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Corporate Tort Liability Under the Alien Tort Statute Post-*Kiobel*

Scott E. Allbright Jr.

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CORPORATE TORT LIABILITY UNDER THE ALIEN TORT STATUTE POST-KIOBEL

BY SCOTT E. ALLBRIGHT, JR.*

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I. INTRODUCTION

The Court of Appeals for the Second Circuit is widely credited with resuscitating¹ the 1789 Alien Tort Statute ("ATS")² in its landmark 1980 decision, *Filartiga v. Pena-Irala*.³ In *Kiobel v. Royal Dutch Petroleum Co.*,⁴ it addressed the liability of corporations for violations of customary international law and fundamentally altered decades of human rights litigation. Since *Filartiga*, the Second Circuit has been known for deciding

¹ See, e.g., Katherine Gallagher, *Civil Litigation and Transnational Business*, 8 J. INT'L CRIM. JUST. 745, 746 (2010); Marc Gottridge & Matthew Galvin, *The ATS: An Introduction and Current Topics*, 826 PLI/LIT 87, 89 (2010).

² 28 U.S.C. § 1350 (2012): "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." The ATS is also referred to by the courts as the "Alien Tort Claims Act" ("ATCA"), and the names are used interchangeably in some opinions.

³ 630 F.2d 876 (2d Cir. 1980) (holding that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights" and that the ATS provided subject matter jurisdiction).

⁴ 621 F.3d 111 (2d Cir. 2010).

ATS cases.⁵ The court entered into uncharted and controversial territory⁶ though, as it attempted to deal with a claim made by a group of Nigerian plaintiffs who alleged 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*”⁷ so as to promote their exploratory efforts.⁸ In ultimately determining that corporate liability does not exist under the ATS,⁹ the Second Circuit majority misconstrued its own precedent and that of other circuits, the Supreme Court’s interpretation of the ATS in *Sosa v. Alvarez-Machain*,¹⁰ the principles and goals of international law, scholarly commentary, and the earliest available interpretations of the ATS. The plaintiffs sought review in the Supreme Court of the United States.

After having the case on its docket for more than two years,¹¹ the Supreme Court’s long-awaited decision in *Kiobel v. Royal Dutch Petroleum Co.*¹² ultimately allowed the Second Circuit result to stand,¹³ albeit on different grounds.¹⁴ That the Supreme Court took so long to decide *Kiobel*, and that its short-yet-divided opinion did little more than cloud

⁵ See Lori Delaney, *Flores v. Southern Peru Copper Corporation: The Second Circuit Fails to Set a Threshold for Corporate Alien Tort Liability*, 25 NW. J. INT’L L. & BUS. 205, 208 (2004); see also *Kiobel*, 621 F.3d at 116. A representative sample of ATS cases decided by the Second Circuit includes: *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Vietnam Ass’n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

⁶ But see *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261 n.12 (2d Cir. 2009) (assuming that corporations may be liable for violations of customary international law).

⁷ *Kiobel*, 621 F.3d at 117 (emphasis added).

⁸ *Id.* at 189-90 (Leval, J., concurring). It was said at one point that the defendants’ “smooth economic activities” could not continue without increased “ruthless military operations.” *Id.*

⁹ *Id.* at 148-49 (majority opinion).

¹⁰ 542 U.S. 692 (2004). *Sosa* was unanimous, but it drew a concurring opinion from Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) and one from Justice Breyer. Justice Scalia took issue with what he saw as a “reservation of discretionary power in the Federal Judiciary” in regards to the ATS. *Id.* at 739. Justice Breyer would add a “further consideration” to the Court’s ATS decision and ask “whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.” *Id.* at 761.

¹¹ Rich Samp, *Supreme Court Observations: Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation*, FORBES, (Apr. 18, 2013, 10:51 AM), <http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/>.

¹² 133 S. Ct. 1659 (2013). Of note, and much like its sole ATS predecessor, *Sosa*, the court in *Kiobel* was divided and spawned a majority opinion along with three concurrences.

¹³ *Id.* at 1669.

¹⁴ *Id.* (applying the presumption against the extraterritorial application of United States law); see also discussion *infra* Part V.

the already muddy waters of corporate ATS liability,¹⁵ speaks volumes of the importance that a final resolution on the issue of corporate liability under the ATS come from the body that first enacted the statute more than two centuries ago. The decision on whether corporations can be subjects of international law under the ATS is also too important a matter to be left to the final decision of judges.¹⁶ While the Second Circuit's interpretation was wrong, and while the Supreme Court skirted the issue, the final resolution—whether the ATS applies to or exempts corporations—should ultimately be a congressional one.¹⁷

The ATS was enacted as part of the Judiciary Act of 1789¹⁸—the same act which gave rise to a famous congressional overreach.¹⁹ The Second Circuit panel quoted Judge Friendly who said that it is a “‘legal Lohengrin’—‘no one seems to know whence it came.’”²⁰ Summarizing the court's holding in *Filartiga*, the panel noted that the ATS supports jurisdiction for tort claims brought by aliens for violations of the law of nations or “customary international law.”²¹ It is clear that there is essentially no suggestion of any original legislative intent in its enactment.²² The Supreme Court has said that it was “enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for

¹⁵ See, e.g., Kristin Linsley Myles and James Rutten, *Kiobel commentary: Answers . . . and more questions*, SCOTUSBLOG (Apr. 18, 2013, 2:07 PM), <http://www.scotusblog.com/2013/04/commentary-kiobel-answers-and-more-questions/>.

¹⁶ The Court's opinion notes this in its discussion of the presumption against the extraterritorial application of United States laws. See *Kiobel*, 133 S. Ct. at 1669.

¹⁷ It is not the goal or purpose of this note to delve too deeply into the Supreme Court's decision in *Kiobel*. Without doubt, the fractured nature of that opinion will spawn numerous scholarly works in the months to come. As stated, this note argues that regardless of the Supreme Court's opinion, the issue of corporate tort liability under the ATS should be a congressional determination and one not left to the individual circuits or district courts. Two noted scholars have suggested that the power to determine the applicability of the ATS belongs to Congress. See Julian Ku & John Yoo, *The Supreme Court Unanimously Rejects Universal Jurisdiction*, FORBES (Apr. 21, 2013, 10:00 AM), <http://www.forbes.com/sites/realspin/2013/04/21/the-supreme-court-unanimously-rejects-universal-jurisdiction> (“This common sense rule reserves for the political branches the crucial right to weigh the foreign policy consequences of subjecting foreign conduct to U.S. law. It also gives Congress a chance to determine whether it wants to give private plaintiffs the power to enforce such norms or keep it in its traditional home, the President and the executive branch.”).

¹⁸ See, e.g., *Kiobel*, 133 S. Ct. at 1663.

¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 139–40 (1803).

²⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 116 (2d Cir. 2010) (quoting *IIT v. Vencap, Inc.*, 519 F.2d 1001, 1015 (2d Cir. 1975)).

²¹ *Id.* at 116 n.3 (the court explained that the terms are synonymous (citing *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 237 (2d Cir. 2003) and *The Estrella*, 17 U.S. (Wheat.) 298, 307 (1819))).

²² See Gottridge & Galvin, *supra* note 1, at 89.

personal liability at the time [of enactment].”²³ Justice Souter, in *Sosa*, recognized that “the birth of the modern line of [ATS] cases [began] with *Filartiga v. Pena-Irala*.”²⁴ The *Filartiga* decision has been credited with bringing the ATS back into relevance. The *Kiobel* opinions have brought the ATS fully into the spotlight and highlight the need for action.

In Part II, this note will introduce and analyze other important ATS cases. First, it will examine the series of ATS cases decided by the Second Circuit, starting with *Filartiga* and culminating with its opinion in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*²⁵ This will be followed by a review of ATS cases decided in other circuits. Part II will also include an analysis of the Supreme Court’s decision in *Sosa v. Alvarez-Machain*, since, prior to *Kiobel*, it was the *only* case decided by the Court under the ATS.²⁶ That portion will focus on the majority’s treatment of the ATS as well as highlight important points made by Justices Scalia and Breyer in their respective concurrences—all very important in fully understanding the state of the law on corporate ATS liability.

Despite the Supreme Court’s affirmance of the Second Circuit’s judgment, the fact that it declined to decide the issue of corporate liability means that the panel’s discussion of corporate ATS liability remains important. Therefore, Part III will provide an overview of the Second Circuit judges’ opinions in *Kiobel* in order to demonstrate the arguments and introduce the most contentious issues. Part IV will analyze the majority and concurring opinions’ treatment of *Sosa* as well as their respective treatment of appellate precedent. Part IV will also analyze the judges’ readings of both customary international law and scholarly commentary. In Part V, this note will turn to the Supreme Court’s long-awaited decision in this case and what it means for ATS litigation going forward. The note will then conclude with a critique of the Second Circuit and Supreme Court *Kiobel* opinions, some comments on the future of corporate ATS liability, and a call to action that highlights the importance of congressional intervention.

²³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

²⁴ *Id.* at 724–25.

²⁵ 582 F.3d 244 (2d Cir. 2009).

²⁶ *Kiobel*, 621 F.3d at 117.

II. DEVELOPING A CONTEXT: THE ALIEN TORT STATUTE IN THE COURTS

A. Adopting an Orphan: The Second Circuit and the ATS

1. Breaking New Ground

In *Filartiga v. Pena-Irala*, Paraguayan citizens brought suit against the Inspector General of the Paraguayan police for the torture and death of the son of one of the plaintiffs in alleged retaliation for the father's political activities.²⁷ The complaint was initially dismissed for lack of subject-matter jurisdiction.²⁸ The panel held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."²⁹ Therefore, the ATS provided jurisdiction.

The defendants challenged the statute's constitutionality, but the court rejoined that Congress had the power to enact it because anything related to the law of nations was within federal common law powers.³⁰ The court cited Blackstone for historical reinforcement.³¹ Concluding that the dismissed claims had to be reversed, the court eloquently opined that "[i]n the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture," and that the holding "is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."³² The judicial resuscitation of the ATS had begun.

2. Jurisdiction Over Non-State Actors for Genocide

In *Kadic v. Karadzic*,³³ the plaintiffs were ethnic minorities from the former Yugoslavia³⁴ allegedly subjected to "rape, forced prostitution, forced impregnation, torture, and summary execution" as part of a "genocidal campaign conducted in the course of the Bosnian civil war" by

²⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 885.

³¹ *Id.* at 886.

³² *Id.* at 890.

³³ 70 F.3d 232, 236 (2d Cir. 1995).

³⁴ *Id.* at 236.

the defendant, the president of a self-proclaimed republic.³⁵ The trial court dismissed the complaints for lack of subject-matter jurisdiction.³⁶ On appeal, the plaintiffs asserted jurisdiction under the ATS.³⁷ The defendant argued that the ATS did not cover non-state actors, and that he, as the leader of merely a “self-proclaimed” state, was technically a non-state actor.³⁸ The unanimous panel disagreed with this assessment of the ATS, and it held that violations of the law of nations are violations independent of state or non-state actor status.³⁹ The court allowed ATS jurisdiction over non-state actors and reversed the dismissal of the complaint.⁴⁰

3. Suits Against Corporations

*Khulumani v. Barclay Nat. Bank Ltd.*⁴¹ could have preempted *Kiobel*, but the defendant did not raise the defense of corporate liability, and so the court did not decide it.⁴² In *Khulumani*, South African citizens alleged that a corporation acted in concert with the South African government to sustain apartheid.⁴³ The trial court dismissed the complaints for lack of subject-matter jurisdiction.⁴⁴ The Second Circuit panel vacated the order.⁴⁵ In a concurrence cited often in *Kiobel*, Judge Katzmman noted that he felt that the trial court erred by “conflat[ing] the jurisdictional and cause of action analyses required by the ATCA” and by disallowing a claim for aiding and abetting apartheid under international law.⁴⁶ He also noted that the circuit seemed to consistently view individual and corporate liability in the same light.⁴⁷ Another judge concurred in the dismissal, but argued that corporations should *not* be liable under the ATS.⁴⁸ Nevertheless, the suit proceeded—the corporate liability defense

³⁵ *Id.* at 236–37.

³⁶ *Id.* at 236.

³⁷ *Id.* at 238.

³⁸ *Id.* at 239.

³⁹ *Id.*

⁴⁰ *Id.* at 251.

⁴¹ 504 F.3d 254 (2d Cir. 2007) (per curiam).

⁴² *Id.* at 282–83 (Katzmann, J., concurring) (since the defendants did not raise the issue, the court did not decide whether corporations are liable under customary international law).

⁴³ *Id.* at 258.

⁴⁴ *Id.* at 259.

⁴⁵ *Id.* at 260 (2–1 opinion).

⁴⁶ *Id.* at 264 (Katzmann, J., concurring).

⁴⁷ *Id.* at 282–83.

⁴⁸ *Id.* at 292 (Hall, J., concurring in part, dissenting in part).

neither argued nor decided.

4. Assuming Corporate Liability Under the Law of Nations

The plaintiffs in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*⁴⁹ were Sudanese citizens who alleged that the defendant aided and abetted human rights abuses by the Sudanese government,⁵⁰ specifically torture, war crimes, complicity in genocide, and crimes against humanity.⁵¹ The complaint was dismissed by the trial court for lack of subject-matter jurisdiction under the ATS.⁵² Finding that the complaint had no suggestion of *intentional* involvement, the panel, which consisted of Chief Judge Jacobs and Judges Cabranes and Leval, affirmed.⁵³ While the claims had to be dismissed, the court opined in a footnote that “[w]e will also assume, without deciding, that corporations such as Talisman may be held liable for the violations of customary international law.”⁵⁴ Prior to *Kiobel*, this was the furthest that the Second Circuit gone in addressing corporate tort liability under the law of nations.

B. The ATS Across America

1. The Ninth Circuit: The Corporate Mindset

In *Doe I v. Unocal Corp.*,⁵⁵ the plaintiffs “allege[d] that the Defendants directly or indirectly subjected the villagers to forced labor, murder, rape, and torture when the Defendants constructed a gas pipeline through the Tenasserim region [of Myanmar].”⁵⁶ The court addressed the meaning of “the law of nations” and the allegations.⁵⁷ It said that a “threshold question in any ATCA case *against a private party*, such as Unocal, is whether the alleged tort requires the private party to engage in state action for ATCA liability to attach”⁵⁸

The ATS-related allegation in *Doe I* was forced labor.⁵⁹ The court

⁴⁹ 582 F.3d 244 (2d Cir. 2009).

⁵⁰ *Id.* at 247.

⁵¹ *Id.* at 253.

⁵² *Id.* at 247.

⁵³ *Id.* at 247–48.

⁵⁴ *Id.* at 261 n.12.

⁵⁵ 395 F.3d 932 (9th Cir. 2002).

⁵⁶ *Id.* at 936.

⁵⁷ *Id.* at 944–45.

⁵⁸ *Id.* at 945.

⁵⁹ *Id.* at 947.

drew guidance from the Second Circuit's decision in *Kadic v. Karadzic*, and held that certain crimes "do *not* require state action when committed in furtherance of other crimes."⁶⁰ The court looked to its precedent and found that "forced labor is a modern variant of slavery" and "is among the 'handful of crimes . . . to which the law of nations attributes *individual liability*'"⁶¹ The court used evidentiary standards as propounded by recent international *criminal* tribunals to determine how international law views aiding and abetting.⁶² The panel held that a jury could find the relevant actus reus⁶³ and mens rea⁶⁴ of aiding and abetting forced labor, and it reversed summary judgment.⁶⁵ Preceding an en banc hearing,⁶⁶ the case was settled out of court⁶⁷ and dismissed.⁶⁸

2. The Eleventh Circuit: ATS Textualism

In *Romero v. Drummond Co.*⁶⁹ the plaintiffs alleged that a corporate defendant paid to have members of a Colombian trade union tortured.⁷⁰ The defendant argued that the ATS does not allow suits against corporations,⁷¹ but the court easily dispatched with that, stating that "[t]he text of the Alien Tort Statute provides no express exception for corporations . . ." and it observed that "the law of this Circuit is that this

⁶⁰ *Id.* at 945-46.

⁶¹ *Id.* at 946 (quoting *Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774, 794-95 (D.C. Cir. 1984) (Edwards, J., concurring)).

⁶² *Id.* at 950.

⁶³ *Id.* at 952 ("[P]ractical assistance or encouragement which has a substantial effect on the perpetration of the crime of, in the present case, forced labor.").

⁶⁴ *Id.* at 953 ("[A]ctual or constructive (i.e., reasonable) knowledge that the accomplice's actions will assist the perpetrator in the commission of the crime.").

⁶⁵ *Id.*

⁶⁶ *Doe I v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003). While the opinion granting the hearing ordered that the "panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court," *id.* at 979, the rationale was nonetheless accepted by three circuit judges. See *Doe I*, 395 F.3d at 963 (Reinhardt, J., concurring) ("As to that [ATS], I agree with the majority that material factual disputes exist regarding plaintiffs' claims for forced labor used in connection with the Yadana Pipeline Project. I also agree with the majority that if plaintiffs prove their allegations, Unocal may be held liable under the Act for the use of forced labor"). Thus, its arguments are worth considering.

⁶⁷ See Lisa Girion, *Unocal to Settle Rights Claims*, L.A. TIMES, Dec. 14, 2004, <http://articles.latimes.com/2004/dec/14/business/fi-unocal14>.

⁶⁸ *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005).

⁶⁹ 552 F.3d 1303 (11th Cir. 2008).

⁷⁰ *Id.* at 1308-09.

⁷¹ *Id.* at 1314.

statute grants jurisdiction from complaints of torture against corporate defendants.”⁷² The panel was referring to *Aldana v. Del Monte Fresh Produce, N.A., Inc.*,⁷³ where a panel held that a corporate defendant could be liable for torture under the ATS.⁷⁴ The blanket defense of incorporation, as argued by Drummond, was not even raised by the defendant,⁷⁵ nor discussed by the panel. Combining the plain text of the ATS and its own case history, the panel had no trouble finding corporate liability.

C. The Supreme Court Enters the Game

1. Setting the Standard

In *Sosa v. Alvarez-Machain*,⁷⁶ Humberto Alvarez-Machain (“Alvarez”) was indicted by a federal grand jury for torturing and killing a United States Drug Enforcement Agency (“DEA”) operative in Mexico.⁷⁷ After the United States government tried unsuccessfully to get help from the Mexican government to apprehend him, it decided to employ a group of Mexican citizens to seize him.⁷⁸ He was taken from his home, kept in a hotel overnight, and then flown to Texas where he was arrested, tried, and acquitted.⁷⁹ Alvarez sued his kidnapper and several DEA agents under the ATS.⁸⁰ How the Court handled the ATS claim is of vital importance in the forthcoming discussion of how the Second Circuit panel misconstrued the Supreme Court’s rationale in *Sosa*.

The trial judge gave summary judgment to Alvarez.⁸¹ The decision was affirmed by a panel of the Ninth Circuit;⁸² a deeply divided en banc circuit also affirmed it.⁸³ The en banc majority applied circuit ATS precedent to hold that it “not only provides federal courts with subject

⁷² *Id.* at 1315.

⁷³ 416 F.3d 1242 (11th Cir. 2005).

⁷⁴ *Id.* at 1253.

⁷⁵ See generally Defendants’ Motion To Dismiss For Lack of Subject Matter Jurisdiction, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2002) (No. 01-3399-Civ-Moreno), 2002 WL 32707307.

⁷⁶ 542 U.S. 692 (2004).

⁷⁷ *Id.* at 697.

⁷⁸ *Id.* at 698.

⁷⁹ *Id.*

⁸⁰ *Id.* (Alvarez also brought a claim under the Federal Tort Claims Act but that is not relevant here.).

⁸¹ *Id.* at 699.

⁸² *Alvarez-Machain v. United States*, 266 F.3d 1045, 1064 (9th Cir. 2001).

⁸³ *Alvarez-Machain v. United States*, 331 F.3d 604, 641 (9th Cir. 2003) (en banc) (6-5 decision).

matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations.”⁸⁴ The majority recognized “a clear and universally accepted norm prohibiting arbitrary arrest and detention . . . codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions.”⁸⁵ Thus, the arrest and detention violated the law of nations.⁸⁶ The DEA petitioned the Supreme Court, and the Court granted certiorari.⁸⁷

The Court’s opinion was fractured.⁸⁸ In Part III, Justice Souter addressed Alvarez’s claim that the ATS not only gave jurisdiction to the federal courts to hear claims for violations of the law of nations, but also gave them the power to create new causes of action for violations of international law.⁸⁹ As to the jurisdictional claim, Justice Souter noted that § 1350 was placed in Section 9 of the Judiciary Act, a section devoted to federal jurisdiction.⁹⁰ Justice Souter called the origination argument “implausible.”⁹¹ For further evidence of the intended nature of the ATS, Justice Souter cited a commentator who wrote that “[the ATS] clearly does not create a statutory cause of action.”⁹² Thus, the Court found that the ATS was intended to “address[] the power of the courts to entertain cases concerned with a certain subject.”⁹³

Justice Souter then moved to a discussion of the “law of nations” as the term was understood in 1789.⁹⁴ Referring to Blackstone, Justice Souter found that English law narrowed the law of nations to the “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”⁹⁵ He concluded that this was likely considered by the first Congress when it enacted the statute.⁹⁶

⁸⁴ *Id.* at 612.

⁸⁵ *Id.* at 620.

⁸⁶ *Id.*

⁸⁷ *Sosa v. Alvarez-Machain*, 540 U.S. 1045 (2003).

⁸⁸ The Court’s opinion was unanimous as to Parts I and III. Part II of the Court’s opinion analyzed the FTCA claim. Part IV garnered just 6 votes and was challenged by the concurrence of Justice Scalia, along with Chief Justice Rehnquist and Justice Thomas.

⁸⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* (quoting William Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 479 (1986) (internal quotation marks omitted)).

⁹³ *Id.* at 714.

⁹⁴ *Id.* at 714–15.

⁹⁵ *Id.* at 715 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).

⁹⁶ *Id.*

He observed that the Continental Congress was concerned with such issues but failed to get the individual states to provide appropriate remedies.⁹⁷ The new government dealt with this problem by vesting the federal judiciary with power under the ATS.⁹⁸

Bemoaning the fact that there is virtually no congressional record or legislative history relevant to the ATS, Justice Souter looked to the writings of commentators and concluded that “a consensus understanding of what Congress intended has proven elusive.”⁹⁹

He then explained that the history of the ATS allows two inferences.¹⁰⁰ The first is that the statute is seemingly self-executing in that it does not require any future act of Congress to vest it with any further authority.¹⁰¹ Justice Souter made further note of Congress’ attentiveness to the law of nations as discussed by Blackstone.¹⁰² The other inference Justice Souter drew is that the ATS was designed to “furnish jurisdiction for a relatively modest set of actions” and that, according to Blackstone, such offenses typically involved states not individuals.¹⁰³

Continuing the quest for a historical understanding of the ATS, Justice Souter discussed the opinion of an Attorney General, who, in 1795 “made it clear that a federal court was open for a tort” resulting from Americans who aided “the French plunder of a British slave colony in Sierra Leone.”¹⁰⁴ Justice Souter felt that he must have presumed the ATS to provide jurisdiction for common law claims.¹⁰⁵ Ultimately, Justice Souter determined that Congress intended the ATS to have “practical [jurisdictional] effect” and that it would provide a cause of action limited to the “modest number of international law violations with a potential for personal liability at the time.”¹⁰⁶

In Part IV, Justice Souter set out the standard for evaluating ATS claims.¹⁰⁷ He noted that the present version of the ATS was substantially the same as its original version.¹⁰⁸ Justice Souter held that courts hearing

⁹⁷ *Id.* at 715-16.

⁹⁸ *Id.* at 717.

⁹⁹ *Id.* at 718-19.

¹⁰⁰ *Id.* at 719.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 720.

¹⁰⁴ *Id.* at 721 (citing 1 Op. Att’y Gen. 57 (1795)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 724.

¹⁰⁷ *Id.* at 724-25.

¹⁰⁸ *Id.* at 725.

ATS claims for violations of the law of nations should ensure that such claims “rest on a norm of international character accepted by the civilized world” which is “defined with a specificity *comparable* to the features of the 18th-century paradigms [the Court, noting Blackstone] has recognized.”¹⁰⁹

He said that “judicial caution” is important in ATS suits because there is tremendous room for interpretation of international norms under this rule.¹¹⁰ Justice Souter cited *Erie v. Tompkins*’s impact on federal common law and opined that the Court has been exceedingly wary of major alterations of substantive law by courts as opposed to legislatures.¹¹¹ He wrote that the Court has adhered to legislatively-created causes of action, with the judiciary having little or no role therein.¹¹² He commanded that courts consider the Executive’s role in foreign relations and how interference by the courts in allowing new claims by aliens could hurt international relations.¹¹³ Justice Souter cautioned that there is “no congressional mandate to seek out and define new and debatable violations of the law of nations.”¹¹⁴ Lastly, Justice Souter noted that the Senate, in ratifying the Covenant on Civil and Political Rights in 1992, “expressly declined to give the federal courts the task of interpreting and applying international human rights law.”¹¹⁵ The Court’s mandate is firm but appropriate.

Justice Souter then turned to the criticisms raised by Justice Scalia’s concurring opinion.¹¹⁶ In response to Justice Scalia’s desire to “close the door” to ATS claims beyond those explicitly noted by Blackstone, he cited several cases to show that American law has always been, not only open to, but bound by, international legal norms.¹¹⁷ Some examples include:

- “[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ *Id.* at 725-26.

¹¹¹ *Id.* at 726 (citing *Erie*, 304 U.S. at 708).

¹¹² *Id.* at 727.

¹¹³ *Id.* at 727-28.

¹¹⁴ *Id.* at 728.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 728-29.

¹¹⁷ *Id.* at 729-30.

circumstances;”¹¹⁸

- “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination;”¹¹⁹ and
- “[T]he Court is bound by the law of nations which is a part of the law of the land.”¹²⁰

He argued that these statements support the proposition that American law should be *open* to new international norms beyond those recognized at Blackstone’s time.¹²¹ Justice Souter’s comment that “the position [the Court] takes today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala*” is very appropriate here.¹²²

Lastly, Justice Souter outlined the Court’s criteria for determining whether a particular claim is sufficient under the ATS.¹²³ He looked to a case from 1820 that described the specificity with which “piracy” was defined under international law.¹²⁴ Justice Souter held that “claims for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when [the ATS] was enacted” should not lie.¹²⁵ Furthermore, such a calculation “should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”¹²⁶ The element of discretion is thus very important.

In Footnote 20, a footnote that will be brought up repeatedly in *Kiobel*, Justice Souter added: “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

¹¹⁸ *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964)) (internal quotation marks omitted).

¹¹⁹ *Id.* at 730 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)) (internal quotation marks omitted).

¹²⁰ *Id.* (quoting *The Nereide*, 9 Cranch 388, 423 (1815) (Marshall, C.J.)) (internal quotation marks omitted).

¹²¹ *Id.* at 730-31.

¹²² *Id.* at 731.

¹²³ *Id.* at 731-32.

¹²⁴ *Id.* (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820)).

¹²⁵ *Id.* at 732.

¹²⁶ *Id.* at 732-33.

as a corporation or individual.”¹²⁷ Also therein, Justice Souter noted a 1984 District of Columbia Circuit case¹²⁸ found an “insufficient consensus . . . that torture by private actors violates international law” while a 1995 Second Circuit case¹²⁹ found a “sufficient consensus . . . that genocide by private actors violates international law.”¹³⁰ Justice Souter said that Alvarez tried to argue that his situation constituted a violation of customary international law, but, like the first example, he did not make a compelling case.¹³¹

Even more went against Alvarez in this regard as Justice Souter referred to the Restatement (Third) of Foreign Relations Law of the United States inferring that “[a]ny credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority.”¹³² He summarized Alvarez’s claim as aspirational and lacking in specificity.¹³³ Thus, the claim was insufficient to establish a violation of customary international law and was therefore jurisdictionally deficient insofar as the ATS is concerned.¹³⁴

2. “One Further Consideration”: Justice Breyer’s Concurring Opinion

After he summarized the majority’s holding, Justice Breyer stated that he wished to add an additional criterion to the court’s analysis.¹³⁵ Justice Breyer said that courts should consider “whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement” and how this fits in an increasingly “interdependent world.”¹³⁶ He views this as a way to ensure that the application of the ATS by American courts helps, and does not hurt, international relations.¹³⁷ His concern for comity stems

¹²⁷ *Id.* at 732 n.20.

¹²⁸ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring).

¹²⁹ *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (2d Cir. 1994).

¹³⁰ *Sosa*, 542 U.S. at 732 n.20.

¹³¹ *See id.* at 726; *see also id.* at 726 n.27.

¹³² *Id.* at 737.

¹³³ *Id.* at 738.

¹³⁴ *Id.*

¹³⁵ *Id.* at 760-61 (Breyer, J., concurring).

¹³⁶ *Id.* at 761.

¹³⁷ *Id.*

especially from suits arising abroad.¹³⁸ Justice Breyer noted that international law may reflect a universal agreement that certain kinds of behavior should be prosecuted including torture, genocide, crimes against humanity, and war crimes.¹³⁹ Justice Breyer argued that because such an agreement exists it makes sense for various nations to allow civil prosecution for these (and, of course, others which may fit in the limited category) infractions.¹⁴⁰ While he noted that this traditionally concerns *criminal* jurisdiction, civil jurisdiction over the same matters should work just the same.¹⁴¹ Because many foreign criminal tribunals combine civil and criminal matters, "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well."¹⁴² Justice Breyer found no sufficient consensus in regards to the present issue, and he restated his conclusion that the ATS precluded Alvarez's suit.¹⁴³

3. *Going Too Far: Justice Scalia's Concurring Opinion*

Justice Scalia declined to join Part IV of the majority opinion because it called for the "reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms."¹⁴⁴ He termed it a "judicial lawmaking role."¹⁴⁵ In light of these concerns, his opinion deserves mention.

Justice Scalia said that the point of departure between his opinion and the majority's is the element of judicial discretion.¹⁴⁶ Such federal common law power, he pointed out, was destroyed by *Erie v. Tompkins* and the Court's decision seems to allow for the kind of judicial lawmaking that would not have been considered at the time of the ATS's enactment.¹⁴⁷

Justice Scalia's overarching concerns dealt with the potential expansion of judicial lawmaking and the lessening of the grip of judicial

¹³⁸ *Id.*

¹³⁹ *Id.* at 762 (referring to *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, P155-56 (Dec. 10, 1998), reprinted in 38 I.L.M. 317, 349-50 (1999); *Attorney-General of Israel v. Eichmann*, 36 I.L.R. 277 (Sup. Ct. 1962)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 762-63.

¹⁴³ *Id.* at 763.

¹⁴⁴ *Id.* at 739 (Scalia, J., concurring).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 744.

¹⁴⁷ *Id.* at 744-45.

restraint.¹⁴⁸ He said that *Kadic v. Karadzic*¹⁴⁹ is an example of a court finding a cause of action based on an international norm even though Congress had enacted a statute conforming to the norm and specifically saying that courts were *not to create* any new rights.¹⁵⁰ Justice Scalia concluded that the law of nations-based creation of new civil claims is a “20th-century invention of international law professors and human rights activists,” and that the Founders would be “appalled” by the kind of discretion authorized by the majority to apply international norms to American law.¹⁵¹ Justice Scalia’s observations are not lost here, since the hearing of American courts of such suits would bring about a massive increase in litigation, but even under Justice Scalia’s well-known judicial philosophy, Originalism, the ATS would seem to apply to corporations.¹⁵²

With this understanding of the Supreme Court’s ATS rationale identified, and with the relevant concerns and considerations noted, it is now time to analyze the Second Circuit’s opinion in *Kiobel*.

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

A. *Factual Allegations*

In *Kiobel v. Royal Dutch Petroleum Co.*,¹⁵³ the plaintiffs alleged that Royal Dutch Petroleum Company (“Royal Dutch”) and Shell Transport and Trading Company (“Shell”), through a subsidiary, aided and abetted the Nigerian government in perpetrating human rights abuses in violation of the law of nations to aid the companies’ oil exploration.¹⁵⁴

Shortly after the exploratory efforts began, the people of the Ogoni region, where these events took place, organized the Movement for

¹⁴⁸ See *id.* at 747–48.

¹⁴⁹ See *supra* Part II.A.2.

¹⁵⁰ *Sosa*, 542 U.S. at 748–49.

¹⁵¹ *Id.* at 749–50.

¹⁵² See, e.g., Max Kennerly, *Originalism and Corporate Personhood Meet The Alien Tort Statute*, LITIG. & TRIAL (Feb. 28, 2012), <http://www.litigationandtrial.com/2012/02/articles/series/special-comment/alien-tort-statute/>; Michael Ramsey, *The Original Meaning of the Alien Tort Statute, Continued*, THE ORIGINALISM BLOG (Mar. 1, 2012), <http://originalismblog.typepad.com/the-originalism-blog/2012/03/the-original-meaning-of-the-alien-tort-statute-continuedmichael-ramsey.html>.

¹⁵³ 621 F.3d 111 (2d Cir. 2010).

¹⁵⁴ *Id.* at 189 (Leval, J., concurring); see also *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d. 457, 464–67 (S.D.N.Y. 2006) (Plaintiffs’ claims were “Extrajudicial Killings,” “Crimes Against Humanity,” “Torture/Cruel, Inhuman and degrading Treatment,” “Arbitrary Arrest and Detention,” “Rights to Life, Liberty, Security and Association,” “Forced Exile,” and “Property Destruction.”).

Survival of Ogoni People, ("MOSOP") and began to protest the presence of the companies.¹⁵⁵ The plaintiffs alleged that since 1993 the companies funded and directed a military campaign by the Nigerian government to suppress the protestors.¹⁵⁶ They also alleged that the companies met to "formulate a strategy to suppress" the Ogonis which included help from the Nigerian government in the form of various raids and attacks carried out by the military giving money, shelter, and food in trade for greater security for their drilling operations.¹⁵⁷ When this was not enough to suppress the protestors, the military created a special forces-type brigade which, over a four-month span:

[B]roke into homes, shooting or beating anyone in their path, including the elderly, women and children, raping, forcing villagers to pay 'settlement fees,' bribes and ransoms to secure their release, forcing villagers to flee and abandon their homes, and burning, destroying or looting property, and killed at least fifty Ogoni residents.¹⁵⁸

Members of MOSOP were held without charges or hearings, sometimes for over a month.¹⁵⁹ They were allegedly beaten and given insufficient rations and other important services.¹⁶⁰ Following their arrests, members of MOSOP were tried and convicted (in a court system allegedly controlled by Royal Dutch and Shell) and then executed.¹⁶¹

B. Procedural Posture

The defendants moved to dismiss the complaint by alleging its failure to meet the specificity required by *Sosa*.¹⁶² The court noted the vagueness in *Sosa*, and analyzed the claims "on the assumption that the *Filartiga* [*v. Pena-Irala*] holding controls, and [said it would] dismiss claims only where they clearly run afoul of *Sosa*."¹⁶³ The court relied on *Presbyterian Church of Sudan v. Talisman Energy Inc.*, and determined that if something were a violation of the law of nations, aiding and abetting that crime was a

¹⁵⁵ *Kiobel*, 621 F.3d at 189.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 190.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 463 (S.D.N.Y. 2006).

crime, too.¹⁶⁴

The court dismissed several claims,¹⁶⁵ but it also allowed a few of the plaintiffs' claims to go forward.¹⁶⁶ In an exercise of wise and prudent judgment, the District Court certified its decision to the Court of Appeals because it felt that there existed "substantial ground for difference of opinion" regarding post-*Sosa* ATS claims.¹⁶⁷

C. The Majority Opinion

The court began by discussing its history with the ATS, noting the unique and complex nature of such claims.¹⁶⁸ Judge Cabranes noted that as recently as 2009 the court had heard cases involving corporate defendants.¹⁶⁹ The applicable legal standard, he said, is to determine whether "absent a relevant treaty of the United States . . . a plaintiff bringing an ATS suit against a corporation has alleged a violation of customary international law."¹⁷⁰ In construing Footnote 20 from *Sosa*, he concluded that customary international law does not recognize corporate liability and held that corporations are not seen as subjects amenable to suit under international law.¹⁷¹ Thus, these allegations cannot come under

¹⁶⁴ *Id.* at 463-64.

¹⁶⁵ Among these were claims for "Property Damage," *id.* ("[P]roperty destruction committed as part of genocide or war crimes, and not property destruction alone violates the law of nations," but that since "Plaintiffs have not alleged genocide or war crimes. . . . Plaintiffs' claim for property destruction is dismissed."); "Forced Exile," *id.* ("The Court is unaware of any federal court decision in which a court has considered, much less allowed, a claim for forced exile pursuant to the ATS. In light of *Sosa*'s limiting principles, the Court dismisses Plaintiffs' claim for forced exile."); "Rights to Life, Liberty, Security and Association," *id.* ("[N]o particular or universal understanding of the civil and political rights [as alleged in the claim]."); and "Extrajudicial Killings" *id.* at 464-65 ("Plaintiffs have not directed the Court to any international authority establishing the elements of extrajudicial killing, and the Court is aware of none.").

¹⁶⁶ These claims were for "Torture/Cruel, Inhuman and Degrading Treatment," *id.* ("Although *Sosa* does not delineate which forms of torture are actionable under the ATS, the Court is persuaded that Plaintiffs' allegations (taken together, if not alone) are sufficient to state a claim."); "Arbitrary Arrest and Detention," *id.* at 465-66 (The court reached this conclusion by inferring from *Sosa*'s holding that a single day's detention was insufficient to raise a claim of detention under the ATS that a detention lasting a much longer time, in this case, up to a year, *could* be enough to bring an ATS claim and therefore let this claim proceed.); and "Crimes Against Humanity," *id.* at 467 ("Where, as here, Plaintiffs have sufficiently alleged claims for torture and arbitrary detention, . . . and have also alleged that these crimes were committed as part of an intentional, systematic attack against a particular civilian population, a claim for crimes against humanity is actionable under the ATS.") (citing *Wiwa v. Royal Dutch Petroleum Co.*, 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002)).

¹⁶⁷ *Id.* at 468 (citations omitted).

¹⁶⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 115-16 (2d Cir. 2010).

¹⁶⁹ *Id.* at 117 n.10.

¹⁷⁰ *Id.* at 118.

¹⁷¹ *Id.* at 120.

the ATS's jurisdiction.¹⁷² Not only is there no norm for such jurisdiction, he said, there is actually authority *against* such a practice.¹⁷³

Judge Cabranes noted the circuit's ATS history and the fact that it had heretofore decided cases involving corporations but that it had explicitly passed on deciding whether the defendants were actually liable—even in cases where it allowed the suit to proceed against the corporate defendant.¹⁷⁴ He explained that these prior assumptions had no bearing on the present case, and proceeded to outline the court's two-part analysis.¹⁷⁵ The first step is to “consider which body of law governs the question—international law or domestic law;” the second is to “consider what the sources of international law reveal with respect to whether corporations can be subject to liability for violations of customary international law.”¹⁷⁶

Judge Cabranes looked at the language in *Sosa* concerning “modest number[s] of international law violations” and “norms . . . accepted by the civilized world.”¹⁷⁷ He concluded that international law is the source to look to for ATS suits.¹⁷⁸

He then looked to whether international law governs the matter of those who are subjects of international law.¹⁷⁹ Judge Cabranes noted that subjects of international law have “legal status, personality, rights, and duties under international law.”¹⁸⁰ He concluded that it is the province of international law, not individual states, to define subjects.¹⁸¹ Starting with the Nazi prosecutions at Nuremberg, he said that individuals are subjects of international law.¹⁸² He found that international law retains the exclusive power to determine who is subject to its authority.¹⁸³

Judge Cabranes held that under *Sosa* the court is obliged to find within the expanse of international law the standard for the appropriate

¹⁷² *Id.*

¹⁷³ *Id.* at 121 n.21.

¹⁷⁴ *Id.* at 124–25.

¹⁷⁵ *Id.* at 125.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 126.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. II, at 70 introductory note) (internal quotation marks omitted).

¹⁸¹ *Id.*

¹⁸² *Id.* at 126–27.

¹⁸³ *Id.* at 127.

type of actor subject to its authority.¹⁸⁴ He added that this is consistent with circuit precedent that has often referenced international norms or standards in answering ATS questions.¹⁸⁵ It is a conjunctive test where liability must be determined for the allegation *and* the actor.¹⁸⁶ Thus, the court must determine whether, under international law, there is an established norm under which corporate defendants can be liable.¹⁸⁷

Beginning the search for the norm, Judge Cabranes cited *Sosa* for the proposition that “a norm must be ‘specific, universal, and obligatory’” to apply to the ATS.¹⁸⁸ Furthermore, he noted that the Supreme Court suggested that, in looking for international legal norms where there is no other clearly labeled source; a court should give weight to the “works of jurists and commentators. . . . [f]or trustworthy evidence of what the law really is.”¹⁸⁹

Judge Cabranes’s search for international legal norms began with the Nuremburg trials.¹⁹⁰ He noted that the tribunal was given authority over “*natural persons only*,” but also had the power to proclaim an *organization* “criminal.”¹⁹¹ Judge Cabranes pointed out that the tribunal, in a case where a corporation had been deemed criminal, explicitly stated that it was exercising jurisdiction over the employees, and that it was proscribed from doing so as to the company itself.¹⁹² He concluded that at least as of the end of World War II, international law applied liability to states and individuals, and explicitly not to corporations.¹⁹³

Judge Cabranes then ventured into a discussion of international tribunals in more recent years, looking at the one established to handle the crisis in Yugoslavia in the 1990s.¹⁹⁴ In dealing with violations of international humanitarian law, the tribunal was vested with authority over “*natural persons to the exclusion of juridical persons*.”¹⁹⁵ Judge Cabranes observed that the Rome Statute limits the jurisdiction of the International

¹⁸⁴ *Id.* at 127–28.

¹⁸⁵ *Id.* at 128.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 130.

¹⁸⁸ *Id.* at 131 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

¹⁸⁹ *Id.* (quoting *Sosa*, 542 U.S. at 733–34) (internal quotation marks omitted).

¹⁹⁰ *Id.* at 132–33.

¹⁹¹ *Id.* at 133.

¹⁹² *Id.* at 134.

¹⁹³ *Id.* at 135–36.

¹⁹⁴ *Id.* at 136.

¹⁹⁵ *Id.* (quoting U.N. Secretary-General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808*, art. 6, U.N. Doc. S/25704 (May 3, 1993)) (internal quotation marks omitted).

Criminal Court to “natural persons.”¹⁹⁶ Noting that the Rome Statute, in the words of a commentator, “implicitly negates—at least for its own jurisdiction—the punishability of corporations and other legal entities,” he concluded that even the later tribunals do not recognize corporate liability in regards to the law of nations.¹⁹⁷

Moving from tribunals to treaties, Judge Cabranes recognized the circuit’s precedent that international law treaties are relevant when they “will only constitute *sufficient proof* of a norm of *customary international law* if an overwhelming majority of States have ratified the treaty.”¹⁹⁸ He noted that some treaties have extended liability to corporate actors, but say nothing of their applicability to human rights violations.¹⁹⁹ He also found “no historical evidence of an existing or even nascent norm of customary international law imposing liability on corporations for violations of human rights.”²⁰⁰ Judge Cabranes concluded that there is an insufficient basis to find a norm of international law regarding corporate liability.²⁰¹

As to the works of commentators, Judge Cabranes added that two international law professors stated that customary international law does not impose liability on corporations.²⁰² He noted that scholars supporting corporate liability see it more as a goal to be achieved than as reality.²⁰³ Finding a lack of a universal norm of corporate liability in the writings of scholars, Judge Cabranes concluded that corporate liability is not a norm under customary international law.²⁰⁴

Applying these conclusions as to the determination of applicable law, and the scope of liability under international law, Judge Cabranes concluded that, at least for the time being, there is no recognition within the law of nations which accords liability to corporations for violations of customary international laws.²⁰⁵

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 136-37 (quoting ALBIN ESER, *Individual Criminal Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 778 (Antonio Cassese et al. eds., 2002)) (internal quotation marks omitted).

¹⁹⁸ *Id.* at 137.

¹⁹⁹ *Id.* at 139.

²⁰⁰ *Id.*

²⁰¹ *Id.* (admitting that while there is an emerging trend, it is not a substantive one).

²⁰² *Id.* at 143.

²⁰³ *Id.* at 144 n.48.

²⁰⁴ *Id.* at 145.

²⁰⁵ *Id.* at 149 (not disclosing the possibility that such liability could *eventually* become a norm of customary international law).

D. Judge Leval's Concurring Opinion

Judge Leval called the majority opinion overbroad and unjustified.²⁰⁶ He stated that while he fully supported the dismissal of the claim, he could not subscribe to the rule of law created by the majority.²⁰⁷ Judge Leval said that the majority opinion does significant damage to *Filartiga v. Pena-Irala*, as well as to human rights litigation.²⁰⁸

He began his literary assault of the majority opinion by suggesting that international law would *desire* the rule that was explicitly *rejected* by the majority.²⁰⁹ Judge Leval noted examples of behavior that, under this rule, would not face ATS liability due to the incorporated status of its perpetrator.²¹⁰ Acknowledging the outrageous situations possible under the court's holding, he stated that the "incompatibility of the majority's rule with the objectives of international law does not conclude the argument."²¹¹

Judge Leval proposed that there is an "absence of any reason, purpose, or objective for which international law might [adopt]" the majority's rule.²¹² Noting that the world has encouraged the growth of juridical entities by giving them all sorts of rights and powers, he concluded that to allow this and then to hold the entities immune from suit would be absurd.²¹³

Judge Leval argued that the majority opinion did not rest on any legal precedent²¹⁴ and cited various Second Circuit cases where corporate liability was either assumed or not raised.²¹⁵ He then referred to ATS cases from other courts where corporate liability was challenged and upheld.²¹⁶ He noted that a 1907 opinion said that "an American corporation could be held liable under the ATS to Mexican nationals if the defendant's 'diversion of the water [of the Rio Grande] was an injury to substantial

²⁰⁶ *Id.* at 154.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 150-51.

²⁰⁹ *Id.* at 154.

²¹⁰ *Id.* at 155-57 (a corporate entity engaged in slave trade and piracy).

²¹¹ *Id.* at 159.

²¹² *Id.*

²¹³ *Id.* at 160 (citing Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304, 322 (2008) ("I am not aware of any legal system in which corporations cannot be sued for damages when they commit legal wrongs that would be actionable if committed by an individual.")).

²¹⁴ *Id.*

²¹⁵ *Id.* at 161 n.12; see also *supra* Part II.A.4.

²¹⁶ *Id.* at 161 n.14. The importance of these decisions will be discussed *infra* in Part IV.C.

rights of citizens of Mexico under the principles of international law or by treaty.’”²¹⁷ Also, as early as 1795²¹⁸ corporations were considered by the Attorney General as subjects who could *sue* under the ATS.²¹⁹ Judge Leval concluded that there is no support for the majority’s holding in prior ATS jurisprudence.

He addressed international tribunals and their relevance.²²⁰ He found that since they have been designed to handle criminal matters and do not handle civil issues, the majority’s argument that they have been denied from handling such matters is meaningless.²²¹

Turning to Footnote 20 in *Sosa*, Judge Leval asserted that the majority misconstrued the meaning of the language therein concerning classes of defendants.²²² Judge Leval concluded that, on the contrary, the text *does not* distinguish between types of private actors, and the only implication from it suggests that the Court combined private defendants into one class.²²³

Judge Leval discussed what he called “deficiencies of the majority’s reasoning.”²²⁴ He said that the argument that “Corporations face no criminal liability under international law so there is no basis for their having *civil* liability” is flawed.²²⁵ Referring to the principle that criminal law punishes intent, he saw no reason to apply criminal rationales to civil law.²²⁶ He then quoted a member of the Rome Statute Drafting Committee for the argument that:

[D]espite the diversity of views concerning corporate *criminal* liability, ‘all positions now accept in some form or another the principle that a legal entity, private or public, can, through its policies or actions, transgress a norm for which the law, whether national or international, provides, *at the very least damages*.’²²⁷

Judge Leval argued that it is illogical to conclude, as the majority did, that

²¹⁷ *Id.* (quoting 26 Op. Att’y Gen. 252, 253 (1907)) (internal quotation marks omitted).

²¹⁸ The ATS was enacted as part of the Judiciary Act of 1789.

²¹⁹ *Id.* (citing 1 Op. Att’y Gen. 57 (1795)).

²²⁰ *Id.* at 163.

²²¹ *Id.*

²²² *Id.* at 163–64.

²²³ *Id.* at 165.

²²⁴ *Id.*

²²⁵ *Id.* at 166.

²²⁶ *Id.*

²²⁷ *Id.* at 168 (quoting M. CHERIF BASSIOUNI, *Crimes Against Humanity in International Criminal Law* 379 (2d rev. ed. 1999)) (second emphasis added).

since criminal tribunals do not have jurisdiction over corporations that corporations are not subjects of international law.²²⁸

Judge Leval then argued that international law leaves issues of civil liability to the determination of the respective states.²²⁹ He mentioned that Professor Oscar Schachter, a famed United Nations scholar, wrote that while it is not necessary for states to allow damages for violations of international law, it is generally left to them to determine what remedies they wish to provide those seeking relief.²³⁰ As a final example in support of this proposition, Judge Leval cited the Convention on the Prevention and Punishment of the Crime of Genocide which calls upon states to make “effective penalties” for such violations.²³¹ Thus, states are permitted to select whichever remedy they deem more effective.²³²

Judge Leval continued with the contention that “the absence of widespread agreement among the nations of the world to impose civil liability on corporations means that they can have no liability under international law.”²³³ Stating that he has no problem with the premises of the argument, but only with its application, he proceeded to analyze each proposition.²³⁴ First, he noted that “the place to look for answers whether any set of facts constitutes a violation of international law is to international law,”²³⁵ which is concerned with certain behaviors and leaves remedies to the states.²³⁶ Further, he wrote that international law does not absolve corporations of liability, and in line with this, allows states to proscribe the relevant measures.²³⁷ He asserted that the majority opinion undermines the principle of international law that allows individual states to create and enforce remedies for its violations.²³⁸

He addressed the premise that “principles of local law, even if accepted throughout the world, are not rules of international law unless they are generally accepted throughout the civilized world as obligatory rules of international law”—its corollary being that “there is no

²²⁸ *Id.* at 170.

²²⁹ *Id.* at 171.

²³⁰ *Id.* at 172 (citing OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 2 (1991)); see also *id.* at 172 n.29.

²³¹ *Id.* at 173.

²³² *Id.* at 174.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 175.

²³⁷ *Id.*

²³⁸ *Id.*

widespread practice in the world of imposing civil liability for violation of the rules of international law” and that no civil liability exists.²³⁹ Judge Leval argued that an “award of damages under the ATS is not based on a belief that international law commands [corporate] civil liability,” and he found it to be an irrelevant and unnecessary determination as to whether international law requires corporate violators to be liable.²⁴⁰ Similarly, he noted that there is no international consensus stipulating that *individuals* are liable in tort for similar violations.²⁴¹

Next, Judge Leval restated his claim that the majority misinterpreted *Sosa* to require international norms to extend precisely to the type of actor making the type of violation and the manner of assessing liability.²⁴² Noting that a majority of the Supreme Court in *Sosa* supported awarding damages under the ATS, he pointed out that this would make no sense if the Court were to require unanimity among nations as to specific remedies, and that since this is the view taken by the Second Circuit majority, it cannot be correct.²⁴³ Thus, he concluded that Judge Cabranes misinterpreted *Sosa*, in terms of customary liability, in a way that does not make sense.²⁴⁴

Judge Leval asserted that the majority opinion did not cite to any sources which say that corporations are not subjects under international law; rather he suggested that multiple sources say the opposite.²⁴⁵ He referred to a report of the Nuremberg tribunal for a statement which explicitly referenced juridical entities.²⁴⁶ Furthermore, and related to this, was the finding that IG Farben was “criminal”—allowing the criminal prosecution of its employees.²⁴⁷ Combining these observations with the early opinions of the Attorneys General, Judge Leval concluded that corporations must be considered subjects within the scope of international law.²⁴⁸

²³⁹ *Id.*

²⁴⁰ *Id.* at 175-76.

²⁴¹ *Id.* at 176.

²⁴² *Id.* at 176-77.

²⁴³ *Id.* at 178.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 180.

²⁴⁷ *Id.*; see also *id.* at 134 (majority opinion) (“This corporation’s production of, among other things, oil, rubber, nitrates, and fibers was harnessed to the purposes of the Nazi state, and it is no exaggeration to assert that the corporation made possible the war crimes and crimes against humanity perpetrated by Nazi Germany, including its infamous programs of looting properties of defeated nations, slave labor, and genocide.”).

²⁴⁸ *Id.* at 180-81.

Moving along, Judge Leval then discussed how the majority, in line with the Supreme Court's instruction in *The Paquete Habana*, looked to the writings of scholars for evidence of the state of international law.²⁴⁹ Judge Leval claimed that the majority referred to no supportive scholastic works and disregarded such material insofar as the material opposes its viewpoint.²⁵⁰ Again referring to the distinction between criminal and civil law, he concluded that while "it is absolutely correct that the rules of international law do not provide civil liability against any private actor and do not provide for any form of liability of corporations" as referred to by some of the majority's sources, this does not mean that the rules of international law do not bind corporations.²⁵¹

Despite this explication, Judge Leval's opinion was a concurrence, and so its final part outlined the facts and history of the case and stated his conclusion that they were insufficient to state a cause of action under the federal pleading standards.²⁵² Thus, regardless of the status of corporate liability under customary international law, *this particular action* could not proceed.

IV. THE SECOND CIRCUIT'S INTERPRETATION OF CASE LAW AND INTERNATIONAL SOURCES

A. *Sosa v. Alvarez-Machain*

1. Footnote 20

The *Kiobel* majority first misconstrued the Supreme Court's language when it used Footnote 20 of *Sosa* to make a determination of the type of defendant liable under international law.²⁵³ The Supreme Court held that a court must determine "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."²⁵⁴ The proper meaning of this instruction is even evident from Judge Cabranes's analysis immediately following the quotation where he notes that States and individual people have been liable, but that corporations

²⁴⁹ *Id.* at 181.

²⁵⁰ *Id.* at 185.

²⁵¹ *Id.* at 186.

²⁵² *Id.* at 188-96.

²⁵³ *Id.* at 120.

²⁵⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004).

have never been liable.²⁵⁵ Interestingly, the majority's analysis seems to imply what the majority seemed to miss, that the language of Footnote 20 only differentiates between public and private actors; the use of the phrase "such as" serves to indicate that the Supreme Court is explaining merely what a private actor *is*, not that there is a difference between *types* of private actors.

Judge Leval pointed this out when he referred to the portion of the *Sosa* opinion where the footnote was located.²⁵⁶ Therein, Justice Souter referred to two ATS decisions and noted the issue of whether or not a consensus existed as to a particular law being violated by, specifically, "private actors."²⁵⁷ The term, used twice in the footnote's parenthetical and in the note itself, should have the same meaning in both places. Thus, it appears that the majority made an unnecessary and incorrect distinction.

Later, the majority applied Justice Breyer's concurring opinion to try to draw further meaning from Footnote 20.²⁵⁸ Justice Breyer wrote that "the norm must extend liability to the type of perpetrator (*e.g., a private actor*) the plaintiff seeks to sue."²⁵⁹ While the majority tried to say that this gives further evidence of the necessary differentiation between individuals and corporations, Justice Breyer's use of "private actor" provides no more enlightenment than Footnote 20, and seems to repeat the principle supporting the conflation of private parties under the ATS. Judge Leval's statement that "far from implying that natural persons and corporations are treated *differently* for purposes of civil liability under the ATS, the intended inference of the footnote is that they are treated *identically*,"²⁶⁰ assessed it well. However, in a subsequent footnote, the majority addressed this issue, saying that the Supreme Court *did not need* to differentiate between such parties,²⁶¹ but this comes off as merely a weak defense to Judge Leval's claim, and the majority quickly moved on to other matters.

Interestingly, a subsequent amicus brief pointed out that in an opinion referenced in neither *Sosa* nor *Kiobel*, the Supreme Court had stated that

²⁵⁵ *Kiobel*, 621 F.3d at 118.

²⁵⁶ *Id.* at 163-64 (Leval, J., concurring).

²⁵⁷ *Sosa*, 542 U.S. at 732 n.20. The cases were: *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by *private actors* violates international law) and *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by *private actors* violates international law).

²⁵⁸ See *Kiobel*, 621 F.3d at 127-28.

²⁵⁹ *Sosa*, 542 U.S. at 760 (Breyer, J., concurring) (emphasis added).

²⁶⁰ *Kiobel*, 621 F.3d at 165 (Leval, J., concurring).

²⁶¹ *Id.* at 129 n.31 (majority opinion).

the ATS “by its terms does not distinguish among classes of defendants”²⁶² There, the Court was concerned with the vitality of the ATS in light of the Foreign Sovereign Immunities Act, but held that the ATS retained “the same effect . . . with respect to defendants other than foreign states.”²⁶³ So, while neither *Sosa* nor *Kiobel* referenced this case, it should have some bearing on the proper interpretation of a defendant within the bounds of the ATS and should, at minimum, suggest that the proper reading is that which does not distinguish between private defendants.

2. Norms of International Law

In addressing whether corporate liability is a norm of international law, the majority noted that “[t]o attain the status of a rule of customary international law, a norm must be ‘specific, universal, and obligatory.’”²⁶⁴ In determining what a “norm” is, the majority mentioned that the Supreme Court instructs courts to look to “sources we have long, albeit cautiously, recognized” such as the writings of scholars, but that the Court also warns that “[a]greements or declarations that are merely aspirational” are *not useful*.²⁶⁵

As to the criteria of a norm being “specific, universal, and obligatory,” the majority opinion appeared to once again mistake the language in *Sosa*. In the portion of the opinion where the Supreme Court grappled with crafting a standard to define violations, it quoted lower courts that had dealt with ATS issues.²⁶⁶ The Court opined that it was “persuaded that federal 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 familiar when § 1350 was enacted.”²⁶⁷ Justice Souter called this “generally consistent with the reasoning of many of the courts and judges who faced the issue.”²⁶⁸ Lastly, the Court used the language “sufficiently

²⁶² Brief for International Law Scholars as Amici Curiae Supporting Appellants at 4, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (No. 06-4800-cv) (arguing in support of en banc rehearing) (quoting *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 438 (1989)) (internal quotation marks omitted).

²⁶³ *Argentine Republic*, 488 U.S. at 438.

²⁶⁴ *Kiobel*, 621 F.3d at 131 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

²⁶⁵ *Id.*

²⁶⁶ *Sosa*, 542 U.S. at 732-33.

²⁶⁷ *Id.* at 732 (emphasis added).

²⁶⁸ *Id.*

definite to support a cause of action;"²⁶⁹ "sufficiently definite" is not the same as "specific" and "universal." It does not appear that the Supreme Court did anything more than articulate a broad standard of judicial analysis and, in doing so, merely offered *examples* of standards that have worked for appellate courts. The Court was far from saying that the highest standard must apply. The cautionary words of Justice Scalia's concurrence confirm this in that they evidence his fear that the Court had left too much leeway for lower courts in determining violations of international law.²⁷⁰

Judge Leval noticed this and said that if this were the case, no civil liability could have been extended under earlier (specifically Second Circuit) ATS cases since "[t]here was no wide adherence among the nations of the world to a rule of civil liability for violation of the law of nations."²⁷¹ And, he concluded, since the Supreme Court at no point spoke negatively of the prior history of ATS cases which found liability, this cannot make sense, and the Court could not have meant for that to be inferred.²⁷² Were the majority's reading of *Sosa* in this context correct, the entire line of ATS cases that allowed suits to proceed would have been incorrect.²⁷³ Judge Leval's analysis of *Sosa* appears to be on point; the majority seems to have misinterpreted it.

Judge Leval's position is further supported by an amicus brief which argued that merely because corporations *had not* been subjected to punishment for violation of international human rights norms that they were *not potentially* subject to punishment for such violations.²⁷⁴ Citing the Permanent Court of International Justice, the amici pointed out that "international norms *could not be inferred* from the *absence* of domestic proceedings."²⁷⁵ The amici concluded that the ATS does not require that international law "recognize a right to sue," and that it "requires only that the tort be 'committed' in violation of a specific, universal, and obligatory

²⁶⁹ *Id.*

²⁷⁰ See discussion *infra* Part II.C.3.

²⁷¹ *Kiobel*, 621 F.3d at 178 (Leval, J., concurring).

²⁷² *Id.*

²⁷³ *Id.*; cf. Brief for International Law Scholars as Amici Curiae Supporting Appellants at 5-7, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (No. 06-4800-cv) (making a similar argument to that used by Judge Leval).

²⁷⁴ Brief for International Law Scholars as Amici Curiae Supporting Appellants at 3, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (No. 06-4800-cv).

²⁷⁵ *Id.* at 3 n.2 (citing S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4) (first emphasis added).

norm of international law.”²⁷⁶

B. Looking Inward: Second Circuit Precedent

The majority was correct that the issue of corporate liability under the ATS had so far been undecided in the Second Circuit,²⁷⁷ but as recently as 2009, the Second Circuit had held that a claim against a corporation could proceed.²⁷⁸ In *Khulumani v. Barclay Nat. Bank Ltd.*, one judge on the panel, Judge Katzmman, referring to recent decisions, including *Sosa*, noted 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.”²⁷⁹ While the opinion of only one judge, this conclusion deserves more weight than is given to it by the majority opinion since it is recent and the judge who made it was competent to analyze the circuit’s recent case history in coming to that determination.

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,²⁸⁰ the panel, which included Judge Leval, did just that and accepted the rationale of Judge Katzmman’s concurrence in *Khulumani* to be circuit precedent.²⁸¹ The majority and Judge Leval sparred over the meaning of Judge Katzmman’s comments in *Khulumani* with Judge Leval saying that Judge Katzmman supports the idea that there is no distinction between private actors.²⁸²

Related to the earlier discussion of Footnote 20 of *Sosa* and the Supreme Court’s mention of prior Second Circuit ATS cases, Judge Leval noted that in neither of those cases did the panels “suggest[] in any way that the law of nations might distinguish between conduct of a natural person and of a corporation. They distinguish[ed] only between private and State action.”²⁸³ Judge Cabranes asserted, however, that there is a two-step analysis employed by Judge Katzmman that Judge Leval missed.²⁸⁴

²⁷⁶ *Id.* at 5 (emphasis removed). A similar observation was made by Judge Posner in *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011).

²⁷⁷ See *Kiobel*, 621 F.3d at 117 n.10; *id.* at 160 n.11 (Leval, J., concurring).

²⁷⁸ *Id.* at 161 n.12 (referring to *Abdullahi v. Pfizer*, 562 F.3d 163 (2d Cir. 2009)).

²⁷⁹ *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 282–83 (2d Cir. 2007) (Katzmann, J., concurring).

²⁸⁰ 582 F.3d 244 (2d Cir. 2009).

²⁸¹ *Id.* at 258.

²⁸² *Kiobel*, 621 F.3d at 161 n.13 (Leval, J., concurring).

²⁸³ *Id.* at 165.

²⁸⁴ *Id.* at 130 n.32 (majority opinion).

Judge Cabranes stated that the second part is whether the “law would recognize the defendants’ responsibility for that violation,”²⁸⁵ but there is nothing therein which details whether Judge Katzmman believes there to be a viable difference between *types* of defendants.²⁸⁶ Nothing suggests that Judge Katzmman, whose opinion has been adopted as “the law of the circuit,” made a distinction between ATS defendants beyond the aforementioned state actor versus non-state actor characterization. Furthermore, an appellate judge from another circuit has read Judge Katzmman’s opinion for the proposition that corporations are liable under the ATS.²⁸⁷ Judge Katzmman even opined that he believed the Supreme Court to be “classifying both corporations and individuals as ‘private actor[s].’”²⁸⁸ Judge Cabranes did not address that particular point. The majority’s assertion about Judge Leval’s “mistake” is, itself, mistaken. Circuit precedent supports a finding of corporate liability under the ATS and says *nothing* either explicitly or implicitly to the contrary.

C. Looking Outward: The ATS in Other Circuits

Since it determined that international law governs the scope of inquiry, the majority did not look to any domestic sources, other than *Sosa*, for guidance.²⁸⁹ If it had looked at the interpretation given to the ATS by other circuits then it might have thought differently.

The majority should have felt compelled to make this investigation, as it cited to Supreme Court language in *The Paquete Habana* which instructed that “‘where there is no treaty and no controlling executive or legislative act or judicial decision,’ customary ‘[i]nternational law is part of our law.’”²⁹⁰ The portion of *The Paquete Habana* from which the majority drew this quote focused on general ways in which a court making an assessment should proceed.²⁹¹ That Court suggested looking to scholars where other helpful sources were lacking.²⁹² The *Kiobel* majority

²⁸⁵ *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 269-70 (2d Cir. 2007) (Katzmann, J., concurring).

²⁸⁶ *Id.* at 270-71.

²⁸⁷ *Id.* at 289 (Hall, J., concurring) (“I share Judge Katzmman’s understanding, . . . , that private parties and corporate actors are subject to liability under the ATCA.”).

²⁸⁸ *Id.* at 283 (Katzmann, J., concurring) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004)).

²⁸⁹ *Kiobel*, 621 F.3d at 125.

²⁹⁰ *Id.* at 125 n.26 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

²⁹¹ See *The Paquete Habana*, 175 U.S. at 700.

²⁹² *Id.* at 700-01.

interpreted the *Sosa* Court's reading of *The Paquete Habana* to avoid writings which were merely "aspirational."²⁹³ Such a reading is reasonable and desirable; it is more likely to produce accurate results. For purposes of developing an understanding of international legal matters, it would make sense that case law from other courts on the same or similar issue would also be beneficial, and certainly not "aspirational." The Supreme Court itself looked for some guidance from appellate courts which had handled ATS claims.²⁹⁴ Thus, recent cases from other Courts of Appeal should have carried some weight in the panel's determination of relevant law.

Judge Leval recognized several instances where other courts found corporate liability under the ATS; two cases which he noted are particularly relevant.²⁹⁵ However, he did not go into them in any detail.²⁹⁶ His goal in citing to *Romero v. Drummond Company* seems similar to when he discussed older Second Circuit cases which had simply assumed corporate liability.²⁹⁷ The majority's reaction to *Romero* would likely have been similar to its dismissing the relevance of prior Second Circuit cases that had assumed liability²⁹⁸ since the underlying precedent did not truly address corporate liability.²⁹⁹ The majority may also have pointed out that the Eleventh Circuit did not analyze corporate liability under customary international law.³⁰⁰ Either way, the absence of any discussion of *Romero* is noticeable.

Judge Leval could have used the Ninth Circuit's analysis in *Doe I v. Unocal Corp.* to support his argument as the panel there explicitly combined all private parties into one category³⁰¹ before addressing their liability under the ATS.³⁰² The majority's rebuttal to this would likely have been a rehashing of its analysis of *Sosa's* Footnote 20, arguing that the

²⁹³ See *Kiobel*, 621 F.3d at 131.

²⁹⁴ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 (2004).

²⁹⁵ See *Kiobel*, 621 F.3d at 161 nn.12 & 14 (Leval, J. concurring). The most important of the cases Judge Leval referred to are *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005) and *Romero v. Drummond, Inc.*, 552 F.3d 1303 (11th Cir. 2008).

²⁹⁶ His citations of them served only to provide examples; he made no citations to their legal reasoning.

²⁹⁷ See *supra* Parts II.A.4, IV.B.

²⁹⁸ See *supra* Part IV.B.

²⁹⁹ See *supra* Part II.B.2.

³⁰⁰ Compare *supra* Part II.C.2 with Parts III.C and III.D.

³⁰¹ See *supra* text accompanying note 58.

³⁰² See *supra* Part II.B.1. At least one sitting Second Circuit judge has accepted the aiding and abetting rationale expressed therein. See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 287 (2d Cir. 2007) (Hall, J., concurring).

Ninth Circuit panel misinterpreted the Supreme Court's opinion.³⁰³ Nevertheless, the *Doe I* panel's gloss of the term "party" lends further support to the conclusion that the Supreme Court did not intend to suggest that there is a difference between types of private parties under the ATS.³⁰⁴

The Second Circuit is the most experienced court at handling ATS matters, however, it is not the only one. Based upon a review of decisions rendered by other Courts of Appeal, both the majority and Judge Leval could have benefited their arguments and understanding of the ATS by some reliance on the rationales expressed by other courts.

D. What the International Community Would Do

1. As Early as Nuremberg

After determining that international law "governs the scope of liability" in ATS cases, the majority looked to determine the proper subjects of international law.³⁰⁵ It stated that a subject of international law has "legal status, personality, rights, and duties."³⁰⁶ Judge Leval agreed with this, but noted that this "terminology has come to mean nothing more than asking whether the particular norm applies to the type of individual or entity charged with violating it, as some norms apply only to States and others apply to private non-state actors."³⁰⁷

Both sides then discussed the Nuremberg tribunals and reached different conclusions. The majority argued that "[t]he defining legal achievement of the Nuremberg trials is that they explicitly recognized *individual liability* for the violation of specific, universal, and obligatory norms of international human rights."³⁰⁸ It then cited to Justice Jackson's conclusion that the ruling "'made explicit and unambiguous what was theretofore . . . implicit in International Law,' namely, ' . . . that . . . individuals are responsible.'"³⁰⁹ This, it argued, shows that international law

³⁰³ See *supra* Part IV.A.1.

³⁰⁴ See *supra* Part IV.A.1.

³⁰⁵ *Kiobel*, 621 F.3d at 126.

³⁰⁶ *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. II, at 70 introductory note)) (emphasis removed).

³⁰⁷ *Id.* at 179 (Leval, J., concurring).

³⁰⁸ *Id.* at 127 (majority opinion).

³⁰⁹ *Id.* (quoting Robert H. Jackson, *Final Report to the President Concerning the Nurnberg War Crimes Trial* (1946), reprinted in 20 TEMP. L.Q. 338, 342 (1946)).

defines who is liable under international law.³¹⁰ On the other hand, Judge Leval cited to the tribunal for the proposition that corporations *could be seen* as liable for violating the law of nations, thus allowing their employees to be tried for the crimes; this, he argued, shows that corporations are indeed seen as subjects under international law.³¹¹ The language used by the tribunal, explicitly referencing “juristic persons,” persuasively suggests that Judge Leval is correct.

Furthermore, the majority put a lot of weight into the fact that neither the London Charter nor the post-World War II tribunals charged a corporation with a crime.³¹² While corporations were not punished, it does not stand for the proposition that they *are not subjects* and *cannot be punished*. Such references could easily suggest that corporations were recognized as subjects under international law at that time, but merely that they were not punished in those instances.

However, even that proposition is incorrect since the entities *had already faced “judicial death through dissolution”* and therefore punishment by the tribunal was impossible.³¹³ The dissolutions themselves were accomplished by a treaty signed by the major powers.³¹⁴ Clearly, juridical entities were recognized; clearly, juridical entities were punished—in the 1940s.

Nor was this the only World War II-related instance where the liability and punishment of corporations was addressed. At the Potsdam

³¹⁰ *Id.*

³¹¹ *Id.* at 180 (Leval, J., concurring) (citing VIII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS (1952) “Where private individuals, *including juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified . . . , is in violation of international law Similarly *where a private individual or a juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of [international law].”).

³¹² *Id.* at 134-35 (majority opinion).

³¹³ Brief for Nuremberg Scholars as Amici Curiae Supporting Appellants at 8, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (No. 06-4800-cv) (arguing in support of en banc rehearing).

³¹⁴ *Id.* at 9 (citing *Agreement Between Governments of the United Kingdom, United States of America, and Union of Soviet Socialist Republics, and the Provisional Government of the French Republic on Certain Additional Requirements to Be Imposed on Germany*, Art. 38, reprinted in Supplement: Official Documents, 40 AM. 1. INT’L. L. 1, 29 (1946) (Article 38 reads: “The National Socialist German Workers’ Party (NSDAP) is completely and finally abolished and declared to be illegal.”)); see also 1 OPPENHEIM’S INTERNATIONAL LAW 1204 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1996) (“[R]elatively extensive participation in a treaty, coupled with a subject matter of general significance and stipulations which accord with the general sense of the international community, do establish for some treaties . . . assist the acceptance of the treaty’s provisions as customary international law.”).

and Yalta Conferences, the parties contemplated the “dismantling [of] Germany’s industrial assets,”³¹⁵ the “dissolution of private corporations,”³¹⁶ the “seizure of industrial factories,”³¹⁷ and the “restitution of confiscated properties and reparations to both the states and individuals who had suffered harm.”³¹⁸ The seizure of Farben’s assets was a penalty “as drastic as any that could be imposed on a juristic entity.”³¹⁹

Considering this evidence, it cannot be said that corporations were not seen as subject to, and punishable by, international law. They simply faced a different kind of punishment from the private actors associated with them.³²⁰ The majority’s contention that customary international law “has *never* extended the scope of liability to a corporation”³²¹ cannot be taken seriously.

2. Recent Developments

The impact and scope of international law has grown since the Nuremberg tribunals, and to exemplify this, Judge Leval cited a string of Second Circuit cases where the court allowed international law claims to be brought by juridical entities against Cuba.³²² How could a corporation bring suit against another nation for a violation of international law if it were not recognized as a subject of international law? Judge Leval answered, correctly, that they could not; they must be subjects of international law.³²³

The trial judge in *Talisman* noted that “precedent from the European Court of Justice has held that corporations may be held liable for human rights violations such as discrimination.”³²⁴ This same judge observed that

³¹⁵ *Id.* at 10.

³¹⁶ *Id.*

³¹⁷ *Id.* at 10-11.

³¹⁸ *Id.* at 11.

³¹⁹ *Id.* at 12.

³²⁰ *See id.* at 14.

³²¹ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010).

³²² *Id.* at 181 n.37 (Leval, J., concurring) (*Banco Nacional de Cuba v. Chem. Bank N.Y. Trust Co.*, 822 F.2d 230 (2d Cir. 1987); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981); *Banco Nacional de Cuba v. First Nat’l City Bank of N.Y.*, 478 F.2d 191 (2d Cir. 1973); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967); *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev’d on other grounds*, 376 U.S. 398 (1964), *superseded by statute*, 22 U.S.C. § 2370(e)(2)).

³²³ *Id.* at 181.

³²⁴ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 318 (S.D.N.Y. 2003) (citing *Case 36/74, Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405, 1419; *Case 43/75, Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, 1976 E.C.R. 455, 457-63.).

“[e]xtensive Second Circuit precedent further indicates that actions under the ATCA against corporate defendants for such substantial violations of international law . . . are the norm rather than the exception.”³²⁵ His summation seems justified by the prior decisions of the Second Circuit. Such examples serve to further Judge Leval’s assertion that corporations are subjects of international law.

In summarizing another difference between the majority opinion and Judge Leval’s, Judge Cabranes noted that “corporate liability is not a norm that we can recognize and apply in actions *under the ATS* because the customary international law of human rights does not impose *any* form of liability on corporations (civil, criminal, or otherwise).”³²⁶ To this, Judge Leval responded, the international tribunals which have been established, such as the one at Nuremburg that declared Farben to be a criminal organization, have not had jurisdiction to award civil damages against *anyone*, much less a corporation.³²⁷ The reason for this has already been shown above.

Judge Leval made no assertion that customary international law *mandates* the imposition of damages on defendants, but stated that such matters are for the individual nations to determine and that the US, through the ATS, has made its determination in favor of awarding damages.³²⁸ Then he added that “the basic position of international law with respect to civil liability is that States may impose civil compensatory liability on offenders, or not, as they see fit.”³²⁹

Furthermore, the Ninth Circuit has held that “what is a crime in one jurisdiction is often a tort in another jurisdiction, and this distinction is therefore of little help in ascertaining the standards of international human rights law.”³³⁰ Also, burdens of proof in international criminal law are often similar to American civil standards, blurring any kind of clear

³²⁵ *Id.* at 319.

³²⁶ *Kiobel*, 621 F.3d at 147 (majority opinion).

³²⁷ *Id.* at 183 (Leval, J., concurring).

³²⁸ 28 U.S.C. § 1350 (2013).

³²⁹ *Kiobel*, 621 F.3d at 172 (Leval, J., concurring); *see also Kiobel*, 621 F.3d at 172 n.28 (citing Convention on the Prevention and Punishment of the Crime of Genocide, art. V, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 (obligating state parties “to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide *effective penalties* for persons guilty of genocide”) (emphasis added)).

³³⁰ *Doe I v. Unocal Corp.*, 395 F.3d 932, 949 (9th Cir. 2002) (citing Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 44-46 (2002)).

line.³³¹ Lastly, the panel there noted that lower courts “are increasingly turning to the decisions by international *criminal* tribunals for instructions regarding the standards of international human rights law under our *civil* ATCA.”³³² The line of demarcation seems to be, at best, foggy.

Therefore, because the United States is “[a] legal culture long accustomed to imposing liability on corporations,”³³³ it makes a certain amount of sense that Congress could choose to impose civil liability on them for violations of customary international law. Finally, and in line with the above, leaving determinations of civil liability to the various nations meshes with the various international laws that leave criminal punishment of juridical entities to the determination of the various states.³³⁴ An American statute to that effect would not be an outlier.

E. Guidance from “the Works of Jurists and Commentators”

The Supreme Court has said that courts should look to “the works of jurists and commentators” for “trustworthy evidence of what the law really is.”³³⁵ In *Sosa*, the Court said that Alvarez did not carry his burden of using these sources to demonstrate that his treatment violated any international norms.³³⁶ Judge Cabranes cited to minimal scholarly sources to support his argument. He referred to the affidavits of two international law professors for the proposition that “customary international law does not recognize liability for corporations that violate its norms” and “no

³³¹ *Id.*

³³² *Id.*

³³³ *Kiobel*, 621 F.3d at 117 (majority opinion).

³³⁴ *Id.* at 169 n.23 (Leval, J., concurring) (“Several international conventions explicitly recognize the diversity in nations’ domestic laws regarding the imposition of criminal sanctions on legal or juridical persons. These conventions require State parties to impose criminal sanctions on legal persons, or where that is not possible under the individual nation’s domestic law, non-criminal sanctions. See Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), entered into force Jan. 18, 2002 (“Subject to the provisions of its national law, each State Party shall take measures . . . to establish the liability of legal persons. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.”); Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business transactions, art. 3, Nov. 21, 1997, DAFFE/IME/BR(97)20, entered into force Feb. 15, 1999 (“The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties In the event that under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportional and dissuasive non-criminal sanctions.”)).

³³⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

³³⁶ *Id.* at 737. He referred to only one such source.

international judicial tribunal has so far recognized corporate liability, as opposed to individual liability, *in a civil or criminal context* on the basis of a violation of the law of nations or customary international law.”³³⁷ Judge Leval pointed out that the question that derived this answer asked only whether the professor *knew* of a decision recognizing corporate liability for a violation of the law of nations, and *not* for him to make an assertion as to the state of international law.³³⁸ The professor, Judge Leval added, even said:

When the terms of an international treaty become part of the law of a given state—whether (as in most common law jurisdictions) by being enacted by parliament [i.e., Congress enacting the ATS] . . . corporations may be civilly liable for wrongful conduct contrary to the enacted terms of the treaty just as they may be liable for any other conduct recognized as unlawful by that legal system.³³⁹

This, would, if anything, support Judge Leval’s opinion.³⁴⁰ The majority opinion cited two treatises and the Restatement, but Judge Leval noted that in none of these sources did the majority find anything which supported the principle of no corporate liability under customary international law.³⁴¹ He pointed out that if this were the case, strange as it seemed to him, that these authors would have made such a notation.³⁴² This is an interesting and valid point.

The majority referred to a 2009 book for the proposition that “despite trends to the contrary, the view that international law primarily regulates States, and in limited instances such as international criminal law, individuals, but not [transnational corporations], is still the prevailing one among international law scholars.”³⁴³ Judge Leval, reading further, found that:

³³⁷ *Kiobel*, 621 F.3d at 143 (majority opinion) (citing Decl. of James Crawford ¶ 10, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009)).

³³⁸ *Id.* at 182 (Leval, J., concurring). This is also corroborated by the amicus brief submitted by the International Law Scholars. See Brief for International Law Scholars as Amici Curiae Supporting Appellants at 7–12, *Kiobel*, 621 F.3d 111 (No. 06–4800-cv) (arguing that international law supports the awarding of damages and obliges states to enact remedies for its violations).

³³⁹ *Kiobel*, 621 F.3d at 183 (quoting Decl. of James Crawford ¶ 4) (internal quotation marks omitted).

³⁴⁰ *Id.* at 183–84.

³⁴¹ *Id.* at 181–82 (referring to the majority opinion’s citations to *Oppenheim’s International Law* and Brierley’s *The Law of Nations*).

³⁴² *Id.*

³⁴³ *Id.* at 143 (majority opinion) (quoting MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ATS 196 (2009)) (alteration by court) (internal quotation marks omitted).

'[T]he ATS, although incorporating international law, is still governed by and forms part of torts law which applies equally to natural and legal persons unless the text of a statute provides otherwise,' and that international law does not prevent a State 'from raising its standards by holding [transnational corporations] which are involved [in] or contribute to violations of international law liable as long as the cause of international law is served because international law leaves individual liability (as opposed to State liability), be it of a natural or a legal person, largely to domestic law.'³⁴⁴

Following this, it is evident that according to an author cited by the *majority*, a state may hold a corporate defendant liable for a breach of the law of nations. Judge Leval also cited that text for the statement that "the ATS 'applies equally to natural and legal persons' and that international law does not bar States from imposing liability on a corporation, as international law leaves civil liability to domestic law."³⁴⁵ Here, again, Judge Leval had the stronger argument.

Judge Leval cited another scholar who, in 2009, wrote that "[a]lleged perpetrators of crimes under international law that do not require any showing of state action, including piracy, genocide, crimes against humanity, enslavement, and slave trading, can be sued under the ATS. Generally, *the prospective private defendants can be individuals, corporations, or other entities*."³⁴⁶ Note that there is no distinction made; it does not appear that one is necessary. This is in line with the plain reading of Footnote 20, Justice Breyer's concurrence, and the pre-*Kiobel* cases which assumed corporate liability.

Finally, he noted that while the majority opinion dismissed some scholarly opinions as aspirational, in reality they are not.³⁴⁷ For example, Judge Cabranes quoted Professor Ratner saying that "the universe of international criminal law does not reveal any prosecutions of corporations per se"³⁴⁸ However, Professor Ratner's sentence concluded: "an important precedent nonetheless shows the willingness of key legal actors to contemplate corporate responsibility at the

³⁴⁴ *Id.* at 172 n.38 (quoting KOEBELE, *supra* note 343, at 208).

³⁴⁵ *Id.* at 181 n.38 (Leval, J., concurring) (quoting KOEBELE, *supra* note 343, at 208).

³⁴⁶ *Id.* at 185 (quoting PETER HENNER, HUMAN RIGHTS AND THE ATS: LAW, HISTORY, AND ANALYSIS 215 (2009)).

³⁴⁷ *See id.* at 185 n.45; *see also id.* at 143 n.48 (majority opinion).

³⁴⁸ *Id.* at 143-44 (quoting Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 477 (2001) (internal quotation marks omitted).

international level.”³⁴⁹ Professor Ratner discussed I.G. Farben and its war crimes trials before noting that the court made continued reference to corporations, including Farben, having “responsibilities,” “obligations,” and “duties” that they had breached.³⁵⁰ The majority made this same contention.³⁵¹ This lends credence to Judge Leval’s later quotation of Professor Ratner for the summation that “international law has *already effectively recognized* duties of corporations.”³⁵² Thus, the claim that the author is “aspirational” is refuted by examples supplied by the author himself.

F. The Earliest Interpretations

Two opinions issued by United States Attorneys General pull in favor of corporations being subjects of international law for ATS purposes.³⁵³ A 1907 opinion interpreted the ATS to say that an American corporation could be held liable.³⁵⁴ A 1795 opinion advised that a British company could sue under the ATS.³⁵⁵ The ATS was enacted in 1789. The Attorney General’s opinion only six years later bears significant weight in interpreting the statute.

In *Sosa*, the Supreme Court spoke approvingly of the 1795 opinion.³⁵⁶ This is contrary to the *Kiobel* majority’s assessment that “neither opinion does anything more than baldly declare that a corporation can *sue* under the ATS . . . or that a corporation can *be sued* under the ATS” and “neither opinion gives any *basis* for its assumptions about customary international law.”³⁵⁷ The Supreme Court’s comments suggest that courts should give weight to these opinions.

³⁴⁹ Ratner, *supra* note 348, at 477.

³⁵⁰ *Id.* at 477–78.

³⁵¹ See *supra* text accompanying note 180 (“legal status, personality, rights, and duties”).

³⁵² *Kiobel*, 621 F.3d at 185 n.45 (Leval, J., concurring) (quoting Ratner, *supra* note 348, at 475) (internal quotation marks omitted).

³⁵³ See *supra* Parts III.C–D.

³⁵⁴ *Kiobel*, 621 F.3d at 180.

³⁵⁵ *Id.*

³⁵⁶ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 721 (2004) (the Attorney General “made it clear that a federal court was open for the prosecution of a tort action . . .”); see also *supra* notes 106–08.

³⁵⁷ *Kiobel*, 621 F.3d at 142 n.44 (majority opinion).

**V. THE PRESUMPTION AGAINST EXTRATERRITORIALITY, OR:
HOW THE SUPREME COURT DODGED THE ISSUE OF CORPORATE
LIABILITY UNDER THE ALIEN TORT STATUTE**

A. A Brief Procedural History of Kiobel at the Supreme Court

While the long procedural history of *Kiobel*'s time at the Supreme Court is well-summarized in the Court's opinion,³⁵⁸ a brief overview is helpful. The Court first granted certiorari on October 17, 2011³⁵⁹ on the question of whether the law of nations recognizes corporate liability.³⁶⁰ The oral argument, however, focused heavily on the question of the extraterritorial application of the ATS.³⁶¹ This line of inquiry was spurred by a question from Justice Alito: "What business does a case like this have in the courts of the United States?"³⁶² The Court then ordered reargument on that issue.³⁶³

Shortly after this second round of arguments, the Court issued its unanimous judgment,³⁶⁴ based squarely on the issue of the extraterritorial

³⁵⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013).

³⁵⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (2011).

³⁶⁰ *Kiobel*, 133 S. Ct. at 1663. In full, the questions were:

1. Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.
2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held.

³⁶¹ Kenneth Anderson, *Kiobel Alien Tort Statute Reargument in SCOTUS Today*, THE VOLOKH CONSPIRACY, (Oct. 1, 2012, 8:17 AM), <http://www.volokh.com/2012/10/01/kiobel-alien-tort-statute-reargument-in-scotus-today/>.

³⁶² Kali Borkoski, *Kiobel v. Royal Dutch Petroleum: What's at stake, and for whom?*, SCOTUSBLOG (Sept. 30, 2012, 9:36 PM), <http://www.scotusblog.com/2012/09/kiobel-v-royal-dutch-petroleum-whats-at-stake-and-for-whom/>.

³⁶³ *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) ("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.").

³⁶⁴ The opinion of the Court was delivered by Chief Justice Roberts and was joined by Justices Scalia, Kennedy, Thomas, and Alito. Separate concurrences were filed by: Justice Kennedy; Justice Alito, joined by Justice Thomas; and Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan.

application of American laws.³⁶⁵ For reasons that are not entirely clear,³⁶⁶ the Court's opinion made no reference to the original question of corporate liability³⁶⁷ or to the oft-cited Footnote 20 from *Sosa*.³⁶⁸ This is not to argue that by deciding *Kiobel* on extraterritoriality grounds was improper in any way—in fact, the Court's decision was based on strong jurisprudential bases and separation of powers considerations.³⁶⁹ There will doubtless be numerous suppositions and theories put forth as to the reasons underlying the Supreme Court's decision in *Kiobel*, but for the present, it is sufficient that the Court left the issue thoroughly undecided.

B. *Where Are We?*

Justifiable prudential concerns aside, the Supreme Court initially granted certiorari in this case on the explicit grounds of resolving the issue of corporate tort liability under the ATS, and that issue remains

³⁶⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). The extraterritoriality issue likely developed from Chief Judge Jacobs's comments immediately following the panel decision where, upon consideration of rehearing, he cited "judicial imperialism" and international concerns as reasons why the court should not impose ATS liability. See *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 270 (2d Cir. 2011).

³⁶⁶ It is possible that the Supreme Court side-stepped the issue of corporate liability in an effort to avoid much of the scrutiny that accompanied its decision in *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310 (2010). See Nicole Flatow *Supreme Court Widens Scope of Case on Corporate Accountability for Human Rights*, ACSBLOG, (Mar. 5, 2012), <http://www.acslaw.org/acsblog/supreme-court-widens-scope-of-case-on-corporate-accountability-for-human-rights> ("A case that started out as potentially the most significant test of corporate personhood since *Citizens United v. FEC* (sic) may now be decided on other grounds.") (citing Dahlia Lithwick, *Justice on the High Seas*, SLATE, (Feb. 28, 2012, 7:25 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/02/the_supreme_court_considers_whether_royal_dutch_shell_is_immune_from_liability_for_human_rights_abuses_because_it_is_a_corporation_single.html).

³⁶⁷ See Kristin Linsley Myles & James Ruttan, *Kiobel commentary: Answers . . . and more questions*, SCOTUSBLOG (Apr. 18, 2013, 2:07 PM), <http://www.scotusblog.com/2013/04/commentary-kiobel-answers-and-more-questions/>.

³⁶⁸ See *supra* Part IV.A.1. In *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011), Judge Posner makes light of what he views to be the hyper-importance that litigants place on Supreme Court footnotes. *Id.* at 1017. But then again, "footnotes are the next closest creature to 'poetry' in Constitutional Law." Professor Ruthann Robson, "Constitutional Footnotes: A Month of Footnotes Starting with the Most Famous Footnote," CONST. L. PROF. BLOG (Apr. 1, 2011), <http://lawprofessors.typepad.com/conlaw/2011/04/-constitutional-footnotes-a-month-of-footnotes-starting-with-the-most-famous-footnote.html>.

³⁶⁹ The presumption against the extraterritorial application of American law "provides that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none.'" *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (citing *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010)). The Court continued: "[t]his presumption 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Id.* (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)). It is well-established that foreign policy considerations are best left to the executive and legislative branches. See, e.g., *id.*

undecided. When the Court granted certiorari, there was a division among the Courts of Appeal on that precise issue.³⁷⁰ In the wake of the Court's decision, that split remains. That the Court left the issue of corporate tort liability under the ATS unresolved poses significant issues for corporations operating abroad.

The divide over corporate ATS liability is even more pronounced when considering the split among the judges of the Second Circuit. Following the panel decision in *Kiobel*, the en banc vote was a split of the ten active members of the court. The essence of Judge Leval's concurrence was felt in the opinions of the judges that dissented from the denial of en banc rehearing.³⁷¹ The opinions noted the new circuit split between the Second and Eleventh Circuits, and he stated that "the panel majority opinion is very likely incorrect as to whether corporations may be found civilly liable under the Alien Tort Statute."³⁷²

The truly interesting opinion was Judge Katzmman's which noted the dispute between Judges Cabranes and Leval over the meaning of his concurrence in *Khulumani v. Barclay Nat. Bank Ltd.*³⁷³ He said that he "see[s] no inconsistency between the reasoning of my opinion in *Khulumani* and Judge Leval's well-articulated conclusion, *with which I fully agree*, that corporations, like natural persons, may be liable for violations of the law of nations under the ATCA."³⁷⁴ There could not have been a better way of showcasing the differences between the judges of the Second Circuit.

The existing circuit split, combined with sharp division within the Second Circuit—a highly-regarded authority on the ATS, speaks to the importance of review and clarification of an increasingly important issue and the need for congressional action.³⁷⁵

³⁷⁰ See *supra* Part II.B.

³⁷¹ One of the opinions was that of Judge Katzmman, whose concurring opinion in *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), was adopted as circuit precedent and the meaning of which was disputed by Judges Cabranes and Leval in *Kiobel*. See discussion *supra* Part IV.B.

³⁷² *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379, 380 (2d Cir. 2011) (Lynch, J., dissenting from denial of rehearing en banc).

³⁷³ *Id.* (Katzmann, J., dissenting from the denial of rehearing en banc).

³⁷⁴ *Id.* (emphasis added).

³⁷⁵ William S. Dodge, *Kiobel Insta-Symposium: The (sic) Pyrrhic Victory of the Bush Administration Position in Kiobel*, OPINIO JURIS (Apr. 23, 2013, 5:13 PM), <http://opiniojuris.org/2013/04/23/kiobel-insta-symposiumthe-pyrrhic-victory-of-the-bush-administration-position-in-kiobel/>.

VI. CONCLUSION

A. The Future of ATS Litigation

In the time since the Second Circuit's decision, *Kiobel* and corporate tort liability has been a hot topic, and the Supreme Court's decision did not, as many predicted, put a definitive end to corporate ATS liability.³⁷⁶ In the aftermath of the Second Circuit's decision, multiple ATS suits against corporations were dismissed citing its rationale³⁷⁷—the impact was immediate.³⁷⁸ It was called “a blockbuster opinion that could spell the end of the vast bulk of ATS litigation.”³⁷⁹ Though it was only one decision, the Second Circuit's deep history with the ATS lends its *Kiobel* decision great weight nationwide.³⁸⁰ And, in light of the Supreme Court's decision, the corporate liability exception remains the law of the Second Circuit,³⁸¹ but corporate liability under the ATS remains law in the Seventh,³⁸² Ninth,³⁸³ and Eleventh³⁸⁴ Circuits.

B. Final Thoughts

The ATS was an Act of Congress—the *first* Congress. Whether the

³⁷⁶ Compare Samp, *supra* note 11 with Nathan Koppel, *Goodbye Alien Torts? Second Circuit Blows Hole in 1789 Law*, WALL STREET JOURNAL LAW BLOG (Sept. 17, 2010, 3:27 PM), <http://blogs.wsj.com/law/2010/09/17/goodbye-alien-torts-second-circuit-blows-hole-in-1789-law/> (“Corporate America can breath (sic) a whole lot easier”) and Julian Ku, *Goodbye to the ATS? Second Circuit Rejects Corporate Liability for Violations of Customary International Law*, OPINIO JURIS (Sept. 17, 2010 1:10 PM), <http://opiniojuris.org>.

³⁷⁷ See, e.g., *Flomo v. Firestone Natural Rubber Co.*, No. 1:06-cv-00627-JMS-TAB, 2010 WL 4174583 (S.D. Ind. Oct. 19, 2010), *aff'd on other grounds*, *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Viera v. Eli Lilly & Co.*, No. 1:09-cv-0495-RLY-DML 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010); *Mastafa v. Chevron Corp.*, No. 10 Civ 5646(JSR), 2010 WL 4967827 (S.D. N.Y. Nov. 29, 2010); *Liu Bo Shan v. China Construction Bank Corp.*, No. 10-2992-cv, 2011 WL 1681995 (2d Cir. May 5, 2011).

³⁷⁸ See, e.g., Koppel, *supra* note 376.

³⁷⁹ Ku, *supra* note 376.

³⁸⁰ See Glenn Lammi, *High Court's Denial of Cert a De Facto Endorsement of Recent Alien Tort Statute Ruling?*, THE LEGAL PULSE (Oct. 4, 2010), <http://wlflegalpulse.com/2010/10/04/high-courts-denial-of-cert-a-de-facto-endorsement-of-recent-alien-tort-statute-ruling/>.

³⁸¹ John Bellinger, *Reflections on Kiobel*, LAWFARE (April 22, 2013, 8:52 PM), <http://www.lawfareblog.com/2013/04/reflections-on-kiobel/>.

³⁸² In a case decided subsequent to the Second Circuit's decision in *Kiobel*, the Seventh Circuit decided *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011) (Posner, J.), which affirmed on other grounds the District Court's opinion in *Flomo v. Firestone Natural Rubber Co.*, No. 1:06-cv-00627-JMS-TAB, 2010 WL 4174583 (S.D. Ind. Oct. 19, 2010) (dismissing ATS suit against corporate defendant due to corporate exemption).

³⁸³ *Doe I v. Unocal*, 395 F.3d 932 (9th Cir. 2002); see discussion *supra* Part II.B.1.

³⁸⁴ *Romero v. Drummond Company, Inc.*, 552 F.3d 1303 (11th Cir. 2008); see discussion *supra* Part II.B.2.

Act remains relevant over 200 years later, to what causes of action it applies, and to which actors it applies has shown to be a topic ill-suited to the determination of the judicial branch. The courts that have spoken on the ATS's applicability to corporations have produced mixed results. If there is anything more difficult for a business to plan for, it is uncertainty. The appeal to the Supreme Court could have produced just such certainty, but it did not. As a result, the courts of the United States remain divided over the issue of corporate ATS liability, and the best way to achieve uniformity would be for an Act of Congress to clarify the purpose and objectives of the Alien Tort Statute.

Regardless, the ultimate determination on the earth-shattering issue of whether the courts of the United States should hear cases such as *Kiobel* carries immense policy implications and involves substantial separation of powers issues. Such a determination should be made by Congress—not the courts.