revenue, but they share something in common beyond their rivalry in the oil industry and their multibillion dollar profits.[2] Each enterprise has faced recent lawsuits brought by private plaintiffs under the Alien Tort Statute[3] (ATS).[4] The ATS has traditionally provided a mechanism for aliens[5] to bring claims against individuals and corporations for tortious conduct committed abroad.[6] The statute expressly grants subject matter jurisdiction to United States district courts[7] and provides the

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1. Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, LAW.COM (Oct. 12, 2010), http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202473215797 [hereinafter Goldhaber, *Life and Death*].

2. Global 500, CNNMONEY.COM, http://money.cnn.com/magazines/fortune/global500/2010/full_list/ (last visited Nov. 23, 2010) (determining 2010 corporate profits: $12,518 million (Royal Dutch); $19,280 million (Exxon Mobil); $16,578 million (BP)).

3. 28 U.S.C. § 1350 (2006); Saad Gul, *The Supreme Court Giveth and the Supreme Court Taketh Away: An Assessment of Corporate Liability Under § 1350*, 109 W. VA. L. REV. 379, 380 (2007) (citing Gary Clyde Hufbauer, *The Supreme Court Meets International Law: What's the Sequel to* Sosa v. Alvarez-Machain*?*, 12 TULSA J. COMP. & INT'L L. 77, 77 (2004) (stating that the ATS is also known as the Alien Tort Claims Act by commentators who believe that the statute incorporates causes of action)).

4. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007) (naming BP as defendant); Doe v. Exxon Mobil Corp., 473 F.3d 345 (D.C. Cir. 2007).

5. BLACK'S LAW DICTIONARY 84 (9th ed. 2009) (defining alien as "a person who was born outside the jurisdiction of the United States, who is subject to some foreign government, and who has not been naturalized under U.S. law").

6. *Kiobel*, 621 F.3d at 161 n.12 (Leval, J., concurring) (citing Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009)) (holding that alleged non-consensual medical experimentation by a corporate defendant stated a claim under the ATS). *But see id.* at 120 (majority opinion) (holding that plaintiffs failed to state a claim under the ATS against corporations); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008) (stating that "[t]he text of the Alien Tort Statute provides no express exception for corporations . . . and the law of this Circuit is that [the ATS] grants jurisdiction from complaints of torture against corporate defendants").

7. 28 U.S.C. § 1350.

opportunity for victims to be awarded "domestic remedies."[8] Enacted as part of the Judiciary Act of 1789, the ATS was initially ignored by attorneys and was infrequently utilized for over 170 years.[9] It was not until the early 1980s, after *Filartiga v. Pena-Irala*,[10] that courts saw a rise in ATS litigation. Starting in 1997, the ATS became a tool for human rights groups to bring claims against domestic and international "corporations for 'aiding and abetting' human rights violations by foreign governments."[11]

While mining and energy industries have been targets for ATS litigation, approximately 150 ATS complaints have been brought against various businesses and industries.[12] While few ATS claims against corporate defendants go to trial,[13] approximately seventeen disputes have been settled before trial for amounts as high as $5.25 billion.[14] As such,

8. Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 61 (2008).

9. Sean Wajert, *Second Circuit Upholds Dismissal of Alien Tort Statute Claim Against Corporate Defendants*, MASSTORTDEFENSE (Sept. 27, 2010), http://www.masstortdefense.com/2010/09/articles/second-circuit-upholds-dismissal-of-alien-tort-statute-claim-against-corporate-defendants/.

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

11. John B. Bellinger III, *Shortening the Long Arm of the Law*, INT'L HERALD TRIB., Oct. 9, 2010, at 8.

12. Goldhaber, *Life and Death*, *supra* note 1 (reporting on claims brought under the ATS against clothing retailers for sweatshop allegations and Ford Motor Co. and General Motors Co. for their roles in supporting apartheid in South Africa).

13. Some disagreement exists regarding the number of corporate liability ATS cases that have gone to trial. *Compare* Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 400–01 (2010) (stating that only two ATS cases have gone to trial, including *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008), and *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008)), *with* Judith Chomsky, *Will the Real ATS Please Stand Up?*, 33 SUFFOLK TRANSNAT'L L. REV. 461, 465–66 (2010) (finding only three corporate ATS cases have gone to trial: *Jama v. U.S.I.N.S.*, 343 F. Supp. 2d 338 (D. N.J. 2004), *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003) and *Bowoto*, 557 F. Supp. 2d. 1080), *and* Marc J. Gottridge & Matthew J. Galvin, *The Alien Tort Statute: An Introduction and Current Topics*, *in* INTERNATIONAL LITIGATION 2010, at 112–13 (PLI Litig. & Admin. Prac. Course Handbook Ser. No. 25100) (2010) (determining that three ATS cases against corporations have gone to trial: *Rodriguez*, 256 F. Supp. 2d 1250, *Bowoto*, 557 F. Supp. 2d. 1080, and *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008)).

14. Some of these settlements include:

> Holocaust agreements ($5.25 billion from German state and industry, $1.25 billion from Swiss banks and $210 million from Austrian state and industry); . . . $30 million from Unocal for Burmese pipeline allegations; . . . $20 million from U.S. clothing retailers for Saipan sweatshop allegations; and $15.5 million . . . [for] Shell's activity in the Niger delta.

Goldhaber, *Life and Death*, *supra* note 1. *See also* Gottridge & Galvin, *supra* note 13, at 113–14 (listing other settlements involving corporate defendants in ATS cases).

liability under the ATS can have significant financial consequences regardless of whether the lawsuit proceeds to the trial stage.[15]

For thirteen years, courts preserved the possibility of holding corporate defendants liable under the ATS.[16] However, on September 17, 2010, the Second Circuit Court of Appeals rejected the theory of corporate ATS liability.[17] In *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit held that corporate liability is not a universally recognized norm of international law and therefore claims against corporate defendants are beyond the scope of the ATS' jurisdictional purview.[18]

This note will argue that corporate liability should be preserved under the ATS despite the *Kiobel* holding. Part I will examine the language of the statute, distinguishing what the text directly states from what it does not address. The influence of relevant legislative history will also be discussed. Part II will explore how various courts have interpreted the ATS when evaluating corporate liability and these courts' holdings. Part III will examine the Second Circuit's opinion in *Kiobel*, including the concurring opinion of Judge Leval. Part IV will discuss how the *Kiobel* majority's holding and reasoning are flawed, and will offer predictions regarding the case's potential impact on corporate liability claims.

I. THE STATUTE'S LANGUAGE AND CONGRESSIONAL INTENT

The Alien Tort Statute allows courts in the United States to hear cases involving human rights violations[19] that have been committed abroad and to provide "domestic remedies."[20] Characterized as a unique jurisdictional statute,[21] §1350 contains three requirements in order to establish federal subject matter jurisdiction: "(1) an alien sues, (2) for a tort, (3) committed 'in violation of the law of nations or a treaty of the United States.'"[22]

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15. *See* Rosaleen T. O'Gara, Note, *Procedural Dismissals Under the Alien Tort Statute*, 52 ARIZ. L. REV. 797, 800–03, 808–09 (2010) (stating how high discovery costs and settlement agreements contribute to costs under the ATS).

16. *Id.* at 804–15 (arguing that cases dealing with corporate ATS liability have been dismissed on procedural grounds, particularly forum non conveniens, political question, comity, and heightened pleading standard, thus leading to a gap in definitive adjudication of substantive issues under the ATS). *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 153–54 (2d Cir. 2010) (Leval, J., concurring) (disagreeing with the majority's finding that international law provides no basis for corporate liability yet dismissing the complaint as it did not meet the pleading requirements).

17. *Kiobel*, 621 F.3d at 120 (rejecting corporate liability under the ATS).

18. *Id.*

19. *See* Goldhaber, *Life and Death*, *supra* note 1 (finding that human rights lawyers have adopted the ATS in order to fight allegations of human rights abuses abroad).

20. Keitner, *supra* note 8, at 61.

21. Judge Cabranes begins the majority opinion in *Kiobel* by noting the ATS is "a jurisdictional provision unlike any other in American law and of a kind apparently unknown to any other legal system in the world." *Kiobel*, 621 F.3d at 115.

22. Vega, *supra* note 13, at 417 (quoting 28 U.S.C. § 1350 (2000)).

A. REQUIRED STATUTORY ELEMENTS

Under the first criterion, the statute makes clear who can initiate a lawsuit—"an alien." However, the statute does not specify the identity of a defendant and does not even require that the defendant be a United States citizen.[23] The statute similarly does not exclude corporations as potential defendants.[24]

The second element states that torts, generally, fall within the ATS. However, the statute has been interpreted as a jurisdictional statute that does not create causes of action. Instead, the Supreme Court has held that the common law is the source of causes of action for international law violations.[25] As a result, no guidance is provided by the statutory language to differentiate between civil and criminal conduct.[26] Instead, courts have been left with the necessary role of considering which claims are included within ATS liability, and they have approached this task with caution.[27] Originally,[28] three specific offenses were held to be appropriate causes of action: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[29] Arguably, if Congress had wanted to restrict the application of the ATS to particular defendants or to criminal rather than civil offenses, qualifying language could have been provided.[30] However, Congress failed to incorporate such structural limitations.

The last requirement under §1350—that the committed tortious act be "in violation of the law of nations or a treaty of the United States"—does not indicate what source defines the "law of nations." Instead, courts have held that "norm[s] of customary international law"[31] that are "specific, universal, and obligatory,"[32] provide the appropriate foundation for determining offenses that fit within the statutory framework. The inevitable difficulty with this standard is that, "the absence of an international law-maker and an international court with compulsory universal jurisdiction entails that many rules are not clear, particularly when they are of

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23. *See* 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-CV, 06-4876-CV) [hereinafter Brief of Professors]; JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 32118, THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS 10 (2003).

24. Brief of Professors, *supra* note 23, at 3.

25. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

26. Brief of Professors, *supra* note 23.

27. *Sosa*, 542 U.S. at 724–29.

28. Originally in this framework corresponds to cases from 1789 until 1980.

29. *Sosa*, 542 U.S. at 715 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (The Univ. of Chicago Press 2002) (1769)).

30. Brief of Professors, *supra* note 23, at 7 ("Congress knew how to limit the jurisdiction of the federal courts with regards to conduct and the identity of defendants.").

31. *Sosa*, 542 U.S. at 738.

32. *Id.* at 732 (quoting *In re* Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

customary origin, and are thus open to differing interpretations."[33] Therefore, there has been a "need for courts gradually to spell out the contents of those rules."[34] Courts might consider offenses that violate the terms of a treaty which the U.S. has signed and executed as the basis for such actions. However, while seemingly more concrete than norms of international law, most treaties do not inherently provide for private rights or cover the range of offenses contemplated by the ATS.[35] Only after Congress enacts legislation that corresponds to offenses in such treaties might courts gain jurisdiction to enforce private rights under it.[36]

B. VARIOUS INTERPRETATIONS OF CONGRESSIONAL INTENT

The text of the ATS reads, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[37] Considering the statute is only one sentence long, legislative history is necessary and helpful in illuminating the meaning of the text. Unfortunately, little if any record of congressional debate[38] regarding private actions or private remedies under the ATS is available.[39] As a result, legal commentators and scholars have proposed a number of rationales to explain why Congress chose to adopt the ATS.[40]

The ATS was established by the First Congress at a time when both the federal and state governments were beginning to consider their roles and the role of the judiciary in foreign affairs.[41] The Judiciary Act of 1789 was a direct result of these debates. It created a court system in accordance with Article III of the Constitution.[42] As a young nation, it was particularly important for the United States to provide a consistent means of redress to aliens so as to maintain good relationships with foreign governments.[43] When the Judiciary Act was enacted, "the First Congress thought it crucial to provide a federal forum to discharge the duty of the nation, to avoid

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33. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 278 (2d Cir. 2007) (Katzmann, J., concurring) (quoting Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. INT'L CRIM. JUST. 585, 590 (2004)).

34. *Id.*

35. ELSEA, *supra* note 23, at 15.

36. *Id.* (describing treaties as "non-self-executing" bases for establishing jurisdiction).

37. 28 U.S.C. § 1350 (2006).

38. ELSEA, *supra* note 23, at 2 (arguing that the "Alien Tort Claims Act" is a misnomer because it "impl[ies] that Congress passed the measure as a separate act, in which case one would expect to find legislative documents from which Congress' intent might readily be divined. . . . [and this] is not the case").

39. Sosa v. Alvarez-Machain, 542 U.S. 692, 718 (2004); Tim Kline, Note, *A Door Ajar or a Floodgate?: Corporate Liability After* Sosa v. Alvarez-Machain, 94 KY. L.J. 691, 692 (2005–2006).

40. *See* ELSEA, *supra* note 23, at 2; Brief of Professors, *supra* note 23.

41. *See* U.S. CONST. art. III, IV; ELSEA, *supra* note 23, at 2.

42. *See* U.S. CONST. art. III, § 1, cl. 1.

43. ELSEA, *supra* note 23, at 9.

potentially hostile state courts, and to promote uniform interpretation when dealing with violations of the law of nations."[44]

Some have hypothesized that the United States, seeking to gain global respect, recognized a need to create a remedial system to address tortious misconduct that has not only harmed individual victims but jeopardized the United States' relationship with foreign nations.[45] Since few torts were initially considered to be of international significance,[46] some theorists have concluded that the ATS was designed to focus on the protection of diplomats and foreign ambassadors, exclusively.[47] Supporters of this view highlight two historical episodes in which ambassadors were attacked in the United States and after which Congress sought to reaffirm foreign diplomatic protection through the ATS.[48] Yet, since Congress sought criminal action in those cases—rather than civil damages as provided for under the ATS—this theory has been met with opposition.[49]

Seeking either criminal or civil liability nevertheless demonstrates an interest in safeguarding foreign relations.[50] Congress likely recognized that such relationships would be most vulnerable during wartime and may have drafted the ATS to cover "law of prize" cases—which include the capture and ownership of seized vessels and cargo during wartime—with this reality in mind.[51] Beyond the war context, commentators have further suggested that the ATS offers courts, regardless of location, universal jurisdiction over egregious violations of international law, particularly those that are considered *hostis humani generis*.[52]

II. COURTS' INTERPRETATIONS

In 2004, the Supreme Court considered ATS liability for the first and only time.[53] Rather than provide a clear standard for subsequent district and circuit courts to follow, the Court left a number of questions unanswered.[54]

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44. Brief of Professors, *supra* note 23.

45. Kline, *supra* note 39, at 693.

46. *See* discussion *supra* Part I.A.

47. ELSEA, *supra* note 23, at 8–9.

48. *Id.* (discussing the "Marbois Affair" in which the French Consul General was attacked in Philadelphia and the arrest of a servant at the Dutch ambassador's home in New York which violated diplomatic immunity standards).

49. *Id.* at 9.

50. *Id.*

51. *Id.*

52. *Id.* at 10 (suggesting the existence under the ATS of universal jurisdiction over conduct that is against all mankind including slave trading and piracy). Elsea defined *hostis humani generis* as "enemies of all humanity." *Id.*

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

54. Richard M. Buxbaum & David D. Caron, *The Alien Tort Statute: An Overview of the Current Issues*, 28 BERKELEY J. INT'L L. 511, 512–13 (2010) (discussing how *Sosa* has created new questions regarding ATS liability). *See also* Kline, *supra* note 39, at 699–701.

As a result, courts are split in how they approach ATS liability.[55]

A. SUPREME COURT PRECEDENT: *SOSA V. ALVAREZ-MACHAIN*

Sosa v. Alvarez-Machain involved the capture, torture, and subsequent murder of a Drug Enforcement Administration (DEA) agent who was on assignment in Mexico.[56] DEA officials in the United States believed that Alvarez-Machain (Alvarez), a Mexican doctor, facilitated the interrogation process by prolonging the agent's life in order to extend the torture efforts.[57] After a warrant was issued, the DEA hired Mexican nationals to transport Alvarez to the United States for trial.[58] Alvarez was later acquitted and returned to Mexico where he filed suit against the United States under the Federal Tort Claims Act (FTCA)[59] and against Sosa, a Mexican national who had assisted in Alvarez's involuntary transportation to the United States, for a violation of the law of nations under the ATS.[60]

The Supreme Court, in an opinion delivered by Justice Souter, interpreted the ATS to include a combination of "expansive and restrictive terms."[61] The Court held that the ATS provided federal jurisdiction to hear a limited number of claims that are "defined by the law of nations and recognized at common law."[62] More precisely, the court limited the jurisdictional scope to claims that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[63] As a result, Alvarez's "single illegal detention of less than a day, . . . transfer of custody to lawful authorities and a prompt arraignment" did not violate such a norm.[64]

While *Sosa* provided some guidance on the proper application of the ATS, it did not establish a standard specific for corporate liability.[65] There is, however, a brief acknowledgment of the potential for corporate liability

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55. Linda A. Willett et al., *The Alien Tort Statute and Its Implications for Multinational Corporations*, BRIEFLY…PERSP. ON LEGIS., REG., & LITIG., Sept. 2003, at 1, 16.

56. *Sosa*, 542 U.S. at 697.

57. *Id.*

58. *Id.* at 697–98.

59. *Id.* at 698. The government's motion to dismiss the FTCA claim was granted and upheld by the Court holding "that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Id.* at 712.

60. *Id.* at 698.

61. Brief of Professors, *supra* note 23, at 7 (citing *Sosa*, 542 U.S. at 718).

62. *Sosa*, 542 U.S. at 712.

63. *Id.* at 725.

64. *Id.* at 738.

65. Defendants included: Sosa, Mexican citizen; Garate-Bustamante, DEA operative; five unnamed Mexican civilians; the United States; four DEA agents. *Id.* at 698. Therefore, no allegations were brought against corporations. Alvarez filed suit under the ATS, Torture Victim Protection Act and the FTCA. *Id.* at 698.

in footnote 20 of the majority's opinion.[66] Lower courts have been forced to wrestle with this footnote's scope.[67]

B. LOWER COURT CASES WITH CORPORATE DEFENDANTS

The Supreme Court's failure to determine whether or not corporations could be held liable under the ATS has led to mixed results in courts that have addressed this issue.[68] Some cases suggest that directors and officers of corporations, for example, can be deemed direct perpetrators of international human rights violations and be held individually liable under the ATS.[69] In order for corporations themselves to be liable, courts would be required to recognize some form of entity-based liability within the jurisdictional framework of ATS, including *respondeat superior* or aiding and abetting.[70]

1. Second Circuit: *Khulumani v. Barclay National Bank Ltd.*

The Second Circuit analyzed whether aiding and abetting could establish liability under the ATS in *Khulumani v. Barclay National Bank Ltd*.[71] Plaintiffs claimed that defendants (fifty named corporations and hundreds of unidentified corporations) collaborated with the South African government to maintain its apartheid system.[72] Since the issue of corporate ATS liability was not raised by defendants, the court did not base its decision on that issue.[73] Still, the establishment of aiding and abetting

66. *Id.* at 732 n.20 ("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.").

67. Joel Slawotsky, *Doing Business Around the World: Corporate Liability Under the Alien Tort Claims* Act, 2005 MICH ST. L. REV. 1065, 1078.

68. *See* Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 AM. J. COMP. L. 455, 466 (2010).

69. *E.g.*, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 122 (2d. Cir. 2010). *See also* Ben Kerschberg, *Corporate Executives: Get Ready for a Billion Dollar Lawsuit*, HUFFINGTONPOST (Dec. 2, 2010, 5:03 PM), http://www.huffingtonpost.com/ben-kerschberg/corporate-executives-get-_b_791292.html (suggesting that directors and officers will become targets of ATS litigation).

70. *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007) (recognizing application of aiding and abetting in the ATS context); Kadic v. Karadžić, 70 F.3d 232, 239 (2d Cir. 1995) (holding jurisdiction could be extended beyond state actors to private actors under the ATS); Chomsky, *supra* note 13, at 462–63 (suggesting that corporate liability under the ATS required the establishment of vicarious liability); Vega, *supra* note 13, at 388–89 (even though ATS litigation has focused on human rights violations, it has been suggested that the ATS may provide a mechanism for alien plaintiffs to litigate claims of bribery); Kline, *supra* note 39, at 696 (describing claims brought against corporations based on "vicarious liability, direct liability, and aiding and abetting").

71. *Khulumani*, 504 F.3d at 260.

72. *Id.* at 258.

73. *Kiobel*, 621 F.3d at 124 (citing *Khulumani*, 504 F.3d at 282–83) (Katzmann, J., concurring)).

liability arguably provides a mechanism for plaintiffs to bring claims against corporate entities for their directors' and officers' conduct.

The district court initially held "that aiding and abetting violations of customary international law cannot provide a basis for [ATS] jurisdiction."[74] The district court, therefore, dismissed plaintiffs' claims for lack of subject matter jurisdiction.[75] The district court based its holding, in part, on a "Statement of Interest" from the U.S. Department of State which suggested that aiding and abetting liability under the ATS would "potentially [have] serious adverse consequences for significant interests of the United States."[76] This decision was subsequently vacated by the Second Circuit, which held that aiding and abetting could constitute a form of liability under the ATS.[77] However, as demonstrated by Judges Katzmann, Hall, and Korman's separate opinions, the panel was unable to agree on the required standard. "'The upshot of this split [in *Khulumani*] is that notwithstanding the agreement of two judges, Judge Katzmann's view [of aiding and abetting liability] did not constitute a holding and is therefore not binding precedent . . .[and] the issue remains live.'"[78]

Judge Katzmann argued that the district court over emphasized prudential concerns, including foreign policy considerations.[79] Katzmann

> canvassed various sources of international law to determine whether, as required by *Sosa*, the requisite "universal recognition" of aiding and abetting liability existed in the international community. From the London Charter . . . to the Rome Statute of the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia (ICTY) . . . [and] Rwanda (ICTR) . . . [he] noted that aiding and abetting has been repeatedly recognized as an accepted form of liability.[80]

Categorizing the South African government as the principal and Barclay National Bank Ltd. as the agent, the Rome Statute was viewed as particularly instructive in determining a standard for aiding and abetting.[81] Katzmann concluded that in order to establish aiding and abetting liability, a defendant needed to: "(1) provide[] practical assistance to the principal

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74. *Khulumani*, 504 F.3d at 260.

75. *Id.* at 259 (denying plaintiffs' request to amend their complaint).

76. *Id.*

77. *Id.* at 260.

78. *Contemporary Practice of the United States Relating to International Law*, 104 AM. J. INT'L L. 100, 120 (John R. Crook ed., 2010) (quoting Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258 (2d Cir. 2009)). *See also* Michael Garvey, Comment, *Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Legislative Prerogative*, 29 B.C. THIRD WORLD L.J. 381, 384–85 (2009) (discussing the absence of an established standard for aiding and abetting liability).

79. Garvey, *supra* note 78, at 389–90 (discussing Katzmann's evaluation of the district court's treatment of aiding and abetting liability).

80. *Id.* at 390 (citation omitted).

81. *Khulumani*, 504 F.3d at 275–77 (Katzmann, J., concurring).

which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose[[82]] of facilitating the commission of that crime."[83]

Judge Korman, concurring in part and dissenting in part, also analyzed the existence of aiding and abetting liability under the ATS and the appropriate standard to employ when determining this form of liability.[84] While agreeing with Katzmann's purpose standard, Korman favored greater deference to the United States and international governments who opposed expanding ATS liability than did Katzmann.[85] In addition, Korman distinguished corporate and individual defendants, arguing that aiding and abetting liability did not apply to corporate entities.[86]

2. Second Circuit: *Presbyterian Church of Sudan v. Talisman Energy, Inc.*

The Second Circuit's standard for aiding and abetting in *Khulumani* was affirmed in *Presbyterian Church of Sudan v. Talisman Energy, Inc*.[87] Here, the Second Circuit held that substantial assistance, with the *purpose* of aiding in the unlawful conduct, was required to establish ATS liability.[88]

Talisman Energy involved allegations that Talisman aided and abetted, or conspired with the Sudan government, in committing human rights abuses.[89] At this time, Talisman had purchased Arakis Energy Corporation, the owner of oil development rights in Sudan and a member of an energy company consortium.[90] When considering the purchase, Talisman was assured by Sudanese officials of the region's "safety, security, and peace" even though Arakis' head of security and Freedom Quest International each advised Talisman not to invest.[91]

The energy company consortium subsequently built all-weather roads and upgraded airstrips to enhance business operations.[92] Regardless of Talisman's efforts to limit their use, the new infrastructure was used by the Sudanese government for military activities.[93] In addition, the government

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82. On the other hand, Judge Hall felt knowledge was sufficient with respect to intent. *Id.* at 288–89 (Hall, J., concurring).

83. *Id.* at 277.

84. *Id.* at 330 (Korman, J., concurring in part and dissenting in part).

85. *Contemporary Practice of the United States Relating to International Law*, 102 AM. J. INT'L L. 155, 185 (John R. Crook ed., 2008).

86. *Khulumani*, 504 F.3d at 321 (Korman, J., concurring in part and dissenting in part) (rejecting Judge Katzmann's assertion that there is "no distinction between a corporation and an individual" because "the specific issue of corporate liability under customary international law" was not litigated in any prior ATS cases and thus is not precedential).

87. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258–59 (2d Cir. 2009).

88. *Id*.

89. *Id.* at 247.

90. *Id.* at 248–49.

91. *Id.* at 249.

92. *Id.*

93. *Id.* at 250.

allegedly created buffer zones around the oil facilities, forcefully removing civilians from the area.[94]

Plaintiffs alleged that Talisman aided and abetted, or conspired[95] in, the killing of civilians.[96] While the Second Circuit previously addressed the standard for ATS aiding and abetting liability against international banks and corporations in *Khulumani*,[97] its reasoning in that case was nonbinding.[98] Given this context, the Second Circuit held that purpose, rather than knowledge, was required to make out an action for aiding and abetting[99]—as well as for conspiratorial—liability.[100]

However, the Second Circuit failed to consider whether corporate liability could exist for violations of customary international law, stating "[b]ecause 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."[101] While the Supreme Court recently had the opportunity to define corporate ATS liability, they declined to review *Talisman Energy*.[102]

3. Eleventh Circuit: *Romero v. Drummond Company, Inc.*

Other circuits[103] have addressed and analyzed the ATS' jurisdiction over a corporate defendant, including the Eleventh Circuit. In *Romero v. Drummond Company, Inc.*, members of a Colombian trade union and relatives of deceased union leaders alleged that the president of Drummond, Ltd., a Colombian subsidiary of a U.S. corporation, had paid paramilitary agents to assassinate union leaders.[104] Claims were brought against the

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94. *Id.*

95. Conspiracy liability involves "[a]n agreement by two or more persons to commit an unlawful act." BLACK'S LAW DICTIONARY 351 (9th ed. 2009).

96. *Talisman Energy*, 582 F.3d at 247.

97. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007).

98. *See supra* note 78.

99. *Talisman Energy*, 582 F.3d at 259. The court addressed aiding and abetting liability because the claims were associated predominantly with criminal charges rather than civil proceedings. *Id.* at 257 n.7.

100. *Id.* at 260.

101. *Id.* at 261 n.12 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)). Interestingly, in the district court, defendants had moved for a judgment on the pleadings. They argued that the decisions in *Sosa* and *Flores* required that the court reconsider: (1) whether "corporations can be liable for violating the ATS;" and (2) whether "accessorial liability" falls within the ATS. *Id.* at 251. The district court denied the motion. *Id.*

102. *Talisman Energy*, 582 F.3d 244, *cert denied*, 131 S. Ct. 122 (2010).

103. "The split in opinions rendered by the Second, Ninth, and D.C. Circuits is illustrative of the struggle between finding a jurisdictional basis for such suits and taking into account the potential impact on foreign relations." Willett et al., *supra* note 55.

104. Romero v. Drummond Co., 552 F.3d 1303, 1309 (11th Cir. 2008). Claims were brought under both the ATS and the Torture Act. *Id.* The court distinguishes the two statutes, explaining that ATS is jurisdictional without creating causes of action, while the Torture Act "provides a cause of action for torture and extrajudicial killing" without granting jurisdiction. *Id.* at 1315. As a

parent company, its subsidiary, and company executives.[105] Drummond argued that the court lacked subject matter jurisdiction under the ATS to hear suits against corporations.[106] Couching its decision in precedent, the court held that "[t]he text of the [ATS] provides no express exception for corporations . . . and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants."[107] Additionally, the Eleventh Circuit had previously permitted claims for aiding and abetting liability under the ATS.[108] Although a jury verdict in favor of defendant was affirmed, [109] the Eleventh Circuit has, as a result of its prior holdings, gained a reputation for being "one of the most [ATS] plaintiff-friendly jurisdictions."[110]

4. Central District of California: *Doe v. Nestle*

Another court has recently explored corporate liability claims in dicta even after resolving the case on other grounds.[111] In *Doe v. Nestle*, allegations of forced child labor on cocoa fields in Côte d'Ivoire were brought against Nestle.[112] The district court held that,

> corporations . . . may not presently be sued under *Sosa* and the [ATS]. There is no support in the relevant sources of international law for the proposition that corporations are legally responsible for international law violations. International law is silent on this question . . . . [A]ll of the available international law materials apply only to states or natural persons.[113]

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result, defects in pleading claims under the ATS are jurisdictional defects and therefore should be addressed first in order to "reach the merits of the appeal." *Id.* at 1314.

105. *Id.* at 1309.

106. While this note focuses on issues under the ATS, Drummond alleges issues under both the ATS and the Torture Act. *Id.* at 1309. He claimed the following subject matter jurisdiction issues:

> Drummond first argues that neither the Torture Act nor the Alien Tort Statute allows suits against corporations. Drummond next argues that these Acts do not provide claims for aiding and abetting. Finally, Drummond argues that the Torture Act provides the exclusive cause of action for extrajudicial killing in violation of international law.

Id. at 1314. Similarly, Drummond presents four additional issues relating to partial summary judgment and issues relating to evidentiary and discovery rulings of the lower court, which will not be discussed here.

107. *Id.* at 1315 (citing Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1242 (11th Cir.2005)).

108. *Id.* (citing Cabello v. Fernández-Larios, 402 F.3d 1148, 1157–58 (11th Cir. 2005)).

109. This court did not examine whether or not international law provided the framework to approve the proposed cause of action.

110. Memorandum from Baker Botts LLP, Alien Tort Statute Update: Two Recent Appellate Decisions Affect Alien Tort Statute Cases Against Corporations (Jan. 23, 2009), *available at* http://www.bakerbotts.com/file_upload/AlienTortStatuteJanuary09.htm.

111. Doe v. Nestle, No. CV 05-5133 SVW (JTLx), 2010 WL 3969615, at *57 (C.D. Cal. Sept. 8, 2010).

112. *Id.* at *1–4.

113. *Id.* at *74.

The district court's analysis in *Nestle* begins at the typical starting point, *Sosa*, and continues by exploring the "well-defined, universally-accepted international law" requirement.[114] Finding that *Sosa* stands for the proposition that only international law is the appropriate barometer to define the scope of liability, the court determined that utilizing domestic common law would be "imperial[istic]."[115] The district court did acknowledge that courts have taken different approaches when evaluating the international law standard.[116] As a result, the district court stated that the issue of determining ATS corporate liability "remains open to reasonable debate."[117]

In *Nestle*, the district court sought to dispose of several arguments that had been made in previous cases in support of corporate liability under the ATS. Rather than focusing on what the law should be or why policy should encourage corporate responsibility, the *Nestle* court stated that courts should focus on what the law actually asserts.[118] The court argued that while circuit court decisions—including decisions in *Romero v. Drummond* and *Khulumani*—have accepted corporate ATS liability, little weight should be given to these precedents because they neglect to identify a universal standard of international law.[119]

The district court reasoned that, although three limited areas were originally found to meet the "law of nations" threshold (violation of safe

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114. *Id.* at *59–60.

115. *Id.*

116. *Id.* at *61–62. For examples of different approaches, compare *id.* (citing Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007) (Katzmann, J., concurring) ("the issue of whether corporations may be held liable under the [ATS] is indistinguishable from the question of whether private individuals may be.")), with *id.* (citing Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1242 (11th Cir.2005) (finding corporate liability under the ATS, without even addressing the issue directly)).

For example, *In re Agent Orange* involved a product liability claim against chemical companies for the manufacturing of a toxic herbicide used during the Vietnam War. *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 15 (E.D.N.Y. 2005).

> In any event, even if it were not true that international law recognizes corporations as defendants, they still could be sued under the ATS. . . . [T]he Supreme Court made clear that an ATS claim is a federal common law claim and it is a bedrock tenet of American law that corporations can be held liable for their torts.

Id. (citing Brief *Amici Curiae* of the Ctr. for Constitutional Rights, Earthrights Int'l and the Int'l Human Rights Law Clinic at the Univ. of Va. School of Law at 24–26, *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7 (No. 04 CV 0400 (JBW))). *See also* Anthea Roberts, *The Agent Orange Case:* Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chemical, 99 AM. SOC'Y INT'L L. PROC. 380, 385 (2005) (discussing that although Judge Weinstein dismissed the claims, he "recognized corporate liability under international law and the ATS").

117. *Nestle*, 2010 WL 3969615, at *62("[D]espite the weight of domestic authority supporting that conclusion, this issue remains open to reasonable debate. Notably, the Second Circuit recently ordered further briefing on this issue, which reveals that the question is not settled in that Circuit.").

118. *Id.* at *63–64 (fairness and logic argument).

119. *Id.* at *64–65 (domestic court precedent).

conduct, infringement of the rights of ambassadors, and piracy), these causes of action were historically reserved for individual, not corporate, liability.[120] The *Nestle* court found that since directors, officers, and employees act on behalf of corporations, *individuals* are responsible for violations and should be held accountable, not the corporate entity.[121] The court argued that this analysis was employed in the Nuremberg Tribunals, which interpreted the London Charter to hold individual members, rather than organizations, liable for legal offenses.[122] Relying on the London Charter, the court in *Nestle* found the Second Circuit's use of treaties as evidence in support of corporate liability in *Talisman Energy* only marginally authoritative.[123] Finding that the United Nations conferences did not adequately touch on the issue of corporate liability, the district court determined that there was no international law standard for corporate liability.[124] The court argued that international law should not be changed simply by asserting a claim or cause of action and seeing if other states object.[125] Instead, the burden fell on plaintiff to demonstrate that international law did recognize corporate liability.[126]

III. *KIOBEL V. ROYAL DUTCH PETROLEUM CO.*

Similar criticisms against a finding of corporate liability in the international law context were employed by the majority in *Kiobel*, which involved claims against Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC, acting through a Nigerian subsidiary.[127] Plaintiffs alleged that defendants aided and abetted the Nigerian government in committing human rights abuses against Nigerian citizens.[128] The United States District Court for the Southern District of New York dismissed some claims it deemed were not recognized by international law,[129] but denied defendants' motion to dismiss claims relating to "aiding and abetting arbitrary arrest and detention; crimes against

120. Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004) (citing 4 BLACKSTONE, *supra* note 29).

121. *See Nestle*, 2010 WL 3969615, at *67. The *Nestle* court discussed *United States v. Krauch* for the proposition that the term "corporations" was not meant to reference its legal character and was instead *"obiter dictum*." *Id.* (citation omitted). "In other words, the tribunal's references to the company were placeholders meant as shorthand for the individual members of the company. . . . [and] were not substantive discussions regarding legal responsibility." *Id.*

122. *Id.* at *67–68 (Nuremberg-based precedent).

123. *Id.* at *66–69 (precedent established by treaties and conventions).

124. *See id.* at *70–71 (describing the United Nations conferences relating to the Rome Statute as demonstrating the lack of an established standard which has gained global acceptance).

125. *Id.* at *72–73 (international practice).

126. *Id.* at *73 (domestic court reasoning).

127. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010).

128. *Id.*

129. *Id.* at 124 (dismissing claims of "aiding and abetting property destruction; forced exile; extrajudicial killing; and violations of the rights to life, liberty, security, and association").

humanity; and torture or cruel, inhuman, and degrading treatment."[130] Under 28 U.S.C. § 1292(b), the district court certified its entire order for interlocutory appeal.[131] On appeal, the Second Circuit in *Kiobel* reasoned that "although customary international law has sometimes extended the scope of liability for a violation of a given norm to individuals, it has *never* extended the scope of liability to a corporation."[132] As a result, the court held that the ATS did not grant jurisdiction over civil claims brought against corporate defendants.

Before *Kiobel*, the Second Circuit's approach in determining jurisdiction under the ATS had been characterized by legal scholars as expansive.[133] However, the court's holding in *Kiobel* appears to limit jurisdiction, finding that the ATS does not confer jurisdiction over claims against corporations, thus exempting them from ATS liability. The court distinguished its current approach from *Khulumani* and *Talisman Energy* where the court had held open the possibility of corporate ATS liability. *Talisman Energy*, interestingly, was heard on the same day and by the same panel of judges as *Kiobel*.[134]

Despite prior case law on the issue, the court in *Kiobel* contended that past cases did not analyze the issue of corporate liability.[135] Commentators have not agreed with this position. The court's decision has been deemed "a significant departure from established ATS jurisprudence,"[136] "unlikely to settle the question as to whether corporations may be held liable under the ATS,"[137] and described as a decision involving "three complex and fractured steps."[138] Unlike *Talisman Energy*, where the issue of corporate liability was fully briefed for the court, but not analyzed in depth, the *Kiobel* court nevertheless took the opportunity to explore corporate liability.[139] The court reasoned that reviewing subject matter jurisdiction de novo was appropriate, regardless of the Second Circuit's past approach.[140]

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130. *Id.*
131. *Id.*
132. *Id.* at 120.
133. *See* Kline, *supra* note 39, at 695.
134. Michael D. Goldhaber, *The Supreme Court Could Kill the Corporate Alien Tort Sooner Than You Think*, THE AM LAW DAILY (Sept. 27, 2010, 6:12 PM), http://amlawdaily.typepad.com/amlawdaily/2010/09/corporatealientort.html [hereinafter Goldhaber, *Supreme Court*].
135. *Kiobel*, 621 F.3d at 124.
136. Press Release, Harvard Law School, International Human Rights Clinic Files Amicus Brief in Corporate Alien Tort Statute Case (Oct. 21, 2010), http://www.law.harvard.edu/news/2010/10/21_ihrc.html.
137. Sheppard Mullin Richter & Hampton LLP, *Second Circuit Holds That Corporations Cannot Be Held Liable for Claims Brought Under the Alien Tort Statute*, CORPORATE & SECURITIES LAW BLOG (Sept. 30, 2010), http://www.corporatesecuritieslawblog.com/securities-litigation-second-circuit-holds-that-corporations-cannot-be-held-liable-for-claims-brought-under-the-alien-tort-statute.html.
138. Goldhaber, *Life and Death*, *supra* note 1.
139. Goldhaber, *Supreme Court*, *supra* note 134.
140. *Kiobel*, 621 F.3d at 124.

The standard to employ when reexamining jurisdiction under the ATS was not defined by the Second Circuit in a unanimous decision. Rather, the majority and concurring opinions agreed that the complaint should be dismissed, but on very different grounds. While the majority rejected the existence of corporate liability under the ATS on international law grounds, the concurrence argued that the claims for aiding and abetting did not satisfy the pleading requirements of the Federal Rules of Civil Procedure as required under *Iqbal*.[141] In this case, particularly because of the pre-existing circuit split on the issue of corporate liability under the ATS, both the majority and concurrence provide valuable commentary.

A. MAJORITY OPINION

The majority used a two step approach to arrive at the conclusion that corporate liability does not exist under the ATS. Step one analyzed whether international or domestic law governs the corporate liability inquiry. Step two evaluated corporate liability through the lens of international law by analyzing tribunals, international treaties, and scholarly work.[142]

The majority contended that the question before the court, provoked by footnote 20 of the Supreme Court's decision in *Sosa*, was "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if defendant is a private actor such as a corporation or individual."[143] In part one—relying on the Supreme Court's analysis in *Sosa*—the *Kiobel* majority concluded that international law which is "specific, universal and obligatory"[144] governs questions of liability under the ATS, not domestic law. Based upon its interpretation of footnote 20, the court reasoned that two questions must be answered to meet the threshold of international acceptance: "*both* whether certain conduct leads to ATS liability *and* whether the scope of liability under the ATS extends to the defendant being sued."[145]

Part two of the majority's opinion reviewed sources of international law. Relying on and adopting the philosophy of Article 38 of the Statute of the International Court of Justice (ICJ Statute), sources of international law include: conventions, customs, and general concepts found in civilized nations.[146]

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141. *Id.* at 193 (Leval, J., concurring).

142. *Id.* at 125 (majority opinion). In this matter, the label concurring opinion tends to be a misnomer, since on the issue of corporate liability, its point of view is better categorized as a dissent.

143. *Id.* at 120 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)).

144. *Id.* at 118 n.12 (citing *Sosa*, 542 U.S. at 732).

145. *Id.* at 128.

146. *Id.* at 132.

1. International Tribunals and Treaties

The majority's opinion is predominantly an analysis of international tribunals since the Nuremberg trials. Beginning its discussion, the majority stated, "[w]e find it particularly significant, therefore, that no international tribunal of which we are aware has *ever* held a corporation liable for a violation of the law of nations."[147] Relying on the Nuremberg Tribunals and the London Charter as instructive sources of customary international law relating to human rights violations,[148] the court highlighted that only individual, natural persons, not organizations or entities, could be liable for a crime.[149] Acknowledging the court's holding from *Filartiga* that law evolves with time, the court continued its analysis of tribunals beyond the Nuremberg period. As previously cited in *Khulumani*, the court looked to the International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as the Rome Statute for guidance. In finding that the jurisdiction of all such tribunals is limited to "natural persons,"[150] the court concluded that there is no international acceptance of corporate liability.[151] Without distinguishing between civil and criminal liability, the majority held that, "[t]he concept of corporate liability for violations of customary international law has not achieved universal recognition or acceptance . . . . [and the] complaint must be dismissed for lack of subject matter jurisdiction."[152]

Looking to another source of international law, the majority analyzed international treaties, analogizing treaties to contracts between nations that could mature into customary international law only if adopted and adhered to by "an overwhelming majority" of nations.[153] Further undermining their evidentiary value, the majority highlighted that the scope of liability created under a treaty is limited to the specific subject matter of the treaty.[154] Acknowledging that some treaties have imposed liability on corporations, the court deemed such instances as insufficient due to their limited occurrence.[155]

147. *Id.*

148. *Id.* at 132–33. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 477–78 (2001) (discussing the manner in which international criminal law during the Nuremberg trials did not foreclose the possibility of corporate liability, but rather demonstrated a willingness to consider corporate liability).

149. *Kiobel*, 621 F.3d at 133.

150. *Id.* at 136–37 (citing the ICTY, ICTR, and the Rome Statute).

151. *Id.* at 137.

152. *Id.* at 149.

153. *Id.* at 137 (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233, 256 (2d Cir. 2003)).

154. *See id.* at 138.

155. *Id.* at 139.

2. Legal Experts

Next, the majority looked to two law professors' expert opinions supporting the notion that corporate liability is not recognized internationally. The majority asserted that Professor James Crawford stated that "'no national court [outside the United States] and no international judicial tribunal has so far recognized corporate liability, as opposed to individual liability, *in a civil or criminal context* on the basis of a violation of the law of nations or customary international law.'"[156] Similarly, the majority relied on Professor (now Judge) Christopher Greenwood's assertion that "'there is no[], and never has been, any assertion of the criminal liability of corporations in international law.'"[157] Beyond these two scholars, the majority cited no further academic support. Instead, it argued that the burden is on plaintiffs to establish that a norm of international law exists.[158]

B. JUDGE LEVAL'S CONCURRENCE

Judge Leval's concurrence strongly rejected the majority's application of legal precedent, characterizing the argument as "illogical, internally inconsistent, contrary to international law, and incompatible with rulings of both the Supreme Court and [the Second Circuit]."[159] While agreeing with the majority that international law provides the appropriate foundation for evaluating ATS liability, the concurrence questioned the majority's failure to distinguish civil from criminal liability. The concurrence argued that for issues of civil liability, international law has taken no position and has instead allowed individual nations to establish their own standards and remedies.[160] It concluded that international law compels one to look to domestic law when interpreting issues of civil liability. The concurrence began by discussing the objectives of international law and proceeds by distinguishing civil and criminal liability, and reevaluating the Supreme Court's decision in *Sosa* to support its interpretation that corporate liability under the ATS is appropriate.

1. Policy Arguments in Support of Corporate Liability

Judge Leval views international law as a compilation of rules that have worldwide acceptance, the focus and purpose of which has evolved to protect against *hostis humani generis* conduct and heinous violations of

156. *Id.* at 143 (quoting Declaration of Professor James Crawford ¶ 10, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (No. 07-0016) (emphasis added)).

157. *Id*. at 143 (quoting Second Declaration of Christopher Greenwood ¶ 13, Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 Civ. 9882 (S.D.N.Y July 10, 2002)).

158. *Id.* at 146.

159. *Id.* at 174 (Leval, J., concurring).

160. *Id.* at 153.

humanitarian rights.[161] His concurrence argued that the majority's approach protects corporations against such violations simply because corporations are incorporated. The concurrence went on to posit that the majority's opinion defeats international law's very objective which is to "protect fundamental human rights."[162] Applying the majority's rule to examples of slave trading, piracy, and genocide, the concurrence demonstrates the absurd consequences that would result from corporations having unfettered protection from liability under international law.[163]

2. The Distinction Between Civil and Criminal Liability

The concurrence acknowledged that a policy argument that runs counter to the majority's approach is insufficient grounds upon which to deem its reasoning inappropriate. Rather, Judge Leval questioned the majority's main evidentiary source—international tribunals. Since the ATS involves civil liability, Judge Leval questioned the tremendous weight that the majority gave to international tribunals, which only have jurisdiction over criminal claims.[164] The concurrence underscored that the majority's approach assumes that international law equates civil and criminal liability.[165] Judge Leval argued that international law does distinguish between civil and criminal liability and that while corporate criminality is not internationally accepted, corporate civil liability does not have the same fate.[166]

3. *Sosa*'s Reference to Norms

The Supreme Court in *Sosa* defined international law, or law of nations, as rules that have received universal acceptance.[167] The *Kiobel* concurrence argued however, that "[t]he majority opinion, disregarding the context of the Court's discussion, construes the 'norm' under discussion as a convention concerning the type of violator of international law upon whom civil tort liability may be imposed."[168] As a result, the concurrence demonstrated that the majority's approach inappropriately required that a norm for imposing tort liability on a corporate violator must be considered universally accepted.

Judge Leval contended that the tortious conduct must be considered a violation of a universally accepted norm of international law. While *who* perpetrates the crime is not irrelevant, the concurrence argued that the

161. *Id.* at 154–55 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)).
162. *Id.* at 154.
163. *Id.* at 155–57.
164. *Id.* at 166.
165. *Id.* at 170–72.
166. *Id.*
167. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004).
168. *Kiobel*, 621 F.3d at 177 (Leval, J., concurring).

Supreme Court was distinguishing between conduct committed by or on behalf of the State and crimes committed independently of State action.[169] The concurrence interpreted footnote 20 as not distinguishing corporations and individuals.[170] Additionally, universal acceptance of a remedy—in this case civil damages—need not be an international norm.[171] The Supreme Court was merely distinguishing "between *conduct that does, and conduct that does not, violate the law of nations*."[172] Finally, the concurrence criticized the lack of academic support for the majority's conclusion and its failure to cite to any published scholastic work.[173]

IV. *KIOBEL'S* CONCURRENCE AS THE APPROPRIATE APPROACH

Some courts have already adopted the majority's reasoning from *Kiobel*.[174] However, the statutory language of the ATS creates an ambiguous standard that fails to specify the identity of potential defendants or causes of action, or to differentiate between criminal and civil violations.[175] Matters are further complicated by the ATS's hybrid nature, which, according to Michael Koebele, "combines both the public and the private sphere because it does not only incorporate public international law by reference but equally forms part of federal torts law."[176] Due to the court's reliance in *Kiobel* on international law as providing the standard for ATS liability, the focal point of the court's analysis should have been dependent on how international law responds to civil liability, specifically.

A. DOES INTERNATIONAL LAW DISTINGUISH BETWEEN CRIMINAL AND CIVIL LIABILITY?

If international law fails to distinguish between civil and criminal liability, the majority's reliance on international tribunals may have firm footing. However, "[i]nternational law distinguishes clearly between [civil and criminal liability] and provides differently for the different objectives of criminal punishment and civil compensatory liability."[177] Accordingly, the *Kiobel* concurrence appropriately criticized the majority's approach since

169. *Id.*
170. *Id.* at 165.
171. *Id.* at 176–77.
172. *Id.* at 177.
173. *Id.* at 181.
174. United States v. Hasan, No. 2:10cr56, 2010 WL 4281892, at *29–30 (E.D. Va. Oct. 29, 2010) (citing *Kiobel* as providing the appropriate procedure in assessing customary international law); Flomo v. Firestone Natural Rubber Co., No. 1:06-cv-00627-JMS-TAB, 2010 WL 4174583, at *1 (S.D. Ind. Oct. 19, 2010) (holding that corporations are not liable under the ATS).
175. *See* discussion *supra* Part II.
176. MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH US TORTS LAW 195 (2009) (footnote omitted).
177. *Kiobel*, 621 F.3d at 152 (Leval, J., concurring).

international tribunals have only evaluated issues related to criminal, not civil, liability.

As highlighted by the concurrence, criminal law and civil law have distinct standards and objectives. While one purpose of criminal liability is to punish a perpetrator for wrongdoing, civil liability seeks to compensate victims for a harm caused to them.[178] Furthermore, both have different burdens of proof; criminal law requires that elements of a given crime be established "beyond a reasonable doubt," a higher evidentiary standard than civil law, which requires only that liability be established "by a preponderance of the evidence".[179]

While the majority in *Kiobel* supports its finding of no corporate liability in part based on the Nuremberg Trials, other conclusions may be drawn from the Nuremberg cases.[180] The absence of corporate defendants in these cases does not necessarily equate to a finding of no corporate liability, particularly because the trials discussed corporations' responsibilities and obligations even without a named corporate defendant.[181]

B. "SPECIFIC, UNIVERSAL, AND OBLIGATORY"[182]

Although the *Kiobel* concurrence argued that in order to find a party liable under the ATS, the requirement of an internationally accepted norm need only apply to the tortious conduct, the majority suggests that international law also governs whether a particular defendant can be found liable for the corresponding tort.[183] Regardless of this distinction, the concurrence's approach should nevertheless prevail. Defining customary international law is a challenging prospect and even the majority in *Kiobel* acknowledges that numerous sources of case law, treaties, and academic writing must be consulted when making such a determination.[184] If that is

178. *Id.* at 169.

179. Both the majority and concurrence agree that international criminal law does not have jurisdiction over corporate defendants; therefore, this note does not discuss corporate criminality in the international sector in detail.

180. *See, e.g.*, *Kiobel*, 621 F.3d at 155 n.7 (Leval, J., concurring) (explaining that civil liability was not imposed on corporate executives in the Nuremberg Trials in order to highlight a flaw in the majority's reasoning. Since civil damages were not awarded against the executives, international law should not, yet nevertheless does, find natural persons civilly liable).

181. *See* Ratner, *supra* note 148, at 477.

182. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (quoting In re Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)). The structure for analyzing corporate rights and duties is based upon the framework employed in a United Nations Report. U.N. Special Representative of the Sec'y Gen., Human Rights Council, Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 3, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007) [hereinafter U.N. Report].

183. Brief of *Amici Curiae* Human Rights & Labor Orgs. in Support of Plaintiffs-Appellants' Petition for Rehearing and for Rehearing En Banc at 2, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (Nos. 06-4800-CV, 06-4876-CV) [hereinafter Brief for Human Rights & Labor].

184. *Kiobel*, 621 F.3d at 131.

the case, then the current trend in international law toward the regulation of corporations is one the majority should have considered.[185]

1. Corporate Rights

In a time of vast globalization, foreign investment, and trade, corporations have been afforded rights as a consequence of their ever expanding relationship with host governments and countries.[186] Although sometimes viewed as a threat by developing countries due to the difficulty of monitoring multinational corporations, international law has nevertheless integrated corporate rights protection in order to ensure future investment.[187]

Corporations have been found to have international rights in numerous areas of law. Corporations can enforce "long-term development contracts with foreign states," protect their land rights against expropriation, and implement international arbitration agreements.[188] In addition, U.S. corporations may now even enjoy freedom of speech protection.[189] "If corporations have rights under international law, by parity of reasoning, they must have duties as well."[190]

2. Corporate Duties

While nations have been inconsistent in establishing regulations on foreign corporations, evidence suggests international acceptance of corporate liability.[191] In 2005, the Special Representative of the United Nations Secretary-General (SRSG), John Ruggie, was asked by United Nations Human Rights Commission to:

- identify and clarify standards of corporate responsibility and accountability for businesses and human rights;
- clarify the implications for businesses of concepts such as "complicity" and "sphere of influence";

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185. *See* KOEBELE, *supra* note 176, at 196.

186. Cristina Baez et al., *Multinational Enterprises and Human Rights*, 8 U. MIAMI INT'L & COMP. L. REV. 183, 217 (1999–2000) (discussing a trend in international law in which corporations have "both substantive and procedural legal capacity"). *See* Chris Jochnick & Nina Rabaeus, *Business and Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon*, 33 SUFFOLK TRANSNAT'L L. REV. 413, 414 (2010) (discussing the growth of international corporations and the role investment treaties have played in the development of multinational corporations); Ratner, *supra* note 148, at 447 (describing the manner in which human rights advocates have shifted their efforts to focus on private businesses).

187. Jochnick & Rabaeus, *supra* note 186, at 414 (citing Ratner, *supra* note 148, at 461).

188. Baez et al., *supra* note 186, at 217–19; Ratner, *supra* note 148, at 488.

189. Adam Liptak, *Justices, 5-4, Reject Corporate Campaign Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1.

190. Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 265 (2004).

191. Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKLEY J. INT'L L. 45, 69 (2002).

> - develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises[].[192]

Pursuant to his role as SRSG, Ruggie sought to find evidence of international corporate legal responsibilities over a nine year period.[193] In a report written in February of 2007, the issue of whether corporate responsibility for human rights violations exists under international law was explored.[194] While the report does not suggest that a clear and concise body of law has developed on the issue, its analysis of "soft law"[195] and other international sources suggests a growing trend towards deeming corporate liability appropriate under international law standards.[196]

a. Indirect Responsibilities

As the court outlined in *Sosa*, and the Second Circuit adopted in *Kiobel*, in order for a cause of action to be viable under the ATS it must be "specific, universal, and obligatory."[197] Even the majority in *Kiobel* acknowledged, however, that if these requirements are taken to their most extreme boundaries, individual liability may not even meet the necessary threshold because "international law has [only] sometimes extended the scope of liability for a violation of a given norm to individuals."[198] At what point does a standard become obligatory and when is there enough evidentiary support to draw the conclusion that a norm has been established? The same questions can be asked when defining universality.[199] Still, the *Kiobel* majority suggested that liability has "*never*" been found against corporations.[200]

Never is a particularly strong term, but is, at the same time, fairly easy to rebuff. Soft law is informative in determining a nation's perspective on a particular area of law without requiring the formality of legally binding

192. *The Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNITED NATIONS GLOBAL COMPACT (Nov. 30, 2010), http://www.unglobalcompact.org/issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html.

193. *Id.*

194. U.N. Report, *supra* note 182, at 3.

195. "Soft law is 'soft' in the sense that it does not by itself create legally binding obligations." *Id.* at 14. "It derives its normative force through recognition of social expectations by states and other key actors." *Id.*

196. *Id.* at 11–12.

197. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 118 n.12 (2d. Cir. 2010) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)).

198. *Id.* at 120.

199. "[N]orm" is defined as "[a] model or standard accepted . . . by society or other large group." BLACK'S LAW DICTIONARY 1159 (9th ed. 2009). "Obligatory" is defined as "[l]egally or morally binding." *Id.* at 1181. "Universality" is defined as "[e]quality of applicability." *Id.* at 1677.

200. *Kiobel*, 621 F.3d at 120.

mandates.[201] The International Labour Organization (ILO), an agency within the United Nations, is comprised of governments, employers, and workers whose shared mission is to promote employment rights and opportunities.[202] Under their *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, corporate duties include: favoring hiring locally, protecting employee health and safety, and allowing for the organization and collective bargaining of workers.[203] By highlighting that corporations have obligations under the ILO, which are agreed to by "governments, industry, and labor," there is "a sense among those three constituencies that corporations have duties toward their employees."[204]

Guidelines reported by the Organisation for Economic Co-Operation and Development (OECD) have similarly required that corporations conduct their operations in a particular manner.[205] While finding that corporations should protect against human rights abuses abroad, the OECD fails to specify which rights are of particular concern.[206] Still, by directly addressing corporate actors, the guidelines show a "capacity and willingness of states to implement their international human rights obligations" through corporations.[207]

b. Direct Responsibilities

In *First National City Bank (FNCB) v. Banco Para El Comercio Exterio De Cuba*, the Supreme Court arguably engaged in the concurrence's suggested approach in *Kiobel*.[208] A Cuban bank brought suit against an American bank for an unpaid letter of credit in which the American bank counterclaimed for the value of their assets that were seized in Cuba.[209] The Supreme Court reasoned that having a corporate form with juridical status did not protect the Cuban bank against liability even though the expropriation of the assets was executed by the Cuban government.[210] The

201. *See* Ratner, *supra* note 148, at 487–88.

202. About the ILO, INT'L LABOUR ORG., http://www.ilo.org/global/About_the_ILO/lang—en/index.htm (last visited Nov. 23, 2010).

203. U.N. Report, *supra* note 182, at 14 (listing the ILO as an example of soft law in support of corporate liability); Ratner, *supra* note 148, at 486–87 (discussing the mission behind the ILO).

204. Ratner, *supra* note 148, at 486–87.

205. *Id.* at 487. *See generally* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDELINES FOR MULTINATIONAL CORPORATIONS, http://www.oecd.org/topic/0,3699,en_2649_34889_1_1_1_1_37439,00.html (stating that although they are only recommendations, governments have adopted the Guideline's standards of good practice).

206. Ratner, *supra* note 148, at 487–88.

207. U.N. Report, *supra* note 182, at 14–15.

208. Brief for Human Rights & Labor, *supra* note 183 (citing First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983)).

209. *First Nat'l City Bank*, 462 U.S. at 613.

210. *Id.* at 632–33.

Court looked to international law which directed them to domestic rules,[211] ultimately finding the bank liable. Given that the Court performed a similar analysis to reach a different conclusion—corporate civil liability—as the *Kiobel* majority, the latter's view that corporations have never been found liable under international law does not hold up.[212] While there may be a presumption that domestic law applies only to the nation which enacted it, a more flexible approach has been employed by the Supreme Court, acknowledging that the United States and international courts have overridden this presumption for the protection of equity and justice.[213]

Alternatively, there are instances in which liability has been directly imposed on corporations. In the environmental law context, international treaties have enabled liability to attach directly to polluters, including corporations.[214] In addition, anti-corruption laws have created duties that are binding on corporations.[215] Through treaties, the European Union has also "created a vast body of legal obligations which apply directly to corporate entities."[216] For example, the Treaty of Rome has sought to regulate behavior and corporate liability.[217] Such duties include mandates against anticompetitive behavior and regulations with which corporations must comply.[218]

C. POLICY

Legal arguments against the implementation of corporate ATS liability have often taken a policy approach. Opponents of corporate liability have addressed the potential threat that an overbroad interpretation would create a "flood" of ATS litigation.[219] A brief reflection on the history of ATS legal precedent,[220] however, strongly questions the validity of such a concern, considering the small number of cases that have been brought and have

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211. *Id.* at 621.

212. *Id.* at 621–22.

> To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result.

Id. (citing for comparison Anderson v. Abott, 321 U.S. 349, 365 (1944)). *See also* Brief for Human Rights & Labor, *supra* note 183.

213. *First Nat'l City Bank*, 462 U.S. at 628–29.

214. Ratner, *supra* note 148, at 479–80.

215. *Id.* at 482.

216. *Id.* at 484.

217. *See* Loïc Lerouge, *Moral Harassment in the Workplace: French Law and European Perspectives*, 32 COMP. LAB. L. & POL'Y J. 109, 145 (2010).

218. Ratner, *supra* note 148, at 484.

219. Koh, *supra* note 190, at 263.

220. *See* discussion *supra* Part II.

survived procedural dismissals.[221] Along these same lines, concern that an expansive approach to ATS liability would lead to corporate liability due to an enterprise's mere presence in a nation where tortious conduct was taking place neglects the legal precedent that has required purpose in establishing aiding and abetting liability.[222]

The most prominent policy question that flows from the majority's decision in *Kiobel* is whether corporations should really be free from liability under the ATS merely because they filed the appropriate documents to incorporate. After all, corporations obtain tremendous profits as a result of their international presence, particularly in regions where the cost of business is significantly cheaper. As noted by the concurring opinion in *Kiobel*, "[a]ccording to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form."[223]

The true impact of *Kiobel* is hotly debated. Some commentators have suggested that ATS litigation will simply switch gears, focusing efforts on individual directors and officers.[224] On the other hand, litigators have strategically withdrawn lawsuits until the standard for determining ATS liability is better established.[225]

CONCLUSION

ATS liability for corporations allows alien plaintiffs to be compensated in U.S. district courts for serious, tortious misconduct committed abroad. While the Second Circuit's decision in *Kiobel* does not eliminate the opportunity for plaintiffs to bring actions against corporate officers, directors, or employees, corporations have the deep pockets.[226] A determination that corporations are not liable due to the lack of a universally accepted norm under international law inappropriately categorizes the structure and mechanism of international corporate law. Giving nations the independent ability to determine remedies for violations delineated in international treaties eliminates the ability to find a norm of

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221. O'Gara, *supra* note 15, at 798 (discussing ATS cases that have been dismissed on procedural grounds).

222. Although a precise standard has not been put in place, there is no indication that mere presence would suffice.

223. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149–50 (2d Cir. 2010) (Leval, J., concurring).

224. Kerschberg, *supra* note 69.

225. Cyrus Farivar, *Nokia Siemens Lawsuit Dropped by Iranian Plaintiffs*, DEUTSCHE WELLE (Nov. 18, 2010), http://www.dw-world.de/dw/article/0,,6240017,00.html.

226. Corporations are in a position to further protect against liability through corporate liability insurance. *See* Robert J. Rhee, *Bonding Limited Liability*, 51 WM. & MARY L. REV. 1417, 1462 (2010).

corporate liability. Supreme Court review is required in order to establish a more defined standard. Evidentiary support for corporate liability from international treaties, conferences, and tribunals strongly suggests that the ATS is not dead and the *Kiobel* majority's reasoning is fundamentally flawed and, hopefully, short lived.

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