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The Second Circuit Correctly Interprets the Alien Tort Statute: *Kiobel v. Royal Dutch*

FRANK CRUZ-ALVAREZ* & LAURA E. WADE**

I. INTRODUCTION

On September 17, 2010, the Second Circuit surprised the legal community by holding in a divided panel that the Alien Tort Statute (“ATS”) does not provide jurisdiction for corporations in United States Courts.¹ In *Kiobel v. Royal Dutch Petroleum Co.*,² the families of seven Nigerians “who were executed by a former military government for protesting Shell’s exploration and development”³ brought suit against the oil company for violations of human rights under the Alien Tort Statute.⁴ Shell denied accusations of involvement in human rights abuses.⁵ *Kiobel* sent shock waves through the legal community, as the Second Circuit turned away from its past precedent and that of three other circuits to find that the ATS does not provide jurisdiction over corporate defendants.⁶

The Eleventh Circuit was one such circuit that explicitly held that corporations could be liable under the ATS.⁷ This article will argue that the Second Circuit was correct in its analysis that the ATS does not

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1. *Court Dismisses Rights Case Against Shell*, N.Y. TIMES, Sept. 17, 2010, <http://www.nytimes.com/2010/09/18/business/energy-environment/18tort.html>.

2. 621 F.3d 111 (2d Cir. 2010).

3. *Id.* at 123.

4. *Id.*; see also *U.S. Appeals Court Declines to Rehear Case re Shell in Nigeria*, REUTERS LEGAL, Feb. 4, 2011, available at http://westlawnews.thomson.com/National_Litigation/News/2011/02_-_February/U_S_appeals_court_declines_to_rehear_case_re_Shell_in_Nigeria/.

5. *Court Dismisses Rights Case Against Shell*, *supra* note 1.

6. See, e.g., *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) (noting that while ATS cases “initially involved state actors violating the law of nations,” ATS cases now also impose “liability on private individuals and corporations”); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733 (9th Cir. 2008); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

7. See *Romero*, 552 F.3d at 1315 (11th Cir. 2008).

provide jurisdiction for corporate defendants. It will advocate that the Eleventh Circuit adopt the same reasoning. Section II of this article will provide the background of the ATS and the importance of *Kiobel* to ATS jurisprudence. Section III will discuss *Sosa v. Alvarez-Machain* and its importance to the issue of corporate liability under the ATS. Section IV will outline the three main Second Circuit cases addressing this issue: *Khulumani v. Barclay*, *Presbyterian Church v. Talisman*, and *Kiobel v. Royal Dutch Petroleum*. *Presbyterian Church* came before the Second Circuit around the same time as *Kiobel* and also addressed the issue of corporate liability under the ATS.⁸ Section V of this article will discuss *Romero v. Drummond* and Eleventh Circuit precedent regarding corporate liability under the ATS. Section VI of this article will conclude by emphasizing why the Second Circuit was correct in determining that the ATS does not provide jurisdiction to corporate defendants.

II. BACKGROUND: THE IMPORTANCE OF *KIOBEL* TO ATS JURISPRUDENCE

The First Congress of the United States passed the ATS in 1789.⁹ It reads: “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.”¹⁰ Despite its passage in 1789, the ATS lay dormant in the United States courts until fairly recently.¹¹ In 1981, the Second Circuit gave new life to the ATS in *Filartiga v. Pena-Irala*.¹² Essentially, the Second Circuit outlined that the ATS provides jurisdiction over “(1) tort actions, (2) brought by aliens (only), (3) for violations of the law of nations (aka ‘customary international law’) including, as a general matter, war crimes and crimes against humanity—crimes in which the perpetrator can be called ‘*hostis humani generis*.’”¹³

The *Filartiga* panel of the Second Circuit explained the background

8. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), cert. denied, 131 S. Ct. 79; 131 S. Ct. 122 (2010).

9. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 115 (2d Cir. 2010); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

10. 28 U.S.C. § 1350 (2010).

11. See Mark Hamblett, *2nd Circuit Rejects Corporate Liability in Alien Tort Cases*, LAW.COM (Sept. 20, 2010), <http://www.law.com/jsp/article.jsp?id=1202472226419>; Kyle Whitmire, *Alabama Company is Exonerated in Murders at Colombian Mine*, N.Y. TIMES, July 27, 2007, <http://www.nytimes.com/2007/07/27/business/27drummond.html>.

12. *Filartiga*, 630 F.2d at 878 (holding that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights.”). This was the case that began the “modern line” of ATS cases. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

13. *Kiobel*, 621 F.3d at 116 (citing *Filartiga*, 630 F.2d at 878).

of the passage of the ATS: There were thirteen colonies fused into a new nation, “bound both to observe and construe the accepted norms of international law,” also known as the law of nations.¹⁴ “Implementing the constitutional mandate for national control over foreign relations, the First Congress established original district court jurisdiction over ‘all causes where an alien sues for a tort only (committed) in violation of the law of nations.’”¹⁵ This need to regulate and enforce accepted norms of international law drove the First Congress to pass the ATS.

In *Filartiga*, the Second Circuit outlined the constitutionality of the ATS by noting that the “constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.”¹⁶ The Second Circuit panel further noted that “courts must interpret international law not as it was in 1789, but as it has been evolved and exists among the nations of the world today.”¹⁷

Filartiga opened the floodgates for ATS claims, first against individuals, and then against corporations and other private actors.¹⁸ Since *Filartiga*, a variety of plaintiffs have filed and prosecuted many ATS-based claims in U.S. District Courts.¹⁹ That said, despite an increase in district court litigation, there are relatively few appellate court decisions, and only one Supreme Court decision, that discuss the ATS in depth. Indeed, it was not until 2004 that the Supreme Court issued its first ATS opinion in *Sosa v. Alvarez-Machain*.²⁰ This decision made it clear that questions concerning the scope of liability under the ATS, including whether such liability extends to a particular defendant, are governed by international law.

The Second Circuit has always been at the forefront of ATS litigation. Therefore, it is no surprise that it was the first circuit to tackle the

14. *Filartiga*, 630 F.3d at 877 (quoting Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350 (2010))).

15. *Id.* at 878.

16. *Id.* at 885.

17. *Id.* at 881.

18. *See Kiobel*, 621 F.3d at 116 & n.5 (noting that the first lawsuit brought under the ATS against a corporation was *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part and rev'd in part*, 395 F.3d 932 (9th Cir. 2002)).

19. *See id.* at 116 (noting that since *Filartiga*, “the ATS has given rise to an abundance of litigation in U.S. district courts”). *See also* *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Abagnin v. AMVAC Chem. Corp.*, 545 F.3d 733 (9th Cir. 2008); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

20. 542 U.S. 692, 712 (2004) (holding that the ATS is only jurisdictional and does not in and of itself create a cause of action).

issue of corporate liability under the ATS head-on. Just as *Filartiga* changed the landscape of ATS jurisprudence, the *Kiobel* opinion will also change the face of ATS jurisprudence in the United States. As other circuits and the Supreme Court have followed Second Circuit ATS jurisprudence after *Filartiga*, they should also continue to follow the Second Circuit and decide that ATS jurisdiction is limited to states and individuals.

III. *SOSA*

The Supreme Court's sole ruling addressing the ATS came in *Sosa v. Alvarez-Machain*.²¹ A group of Mexican nationals, including defendant Jose Francisco Sosa, seized plaintiff Humberto Alvarez-Machain pursuant to a United States Drug Enforcement Agency plan to bring Alvarez-Machain into the United States to try him for torture.²² Alvarez-Machain was ultimately acquitted, and in 1993, after his return to Mexico, he filed suit in United States District Court pursuant to the Federal Tort Claims Act and the ATS.²³ The District Court granted summary judgment and awarded damages on the ATS claim.²⁴ The Ninth Circuit affirmed the ATS judgment. When ruling again en banc, it also noted that the ATS "creates a cause of action for an alleged violation of the law of nations."²⁵

The Supreme Court reversed, holding that the ATS is "in terms only jurisdictional" and enables federal courts to hear claims based on the law of nations.²⁶ Notably, in a footnote, the Court pointed towards the issue of corporate liability, stating 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 an individual."²⁷ While the Court noted the issue, it provided no further commentary or resolution. Courts were still left to grapple with whether or not the ATS provided jurisdiction for corporate actors. This lack of clarity was most apparent in the Second Circuit.

21. *Id.*

22. *Id.* at 697-701.

23. *Id.* at 698.

24. *Id.* at 699.

25. *Id.* (quoting *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003) (en banc), *rev'd sub nom.* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (emphasis added).

26. *Id.* at 712.

27. *Id.* at 733 n.20 (emphasis added).

IV. SECOND CIRCUIT CASES

The Second Circuit has entertained numerous ATS claims.²⁸ In these cases, the Second Circuit panels generally assumed that the ATS applied to corporations.²⁹ Three main cases demonstrate how the Second Circuit has dealt with corporate liability under the ATS throughout the last thirty years. In *Khulumani v. Barclay Nat'l Bank, Ltd.*, the Second Circuit grappled with the issue of corporate liability without ultimately issuing a decision.³⁰ The Second Circuit, however, was recently confronted with the issue of corporate liability under the ATS in two recent cases where the defendants specifically pled and argued that United States courts do not have jurisdiction over corporate defendants under the ATS. In the first case, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*³¹ the court avoided addressing the corporate liability issue because it was able to affirm the lower court's summary judgment in favor of the defendant, Talisman Energy, Inc., without addressing the underlying subject matter jurisdiction issue. In the second case, *Kiobel v. Royal Dutch*, the court could no longer avoid addressing the issue of corporate liability. The case came before the Second Circuit following the lower court's ruling, which granted in part and denied in part the defendants' motion to dismiss. Recognizing that the issue of corporate liability under the ATS remained unresolved, the district court certified its order for interlocutory appeal. As such, the issue of corporate liability was squarely in front of the panel, and the Panel had no choice but to decide it.

A. *Khulumani v. Barclay*

In *Khulumani*, the Second Circuit heard an appeal from the United States District Court for the Southern District of New York, where plaintiffs pled that a group of corporate defendants had "actively and willingly collaborated with the government of South Africa" in maintaining a system of apartheid in violation of international law.³² The District Court held that plaintiffs failed to establish subject matter jurisdiction

28. See, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat'l. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

29. See *Abdullahi*, 562 F.3d at 163; *Vietnam Ass'n*, 517 F.3d at 104; *Khulumani*, 504 F.3d at 254; *Flores*, 414 F.3d at 233.

30. *Khulumani*, 504 F.3d at 254. As discussed earlier, the ATS was largely dormant until the Second Circuit opinion of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

31. 582 F.3d 244 (2d Cir. 2009).

32. *Khulumani*, 504 F.3d at 258.

under the ATS and dismissed the lawsuit.³³ On appeal, two of the Judges joined to reverse dismissal of the ATS claims, ruling that aider and abettor violations can provide a basis for ATS jurisdiction.³⁴ Significantly, the defendants did not raise the issue of corporate liability, however, each of the three judges that comprised the panel expressed a different view on the issue of corporate liability under the ATS.³⁵ Judge Katzmann first stated in his concurring opinion that because the issue was not pled, the Court would not reach it. He then expressed his opinion that jurisdiction to entertain an ATS claim depended upon whether the alleged tort was “committed in violation of the law of nations, and whether this law would recognize the defendant’s responsibility for that violation.”³⁶ He added that the Second Circuit has “repeatedly treated the issue of whether corporations may be held liable under the [ATS] as indistinguishable from the question of whether private individuals may be.”³⁷ Judge Hall stated in his concurrence that corporate defendants should be liable under the ATS.³⁸ Finally, Judge Korman, concurring in part and dissenting in part, concluded that corporate actors should not be liable under the ATS because international law does not recognize corporate liability.³⁹ After conducting an exhaustive review of international law sources, Judge Korman further noted that “because the established norm during the apartheid era was that corporations were not responsible legally for violations of norms prescribing crimes against humanity, the complaints are subject to dismissal on this ground alone.”⁴⁰

B. Presbyterian Church v. Talisman

In this case, a group of Sudanese people filed suit against Talisman Energy, Inc., claiming that they were “victims of human rights abuses committed by the Government of Sudan in Khartoum,” and that Talisman “aided and abetted or conspired with the government” in the commission of these abuses.⁴¹ Before the decision in the District Court proceedings, defendants moved for judgment on the pleadings, arguing that the court should consider, after *Sosa*⁴² and the Second Circuit’s

33. *Id.* at 259.

34. *Id.* at 260.

35. *Id.* at 282 (Katzmann, J., concurring).

36. *Id.* at 270 (internal citation omitted).

37. *Id.* at 282.

38. *Id.* at 289 (Hall, J., concurring) (“I share Judge Katzmann’s understanding . . . that . . . corporate actors are subject to liability under the [ATS].”).

39. *Id.* at 326 (Korman, J., dissenting).

40. *Id.*

41. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79; 131 S. Ct. 122 (2010).

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

decision in *Flores*,⁴³ whether the ATS provides jurisdiction for corporate liability.⁴⁴ The District Court denied the motion, and the case proceeded.⁴⁵ Defendant Talisman moved for summary judgment on all claims.⁴⁶

Plaintiffs claimed that Talisman violated the customary international law relating to genocide, torture, war crimes, crimes against humanity, and the treatment of ethnic and religious minorities and their property. Additionally, plaintiffs argued that Talisman conspired with and aided and abetted its sole co-defendant, the Republic of Sudan, to commit those same violations of customary international law.⁴⁷ The plaintiffs did not oppose the motion for summary judgment as to Talisman's direct liability, therefore the only issue was whether Talisman was entitled to summary judgment on the claims of conspiring with and aiding and abetting the government.⁴⁸

The District Court found that the Sudanese residents failed to allege a sufficient conspiracy claim under the ATS,⁴⁹ and that the residents failed to establish aider and abettor liability for genocide,⁵⁰ for crimes against humanity,⁵¹ and for war crimes.⁵² Plaintiffs appealed from this decision to the Second Circuit.⁵³

The Second Circuit heard arguments from the parties on January 12, 2009—the same day the Circuit heard arguments in *Kiobel v. Royal Dutch Petroleum Co.*⁵⁴ Notably, the Second Circuit panel requested and received post-argument briefing on the issue of corporate liability under the ATS from both parties in the *Talisman* case.⁵⁵ In the opinion

43. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

44. *Presbyterian Church*, 582 F.3d at 251.

45. *Id.*

46. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 662 (S.D.N.Y. 2006).

47. *Presbyterian Church*, 582 F.3d at 251.

48. *Presbyterian Church*, 453 F. Supp. 2d at 662.

49. *Id.* at 664–65 (noting that “liability under the ATS for . . . conspiracy may only attach where the goal of the conspiracy was either to commit genocide or to commit aggressive war.”).

50. *Id.* at 668–70 (stating that to survive summary judgment on a claim of genocide, there must be “evidence not only that genocide was occurring,” but that defendant understood that and defendant intended his acts to facilitate genocide).

51. *Id.* at 670–71 (noting that Plaintiffs had not presented sufficient evidence of crimes against humanity).

52. *Id.* at 671.

53. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79; 131 S. Ct. 122 (2010).

54. *Id.* at 245; *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

55. Petition for Writ of Certiorari, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 131 S. Ct. 79 (2010) (No. 09-1262) at 10 (citing Petitioner's Reply Brief, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 131 S. Ct. 79 (2010) (No. 09-1262); *Talisman Energy, Inc. v. Presbyterian Church of Sudan*, 131 S. Ct. 122 (2010) (No. 09-1418)).

affirming the dismissal, however, the Second Circuit did not discuss the substance of whether corporations can be held liable under the ATS. Instead, the opinion focused on the plaintiff's failure to meet their burden of proof on the substantial assistance claim under the ATS.⁵⁶ Because the *Talisman* panel was reviewing an order granting summary judgment, the panel was able to render a decision based on the substantive evidentiary issue, without addressing the underlying issue of subject matter jurisdiction.

Demonstrating a desire to have the issue of corporate liability under the ATS addressed, when the plaintiff, Presbyterian Church, filed a Writ of Certiorari to the United States Supreme Court, *Talisman* filed a Conditional Cross-Petition for a Writ of Certiorari focused primarily on the underlying subject matter jurisdiction issues. The first issue listed and briefed in *Talisman*'s Conditional Cross-Petition for Writ of Certiorari was whether "federal courts lack subject matter jurisdiction under the Alien Tort Statute to impose liability on corporations for torts committed in violation of customary international law, given that no international law norm recognizing corporate liability has been 'accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [this Court has] recognized.'"⁵⁷

Talisman's brief first cites *Sosa*, noting that *Sosa* did not address whether or not corporate actors may be liable under the ATS, but that it did state that matters concerning the scope of liability under the ATS are governed by international law.⁵⁸ The brief then mentions the Second Circuit's decision in *Khulumani v. Barclay Ltd.*⁵⁹ to demonstrate that this issue has been raised in other cases and that lower courts have avoided addressing it head on and expressed contradictory views that need to be reconciled. *Talisman* goes on to explain in its brief that the

56. *Presbyterian Church*, 582 F.3d at 247.

57. Conditional Cross-Petition for a Writ of Certiorari, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 131 S. Ct. 79 (2010) (No. 09-1262), at (i) Questions Presented (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004)). The other issues presented and briefed were whether federal courts "lack subject matter jurisdiction to apply the Alien Tort Statute extraterritorially to claims for violations of customary international law arising entirely outside the United States" and whether there is no ATS cause of action where "(i) the claims are based on events arising solely outside the United States and had no effect on the United States whatsoever, (ii) the claims are asserted against a foreign defendant not in the custody of the United States and (iii) a country providing an adequate alternative forum has a close nexus to the dispute." *Id.* In the third issue, it is noteworthy that the country with an adequate alternative forum and a close nexus in this instance was Canada, as *Talisman* is a Canadian company. The Canadian government and United States State Department were involved in the proceedings of *Talisman*.

58. *Id.* (citing *Sosa*, 542 U.S. at 732 n.20 ("[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.")).

59. 504 F.3d 254 (2d. Cir. 2007).

Second Circuit panel in *Talisman* requested and received post-argument briefing on the issue of corporate liability, yet declined to reach the question.⁶⁰ They then further explain why: because the Panel assumed, without deciding, that corporations can be liable under the ATS.⁶¹ The Panel thought this was appropriate because they found that plaintiffs' claims failed on other grounds.⁶²

In further deference to the Supreme Court guidelines, the brief cites *Sosa*'s guidelines: ATS jurisdiction extends only to "a narrow class of claims based on 'norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms' of violation of safe conducts, infringement of the rights of ambassadors, and piracy."⁶³ The brief then states the question presented here, in light of *Sosa*: "whether there is a consensus among States, demonstrable with all the certainty that *Sosa* requires, that liability for violations of customary international law extends to corporations."⁶⁴ The defendants argued that there is no such consensus, for numerous reasons.

First, no international tribunal has held a corporation liable for violating customary international law. No organizational charter has ever granted such a tribunal jurisdiction to do so. Rather, jurisdiction of international tribunals has been expressly limited to natural, not corporate, persons.⁶⁵ The London Charter that established the International Military Tribunal at Nuremberg established jurisdiction over persons acting as individuals or as members of organizations; not "over claims asserted against organizations or juridical persons."⁶⁶ The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda also limited jurisdiction to "natural persons."⁶⁷ The Rome Statute of the International Criminal Court, with 148 signatories, likewise provided only for jurisdiction over natural persons.⁶⁸ During the passage of the Rome statute, the parties debated whether or not jurisdiction should extend to juridical persons, but there was no consensus between the states.⁶⁹ The brief also cites the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment—the Torture Convention—which, by its terms, extends only to natural per-

60. Conditional Cross Petition for a Writ of Certiorari, *supra* note 57, at 10.

61. *Id.*

62. *Id.*

63. *Id.* at 11 (quoting *Sosa*, 542 U.S. at 725.)

64. *Id.*

65. *Id.* at 12.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 12–13.

sons.⁷⁰ Because of this, the United States Torture Victim Protection Act, passed to implement the Torture Convention, states that “individuals” are capable of violating the statute and “individuals” are those who are subject to torture (implying that it refers solely to natural persons).⁷¹ Finally, defendants also mention a twenty-eight country survey carried out on Talisman’s behalf after the Second Circuit requested post-argument briefing, which uncovered no judicial decisions recognizing corporate liability.⁷²

Despite the thorough briefing, the Supreme Court denied certiorari.⁷³

C. *Kiobel v. Royal Dutch*

Plaintiffs in this case were “residents of Nigeria who claimed that Dutch, British, and Nigerian corporations, engaged in oil exploration and production, aided and abetted the Nigerian government in committing violations of the law of nations.”⁷⁴ The plaintiffs filed a class action in 2002 in the United States District Court for the Southern District of New York. The defendants in this case were Royal Dutch and Shell. Plaintiffs alleged that, through a subsidiary named “Shell Petroleum Development Company of Nigeria, Ltd. (“SPDC”), the Defendants aided and abetted the Nigerian government in committing human rights abuses directed at plaintiffs.”⁷⁵ All defendants were corporate entities, also known as “juridical” entities.⁷⁶

While the SPDC engaged in oil exploration and production in Nigeria, the Nigerian people organized a response movement to protest the environmental damage. The plaintiffs alleged that the SPDC enlisted the aid of the Nigerian government to suppress the environmental response movement. Plaintiffs also accused the Nigerian government of attacking and raping people, destroying property, and looting.⁷⁷ Specifically, SPDC is alleged to have: “(1) provided transportation to Nigerian forces, (2) allowed their property to be utilized as a staging ground for attacks, (3) provided food for soldiers involved in the attacks, and (4) provided compensation to those soldiers.”⁷⁸

70. *Id.* at 13.

71. *Id.*

72. *Id.* at 14.

73. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79; 131 S. Ct. 122 (2010).

74. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 (2d Cir. 2010).

75. *Id.* at 123.

76. *Id.*

77. *Id.*

78. *Id.*

The defendants moved to dismiss based on *Sosa*.⁷⁹ The District Court dismissed the action in September of 2006, only with respect to the claims based on property destruction, forced exile, extrajudicial killing, and violations of the rights to life, liberty, security, and association. The District Court held that customary international law did not define those violations with the particularity required by *Sosa*.⁸⁰ The court, however, denied the motion to dismiss with respect to arbitrary arrest and detention, crimes against humanity, and torture or cruel, inhuman, and degrading treatment.⁸¹ The District Court then certified the entire order for interlocutory appeal pursuant to 28 USC 1292(b).⁸²

The Second Circuit heard arguments on January 12, 2009,⁸³ the same day they heard arguments in *Talisman*. The panel rendered their decision on September 17, 2010.⁸⁴ In stark contrast to the *Talisman* opinion, which ignored the issue of corporate liability, the *Kiobel* majority, comprised of Judge Cabranes and Judge Jacobs, admitted that corporate liability was an “unresolved” ATS issue that the Second Circuit had left “unanswered.”⁸⁵ Judge Cabranes, writing for the majority, further admitted that the Second Circuit has not directly addressed the “lurking” issue of whether a corporation can be liable under the ATS for violations of customary international law.⁸⁶

In its introduction, the majority briefly identifies the facts relevant to the litigation. Then, they note the difficulty of their decision: U.S. legal culture routinely holds corporations civilly liable in tort, so how could corporations *not* be civilly liable in tort under the ATS?⁸⁷ After outlining *Sosa*’s requirement—that the ATS provides limited jurisdiction over “a limited number of offenses defined by customary international law”⁸⁸—the majority explains that this examination requires the court to look beyond domestic law and examine “specific and universally accepted rules that the nations of the world treat as binding *in their dealings with one another*.”⁸⁹ Therefore, because *Sosa* requires the Court to look to international law, the fact that corporations can be held

79. *Id.* at 124.

80. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 464–67 (S.D.N.Y.2006).

81. *Id.*

82. *Id.* at 467–68.

83. *Kiobel*, 621 F.3d at 111.

84. *Id.*

85. *Id.* at 117 n.10.

86. *Id.* at 124.

87. *Id.* at 117–18.

88. *Id.* at 118 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (emphasis removed)).

89. *Id.*

liable in our domestic tort law does not mean that the ATS confers jurisdiction over corporations.

Also within the introduction, the majority notes that the “singular achievement of international law since the Second World War has come in the area of human rights.”⁹⁰ Looking to human rights developments, they cite the Nuremberg trials, noting that “the principle of individual liability for violations of international law has been limited to natural persons” because the moral responsibility for such heinous crimes is an individual issue.⁹¹ They then outline other international tribunals, post-Nuremberg, that have found liability for human rights abuses only individually.⁹²

To conclude their introduction, the majority states its holding, that “insofar as plaintiffs bring claims under the ATS against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs’ claims fall outside the limited jurisdiction provided by the ATS.”⁹³ Therefore, the ATS does not provide a forum for suits against corporate Defendants, who are immune from suit under the ATS. There simply is no international law norm under which corporations can be civilly liable in tort law.⁹⁴

In its discussion, the majority provides a two-step analysis. First, the court should ask whether international or domestic law governs the question.⁹⁵ Second, the court should ask what the sources of international law reveal with respect to whether corporations can be subject to liability for violations of customary international law.⁹⁶ The majority then proceeds to the first step: Which body of law governs—international or domestic?

Based on Supreme Court precedent found in *Sosa*, the majority answers the first question: Customary international law, also called the law of nations, governs ATS inquiries.⁹⁷ At the time of the passage of the ATS, in 1789, there were three specific offenses against the law of nations: safe conducts, infringement of rights of ambassadors, and piracy.⁹⁸ Following, however, the reasoning in *Sosa*, courts may now recognize claims based on the present day law of nations, if the claims rest on norms of international character accepted by the civilized world

90. *Id.*

91. *Id.* at 119.

92. *Id.* (citing the design of the International Criminal Court and the Rome Statute).

93. *Id.* at 120.

94. *Id.*

95. *Id.* at 125.

96. *Id.*

97. *Id.* at 125–26.

98. *Id.* at 125.

and defined with specificity.⁹⁹

Furthermore, in *Sosa* itself, the Supreme Court stated that courts must look to “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.”¹⁰⁰ Since *Sosa*, the majority writes, courts must look to “customary international law to determine *both* whether certain conduct leads to ATS liability *and* whether the scope of liability under the ATS extends to the defendant being sued.”¹⁰¹

Using this logic, the majority acknowledges that at first blush, it seems that corporations could be liable under the ATS, since they are liable in tort under the domestic law of the United States.¹⁰² The majority, however, goes on to explain that:

[b]y conferring subject matter jurisdiction over a limited number of offenses defined by international law, the ATS requires federal courts to look beyond rules of domestic law—however well-established they may be—to examine the specific and universally accepted rules that the nations of the world treat as binding *in their dealings with one another*.¹⁰³

With this baseline established, the majority proceeds to the second prong of the analysis: Whether sources of international law reveal that corporations can be liable under the ATS.

To guide the second prong analysis, the majority notes that customary international law includes only “those standards, rules, or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or dealings *inter se*.”¹⁰⁴ A common good in this context is a treaty. Where there is no treaty, controlling executive or legislative act, or judicial decision, one must look to the customs and usages of civilized nations.¹⁰⁵ Furthermore, to attain the status of a rule of customary international law, a norm must be specific, universal, and obligatory.¹⁰⁶

The majority looks to Article 38 of the Statute of the International Court of Justice, which says the following sources apply in international law: (1) international conventions; (2) international custom; (3) general principles of law recognized by civilized nations; and (4) judicial deci-

99. *Id.* at 125–26.

100. *Id.* at 126 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004)).

101. *Id.* at 128.

102. *Id.* at 117.

103. *Id.* at 118.

104. *Id.* at 118 (citing *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.)).

105. *Id.* at 131 (citing *Sosa*, 542 U.S. at 733–34).

106. *Id.*

sions & teachings of the most highly qualified publicists.¹⁰⁷ The majority proceeds to analyze each source.

Regarding international conventions, also called international tribunals, none have ever held a corporation liable for a violation of the law of nations.¹⁰⁸ The London Charter, which established the International Military Tribunal at Nuremberg, granted the Tribunal jurisdiction over natural persons only.¹⁰⁹ United States Military tribunals prosecuted Corporate Executives, but not the corporations themselves.¹¹⁰ Specifically, the majority noted that the Tribunal refused to hold the I.G. Farben Chemical Company liable.¹¹¹ Other International Tribunals continually declined to hold corporations liable, including both the International Tribunal for Yugoslavia and for Rwanda.¹¹² Furthermore, the Rome Statute of the International Criminal Court limits that tribunal's jurisdiction to "natural persons,"¹¹³ even though France proposed to hold corporations liable during the passage of the Rome Statute.¹¹⁴

Looking to international custom and general principles, the majority noted that they are essentially contractual obligations between states.¹¹⁵ As such, international custom is sufficient proof of customary international law only if a significant number of people have ratified a relevant treaty.¹¹⁶ Furthermore, calling something a norm of international human rights essentially makes it applicable even to states that have not ratified the treaty.¹¹⁷ Finally, it would be inappropriate to decide that treaties create a norm of corporate liability when so many major multilateral treaties expressly reject this notion.¹¹⁸

The majority then addresses another source of international law: works of publicists. These are a "relevant" source of international law¹¹⁹—two renowned international law professors argued before the

107. *Id.* at 132.

108. *Id.* at 132.

109. *Id.* at 133–34 (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the "London Charter") art. 6, Aug. 8, 1945, 59 Stat. 1544, 1547). The London Charter granted the International Military Tribunal the ability to declare organizations criminal, but only in order to facilitate the prosecution of individuals within. *Id.* at 134.

110. *Id.* at 134.

111. *Id.* at 134–36.

112. *Id.* at 136.

113. *Id.*

114. *Id.* at 137.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 139 (citing The Rome Statute of the International Criminal Court art. 25, *opened for signature* July 17, 1998, 37 I.L.M. 1002).

119. *Id.* at 142.

panel during *Presbyterian Church* that “customary international law does not recognize liability for corporations that violate its norms.”¹²⁰

In summary, customary international law imposes individual liability for a limited number of international crimes. Therefore, applying customary international law to the ATS criteria outlined in *Sosa*, the ATS provides jurisdiction only over claims in tort against states or individuals. The majority notes that “[i]t is inconceivable that a defendant who is *not liable* under customary international law could be *liable* under the ATS.”¹²¹ Therefore, the ATS does not provide jurisdiction over corporate defendants in tort. The majority concludes that “insofar as plaintiffs in this action seek to hold only corporations liable for their conduct in Nigeria (as opposed to individuals within those corporations), and only under the ATS, their claims must be dismissed for lack of subject matter jurisdiction.”¹²² In order to be recognized under the ATS, corporate liability must achieve universal recognition and acceptance as a norm in relation to states *inter se*.¹²³ The majority notes that corporate liability might “gradually ripen” into a rule of international law, but until that occurs, corporations cannot be held liable under the ATS¹²⁴

1. *Kiobel v. Royal Dutch*: Concurring Opinion

Many scholars, academics, and human rights groups expressed alarm over the holding in *Kiobel*. No critique of the majority, however, was quite as powerful as Judge Leval’s concurring opinion. Judge Leval sets forth a number of detailed critiques, arguing that the question of corporate liability under the ATS is not governed by international law. Judge Leval begins his opinion by suggesting the majority’s opinion gives corporations carte blanche to adopt a corporate form and engage in whatever heinous activities they so desire, without fear of being found liable for a human rights violation in the United States under the ATS.¹²⁵ As discussed further below, Judge Leval greatly exaggerates the impact of the majority’s opinion.

First, he noted that there is “no basis” in the law of nations for the

120. *Id.* at 143.

121. *Id.* at 122.

122. *Id.* at 145.

123. *Id.*

124. *Id.* at 149.

125. Much of the summary consists of Judge Leval’s prediction of the effect of the majority’s decision: that the most abhorrent conduct—violations of norms of the international law of human rights—will go unpunished if the perpetrator is a corporation. Judge Leval also highlights that under the majority’s rule, “compensatory damages may be awarded under the ATS against the corporation’s employees . . . but not against the corporation that commanded the atrocities and earned profits by committing them.” *Id.* (Leval, J., concurring).

majority's holding.¹²⁶ He cited the lack of support for their decision: it was not a precedent of international law, there was no court approval for it, no international tribunal had declared it to be, no treaty or international convention had stated so, and no work of scholarship had declared it to be so.¹²⁷ Therefore, Judge Leval contended, the majority erred in looking to international law for guidance to see what bodies and rules recognize corporate liability.¹²⁸

Second, Judge Leval criticized the majority for looking to international criminal tribunals in its analysis, because corporations are never liable criminally,¹²⁹ and for contending that international law does not distinguish between criminal and civil liability.¹³⁰ In the majority's defense, however, few sources address this issue. Because this is a novel issue of law, and the ATS necessarily utilizes international law for interpretation, the majority had to utilize whatever international sources they could find for guidance. Furthermore, Judge Leval does not cite to any examples of the sources where international law distinguishes between civil and criminal. Rather, his concurring opinion seems to gloss over this.

Third, Judge Leval criticized the majority's reliance on an absence of a universal practice among nations of imposing civil damages on corporations. Judge Leval believes that international law relies on a set of norms and leaves other questions for nations to resolve for themselves. Therefore, "[w]hile most nations have not recognized tort liability for violations of international law, the United States, through the ATS, has opted to impose civil compensatory liability on violators and draws no distinction in its laws between violators who are natural persons and corporations."¹³¹ Judge Leval essentially argues that since international law has not created a norm of whether or not corporations can be civilly liable, the law of the United States should supplement international law norms. Under his analysis, because corporations can be held liable for civil damages in the United States, corporations can also be found liable under the ATS.

This is a circular argument that the concurrence uses to circumvent existing precedent. While it is true that United States law does not draw a distinction between corporations and individuals in civil law, the Supreme Court stated in *Sosa* that the ATS provides jurisdiction only,

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 151–52.

130. *Id.* at 152.

131. *Id.*

not a cause of action in and of itself.¹³² *Sosa* and other ATS precedent state that ATS causes of action must be based on international law.¹³³ Any attempt to say that international law is then supplemented by the domestic law of the United States is simply an attempt to bypass *Sosa* and other ATS precedent. A Court cannot bypass *Sosa* by saying that “international law” is essentially international norms and that domestic law supplements it. Otherwise, the ATS would create causes of action for international corporations both under international law and all other United States laws that “supplement” it—this goes against the statute itself.

Fourth, to explain the consequences of the majority’s opinion, Judge Leval writes that “because international law generally leaves all aspects of the issue of civil liability to individual nations, there is no rule or custom of international law to award civil damages in any form or context.”¹³⁴ Therefore “the absence of a universally accepted rule for the award of civil damages against natural persons means that U.S. courts may not award damages against a natural person.”¹³⁵ These statements ignore the fact that, by passing the ATS, the United States Congress created such a forum. While this is not a part of international law in and of itself, the legislature has the power to create causes of action in the courts of the United States.

Following this line of reasoning, Judge Leval states that if we must look to international law, and it cannot be supplemented by domestic laws, then there would have been no Nuremberg trials, no subsequent international tribunals, etc.¹³⁶ This logic is clearly flawed, since the Nuremberg trials were part of an International Charter. They were not authorized by the ATS nor brought under the jurisdiction of United States Courts.

Judge Leval continues, saying that it is improbable that the humanitarian law of nations—based in moral judgments reflected in legal systems throughout the world and seeking to protect fundamental human rights—would espouse a rule which undermines that objective and lacks any logical justification.¹³⁷ He explains that the rules of international law were created by a collective human agency representing the nations of the world with a purpose to serve desired objectives.¹³⁸ After Nuremberg, these objectives changed and broadened toward “universally

132. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

133. *Id.*

134. *Kiobel*, 621 F.3d at 152 (Leval, J., concurring).

135. *Id.* at 153.

136. *Id.* at 153.

137. *Id.* at 154.

138. *Id.*

shared moral objectives.”¹³⁹ There are certain universally condemned acts, however, that the law of nations emphatically opposes.¹⁴⁰

Judge Leval split these acts into two categories: where the corporation itself inflicts humanitarian abuses (slave trade and exploitation, piracy, and genocide) and where the corporation only aids and abets.¹⁴¹ In describing the direct infliction, Judge Leval again compared this to Nuremberg,¹⁴² despite his previous objection to the majority’s use of criminal liability situations in the analysis of civil liability. Again, it is difficult to see the merit of arguments relating to Nuremberg since it was not brought under the ATS. Regarding the claims where the corporation only aids and abets, Judge Leval recalled the standard set out in *Talisman* that a corporation must act with a purpose, so that the ATS would not be overly burdensome to corporations.

The concurrence also pointed out that it is nonsensical for the legal systems of the world to encourage “establishment of juridical entities” but “exempt [them] from the law’s commands and [immunize them] from suit.”¹⁴³ This does not seem reasonable. Congress creates laws and the Courts interpret them by applying the current law to factual situations. Nothing prevents Congress from expanding the ATS or passing new legislation creating liability for corporations’ actions abroad.

Finally, Judge Leval criticizes the majority for relying on *Sosa*’s footnote written by Justice Souter in dictum, despite the fact that the majority used the only relevant language from the only ATS decision ever issued by the Supreme Court.¹⁴⁴ Indeed, although *Sosa* did not address corporate liability, Justice Souter’s footnote is the only Supreme Court precedent on which lower courts can rely.

Despite the lengthy criticism of the majority opinion, Judge Leval wrote that the complaint should still be dismissed because the plaintiffs pled aiding and abetting without pleading a specific purpose, as required by *Talisman*.¹⁴⁵

2. *Kiobel v. Royal Dutch*: The Majority’s Response to the Concurring Opinion

The majority briefly addressed Judge Leval’s concurrence, both in their introduction and in a separate section.¹⁴⁶ In the introduction, the

139. *Id.*

140. *Id.* at 155.

141. *Id.*

142. *Id.*

143. *Id.* at 160.

144. *Id.*

145. *Id.* at 153–54.

146. *See id.* at 120–21, 145.

majority responded to Judge Leval's criticism that no precedent of international law endorses the majority's holding.¹⁴⁷ The majority responded that the responsibility for establishing a norm of international law lies with the one wishing to invoke it.¹⁴⁸ Therefore, it was the plaintiffs' responsibility to establish an international norm of holding a corporation liable. Since there are not "so many sources of international law calling for corporate liability," no norm was established and the corporations cannot be liable under the ATS.¹⁴⁹

Further, when the majority addressed Judge Leval's concurrence in its own section, they noted that Judge Leval agreed that international law does not impose liabilities on corporations or other private juridical entities.¹⁵⁰ Therefore, Judge Leval was not criticizing the second prong of their reasoning, but the first prong: that customary international law supplies the rule of decision.¹⁵¹ Indeed, Judge Leval proposed that domestic law should fill in the gaps where no norm of the law of nations exists. In doing so, Judge Leval ignored the fact that no governing body has ever granted an international tribunal jurisdiction over corporations.¹⁵² They further address his criticisms by saying that Judge Leval has attempted to shift the burden of identifying a norm of customary international law to the court, as opposed to the party being sued.¹⁵³ Since there is a definite absence of a norm of corporate liability in customary international law, the majority was correct.

The majority also noted that Judge Leval dismissed their argument that international tribunals consistently do not recognize corporate liability as a norm of customary international law.¹⁵⁴ The majority says that this distinction between civil and criminal liability is of little consequence, since there is no precedent regarding this distinction.¹⁵⁵ Judge Leval distorted their analysis: Judge Leval claimed the majority held "that the absence of a universal practice among the law of nations of imposing civil damages on corporations for violations of international law means that under international law corporations are not liable for violations of the law of nations."¹⁵⁶ The majority states this is not their holding.¹⁵⁷ The correct holding is that because corporate liability is not a

147. *Id.* at 120.

148. *Id.* at 120–21.

149. *Id.* at 121.

150. *Id.* at 145.

151. *Id.*

152. *Id.*

153. *Id.* at 146.

154. *Id.*

155. *Id.* (citing *Khumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 270 n.5 (2d Cir. 2007)).

156. *Id.* at 147.

157. *Id.*

norm, it cannot be applied in ATS proceedings.¹⁵⁸ Finally, the majority states that Judge Leval incorrectly categorized who can be liable for violations of international law as merely a question of remedy independently determined by each state.¹⁵⁹ Rather, the majority states, “the subjects of international law are defined by reference to international law itself.”¹⁶⁰

The majority also notes that they do not take Judge Leval’s passion for his position lightly.¹⁶¹ They note that Judge Leval calls their opinion illogical, strange, and inconsistent.¹⁶² They then say that if their reasoning is flawed, it will certainly be corrected by higher judicial authority.¹⁶³

3. Rehearing En Banc Denied

On February 4, 2011, the Second Circuit Court of Appeals voted to deny rehearing en banc.¹⁶⁴ Judges Lynch, Pooler, Katzmman, and Chin dissented, noting that the Second Circuit’s opinion in *Kiobel* created a circuit split with the Eleventh Circuit, citing *Romero v. Drummond*.¹⁶⁵ Judge Katzmman noted in a separate dissent that the Court divided 5-5 as to whether to proceed to en banc rehearing.¹⁶⁶

V. CURRENT ELEVENTH CIRCUIT LAW: *ROMERO V. DRUMMOND*— ELEVENTH CIRCUIT STILL HOLDS THAT CORPORATIONS ARE LIABLE UNDER THE ALIEN TORT STATUTE

In contrast to the Second Circuit, Eleventh Circuit law clearly states that the ATS provides jurisdiction over corporate defendants. *Romero v. Drummond* was an appeal from the United States District Court for the Northern District of Alabama.¹⁶⁷ The appellate opinion is consolidated from a number of appeals.¹⁶⁸ In one lower court case, the District Court

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 122.

162. *Id.*

163. *Id.* at 123.

164. *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 06-4800-CV, 06-4876-CV, 2011 WL 338151, *1 (2d Cir. 2011); see also *U.S. Appeals Court Declines to Rehear Case re Shell in Nigeria*, *supra* note 4.

165. *Kiobel*, 2011 WL 338151, at *1.

166. *Id.*

167. See *Romero v. Drummond Co.*, No. CV-03-BE-0575-W, 2006 WL 5186500, at *1 (N.D. Ala. Apr. 19, 2006).

168. See *Romero v. Drummond Co.*, 552 F.3d 1303, 1309 (11th Cir. 2008); *Romero v. Drummond Co.*, 480 F.3d 1234, 1238 (11th Cir. 2007). Note that two Eleventh Circuit appellate decisions exist under the same name. On March 14, 2007, the Eleventh Circuit issued *Romero v. Drummond Co.*, 480 F.3d 1234 (11th Cir. 2007), a decision concerning consolidated appeals, all

granted a motion to dismiss on the basis of plaintiff's failure to provide adequate expert disclosures under Federal Rule of Civil Procedure 26(a)(2)(B).¹⁶⁹ In the other lower court decision cited, plaintiffs sought damages under the ATS for extrajudicial killings on behalf of all plaintiffs, against all defendants.¹⁷⁰ The District Court denied the defendants' motion to dismiss as to the ATS claims because the union involved in the litigation was an alien, because it had adequately alleged an actionable tort for denial of the fundamental rights to associate and organize, and because it adequately alleged state action.¹⁷¹

On appeal, the Eleventh Circuit Panel considered "whether executives of Drummond, Ltd., the Colombian subsidiary of a coal mining company in Alabama, paid paramilitary operatives to torture and assassinate leaders of a Colombian trade union, SINTRAMIENERGETICA."¹⁷² As background, the court explains that in 2002 and 2003, the Union, several leaders, and the families of deceased union leaders sued Drummond, Drummond's parent company, and their executives under the ATS and the Torture Victim Protection Act of 1991.¹⁷³ The District Court consolidated the two cases and granted partial summary judgment against the plaintiffs. However, "one claim for relief that Drummond aided and abetted the killings, which were war crimes, remained."¹⁷⁴

The jury returned a verdict for defendant Drummond.¹⁷⁵ The plaintiffs appealed the partial summary judgment and a series of discovery and evidentiary rulings made before and during the trial.¹⁷⁶ Drummond appealed as well, to challenge the subject-matter jurisdiction of the District Court.¹⁷⁷

The court notes at the beginning of the opinion that they have concluded that the District Court did indeed have subject-matter jurisdiction under the ATS.¹⁷⁸ The Court then continues its discussion and addresses each issue separately.¹⁷⁹ Regarding partial dismissal: Drummond moved to dismiss in 2002 because the "union lacked standing to sue for wrong-

dealing with a criminal contempt sanction due to discovery-related issues during the *Romero* trial. This opinion does not address any ATS issues. In fact, the entire opinion does not even mention the ATS.

169. *Romero*, 2006 WL 5186500, at *1.

170. *Estate of Rodriguez v. Drummond Co. Inc.*, 256 F. Supp. 2d 1250, 1255 (N.D. Ala. 2003).

171. *Id.* at 1265.

172. *Romero*, 552 F.3d at 1308–09.

173. *See id.* at 1309.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* Much of this opinion contains discussion related to non-ATS issues (mainly discovery and evidentiary issues). This article will delve only into the ATS-related portion of the opinion.

ful death and that corporations are not subject to suit under the Torture Act.”¹⁸⁰ “The District Court ruled that the union lacked standing to pursue a wrongful death claim under Alabama law, and that corporations are subject to suit under [the Torture Act].”¹⁸¹ In addition to discovery issues, “plaintiffs dismissed their right-to-associate claims under the Alien Tort Statute . . . [and] [t]he district court concluded that sufficient evidence supported the claim for aiding and abetting extrajudicial killings in violation of the Alien Tort Statute.”¹⁸²

In its analysis, the Eleventh Circuit panel noted that the court must review *de novo* issues of subject-matter jurisdiction.¹⁸³ The panel then addressed Drummond’s arguments that: neither the Torture Act nor the ATS allow suits against corporations; that neither provide claims for aiding and abetting; and “that the Torture Act provides the exclusive cause of action for extrajudicial killing in violation of international law.”¹⁸⁴

The Eleventh Circuit first makes it clear that the District Court had subject-matter jurisdiction, stating that “the arguments of Drummond about the Alien Tort Statute are foreclosed by our precedent.”¹⁸⁵ The panel then stated that “the ATS is jurisdictional and does not create an independent cause of action.”¹⁸⁶ “The ATS [also] provides jurisdiction over the plaintiffs’ claims for violations of the law of nations.”¹⁸⁷

The panel noted that although the text of the ATS itself provides no explicit exception for corporations, that the law of the Eleventh Circuit “grants jurisdiction from complaints of torture against corporate defendants” and that the court is bound by that precedent.¹⁸⁸ This is the extent of the discussion regarding corporate liability under the ATS. It stands in stark contrast to the lengthy analysis seen in the *Kiobel*. Without further discussion and analysis, it almost appears that the Eleventh Circuit assumed that the ATS permits corporate liability.

VI. CONCLUSION: WHY THE SECOND CIRCUIT IS RIGHT

We live in an ever-expanding global society where corporations routinely split into subsidiaries and do business all around the world. There is a temptation to follow existing assumptions that the ATS provides jurisdiction over corporations, without looking to the actual text of

180. *Id.* at 1309–10.

181. *Id.*

182. *Id.* at 1312.

183. *Id.* at 1313.

184. *Id.* at 1314.

185. *Id.* at 1315.

186. *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004)).

187. *Id.*

188. *Id.*

or correct interpretation of the statute. This is a trap into which our courts must not fall.

The lengthy majority opinion issued by the Second Circuit in *Kiobel* outlines the correct law: The ATS clearly cannot be applied to corporations because they are not liable under customary international law. This is not to say that corporations have free reign to act however they want overseas. The history of the ATS, however, shows that Congress drafted it with the intent to bring customary international law within the borders of the United States. It was not intended to be a method for courts to create new liabilities for corporations without regard to the current international norms.

To remedy situations where corporations are committing human rights abuses abroad, Congress could certainly pass a new statute extending jurisdiction for corporations' international actions to the United States' courts. Until this happens, the Eleventh Circuit and the other courts in the United States should follow the Second Circuit's legal reasoning and analysis and hold that the ATS does not create a cause of action for corporations.

