Corporate Tort Liability Under the Alien Tort Statute Post-Kiobel

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I. Introduction

The Court of Appeals for the Second Circuit is widely credited with resuscitating\(^1\) 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

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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).
The court entered into uncharted and controversial territory 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” so as to promote their exploratory efforts. In ultimately determining that corporate liability does not exist under the ATS, 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, 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, the Supreme Court’s long-awaited decision in Kiobel v. Royal Dutch Petroleum Co. ultimately allowed the Second Circuit result to stand, albeit on different grounds. That the Supreme Court took so long to decide Kiobel, and that its short-yet-divided opinion did little more than cloud

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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.


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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{17}

The ATS was enacted as part of the Judiciary Act of 1789—\textsuperscript{18}the same act which gave rise to a famous congressional overreach.\textsuperscript{19} The Second Circuit panel quoted Judge Friendly who said that it is a "'legal Lohengrin'-'no one seems to know whence it came.'"\textsuperscript{20} Summarizing the court's holding in \textit{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."\textsuperscript{21} It is clear that there is essentially no suggestion of any original legislative intent in its enactment.\textsuperscript{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


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

\textsuperscript{17} It is not the goal or purpose of this note to delve too deeply into the Supreme Court's decision in \textit{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, \textit{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.").

\textsuperscript{18} See, e.g., \textit{Kiobel}, 133 S. Ct. at 1663.

\textsuperscript{19} \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 139-40 (1803).

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

\textsuperscript{21} \textit{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))).

\textsuperscript{22} See Gottridge & Galvin, \textit{supra} note 1, at 89.
personal liability at the time [of enactment].”\textsuperscript{23} Justice Souter, in \textit{Sosa}, recognized that “the birth of the modern line of [ATS] cases [began] with \textit{Filartiga v. Pena-Irala}.”\textsuperscript{24} The \textit{Filartiga} decision has been credited with bringing the ATS back into relevance. The \textit{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 \textit{Filartiga} and culminating with its opinion in \textit{Presbyterian Church of Sudan v. Talisman Energy, Inc.}\textsuperscript{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 \textit{Sosa v. Alvarez-Machain}, since, prior to \textit{Kiobel}, it was the only case decided by the Court under the ATS.\textsuperscript{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 \textit{Kiobel} in order to demonstrate the arguments and introduce the most contentious issues. Part IV will analyze the majority and concurring opinions’ treatment of \textit{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 \textit{Kiobel} opinions, some comments on the future of corporate ATS liability, and a call to action that highlights the importance of congressional intervention.

\textsuperscript{24} \textit{Id.} at 724-25.
\textsuperscript{25} 582 F.3d 244 (2d Cir. 2009).
\textsuperscript{26} \textit{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. The complaint was initially dismissed for lack of subject-matter jurisdiction. 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.” 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. The court cited Blackstone for historical reinforcement. 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.” The judicial resuscitation of the ATS had begun.

2. Jurisdiction Over Non-State Actors for Genocide

In Kadic v. Karadzic, the plaintiffs were ethnic minorities from the former Yugoslavia 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
the defendant, the president of a self-proclaimed republic. The trial court dismissed the complaints for lack of subject-matter jurisdiction. On appeal, the plaintiffs asserted jurisdiction under the ATS. 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. 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. The court allowed ATS jurisdiction over non-state actors and reversed the dismissal of the complaint.

3. Suits Against Corporations

Khulumani v. Barclay Nat. Bank Ltd. could have preempted Kiobel, but the defendant did not raise the defense of corporate liability, and so the court did not decide it. In Khulumani, South African citizens alleged that a corporation acted in concert with the South African government to sustain apartheid. The trial court dismissed the complaints for lack of subject-matter jurisdiction. The Second Circuit panel vacated the order. In a concurrence cited often in Kiobel, Judge Katzmann 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. He also noted that the circuit seemed to consistently view individual and corporate liability in the same light. Another judge concurred in the dismissal, but argued that corporations should not be liable under the ATS. Nevertheless, the suit proceeded—the corporate liability defense

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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 defendant 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." 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 . . . .'" The court used evidentiary standards as propounded by recent international criminal tribunals to determine how international law views aiding and abetting. The panel held that a jury could find the relevant actus reus and mens rea of aiding and abetting forced labor, and it reversed summary judgment. Preceding an en banc hearing, the case was settled out of court and dismissed.

2. The Eleventh Circuit: ATS Textualism

In *Romero v. Drummond Co.*, the plaintiffs alleged that a corporate defendant paid to have members of a Colombian trade union tortured. The defendant argued that the ATS does not allow suits against corporations, 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

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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.
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.” The panel was referring to *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, where a panel held that a corporate defendant could be liable for torture under the ATS. The blanket defense of incorporation, as argued by Drummond, was not even raised by the defendant, 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*, 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. 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. He was taken from his home, kept in a hotel overnight, and then flown to Texas where he was arrested, tried, and acquitted. Alvarez sued his kidnapper and several DEA agents under the ATS. 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. The decision was affirmed by a panel of the Ninth Circuit; a deeply divided en banc circuit also affirmed it. The en banc majority applied circuit ATS precedent to hold that it “not only provides federal courts with subject

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72 Id. at 1315.
73 416 F.3d 1242 (11th Cir. 2005).
74 Id. at 1253.
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.\textsuperscript{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."\textsuperscript{85} Thus, the arrest and detention violated the law of nations.\textsuperscript{86} The DEA petitioned the Supreme Court, and the Court granted certiorari.\textsuperscript{87}

The Court's opinion was fractured.\textsuperscript{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.\textsuperscript{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.\textsuperscript{90} Justice Souter called the origination argument "implausible."\textsuperscript{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."\textsuperscript{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."\textsuperscript{93}

Justice Souter then moved to a discussion of the "law of nations" as the term was understood in 1789.\textsuperscript{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."\textsuperscript{95} He concluded that this was likely considered by the first Congress when it enacted the statute.\textsuperscript{96}

\textsuperscript{84} Id. at 612.
\textsuperscript{85} Id. at 620.
\textsuperscript{86} Id.
\textsuperscript{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.
\textsuperscript{90} Id.
\textsuperscript{91} 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)).
\textsuperscript{92} Id. at 714.
\textsuperscript{93} Id. at 714-15.
\textsuperscript{94} Id. at 715 (citing 4 William Blackstone, Commentaries on the Laws of England 68 (1769)).
\textsuperscript{95} Id.
He observed that the Continental Congress was concerned with such issues but failed to get the individual states to provide appropriate remedies.\textsuperscript{97} The new government dealt with this problem by vesting the federal judiciary with power under the ATS.\textsuperscript{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.”\textsuperscript{99}

He then explained that the history of the ATS allows two inferences.\textsuperscript{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.\textsuperscript{101} Justice Souter made further note of Congress’ attentiveness to the law of nations as discussed by Blackstone.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{104} Justice Souter felt that he must have presumed the ATS to provide jurisdiction for common law claims.\textsuperscript{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.”\textsuperscript{106}

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

\begin{quote}
\textsuperscript{97} Id. at 715-16.
\textsuperscript{98} Id. at 717.
\textsuperscript{99} Id. at 718-19.
\textsuperscript{100} Id. at 719.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 720.
\textsuperscript{104} Id. at 721 (citing 1 Op. Att’y Gen. 57 (1795)).
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 724.
\textsuperscript{107} Id. at 724-25.
\textsuperscript{108} Id. at 725.
\end{quote}
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.”

He said that “judicial caution” is important in ATS suits because there is tremendous room for interpretation of international norms under this rule. Justice Souter cited Erie v. Tomkins’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. He wrote that the Court has adhered to legislatively-created causes of action, with the judiciary having little or no role therein. 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. Justice Souter cautioned that there is “no congressional mandate to seek out and define new and debatable violations of the law of nations.” 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.” The Court’s mandate is firm but appropriate.

Justice Souter then turned to the criticisms raised by Justice Scalia’s concurring opinion. 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. Some examples include:

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

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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;"  
• “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;” and
• “[T]he Court is bound by the law of nations which is a part of the law of the land.”

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. 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.

Lastly, Justice Souter outlined the Court’s criteria for determining whether a particular claim is sufficient under the ATS. He looked to a case from 1820 that described the specificity with which “piracy” was defined under international law. 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. 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.”

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

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as a corporation or individual.\textsuperscript{1}\textsuperscript{27} Also therein, Justice Souter noted a 1984 District of Columbia Circuit case\textsuperscript{1}\textsuperscript{28} found an “insufficient consensus . . . that torture by private actors violates international law” while a 1995 Second Circuit case\textsuperscript{1}\textsuperscript{29} found a “sufficient consensus . . . that genocide by private actors violates international law.”\textsuperscript{1}\textsuperscript{30} 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.\textsuperscript{1}\textsuperscript{31}

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.”\textsuperscript{1}\textsuperscript{32} He summarized Alvarez’s claim as aspirational and lacking in specificity.\textsuperscript{1}\textsuperscript{33} Thus, the claim was insufficient to establish a violation of customary international law and was therefore jurisdictionally deficient insofar as the ATS is concerned.\textsuperscript{1}\textsuperscript{34}

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.\textsuperscript{1}\textsuperscript{35} 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.”\textsuperscript{1}\textsuperscript{36} He views this as a way to ensure that the application of the ATS by American courts helps, and does not hurt, international relations.\textsuperscript{1}\textsuperscript{37} His concern for comity stems

\textsuperscript{1}\textsuperscript{27} Id. at 732 n.20.
\textsuperscript{1}\textsuperscript{28} Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring).
\textsuperscript{1}\textsuperscript{29} Kadic v. Karadzic, 70 F.3d 232, 239-41 (2d Cir. 1994).
\textsuperscript{1}\textsuperscript{30} Sosa, 542 U.S. at 732 n.20.
\textsuperscript{1}\textsuperscript{31} See id. at 726; see also id. at 726 n.27.
\textsuperscript{1}\textsuperscript{32} Id. at 737.
\textsuperscript{1}\textsuperscript{33} Id. at 738.
\textsuperscript{1}\textsuperscript{34} Id.
\textsuperscript{1}\textsuperscript{35} Id. at 760-61 (Breyer, J., concurring).
\textsuperscript{1}\textsuperscript{36} Id. at 761.
\textsuperscript{1}\textsuperscript{37} Id.
especially from suits arising abroad. 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. 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. While he noted that this traditionally concerns criminal jurisdiction, civil jurisdiction over the same matters should work just the same. Because many foreign criminal tribunals combine civil and criminal matters, “universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.” Justice Breyer found no sufficient consensus in regards to the present issue, and he restated his conclusion that the ATS precluded Alvarez’s suit.

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.” He termed it a “judicial lawmaking role.” 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. Such federal common law power, he pointed out, was destroyed by *Erie v. Tomkins* 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.

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

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138 Id.
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.\textsuperscript{148} He said that \textit{Kadic v. Karadzic}\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{Kiobel}.

\section*{III. \textit{Kiobel v. Royal Dutch Petroleum Co.}}

\subsection*{A. Factual Allegations}

In \textit{Kiobel v. Royal Dutch Petroleum Co.},\textsuperscript{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.\textsuperscript{154}

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

\begin{footnotesize}
\footnote{148}{See \textit{id.} at 747-48.}
\footnote{149}{See \textit{supra} Part II.A.2.}
\footnote{150}{\textit{Sosa}, 542 U.S. at 748-49.}
\footnote{151}{\textit{id.} at 749-50.}
\footnote{153}{621 F.3d 111 (2d Cir. 2010).}
\footnote{154}{\textit{id.} at 189 (Leval, J., concurring); see also \textit{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.”).}
\end{footnotesize}
Survival of Ogoni People, ("MOSOP") and began to protest the presence of the companies.\textsuperscript{155} The plaintiffs alleged that since 1993 the companies funded and directed a military campaign by the Nigerian government to suppress the protestors.\textsuperscript{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.\textsuperscript{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.\textsuperscript{158}

Members of MOSOP were held without charges or hearings, sometimes for over a month.\textsuperscript{159} They were allegedly beaten and given insufficient rations and other important services.\textsuperscript{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.\textsuperscript{161}

\textbf{B. Procedural Posture}

The defendants moved to dismiss the complaint by alleging its failure to meet the specificity required by \textit{Sosa}.\textsuperscript{162} The court noted the vagueness in \textit{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 \textit{Sosa}."\textsuperscript{163} The court relied on \textit{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

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\textsuperscript{155} \textit{Kiobel}, 621 F.3d at 189.
\textsuperscript{156} \textit{id}.
\textsuperscript{157} \textit{id}.
\textsuperscript{158} \textit{id} at 190.
\textsuperscript{159} \textit{id}.
\textsuperscript{160} \textit{id}.
\textsuperscript{161} \textit{id}.
\textsuperscript{162} \textit{id}.
\textsuperscript{163} \textit{Kiobel v. Royal Dutch Petroleum Co.}, 456 F. Supp. 2d 457, 463 (S.D.N.Y. 2006).
\end{flushleft}
crime, too.\textsuperscript{164}

The court dismissed several claims,\textsuperscript{165} but it also allowed a few of the plaintiffs’ claims to go forward.\textsuperscript{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.\textsuperscript{167}

C. The Majority Opinion

The court began by discussing its history with the ATS, noting the unique and complex nature of such claims.\textsuperscript{168} Judge Cabranes noted that as recently as 2009 the court had heard cases involving corporate defendants.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{171} Thus, these allegations cannot come under

\textsuperscript{164} Id. at 463-64.

\textsuperscript{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.”).

\textsuperscript{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 \textit{Wiwa v. Royal Dutch Petroleum Co.}, 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002)).

\textsuperscript{167} Id. at 468 (citations omitted).

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

\textsuperscript{169} Id. at 117 n.10.

\textsuperscript{170} Id. at 118.

\textsuperscript{171} Id. at 120.
the ATS's jurisdiction. Not only is there no norm for such jurisdiction, he said, there is actually authority against such a practice.

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. He explained that these prior assumptions had no bearing on the present case, and proceeded to outline the court's two-part analysis. 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." Judge Cabranes looked at the language in Sosa concerning "modest number[s] of international law violations" and "norms . . . accepted by the civilized world." He concluded that international law is the source to look to for ATS suits.

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

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

Beginning the search for the norm, Judge Cabranes cited \textit{Sosa} for the proposition that "a norm must be 'specific, universal, and obligatory'" to apply to the ATS.\textsuperscript{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."\textsuperscript{189}

Judge Cabranes's search for international legal norms began with the Nuremburg trials.\textsuperscript{190} He noted that the tribunal was given authority over "natural persons only," but also had the power to proclaim an organization "criminal."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{194} In dealing with violations of international humanitarian law, the tribunal was vested with authority over "natural persons to the exclusion of juridical persons."\textsuperscript{195} Judge Cabranes observed that the Rome Statute limits the jurisdiction of the International

\textsuperscript{184} Id. at 127-28.
\textsuperscript{185} Id. at 128.
\textsuperscript{186} Id.
\textsuperscript{187} Id. at 130.
\textsuperscript{188} Id. at 131 (quoting \textit{Sosa} v. Alvarez-Machain, 542 U.S. 692, 732 (2004)).
\textsuperscript{189} Id. (quoting \textit{Sosa}, 542 U.S. at 733-34) (internal quotation marks omitted).
\textsuperscript{190} Id. at 132-33.
\textsuperscript{191} Id. at 133.
\textsuperscript{192} Id. at 134.
\textsuperscript{193} Id. at 135-36.
\textsuperscript{194} Id. at 136.
Criminal Court to "natural persons." 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.

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." He noted that some treaties have extended liability to corporate actors, but say nothing of their applicability to human rights violations. 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." Judge Cabranes concluded that there is an insufficient basis to find a norm of international law regarding corporate liability.

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. He noted that scholars supporting corporate liability see it more as a goal to be achieved than as reality. 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.

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.

196 Id.
197 Id. at 136-37 (quoting ALBIN ESER, Individual Criminal Responsibility, in I 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. 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. Judge Leval said that the majority opinion does significant damage to Filartiga v. Pena-Irala, as well as to human rights litigation.

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. Judge Leval noted examples of behavior that, under this rule, would not face ATS liability due to the incorporated status of its perpetrator. 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.”

Judge Leval proposed that there is an “absence of any reason, purpose, or objective for which international law might [adopt]” the majority’s rule. 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.

Judge Leval argued that the majority opinion did not rest on any legal precedent and cited various Second Circuit cases where corporate liability was either assumed or not raised. He then referred to ATS cases from other courts where corporate liability was challenged and upheld. 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

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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.\textsuperscript{217} Also, as early as 1795\textsuperscript{218} corporations were considered by the Attorney General as subjects who could sue under the ATS.\textsuperscript{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.\textsuperscript{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.\textsuperscript{221}

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

Judge Leval discussed what he called "deficiencies of the majority's reasoning."\textsuperscript{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.\textsuperscript{225} Referring to the principle that criminal law punishes intent, he saw no reason to apply criminal rationales to civil law.\textsuperscript{226} He then quoted a member of the Rome Statute Drafting Committee for the argument that:

\begin{quote}
[D]espite the diversity of views concerning corporate \textit{criminal}\nliability, "all positions now accept in some form or another the\nprinciple that a legal entity, private or public, can, through its\npolicies or actions, transgress a norm for which the law, whether\nnational or international, provides, \textit{at the very least damages}."\textsuperscript{227}
\end{quote}

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

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\textsuperscript{217} Id. (quoting 26 Op. Att'y Gen. 252, 253 (1907)) (internal quotation marks omitted).
\textsuperscript{218} The ATS was enacted as part of the Judiciary Act of 1789.
\textsuperscript{219} Id. (citing 1 Op. Att'y Gen. 57 (1795)).
\textsuperscript{220} Id. at 163.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 163-64.
\textsuperscript{223} Id. at 165.
\textsuperscript{224} Id.
\textsuperscript{225} Id. at 166.
\textsuperscript{226} Id.
\textsuperscript{227} Id. at 168 (quoting \textit{M. Cherif Bassiouni}, \textit{Crimes Against Humanity in International Criminal Law} 379 (2d rev. ed. 1999)) (second emphasis added).
\end{flushright}
since criminal tribunals do not have jurisdiction over corporations that corporations are not subjects of international law.\footnote{228}

Judge Leval then argued that international law leaves issues of civil liability to the determination of the respective states.\footnote{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.\footnote{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.\footnote{231} Thus, states are permitted to select whichever remedy they deem more effective.\footnote{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.”\footnote{233} Stating that he has no problem with the premises of the argument, but only with its application, he proceeded to analyze each proposition.\footnote{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,”\footnote{235} which is concerned with certain behaviors and leaves remedies to the states.\footnote{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.\footnote{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.\footnote{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
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. Judge Leval claimed that the majority referred to no supportive scholastic works and disregarded such material insofar as the material opposes its viewpoint. 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.

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. 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. 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." 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

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249 Id. at 181.
250 Id. at 185.
251 Id. at 186.
252 Id. at 188-96.
253 Id. at 120.
have never been liable. 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. 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." 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. Justice Breyer wrote that "the norm must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue." 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," 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, 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

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255 Kiobel, 621 F.3d at 118.
256 Id. at 163-64 (Leval, J., concurring).
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

263 Argentine Republic, 488 U.S. at 438.
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).
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, but as recently as 2009, the Second Circuit had held that a claim against a corporation could proceed. In Khulumani v. Barclay Nat. Bank Ltd., one judge on the panel, Judge Katzmann, 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.” 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., the panel, which included Judge Leval, did just that and accepted the rationale of Judge Katzmann’s concurrence in Khulumani to be circuit precedent. The majority and Judge Leval sparred over the meaning of Judge Katzmann’s comments in Khulumani with Judge Leval saying that Judge Katzmann supports the idea that there is no distinction between private actors.

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.” Judge Cabranes asserted, however, that there is a two-step analysis employed by Judge Katzmann that Judge Leval missed.

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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)).
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," but there is nothing therein which details whether Judge Katzmann believes there to be a viable difference between types of defendants. Nothing suggests that Judge Katzmann, 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 Katzmann's opinion for the proposition that corporations are liable under the ATS. Judge Katzmann even opined that he believed the Supreme Court to be "classifying both corporations and individuals as 'private actor[s]." 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. 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.'" 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. That Court suggested looking to scholars where other helpful sources were lacking. The Kiobel majority

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286 Id. at 270-71.

287 Id. at 289 (Hall, J., concurring) ("I share Judge Katzmann'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." 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. 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. However, he did not go into them in any detail. 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. The majority's reaction to *Romero* would likely have been similar to its dismissing the relevance of prior Second Circuit cases that had assumed liability since the underlying precedent did not truly address corporate liability. The majority may also have pointed out that the Eleventh Circuit did not analyze corporate liability under customary international law. 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 category before addressing their liability under the ATS. The majority's rebuttal to this would likely have been a rehashing of its analysis of Sosa's Footnote 20, arguing that the

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293 See Kiobel, 621 F.3d at 131.
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. 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.

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. It stated that a subject of international law has “legal status, personality, rights, and duties.” 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.”

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.” 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.’” 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 Nuremberg War Crimes Trial (1946), reprinted in 20 TEMP. L.Q. 338, 342 (1946)).
defines who is liable under international law.\textsuperscript{310} On the other hand, Judge Leval cited to the tribunal for the proposition that corporations \textit{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.\textsuperscript{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.\textsuperscript{312} While corporations were not punished, it does not stand for the proposition that they \textit{are not subjects} and \textit{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 \textit{had already faced "judicial death through dissolution"} and therefore punishment by the tribunal was impossible.\textsuperscript{313} The dissolutions themselves were accomplished by a treaty signed by the major powers.\textsuperscript{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
and Yalta Conferences, the parties contemplated the "dismantling [of] Germany's industrial assets," the "dissolution of private corporations," the "seizure of industrial factories," and the "restitution of confiscated properties and reparations to both the states and individuals who had suffered harm." The seizure of Farben's assets was a penalty "as drastic as any that could be imposed on a juristic entity."

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. The majority's contention that customary international law "has never extended the scope of liability to a corporation" 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. 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.

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." 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).
"[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).
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).
line.\textsuperscript{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."\textsuperscript{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,"\textsuperscript{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.\textsuperscript{334} An American statute to that effect would not be an outlier.

\textit{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."\textsuperscript{335} In \textit{Sosa}, the Court said that Alvarez did not carry his burden of using these sources to demonstrate that his treatment violated any international norms.\textsuperscript{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

\begin{footnotesize}
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\item \textsuperscript{331} Id.
\item \textsuperscript{332} Id.
\item \textsuperscript{333} \textit{Kiobel}, 621 F.3d at 117 (majority opinion).
\item \textsuperscript{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), \textit{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, DAF/HE/IME/BR(97)20, \textit{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, proportionate and dissuasive non-criminal sanctions.").
\item \textsuperscript{335} \textit{Sosa v. Alvarez-Machain}, 542 U.S. 692, 734 (2004) (quoting \textit{The Paquete Habana}, 175 U.S. 677, 700 (1900)).
\item \textsuperscript{336} Id. at 737. He referred to only one such source.
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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.” 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. 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.

This, would, if anything, support Judge Leval’s opinion. 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. He pointed out that if this were the case, strange as it seemed to him, that these authors would have made such a notation. 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.” Judge Leval, reading further, found that:

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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.‘

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.” 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.” 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. For example, Judge Cabranes quoted Professor Ratner saying that “the universe of international criminal law does not reveal any prosecutions of corporations per se . . . .” 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 Koebel, supra note 343, at 208).
345 Id. at 181 n.38 (Leval, J., concurring) (quoting Koebel, 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).
international level." 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. The majority made this same contention. 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." 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. A 1907 opinion interpreted the ATS to say that an American corporation could be held liable. A 1795 opinion advised that a British company could sue under the ATS. 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. 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." The Supreme Court's comments suggest that courts should give weight to these opinions.

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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.
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, a brief overview is helpful. The Court first granted certiorari on October 17, 2011 on the question of whether the law of nations recognizes corporate liability. The oral argument, however, focused heavily on the question of the extraterritorial application of the ATS. 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?” The Court then ordered reargument on that issue.

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

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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.
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.\textsuperscript{365} For reasons that are not entirely clear,\textsuperscript{366} the Court's opinion made no reference to the original question of corporate liability\textsuperscript{367} or to the oft-cited Footnote 20 from Sosa.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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_abuse_because_it_is_a_corporation_.single.html).


\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{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.”\textsuperscript{372}

The truly interesting opinion was Judge Katzmann’s which noted the dispute between Judges Cabranes and Leval over the meaning of his concurrence in \textit{Khulumani v. Barclay Nat. Bank Ltd.}\textsuperscript{373} He said that he “see[s] no inconsistency between the reasoning of my opinion in \textit{Khulumani} and Judge Leval’s well-articulated conclusion, \textit{with which I fully agree}, that corporations, like natural persons, may be liable for violations of the law of nations under the ATCA.”\textsuperscript{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.\textsuperscript{375}

\textsuperscript{370} See supra Part II.B.

\textsuperscript{371} One of the opinions was that of Judge Katzmann, whose concurring opinion in \textit{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 \textit{Kiobel}. See discussion supra Part IV.B.

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

\textsuperscript{373} \textit{Id.} (Katzmann, J., dissenting from the denial of rehearing en banc).

\textsuperscript{374} \textit{Id.} (emphasis added).

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. In the aftermath of the Second Circuit’s decision, multiple ATS suits against corporations were dismissed citing its rationale—the impact was immediate. It was called “a blockbuster opinion that could spell the end of the vast bulk of ATS litigation.” Though it was only one decision, the Second Circuit’s deep history with the ATS lends its Kiobel decision great weight nationwide. And, in light of the Supreme Court’s decision, the corporate liability exception remains the law of the Second Circuit, but corporate liability under the ATS remains law in the Seventh, Ninth, and Eleventh Circuits.

B. Final Thoughts

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


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

379 See, supra note 376.


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


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.