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## Pirates Incorporated: *Kiobel v. Royal Dutch Petroleum Co.* and the Uncertain State of Corporate Liability for Human Rights Violations under the Alien Tort Statute

Jennifer L. Karnes  
*University at Buffalo School of Law*

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## COMMENT

### **Pirates Incorporated?: *Kiobel v. Royal Dutch Petroleum Co.* and the Uncertain State of Corporate Liability for Human Rights Violations Under the Alien Tort Statute**

JENNIFER L. KARNES†

#### INTRODUCTION

In September 2010, the Second Circuit issued a decision that was coined the “death knell for most human rights litigation against multinational companies in U.S. courts.”<sup>1</sup> In *Kiobel v. Royal Dutch Petroleum Co.*, the court ruled that the Alien Tort Statute (“ATS”) could not be used to hold corporations liable for human rights violations committed abroad.<sup>2</sup> ATS is a one-sentence jurisdictional provision that allows foreigners to bring claims in federal court for torts committed in violation of the “law of nations” or a treaty of the United States.<sup>3</sup> Since 1980, it has been used increasingly as a means to hold perpetrators accountable for

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† J.D. Candidate, Class of 2012, SUNY Buffalo Law School; B.A., 2008, New York University.

1. John B. Bellinger III, Op-Ed., *Shortening the Long Arm of the Law*, INT’L HERALD TRIB., Oct. 8, 2010, at 8.

2. 621 F.3d 111, 148-49 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).

3. 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

international human rights violations.<sup>4</sup> Since the *Kiobel* ruling, the District of Columbia Circuit in *Doe VIII v. Exxon Mobil Corp.*,<sup>5</sup> the Seventh Circuit in *Flomo v. Firestone Natural Rubber Co.*,<sup>6</sup> and the Ninth Circuit in *Sarei v. Rio Tinto, PLC*,<sup>7</sup> have sided with the Eleventh Circuit's holding in *Romero v. Drummond Co.*<sup>8</sup> and have ruled that ATS imposes liability on corporate defendants for certain human rights violations. During the October 2011 Term, the Supreme Court heard arguments in *Kiobel*,<sup>9</sup> but came short of deciding once and for all whether ATS can be used to impose liability on multinational corporations with substandard human rights practices. Instead, in a rare move, the Court ordered that the case be set for reargument during the October 2012 Term on a more expansive issue,<sup>10</sup> which was neither addressed by the Second Circuit, nor in the Court's prior ATS decisions. The Court's consideration

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4. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-90 (2d Cir. 1980) (finding that ATS grants sufficient basis for federal jurisdiction in human rights claims).

5. 654 F.3d 11, 41 (D.C. Cir. 2011).

6. 643 F.3d 1013, 1018-19 (7th Cir. 2011).

7. Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927, at \*11 (9th Cir. Oct. 25, 2011).

8. 552 F.3d 1303, 1315 (11th Cir. 2008).

9. See Transcript of Oral Argument, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 28, 2012). The Supreme Court heard arguments in *Kiobel* on the same day as *Mohamad v. Rajoub*, where the Court considered whether the Torture Victims Protection Act ("TVPA") permits suits against non-natural persons. 634 F.3d 604 (D.C. Cir.), *cert. granted*, 132 S. Ct. 454 (2011). In *Mohamad*, the widow and children of Azzam Rahim, an American citizen who was tortured and murdered while in the custody of Palestinian Authority ("PA") intelligence officers, brought a suit under the TVPA against the respondents, Jibril Rajooub, Amin Al-Hindi, Twfik Tirawi, the PA, and the Palestine Liberation Organization ("PLO"). *Id.* at 605. The D.C. Circuit affirmed the district court's dismissal of plaintiffs' action against the PA and the PLO on the grounds that the TVPA permits actions against natural persons only. *Id.* at 609. The Supreme Court affirmed, finding that "individual" as used in the statute did not encompass organizations. *Mohamad v. Palestinian Auth.*, No. 11-88, 2012 WL 1314011, at \*3 (U.S. Apr. 18, 2012), *aff'g* *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011). It is clear that in analyzing *Kiobel* the Court will pay much attention to the interplay between ATS and TVPA.

10. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Mar. 5, 2012), 2012 WL 687061 (memorandum restoring case to calendar for reargument).

of this more sweeping issue, whether ATS applies extraterritorially,<sup>11</sup> could potentially undermine all modern ATS litigation as applied to both corporate entities and individual defendants.

The issue of corporate liability under ATS has been hotly debated. Corporate executives and pro-business groups view ATS as a threat, and have actively sought to quell the litigation. These groups believe that the surge in ATS litigation will make it difficult for companies to do business in places where human rights abuses occur, and that ATS makes corporations the “surrogate for foreign governments” primarily responsible for the abuse.<sup>12</sup> Human rights activists and plaintiff lawyers see the recent explosion of ATS litigation<sup>13</sup> as an important step in giving human rights victims a forum to state their claims.<sup>14</sup> Further, activists criticize the notion of immunizing a “Pirates Incorporated”-type entity from liability for egregious human rights violations, while at the same time granting these entities many of the same rights as private citizens, who would be liable for those same violations under ATS.<sup>15</sup> The Bush Administration viewed ATS as a

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11. *Id.*

12. Nathan Koppel, *Arcane Law Brings Conflicts From Overseas to U.S. Courts*, WALL ST. J., Aug. 27, 2009, at A11.

13. Since 1980, the courts have issued 173 opinions in cases brought under ATS. Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 357 (2011). During the Bush administration, the courts issued about 150 decisions in ATS cases, more than three times the amount of cases decided during the Clinton administration. JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS 127-28 (2009).

14. *See, e.g.*, Brief for the Brennan Center for Justice at NYU School of Law as Amicus Curiae Supporting Petitioners at 2, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Dec. 21, 2011), 2011 WL 6813566, at \*2. (“The Brennan Center for Justice at NYU School of Law respectfully submits this brief amicus curiae in the hope that victims of alleged corporate wrongdoing in violation of customary international law will continue to enjoy access to an Article III forum of excellence capable of providing equal justice under law to the weakest of victims, as well as to the most powerful of multinational corporations.”).

15. The title of this Comment and the reference to “Pirates, Incorporated” is derived from a question Justice Breyer posed to counsel for Respondent at the

threat to U.S. foreign policy goals,<sup>16</sup> but the Obama Administration has filed an amicus brief with the Court in support of corporate liability.<sup>17</sup>

While the issue of extraterritorially was not raised in *Kiobel*, the Court's order has expanded the scope of review in *Kiobel* to encompass issues raised by the other circuits. In its order following oral argument, the Court requested that the parties submit supplemental briefings to address the issue of: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."<sup>18</sup> At the *Kiobel* argument, the Justices appeared to be particularly concerned with using ATS to recognize a cause of action for violation of the law of nations occurring within the territory of another sovereign nation.<sup>19</sup>

*Kiobel* and the more recent case law suggests that the courts are deeply divided on the question of whether ATS can be used to impose liability on multinational corporations. This Comment will (1) provide a history of ATS; (2) analyze the recent circuit court opinions, with a focus on the current outlier—*Kiobel*; (3) discuss the leading arguments for and against the imposition of corporate liability; (4) analyze the Supreme Court's focus on recent arguments from the Ninth and D.C. Circuits over whether ATS can be applied extraterritorially to a suit between a foreign corporation and an alien; and (5) argue that Congress should clarify the scope of ATS. This Comment

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*Kiobel* oral argument. Transcript of Oral Argument, *supra* note 9, at 25 ("Do you think in the 18th century if they'd brought Pirates, Incorporated, and we get all their gold, and Blackbeard gets up and he said, 'Oh, it isn't me; it's the corporation'—do you think they would have then said: 'Oh, I see, it's a corporation. Good-bye. Go home.'").

16. See DAVIS, *supra* note 13, at 128.

17. Brief for United States as Amicus Curiae Supporting Petitioners at 6-7, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Dec. 21, 2011), 2011 WL 6425363, at \*6-7.

18. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Mar. 5, 2012), 2012 WL 687061 (memorandum restoring case to calendar for reargument).

19. See *infra* Part V.

will pay special attention to the courts' varying interpretations of the actions of the Nuremberg Tribunal and the interplay between the Torture Victims Protection Act ("TVPA") and ATS. More specifically, this Comment will focus on the extraterritoriality argument and whether ATS requires that plaintiffs exhaust all remedies in the country in which the alleged violation occurred. This Comment is neither an endorsement nor a condemnation of corporate liability. Instead, this Comment seeks to demonstrate the judiciary's struggle to interpret international law as applied to ATS and call for congressional guidance.

## I. THE ALIEN TORT STATUTE: A HISTORICAL OVERVIEW

### A. *Filartiga Re-Awakens the "Legal Lohengrin"*<sup>20</sup>

The concept of observing and construing the accepted norms of international law, the "law of nations," was recognized at common law under the Articles of Confederation, and later adopted in the Constitution.<sup>21</sup> ATS, the jurisdictional provision also known as the Alien Tort Claims Act,<sup>22</sup> was passed by the First Congress in the Judiciary Act of 1789, as a means to implement the constitutional mandate to uphold universally accepted norms of international law.<sup>23</sup> It gave federal courts jurisdiction over tortious conduct that violates a treaty in which the U.S. and the country where the tort occurred are parties, or if the law of nations prohibits the act.<sup>24</sup> There is little surviving legislative history or record of congressional

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20. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) ("This old but little used section is a kind of legal Lohengrin . . . no one seems to know whence it came.").

21. *Filartiga v. Pera-Irala*, 630 F.2d 876, 877-78 (2d Cir. 1980); *see also* U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the [S]upreme Court shall have original Jurisdiction.").

22. For purposes of clarity in this Comment, I will refer to the statute as "ATS" exclusively.

23. *See, e.g., Filartiga*, 630 F.2d at 878-88.

24. 28 U.S.C. § 1350 (2006).

discussions about private actions that might be subject to ATS jurisdiction.<sup>25</sup> It has been inferred from the limited historical record and the common law that the First Congress intended to grant ATS jurisdiction over a limited scope of actions: (1) violation of safe conducts, (2) infringement of the rights of ambassadors, and (3) piracy.<sup>26</sup> However, ATS was rarely invoked, and the judiciary did not interpret it for nearly 200 years. In the sparse dicta, courts continued to construe the law of nations as “excluding that law which governs a state’s treatment of its own citizens.”<sup>27</sup>

In 1980, the courts’ construction of the law of nations expanded significantly when the Second Circuit gave effect to ATS in an opinion that Judge Kaufman called a “small but important step in fulfillment of the ageless dream to free all people from brutal violence.”<sup>28</sup> In *Filartiga*, citizens from Paraguay, who had applied for political asylum within the United States, brought an action against another Paraguayan citizen alleging that the defendant wrongfully caused the death of plaintiff’s son by the use of torture.<sup>29</sup> Since the cause of action did not arise directly under a treaty, the court had to decide whether the alleged conduct violated the law of nations.<sup>30</sup> The law of nations is synonymous with customary international law (“CIL”), which contains those norms that reflect a widespread state practice,<sup>31</sup> and a “settled rule of international law’ by ‘the general assent of civilized nations.’”<sup>32</sup> The courts often view criminal law and tort law interchangeably in forming the

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25. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718 (2004).

26. *Id.* at 715 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*68).

27. *Filartiga*, 630 F.3d at 880 (citing *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir. 1976); *IIT*, 519 F.2d at 1016-17).

28. *Id.* at 890.

29. *Id.* at 878.

30. *Id.* at 880.

31. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 127 (2d Cir. 2010).

32. *Filartiga*, 630 F.2d at 881 (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)).

basis for a cause of action in ATS cases.<sup>33</sup> While a treaty only binds its parties, CIL and jus cogens norms<sup>34</sup> bind *all* governments, including those that have not recognized the norm, so long as they have not expressly and persistently objected to its development.<sup>35</sup> Because customary norms derive from both criminal and civil law, there is little meaningful distinction in ATS litigation between the two.<sup>36</sup> *Filartiga* is significant in expanding the construction of the law of nations from its eighteenth-century definition to its conception “as it has evolved and exists among the nations of the world today.”<sup>37</sup> After examining various sources of modern CIL, including the United Nations Charter, the Universal Declaration of Human Rights, various treaties, and judicial opinions, the court concluded that torture<sup>38</sup> was prohibited by the law of nations, and that the prohibition “is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.”<sup>39</sup>

B. *The Court of Appeals for the District of Columbia Circuit Expresses Concerns*

*Filartiga* signaled the reawakening of ATS litigation in U.S. courts, but the question of whether ATS could truly be used to bring human rights violators to justice was fraught with controversy from the beginning, both in the legal community and the courts. In 1984, the Court of Appeals for the District of Columbia Circuit heard *Tel-Oren v. Libyan*

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33. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 257 n.7 (2d Cir. 2009).

34. A concept closely related to CIL in international law is jus cogens norms, which are the norms “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

35. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987).

36. See *Talisman*, 582 F.3d at 257 n.7.

37. *Filartiga*, 630 F.2d at 881.

38. The case dealt with official, state-sponsored torture. *Id.* at 878.

39. *Id.* at 884.

*Arab Republic*, where injured Israelis and family members of deceased Israelis brought a claim against a group allied with the Palestinian Liberation Organization (“PLO”), alleging that the group committed murder and torture during an armed attack of a civilian bus.<sup>40</sup> While all members of the judges’ panel affirmed the district court’s decision to dismiss for lack of subject-matter jurisdiction, the judges were sharply divided in their reasoning. It is noteworthy to explore the divergence in opinions as the judges’ arguments for and against ATS’s jurisdictional grant continue to appear, and reappear, throughout human rights jurisprudence. Judge Edwards expressed his agreement with *Filartiga* and its holding that ATS “opens the federal courts for adjudication of the rights already recognized by international law.”<sup>41</sup> However, he distinguished *Tel-Oren* on factual grounds.<sup>42</sup> Since members of the PLO are non-state actors, “[a]bsent direction from the Supreme Court on the proper scope of the obscure section 1350,” Judge Edwards was unwilling to find that the law of nations extended to persons not acting under the color of law, citing the lack of international consensus on the matter.<sup>43</sup>

While endorsing *Filartiga*, Judge Edwards provided an alternative interpretation of ATS in that it allows an alien to bring a common law tort action in federal court without satisfying the diversity requirement or jurisdictional amount, so long as the tort was committed in violation of international law.<sup>44</sup> Pointing out that diversity jurisdiction already allowed aliens to bring actions in the federal courts if they satisfied the amount threshold, Judge Edwards speculated that the drafters of the Judiciary Act of 1789 had intended to maintain a federal cause of action for aliens whatever the amount in controversy—in order to protect them from the potential prejudices of the state court system—since protecting the rights of aliens within the

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40. 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam).

41. *Id.* at 777 (Edwards, J., concurring).

42. *Id.* at 799 n.2.

43. *Id.* at 776.

44. *Id.* at 782.

United States was of utmost foreign policy concern.<sup>45</sup> Judge Edwards concluded that under both the *Filartiga* and alternative formulation plaintiffs *need not* “identify and plead a right to sue granted by the law of nations.”<sup>46</sup>

Judge Bork, on the other hand, dismissed the case on the ground that “[n]either the law of nations nor any of the relevant treaties provides a cause of action that appellants may assert in courts of the United States,”<sup>47</sup> reasoning that Congress’s grant of ATS jurisdiction did not, in itself, create a cause of action that individuals could enforce in municipal courts.<sup>48</sup> Judge Bork found that the plaintiffs did not seek to enforce a statutory nor a constitutional right, as required to invoke the power of the court.<sup>49</sup> Relying on (1) the political question doctrine<sup>50</sup>—which contends that some issues, such as foreign policy issues, are better left to the political process than judicial intervention; and (2) the act of state doctrine<sup>51</sup>—in which sovereign immunity precludes the U.S. courts from inquiring into the validity of the acts of a foreign sovereign in its own territory,<sup>52</sup> Judge Bork further reasoned that separation of powers principles prevented the court from establishing a cause of action.<sup>53</sup> Recognizing a new cause of action, in Judge Bork’s opinion, would require

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45. *Id.* Judge Robb responded that this alternative formulation could find no support in the historical record, because in 1898, the “young, weak nation” sought to avoid foreign entanglements. *Id.* at 821 (Robb, J., concurring). “A refusal by a United States court to hear a dispute between aliens is much less offensive to the states involved than would be an acceptance of jurisdiction and a decision on the merits.” *Id.* Robb interpreted Judge Edward’s opinion to give the courts the power to hear these types of cases between foreigners as an “officious interloper and international busybody.” *Id.*

46. *Id.* at 788 (Edwards, J., concurring).

47. *Id.* at 799 (Bork, J., concurring).

48. *Id.* at 801.

49. *See id.*

50. *Id.* at 803 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (noting that if it were necessary to resolve the case, he would hold that the political question doctrine bars the lawsuit).

51. *Id.* at 803-04.

52. *See id.* at 790-91.

53. *Id.* at 805.

the court to analyze principles of international law that are not clearly defined and may touch “sharply on national nerves,” and create an exception to the general rule that international law only binds state actors.<sup>54</sup> Further, it follows from *Filartiga*’s reasoning that if there exists an individual right to bring claims under the law of nations, then there also exists a cause of action for any violation of the treaties to which the United States is a party.<sup>55</sup> Bork cautioned that this line of reasoning was absurd, because it would mean, “all existing treaties became, and all future treaties will become, in effect, self-executing when ratified.”<sup>56</sup> Bork also noted that there was no international consensus on whether terrorism violated the law of nations, that no treaty provided individuals with a right to seek damages, and that at the time of the enactment of ATS, the concept of international human rights law simply did not exist.<sup>57</sup> Bork concluded that “unless a modern statute, treaty, or executive agreement provided a private cause of action for violations of new international norms which do not themselves contemplate private enforcement,” it was not the role of the court to develop new causes of action under ATS.<sup>58</sup>

Judge Bork contended that the *Filartiga* court’s formulation of ATS would run contrary to the Constitution by allowing the court to meddle in the other branches’ powers to decide matters of foreign relations under Articles I and II.<sup>59</sup> Following this reasoning, Judge Robb found that the case could not be adjudicated on the basis of the political

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54. *Id.* at 804-05 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1963)).

55. *See id.* at 820.

56. *Id.* A non-self-executing treaty is one for which Congress must enact implementing legislation, while a self-executing treaty becomes the law of the land and can be enforced in U.S. courts without any acts of Congress. *See* DAVID WEISSBRODT ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 897-900 (4th ed. 2009).

57. *Tel-Oren*, 726 F.2d at 810-16 (Bork, J., concurring).

58. *Id.* at 816.

59. *Id.* at 822.

question doctrine.<sup>60</sup> Judge Robb further warned that adjudicating controversial foreign policy issues was a slippery slope, given each nation's differing notions of terrorism, and that "each supposed scenario carries with it an incredibly complex calculus of actors, circumstances, and geopolitical considerations."<sup>61</sup> This debate over the foreign policy implications of ATS jurisdiction persists today, and appears in *Kiobel* as a basis for rejecting corporate liability. Judges Bork's and Robb's concurrences were very influential during the twenty-year period between *Tel-Oren* and the Supreme Court's decision in *Sosa v. Alvarez-Machain*.<sup>62</sup> During this time, only the Second and Ninth Circuits allowed ATS claims—other courts continued to rely on *Tel-Oren* to conclude that ATS jurisdiction did not apply over ATS plaintiffs' alleged claims.<sup>63</sup>

C. *Sosa v. Alvarez-Machain: The Supreme Court Finally Speaks to ATS*

*Filartiga* clarified that the adjudication of violations of CIL norms falls within the ambit of federal jurisdiction.<sup>64</sup> In *Sosa v. Alvarez-Machain*, the Supreme Court denied the Government's allegations that ATS was merely a jurisdictional provision,<sup>65</sup> finding that it was not a "jurisdictional convenience to be placed on the shelf for the use by a future Congress or state legislature that might, some day, authorize the creation of causes of action."<sup>66</sup> *Sosa* stated that the causes of action to which ATS jurisdiction applies are drawn from the common law,<sup>67</sup> and that the modern day causes of action "rest on a norm of international

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60. *Id.* at 823 (Robb, J., concurring).

61. *Id.* at 827.

62. See DAVIS, *supra* note 13, at 23-24.

63. *Id.* at 24.

64. *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

65. 542 U.S. 692, 724 (2004).

66. *Id.*

67. *Id.* at 694 (referencing (1) violation of safe conducts, (2) infringement of the rights of ambassadors, and (3) piracy).

character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms.”<sup>68</sup> The *Filartiga* court attributed the lack of successful ATS suits to the fact that the jurisdictional threshold is high, as the alleged tort must violate the “well-established, universally recognized norms of international law.”<sup>69</sup> ATS’s jurisdictional grant is distinguishable from § 1331 federal question jurisdiction,<sup>70</sup> in that establishing federal jurisdiction under ATS involved “a more searching review of the merits,” than § 1331’s “arising under” threshold.<sup>71</sup> Addressing the issue cautiously, *Sosa* similarly made it clear that ATS grants courts jurisdiction over a limited number of causes of action, and that it was the role of the courts to determine “whether a norm is sufficiently definite to support a cause of action.”<sup>72</sup> The Court further instructed that the judiciary “should *not* recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [ATS] was enacted”<sup>73</sup>—namely, piracy, violations of safe conducts, and infringement on the rights of ambassadors.<sup>74</sup>

*Sosa* instructs the courts to look to the sources of international law that it has “long, [but] cautiously, recognized.”<sup>75</sup> These sources include works of jurors and

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68. *Id.* at 725.

69. *Filartiga*, 630 F.2d at 887-88.

70. 28 U.S.C. § 1331 (2006) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

71. *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (citing *Filartiga*, 630 F.2d at 877-78).

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

73. *Id.* (emphasis added).

74. *Id.*

75. *Id.* at 733. The judiciary’s use of comparative and international law has been controversial among members of Congress, as well as members of the federal bench. While internationalists argue that the reliance on foreign legal materials is a long-standing American tradition, and is of particular importance in the modern era of globalization, originalists argue that the U.S. Constitution

commentators that reflect “the customs and usages of civilized nations,” that courts must use “not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”<sup>76</sup> While human rights instruments may accurately reflect customary norms, they are not dispositive on whether a tort violates the law of nations. In *Sosa*, the plaintiff-petitioner alleged that his abduction constituted “arbitrary arrest”<sup>77</sup> within the meaning of the Universal Declaration of Human Rights<sup>78</sup> and the International Covenant on Civil and Political Rights (“ICCPR”).<sup>79</sup> The Court found that since the U.N. Declaration was an aspirational document, setting standards which states must strive to achieve, it could not create a cause of action under ATS.<sup>80</sup> Further, although the United States is a party to the ICCPR, the treaty is not self-executing, and thus, cannot

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should be interpreted with sole reliance on domestic sources. *See, e.g.*, Martha Minow, *The Controversial Status of International and Comparative Law in the United States*, 52 HARV. INT’L L.J. ONLINE 1 (2010), [http://www.harvardilj.org/2010/08/online\\_52\\_minow/](http://www.harvardilj.org/2010/08/online_52_minow/); *see also Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 471 (2006) (statement of Samuel A. Alito, Supreme Court Associate Justice Nominee) (“The Framers did not want Americans to have the rights of people in France or the rights of people in Russia, or any of the other countries on the continent of Europe at the time. They wanted them to have the rights of Americans, and . . . I don’t think it’s appropriate to look to foreign law.”). *But see* Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Keynote Address at the the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003), *in* 97 AM. SOC’Y INT’L L. PROC. 265, 268 (2003) (“International institutional issues cannot be treated as if they were exotic hot-house flowers, rarely of relevance to domestic courts. Those issues, when relevant, must be briefed fully, with a comprehensive explanation of the legal relationships between our Court and, say, the International Court of Justice.”).

76. *Sosa*, 542 U.S. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)) (internal quotation marks omitted).

77. *Id.*

78. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 73 (Dec. 10, 1948).

79. International Covenant on Civil and Political Rights art. 9, Mar. 23, 1976, 999 U.N.T.S. 171.

80. *Sosa*, 542 U.S. at 734.

create enforceable obligations in federal court.<sup>81</sup> The Court held that arbitrary detention did not rise to the level of a violation of international law, unless it was prolonged and encouraged, or condoned as a matter of state policy.<sup>82</sup>

In addition to the requirement that the tort be a clearly defined violation of CIL, *Sosa* suggests another criterion for determining whether tortious conduct violates the law of nations, “an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”<sup>83</sup> The Court suggests that the exhaustion of domestic remedies and international criminal tribunals may be potential considerations in appropriate cases.<sup>84</sup> In a footnote, the Court also suggests that foreign policy concerns may be valid considerations in future cases, and that there is a strong argument for “giv[ing] serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”<sup>85</sup> Citing *In re South African Apartheid Litigation*,<sup>86</sup> where plaintiffs sought damages from a number of corporations that allegedly participated in the apartheid regime in South Africa, the Court noted that the post-apartheid South African government raised concerns that the case would interfere with the country’s Truth and Reconciliation Commission.<sup>87</sup> The U.S. government agreed

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81. *Id.* at 735 (citation omitted).

82. *Id.* at 738 (“It is enough to hold that 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.”); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986).

83. *Sosa*, 542 U.S. at 732-33.

84. *Id.* at 733 n.21.

85. *Id.*

86. 346 F. Supp. 2d 538 (holding that multinational corporations did not violate international law for doing business with apartheid South Africa).

87. *Sosa*, 542 U.S. at 733 n.21; *see also* *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 259 (2d Cir. 2007) (“Penuell Mpapa Maduna, who was then the Minister of Justice and Constitutional Development for South Africa, submitted an *ex parte* declaration to the district court, stating that the South African government regarded these proceedings as interfering ‘with a foreign sovereign’s efforts to address matters in which it has the predominant interest’ and asking that the proceedings be dismissed. After receiving the South African

that the apartheid litigation would hinder foreign policy goals.<sup>88</sup>

Justice Scalia's concurrence fundamentally disagreed with the majority's discretion based framework.<sup>89</sup> Relying on the Erie Doctrine, which purports that there is no federal body of common law,<sup>90</sup> Scalia reasoned that "[t]he notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human rights advocates."<sup>91</sup> Echoing the separation of powers argument in Judge Bork's concurring opinion in *Tel Oren*,<sup>92</sup> Scalia criticized, "[f]or over two decades now, unelected federal judges have been usurping

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declaration, the district court, *sua sponte*, solicited the views of the United States Department of State. The State Department responded by submitting a 'Statement of Interest' asserting that 'continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the United States.').", *aff'd sub nom. for lack of quorum*, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

88. *Sosa*, 542 U.S. at 733 n.21. Pre-*Sosa* cases also referred to foreign policy considerations in dicta. *See, e.g.*, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) ("The lack of clarity in, and absence of consensus about, the legal principles invoked by appellants, *together with the political context of the challenged actions and the PLO's impingement upon American foreign relations, lead to the conclusion that appellants' case is not the sort that is appropriate for federal-court adjudication, at least not without an express grant of a cause of action.*" (emphasis added)).

89. *Sosa*, 542 U.S. at 739 (Scalia, J., concurring); *see also* *Ku*, *supra* note 13, at 355-56 (arguing that the manner in which courts have defined ATS in the post-*Sosa* era lends support to Justice Scalia's skepticism about the system of judicial international lawmaking that is authorized by *Sosa*).

90. The Erie Doctrine is a fundamental rule of civil procedure arising from *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which held that a federal court must apply the substantive law of the State, unless it is interpreting a claim under the U.S. Constitution or federal law. *Id.* at 78.

91. *Sosa*, 542 U.S. at 749-50 (Scalia, J., concurring) (citation omitted). Justice Scalia criticized further: "The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty . . . could be judicially nullified because of the disapproving views of foreigners." *Id.* at 750 (citation omitted).

92. *See* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801-08 (D.C. Cir. 1984) (Bork, J., concurring).

this lawmaking power by converting what they regard as norms of international law into American law.”<sup>93</sup>

D. *ATS Extends From Parties Acting Under the Color of Law to Non-State Actors to Corporations*

In *Kadic v. Karadzic*, decided in 1995, the Second Circuit extended ATS liability to non-state actors, ignoring Judge Edwards’s reservations that international law may not impose individual responsibilities.<sup>94</sup> Croatian and Muslim citizens of Bosnia-Herzegovina brought the action against Radovan Karadzic, leader of the insurgent Bosnian-Serb forces, alleging that they were victims or representatives of victims of atrocities committed as part of the insurgent groups’ genocidal campaign in the course of the Bosnian Civil War.<sup>95</sup> The court disagreed with Karadzic’s assertion that the plaintiffs failed to allege violations of the law of nations, because such norms only bind states, and not private individuals.<sup>96</sup> Citing the availability of private actions under the law of nations for (1) piracy, (2) prohibitions against slave trades, and (3) certain war crimes, the court concluded that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of the state or only as private individuals.”<sup>97</sup>

Cases brought under ATS often raise additional claims under the TVPA.<sup>98</sup> The TVPA establishes liability in tort for “an individual, who under actual or apparent authority, or color of law, of any foreign nation” subjects an individual to torture or extrajudicial killing.<sup>99</sup> Citing the TVPA’s

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93. *Sosa*, 542 U.S. at 750 (Scalia, J., concurring).

94. 70 F.3d 232, 240 (2d Cir. 1995).

95. *Id.* at 236-37.

96. *Id.* at 239.

97. *Id.*

98. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2006)).

99. *Id.*

legislative history,<sup>100</sup> the court explained that Congress sought to codify the cause of action in *Filartiga* and extend access to the remedy to U.S. citizens, as well as aliens.<sup>101</sup> However, the *Kadic* court reasoned, “[t]he scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act.”<sup>102</sup> Thus, the court rejected defendants’ contention that the alleged violations of the law of nations had to be the result of state action. The court concluded that CIL’s proscriptions against (1) genocide, and (2) war crimes extended to private individuals.<sup>103</sup> Although torture must exist under the color of law, the court found that the plaintiffs had sufficiently alleged that Karadzic’s regime was a state, and that he acted under the color of law for purposes of international law requiring “official action.”<sup>104</sup>

Corporations effectively began becoming defendants in ATS cases in 1997, when a California district court allowed Burmese plaintiffs to proceed with their claims against the Burmese government and an American oil company, Unocal Corporation.<sup>105</sup> Up until this point, the cases in which plaintiffs brought claims against corporations were dismissed on other grounds. *Doe v. Unocal Corp.* was the first to deny defendant’s motion to dismiss.<sup>106</sup> On appeal, the Ninth Circuit analyzed whether a “private party” could be liable for the alleged jus cogens violations of murder, torture, slavery, rape, and forced labor.<sup>107</sup> Following the precedent established in *Kadic*, the court analyzed (1) whether the alleged tort required state action in order for ATS liability to attach to it, and (2) if so, whether the

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100. H.R. REP. NO. 102-367, at 3-4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86.

101. *Kadic*, 70 F.3d at 241.

102. *Id.*

103. *Id.* at 241-44.

104. *Id.* at 245.

105. *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff’d in part, rev’d in part*, 395 F.3d 932 (9th Cir. 2002).

106. *Id.* at 897-98; *see* Ku, *supra* note 13, at 365.

107. *Doe I v. Unocal Corp.*, 395 F.3d 932, 944-45 (9th Cir. 2002).

private party engaged in state action.<sup>108</sup> The court did not analyze the issue of corporate liability specifically, but instead found that Unocal Corporation could be liable as a private party.<sup>109</sup> The court, further, held that forced labor was a modern form of slavery—to which the law of nations attached individual liability—and thus, the defendant company could be held liable for damages.<sup>110</sup> Moreover, the court concluded that Unocal could be found liable under an aiding and abetting standard if they engaged in “knowing practical assistance or encouragement that ha[d] a substantial effect on the perpetration of the crime.”<sup>111</sup>

Since 1997, Exxon Mobil,<sup>112</sup> Shell,<sup>113</sup> Nestle,<sup>114</sup> Coca-Cola,<sup>115</sup> Occidental Petroleum Corporation,<sup>116</sup> Caterpillar

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108. *Id.* at 945.

109. *Id.* at 945-46.

110. *Id.* at 946.

111. *Id.* at 947.

112. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005) (dismissing case brought by Indonesian plaintiffs alleging that defendant corporation had contracted with a unit of the Indonesian national army to provide security for their oil pipeline, and, in doing so, aided and abetted the military in its alleged commission of genocide, torture, crimes against humanity, arbitrary detention, extrajudicial killing, and sexual violence, on the grounds the plaintiffs failed to sufficiently allege joint action by defendant corporation and the military).

113. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (allowing case to proceed where plaintiffs alleged that Shell Nigeria recruited the Nigerian police and military to attack local villages and suppress the organized opposition to its development activity).

114. *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (dismissing complaint against defendant corporations alleging that they aided and abetted farmer’s engagement in forced labor of Malian children on cacao fields in Côte d’Ivoire, on the grounds that plaintiffs failed to establish that corporations had the requisite mens rea).

115. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009) (dismissing case where plaintiffs brought claims under ATS alleging that the Coca-Cola Company had conspired with armed groups in the murder, torture, and intimidation of Columbian union leaders).

116. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (dismissing complaint that Colombian citizen plaintiffs brought against the oil company and a private security firm that had allegedly partaken in the bombing of a Colombian village, on the grounds that the case was barred by the political question doctrine).

Inc.,<sup>117</sup> and the manufacturers of Agent Orange, inter alia, have all been the subject of ATS litigation. In *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, the Second Circuit found that that the defendant manufactured and distributed the herbicide Agent Orange primarily for the purpose of destruction of crops, not to poison or target human populations.<sup>118</sup> Thus, the fact that Dow Chemical supplied Agent Orange to the U.S. military for use in Vietnam did not establish an actionable claim under ATS.<sup>119</sup> In *Abdullahi v. Pfizer, Inc.*, plaintiffs brought an action against Pfizer Pharmaceutical Company, alleging that the company performed involuntary medical testing of an experimental antibiotic on children in Nigeria, without their consent or knowledge.<sup>120</sup> The court held that the CIL norm prohibiting nonconsensual human medical experimentation was enforceable by ATS.<sup>121</sup> The Supreme Court denied certiorari in both *Agent Orange*<sup>122</sup> and *Abdullahi*.<sup>123</sup>

In *Khulumani v. Barclay National Bank Ltd.*, plaintiffs in three separate class actions brought claims against about fifty multinational corporations, alleging that these corporations had aided the South African apartheid regime

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117. *Corrie v. Caterpillar Inc.*, 503 F.3d 974 (9th Cir. 2007) (relying on political question doctrine to dismiss case brought by family members of Israeli individuals who were killed or injured when Israeli Defense Forces used bulldozers to demolish homes in Palestinian Territories, against bulldozer manufacturer, alleging manufacturer knew that the equipment would be used in violation of international law).

118. 517 F.3d 104, 119 (2d Cir. 2008).

119. *Id.* at 123.

120. 562 F.3d 163, 169 (2d Cir. 2009).

121. *Id.* at 187; see also Recent Cases, *Federal Statutes—Alien Tort Statutes—Second Circuit Looks Beyond Complaint to Find State Action Requirement Satisfied—Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009), 123 HARV. L. REV. 768, 773 (2010) (criticizing the court for looking beyond the trial court's factual record and determining that the plaintiffs had sufficiently alleged that Nigeria was involved in the alleged events).

122. *Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 555 U.S. 1218 (2009).

123. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3541 (2010).

in its commission of human rights violations.<sup>124</sup> The court found that plaintiffs could plead a theory of aiding and abetting liability under ATS.<sup>125</sup> On a petition for writ of certiorari brought by defendant corporations, four members of the Supreme Court recused themselves, due to their economic interests in the defendant companies.<sup>126</sup> Accordingly, the Supreme Court affirmed the judgment for lack of quorum.<sup>127</sup> The fact that many of the Justices have shareholder stakes in the corporations that are sued under ATS may be why the Court, until now, has been hesitant to address corporate liability.

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, Sudanese residents brought an ATS claim against a Canadian energy company alleging that the company, in an effort to facilitate oil exploration activities, collaborated with the Republic of Sudan's government in its policy of ethnically cleansing civilian populations.<sup>128</sup> The *Talisman* court altered the mens rea standard for aiding and abetting human rights violations,<sup>129</sup> finding that to satisfy the aiding

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124. 504 F.3d 254, 258 (2d Cir. 2007).

125. *Id.* at 260.

126. *See, e.g.*, Brief of KBR, Inc., as Amicus Curiae in Support of Respondents at 29, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 2, 2011), 2012 WL 379577, at \*29 (“By choosing to join certain corporate defendants, plaintiffs may force the recusal of judges known to hold shares in those corporations, in some instances coming close to selecting which judges will hear their case.”).

127. *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028, 1028-29 (2008) (“[S]ince a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of the Court, the judgment is affirmed under 28 U.S.C. § 2109, which provides that under these circumstances the Court shall enter its order affirming the judgment of the same court from which the case was brought for review with the same effect as upon affirmance by an equally divided Court.”), *aff'g for lack of quorum*, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

128. 582 F.3d 244, 247 (2d Cir. 2009).

129. While the *Talisman* decision is significant to the Second Circuit's holding in *Kiobel*, the “aiding and abetting” standard is its own, separate, controversial issue that is beyond the scope of this Comment. For an in-depth discussion of the issue of corporate complicity liability, see Richard L. Herz, *The Liberalizing Effect of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 222-32 (2008).

and abetting standard, plaintiffs needed to demonstrate that there was evidence, either direct or circumstantial, that the defendant acted with the requisite mens rea to provide *substantial assistance* in the commission of internationally recognized human rights violations.<sup>130</sup> However, the Second Circuit affirmed the dismissal of the case solely on complicity liability grounds, without passing on the merits of whether corporations, themselves, could be liable.<sup>131</sup> The court, however, noted that “[t]his attenuation between the plaintiffs’ allegations and the named defendant (the only entity over which the district court had personal jurisdiction) raises knotty issues concerning control, imputation, and veil piercing (among other things).”<sup>132</sup> The Supreme Court denied certiorari.<sup>133</sup> This case set the groundwork for the Second Circuit’s decision in *Kiobel*.

Despite the number of cases brought under the ATS in recent years, none of these cases has resulted in jury verdicts ordering these multinationals to pay damages. In 2007 in *Bowoto v. Chevron Corp.*, a jury found Chevron not guilty of allegations that it had aided and abetted in the shooting of Nigerian villagers, who occupied an offshore oil barge to protest its environmental record and hiring practices.<sup>134</sup> However, some corporations have paid large settlements to avoid costly litigation. In 2004, Unocal Corporation, an oil and gas company, settled with plaintiffs for an undisclosed amount, after they were accused of aiding atrocities committed by soldiers of Myanmar during its construction of a pipeline in the country.<sup>135</sup> In 2007, Yahoo! settled with the family of two Chinese political dissidents, who were jailed after Yahoo! supplied the Chinese government with e-mail records.<sup>136</sup> In 2009, while

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130. *Talisman*, 582 F.3d at 260-61.

131. *Id.* at 268.

132. *Id.* at 261.

133. *Talisman Energy, Inc. v. Presbyterian Church of Sudan*, 131 S. Ct. 122 (2010).

134. 621 F.3d 1116, 1122 (9th Cir. 2010).

135. *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6.

136. Catherine Rampell, *Yahoo Settles with Chinese Families*, WASH. POST, Nov. 14, 2007, at D4.

denying any wrongdoing, Shell paid \$ 15.5 million to settle a case brought by Nigerians alleging human rights abuses.<sup>137</sup> The family members of Ken Saro-Wiwa, who was hanged by the Nigerian military regime after protesting Shell's environmental practices, accused Shell of conspiring to seek the government's aid in silencing his criticism.<sup>138</sup> Shell professed its innocence, but labeled the settlement as a humanitarian act to compensate the families of the victims.<sup>139</sup>

## II. *KIOBEL V. ROYAL DUTCH PETROLEUM*: THE END OF CORPORATE LIABILITY?

### A. *The Majority Finds That No Norm of Corporate Liability Exists in any Relevant Sources of Customary International Law*

Plaintiffs, who were residents of the Ogoni Region of Nigeria, brought a class action complaint against defendants Royal Dutch Petroleum Company ("Royal Dutch") and Shell Transport and Trading Company PLC, alleging that the defendant corporations aided and abetted the Nigerian government in its commission of (1) extrajudicial killings; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest or detention; (5) violation of the rights of life, liberty, security, and association; (6) forced exile; and (7) property destruction.<sup>140</sup> Plaintiffs were members of a resistance group that opposed the defendant corporations' oil exploration and production, and protested their detrimental environmental effects.<sup>141</sup> Plaintiffs alleged that in the early 1990s, members of the Nigerian military attacked their villages by shooting, killing, beating, and raping Ogoni residents and destroying and looting

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137. Jad Mouawad, *Shell Agrees to Settle Abuse Case for Millions*, N.Y. TIMES, June 9, 2009, at B1.

138. *Id.*

139. *Id.*

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

141. *Id.*

property.<sup>142</sup> The plaintiffs contended that the defendant corporations provided transportation to the military forces, allowed their property to be used as a “staging ground for [the] attacks,” and compensated the soldiers.<sup>143</sup> The district court dismissed four of plaintiffs’ claims, but sustained some of the aiding and abetting claims and certified the matter for an interlocutory appeal.<sup>144</sup>

Citing the series of corporate liability cases that had been decided *sub silentio*,<sup>145</sup> the court acknowledged: “[T]here remain a number of unresolved issues lurking in our ATS jurisprudence—issues that we have simply had no occasion to address in the handful of cases we have decided in the thirty years since the revival of the ATS.”<sup>146</sup> Judge Carbranes first explained that the subjects of international law—i.e., individuals, as first recognized at the International Military Tribunal at Nuremberg (“Nuremberg”)—are determined by international law and not the sovereign states.<sup>147</sup> While it may seem logical to assume that corporate liability exists under ATS because

142. *Id.*

143. *Id.*

144. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465-67 (S.D.N.Y. 2006). An interlocutory appeal occurs in the middle of a case, before a final judgment:

When a district judge . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C § 1292(b) (2006).

Section 1292(c)(1) gives the Court of Appeals exclusive jurisdiction over appeals from interlocutory orders. 28 U.S.C. § 1292(c)(1). In *Kiobel*, “[c]orporate liability was not considered by the district court judge, was not raised by the defendant, and was not briefed by anyone.” Marco Simons, *Kiobel’s First Victim: Flomo v. Firestone*, EARTHRIGHTS.ORG BLOG (Oct. 5, 2010, 5:56 PM), <http://www.earthrights.org/blog/kiobels-first-victim-flomo-v-firestone>.

145. *Kiobel*, 621 F.3d at 124 (citing *Hagens v. Levine*, 415 U.S. 528, 533 n.5 (1974)).

146. *Id.* at 117. The court “decline[d] to address . . . [the] lurking question[ ] . . . [of] whether the ATS applies ‘extraterritorially.’” *Id.* at 117 n.10.

147. *Id.* at 126.

the notion of corporate liability is so firmly rooted in American legal culture<sup>148</sup> and domestic tort law, the court noted that “the substantive law that determines our jurisdiction under the ATS” is neither domestic law, nor the domestic law of another country.<sup>149</sup> Instead, the court found that it was bound by *Sosa* to look to CIL to determine (1) whether certain conduct leads to ATS liability, and (2) whether the scope of liability under the ATS extends to the defendant being sued.<sup>150</sup> It was not sufficient for most or even all “civilized nations” to recognize corporate liability—rather, that norm had to come from international law. The court further supported the proposition that the scope of liability must come from CIL, not domestic law, by referencing *Khulumani*, in which Judge Katzmann, in concurrence, found that a domestic statute had no relevance to his determination of whether aiding and abetting liability was recognized under ATS.<sup>151</sup>

After explaining that the decision was guided principally, and almost exclusively, by CIL, whose norms were not meant to be created by U.S. courts unilaterally, the court identified (1) international conventions, (2) international custom, and (3) the general principles of law recognized by civilized nations—the guideposts laid forth in Article 38 of the Statute of the International Court of Justice<sup>152</sup>—as the applicable sources of CIL norms.<sup>153</sup> The court looked first to international tribunals and concluded that neither Nuremberg, the International Criminal Tribunal for the former Yugoslavia (“ICTY”), nor the International Criminal Tribunal for Rwanda (“ICTR”) had

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148. *Kiobel*, 621 F.3d at 117 & n.11 (noting that the idea that corporations are “juridical persons” with duties, liabilities, and rights has been continually recognized by the courts).

149. *Id.* at 117-18.

150. *Id.* at 128.

151. *Id.* at 130 (citing *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 282 (2d Cir. 2007) (Katzmann, J., concurring)).

152. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993.

153. *Kiobel*, 621 F.3d at 132.

ever recognized corporate liability.<sup>154</sup> The London Charter, which established Nuremberg, expressly granted jurisdiction over natural persons only.<sup>155</sup> While the London Charter also granted the tribunals the authority to declare organizations criminal, the Court reasoned that this provision was simply meant to allow for prosecution of *individuals* who were members of organizations—i.e., members of the Gestapo and Nazi regime.<sup>156</sup> Similarly, the court relied on the United States Military Tribunals law that allowed for prosecution of corporate executives, but not the corporate entity itself for violations of international law.<sup>157</sup> Additionally, Nuremberg refused to impose liability on I.G. Farbenindustrie Aktiengesellschaft (“I.G. Farben”), a chemical manufacturer that knowingly supplied lethal chemicals for use in the gas chambers at Auschwitz concentration camp, along with other products that were instrumental in the eradication of millions of people during the Holocaust, “because crimes against international law are committed by men, not by abstract entities.”<sup>158</sup> The court concluded that “in declining to impose corporate liability under international law in the case of the most nefarious corporate enterprise known to the civilized world, . . . [Nuremberg] expressly defined liability under the law of nations as liability that could not be divorced from *individual* moral responsibility.”<sup>159</sup> Additionally, the court cited a report by the U.N. Secretary-General that defined ICTY’s jurisdiction as extending to natural persons only, and not juridical persons.<sup>160</sup> Finally, the court looked to the

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154. *Id.* at 136.

155. *Id.* at 133-34 (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 270 [hereinafter London Charter]).

156. *Id.* at 134.

157. *Id.* (citing Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945).

158. *Id.* at 134-35.

159. *Id.* at 135.

160. *Id.* at 136 (citing U.N. Secretary-General, Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, art. 6, U.N. Doc. S/25704 (May 3, 1993)).

Rome Statute, which also limited the ICC's jurisdiction to natural persons.<sup>161</sup>

The court noted that a treaty could only be evidence of a CIL norm if it were ratified by an "overwhelming majority of states" who "consistently act in accordance with its principles,"<sup>162</sup> such that its norms bind states that have not ratified the treaty. Although recent specialized treaties<sup>163</sup> have recognized corporate liability, the court reasoned that this liability was in the context of the treaties' subject matter, and not the broader context of human rights violations.<sup>164</sup> The court noted that treaties do not necessarily codify existing norms of CIL.<sup>165</sup> Additionally, reading the aforementioned treaties to construe a CIL norm of corporate

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161. *Id.* at 136-37 (citing Rome Statute of the International Criminal Court art. 25(1), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 105 [hereinafter Rome Statute]).

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

163. The court referenced the treaties relied upon by the *Talisman* district court as evidence of corporate liability under CIL. *Id.* at 138 n.40 (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 289, 316-17 (S.D.N.Y. 2003)). The treaties included:

(1) Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, *adopted* July 1, 1949, 96 U.N.T.S. 257 (not ratified by the United States); (2) Convention on Third Party Liability in the Field of Nuclear Energy, *done* July 29, 1960, amended Jan. 28, 1964, 956 U.N.T.S. 251 (not ratified by the United States, China, the Soviet Union, or Germany); (3) International Convention on Civil Liability for Oil Pollution Damage, *done* Nov. 29, 1969, 973 U.N.T.S. 3 (not ratified by the United States, China, or the Soviet Union); (4) Vienna Convention on Civil Liability for Nuclear Damage, *done* May 21, 1963, 1063 U.N.T.S. 265 (not ratified by the United States, China, France, Germany, or the United Kingdom); (5) Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, *done* Dec. 17, 1971, 974 U.N.T.S. 255 (not ratified by the United States, China, the Soviet Union, or the United Kingdom); and (6) Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, *done* Dec. 17, 1976, *reprinted at* 16 I.L.M. 1450 (signed by six States but ratified by none).

*Id.*

164. *Id.* at 138.

165. *Id.* at 139.

liability would run contrary to other treaties' express rejection of corporate liability.<sup>166</sup> The court reasoned that even if an overwhelming number of states had ratified these treaties, they "have not had such influence that a general rule of corporate liability has become a norm of customary international law."<sup>167</sup> Finally, the court looked to subsidiary sources of CIL, relying on the declarations of Professor James Crawford and Professor Christopher Greenwood, experts in the field of international law, whose legal scholarship discusses the lack of any notion of corporate liability in either criminal or civil international law.<sup>168</sup>

In its conclusion, the court explained that it was unwilling to recognize corporate liability under ATS, because corporate liability had simply not risen to the level of a "specific, universal, and obligatory" norm encompassed in "the law of nations."<sup>169</sup> Still, the court warned that the decision did not give corporate entities *carte blanche*.<sup>170</sup> The majority clarified that corporations could still be held responsible under another body of law, and that "nothing in the opinion limits or forecloses suits under the ATS against a corporation's employees, managers, officers, directors, or any other person who commits, or purposefully aids and abets, violations of international law."<sup>171</sup> Under the courts' current interpretation of ATS, the scope of liability and the causes of actions that it encompasses are constantly evolving. While *Kiobel* found that, today, there exists no norm for corporate liability for human rights violations in customary international law, it acknowledged "that customary international law is not a 'static' body of law incapable of evolution or growth,"<sup>172</sup> and that it was possible for a norm of corporate liability to ripen.<sup>173</sup> This analysis

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166. *Id.*

167. *Id.*

168. *Id.* at 142-43 (citation omitted).

169. *Id.* at 148-49.

170. *Id.* at 149.

171. *Id.*

172. *Id.* at 141 n.43.

173. *Id.* at 149 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004)).

leaves the door open for the recognition and development of such a norm.

B. *Judge Leval: "The majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights."*<sup>174</sup>

Judge Leval, concurring in judgment only, wrote an opinion sharply critical of the majority's reasoning.<sup>175</sup> His opinion drew on a series of hypotheticals involving "extraordinarily abhorrent conduct"<sup>176</sup> to illustrate that the majority's opinion contains internal inconsistencies, and that its holding could have disastrous consequences in stagnating the progress of international human rights. Through his "parade of horrors," Judge Leval opined that under the majority's rule, gross violators of human rights, such as the operators of the Nazi extermination camps, could completely escape liability by incorporating.<sup>177</sup> Judge Leval warned that the majority rule gives corporations an incentive to exploit cheap labor, while providing a shield from any responsibility.<sup>178</sup> Judge Leval critiqued the majority's contention that corporate executives, but not the entity itself, could be held liable for human rights violations.<sup>179</sup> Judge Leval found this reasoning flawed on the basis that there is no universally accepted norm for tort liability in general—neither for individuals nor entities—thus, he argued, no right to tort damages could exist under ATS for natural persons either, which runs contrary to *Sosa* and existing precedent.<sup>180</sup>

Judge Leval distinguished the I.G. Farben case, relied on by the majority, on the grounds that Nuremberg was established to impose criminal, and not civil, sanctions on

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

175. *Id.*

176. *Id.* at 158-59.

177. *Id.* at 150.

178. *See id.* at 158-59.

179. *See id.* at 179.

180. *Id.* at 152.

offenders.<sup>181</sup> Thus, the fact that I.G. Farben's executives were tried for their exploitation of slave labor at the Nazi camps as individuals and not as a corporate entity was not dispositive on the issue of corporate civil liability.<sup>182</sup> Other historians have explained that Nuremberg did, in fact, intend to try corporations directly, and have suggested that the failure to do so was "a result of a combination of factors, including Allied interest in maintaining the German economic structure, the weariness of 'awakening legal concerns' with a somewhat controversial and novel legal move, and the evidentiary difficulties of prosecuting entities with complex structures."<sup>183</sup> This differing interpretation of the historical record illustrates the inherent flaw in the court's reliance on imperfect sources of international law to determine whether a claim can be brought in federal courts.

Judge Leval argued that the majority's reliance on the statutes of the international tribunals was flawed, because, to date, these tribunals have only focused on criminal punishment.<sup>184</sup> Rejecting the majority's contention that

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181. *Id.* at 155-56.

182. *Id.* at 155; see Tyler Giannini & Susan Farbstein, *Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights*, 52 HARV. INT'L L.J. ONLINE 119, 122 (2010), [http://www.harvardilj.org/2010/11/online\\_52\\_giannini\\_farbstein/](http://www.harvardilj.org/2010/11/online_52_giannini_farbstein/) ("The *Kiobel* majority misinterpreted the historical record by relying on I.G. Farben to support its assertion that because the corporate entity itself was not prosecuted criminally at Nuremberg, there is no international consensus that corporations can be held accountable for violations of international law. . . . Farben received the ultimate penalty when the Allied Control Council ordered it dissolved through Control Council Law No. 9. Thus, the example of I.G. Farben demonstrates that international law has long held corporate entities accountable for egregious violations in conflict zones." (citations omitted)); see also Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 364 (2008) ("[T]he growth of multinational corporations over the last twenty-five years, the manner in which they operate, and the lack of safeguards ensuring good corporate governance, justify and provide strong support for holding corporations liable under Nuremberg's standards.").

183. Ku, *supra* note 13, at 381-82 (citing Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1198-99 (2009)).

184. *Kiobel*, 621 F.3d at 163 (Leval, J., concurring).

there is no distinction between civil and criminal liability under international law, Judge Leval criticized the majority for comparing apples to oranges, particularly when our legal culture makes clear distinctions between civil and criminal law<sup>185</sup>: “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.”<sup>186</sup> Judge Leval contended that this distinction simply means that the international community has chosen not to punish corporations criminally because imposing criminal liability would fail to meet the objectives of criminal punishment.<sup>187</sup> It was logical, Judge Leval reasoned, that the international community would instead choose to impose civil liability on corporations—entities that would be better equipped to compensate victims, than individual defendants.<sup>188</sup> He reasoned that because “major instruments that codify the humanitarian law of nations define forms of conduct that are illegal under international law, and obligate States to take appropriate steps to prevent the conduct,” the international community did not *require* the availability of civil remedies.<sup>189</sup> As prior ATS case law has explained, “[w]hat is a crime in one jurisdiction is often a tort in another jurisdiction”<sup>190</sup>—international law does not draw clear distinctions between the two.

The judge argued that the majority’s rule would pervert the long-recognized jurisdiction of ATS over one of the eighteenth-century paradigms—piracy—by not allowing claims against the seizure of a vessel owned by a corporation, as corporate entities have neither a right to a

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185. *Id.* at 169.

186. *Id.* at 166.

187. *Id.* at 170.

188. *Id.*

189. *Id.* at 173-74 (footnote omitted).

190. *Doe I v. Unocal Corp.*, 395 F.3d 932, 949 (9th Cir. 2002).

remedy, nor an obligation under international law.<sup>191</sup> Similarly, said Judge Leval, corporations could commit acts of genocide without any civil liabilities.<sup>192</sup> Judge Leval suggested that the majority rule is nonsensical because the international community has no interest in advancing a rule that allows corporations to escape liability and no shared objective in recognizing it.<sup>193</sup>

The concurrence contended that there is no precedent for the majority's decision, relying on the string of prior caselaw involving ATS suits against corporations, in which the court did not pass on the merits of corporate liability under the statute.<sup>194</sup> Judge Leval relies on two Attorney General opinions—(1) a 1907 opinion that an American corporation could be liable under ATS to Mexican nationals for diversion of the waters of the Rio Grande,<sup>195</sup> and (2) a 1795 opinion by Attorney General William Bradford that a British corporation could pursue a civil action under the ATS for injury caused to it in violation of international law<sup>196</sup>—to conclude that there is precedent for corporate liability.<sup>197</sup>

Finally, Judge Leval interpreted footnote twenty of the *Sosa* opinion, which read 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,”<sup>198</sup> to imply that private actors and corporations were to be treated identically.<sup>199</sup> The majority had interpreted this language to mean that the two were to be treated differently.

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191. *Kiobel*, 621 F.3d at 156-57 (Leval, J., concurring).

192. *Id.* at 157.

193. *Id.* at 157.

194. *Id.* at 161 n.12.

195. *Id.* at 162 (citing Mexican Boundary—Diversion of the Rio Grande, 26 Op. Att’y Gen. 250, 253 (1907)).

196. *Id.* (citing Breach of Neutrality, 1 Op. Att’y Gen. 57, 59 (1795)).

197. *Id.*

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

199. *Kiobel*, 621 F.3d at 165 (Leval, J., concurring).

### III. THE SECOND CIRCUIT DENIES PANEL AND EN BANC REHEARING IN *KIOBEL*

On February 4, 2011, the Second Circuit further affirmed its decision in *Kiobel* when it denied appellants' petition for panel rehearing.<sup>200</sup> Yet, the court also split five-to-five as to whether to proceed to en banc rehearing.<sup>201</sup> Writing for the dissent to the denial for rehearing *en banc*, Judge Lynch wrote "the panel majority opinion is very likely incorrect as to whether corporations may be found civilly liable under the Alien Tort Statute."<sup>202</sup>

#### A. *Chief Judge Jacobs Opines Kiobel Arrived at a "Sound and Elegant" Decision*<sup>203</sup>

In the opinion denying panel rehearing, Chief Judge Jacobs and Judge Cabranes filed concurring opinions, and Judge Leval dissented. Calling Judge Cabranes's *Kiobel* opinion a "sound and elegant" one, Judge Jacobs criticized Judge Leval's opinion as being overly academic, and subjected it to "some tests of reality."<sup>204</sup> First, Chief Judge Jacobs points out that Judge Leval fails to address whether

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200. *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 269 (2d Cir.) (memorandum denying panel reh'g), *cert. granted*, 132 S. Ct. 472 (2011).

201. *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379, 380 (2d Cir.) (memorandum denying en banc reh'g), *cert. granted*, 132 S. Ct. 472 (2011). Chief Judge Jacobs concurred in the denial, and Judges Lynch, Pooler, Katzmann, and Chin all dissented. *Id.* Judge Raymond J. Lohier, Jr., an Obama appointee sworn in on February 4, 2011, did not vote on the petition for rehearing en banc. Second Petition for Re-Hearing *En Banc* For Plaintiffs-Appellants-Cross-Appellants at 2, *Kiobel*, 621 F.3d 111 (Nos. 06-4800-cv, 06-4876-cv). On February 17, 2011, appellants filed a second petition for en banc rehearing, contending that under the court's Internal Operating Procedure 35.1(b) all judges active on the date of entry of an en banc order, including Judge Lohier, were entitled to vote on the petition. *Id.* at 2-4. Appellants requested that Judge Lohier be polled, as his vote in favor of en banc rehearing would lead to an en banc decision. *Id.* This second petition, however, was denied on March 1, 2011. See Petition for Writ of Certiorari at 9, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. June 6, 2011).

202. *Kiobel*, 642 F.3d at 380 (en banc reh'g denial) (Lynch, J., dissenting).

203. *Kiobel*, 642 F.3d at 269 (panel reh'g denial) (Jacobs, C.J., concurring).

204. *Id.*

the remedy embodied in ATS is consistent with international law.<sup>205</sup> While the prohibition of a particular crime might rise to a level of international concern such that it becomes a CIL norm, Jacobs pointed out, there is no international consensus on the punishment.<sup>206</sup> Using international disagreement over the death penalty as an example, Jacobs cited to instances in which Europe has refused to extradite criminals to the United States that may face death row.<sup>207</sup> Judge Leval responded that, while international law does not specify the remedies for violations of CIL norms, it does give each nation the freedom to proscribe whichever remedy they wish.<sup>208</sup>

Chief Judge Jacobs contended that ATS litigation could be particularly divisive in the realm of foreign policy.<sup>209</sup> Referring to the courts' interpretation of ATS as "judicial imperialism," Chief Judge Jacobs raised concerns that other countries would be unreceptive to adjudicating these matters in foreign courts, as was the case in the post-Apartheid South African litigation.<sup>210</sup> Chief Judge Jacobs noted that each country has an economic stake in protecting and regulating the companies operating within its borders, and that this explains "why no international consensus has arisen (or is likely to arise) supporting corporate liability."<sup>211</sup>

Finally, Chief Judge Jacobs reasoned that because of *Talisman's* heightened mens rea standard,<sup>212</sup> it would be

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205. *Id.*

206. *Id.*

207. *Id.* ("The pirate is the enemy of all mankind and offends international norms that are universal among civilized countries; so the United States should have no trouble achieving extradition of a pirate. But if the remedy in this country entails capital punishment, one would soon see that other nations have a lively interest in the processes and remedies afforded under United States law, an interest apart from bare classification of piracy as a violative of a norm of customary international law.")

208. *Id.* at 277 (Leval, J., dissenting).

209. *Id.* at 270 (Jacobs, C.J., concurring).

210. *Id.*

211. *Id.*

212. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009).

difficult for cases against corporations to survive without proof that the corporate entity acted with the *intention* of violating CIL.<sup>213</sup> Thus, “[t]he incremental number of cases actually foreclosed by the majority opinion in *Kiobel* approaches the vanishing point.”<sup>214</sup> Instead, according to Chief Judge Jacobs, *Kiobel* has the effect of preventing ATS from becoming an instrument of extortion—i.e., preventing meritless claims brought under creative pleadings to proceed through discovery, or lead to coerced, multi-million dollar settlements.<sup>215</sup> Further, Chief Judge Jacobs raised concerns that the discovery process could reveal corporate strategy and trade secrets, and provoke “bad public relations or boycotts.”<sup>216</sup>

B. *Judge Leval Criticizes the Majority for Letting Policy Dictate Their Decision*

Judge Leval criticized Chief Judge Jacobs for allowing an “intense, multi-faceted policy agenda” to infiltrate his opinion.<sup>217</sup> He opined that it is not the role of the courts to adjudicate policy matters, and that many of Chief Judge Jacobs’s policy criticisms, while valid, apply to ATS litigation generally, instead of to corporations specifically.<sup>218</sup> Calling the majority’s opinion “substantial overkill,” Judge Leval reasoned that the categorical exemption of corporations from ATS suits is improper, and that the courts have gate-keeping machinery in place to prevent frivolous suits from proceeding to discovery, and to curtail excessive jury verdicts.<sup>219</sup> Judge Cabranes, the author of the underlying decision’s majority opinion, rejected Judge Leval’s accusations that the decision stems from policy choices; he reiterated that the majority’s decision was formed in accordance with *Sosa*, and that corporate liability

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213. *Kiobel*, 642 F.3d at 271 (Jacobs, C.J., concurring).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 272 (Leval, J., dissenting).

218. *Id.* at 273.

219. *Id.* at 274.

has simply not been defined as a “specific, universal, and obligatory” norm.<sup>220</sup>

Judge Leval repeated his warning that *Kiobel* incentivizes businesses to incorporate in order to shield themselves from liability.<sup>221</sup> While Chief Judge Jacobs opined that I.G. Farben was one of few companies in history that have engaged “in the atrocity business,”<sup>222</sup> Judge Leval responded that he did not share in this confidence that other companies would not utilize the protections provided by the corporate form.<sup>223</sup> Judge Leval referenced the fact that Somali pirates have organized into “limited, profit-sharing partnerships so as to secure investments in their operations,” and cited to the recent explosion in outsourcing of military operations to private contractors; *Kiobel* could allow these militaries to “contract their services to despots and others for the conduct of dirty business.”<sup>224</sup> Rejecting separation of powers and foreign policy arguments, Judge Leval called “Judge Jacobs’ reliance on his perception of the foreign policy of the United States . . . inappropriate . . . to justify far-reaching rulings that narrow the scope of the law of nations without any guidance from the departments of government.”<sup>225</sup> Judge Leval conceded that deference to opinions of the executive branch may be appropriate on a case-by-case basis, but noted that the Second Circuit “did not seek guidance from the Department of State” in *Kiobel*.<sup>226</sup>

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220. *Id.* at 272 (Cabranes, J., concurring) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

221. *See id.* at 275 (Leval, J., dissenting).

222. *Id.* (Jacobs, C.J., concurring).

223. *Id.* at 275 (Leval, J., dissenting).

224. *Id.* Some support for Judge Leval’s argument can be found in what Julian Ku refers to as the “third wave” of post-9/11 ATS litigation, in which alien plaintiffs have brought claims against the U.S. Government for its military’s anti-terrorism activities, alleging, inter alia, torture at its Guantanamo Bay and Abu Ghraib detention facilities. *See* Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT’L L. REV. 105, 110 (2005).

225. *Kiobel*, 642 F.3d at 276 (Leval, J., dissenting).

226. *Id.*

#### IV. OTHER CIRCUITS SUPPORT THE IMPOSITION OF CORPORATE LIABILITY

The courts that have ruled in favor of corporate liability have arrived at their decisions through several different analyses. The Eleventh Circuit, the first to recognize that corporations could be properly named as defendants in ATS suits, simply reasoned that there is no language in the statute expressly exempting corporations.<sup>227</sup> The Seventh<sup>228</sup> and D.C.<sup>229</sup> Circuits, however, found that while CIL defines the substantive causes of action, it does not define which parties could be properly sued under ATS. Further, these Circuits found support for corporate liability in the historical record. The Ninth Circuit, like the Eleventh, noted that nothing in the statute itself suggests a bar to suits against corporations.<sup>230</sup> The Ninth Circuit, however, found that determining whether a corporation could be sued under ATS involves a claim-by-claim inquiry into the scope of liability of private actors for each alleged violation—i.e., CIL may recognize corporate liability for one alleged violation, like genocide, but not for another, like racial discrimination.<sup>231</sup> Additionally, the splintered Ninth and D.C. Circuit opinions raised a bevy of new issues that were not addressed in *Kiobel*, such as the exhaustion of remedies, extraterritoriality, and universal jurisdiction. Specifically, the Ninth Circuit's feverish dissents called into question whether Congress intended the ATS to apply to activities that occur within a foreign country (extraterritorially), and whether ATS imposes liability on those who merely aid and abet the human rights violations of others.<sup>232</sup>

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227. *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

228. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1015-17 (7th Cir. 2011).

229. *See Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 75-76 (D.C. Cir. 2001).

230. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011).

231. *Id.* at 755-63, 768-70.

232. *See infra* Part IV.D. While there is an obvious interplay between corporate liability and aiding and abetting liability, it will not be addressed at length in this Comment.

A. *Romero v. Drummond Co.*

In *Romero v. Drummond Co.*, plaintiffs brought an action against Drummond, Ltd., a U.S. mining company, alleging that its president Augusto Jimenez, with the knowledge of U.S. corporate executives, hired paramilitaries to torture leaders of the Sintramienergetica union.<sup>233</sup> These claims were brought under both TVPA and ATS.<sup>234</sup> While the court affirmed the lower court's dismissal of the case on the basis of evidentiary and discovery issues, the court rejected the company's arguments that ATS and the TVPA do not permit suits against corporations.<sup>235</sup> Without much analysis, the court found:

Because the Alien Tort Statute is jurisdictional, we must address the argument of Drummond about corporate liability under that statute. The text of the Alien Tort Statute 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.<sup>236</sup>

The *Romero* court contended that it was bound by its decision in *Aldana v. Del Monte Fresh Produce*.<sup>237</sup> However,

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233. 552 F.3d 1303, 1309 (11th Cir. 2008). The violence at issue in the case takes place within the context a four-decade long Colombian civil war, and a right-wing paramilitary movement to suppress labor unions. Since the 1986 formation of the Central Unitaria de Trabajadores de Colombia, the largest trade union confederation in Colombia, over 4000 trade unionists have been murdered. Plaintiff's Complaint ¶ 2, *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) (No. CV-03-BE-0575-W), 2003 WL 24083752. U.S. corporations have previously been linked to anti-union violence in Colombia. Even more prominently, Coca-Cola came under scrutiny for its alleged role in anti-union activity. In *Sinaltrainal v. Coca-Cola Co.*, plaintiffs brought claims under ATS alleging that the Coca-Cola Company had conspired with armed groups in the murder of a local union leader that occurred inside a Coca-Cola bottling facility, as well as the torture and intimidation of other union leaders. 578 F.3d 1252 (11th Cir. 2009). The case was dismissed, and the Eleventh Circuit affirmed the district court's decision to dismiss the ATS claims on the basis that it failed under the *Twombly* pleading standard. *Id.* at 1268.

234. *Romero*, 552 F.3d at 1309.

235. *Id.* at 1314-15, 1324.

236. *Id.* at 1315 (internal citation omitted).

237. *Id.* at 1316 (citing *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 (11th Cir. 2005)).

while *Aldana* allowed ATS claims against corporations to proceed, the case did not directly address corporate liability.<sup>238</sup> While *Aldana* does, in fact, support *Romero*'s holding that TVPA was not the exclusive cause of action for a torture claim, and that bringing a claim under TVPA did not preclude bringing a claim of torture under ATS,<sup>239</sup> the case provides no analysis for why the court may recognize corporate liability under ATS.

B. *Doe VIII v. Exxon Mobil Corp.*

In *Doe VIII v. Exxon Mobil Corp.*, plaintiff-appellants alleged that Exxon retained members of the Indonesian Army to guard its natural gas facility, even though Exxon was aware that the army had committed human rights violations in the past, and knew their performance of the security contract would lead to human rights violations against the residents of Aceh.<sup>240</sup> In its lengthy 120-page opinion written by Judge Rogers, the majority ruled that ATS applied extraterritorially, and that "aiding and abetting liability is available under the ATS" for those defendants that meet the "knowledge" mens rea standard.<sup>241</sup>

In addressing corporate liability, the *Exxon* court first reasoned that CIL does not provide the rule of decision for determining whether corporate liability exists under ATS. The court opined that *Kiobel* erred in "conflat[ing] the norms of conduct at issue in *Sosa* and the rules for any remedy to be found in federal common law."<sup>242</sup> According to the court, *Sosa* only addressed the fact that the "substantive content of the common law causes of action that courts recognize in ATS cases must have its source in [CIL]."<sup>243</sup> While CIL "provides rules for determining whether international disapprobation attaches to certain types of

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238. *Aldana*, 416 F.3d at 1242.

239. *Id.* at 1250.

240. 654 F.3d 11, 15-16 (D.C. Cir. 2011).

241. *Id.* at 20.

242. *Id.* at 41.

243. *Id.*

conduct,” it does not provide rules for determining procedural obligations.<sup>244</sup> The court reasoned that the “technical accoutrements to the ATS cause of action” are “drawn from federal common law.”<sup>245</sup> Relying on the explanation of Professor Louis Henken, the court noted that: “International law itself . . . does not require any particular reaction to violations of law . . . . Whether and how the United States should react to such violations are domestic, political questions . . . .”<sup>246</sup> Thus, the fact that CIL provided no right of action to sue corporations did not establish corporate immunity under ATS. Further, *Kiobel*, said the court, misread footnote twenty of *Sosa* as establishing corporate immunity, when in actuality, the footnote merely referenced the dichotomy between international law as applied to state and non-state actors.<sup>247</sup> International law, the majority said, recognizes that “corporate legal responsibility is part and parcel of the privilege of corporate personhood.”<sup>248</sup>

The *Exxon* court reasoned that the historical underpinnings of ATS demonstrate that corporate liability is permissible.<sup>249</sup> In 1781, the Continental Congress adopted a Resolution that would be a “direct precursor of the [ATS],” requesting each state to establish remedies for violations of the law of nations.<sup>250</sup> One rationale for this Resolution, the court explained, had its basis in a case where Chevalier De Longchamps, a French citizen, assaulted Francis Barbe Marbois, a French Consul General in Philadelphia.<sup>251</sup> While De Longchamps was eventually prosecuted in Pennsylvania

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244. *Id.* at 43.

245. *Id.* at 51.

246. *Id.* at 42 (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 245 (2d ed. 1996)).

247. *Id.* at 50.

248. *Id.* at 53.

249. *Id.* at 26.

250. *Id.* at 44 (quoting Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 477 (1989)).

251. *Id.* at 44 (citing *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 111 (O.T. Phila. 1784)).

state court for a violation of the law of nations, the federal government “struggled to respond to an international incident over which [it] had no authority.”<sup>252</sup> Accordingly, “[t]he Judiciary Act of 1789 ensured that there would be no gap in federal subject matter jurisdiction with regard to torts in violation of treaties or the law of nations.”<sup>253</sup> Under this historical context, Judge Rogers reasoned that it would have been nonsensical for Congress to be “concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but [to be] content to allow formal legal associations of individuals, i.e., corporations, to do so.”<sup>254</sup> Further, the majority argued, corporate liability in tort was an accepted principle of tort law in the United States at the time that ATS was adopted.<sup>255</sup>

In his dissent, Judge Kavanaugh first opined that (1) ATS does not apply extraterritorily to violations that occurred in different nations; (2) the Second Circuit was correct in analyzing corporate liability under CIL, and no international tribunal had ever allowed a CIL claim against a corporation; (3) even if CIL provides for corporate liability under ATS, the application of ATS would be incongruent with the TVPA; and (4) plaintiff’s complaint should be dismissed based on the Executive Branch’s opinion that the suit would hinder foreign policy goals.<sup>256</sup>

Relying on the TVPA as evidence of congressional intent, the *Exxon* dissent noted that corporate liability under ATS was at odds with the congressional intent of the TVPA. Inasmuch as Congress specifically limited corporate liability under the TVPA by only authorizing recovery from *individuals* who engage in torture or extrajudicial killing “under actual or apparent authority, or color of law, of any foreign nation,”<sup>257</sup> Judge Kavanaugh said that ATS should,

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252. *Id.*

253. *Id.* at 45.

254. *Id.* at 47.

255. *Id.*

256. *Id.* at 72-74 (Kavanaugh, J., dissenting).

257. 18 U.S.C. § 1350 (1992).

likewise, provide neither corporate nor aiding and abetting liability.<sup>258</sup> Borrowing from *Sosa*, the dissent noted that it must look for “legislative guidance before exercising innovative authority over substantive law’ in ATS cases,”<sup>259</sup> and argued that the majority should look to the TVPA “when fashioning the contours of the famously vague ATS.”<sup>260</sup> If U.S. citizens are unable to recover against corporations for torture and extrajudicial killing, it would be “odd and incongruous to disregard those limits in defining when aliens may sue” for the same conduct.<sup>261</sup> Thus, the majority’s failure to consider the scope of the TVPA, reasoned Judge Kavanaugh, “produce[d] the rather bizarre outcome that *aliens* may sue corporations in U.S. courts for aiding and abetting torture and extrajudicial killing, but *U.S. citizens* may *not* sue U.S. corporations” for the same.<sup>262</sup> The majority conceded that the House Foreign Affairs Committee amended the TVPA to impose liability on “an individual,” instead of on “any person” as appeared in the initial draft of the bill.<sup>263</sup> Further, the majority noted that one congressional committee member had noted that the purpose of the amendment was to “make clear that the bill applie[d] to ‘individuals and not to corporations.’”<sup>264</sup> Nonetheless, said the dissent, the Committee’s actions in amending the TVPA—a statute intended to supplement the ATS—did not speak to the issue of corporate liability under ATS<sup>265</sup>—a statute “designed to afford greater jurisdictional protections to aliens.”<sup>266</sup>

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258. *Exxon*, 654 F.3d at 72, 85-88 (Kavanaugh J., dissenting).

259. *Id.* at 86 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004)).

260. *Id.* at 87.

261. *Id.* at 87.

262. *Id.* at 88.

263. *Id.* at 56 (majority opinion) (citing *The Torture Victims Protection Act: Hearing and Markup Before the H. Comm. on Foreign Affairs on H.R. 1417*, 100th Cong. 87-88 (1988)).

264. *Id.*

265. *Id.* at 85-87 (Kavanaugh, J., dissenting)

266. *Id.* at 56 (majority opinion).

C. *Flomo v. Firestone Natural Rubber Co.*

In a more concise, twelve-page opinion, decided just three days after *Exxon* on July 11, 2011, the Seventh Circuit rejected *Kiobel* and held that a corporation or any other non-natural person (in this case a limited liability company) could be held liable under ATS.<sup>267</sup> In *Flomo*, the plaintiffs sued the Firestone Natural Rubber Company, challenging its Liberian subsidiary's practice of allegedly utilizing hazardous child labor.<sup>268</sup> While the subsidiary did not directly employ children, "it set[ ] high daily production quotas" that were difficult for its employees to meet without help.<sup>269</sup> In order to meet this quota, the workers would often "dragoon their wives or children into helping them, at no monetary cost."<sup>270</sup>

The opinion, written by Judge Posner, began by discussing the difficulty of defining CIL norms, which have a "soft, indeterminate character,"<sup>271</sup> and noted that the future of corporate liability was left open in an "enigmatic footnote in *Sosa*."<sup>272</sup> Once again, addressing the much-contested I.G. Farben case, the court attacked "[t]he factual premise" of *Kiobel*, and noted that German corporations that assisted the Nazi war effort were dissolved by the Allied Powers under the authority of CIL, including I.G. Farben, whose assets were seized and made available for reparations.<sup>273</sup> The court acknowledged that corporations have rarely been prosecuted either criminally or civilly for violating CIL norms, but reasoned that this fact alone did not reflect "a desire to keep liability . . . within tight bounds by confining it to abhorrent conduct—the kind of conduct

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267. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1013 (7th Cir. 2011).

268. *Id.* at 1015.

269. *Id.* at 1023.

270. *Id.*

271. *Id.* at 1015 (quoting *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247-48 (2d Cir. 2003)).

272. *Id.* at 1017.

273. *Id.*

that invites criminal sanctions.”<sup>274</sup> It would have “seemed tepid,” said the court, to sue the Nazi war criminals in tort with such charges as intentional infliction of emotional distress, wrongful death, and battery, and thus, it was natural that a tradition would develop of punishing violations of CIL criminally.<sup>275</sup> Based on this rationale, the court reasoned that it was not significant that corporations “ha[d]n’t [previously] figured in prosecutions of war criminals and other violators of [CIL].”<sup>276</sup> Even if, the court reasoned, a corporation had *never* been punished for violating a CIL norm, there must “always [be] a first time for litigation to enforce a norm.”<sup>277</sup> The court went on to point out:

If a corporation complicit in Nazi war crimes could be punished criminally for violating [CIL], as we believe it could be, then *a fortiori* if the board of directors of a corporation directs the corporation’s managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation can be *civilly* liable.<sup>278</sup>

At the heart of the *Flomo* court’s argument was that *Kiobel* mistook *Sosa*’s mandate as a means of defining the *procedural* scope of ATS, instead of the means of defining the substantive scope of actionable CIL norms that it was intended to be. The court reasoned that “[i]f a plaintiff had to show that civil liability for such violations was *itself* a norm, . . . no claim under [ATS] could *ever be successful*” (because the United States is the only country that imposes civil liability).<sup>279</sup> It further reasoned that even if “the only actionable violations” of CIL were “acts so maleficent that criminal punishment would be an appropriate sanction for the actors,” it would still be proper to punish the actors with

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274. *Id.* at 1018.

275. *Id.*

276. *Id.* at 1019.

277. *Id.* at 1017.

278. *Id.* at 1019 (second emphasis added) (citing *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 170 (2010) (Leval, J., concurring)).

279. *Id.* (emphasis added).

civil sanctions for the same violations.<sup>280</sup> Citing a number of treaties that allow a country to elect alternative remedies to criminal liability, the court found that “[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them.”<sup>281</sup> Finally, the court noted that imposing liability on an entity that “does not breathe” is well-grounded in the precedent of parties obtaining in rem judgments against pirate ships.<sup>282</sup> While the court “satisfied [itself] that corporate liability is possible” under ATS, the court ultimately concluded that there was not an “adequate basis” to infer that the alleged child labor at the Firestone plantation violated a CIL norm.<sup>283</sup>

#### D. *Sarei v. Rio Tinto, PLC*

On October 25, 2011, the Ninth Circuit, in a lengthy en banc decision,<sup>284</sup> decided a number of ATS issues holding, inter alia, that (1) ATS liability may be applied

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280. *Id.*

281. *Id.* at 1020.

282. *Id.* at 1021 (citation omitted).

283. *Id.* at 1021, 1024.

284. *Sarei v. Rio Tinto, PLC*, No. 02-56256, 2011 WL 5041927, at \*1 (9th Cir. Oct. 25, 2011). The case has a rather complex procedural history. The Ninth Circuit’s most recent decision was the second time the case was heard by the en banc court. *Id.* In *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 825 (9th Cir. 2008), the court was divided on the issue of exhaustion of local remedies. On remand, the court gave plaintiffs the choice to either withdraw or to submit their claims to the two-step exhaustion process. *Sarei v. Rio Tinto, PLC*, 650 F. Supp. 2d 1004, 1032 (C.D. Cal. 2009). The plaintiffs withdrew a number of claims, and the only claims that remained for consideration in the subsequent (and final) appeal were plaintiffs’ claims for genocide, crimes against humanity, war crimes, and racial discrimination. *Rio Tinto*, 2011 WL 5041927, at \*1. Seven separate opinions were filed: (1) Judge Schroeder filed the en banc decision; (2) Judge Reinhardt filed a concurring opinion; (3) Judge Pregerson filed an opinion concurring in part and dissenting in part, in which Judge Rawlinson joined, (4) Judge McKeown filed an opinion concurring in part and dissenting in part, in which Judges Reinhardt and Berson joined; (5) Judge Bea filed an opinion concurring in part and dissenting in part, in which Judges Kleinfeld and Callahan joined and in which Judge Ikuta joined in part; (6) Judge Kleinfeld filed a dissenting opinion, in which Judges Bea and Ikuta joined; and, (7) Judge Ikuta filed a dissenting opinion in which Judges Kleinfeld, Callahan, and Bea joined. *Id.*

extraterritorially,<sup>285</sup> (2) corporations may be found liable under ATS,<sup>286</sup> (3) ATS does not bar “aiding and abetting liability,”<sup>287</sup> (4) there is “arising under” jurisdiction and courts may develop federal common law in such cases,<sup>288</sup> and (5) prudential exhaustion may be required in ATS cases.<sup>289</sup> In *Rio Tinto*, plaintiffs, current and former residents of the island of Bougainville in Papua New Guinea (“PNG”), brought suit against defendants Rio Tinto PLC and Rio Tinto Limited, a mining company.<sup>290</sup> Rio Tinto’s operations caused vast environmental damage, which led to an uprising against it in the late 1980s that resulted in the use of military force against citizens of PNG and many deaths.<sup>291</sup>

The majority, in an opinion written by Judge Schroeder, found that ATS, itself, is not a bar to corporate liability.<sup>292</sup> Like the *Exxon* dissent, the majority relied on the TVPA for support, concluding that while Congress explicitly rejected corporate liability under the TVPA, no such prohibition exists under ATS.<sup>293</sup> The majority’s interpretation of *Sosa*, however, differs radically from that of the D.C. and Seventh Circuit.<sup>294</sup> Under *Sosa*, the majority reasoned, the scope of

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285. *Id.* at \*4-5.

286. *Id.* at \*6.

287. *Id.* at \*7. Judge Pregerson dissented in part with the majority’s mens rea standard for aiding and abetting liability, opining that “knowledge that one is assisting unlawful activity is the applicable mens rea standard for aiding and abetting liability.” *Id.* at \*31 (Pregerson, J., concurring in part, dissenting in part).

288. *Id.* at \*13 (majority opinion).

289. *Id.* at \*14.

290. *See id.* at \*1.

291. *Id.*

292. *Id.* at \*6.

293. *Id.* (citing *Bowoto v. Chevron*, 621 F.3d 1116, 1126-27 (9th Cir. 2010)).

294. *Id.* at \*20. While the *Exxon* and *Flomo* courts both argued that the *Kiobel* majority misunderstood *Sosa*, and that corporate liability itself need not be a “specific, universal, and obligatory” norm under substantive law, they found that the determination of whether to impose liability was a matter of procedure to be derived from the federal common law. *See Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 43-53 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017-20 (7th Cir. 2011).

liability of private actors is specific to each cause of action asserted, i.e., to each alleged violation of a CIL norm.<sup>295</sup> “The proper inquiry, therefore, should consider separately each violation of international law alleged and which actors may violate it.”<sup>296</sup> The main question for the court in determining liability, then, was not whether there was an overall precedent for imposing liability on a particular actor, but whether “international law extends its prohibitions to the perpetrators in question.”<sup>297</sup> Recognizing that its opinion was in conflict with *Kiobel*, the court explained that given the fact that Congress could have never imagined the number of international institutions that exist today, and thus liability was not limited to “where international fora” had imposed it.<sup>298</sup>

Using this analysis, the majority first considered corporate liability for acts of genocide. The court looked to the Genocide Convention as evidence that the prohibition against genocide was a jus cogens norm, cognizable under ATS.<sup>299</sup> Further, under Article IX of the Genocide Convention, parties may submit disputes to the ICJ “relating to the responsibility of a State for genocide.”<sup>300</sup> The court determined that the International Court of Justice recognized a universal prohibition of genocide such that the commission of genocide violates international law whether committed by a state, an individual, or an “amorphous group.”<sup>301</sup> Based on this universal prohibition, the court reasoned, liability for genocide extends to corporations.

Next, the court found that the prohibition against war crimes as defined in Common Article III of the Geneva

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295. *Rio Tinto*, 2011 WL 5041927, at \*7.

296. *Id.*

297. *Id.* at \*20.

298. *Id.*

299. *Id.* at \*18-19.

300. *Id.* at \*19 (quoting Convention on the Prevention and Punishment of the Crime of Genocide art IX, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951)).

301. *Id.*

Convention<sup>302</sup> was a specific, universal, obligatory norm.<sup>303</sup> Relying on two district court cases<sup>304</sup> and the Eleventh Circuit's decision in *Sinaltrainal v. Coca-Cola Co.*,<sup>305</sup> the court determined that international law also extends the scope of liability to war crimes.<sup>306</sup> The court further determined that the alleged food and medical blockade did not constitute a crime against humanity because international law did not recognize such a blockade to be in violation of an internationally recognized norm.<sup>307</sup> The court noted that neither the ICTY nor ICTR referred to a deprivation of food and medicine, and that the Rome Statute included the deprivation of food and medicine but did not specifically mention a blockade.<sup>308</sup> In rejecting plaintiffs' racial discrimination claim, the court found that the Racial Discrimination Convention did not include a provision for "systemic" racial discrimination, and that the treaty itself had not been sufficiently enforced by the international community.<sup>309</sup>

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302. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Oct. 21, 1950, 75 U.N.T.S. 287.

303. *Rio Tinto*, 2011 WL 5041927, at \*23-24.

304. *Al Qurasishi v. Nakhla*, 728 F. Supp. 2d 702, 744 (D. Md. 2010) ("The Fourth Geneva Convention does not limit its application based on the identity of the perpetrator of the war crimes. Rather its protections arise based on who the potential victims are."); *In re Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 582 (E.D. Va. 2009) ("Claims for violators of the international norm proscribing war crimes are cognizable under the ATS.").

305. 578 F.3d 1252, 1263 (11th Cir. 2009) (noting that liability under the ATS has expanded to include corporations).

306. *Rio Tinto*, 2011 WL 5041927, at \*24-25. Additionally, the court found that "at least purposive action in furtherance of a war crime constitutes aiding and abetting that crime." *Id.* at \*25.

307. *Id.* at \*27-28.

308. *Id.* at \*27 (citing Rome Statute, *supra* note 161, art. 7(2)(b)). Judge Pregerson dissented finding that the food and medical blockade constituted murder and torture, and was therefore a crime against humanity. *See id.* at \*34-36 (Pregerson, J., concurring in part, dissenting in part).

309. *Id.* at \*28 (majority opinion) (citing International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969)). Judge Pregerson disagreed with the majority, finding that there was a *jus cogens* norm prohibiting systematic racial discrimination, and that the plaintiffs had

In affirming the majority's decision to impose ATS liability on corporations, Judge McKeown agreed that a norm-specific inquiry was the proper analysis but "rejected the notion that we must find an example of corporate liability in an international forum."<sup>310</sup> He noted that international criminal tribunals could "not be invoked as limiting factors regarding the capacity of defendants," as they impose criminal rather than civil liability.<sup>311</sup> He further opined that inasmuch as the two international prohibitions against genocide and war crimes are restricted in scope by the identity of the victim and not the actor, ATS liability for such violations extends to corporate actors.<sup>312</sup>

1. *Exhaustion of Remedies.* The Ninth Circuit is unique in reading an exhaustion requirement into ATS—a requirement that was not addressed by *Sosa* or *Kiobel*. In the *Rio Tinto* plurality's initial remand order, the plurality set forth a two-factor balancing test requiring the district court to weigh the following factors:

(1) [T]he strength of the nexus, if any between the United States and the acts and omissions alleged in the complaint—the less nexus, the more reason for exhaustion, and (2) the gravity of the violations alleged, namely whether the claims implicated 'matters of universal concern'—the more grave the violations, the less reason for exhaustion.<sup>313</sup>

If these factors weighed in favor of imposing an exhaustion requirement, the plurality opinion set out a two-part exhaustion test: "(1) [W]hether the foreign plaintiffs had local remedies where the alleged torts occurred and had exhausted them, and if not, (2) whether any exhaustion requirement is excused because local remedies are

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adequately alleged that it took place under the color of law, as required. *Id.* at \*36-37 (Pregerson, J., concurring in part, dissenting in part).

310. *Id.* at \*45 (McKeown, J., concurring in part, dissenting in part).

311. *Id.*

312. *Id.* at \*44. Judge McKeown found, however, that plaintiffs had not sufficiently stated claims for genocide and war crimes. *Id.* at \*46-47.

313. *Id.* at \*49 (Bea, J., concurring in part, dissenting in part) (citing *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008)).

ineffective, unobtainable, unduly prolonged, inadequate, or otherwise futile to pursue.”<sup>314</sup>

Judge Bea, joined by Kleinfeld and Callahan, concurred in part and dissented in part on the basis that the district court erred in applying the rules of “prudential exhaustion” and that the plaintiff was barred by the mandatory exhaustion provisions of the law of nations, which in his view required an exhaustion of local remedies.<sup>315</sup> Under the first prong of the plurality’s test, Judge Bea noted that the district court erred in finding a nexus, and that the only connection between the cause of action and the United States was that Rio Tinto did business in the United States.<sup>316</sup> Finding that the district court failed to properly implement the balancing test, Judge Bea was of the opinion that the case should be remanded.<sup>317</sup> The majority, however, found that the district court had not abused its discretion in this regard.<sup>318</sup> The majority opined that the universality of the norm alleged to be violated is a factor in determining whether exhaustion is required, and that even if a claim has a weak nexus to the United States, it may be allowed to proceed without the exhaustion of local remedies.<sup>319</sup> Likewise, the *Flomo* court rejected a similar argument that plaintiffs in ATS suits were required to exhaust all legal remedies in the nation in which the violation occurred, but conceded that for the purpose of international comity, a federal court might stay an ATS suit “in order to give the courts of the nation in which the violation occurred a chance to remedy it.”<sup>320</sup>

2. *Extraterritoriality and Universal Jurisdiction.* Judge Kleinfeld’s *Rio Tinto* dissent took an even stronger position against ATS, suggesting that there is no Article III

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314. *Id.* at \*50.

315. *Id.* at \*51-52.

316. *Id.*

317. *Id.* at \*53.

318. *Id.* at \*14 (majority opinion).

319. *Id.*

320. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011).

jurisdiction over claims between two aliens.<sup>321</sup> Instead, ATS was “promulgated to enable foreigners to sue for violations in America of a narrow set of norms, where failure to vindicate the wrongs might embroil our weak, new nation in diplomatic or military disputes.”<sup>322</sup> Noting that a respect for state sovereignty was at the heart of ATS, Kleinfeld reasoned that recent European attempts to assert universal jurisdiction over unpopular foreign officials accused of committing atrocities, including Spain’s failed attempts to prosecute U.S. executives for alleged war crimes in Guantanamo and Iraq, did not establish an international consensus for universal jurisdiction—particularly in civil cases.<sup>323</sup> Further, the dissent noted that there was a lack of clearly expressed affirmative congressional intent that ATS was meant to apply extraterritorially.<sup>324</sup> Relying on the *Morrison v. National Australia Bank Ltd.*<sup>325</sup> “bright line rule” and the *Charming Betsy* canon of construction,<sup>326</sup> the dissent noted that ambiguous statutes should be read as to “avoid unreasonable interference with the sovereign authority of other nations.”<sup>327</sup> ATS, reasoned Kleinfeld, only indicated what may constitute a tort but did not indicate *where* the tort was committed, and in the absence of clearly expressed congressional intent, foreign courts were not to “wield their swords in foreign countries for wrongs having nothing to do with their own country.”<sup>328</sup>

Using a slippery slope argument, Judge Kleinfeld argued that the courts’ exercise of ATS jurisdiction could open the door to suits against U.S. officials in foreign courts: “Once we release the genie of universal jurisdiction from the

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321. *Rio Tinto*, 2011 WL 5041927, at \*54 (Kleinfeld, J., dissenting).

322. *Id.*

323. *Id.* at \*58.

324. *Id.* at \*60-62.

325. 130 S. Ct. 2869, 2877 (2010).

326. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

327. *Rio Tinto*, 2011 WL 5041927, at \*61 (Kleinfeld, J., dissenting).

328. *Id.* at \*62.

bottle, we cannot control for whom the genie works its magic.”<sup>329</sup> Calling the majority’s exercise of ATS jurisdiction over the alleged violations that occurred in PNG—a small county of which the United States has no nexus—“judicial imperialism,” Judge Kleinfeld opined that ATS did not grant jurisdiction over claims committed “by foreign nationals in foreign countries against foreign nationals.”<sup>330</sup>

Similarly, in *Exxon*, Judge Kavanaugh also stated that the long-recognized presumption against extraterritoriality applied to ATS inasmuch as ATS gives no express indication that it applies outside the United States.<sup>331</sup> While the historical record provides evidence that the First Congress wanted to have jurisdiction over claims in which aliens were injured in the United States, Judge Kavanaugh believed that it provided no evidence that Congress was “concerned about remedying aliens injured in foreign lands.”<sup>332</sup> Since the purpose of ATS was to avoid foreign conflicts, it would be “very odd to think that Congress of 1789 wanted to create a French tort cause of action enforceable in U.S. court for, say, a Frenchman injured in London.”<sup>333</sup>

Beyond the fact that ATS was not meant to apply extraterritorially, Judge Kavanaugh reasoned that “something is palpably awry in the modern ATS litigation juggernaut”<sup>334</sup> as ATS cases actually “engendered conflict with other sovereign nations.”<sup>335</sup> The dissent noted the Indonesian government’s objection to the *Exxon* suit, the South African government’s objection to post-Apartheid ATS litigation, and PNG’s objection to the *Rio Tinto* suit.<sup>336</sup> In his opinion, however, applying ATS on the high seas did

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329. *Id.* at \*66.

330. *Id.* at \*67-68.

331. *Doe VIII v. Exxon Mobil Corp.*, 645 F.3d 11, 75-76 (D.C. Cir. 2001) (Kavanaugh, J., dissenting).

332. *Id.* at 77.

333. *Id.*

334. *Id.* at 78.

335. *Id.* at 77.

336. *Id.* at 77-78.

not pose the risk of conflict, as confirmed by earlier cases that applied ATS to this type of conduct.<sup>337</sup>

The *Rio Tinto* majority “categorically rejected the argument that ATS applies only to torts committed in this country,”<sup>338</sup> noting that the issue had been previously addressed in *In re Estate of Ferdinand E. Marcos Human Rights Litigation* and that ATS “shows on its face: no limitations on citizenship of the defendant, or the locus of the injury.”<sup>339</sup> The majority found the dissenting judge’s reliance on *Morrison* misplaced as that case ruled that section 10(b) of the Securities Exchange Act of 1934 did not apply to securities transactions conducted in other nations, and did not address ATS claims.<sup>340</sup> Judge McKeown agreed that claims under the law of nations encompass extraterritorial conduct.<sup>341</sup> Analogizing ATS jurisdiction to federal question jurisdiction, McKeown’s concurrence noted that the proper inquiry is not whether the statute itself extends extraterritorially, but whether the cause of action does.<sup>342</sup> ATS, reasoned Judge McKeown, “cabins the source of the cause of action by reference to ‘the law of nations,’”<sup>343</sup> and given this international focus, it is clear that Congress intended the statute to apply both to conduct occurring in and out of the United States.<sup>344</sup> The *Flomo* court also rejected defendant’s argument that ATS has no extraterritorial application, reasoning that the *Sosa* case centered on “nonmaritime, extraterritorial conduct,” and

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337. *Id.* at 78.

338. *Sarei v. Rio Tinto, PLC*, No. 02-56256, 2011 WL 5041927, at \*3 (9th Cir. Oct. 25, 2011).

339. *Id.* (quoting *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 499-501 (9th Cir. 1992) (considering an ATS case based on torture that took place in the Philippines, and finding that ATS could be used extraterritorially)).

340. *Id.* at \*4.

341. *Id.* at \*38 (McKeown, J., concurring in part, dissenting in part).

342. *Id.*

343. *Id.* at \*38.

344. *Id.* at \*39.

that if the statute was not meant to apply extraterritorially, it would be “superfluous.”<sup>345</sup>

3. “*Arising Under*” *Jurisdiction*. Similar to the argument that ATS does not apply extraterritorially, Judge Ikuta’s *Rio Tinto* dissent opined that federal courts only have jurisdiction over suits between an alien and a citizen.<sup>346</sup> Article III judges, Judge Ikuta said, only have jurisdiction over (1) cases “arising under” the “laws of the United States”; (2) cases relating to a specific subject matter; and (3) cases relating to specific parties, such as those affecting ambassadors.<sup>347</sup> According to Judge Ikuta, because international law is not part of the “Laws of the United States,” and ATS is a “purely jurisdictional” statute that does not create a body of substantive law, a claim arising between two foreigners did not fit into any of three jurisdictional categories.<sup>348</sup> Judge Ikuta opined that *Sosa*’s silence on the jurisdictional issue could not be read as an endorsement; rather, the Court in *Sosa* had no reason to address the Article III issue because the tort claims in that case “shared a common nucleus of operative fact with plaintiff’s original and jurisdictionally unproblematic claims.”<sup>349</sup> Judge Ikuta contended that inasmuch as ATS did not create substantive federal law and that the historical evidence suggested that Congress purposefully omitted “the law of nations” from the scope of Article III power, ATS was only intended to allow the courts to hear claims brought by aliens against citizens.<sup>350</sup> The majority dismissed Judge Ikuta’s contention, noting that the “common law” had changed dramatically after *Erie*,<sup>351</sup> and that ATS cases

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345. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011).

346. *Rio Tinto*, 2011 WL 5041927, at \*68 (Ikuta, J., dissenting).

347. *Id.* at \*69.

348. *Id.* at \*69-70.

349. *Id.* at \*69, \*79-80.

350. *Id.* at \*69.

351. *Id.* at \*8-9 (majority opinion) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

“arise under” the “laws of the United States.”<sup>352</sup> The court “read *Sosa* to permit courts to develop federal common law by incorporating into it certain claims that derive from norms of international law—but only after determining that they meet the *Sosa* standards.”<sup>353</sup>

#### V. EXTRATERRITORIAL APPLICATION OF ATS: THE JUSTICES WEIGH IN

While the issue of extraterritoriality was not addressed in *Kiobel*, the Supreme Court, prompted by Judge Kavanaugh and Judge Kleinfeld’s opinions, focused heavily on the issue at the February 28, 2012 oral arguments.<sup>354</sup> Justice Kennedy immediately set the tone for the argument, asking attorney for the Petitioners, Paul Hoffman, if Petitioners could refute the proposition raised in an amicus brief that: “No other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection.”<sup>355</sup> Justice Alito asked if a similar case could be brought in “[a]ny other country other than the country of the citizenship of the defendants.”<sup>356</sup> Chief Justice Roberts went further, asking, “if there is no other country where this suit could have been brought, regardless of what American domestic law provides, isn’t it a legitimate concern that allowing the suit itself contravenes international law?”<sup>357</sup>

Justice Alito, noting that the case involves twelve Nigerian plaintiffs alleging violations committed against them by a foreign dictatorship in Nigeria, asked: “What . . . business does a case like that have in the courts of the

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352. *Id.* at \*13.

353. *Id.* at \*10.

354. Transcript of Oral Argument, *supra* note 9.

355. *Id.* at 3-4 (quoting Brief of Chevron Corporation et al. as Amici Curiae in Support of Respondents at 6, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 3, 2012)).

356. *Id.* at 7.

357. *Id.* at 8.

United States?”<sup>358</sup> Drilling into the extraterritoriality problem, Justice Alito asked: “Do you really that think the first Congress wanted victims of the French Revolution to be able . . . to sue French defendants in the courts of the United States?”<sup>359</sup>

Referencing the legislative intent of “preventing international tension,”<sup>360</sup> Alito noted that the case had “no connection to the United States whatsoever” and that “this kind of a lawsuit only creates international tension.”<sup>361</sup> Justice Kennedy distinguished *Filartiga* from *Kiobel* noting that the *Filartiga* victims and the defendant had a residence in New York, while “[i]n this case, the corporations have residences and presence in many other countries where they have . . . many more contacts than here.”<sup>362</sup> Finally, Justice Breyer, in questioning Deputy Solicitor General Edwin S. Kneedler, arguing on behalf of the United States as amicus curiae, pointed out that there is no “United States Supreme Court of the World.”<sup>363</sup>

After hearing arguments, the Court ordered that the case be rebriefed and reargued to encompass the broader extraterritoriality issue.<sup>364</sup> It is likely that this issue will be pivotal to the Court’s ultimate decision.

## VI. RECONCILING THE CIRCUIT SPLIT

It is difficult to reconcile the circuit split, as there is internal discord within the *Kiobel*, *Exxon*, and *Rio Tinto* panels. The Eleventh Circuit seems to have arrived at its conclusion simply on the basis that it could not find any

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358. *Id.* at 11.

359. *Id.* at 12.

360. *Id.*

361. *Id.*

362. *Id.* at 13-14.

363. *Id.* at 23.

364. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Mar. 5, 2012) (memorandum restoring case to calendar for reargument).

express prohibition against corporate liability.<sup>365</sup> Since the *Romero* decision, however, the other circuits have found support for corporate liability within both international law and the statute's historical record.<sup>366</sup> There appears to be an ideological split over whether the imposition of liability is a matter of substantive law, as the *Kiobel* majority and Ninth Circuit have found, or procedural law and remedy, as argued by the Seventh and D.C. Circuits. At oral argument, reflecting the latter interpretation, Justice Kagan stated: "[T]he question then is, can one hold the corporation responsible for that tort? And that seems to be a question of enforcement, of remedy; not of substantive international law."<sup>367</sup> Justice Kennedy asked if Respondent was "conced[ing] away too much" by "say[ing] well there's a difference in substance . . . and remedy questions of jury trial, damages, and so forth. That's domestic."<sup>368</sup> Kathleen M. Sullivan, counsel for the Respondent, argued that the second step in *Sosa* provided a "second screen" and that:

[E]ven if international law had provided any source of corporate liability, which it does not, you would still have to ask—footnote 30 of *Sosa* says it's a higher bar—should Federal common law . . . now embrace these kinds of actions? And the answer is "no." Even if you found this were a question of domestic remedy, we think you cannot. This is a question of substance. But even if this were a question of—domestic remedy, you should not find liability for corporations . . . .<sup>369</sup>

As noted by the Seventh Circuit in *Flomo*, if anything, the Circuit's differing interpretation of *Sosa*'s mandate highlights the "conspicuous" problems inherent in ATS:

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

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365. See *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) (holding that ATS does not provide an exception for corporations).

366. See *supra* Part IV.

367. Transcript of Oral Argument, *supra* note 9, at 30.

368. *Id.* at 41.

369. *Id.* at 42.

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.<sup>370</sup>

The Supreme Court must determine which court correctly applied the *Sosa* guidelines to their analysis, and whether *Sosa* actually requires that corporate liability itself be a well-established norm in the law of nations.

The recent caselaw suggests a level of judicial activism that Professor Julian Ku argues leaves the courts to resort to gap-filling:

Harmless but seemingly useful gap-filling has and will tempt U.S. courts as they further develop the standards of private corporation liability under customary international law. Judicial pronouncements on veil-piercing for foreign corporations and their subsidiaries, enterprise liability, and standards for determining corporate intent will all be justified and explained as gap filling.<sup>371</sup>

This practice of judicial development and recognition of new standards of international law is inconsistent with *Sosa*’s instructions to exercise caution in developing new causes of action. As John B. Bellinger III, former legal advisor to the State Department argues: “[T]he development of the scope of the ATS has largely been left to litigants and the courts, without formal involvement from Congress and largely contrary to the views of the Executive.”<sup>372</sup> To be clear, *Kiobel* in no way alleviates corporations of their social and moral responsibilities, nor does it advocate that corporations should commit, aid, or turn a blind eye to the commission of flagrant human rights violations. However, it is reasonable for Congress to clarify the scope of ATS, instead of requiring that the judiciary rely on gap-filling.

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

371. Ku, *supra* note 13, at 391-92.

372. John B. Bellinger III, Lecture, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT’L L. 1, 2 (2009).

Congress should define the scope of ATS liability and the causes of action encompassed under the law of nations.

A. *Should Corporations Face Tort Liability for Human Rights Violations? The Debate*

The debate over corporate liability under ATS rages on in corporate boardrooms, academic circles, NGOs, and the courts. These arguments, while some are novel, have been repeated again and again since *Filartiga*. Proponents of corporate liability argue that it is inherently unfair to recognize corporations as having rights, but at the same time, seek to immunize them from liability for failing to exercise their duties.<sup>373</sup> Human rights groups hope that this impact litigation will attempt to foster corporate accountability and raise public awareness of violations taking place against corporate employees and third world citizens.<sup>374</sup> Critics argue that the pursuit of an ATS verdict is a fruitless act—cases have rarely proven successful and judgments are often difficult to collect.<sup>375</sup> Alternatively, human rights activists argue that corporations have the deep-pockets needed to compensate victims, and that ATS provides one of the only forums where victims can seek retribution.<sup>376</sup> The debate encompasses policy and fiscal concerns, as much as it includes debates over the true scope of the statute.

One common argument against the imposition of corporate liability is that it would prevent corporations from expanding their businesses into regions with substandard

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373. See Harold Hongju Koh, *Separating Myth From Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 265 (2004); see also *Flomo*, 643 F.3d at 1020 (“American corporations that have branches in backward or disordered countries may be incapable of preventing abuses of workers in those countries by their employees.”).

374. See Paul Magnusson, *Legal Settlements: A Milestone for Human Rights*, BUS. WK., Jan. 24, 2005, at 63, 63.

375. See, e.g., Philip A. Scarborough, Note, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 459 n.16 (2007).

376. See *id.* (“[C]orporations are attractive ATS defendants because there is a real possibility of financial recovery on any judgment (or settlement) that might be obtained.”).

human rights practices—regions where resources are abundant, and the economic climate is favorable to profit-maximizing—because companies operating in these locations would fear being subject to liability for the activities it cannot directly control.<sup>377</sup> Judge Leval criticized this argument that, stating: “The shoemaker of Hitler’s shoes should not be held responsible for Hitler’s atrocities, even if the shoemaker knows that a pair of shoes will help Hitler accomplish his horrendous agenda.”<sup>378</sup> Judge Posner, rather biting, addressed the same argument:

One of the amicus curiae briefs argues seemingly not tongue in cheek, that corporations shouldn’t be liable under [ATS] because that would be bad for business. That may seem both irrelevant and obvious; it is irrelevant, but not obvious. Businesses 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.<sup>379</sup>

At the *Kiobel* oral argument, Justice Breyer posed a similar hypothetical to Respondent:

Do you think in the 18th century if they'd brought Pirates, Incorporated, and we get all their gold, and Blackbeard gets up and he says, “Oh, it isn't me; it's the corporation!” Do you think that they would have then said, “Oh, I see, it's a corporation. Goodbye. Go home.”<sup>380</sup>

Referencing *Talisman*’s heightened mens rea standard requiring corporations to act with the purpose of promoting another violator’s activities in order to be liable, the *Kiobel* concurrence sought to prove that the chain of liability would not be so attenuated as to cause undue hardship on

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377. See, e.g., GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, INST. FOR INT’L ECONS., AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, at 40 (2003). But see Koh, *supra* note 373, at 269 (“[P]laintiff[s] need[ ] to show much, much more than simply that the multinational enterprise has chosen to invest in a ‘troublesome country.’”).

378. *Kiobel v. Royal Dutch Petroleum Co.*, 611 F.3d 111, 158 (2d Cir. 2010) (Leval, J., concurring).

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

380. Transcript of Oral Argument, *supra* note 9, at 25-26. Ms. Sullivan responded: “[Y]es, the corporation would not be liable.” *Id.* at 26.

corporations.<sup>381</sup> The *Flomo* court, similarly, criticized that this argument was not an “objection to corporate civil liability,” but rather to its scope.<sup>382</sup> In declining to define how far corporate vicarious liability extends under ATS, Judge Posner noted that the plaintiffs conceded that liability extends only to “violations that are directed, encouraged, or condoned at the corporate defendant’s decision-making level.”<sup>383</sup> Critics worry that the corporation as a whole may be hauled into court when these subsidiaries commit human rights violations, even if the parent corporation had no knowledge and did not consent to such violations.<sup>384</sup> While pro-business groups have contended that *Kiobel* will discourage investment in foreign markets,<sup>385</sup> human rights activists have criticized the Second Circuit for creating “perverse incentives for actors in conflict zones to collude with one another at the expense of human rights protections for civilians and communities.”<sup>386</sup>

Another major concern by pro-business groups and the executive branch is the effect ATS litigation has on foreign

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381. See *Kiobel*, 611 F.3d at 154, 157-58 (Leval, J., concurring).

382. *Flomo*, 643 F.3d at 1021.

383. *Id.*

384. See, e.g., Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT’L L. & POL’Y 119, 132-33 (2007).

385. Brief of Chamber of Commerce of the United States of America as Amicus Curiae in Support of Defendants-Appellees/Cross-Appellants, *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (Nos. 02-56256, 02-56390, 09-56381), 2009 WL 8174962, at \*1 (arguing that corporate ATS litigation “threatens to deter cross-border business activity that is beneficial both to Americans and to the citizens of other nations”); Brief of Amicus Curiae the Federation of German Industries in Support of Defendants-Appellees/Cross-Appellants Seeking Reversal of District Court Decision at 2, *Sarei v. Rio Tinto, PLC*, 671 F.3d 73 (9th Cir. 2011) (Nos. 02-56256, 02-56390, 09-56381), 2009 WL 5538942 (“Because the willingness of companies to invest abroad hinges critically on identifying, measuring, and limiting risk, German industry has a substantial interest in ensuring that U.S. federal courts respect a foreign nation’s ability to regulate its own affairs. German companies have long operated pursuant to self-imposed good-governance guidelines and consistent with all domestic and international legal requirements governing their foreign investment and related business operations.”).

386. Giannini & Farbstain, *supra* note 182, at 132.

affairs.<sup>387</sup> The Bush administration submitted amicus briefs, statements of interest, and letters in a number of ATS cases involving corporate liability that proved to be influential in having these cases dismissed.<sup>388</sup> In Judge Kavanaugh's *Exxon* dissent, he noted that the Department of State opposed the litigation, stating that it would hinder anti-terrorism efforts and the promotion of human rights in Indonesia, and could affect the Indonesian economy at the detriment of U.S. interests.<sup>389</sup> The majority noted that the Government did not request dismissal of the case and that the district court had granted substantial weight to U.S. concerns such that the adjudication of the case would not impede foreign relations.<sup>390</sup> The *Rio Tinto* court dismissed defendants' argument that the case was barred by the political question doctrine, noting that the Department of State no longer believed that the litigation would adversely impact reconciliation in the war between PNG and Bougainville.<sup>391</sup> Further, the majority found that the court's consideration of the exhaustion requirements alleviated any concerns that plaintiffs' claims were barred by the political comity doctrine: "It is out of that very spirit of cooperation

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387. This argument was echoed in footnote twenty-one of *Sosa* and in Judge Bork's *Tel-Oren* concurrence. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 744, 801-02 (D.C. Cir. 1984) (Bork, J., concurring).

388. See *Bellinger*, *supra* note 372, at 12; see also DAVIS, *supra* note 13, at 140 ("Another factor driving the Bush Administration's stringent opposition in ATS cases is its fear that administration officials may be sued in U.S. courts or in the courts of other nations."); *c.f.* Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773, 809 (2008) ("In a remarkable break from recent history, the courts have rejected a significant number of Bush administration suggestions that corporate-defendant ATS cases endanger U.S. foreign policy. A close look at those cases makes clear that the shift is not the result of a change in the way the courts have exercised their authority, but rather a judicious recognition that the Bush administration views are unreasonable, and therefore undeserving of deference.").

389. *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 89 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

390. See *id.* at 61, 64 (majority opinion).

391. See *Sarei v. Rio Tinto, PLC*, No. 02-56256, 2011 WL 5041927, at \*14 (9th Cir. Oct. 25, 2011).

and deference to tribunals in other nations [i.e. comity] that we held exhaustion may be a prudential bar to certain” ATS claims.<sup>392</sup>

The Obama administration, on the other hand, has come out in support of corporate liability under ATS. In its amicus brief, the Government noted it was “not aware of any international-law norm of the sort identified in *Sosa* that distinguishes between natural and juridical persons.”<sup>393</sup> Further, it took a similar approach as *Flomo* and *Exxon* arguing that corporate liability under ATS “should be determined as a matter of federal common law.”<sup>394</sup> Additionally, like the *Rio Tinto* court, the Government argued that the court must conduct a “norm-by-norm assessment to determine whether the actor being sued is within the scope of the identified norm.”<sup>395</sup> Further, the Government contended that neither the text and history of ATS nor the “legal culture” of the United States provided a basis for rejecting corporate personhood under ATS.<sup>396</sup>

Human rights activists caution that the courts’ (and the former Bush administration’s) opposition to corporate liability perpetuates the stereotype that the United States holds the world to a higher standard than itself, and that it “is unwilling to sacrifice the narrow economic interests of a few U.S. multinationals in order to protect human rights by placing even modest limits on their actions abroad.”<sup>397</sup> The

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392. *Id.* at \*16.

393. Brief for the United States as Amicus Curiae Supporting Petitioners at 7, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Dec. 21, 2011), 2011 WL 6425363, at \*7.

394. *Id.* at 15.

395. *Id.* at 18.

396. *Id.* at 7.

397. Richard L. Herz, *The Liberalizing Effect of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 230 (2008); see Brief of Amici Curiae U.S. Diplomats in Support of Plaintiffs-Appellants at 23, *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (Nos. 02-56256, 02-56390, 09-56381), 2010 WL 5780095, at \*23 (“When U.S. companies operate overseas, their actions reflect upon the United States as a whole. Our standing as a world leader and our commitment to human rights are diminished if we fail to hold accountable those who are complicit in human rights violations.”).

United States has not ratified an international human rights treaty since its December 2002 ratification of the Convention on the Rights of the Child's two optional protocols.<sup>398</sup> However, as Judge Jacobs stated, there is no "consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them—and to beggar them by rendering theirs assets into compensatory damages, punitive damages, and (American) legal fees."<sup>399</sup> Thus, it is also said that the concept of ATS, itself, makes the United States, with its far from perfect human rights record, a hypocrite, in that its courts judge the actions of noncitizens, and the human rights records of other countries.<sup>400</sup>

B. *Courts Should Continue to Construe ATS Narrowly Until Congress Speaks to the Issue*

Despite its "posted . . . warning signs against judicial innovation,"<sup>401</sup> *Sosa* gave the courts an unusually broad mandate to interpret international law<sup>402</sup> and unilaterally define the scope of ATS. Since the scope of ATS has expanded exponentially from its application to the eighteenth-century paradigms and since members of the

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398. HUMAN RIGHTS WATCH, UNITED STATES RATIFICATION OF HUMAN RIGHTS TREATIES 1 (2009), available at <http://www.hrw.org/en/news/2009/07/24/united-states-ratification-international-human-rights-treaties>.

399. *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 270 (2d Cir. 2011).

400. *Bellinger*, *supra* note 372, at 2 ("ATS has given rise to friction, sometimes considerable, in our relations with foreign governments, who understandably object to their officials or their domestic corporations being subjected to U.S. jurisdiction for activities taking place in foreign countries and having nothing to do with the United States.").

401. *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810, 814 (S.D. Ind. 2010).

402. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 743, 747 (2004); see also *Ku*, *supra* note 13, at 391 (arguing that the courts misunderstand the conceptual distinction between CIL and treaty-based international law, and the court's over-reliance on domestic cases, in lieu of foreign caselaw, make it difficult to accurately satisfy *Sosa's* "universality" requirement).

First Congress were unfamiliar with the corporate entity, it is logical that some judges have strived to interpret ATS narrowly. Neither courts nor academics have been able to arrive at a consensus on whether corporate liability is a CIL norm. Both *Kiobel* and *Rio Tinto* follow logically from *Sosa*'s mandate to exercise caution in recognizing new causes of action, and to limit this recognition to discernable, universal norms of CIL.<sup>403</sup> While leaving it up to the courts to interpret CIL on a case-by-case basis, *Sosa* cautioned: "[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms."<sup>404</sup> Alternatively, the *Flomo* and *Exxon* courts present a radically different, but logical approach to defining *which actors* can be sued. Nonetheless, the congressional and historical records shed little light on whether the First Congress intended to define both the causes of actions and defendants under ATS through CIL or if it intended federal common law to define which parties could be properly sued.

While *Sosa* paved the way for innovative enforcement of human rights norms, it also opened a Pandora's box—granting the judiciary unfettered discretion over ATS claims and vesting in federal judges, who deal almost entirely with domestic law, the difficult task of interpreting an amorphous body of soft law. Aside from the obvious and demonstrated difficulties in interpreting international law, recent ATS case law has highlighted the inherent difficulty in making factual determinations. Judge Kleinfeld's *Rio Tinto* dissent noted that "judicial decisions on entirely foreign matters are likely to be mistaken because of the inadequate reliability of factual determinations."<sup>405</sup>

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403. See *Sosa*, 542 U.S. at 727-28. But see Joel Slawotsky, *Corporate Liability in Alien Tort Litigation*, 1 VA. J. INT'L L. ONLINE 27, 42 (2011) [http://www.vjil.org/assets/pdfs/vjilonline1/1/Slawotsky\\_Post-Production\\_.pdf](http://www.vjil.org/assets/pdfs/vjilonline1/1/Slawotsky_Post-Production_.pdf) ("There is an absence of support for opining that *Sosa* mandates an examination of international law to determine whether corporations may have liability.").

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

405. *Sarei v. Rio Tinto, PLC*, No. 02-56256, 2011 WL 5041927, at \* 66 (9th Cir. Oct. 25, 2011) (Kleinfeld, J., dissenting).

Kleinfeld illustrated that immense language and cultural barriers can lead to an overreliance on anthropological experts and give jurors the impossible task of judging what is right or wrong in a country operating within radically different historical, legal, and moral paradigms: “The incapacity of American courts to ascertain facts about what foreigners did to foreigners in a foreign land, combined with the amorphousness of the general principles of law to be applied, can only lead to unreliable, unpredictable, and unjust results.”<sup>406</sup>

The courts’ and various scholars’ alternative interpretations of the Nuremberg Tribunal’s decision to forego prosecution of the I.G. Farben company is just one example of the problems that may arise when judges are given the lofty task of interpreting and defining norms of international law. Neither historians nor judges have been able to arrive at a consensus for why I.G. Farben escaped punishment, when its exploitation of concentration camp labor and production of deadly chemicals played a direct role in the deaths of Holocaust victims.<sup>407</sup> The *Kiobel* majority interpreted this choice as an express rejection of corporate liability under international law.<sup>408</sup> The majority noted that while twenty-four I.G. Farben executives were tried for their role in the Holocaust, the corporation was neither charged nor named in the indictment.<sup>409</sup> A group of Nuremberg Scholars, composed of academicians from law, history, and political science, filed an amicus brief in *Flomo* arguing that the factual premise of *Kiobel* was inaccurate.<sup>410</sup>

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406. *Id.*

407. See Ku, *supra* note 13, at 381-82; see also Gianinni & Farbstein, *supra* note 182, at 121 (“The I.G. Farben example clearly illustrates that the international system can regulate corporate actors operating in conflict zones.”).

408. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 134 (2d Cir. 2010).

409. *Id.* at 134-35.

410. See Brief of Amici Curiae Nuremberg Scholars Omer Bartov et al. in Support of Plaintiffs-Appellants Seeking Reversal at 1, *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011) (No. 10-3675), 2011 WL 2452311, at \*1.

Both the *Flomo* and *Exxon* courts noted that I.G. Farben was ordered dissolved and made to pay reparations.<sup>411</sup>

At oral argument before the Supreme Court in *Kiobel*, Ms. Sullivan argued for the Respondent that Nuremberg established the concept of holding *individuals* liable for human rights violations.<sup>412</sup> In response, Justice Ginsburg, noting that Nuremberg dealt with criminal and not civil liability, asked: “What happened to I.G. Farben? I thought it was dissolved and its assets taken.”<sup>413</sup> Ms. Sullivan replied that “when I.G. Farben was dissolved, it was part of denazification, decartelization, and the destruction of the Nazi war machine of which I.G. Farben was an integral part.”<sup>414</sup> The fact that the debate over the I.G. Farben case has been so prominent in ATS case law and recent literature<sup>415</sup> is an indicator of the uncertain nature of corporate ATS litigation in the post-*Sosa* era. As Judge Posner conceded, “the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges.”<sup>416</sup> If courts continue to be empowered to interpret sources of international law and conflicting historical records, with no congressional intervention, ATS jurisprudence will remain inconsistent.

Judge Kleinfeld’s *Rio Tinto* dissent highlights the problem of attempting to interpret a statute that lay dormant for almost 200 years without additional congressional guidance:

Congress has never given us “a clear mandate” for the wrongs alleged in the [plaintiffs’] complaint before us [e.g. war crimes, genocide, racial discrimination]. *Sosa* did not open the door to our unconsented entry. The Court suggested that there may be some international norms that violate the law of nations in addition to

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411. *Flomo*, 643 F.3d at 1017; *Doe VIII v. Exxon Mobil*, 654 F.3d 11, 52 (D.C. Cir. 2011).

412. Transcript of Oral Argument, *supra* note 9, at 35.

413. *Id.* at 35.

414. *Id.* at 36.

415. See sources cited *supra* note 182.

416. *Flomo*, 643 F.3d at 1015.

piracy, safe conducts, and assaults against ambassadors, but warned courts to be cautious in creating new claims.

...

The only wrong the First Congress could have possibly contemplated as providing for universal jurisdiction would have been piracy. But imaginative speculation about how legislators in 1789 may have felt about piracy cannot expand the Alien Tort Statute's reach to entirely foreign disputes that bear no relation whatsoever to piracy. Twenty-first-century preferences regarding universal jurisdiction and war crimes do not shed light on the congressional intent underlying an eighteenth-century statute.<sup>417</sup>

Given the highly contested state of ATS in each circuit and the cost of such litigation to corporations, human rights victims, and the judiciary, alike, Congress should step in and define the scope of ATS. The Supreme Court, itself, in *Sosa*, invited a congressional amendment clarifying the statute: “[W]e would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations.”<sup>418</sup> Judge Posner further stated in *Flomo* that ATS “contains no clarifying language” and “since it’s . . . a statute, Congress could curtail its scope”<sup>419</sup> As Bellinger argues:

Defining causes of action legislatively would lend certainty and accountability to the litigation—judges would no longer be left to divine causes of action in the unfamiliar materials of international law—and such definitions would embody the judgment of Congress and the President as to the content of international law.<sup>420</sup>

Further, congressional guidance would prevent the courts from being in the precarious position of adjudicating public policy concerns. As stated by the district court in

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417. *Sarei v. Rio Tinto, PLC*, No. 02-56256, 2011 WL 5041927, at \*6 (9th Cir. Oct. 25, 2011) (Kleinfeld, J., dissenting).

418. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004). The Court went on to note that, “nothing Congress has done is a reason for us to shut the door to the law of nations entirely.” *Id.*

419. *Flomo*, 643 F.3d at 1016.

420. Bellinger, *supra* note 372, at 13.

*Flomo v. Firestone Natural Rubber Co.*,<sup>421</sup> deciding to impose corporate liability is “a policy judgment better made by a legislature than a federal court—that facilitating victim compensation is more desirable than deterring individual misconduct.”<sup>422</sup> Until Congress amends ATS, the Court should continue to interpret ATS narrowly.

If *Kiobel* becomes the law of the land, human rights activists will not be left without any avenues to curtail bad corporate conduct. ATS litigation, while undoubtedly a useful tool, is not necessary to ignite public activism. For example, after the Coca-Cola case’s dismissal,<sup>423</sup> plaintiffs launched its Campaign to Stop Killer Coke.<sup>424</sup> In the wake of the allegations that the Coca-Cola Company was to blame for the murders of union members in Colombia, about forty college campuses boycotted Coke products.<sup>425</sup> Other unions, in a show of solidarity, picketed the company’s April 2002 annual shareholder meeting at Madison Square Garden, publicly decrying the Coca-Cola Company’s involvement and calling for tougher labor standards at its global manufacturing plants, while inside the walls of the arena, executives assured shareholders that the allegations were

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421. In its post-*Kiobel* decision, the Southern District of Indiana found that while the court had jurisdiction over corporate ATS claims, international law does not support a claim of corporate liability, based on the lack of corporate liability (1) under international criminal, (2) TVPA, and (3) outside of ATS for tort claims. *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810, 817 (S.D. Ind. 2010). Further, *Flomo* opined that “[r]ecognizing corporate liability under the ATS would further exacerbate the disparate treatment between citizens and aliens in American courts and would promote forum shopping.” *Id.* at 818.

422. *Id.* at 817.

423. See *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1259, 1270 (11th Cir. 2009).

424. See CAMPAIGN TO STOP KILLER COKE, <http://www.killercoke.org> (last visited Apr. 13, 2012).

425. See, e.g., Dean Foust et al., “Killer Coke” or Innocent Abroad?, *BUS. WK.*, Jan. 23, 2006, [http://www.businessweek.com/print/magazine/content/06\\_04/b3968074.htm](http://www.businessweek.com/print/magazine/content/06_04/b3968074.htm); Meg Massey, *A Student Backlash Against Coke*, *TIME*, Aug. 9, 2007, [http://www.time.com/time/specials/2007/article/0,28804,1651473\\_1651472\\_1651479,00.html](http://www.time.com/time/specials/2007/article/0,28804,1651473_1651472_1651479,00.html).

false.<sup>426</sup> Public outrage over corporate human rights practices can trigger the political process, encouraging Congress to implement better regulations of U.S. corporations' human rights practices. Additionally, the United Nations, led by the efforts of special representative for business and human rights, John Ruggie, is developing guidelines to help multinational corporations respect human rights.<sup>427</sup> Rather than leaving it up to the American judiciary to construct rules of international law, the U.N. and regional human rights systems should strive to create and impose standards that govern corporations' business and human rights practices.

It should be noted that unless prompted by the Supreme Court's upcoming decision, a congressional amendment to ATS might not be politically feasible. Given the current state of politics, the upcoming presidential election, and the prominence of budget, economic, tax policy, and healthcare concerns, to name a few, amending ATS is certainly not a congressional priority. As the Occupy Wall Street movement has illustrated, many citizens are disgruntled by corporate policies, and a proposal to limit corporate liability for corporations that may have a hand in human rights violations abroad would undoubtedly be met with resistance. However, as money equals power in Washington, corporate lobbies may have more clout over human rights groups. Moreover, Congress may have no occasion to address ATS if the Court rules next term that ATS is unconstitutional as applied extraterritorially.

Some commentators have said that the Court's request for reargument in *Kiobel* foreshadows a watershed decision,

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426. Greg Winter, *Teamsters Union Protests at Coke Meeting*, N.Y. TIMES, Apr. 18, 2002, at C4.

427. Bellinger, *supra* note 1; *see, e.g.*, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, ¶¶ 44, 62-65, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie); Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie).

in which the Court may decide to effectively end modern ATS litigation by significantly limiting the extraterritorial application of the statute.<sup>428</sup> Adam Liptak of the *New York Times* analogized the case to *Citizens United v. Federal Election Commission*,<sup>429</sup> where the Court also requested reargument.<sup>430</sup> In that very controversial case, the Court “broaden[ed] what had been a quirky case into one that would give rise to the 2010 campaign finance blockbluster,”<sup>431</sup> and “granted corporations (alongside unions and other organizations) a First Amendment right to political speech in allowing them to spend freely in elections.”<sup>432</sup> The order signals that human rights activists have cause for concern as the Court has opened the door to ruling that ATS is unconstitutional as applied to claims between two foreigners in a foreign land, regardless of whether the defendants are corporate entities or individuals. Bellinger noted that the Court’s order poses a Catch-22 problem for the Obama administration in that if it advocates against the extraterritorial application of ATS, it would run contrary to the “position of human rights groups and undercutting its prior argument in favor of corporate

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428. See, e.g., Adam Liptak, *Supreme Court Seeks Clarification on Jurisdiction in a Human Rights Case*, N.Y. TIMES, Mar. 6, 2012, at A15; John B. Bellinger III, *Stop Press: Supreme Court Orders Kiobel Reargued to Address Extraterritoriality*, LAWFARE BLOG (Mar. 5, 2012, 7:03 PM), <http://www.lawfareblog.com/2012/03/stop-press-supreme-court-orders-kiobel-reargued-to-address-extraterritoriality/>.

429. 130 S. Ct. 876 (2010).

430. Liptak, *supra* note 428.

431. *Id.*; see also Lyle Denniston, *Kiobel to be Expanded and Reargued*, SCOTUSBLOG (Mar. 5, 2012, 2:01 PM), <http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/> (“The new order was another, vivid illustration of the tendency of the ‘Roberts Court’ to take on the broadest kind of controversy in cases brought to it.”).

432. Michael Bobelian, *Corporations Granted Constitutional Rights Should Bear Responsibility for Their Crimes*, FORBES.COM (Feb. 27, 2012, 5:35 PM), <http://www.forbes.com/sites/michaelbobelian/2012/02/27/corporations-granted-constitutional-rights-should-bear-responsibility-for-their-crimes/> (“[I]t would be inequitable for these same justices to find that while corporations can benefit from the rights, privileges, and protections granted to individuals under the Constitution, they are exempt from the most basic obligations human beings owe to each other.”).

liability.”<sup>433</sup> Alternatively, if it argues in favor of extraterritorial application, it would be taking a position “contrary to the position of many foreign governments and inconsistent with international law principles of jurisdiction,”<sup>434</sup> as well as the view of the Bush administration.

#### CONCLUSION

While *Kiobel* is currently an “outlier,” it is difficult to predict how the Court will ultimately rule. The Court will likely be divided along ideological lines. If the tone of the oral arguments before the Court is any indication, Justice Alito and possibly Chief Justice Roberts may grant corporate immunity, or determine that ATS is unconstitutional when applied extraterritorially. Based on his *Sosa* opinion, Justice Scalia will most likely vote to uphold *Kiobel* or to abolish the extraterritorial application of ATS altogether.<sup>435</sup> Justice Thomas is also likely to side with his conservative colleagues. Justices Ginsburg, Kagan, and Sotomayor will likely vote to overturn the Second Circuit’s ruling. Justice Breyer’s skepticism at the notion that human rights violators could obtain immunity by forming a “Pirates, Inc.”-type corporate entity suggests that he may also vote in favor of corporate liability. Moreover, Justice Breyer’s recent concurring opinion in *Mohamad v. Palestinian Authority* sheds light on this very view.<sup>436</sup> In *Mohamad*, Justice Breyer noted that while the word “individual” as used in the TVPA does not encompass organizations, “individual” in other federal laws could refer

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433. Bellinger, *supra* note 428.

434. *Id.*

435. See Rich Samp, *Will Supreme Court Add Another Alien Tort Statute Case to Its Docket?*, FORBES.COM (Nov. 11, 2011), <http://www.forbes.com/sites/wlf/2011/11/28/will-supreme-court-add-another-alien-tort-statute-case-to-its-docket/> (“Given that the Court’s 2004 ATS decision (*Sosa v. Alvarez-Machain*) was broadly skeptical of all ATS lawsuits, it is very plausible that a combined decision this June in *Kiobel* and *Sarei* could sound a virtual death knell for such lawsuits.”).

436. See *Mohamad v. Palestinian Auth.*, No. 11-88, slip. op. at 1 (U.S. Apr. 18, 2012) (Breyer, J., concurring).

to corporations or other entities.<sup>437</sup> As has been the case in recent years, Justice Kennedy may prove to be the pivotal swing vote.

Regardless of the result of the Court's forthcoming decision, ATS case law will likely continue to be inconsistent, as courts vary in their interpretation of international law. Foreign policy concerns, namely resistance from the executive branch and foreign governments, may also serve as blockades to future ATS litigation. Furthermore, presenting ATS cases to American jurors will present challenges to both counsel and the courts not often seen in civil litigation. Nonetheless, even if verdicts in favor of victims continue to be difficult to obtain, a decision in favor of corporate liability could act as a substantial deterrent to abhorrent corporate conduct. As suggested by *Kiobel*, corporate executives will continue to face ATS liability; while, "it would be a lot harder to win those cases, . . . these lawsuits have never been about winning but about getting a lot of bad publicity about corporations and building sympathy for the cause plaintiffs are involved in."<sup>438</sup>

*Kiobel* was once hailed as the end of ATS litigation in federal courts, but the result of the battle over corporate liability under the statute remains to be seen. Recent developments suggest that the judiciary is highly polarized over how to interpret international law, how to define CIL norms, and how to properly apply *Sosa*, as well as the value of corporate liability in public policymaking. Those with a stake in ATS litigation should encourage legislators to address the scope of ATS. Without congressional intervention, the courts will continue to decide the scope of international law based on varying interpretations of the historical record, treaties, and preexisting international human rights enforcement mechanisms. Until there is a clear statutory basis for ATS litigation, human rights activists may continue to expend enormous capital and

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437. *Id.*

438. Marcia Coyle, *Will Alien Tort Case Be the Next Citizens United?*, NAT'L L. J. (Feb. 1, 2012), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1328082590715>.

manpower, seeking to impose liability on corporations without any indication that they will successfully recover damages. In turn, corporations, unguided by Congress, will continue to expend substantial funds defending these suits while being wholly unaware of which of their actions are truly sanctionable under ATS. For now, human rights activists, and corporate executives, anxiously await the Supreme Court's *Kiobel* decision for a definitive answer on the future of ATS litigation.