

6-11-2012

# Corporate Liability For International Torts: Did The Second Circuit Misinterpret The Alien Tort Statute?

Daniel Prince

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### Recommended Citation

Prince, Daniel (2012) "Corporate Liability For International Torts: Did The Second Circuit Misinterpret The Alien Tort Statute?," *Seton Hall Circuit Review*: Vol. 8: Iss. 1, Article 2.  
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## Corporate Liability for International Torts: Did the Second Circuit Misinterpret the Alien Tort Statute?

*Daniel Prince*<sup>†</sup>

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## I. INTRODUCTION

In 2009, a Second Circuit panel heard a case that involved atrocities committed in the Sudan. The panel “assume[d], without deciding, that corporations . . . may be held liable for violations of customary international law,” under the Alien Tort Statute (“ATS”).<sup>1</sup> The ATS provides, “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>2</sup> Under the ATS, victims of human rights abuses could sue private tortfeasors in U.S. federal courts, regardless of who committed the abuses or where the abuses occurred.

One year later, *Kiobel v. Royal Dutch Petroleum Co.*<sup>3</sup> came before the same three-judge panel in the Second Circuit on an interlocutory

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<sup>1</sup> 28 U.S.C. § 1350 (2006); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261 n.12 (2d Cir. 2009).

<sup>2</sup> 28 U.S.C. § 1350.

<sup>3</sup> 621 F.3d 111 (2d Cir. 2010), *cert granted*, 132 S.Ct. 472 (2011).

appeal. A majority of the panel declared that it would not be bound by its prior assumption,<sup>4</sup> and held that a transnational corporation could not be liable for violations of the law of nations because the law of nations has customarily imposed liability only upon States and natural persons, and it has declined to extend liability to corporate entities.<sup>5</sup>

Judge José Cabranes wrote the *Kiobel* majority opinion, which was joined by Chief Judge Dennis Jacobs. The majority reasoned that customary international law defines those who are subject to human rights norms and establishes who can be liable for violating those norms. Since no corporation has ever been liable for human rights torts in an international tribunal, these corporate defendants could not have committed a “violation.” Without a violation of the law of nations, the ATS could not provide the court with subject matter jurisdiction. The third member of the appellate panel passionately opposed this construction of the word “violation.” Senior Judge Pierre Leval nevertheless concurred in the judgment, dismissing the case on the grounds that the plaintiffs’ claim was not well-pleaded.

The Supreme Court recently granted certiorari to resolve two questions arising from *Kiobel*: (1) whether the issue of corporate civil tort liability under the ATS is a question of merits or of subject matter jurisdiction, and (2) “[w]hether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide[.]”<sup>6</sup> This article addresses not only these specific issues, but also explores the highly relevant canons of statutory interpretation, norms of international law, and the facts, evidence, and circumstances surrounding the *Kiobel* decision that will likely remain untouched by the Supreme Court. There is a parable that aptly illustrates the situation:

An Associate Justice of the Supreme Court was sitting by a river when a Traveler approached and said:

“I wish to cross. Will it be lawful to use this boat?”

“It will,” was the reply; “it is my boat.”

The Traveler thanked him, and pushing the boat into the water embarked and rowed away. But the boat sank and he was drowned.

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<sup>4</sup> See *id.* at 118–20.

<sup>5</sup> *Id.*

<sup>6</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 132 S.Ct. 472 (2011); Lyle Denniston, *Court to Rule on Suing Corporations and PLO*, SCOTUSBLOG, <http://www.scotusblog.com/?p=129758>.

“Heartless man!” said an Indignant Spectator. Why did you not tell him that your boat had a hole in it?”

“The matter of the boat’s condition,” said the great jurist, “was not brought before me.”<sup>7</sup>

This article advances the position of the *Kiobel* minority one step further to argue that the majority’s interpretation of the ATS rests upon fundamentally unsound principles of statutory construction. Neither federal law nor international law exempts corporations from observance of universally accepted human rights laws. I argue here that the *Kiobel* majority erred, and the Supreme Court should reverse the Second Circuit’s decision.

Part II of this article explains the importance and novelty of the *Kiobel* decision and examines both the majority and minority opinions in detail. Part III argues that the majority’s reasoning is based upon an unsound construction of the ATS. My interpretation of the statute comprises four main arguments.

First, the statute itself does not limit the breadth of the ATS. While it requires that plaintiffs be aliens—and even a corporate entity can be an ATS plaintiff—there is no limitation on defendants. And plain meaning should be decisive. Furthermore, a fair construction of the statute around the time of its original enactment would have been likely to conclude that the statute allows suits against corporations.

Second, the interaction of the ATS with other federal laws indicates that a limitation on corporate liability, if one is to be found, must arise under federal, not international law. To limit the breadth of the ATS, either Congress must pass subsequent limiting legislation or courts must give it a limiting construction. Congress has limited one class of ATS defendants: an ATS lawsuit may not proceed against a foreign sovereign. It has not limited such lawsuits against corporations.

Third, the Supreme Court’s clarification of the statute in 2004 introduced even more ambiguities, principally the nature of an international “norm” and whether the distinction between natural and juridical persons is “related” to subject matter jurisdiction. The *Kiobel* majority felt “required” by the 2004 decision to search international law sources to establish a custom of corporate liability as a prerequisite for subject matter jurisdiction. However, the Supreme Court does not, in fact, require this inquiry.

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<sup>7</sup> Ambrose Bierce, *A Defective Petition*, in THE COLLECTED WORKS OF AMBROSE BIERCE, vol. VI 294 (1911), available at <http://books.google.com/ebooks?id=EnpKAAAAYAAJ> at 280.

Fourth—a more creative approach to statutory construction—the ATS, though first codified in 1789, was essentially reauthorized by Congress in 1991. The Torture Victim Protection Act (“TVPA”), passed alongside the ATS, should be relevant to any construction of the older statute. *In pari materia* analysis of the TVPA gives the ATS a new meaning and purpose. The TVPA does not, however, clarify the corporate liability issue because however the statute is construed—to either allow or exempt corporate defendants—the construction must be based to some degree in absurdity.

Part IV asserts that the *Kiobel* majority has improperly imported norms of personal jurisdiction from international criminal tribunals into ATS subject matter jurisdiction requirements. The majority’s interpretation requires in essence an *international cause of action*. This holding erroneously departs from the established method of creating a cause of action using different strands of common law and improperly elevates international law above federal law. The minority’s consideration of this issue as one of *remedy* is closer to the mark, but it makes the same mistake of importing a procedural rule without adequate support.

Part V demonstrates that even if the *Kiobel* majority is correct in interpreting the ATS to require an international custom of enforcing human rights law against corporations, it ignored evidence that would support such a custom. Contrary to the majority’s holding, international law does consider corporate actors to be subject to human rights norms, and it has enforced those norms against a corporation. Additionally, the majority’s review of international law sources is incomplete, and the rapid development of this area of international law casts further doubt on the majority’s conclusion. *Kiobel* should be decided in light of the environment it affects: an increasingly globalized world in which transnational corporations often hold more economic power than many States.

## II. IS *KIOBEL* AN OUTLIER, OR THE END OF CORPORATE LIABILITY?

Human rights abuses were committed in the Niger Delta from 1993–1995. The *Kiobel* plaintiffs claimed that Royal Dutch/Shell and its corporate subsidiaries aided and abetted the commission of those abuses. The plaintiffs sued in the Southern District of New York, alleging that Shell provided transportation, food and compensation to ultraviolent Nigerian soldiers, and that Shell had a hand in the sham trials and death sentences of nine Ogoni protesters, including Dr. Barinem Kiobel and

Ken Saro-Wiwa.<sup>8</sup> A U.S. federal court could not determine whether Shell bore any responsibility for those abuses unless it had jurisdiction over the subject matter of the cause of action. This article, therefore, discusses the facts of this fascinating case only insofar as they are relevant to ATS jurisdiction.

The *Kiobel* action, like other ATS cases over the past 15 years, sought to litigate notorious injustices. One business commentator noted the proliferation of ATS litigation against companies “doing business in conflict-torn regions [and] . . . countries with poor human rights records or oppressive governments . . . .”<sup>9</sup> Many of the defendants have been involved in “extractive industries . . . such as ExxonMobil in Indonesia, Occidental in Colombia, Talisman in Sudan, Shell in Nigeria, Unocal in Burma, and Rio Tinto in Papua New Guinea.”<sup>10</sup> Other ATS suits have alleged that Pfizer conducted medical experiments on Nigerian children without consent, and that Nestle used child labor to work cocoa plantations in the Ivory Coast.<sup>11</sup> Even al-Qaeda, a vague entity with no definable corporate headquarters, has been sued under the ATS.<sup>12</sup>

In *Saleh v. Titan*, 250 Iraqis brought suit against American contractors CACI International and Titan Industries (now dba L-3 Services), alleging violations of human rights in Abu Ghraib prison and other detention facilities.<sup>13</sup> The last of these generated political backlash against the ATS in general, but it illustrates a significant goal of ATS plaintiffs: to expose human rights violations by trying them in the court of public opinion.

The dismissal of the case against Shell in 2010 by the divided Second Circuit panel made headlines, and the sweep of the ruling gained

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<sup>8</sup> Pleadings and other court documents for the *Wiwa/Kiobel* case are available at <http://www.haguejusticeportal.net/eCache/DEF/12/065.html>. Several plaintiffs, including Wiwa’s son, settled with Shell in 2009. Jad Mouwad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 8, 2009, at B1. *Kiobel*’s widow is now the lead plaintiff.

<sup>9</sup> John B. Bellinger, *Will Federal Court’s Kiobel Ruling End Second Wave of Alien Tort Statute Suits?*, 25 WASHINGTON LEGAL FOUNDATION NO. 34, 2 (Nov. 12, 2010), available at [http://www.wlf.org/Upload/legalstudies/legalbackgrounder/11-12-10Bellinger\\_LegalBackgrounder.pdf](http://www.wlf.org/Upload/legalstudies/legalbackgrounder/11-12-10Bellinger_LegalBackgrounder.pdf) (citations omitted).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 784 n.16, 785 n.19, 826 (S.D.N.Y. 2005) (allowing ATS claims to proceed against al Qaeda and two alleged “fronts” for that “organization”).

<sup>13</sup> *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); Juli Schwartz, *Saleh v. Titan Corporation: The Alien Tort Claims Act: More Bark Than Bite? Procedural Limitations and the Future of ATCA Litigation Against Corporate Contractors*, 37 RUTGERS L.J. 867 (2006); see also *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700 (E.D. Va. 2009).

immediate attention.<sup>14</sup> It was the first appellate<sup>15</sup> decision to hold that the ATS could not be used against corporations.<sup>16</sup> The position taken by the majority appeared to gain steady ground in lower courts since the decision was issued in September 2010.<sup>17</sup> An Indiana district court, for example, dismissed an ATS claim against a corporation, solely on the persuasiveness of *Kiobel*.<sup>18</sup> One week later, the same court disposed of a similar case, this time on the merits rather than for want of jurisdiction.<sup>19</sup> Within the Second Circuit, one post-*Kiobel* dismissal did not even generate a written opinion.<sup>20</sup> Elsewhere, plaintiffs' attorneys attempted to control the fallout.<sup>21</sup>

Meanwhile, attorneys for Esther Kiobel petitioned the panel for a rehearing *en banc*, which was denied; the remaining active judges of the Second Circuit voted 5–5 to rehear *Kiobel*, which had the effect of denying a rehearing.<sup>22</sup>

Several months later, the Eleventh Circuit allowed an ATS suit against a corporate defendant to proceed, creating a circuit split.<sup>23</sup> Shortly after the *Kiobel* plaintiffs filed their Petition for Certiorari,<sup>24</sup> the Seventh Circuit also split with the *Kiobel* majority on the question of

<sup>14</sup> Bob Van Voris and Patricia Hurtado, *Nigeria Torture Case Decision Exempts Companies From U.S. Alien Tort Law* (Sep. 17, 2010), available at <http://www.bloomberg.com/news/2010-09-17/u-s-corporations-aren-t-subject-to-alien-tort-law-appeals-court-rules.html>.

<sup>15</sup> A district court in California reached this same conclusion one week before the *Kiobel* decision was filed. See *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1132–45 (C.D. Cal. 2010) (the practice of forced child labor in cocoa fields in Mali was not actionable because of defendant's corporate nature).

<sup>16</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 151 note \* (2d Cir. 2010) (Leval, J. concurring).

<sup>17</sup> *E.g.*, *Viera v. Eli Lilly & Co.*, No. 09-495, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010); *Mastafa v. Chevron Corp.*, 759 F. Supp. 2d 297 (S.D.N.Y. 2010); *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810 (S.D. Ind. 2010).

<sup>18</sup> *Viera*, 2010 WL 3893791 at \*2.

<sup>19</sup> *Flomo*, 744 F. Supp. 2d at 817.

<sup>20</sup> *Mastafa*, 759 F. Supp. 2d at 298–301 (noting that ATS claims were dismissed in open court).

<sup>21</sup> Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, *Doe v. Drummond Co., Inc.*, No. 7:09-cv-1041, 2010 WL 4036147, at \*41–\*42 (N.D. Ala. Oct. 12, 2010) (arguing *Kiobel* should not be persuasive authority).

<sup>22</sup> *Kiobel*, 642 F.3d 268 (2d Cir. 2011); *reh'g, en banc, denied*, 642 F.3d 379 (2d Cir. 2011).

<sup>23</sup> *Baloco v. Drummond Co., Inc.*, 631 F.3d 1350 (11th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); see also Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 367–68 (2011) (reporting the Eleventh Circuit's lack of analysis on the issue).

<sup>24</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert granted*, 132 S.Ct. 472 (2011).

corporate liability.<sup>25</sup> A divided D.C. Circuit has since departed from *Kiobel* as well, although it denied that corporations may be liable under the TVPA.<sup>26</sup> In October, 2011, the Supreme Court granted certiorari to hear *Kiobel* alongside *Mohamad v. Rajoub*.<sup>27</sup>

The majority's ruling in *Kiobel* raised numerous policy questions that extend beyond the narrow issues to be addressed by the Supreme Court. If federal courts do not have jurisdiction over alien tort claims against corporations, what becomes of the actions against corporate entities that were fully litigated before this ruling? In one trial, a jury found a corporation liable for violations of international law and awarded compensatory and punitive damages.<sup>28</sup> In another case, an \$80 million default judgment was entered against a corporate defendant for forced labor violations.<sup>29</sup> Other ATS litigation has resulted in outcomes favorable to defendants, one notable example being a jury's unanimous verdict that Chevron was not responsible for violence against protesters who had taken over an oil platform.<sup>30</sup> If the court had no power to hear the case, any verdict would be invalid—would *res judicata* prevent the plaintiffs from suing Chevron elsewhere? If *Kiobel* is affirmed by the Supreme Court, could the damage awards be retroactively dissolved because the courts actually had no power to hear the cases?<sup>31</sup> The Second Circuit does not address these questions.

The remainder of Part I explains the fundamental disagreement between the majority and concurring opinions. Both assert the need to assess possible violations of the law of nations by consulting international law. To determine whether a plaintiff has pleaded a "violation of the law of nations," Judge Leval's concurring opinion would ask whether an international criminal tribunal could punish the

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<sup>25</sup> *Flomo v. Firestone*, 643 F.3d 1013 (7th Cir. 2011).

<sup>26</sup> See part III.C, *infra*; *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011).

<sup>27</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 132 S.Ct. 472 (2011); Lyle Denniston, *Court to Rule on Suing Corporations and PLO*, SCOTUSBLOG, <http://www.scotusblog.com/?p=129758>.

<sup>28</sup> *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008). The verdict the following year awarded \$1.75 million to plaintiffs. See More Law Lexapedia, [www.morelaw.com/verdicts/case.asp?n=1:08-cv-01659-BMC&s=NY&d=40919](http://www.morelaw.com/verdicts/case.asp?n=1:08-cv-01659-BMC&s=NY&d=40919) (case summary noting verdicts).

<sup>29</sup> *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (\$80 million verdict for plaintiffs who endured forced labor).

<sup>30</sup> *Bowoto v. Chevron*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); see also *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) (verdict absolved defendants of responsibility for deaths).

<sup>31</sup> See Fed. R. Civ. P. 60(b)(4–6) (allowing relief from a judgment that is void, or that was based on an earlier judgment that has been reversed and vacated, but only if the motion is filed "within a reasonable time" 60(c)).

conduct alleged here.”<sup>32</sup> The majority, by contrast, asks whether an international criminal tribunal could punish *this defendant* for the conduct alleged here.<sup>33</sup>

A disconnect within the judicial panel is apparent. Judge Leval described the majority’s logic as “internally inconsistent.”<sup>34</sup> Though Judge Leval’s conclusion seems correct, he fails to understand how the majority reached its conclusions. This section endeavors to understand the majority’s reasoning by probing the unexpressed assumptions that underlie its logic. Because Judge Leval’s worldview is apparent throughout, there is no similar need to plumb subtext in the concurring opinion.

#### A. *The Kiobel Majority*

##### 1. Substance of the Opinion

Judge Cabranes begins by observing that while the ATS places a limitation on plaintiffs, it is silent regarding defendants.<sup>35</sup> Because the statute does not indicate who can violate the law of nations, the first issue facing the majority is which law should fill that gap, international or federal law?<sup>36</sup>

The majority’s ATS analysis here follows the guidelines laid out in the landmark Supreme Court decision *Sosa v. Alvarez-Machain*.<sup>37</sup> In 2004, the Supreme Court heard an ATS claim that was brought against a natural person acting under the authority of the United States.<sup>38</sup> Justice Souter mentioned the issue of corporate liability in a footnote, to which the *Kiobel* majority turned for direction: “In *Sosa* the Supreme Court instructed the lower federal courts to consider ‘whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.’”<sup>39</sup> If international law does not provide liability against a given actor, it cannot be alleged that the actor has committed the tort in violation of the law of nations, so the plaintiffs have failed to establish an element necessary for jurisdiction. In *Kiobel*,

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<sup>32</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149–51 (2d Cir. 2010) (Leval, J., concurring).

<sup>33</sup> *Id.*

<sup>34</sup> *Kiobel*, 621 F.3d at 152, 153, 174 (Leval, J., concurring).

<sup>35</sup> *Id.* at 150 (Leval, J., concurring).

<sup>36</sup> *Id.* at 122, 125.

<sup>37</sup> 542 U.S. 692 (2004).

<sup>38</sup> *Id.*

<sup>39</sup> *Kiobel*, 621 F.3d 111, 126 (quoting and adding emphasis to *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004)).

the plaintiffs alleged that Shell had aided and abetted human rights abuses.<sup>40</sup> Applying Souter's instruction, the majority asked whether international law had identified non-State entities that may be held responsible for committing that act.<sup>41</sup> The court concluded that aiding and abetting is indeed within the scope of liability in international law.<sup>42</sup>

To determine whether to address corporate liability before conduct, the majority drew support from Judge Katzmann's concurring opinion in *Khulumani v. Barclay National Bank Ltd.*,<sup>43</sup> a Second Circuit decision that followed *Sosa* and established civil liability for aiding and abetting the violation of an international law norm.<sup>44</sup> "[T]o assure itself that it has jurisdiction to hear a claim under the [ATS]," Katzmann wrote, "[a court] should first determine whether the alleged tort was in fact 'committed in violation of the law of nations,' . . . and whether this law would recognize the defendants' responsibility for that violation."<sup>45</sup> Katzmann noted that although domestic law carried a presumption against aiding and abetting liability, international law did extend liability to non-State actors who aided and abetted violations of the law of nations.<sup>46</sup> Liability on the theory of aiding and abetting was generally recognized by international law, so a jurisdictional claim could be upheld on that basis.<sup>47</sup>

The majority reasoned that corporate liability is like aiding and abetting liability in that it is not *itself* a violation, but rather a norm that seeks to identify those responsible for the underlying offense.<sup>48</sup> "It is inconceivable that a defendant who is not liable under customary international law could be liable under the ATS."<sup>49</sup> Thus, international law must assign liability to an aiding and abetting corporation before the ATS will do so.

The majority points out that this principle has long been the law in other ATS cases as well.<sup>50</sup> For example, the Nuremberg tribunals established individual criminal liability for individuals acting under color of State law. Under this rule, Palestinian attackers could not be held liable for bombing a busload of Israelis in a 1984 ATS case, in part

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<sup>40</sup> *Kiobel*, 621 F.3d at 117.

<sup>41</sup> *Id.* at 125.

<sup>42</sup> *See id.* at 129–30.

<sup>43</sup> 504 F.3d 254 (2d Cir. 2007).

<sup>44</sup> *Kiobel*, 621 F.3d at 129.

<sup>45</sup> *Id.* (quoting *Khulumani*, 504 F.3d at 270) (alteration in original).

<sup>46</sup> *Kiobel*, 621 F.3d at 129–30 (citing *Khulumani*, 504 F.3d at 270).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 129–30.

<sup>49</sup> *Id.* at 122 (emphasis added).

<sup>50</sup> *Id.* at 128.

because the Palestinian Liberation Organization was not a recognized State, and in part because liability for “individuals acting separate from any State’s authority or direction” was “less established.”<sup>51</sup> That is to say, the nature of the defendant served to bar the suit. Ten years later, however, the Second Circuit acknowledged that customary international law had evolved when it found that Radovan Karadžić could be held liable for crimes against humanity committed while he was president of Srpska, another quasi-State.<sup>52</sup> The court stated, “[w]e have looked to international law to determine whether State officials, private individuals, and aiders and abettors, can be held liable under the ATS. There is no principled basis for treating the question of corporate liability differently.”<sup>53</sup>

Next, the *Kiobel* majority turned to traditional sources of customary international law to determine whether States had established a consistent practice of holding corporations liable for human rights violations and whether a sense of legal obligation impelled them to do so.<sup>54</sup> The majority notes that international law identifies who may be held responsible for violating its norms. Since the Nuremberg tribunals, “international law imposes duties and liabilities upon individuals as well as upon states.”<sup>55</sup> Although liability is well established for living, breathing aiders and abettors, it is not established for corporations. In fact, the London charter that established the tribunals provided jurisdiction exclusively over natural persons.<sup>56</sup> While the International Military Tribunal did have the authority to indict criminal organizations, a declaration that a defendant was part of a criminal organization “did not result in the organization being punished or having liability assessed against it. Rather, the effect of declaring an organization criminal was merely to facilitate the prosecution of *individuals* who were members of the organization.”<sup>57</sup>

The majority noted in particular that several executives of I.G. Farben, a corporation that was thoroughly complicit in Nazi atrocities, were tried for war crimes.<sup>58</sup> However, the military tribunals at

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<sup>51</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 793 (D.C. Cir. 1984), *cert. denied* 470 U.S. 103 (1985); *see also Kiobel*, 621 F.3d at 128.

<sup>52</sup> *Kadic v. Karadžić*, 70 F.3d 232, 239–41 (2d Cir. 1995).

<sup>53</sup> *Kiobel*, 621 F.3d at 130 (internal citations omitted).

<sup>54</sup> *Id.* at 132 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) and ICJ Statute, 59 Stat. 1055, 1060 art. 38 (1945)).

<sup>55</sup> The Nuremberg Trial (*United States v. Goering*), 6 F.R.D. 69, 119 (Int’l Mil. Trib. at Nuremberg, 1946), *quoted in Kiobel*, 621 F.3d at 127.

<sup>56</sup> *Kiobel*, 621 F.3d at 133–34.

<sup>57</sup> *Id.* at 134.

<sup>58</sup> *Id.*

Nuremberg did not indict Farben itself.<sup>59</sup> Why not prosecute the entity responsible for Auschwitz? The majority seizes on the trial's most memorable passage: "Crimes against international law are committed by men, not by abstract entities [i.e. States], and only by punishing individuals who commit such crimes can the provisions of international law be enforced."<sup>60</sup> Thus, in 1948, individual liability was a recognized norm of international law, and corporate liability was not.

The *Kiobel* court then asked whether international law has evolved since then to enforce norms of corporate responsibility. The majority answered in the negative, holding that subsequent international criminal tribunals for Yugoslavia and Rwanda reached the same conclusion as the tribunal at Nuremberg.<sup>61</sup> So too has the International Criminal Court, established by the Rome Statute in 1998.<sup>62</sup> Additionally, the majority notes that international tribunals do not have jurisdiction to impose civil liability on *any* private actor.<sup>63</sup>

In addition to international tribunals, the majority also considered other sources of international law: treaties and the writings of publicists.<sup>64</sup> While some treaties, such as the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, provide for corporate liability, the majority found that they are limited to their specific subject areas. The *Kiobel* majority concluded that no treaty explicitly provides private causes of action for international human rights violations that extend liability to corporations.<sup>65</sup>

Although scholars and jurists have addressed the idea of corporate criminal liability<sup>66</sup> and international corporate obligations,<sup>67</sup> they fail to provide evidence that liability for corporations is customarily enforced by international law today. "Tellingly, most proponents of corporate liability under customary international law discuss the subject as merely a possibility or a goal, rather than an established norm of customary

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<sup>59</sup> *Id.*

<sup>60</sup> *Kiobel*, 621 F.3d at 135, citing *The Nuremberg Trial*, 6 F.R.D. at 110.

<sup>61</sup> *Id.* at 136.

<sup>62</sup> *Id.* at 136–37.

<sup>63</sup> *Id.* at 137.

<sup>64</sup> *Id.* at 137–45.

<sup>65</sup> *Id.* at 141.

<sup>66</sup> *E.g.*, José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1(2011); Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

<sup>67</sup> *E.g.*, David D. Christensen, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After Sosa v. Alvarez-Machain*, 62 WASH. & LEE L. REV 1219, 1235 (2005).

international law,” the majority asserts.<sup>68</sup> The majority opinion includes citations to notable proponents of human rights enforcement, including Menno Kamminga, Steven Ratner, Beth Stevens, and Paul Hoffman (the last of whom was the lead advocate for the *Kiobel* plaintiffs.<sup>69</sup> Hoffman also represented Humberto Álvarez-Machain in 2004, and he argued the appeals at the Seventh and D.C. Circuits in 2011).<sup>70</sup> These scholars were consulted to provide “trustworthy evidence of what the law really is.”<sup>71</sup> Their writings, far from adducing evidence to show the actual practice of corporate liability at the international level, in fact indicate that such liability is aspirational in nature.<sup>72</sup>

Judge Cabranes, writing for the majority in *Kiobel*, indicates that the absence of an international legal norm extending the scope of liability to corporations must be dispositive.<sup>73</sup> At present, corporate entities (“juridical persons”) cannot be regarded as subjects of international law with duties to abide by human rights norms. “To permit [federal] courts to recognize *corporate liability* under the ATS, however, would require, at the very least, a different statute—one that goes beyond providing jurisdiction over torts committed ‘in violation of the law of nations’ to authorize suits against entities that *are not* subjects of customary international law.”<sup>74</sup>

Moreover, as a matter of policy, the ATS should not be read “to encourage United States courts to create new norms of customary international law unilaterally.”<sup>75</sup> If a domestic court recognized such a norm, and it was not universally accepted, the court might “create friction in our relations with foreign nations and, therefore, would contravene the international comity the statute was enacted to promote.”<sup>76</sup>

For these reasons, the majority held that plaintiffs had not charged a violation of international law, and dismissed the case for lack of subject-matter jurisdiction.

## 2. The Majority’s Underlying Worldview

The majority decision has a long reach: *Kiobel* does not merely stand for the principle that corporations cannot be sued on a tort theory

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<sup>68</sup> *Kiobel*, 621 F.3d at 144 n.48.

<sup>69</sup> *Id.* at 144.

<sup>70</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>71</sup> *Kiobel* at 143–44 n.47 (quoting *Sosa*, 542 U.S. at 734).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 191 (Leval, J., concurring).

<sup>74</sup> *Id.* at 148.

<sup>75</sup> *Id.* at 140.

<sup>76</sup> *Id.* at 140–41.

of aiding and abetting. Rather, it finds that corporate entities cannot violate customary international law, because they are not subject to it.

The majority's discourse on subjects of international law indicates a narrower definition of the word "violation." A violation is not merely breaking a rule. Rather, a person or entity is only subject to a rule if he, she, or it can reasonably expect sanctions for noncompliance.<sup>77</sup> This idea is not well-developed by the majority, but it is rooted in common sense. "If you want to know the law and nothing else," Justice Holmes once said, "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct . . . in the vaguer sanctions of conscience."<sup>78</sup> Holmes explained that the notion of a legal duty is rooted in the prophecies of what courts will do in fact, not what they ought to do.<sup>79</sup> With custom as its only guidepost, it seems intuitive for the *Kiobel* majority to tacitly assume that an unenforced rule is a nullity. Since corporations have no expectation of being held liable for human rights violations under international law, it would be unfair to grant a court power to impose liability upon them.<sup>80</sup>

The pair of international law principles identified by the majority—no criminal liability for corporations, and no civil liability for any private actor—indicates that corporations have no obligations under international law. They therefore are not subject to that law.

The majority opinion is also an exercise in legal formalism in that it avoids—and even admonishes—policy considerations that might favor the plaintiffs. For the majority, strict adherence to established principles of customary international law is an end in itself. There is no discussion of the evils addressed by the modern line of Alien Tort Statute jurisprudence. The discussion of whether ATS litigation enmeshes the judiciary in foreign relations, which may have been the purpose of *Sosa*'s footnote 20, is mentioned only in passing.<sup>81</sup> Judge Leval disagreed, stating, "[l]imiting civil liability to individuals while exonerating the corporation . . . makes little sense in today's world," and "[d]efendants present[ed] no policy reason why corporations should be uniquely

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<sup>77</sup> See Alvarez, *supra* note 66, at 22–24.

<sup>78</sup> See generally O.W. Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 459, 461 (1897).

<sup>79</sup> *Id.*

<sup>80</sup> *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1016 (7th Cir. 2011).

<sup>81</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 760–63 (2004) (Breyer, J., concurring) (interpreting footnote 20 to mean that comity principles allow universal criminal jurisdiction for certain egregious behavior, and that universal tort jurisdiction over that same behavior "would be no more threatening").

exempt from tort liability under the ATS[.]”<sup>82</sup> The majority rejoined, “[c]ustomary international law . . . is developed through the customs and practices of States, not by what ‘makes . . . sense’ to a judge, [or] the ‘policy reason[s]’ recognized by a judge.”<sup>83</sup>

Judge Cabranes, an international law expert, appears to reject the notion that his decisions on the law of nations make him a participant in the gradual formation of custom. Instead, his majority opinion takes the position that international law norms are merely discoverable. The majority indicates that its *Kiobel* decision could be reversed if Congress specifically authorized subject matter jurisdiction for international law claims against corporate defendants, or if corporate liability ripened into a specific, universal, obligatory norm of international law.<sup>84</sup>

### B. *The Kiobel Minority*

While Judge Cabranes treats customary international law as a body of norms whose practice can be discovered, Judge Leval’s minority opinion appears to view federal courts as contributors in the gradual creation and development of international custom and principles. Because of this worldview, the minority perceives not that the majority has discovered the absence of a rule of corporate liability, but rather that the majority has fabricated a positive rule of corporate immunity.<sup>85</sup>

The majority’s logic, in Judge Leval’s eyes, amounts to a crime against humanity, and he attacks with quotable panache. “According to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims’ claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.”<sup>86</sup> For example, “[m]y colleagues’ new rule offers secure protection for the profits of piracy so long as the perpetrators take the precaution to incorporate the business.”<sup>87</sup> Nearly two-thirds of Judge Leval’s opinion is devoted to criticizing the majority’s reasoning and conclusions.

Judge Leval nevertheless accedes to both of the majority’s most important propositions. He agrees that “the place to look for answers

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<sup>82</sup> *Kiobel*, 621 F.3d at 140 (Leval, J., concurring) (quoting *In re Agent Orange Prod. Liability Litig.*, 373 F. Supp. 2d 7, 58, 59 (E.D.N.Y. 2005) (emphasis added).

<sup>83</sup> *Kiobel*, 621 F.3d at 140 n.41 (Leval, J., concurring) (alteration in original).

<sup>84</sup> *Kiobel*, 621 F.3d at 153 (Leval, J., concurring).

<sup>85</sup> Immunity has been a holy quest for defendants of modern ATS claims since such claims began. See generally Tom Lininger, *Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 HARV. HUM. RTS. J. 177 (1994).

<sup>86</sup> *Kiobel*, 621 F.3d at 149–50 (Leval, J., concurring).

<sup>87</sup> *Id.* at 156 (Leval, J., concurring).

whether any set of facts constitutes a violation of international law is to international law,” and also that “the rules of international law do not provide civil liability against any private actor and do not provide any form of liability [against] corporations.”<sup>88</sup> And while the concurrence does not explicitly challenge the assertion that international law should provide the scope of liability for ATS cases, the approach is more nuanced. The concurrence agrees with an interpretation of the ATS by German attorney and scholar Michael Koebele that “the 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.”<sup>89</sup> The law of nations in the areas of human rights and the law of war generally regulates conduct, but it is generally silent on how such norms may be enforced (universal criminal jurisdiction is a notable exception). “[International law] leaves the manner of enforcement, including the question of whether there should be private civil remedies for violations of law, almost entirely to individual nations.”<sup>90</sup>

This theme reverberates through the concurring opinion to challenge the majority’s next contention: that international criminal law *must* extend liability to corporations before the ATS will do so.<sup>91</sup> The minority accepts that international law does not recognize corporate criminal liability.<sup>92</sup> But there is a good reason for this limitation: criminal liability is generally not appropriate for a corporation. “The reasons why the jurisdiction of international criminal tribunals has been limited to the prosecution of natural persons, as opposed to juridical entities, relate to the nature and purposes of criminal punishment, and have no application to the very different nature and purposes of civil compensatory liability.”<sup>93</sup>

Criminal sanctions serve several purposes, the concurrence points out.<sup>94</sup> Society may justly demand retribution to make an offender suffer for the suffering he caused; incapacitate the offender by incarcerating him; correct the offender using fear of punishment to dissuade him from future bad acts; and deter others who may wish to avoid similar

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<sup>88</sup> *Id.* at 174, 186 (Leval, J., concurring).

<sup>89</sup> Michael Koebele, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH U.S. TORTS LAW 208 (2009); *see also Kiobel*, 621 F.3d at 172 n.30, 181 n.38 (Leval, J., concurring).

<sup>90</sup> *Kiobel*, 621 F.3d at 176 (Leval, J., concurring).

<sup>91</sup> *Id.* at 127–31.

<sup>92</sup> *Id.* at 166–67 (Leval, J. concurring).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 166 (Leval, J., concurring).

punishments.<sup>95</sup> However, none of these objectives is reached by imposing criminal punishments on a corporate entity.<sup>96</sup> “A corporation, having no body, no soul, and no conscience, is incapable of suffering, of remorse, or of pragmatic reassessment of its future behavior.”<sup>97</sup> Corporate criminal liability would be bad policy because it would not achieve those stated goals.

Furthermore, international organizations rightly refuse to extend criminal liability to corporations for practical reasons. *Mens rea* cannot reasonably be imputed. A corporation cannot be incapacitated by imprisonment. “[W]hen the time comes to impose punishment for past misdeeds, the corporation’s owners, directors, and employees may be completely different persons from those who held the positions at the time of misconduct [which could] *undermine* the objectives of criminal law by misdirecting prosecution away from those deserving of punishment.”<sup>98</sup> The Seventh Circuit later pointed out that “if a crime . . . is committed or condoned at the managerial or board of directors level of the corporation, the corporation itself is criminally liable.”<sup>99</sup>

The minority agreed with the majority’s reasoning that international crimes are committed by people, not abstract entities, and therefore an evaluation of the conduct of those entities is not foreclosed.<sup>100</sup> “Among the focuses of the Nuremberg trials was the exploitation of slave labor by I.G. [Farben] . . . . The tribunal found that Farben’s program of exploitation of slave labor violated the standards of international law.”<sup>101</sup> By emphasizing this nuance, the minority rejects the notion that no violation has occurred unless criminal liability could result. The action of exploiting slaves constituted a violation of international law at the moment it occurred, regardless of who committed the act, or what liability might attach, or whether an international or national court could exercise personal jurisdiction over the violator.<sup>102</sup> Under the majority’s formulation, in contrast, “compensatory damages *may be awarded under the ATS against the corporation’s employees*, natural persons who acted in the corporation’s behalf, *but not against the corporation* that commanded the atrocities and earned profits by committing them.”<sup>103</sup>

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<sup>95</sup> *Id.* at 166–67 (Leval, J., concurring).

<sup>96</sup> *Kiobel*, 621 F.3d at 168 (Leval, J., concurring).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011).

<sup>100</sup> *Kiobel*, 621 F.3d at 168 (Leval, J., concurring).

<sup>101</sup> *Id.* at 155 (Leval, J., concurring).

<sup>102</sup> *Id.* at 159 (Leval, J., concurring).

<sup>103</sup> *Id.* at 151 (Leval, J., concurring).

Civil liability, in contrast with criminal liability, serves different ends, the concurrence explains. “A principal objective of civil tort liability is to compensate victims of illegal conduct for the harms inflicted on them and to restore to them what is rightfully theirs.”<sup>104</sup> These objectives cannot be reached by suing the responsible employees of a corporation. “Because the corporation, and not its personnel, earned the principal profit from the violation of the rights of others, the goal of compensation of the victims likely cannot be achieved if they have remedies only against the [natural] persons who acted on the corporation’s behalf, even in the unlikely event that the victims could sue those persons in a court which grants civil remedies for violations of international law.”<sup>105</sup> Thus, the majority erred by looking primarily to international *criminal* law and only briefly to international civil law.

The minority asked instead, *how* does the law of nations customarily impose civil liability for violations of its norms?<sup>106</sup> Far from being silent on the issue, international law frequently *delegates* responsibility for civil enforcement of its norms. The Convention on the Prevention and Punishment of the Crime of Genocide, for example, is “typical” in that it “defines the illegal act of genocide, obligates State parties to enforce its prohibition, and leaves it to each State to devise its own system for giving effect to the Convention’s norms.”<sup>107</sup>

The U.S. is one of those parties, and it has affected such a system. The courts of the United States have been open to the law of nations since their founding. The “define and punish” clause of the Constitution allows U.S. courts to adjudicate *crimes* committed in violation of the law of nations, no matter where committed.<sup>108</sup> The Alien Tort Statute in a similar fashion allows universal *civil* jurisdiction by authorizing U.S. courts to exercise jurisdiction over *torts* committed in violation of international law.<sup>109</sup> In both types of cases, jurisdiction rests on the character of the act, not the personality of the actor.

The concurring opinion also explains why ATS subject matter jurisdiction in federal courts should not be coextensive with personal jurisdiction in international criminal tribunals: the tribunals “withhold

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<sup>104</sup> *Id.* at 169 (Leval, J., concurring).

<sup>105</sup> *Id.*

<sup>106</sup> *Kiobel*, 621 F.3d at 173–74 (Leval, J., concurring).

<sup>107</sup> *Id.* at 173 (Leval, J., concurring) (discussing the Convention on the Prevention and Punishment of the Crime of Genocide, arts. I, II, V, 78 U.N.T.S. 277 (Dec. 9, 1948)).

<sup>108</sup> U.S. CONST. art I, § 8, cl. 10. *See e.g.*, *U.S. v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010) (upholding charge of piracy off the coast of Somalia); *see also* Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 150 (2009).

<sup>109</sup> 28 U.S.C. § 1350 (2006).

criminal liability from juridical entities for reasons that have nothing to do with whether they violated the conduct norms of international law, but result only from a perceived inappropriateness of imposing criminal judgments on artificial entities.”<sup>110</sup>

Judge Leval makes two points regarding how international civil law may inform “scope of liability” principles. First, international law recognizes and assigns civil liability to abstract entities.<sup>111</sup> Statehood, like incorporation, creates an abstract entity with legal personage, and the International Court of Justice (“ICJ”) (among others) may award reparations from one State to another. It is therefore no great leap to assume that international law supports a theory of liability that encompasses juridical persons, such as corporations.<sup>112</sup> Secondly, human rights conventions assign the task of enforcing their norms of conduct against private violators to States, leaving the procedure and rules of decision to the domestic legal systems.<sup>113</sup> Every legal system in the world extends liability to corporations for torts. The ATS does too. This pair of principles—international law’s recognition of civil damages borne by bloodless entities (States), and punishment of private entities by domestic courts for violations of human rights law—indicates that there is nothing wrong with entertaining suits that allege corporate liability for torts committed in violation of the law of nations. There is certainly nothing to suggest that corporations are not subject to human rights norms or that they are exempt from observing norms of conduct that otherwise command universal acceptance.

The *Kiobel* minority, like the majority, discussed Judge Katzmman’s exegesis on ATS causes of action.<sup>114</sup> To summarize, federal courts transmute international criminal acts into federal civil wrongs because the ATS provides justice to human rights victims in a different way than international criminal law does.<sup>115</sup> International criminal tribunals establish whether there was wrongdoing and proceed to justice by punishing the (private) wrongdoer.<sup>116</sup> The federal courts, by contrast, establish whether there was wrongdoing using the same international criteria, but proceed to justice by compensating the victim.<sup>117</sup> The majority understood Katzmman to require that the “law [of nations]

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<sup>110</sup> *Kiobel*, 621 F.3d at 187 (Leval, J., concurring).

<sup>111</sup> *Id.* at 147 (Leval, J., concurring).

<sup>112</sup> *Id.* at 170–71 n.24 (Leval, J., concurring).

<sup>113</sup> *Id.* at 169 (Leval, J., concurring).

<sup>114</sup> *Id.* at 186–87 (Leval, J., concurring).

<sup>115</sup> *Id.* (Leval, J., concurring) (citing *Khulumani v. Barclay Nat. Bank Ltd*, 504 F.3d 254, 282 (2007) (Katzmann, J., concurring)).

<sup>116</sup> *Kiobel*, 621 F.3d at 151 (Leval, J., concurring).

<sup>117</sup> *Id.* at 129.

would recognize the defendants' responsibility for that violation,"<sup>118</sup> but the minority fleshes out the principle in greater depth.

Legal classification can be important to whether or not there has been a "violation," but only when the distinction is between State and non-State actors. Katzmann went on to say, "[w]e have repeatedly treated the issue of whether corporations may be held liable under the AT[S] as indistinguishable from the question of whether private individuals may be."<sup>119</sup>

When the majority could not find any "norm" of corporate liability *within* the law of nations, it made what the minority considered an enormous and unjustified leap in declaring that corporations are not *subject* to the law of nations, and they owe no duty to abide by (otherwise universal) human rights norms.<sup>120</sup> In a string of hypotheticals, the minority illustrates that the majority's holding would allow a corporation to commit heinous atrocities and shield the corporation's ill-gotten profits from any legal accountability.<sup>121</sup>

Despite the spirited disagreement on the question of whether the ATS allows for corporate liability, Judge Leval nonetheless concurs in the judgment to dismiss the case for failure to state a proper claim for secondary liability.<sup>122</sup> The Second Circuit in *Presbyterian Church of Sudan* found that international law's standard for aiding and abetting human rights abuses requires a *mens rea* showing of purpose to bring about those abuses.<sup>123</sup> Mere knowledge of abuses, even when combined with material support in fact is not sufficient "to support the inference of a *purpose* on the defendant's part to facilitate human rights abuses."<sup>124</sup> Judge Leval explains by analogy that this standard is appropriate: "The shoemaker who makes Hitler's shoes should not be held responsible for Hitler's atrocities, even if the shoemaker knows that a pair of shoes will help Hitler accomplish his horrendous agenda."<sup>125</sup> This complaint did

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<sup>118</sup> *Id.* at 129–30 n.32.

<sup>119</sup> *Khulumani*, 504 F.3d at 282 (Katzmann, J.), *quoted in Kiobel*, 621 F.3d at 187; *see also Kiobel, reh'g, en banc, denied*, 642 F.3d 379 (2d Cir. 2010) (Katzmann, J., dissenting) (endorsing the minority's view of his *Khulumani* decision).

<sup>120</sup> *Kiobel*, 621 F.3d at 153 (Leval, J., concurring).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 196 (Leval, J., concurring).

<sup>123</sup> *Id.* at 192 (Leval, J., concurring) (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.* 582 F.3d 244, 258 (2d Cir. 2009)). *Accord Aziz v. Alcolac Inc.*, 658 F.3d 388, 395–98 (4th Cir. 2011).

<sup>124</sup> *Kiobel*, 621 F.3d at 193 (Leval, J., concurring).

<sup>125</sup> *Id.* at 158. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (determining due process requirements for Bin Laden's driver, who was charged with conspiracy).

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not allege specific facts that indicate Shell acted with the requisite purpose.<sup>126</sup>

It may be relevant for future ATS cases and scholarship to note that there appears to be a circuit split on the *mens rea* requirement for aiding and abetting, and that this split appears to reflect a division among sources of international law.<sup>127</sup> The Ninth Circuit has a more permissive standard than the one articulated by the Second Circuit minority. The Ninth Circuit would hear an aiding and abetting claim if the defendant gave “knowing practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of the crime.”<sup>128</sup>

### III. A MORE CONSTRUCTIVE APPROACH: THE ATS DOES NOT FORECLOSE CORPORATE LIABILITY

Contrary to the majority opinion in *Kiobel*, the ATS does not “require [the court to] look to international law to determine [its] jurisdiction over ATS claims against a particular class of defendant, such as corporations.”<sup>129</sup> This section analyzes the ATS, and addresses the issue of corporate liability within the ATS interpretation.

The first step of statutory construction analysis is uncontroversial: the plain language of the statute does not exclude any defendant. Secondly, the legislative history indicates no Congressional intent to exclude corporate defendants, and the words would not have been understood to exclude such defendants at the time of its enactment. Thirdly, another federal statute does enumerate exclusions for foreign sovereigns from ATS claims. These well-settled exclusions should inform the more nebulous status of corporate defendants. Fourth, greater credit should be given to Judge Leval’s assertion that the majority misread *Sosa*. Finally, the ATS should be interpreted *in pari materia* with its clarifying statute, the Torture Victims Protection Act.

#### A. The Plain Meaning Does Not Limit the Breadth of ATS Jurisdiction

This section examines the plain meaning of the ATS piece by piece. Any exercise in statutory construction must begin with the text: “The

<sup>126</sup> *Kiobel*, 621 F.3d at 192–93.

<sup>127</sup> See generally, Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT’L HUM. RTS. 304 (2008).

<sup>128</sup> Compare *Kiobel*, 621 F.3d at 186–88 (Leval, J., concurring) (“purpose” *mens rea* requirement) (citing *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, (2d Cir. 2007) (which relied on ICC Statute, art. 25.3(c)) with *Doe I v. Unocal Corp.*, 395 F.3d 932, 932 (9th Cir. 2002) (“knowledge” *mens rea* requirement, adopting the standard from the ICTY case of *Prosecutor v. Furundžija*, reprinted in 38 I.L.M. 317 (1999) (which in turn relied on the Nuremberg Tribunals)).

<sup>129</sup> *Kiobel*, 621 F.3d at 172 n.30.

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.”<sup>130</sup> The sentence comprises a broadly worded enacting clause restricted by provisos. The enacting clause of the ATS provides federal jurisdiction over *any civil action*. A civil action must contain three interrelated ingredients: a plaintiff, a defendant, and a claim.

The first proviso of the ATS requires the plaintiff of the action to be “an alien.” In ordinary usage, the word “alien” describes “a person who was born outside the jurisdiction of the United States, who is subject to some foreign government, and who has not been naturalized under U.S. law.”<sup>131</sup> Corporate entities are not born, nor can they be naturalized, so the ordinary meaning would indicate only natural persons are aliens. However, because U.S. courts appear to treat “alien corporations” similar to natural alien persons in many respects,<sup>132</sup> the inquiry should not end here.

If a corporation can be an ATS plaintiff, courts should not prevent them from appearing as defendants as well. The *Kiobel* majority summarily dismissed an argument by Harold Koh pointing out that international law has, over time, distributed more rights to corporate entities, and those rights, by a “parity of reasoning,” ought to entail corresponding obligations.<sup>133</sup> Koh explained that since transnational corporations may bring suits under international law (to ICSID arbitration, for example), they must be *subjects* of that law, and therefore, according to Koh, they ought to be correspondingly amenable to suit under that law.<sup>134</sup> Similarly, if a corporation can sue under the ATS, it ought to be amenable to suit under that law as well.

At least one foreign corporation has filed an ATS claim as a plaintiff.<sup>135</sup> The corporation had sued Argentina, so sovereign immunity blocked the claim because the defendant was not appropriate.<sup>136</sup> Nevertheless the case went all the way to the Supreme Court, and the

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<sup>130</sup> 28 U.S.C. § 1350 (2006).

<sup>131</sup> BLACK’S LAW DICTIONARY (9th ed. 2009); *accord* BALLENTINE’S LAW DICTIONARY (3d ed. 1969); NOLO’S PLAIN ENGLISH LAW DICTIONARY.

<sup>132</sup> *E.g.*, JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure, 536 U.S. 88, 98 n.3 (2002) (A British Virgin Islands corporation was a “citizen or subject” of the UK for purposes of alienage diversity jurisdiction.).

<sup>133</sup> *Kiobel*, 621 F.3d at 140 n.41 (quoting Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT’L ECON. L. 263, 265 (2004).

<sup>134</sup> Koh, *supra* note 133, at 264–65.

<sup>135</sup> *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986) *rev’d* 830 F.2d 421 (2d Cir. 1987), *rev’d* 488 U.S. 425 (1989).

<sup>136</sup> *Id.*

viability of the corporate plaintiff was not questioned once.<sup>137</sup> Since the Supreme Court tacitly allowed corporations to be ATS plaintiffs, by an analogous parity of reasoning, the ATS should not disqualify suits that name corporate defendants.<sup>138</sup> Chief Justice Rehnquist said as much, writing for the unanimous Court, “[t]he Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the [Foreign Sovereign Immunities Act] as before with respect to defendants other than foreign states.”<sup>139</sup>

The next proviso places two unrelated limitations on ATS causes of action. The plaintiff’s civil action must be a claim for a tort only. The tort requirement may be satisfied by virtually any injury alleged by the plaintiff.<sup>140</sup> This, like the alien requirement, seems straightforward. Lastly, the tort must have been committed in violation of the law of nations. This final requirement incorporates standards that relate not only to the substance of the injury, a legal question, but also to the factual circumstances surrounding its commission.

Importantly, of the three necessary components of civil actions—plaintiff, defendant, and claim—the Alien Tort Statute addresses only two. It categorically restricts all but a limited specific group of plaintiffs and all but a limited subset of claims. The phrasing does not address the nature of any prospective defendant. The *Kiobel* concurrence takes the statute at face value. Plaintiffs are limited. Claims are limited. Since no limitation is placed on defendants, none is intended.

The majority, by contrast, saw an incomplete statute: the ATS strictly limits the viability of plaintiffs and claims, but there is a gap regarding viable defendants. Filling that gap presents a choice-of-law issue. Resolving this issue is difficult, in part because of the expansiveness of the phrase “any civil action,”<sup>141</sup> and in part because “Congress has incorporated by reference” offenses defined by the law of nations, rather than “crystallizing in permanent form and in minute detail every offense” that could arise.<sup>142</sup> There is, therefore, a fundamental ambiguity in this statute. To resolve the statutory ambiguity, we turn to other pronouncements of the legislature to interpret the language in a manner consistent with its objectives.

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<sup>137</sup> *Id.*

<sup>138</sup> *Contra Kiobel*, 621 F.3d at 142 n.44.

<sup>139</sup> *Argentine Republic*, 488 U.S. at 438.

<sup>140</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>141</sup> William Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 498 (1986) (cited with approval by both Souter and Scalia in *Sosa*, 542 U.S. 692).

<sup>142</sup> *Ex parte Quirin*, 317 U.S. 1, 30, n.6 (1942) (construing a “violation of the law of war” by comparison with other “law of nations” provisions).

*B. Congress Did Not Intend to Limit ATS Defendants, Except to Bar Suits Against Foreign Sovereigns.*

Since the statute is ambiguous, it is worthwhile to examine the legislative history to understand how the ATS incorporated the law of nations in the eighteenth century, and how it incorporates today's customary international law.

1. Historical Background

The Alien Tort Statute—codified by the First U.S. Congress, and signed by George Washington—has remained essentially unchanged since its codification in section 9 of the First Judiciary Act of 1789, but its use, even at the time of enactment, was unknown. From 1789–1980, federal courts heard only two ATS cases. The first, a 1795 admiralty case, invoked a violation of a U.S. treaty;<sup>143</sup> the second, a 1961 custody dispute, pleaded a violation of the law of nations.<sup>144</sup> Neither decision provided any substantial interpretation of the ambiguous text.

The Supreme Court has comprehensively analyzed the ATS only once, in *Sosa v. Alvarez-Machain*.<sup>145</sup> Justice Souter lamented that the “poverty of drafting history,” regarding the Alien Tort provision, makes it “fair to say that a consensus understanding of what Congress intended has proven elusive.”<sup>146</sup> The lack of legislative record, however, has been compensated by a wealth of subsequent scholarship on the subject.<sup>147</sup> Because open-ended statutory terms were not clarified by the legislative history, the Court thoroughly plumbed the historical record to gain a sense of the statute in the context of its time.

Given its rare usage, commentators, historians, and jurists have proposed several possible motivations for passing the ATS. The Framers may have felt a moral duty to open their courts to aliens: “Cursed is anyone who withholds justice from the foreigner . . . .”<sup>148</sup> Congress may have been attempting pragmatic statecraft by demonstrating to the world

<sup>143</sup> *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795).

<sup>144</sup> *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).

<sup>145</sup> 542 U.S. 692 (2004). While *Sosa v. Alvarez-Machain*, is the only significant Supreme Court decision regarding the Alien Tort Statute, it is not the only ATS claim to come before the Court. See also *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (decided one day before *Sosa*) (“The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court’s jurisdiction over their [ATS and other] claims.”); *O’Reilly De Camara v. Brooke*, 209 U.S. 45 (1908).

<sup>146</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718–19 (2004).

<sup>147</sup> E.g., M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERK. J. INT’L L. 316 (2009) (The word “foreigner” in the Senate’s first draft was changed to “alien”).

<sup>148</sup> *Deuteronomy* 27:19.

how the fledgling nation was paying “decent respect to the opinions of mankind.”<sup>149</sup> One scholar posited that “tort” referred exclusively to naval prize cases.<sup>150</sup> The Supreme Court surmised that the law of nations in the era of the Framers included bodies of norms such as *lex mercatoria* and the laws of war, and the ATS at the time of drafting probably would have comprehended three international law torts described by Blackstone in England’s criminal law: maritime piracy, offenses against ambassadors, and the violation of safe conducts.<sup>151</sup> Another theory, recently voiced by Judge Kleinfeld of the Ninth Circuit, asserts that the ATS solved Congress’s “incapacity to deal with such matters as the Marbois Incident.”<sup>152</sup> (When François Marbois, a French consul, was assaulted in 1784, Congress “lacked any judicial authority in Pennsylvania,” where this tort occurred, and could only “act[] as a cheerleader to the Pennsylvania courts.”<sup>153</sup>)

The Supreme Court had good reason to spend so much time in the 18th century when deciding *Sosa*: it is axiomatic that a law should be interpreted in light of the evils it was designed to prevent.<sup>154</sup> Thus, references to William Blackstone,<sup>155</sup> nods to Alexander Hamilton,<sup>156</sup> and discussions of *Bolchos*<sup>157</sup> remain *de rigueur* today. Further speculation on this front, however, is not likely to inform the debate about corporate ATS liability. Another method of discerning legislative intent might be to look at how the Framers might have expected the statute to be interpreted in their own day.

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<sup>149</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>150</sup> Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT’L & COMP. L. REV. 445 (1995) (cited for interpretive context in *Sosa*, 542 U.S. at 718, but not endorsed by any Justice). Many prize cases considered by the Supreme Court do track the language of the ATS without citing it specifically. *E.g.*, *The Malek Adhel*, 43 U.S. 210 (1844) (Pirates were *hostis humani generis*; a ship owner was liable for violations of the law of nations committed by the captain and crew).

<sup>151</sup> *Sosa*, 542 U.S. at 714–15 (2004) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)). *Cf.* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 814–15 (D.C. Cir. 1984).

<sup>152</sup> *Sarai v. Rio Tinto*, 625 F.3d 561, 564 (9th Cir. 2010) (Kleinfeld J., dissenting from the order to mediate); *see also* *Respublica v. De Longchamps*, 1 U.S. 111, 1784 WL 85 (1784); Jeremy K. Schrag, *A Federal Framework for Regulating the Growing International Presence of the Several States*, 48 WASHBURN L.J. 425 (2009) (recounting the 1784 Marbois Incident).

<sup>153</sup> Schrag, *supra* note 152.

<sup>154</sup> The axiom goes back at least as far as *Heydon’s Case*, (1584) 76 Eng. Rep. 637, 638 (K.B.) (Lord Coke).

<sup>155</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 125 (2d Cir. 2010) (citing 2 WILLIAM BLACKSTONE, COMMENTARIES).

<sup>156</sup> *Tel-Oren*, 726 F.2d at 784 (citing THE FEDERALIST NO. 80 (Alexander Hamilton)).

<sup>157</sup> *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795) (*discussed in* *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011)).

## 2. Construing Corporate Responsibility in Federal Courts—Early 1800s

Given the paucity of drafting history and the likelihood that the Supreme Court will revisit historical sources when it hears this issue, it might be useful to explore how the statute would have been interpreted around the time of its passage. As it so happens, a contemporaneous interpretation of a similar statute exists.

In *Bank of the United States v. M'Kenzie*, a legal entity incorporated in Pennsylvania brought suit for nonpayment of a loan against a debtor in Virginia.<sup>158</sup> McKenzie defaulted in 1821.<sup>159</sup> When the bank sued in 1828, Virginia's statute of limitations barred the suit.<sup>160</sup> The bank argued that it could not have violated the statute of limitations because the statute did not apply to corporations.<sup>161</sup> On demurrer, Chief Justice Marshall rejected the bank's argument:

The enacting clause does not contemplate the character of the plaintiff, but looks singly to the action itself. . . . In construing this section, it is entirely unimportant, by whom the suit is brought. The action is equally barred by length of time, whoever may be the plaintiff. The plain words of the statute are decisive.

Nor does any reason of justice or policy exist, which should take a corporation out of these words. The legislature could have no motive for limiting the time, within which a suit should be brought by an individual, which does not apply with equal force to a suit brought by a corporation.<sup>162</sup>

Marshall's two responses to the bank's contention—one based on the statutory language, the other based on policy—can be analogously applied to reject the argument of the *Kiobel* majority that the Alien Tort Statute forbids corporations as defendants. The enacting clause of the ATS does not contemplate the character of the defendant; instead, it looks to the action itself and the nature of the plaintiff.<sup>163</sup> The plain words decisively allow any civil action, whoever the defendant may be. Moreover, no reason of justice or policy exists to excise corporate defendants from the ATS. International law could have no motive for imposing human rights obligations on sovereigns and natural persons without imposing them equally strongly on juridical persons. To the

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<sup>158</sup> *Bank of United States v. M'Kenzie*, 2 Brock 393, 2 F.Cas. 718, 721 (Cir. Ct. D. Va. 1829).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 719.

<sup>161</sup> *Id.* at 719–20.

<sup>162</sup> *Id.*

<sup>163</sup> *See* 28 U.S.C. § 1350.

contrary, human rights law has an abiding interest in protecting the civil, political, and judicial rights of all people from any and all infringers. The ATS, by its own terms, therefore would apply with equal force to a natural person, or a corporate person.

*C. The majority erred in its interpretation of Sosa*

“[W]e are required,” Judge Cabranes wrote, “to look to international law to determine whether corporate liability for a ‘violation of the law of nations’ . . . is a norm ‘accepted by the civilized world and defined with a specificity . . . .’”<sup>164</sup> Required? International law does not require this inquiry. The statute does not require this inquiry either, as explained above. No other federal law requires this limitation. Rather, the source of this “requirement” is footnote 20 of the Supreme Court’s decision in *Sosa v. Alvarez-Machain*.<sup>165</sup>

The *Sosa* decision has attracted some criticism for its lack of clarity.<sup>166</sup> The *Kiobel* majority made four errors reading *Sosa*, two of which involved erroneous reliance on footnote 20. First, the footnote draws a distinction between public actors (sovereigns) and private actors (individuals and corporations),<sup>167</sup> but the majority’s *further* distinction between individuals and corporations was not warranted. Second, the majority failed to appreciate the policy reasons underlying footnote 20’s distinction, and failed to place it in context. Third, the majority’s repeated reference to procedural “norms” of international law gives that word a broader sense than it was given by the Supreme Court. Fourth, the implications of the majority’s position lead to logical conclusions that would likely have been rejected by the Supreme Court.

1. Footnote 20 Invokes the Public/Private International Law Dichotomy, and Makes No Distinction Among Private Entities

Footnote 20 in *Sosa* is ambiguous. It states: “A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”<sup>168</sup> The footnote then cites discussions of the public/private distinction in *Tel-*

<sup>164</sup> *Kiobel*, 621 F.3d 111, 121 (2d Cir. 2010) (citing the ATS, 28 U.S.C. § 1350, and *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004)).

<sup>165</sup> *Sosa*, 542 U.S. at 732 n.20.

<sup>166</sup> E.g., Stephen Satterfield, *Still Crying Out for Clarification: The Scope of Liability Under the Alien Tort Statute After Sosa*, 77 GEO. WASH. L. REV. 216 (2008).

<sup>167</sup> *Sosa*, 542 U.S. at 732 n.20.

<sup>168</sup> *Id.*

*Oren and Kadic*.<sup>169</sup> This sentence could be read to differentiate between public and private actors. It could further be read to differentiate between individual private actors and corporate private actors.

The majority is not wrong to consider the nature of the actor who allegedly violated the law of nations. Violations of the law of nations often turn on this distinction. To use Judge Friendly's famous example, if a private individual or an agent of a private corporation takes property from a foreigner, he has violated a universally accepted rule frequently rendered, "thou shalt not steal," but he has *not* violated the law of nations.<sup>170</sup> The same act, if carried out under color of State law, would now be called uncompensated "expropriation," which *is* a remediable violation of customary international law.<sup>171</sup> For another example, when an individual ties up his neighbor and beats him, demanding to know who damaged his roof, the victim has been tortured, but he has a claim only for false imprisonment and battery. But if a government worker seizes a foreigner, confines him, and brutalizes him to obtain information, he has committed official torture.<sup>172</sup> No one would deny that it violates the law of nations.

The essential difference between theft and expropriation is the character of the actor. That difference also transforms a battery, a private wrong, into torture, an offense against civilization itself. It should go without saying, and the majority acknowledges, that the nature of the actor is frequently the deciding factor as to whether there has been a violation of the law of nations.<sup>173</sup> For norms such as these, the nature of the perpetrator is relevant to the nature of the violation. But no State action is required for other norms, such as those prohibiting human trafficking, genocide, war crimes, piracy, hijacking of aircraft, or, as alleged in *Kiobel*, aiding and abetting a consistent pattern of gross violations of internationally recognized human rights.<sup>174</sup>

In support of its inquiry into whether international law assigns corporate liability, the majority also quotes Justice Breyer's concurring opinion in *Sosa*, which interpreted footnote 20 to mean that "[t]he norm [of international law] must extend liability to the type of perpetrator (e.g.

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<sup>169</sup> *Id.*

<sup>170</sup> *See* *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

<sup>171</sup> G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., U.N. Doc. A/5344 at 15 ¶4 (Dec. 14, 1962). Although different definitions of expropriation have since arisen, this document is considered to be the codification of customary international law.

<sup>172</sup> *See* *Kadic v. Karadžić*, 70 F.3d 232, 240 (2d Cir. 1995); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984).

<sup>173</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 122 (2d Cir. 2010).

<sup>174</sup> *E.g.* 18 U.S.C. §§ 1091 (genocide), 1651 (piracy), 2441 (war crimes).

a private actor) the plaintiff seeks to sue.”<sup>175</sup> However, Justice Breyer misinterpreted footnote 20. ATS jurisdiction does not depend on whether liability is assigned to certain perpetrators. Rather, the test is whether the law of nations is violated.

Consider a child soldier who enlists his young friends. Liability could not be imposed against him because no international tribunal is competent to try juvenile offenders,<sup>176</sup> but he has, unquestionably, violated the law of nations.<sup>177</sup> Under Justice Breyer’s interpretation, the child has committed no violation. That is wrong. Footnote 20 is not among Justice Souter’s most artful sentences, but it is meant to tread the familiar line between public and private international law. The *Kiobel* majority should not have adopted Justice Breyer’s assertion as its rule of decision.

## 2. Policy Interests Underlie Scope of Liability Inquiry

Footnote 20 implicates the “scope of liability,” which is not a principle of international law. Rather, it is a term of art in tort law in the area of proximate causation. The Supreme Court guided lower courts to first determine whether an ATS complaint alleged violation of a specific and universal norm, and, if this jurisdictional requirement is met, a court must then ascertain whether it would be advisable for a U.S. court to hear the matter.<sup>178</sup> Footnote 20 occurs in the context of the second inquiry into justiciability, an issue that the Supreme Court did not reach in *Sosa* because Alvarez’s claim was dismissed on its merits.

Lower courts must avoid enmeshing the United States in international disputes by considering several relevant factors, one of which, described in footnote 20, dealt with the scope of liability extended by customary international law. This “additional consideration”<sup>179</sup> was meant to help judges evaluate the potential repercussions if liability were to be imposed by a United States court. Plainly, certain cases may present defendants over whom it is not appropriate to exercise federal jurisdiction, even if jurisdictional criteria are otherwise met. In such cases, general justiciability limitations may justify dismissal in isolated cases for reasons of *forum non conveniens*, comity, or sovereign

<sup>175</sup> *Kiobel*, 621 F.3d at 127–28 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 760 (2004) (Breyer, J., concurring)).

<sup>176</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 at art. 26 (July 17, 1989).

<sup>177</sup> U.N. Convention on the Rights of the Child, G.A. Res 44/25, art. 38(2) (effective 1990). 139 states have ratified the Optional Protocol on the Involvement of Children in Armed Conflict (entered into force 2002); see also 18 U.S.C. § 2442.

<sup>178</sup> *Sosa*, 542 U.S. at 732 n.20 (2004).

<sup>179</sup> *Id.*

immunity. The instruction should not generate categorical exclusion of a certain class of defendants.

Thus, this inquiry is important, not because the statute requires it, but rather because it implicates the general justiciability principles that constrain the federal judiciary. The *Kiobel* court erred by inquiring whether international law extends liability to a specific type of defendant without considering the policy rationale for this judicially created inquiry. The Second Circuit's intense focus on corporate liability does not serve the purposes animating the edicts of Congress, the prerogatives of the executive branch, or the abiding global interests in human rights protection.

### 3. "Norms" of International Law in *Sosa* Are Substantive, Not Procedural

The word "prohibition" could be substituted for every instance of the word "norm" in Justices Souter's, Scalia's, and Breyer's *Sosa* opinions. Some exemplars: "[t]he determination whether a norm is sufficiently definite to support a cause of action . . . ;"<sup>180</sup> "[s]ince enforcement of an international norm by one nation's courts implies that other nations' courts may do the same . . . ;"<sup>181</sup> and "[o]ne of the norms at issue in that case was the norm against genocide. . . ."<sup>182</sup> The *Kiobel* minority correctly understood that "norms," as that word was used by the Supreme Court, indicate *rules of conduct*.<sup>183</sup>

By contrast, the majority in *Kiobel* uses the word "norm" to mean something akin to "principle." For example, "provisions imposing corporate liability in some recent specialized treaties have not established corporate liability as a *norm* of customary international law."<sup>184</sup> According to Judge Leval, the majority erred by using the word to indicate rules of procedure, rules of jurisdiction, rules of liability, or rules of remedies.<sup>185</sup>

The majority's use of the term "norm" in different subtle ways throughout the opinion renders its decision less legitimate. Consider: "[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,"<sup>186</sup> but

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<sup>180</sup> *Sosa*, 542 U.S. at 732.

<sup>181</sup> *Id.* at 748.

<sup>182</sup> *Id.* at 761.

<sup>183</sup> *Id.*

<sup>184</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 139 (2d Cir. 2010) (emphasis added).

<sup>185</sup> *Id.* at 171 (Leval, J., concurring).

<sup>186</sup> *Id.* at 127.

“international tribunals have consistently declined to recognize corporate liability as a *norm* of customary international law,”<sup>187</sup> and “[o]ur recognition of a *norm* of liability as a matter of domestic law, therefore, cannot create a *norm* of customary international law.”<sup>188</sup> This broadening of the term means that some norms of international law no longer provide the substantive basis for violations of the law.

Incidentally, it is possible to reach the majority’s conclusion without a confused reference to “norms.” As Julian Ku wrote, “neither historic nor contemporary international precedents establish a consensus in favor of imposing liability on private corporations, particularly with respect to violations of *jus cogens* norms.”<sup>189</sup> However, the U.S. Supreme Court evidently preferred to use “norm” vaguely, and avoided any mention of *jus cogens*.

#### 4. The Majority’s Conclusion Parallels an Argument Rejected in *Sosa*

The *Kiobel* majority also failed to take into account the spirit of the “rule” it was discovering. Álvarez-Machain asserted that “his arrest was arbitrary and as such forbidden by international law not because it infringed the prerogatives of Mexico, but because no applicable law authorized it.”<sup>190</sup> The Supreme Court swatted this argument away, stating that the plaintiff was improperly invoking a “general prohibition . . . regardless of the circumstances” and indicated that he was redefining the word “arbitrary” to create a “broad rule.”<sup>191</sup> However, in a similar fashion, the *Kiobel* majority in essence asserts corporate liability is forbidden under the ATS, not because international law’s prerogatives are infringed, but because there is no universal norm authorizing it. Thus the majority’s line of reasoning is as specious as Álvarez-Machain’s: it invokes a general prohibition—the lack of civil corporate liability or criminal corporate liability in international fora—to create a broad rule, that those entities are not subjects of human rights law. To paraphrase Justice Souter: this view would support corporate immunity from ATS claims in federal court, for any human rights abuse, anywhere in the world, without any cognizance of Congress’s power to establish the jurisdiction of the federal courts.<sup>192</sup> In short, international

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<sup>187</sup> *Id.* at 146.

<sup>188</sup> *Id.* at 103, 118, and 127.

<sup>189</sup> Ku, *supra* note 23, at 377 (emphasis added).

<sup>190</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 736 (2004).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 713.

law would trump federal law to determine this aspect of jurisdiction in American courts.

That result would be unconstitutional. *Argentine Republic* should have informed the *Kiobel* majority's construction of the ATS, as it illustrates the "settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'"<sup>193</sup>

This principle indicates that Congress, not international law, has the exclusive power to expand or limit its own jurisdictional provisions. Congress controls the field when it comes to limitations on ATS defendants. The *Kiobel* majority, by contrast, held that international law, not federal law, decides whether corporations can be ATS defendants.<sup>194</sup> The majority's holding gives international law more power over the jurisdictional provisions of United States courts than Congress has.<sup>195</sup>

The majority was wrong to fill the ATS gap—its silence regarding defendants—with international law. Furthermore, by the majority's own admission, it has merely discovered that no international tribunal is equipped with jurisdiction over transnational corporations with power to assign damages against them. Human rights law is meant to be universal, and the majority shows no evidence that international law excludes corporations from the universe. The lack of a positive principle of corporate exclusion is just as suspicious as the lack of a positive principle of corporate liability. Thus, just as the ATS does not indicate a party that may be sued, there is a gap in international law regarding corporate liability. The majority thus *interprets* an exclusion, and fills the ATS gap regarding defendants with this judge-made rule.

#### D. *The ATS is 20 Years Old, Not 200*

##### 1. 102nd Congress: Approves *Filártiga*, and Expressly Allows Two Causes of Action

In 1991, the 102nd Congress considered the limited usefulness of the ATS over the past 200 years and its revival by the modern line of

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<sup>193</sup> *Amerada Hess Shipping Corp. v. Argentine Republic*, 488 U.S. 425, 433 (1989) (internal citation omitted).

<sup>194</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 130–31 (2d Cir. 2010).

<sup>195</sup> For the opposing view, see Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 103 (2008) (noting "international law, not federal common law, governs the standards for accomplice liability at both the jurisdictional and merits stages"); see also Ku, *supra* note 23, at 368 (referring to *Talisman's* belief that international law controlled the inquiry).

ATS jurisprudence. In the legislative record, Congress approved of *Filártiga* by name and endorsed subsequent cases that vindicated human rights abuses in U.S. courts. In its new human rights context, Congress saw two problems with the present wording of the ATS. First, foreigners ought not to be given more access to U.S. courts than U.S. citizens enjoy. Second, judges faced the difficult task of formulating causes of action when neither international law nor federal law explicitly provided a right to sue for human rights abuses. Congress solved these two dilemmas in an unusual way. It passed the Torture Victim Protection Act of 1991 (“TVPA”) alongside the ATS, as a Note to 28 U.S.C. § 1350.<sup>196</sup>

As one Congressman explained, the TVPA would “enhance the remedy already available under section 1350 in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.”<sup>197</sup> This statement also validates *Filártiga*’s holding that the ATS could be applied to conduct that occurred outside the territorial jurisdiction of the United States.<sup>198</sup> Congress selected two *jus cogens* violations of international law and formed two causes of action—covering the torts of torture and extrajudicial killing—for which the ATS would provide jurisdiction.<sup>199</sup> Even though Judge Bork’s concurring opinion in *Tel-Oren* had not been followed, Congress evidently worried about his refusal to hear a case without an express grant of jurisdiction over definite causes of action. “The TVPA would provide such a grant . . . . At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by [the ATS].”<sup>200</sup> Consequently, “[t]hat statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.”<sup>201</sup>

While Congress was deliberating the TVPA, it could have replaced or amended the archaic-sounding ATS. Instead of doing so, Congress enshrined two substantive causes of action as an explanatory Note to this jurisdictional statute, simultaneously validating and abrogating Bork’s concerns. This Note could be monumentally helpful to jurists. First of all, Congress has taken a direct stand on what might have been a dubious

<sup>196</sup> Torture Victim Protection Act of 1991, Pub. L. 102–256, 106 Stat. 73 (1992).

<sup>197</sup> H.R. REP. NO. 102-367, at 3 (1991); *see also* S. REP. NO. 102-249, at 137–38 (1991).

<sup>198</sup> *Sarei v. Rio Tinto*, 625 F.3d 561, 563–64 (9th Cir. 2010) (Kleinfeld, J., dissenting) (quoting *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010)).

<sup>199</sup> 28 U.S.C. § 1350 (2006).

<sup>200</sup> H.R. Rep. No. 102-367, at 3 (1991).

<sup>201</sup> H.R. REP. NO. 102-367 (1991) (emphasis added).

interpretation of this statute and expressed clear approval of the modern construction that has emerged since *Filártiga*. Second, these two “sample” causes of action should assist judges in the formulation of new categories of claims.

In passing the TVPA, Congress essentially re-enacted the ATS, giving it a modern meaning and a modern intention, despite its use of the passé vernacular “law of nations.” While a nominal nod to the 18th century drafters may not be inappropriate, the interpretive adventure begins anew with what Congress intended this ambiguous sentence to mean at the time of its (re)enacting. The ATS now unequivocally provides jurisdiction for causes of action based on violations of human rights norms.

The legislative history further indicates an intention that the TVPA apply to abuses perpetrated abroad. “Judicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law . . . . The Torture Victim Protection Act would respond to this situation.”<sup>202</sup> Nevertheless, appellate judges are split on the issue of ATS extraterritoriality. Judge Kleinfeld of the Ninth Circuit recently stated that the ATS cannot be applied to acts occurring outside the U.S., finding that “[w]hen a statute gives no clear indication of extraterritorial jurisdiction, it has none.”<sup>203</sup> Another court has held that the ATS applies *only* extraterritorially.<sup>204</sup> Defendants have argued that the TVPA supplants or preempts the ATS.<sup>205</sup> This construction has been rejected.<sup>206</sup> However, the TVPA ought to inform how judges craft *new* causes of action based on other norms of customary international law. TVPA causes of action are subject to several limitations: plaintiffs are limited; a

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<sup>202</sup> H.R. REP. NO. 102-367, at 3 (1991).

<sup>203</sup> *Sarei*, 625 F.3d at 563–64 (Kleinfeld, J., dissenting) (quoting *Morrison*, 130 S. Ct. at 2878).

<sup>204</sup> *See Velez v. Sanchez*, 754 F. Supp. 2d 488, 496 (E.D.N.Y. 2010) (“[T]he Court has not found a single post-*Filartiga* case addressing claims arising out of domestic conduct; all of the conduct of which Velez complains occurred in the United States . . . . Velez’s claims of domestic human trafficking and forced labor are not within *Filartiga*’s conception of the statute’s grant of jurisdiction.”).

<sup>205</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004).

<sup>206</sup> *E.g.*, *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 416 F.3d 1242, 1250–51 (11th Cir. 2005); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp 2d 1164, 1178 n.13 (C.D. Cal. 2005). *Contra Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005).

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statute of limitations of ten years is imposed; and exhaustion of “adequate and available” remedies abroad is a prerequisite.<sup>207</sup>

The legislative history indicates minimal consideration of the scope of liability, but it does lay out clear prioritization of policy: “There are, of course, situations in which application of this statute could create difficulties in our relations with friendly countries. But this is a small price to pay in order to see that justice is done for the victims of torture.”<sup>208</sup> In response to a question about viable defendants, one Senator indicated an expansive scope of liability.<sup>209</sup> Except for those who enjoy diplomatic or sovereign immunity, “only defendants over which a court in the United States has personal jurisdiction may be sued.”<sup>210</sup>

To sum up, Congress considered changing the ATS, but opted for flexibility by retaining the original language. This ought to be considered a recent reenactment of the statute that explicitly approves of its application to causes of action for two *jus cogens* violations that would have no other territorial connection to the United States. Congress also explicitly intended for those causes of action to be illustrative and not exhaustive. Congress further assumed the “gap” regarding defendants would be filled by federal law—statutory immunity for foreign sovereigns and personal jurisdiction limitations that exclude defendants with no ties to the United States.

## 2. Construing Corporate Liability Under the TVPA: A Circuit Split

Because the TVPA should inform any interpretation of the ATS, it is worthwhile to ask whether the TVPA applies to corporations.<sup>211</sup> The TVPA states that “[a]n individual . . . who subjects an individual to torture shall, in a civil action, be liable for damages to that individual.”<sup>212</sup> Unlike the ATS, which only mentions plaintiffs, the TVPA refers to both plaintiffs and defendants. Circuit courts are split as to whether the term used to characterize defendants—individual—includes legal persons.

A district court within the Eleventh Circuit allowed a torture claim against a corporation, accepting plaintiff’s argument “that by imposing liability on ‘individuals who subject others to torture or extrajudicial

<sup>207</sup> See *Sosa*, 542 U.S. at 728, 731 (discussing the TVPA generally); see also *Sosa*, 542 U.S. at 733 n.21 (indicating the Court might find the TVPA’s exhaustion requirement relevant in a future case on that issue).

<sup>208</sup> 137 Cong. Rec. H 11,244-04 (1991).

<sup>209</sup> S. REP. NO. 102-249 (1991).

<sup>210</sup> *Id.*

<sup>211</sup> See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

<sup>212</sup> Torture Victims Protection Act of 1991, Pub. L. No. 102-256, § 2, 106 Stat. 73 (1992).

killing,’ the word ‘individual’ is equivalent to ‘person’ . . . . [C]orporations are generally treated as persons in other areas of law[;] therefore, liability under the TVPA should also extend to corporations.”<sup>213</sup> To support this holding, the Court looked to legislative intent and to precedent. It found no legislative intent to create “any exemption for private corporations, and courts have held corporations liable for violations of international law under the related AT[S].”<sup>214</sup> Moreover, the Supreme Court in *Clinton v. New York* recently held that the term “‘individual’” is synonymous with “‘person,’” acknowledging that “‘‘person’ often has a broader meaning in the law’’ than in ordinary usage.”<sup>215</sup> [I]t is reasonable to conclude that had Congress intended to exclude corporations from liability under the TVPA, it could and would have expressly stated so.<sup>216</sup> The Ninth Circuit then reached the opposite conclusion:

Congress’s use of the word “individual” throughout the statute indicates that it did not intend for the TVPA to apply to corporations. Indeed, Congress [in the Dictionary Act, 1 U.S.C. § 1] has directed courts to presume the word “individual” in a statute refers to natural persons and not corporations . . . .

[However, that presumption did not apply where a] statute used the words “individual” and “person” interchangeably throughout.

Here, in contrast, it is evident that Congress drafted the TVPA in such a manner as to limit liability to natural persons. The TVPA consistently uses “individual” throughout the statute to refer both to the torturer and the victim of torture. (“An individual who . . . subjects an individual to torture.”). Corporations, of course, cannot be tortured [because they] cannot suffer physical injury. Plaintiffs ask us to give the same word different meanings in the same statute. They ask us to interpret “individual” to mean a natural person when referring to the victim, but to mean either a natural person or a corporation when referring to the torturer. This interpretation of the statute runs counter to the “normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.”

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<sup>213</sup> *Sinaltrainal v. Coca-Cola, Co.*, 256 F. Supp. 2d 1345, 1358–59 (S.D. Fla. 2003), *aff’d* 578 F.3d 1252 (11th Cir. 2009).

<sup>214</sup> *Id.*

<sup>215</sup> *Clinton v. New York*, 524 U.S. 417, 429 (1998).

<sup>216</sup> *Sinaltrainal*, 256 F. Supp. 2d at 1358–59. (internal citations omitted).

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There is no indication Congress intended “individual” to have a variety of meanings throughout the TVPA.<sup>217</sup>

Even before *Kiobel*, the Second Circuit agreed with the Ninth, using similar reasoning:

Under the TVPA, the term “individual” describes both those who can violate its proscriptions against torture, as well as those who can be victims of torture . . . “[B]oth from context and common sense only natural persons can be the ‘individual’ victims of acts that inflict ‘severe pain and suffering.’ Because the TVPA uses same term ‘individual’ to identify offenders, the definition of ‘individual’ within the statute appears to refer to a human being, suggesting that only natural persons can violate the Act.”<sup>218</sup>

After *Kiobel*, the D.C. Circuit reached this conclusion as well.<sup>219</sup> This reasoning essentially grants corporations complete immunity from TVPA torture claims. Since a corporation cannot be tortured it cannot commit torture either, unless we give the same word two different meanings. (Paradoxically, while corporate defendants embrace this argument, they reject the similar logic of Harold Koh’s parity idea.<sup>220</sup>)

An alternative to either interpretation is that Congress’s consistent use of the word “individual” was meant to stand in contraposition to the word “alien” in the ATS. That is, Congress intended to increase the class of possible claimants to comprise U.S. nationals as well as aliens, and did not take a position on holding Chevron or Coca-Cola accountable.<sup>221</sup>

The legislative context supports this interpretation. In 1991, no ATS claim had attempted to hold a corporate entity liable for international torts. *Doe v. Unocal*, the first ATS claim that sustained jurisdiction against a corporate defendant, was not filed until 1996.<sup>222</sup> Congress most likely never anticipated the aiding and abetting actions that have arisen since the TVPA was passed. As the title of the act indicates, Congress was focused on the victims—not the perpetrators—

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<sup>217</sup> *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126–27 (9th Cir. 2010) (internal citations omitted).

<sup>218</sup> *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d at 254, 323–24 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (citation omitted) (quoting *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 56 (E.D.N.Y. 2005)).

<sup>219</sup> *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); see also *id.* (Kavanaugh J., dissenting).

<sup>220</sup> Koh, *supra* note 133.

<sup>221</sup> See Eric Engle, *The Torture Victim’s Protection Act, the Alien Tort Claims Act, and Foucault’s Archaeology of Knowledge*, 67 ALB. L. REV. 501, 503 n.14 (2003) (explaining eight obstacles to ATS jurisdiction).

<sup>222</sup> *Doe I v. Unocal Corp.*, 395 F.3d 932, 932 (9th Cir. 2002).

of torture. Moreover, the title of a statute may be considered when construing its meaning.<sup>223</sup>

Because the alternative construction may be just as specious as those advanced by the circuits, we may fall back on maxims of statutory construction to at least obtain consistency in the result. But the warring canons of interpretation here similarly have no clear winner. On the one hand, “[t]he same language used repeatedly in the same connection is presumed to bear the same meaning throughout the statute . . . .”<sup>224</sup> However, “[t]his presumption will be disregarded where it is necessary to assign different meanings to make the statute consistent.”<sup>225</sup> It is true that a corporation cannot be tortured, so it cannot not be a victim under the TVPA. (Anticompetitive practices or over-regulation may analogously “hurt” a corporation’s bottom line, but they do not count. The ordinary meaning of “torture” involves physical injury.) But the converse—that a corporation, acting through its agents, could not *commit* torture—is not true. To give “individual” the same meaning in both places would lead to an absurd conclusion. “Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.”<sup>226</sup> As Justice Scalia instructs: “[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”<sup>227</sup>

As the foregoing analysis indicates, both interpretations of the TVPA are unreasonable. If “individual” includes corporations as perpetrators but not as victims of torture, then the construction is absurd, though the result fairly realizes Congress’s intent to secure justice for victims. If “individual” does not include corporations, then the word has a consistent meaning throughout the sentence, but the result eliminates the concept of *respondeat superior* for torture cases. This is the key issue which the Supreme Court must resolve. True to form, however, the Court will likely resolve the matter on ideological lines. Perhaps, then, Congress should resolve the ambiguity that it created itself.<sup>228</sup>

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<sup>223</sup> *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998).

<sup>224</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1949) (illustrating the premise that every canon of construction has a counter-canon).

<sup>225</sup> *Id.* at 404.

<sup>226</sup> *Lau Ow Bew v. United States*, 144 U.S. 47, 59 (1892).

<sup>227</sup> Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997).

<sup>228</sup> See generally Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT’L L. & POL’Y 119 (2007) (drafting statutory language that would elegantly resolve nearly all the issues raised by *Kiobel*, *Flomo*, and *Exxon*).

## IV. WHICH LAW PROVIDES THE CAUSE OF ACTION?

The Supreme Court has held that the ATS provides jurisdiction only. With one exception—the Torture Victim’s Protection Act—no law explicitly grants causes of action to alien plaintiffs. The cases against Shell, Firestone, and Exxon, however, all allege corporate liability on a theory of aiding and abetting, which is not covered under the TVPA. Where should a plaintiff look to see whether he or she has a case? Three bodies of law seem plausible: international law itself, *lex loci* (the law of the place where the harm occurred), or U.S. federal common law. After the jurisdictional issue was settled in *Filártiga v. Peña Irala*, the district court took an extraordinary approach to answering this question.

## A. Patchwork Cause of Action

Peña did not participate in the proceedings after the Second Circuit’s landmark opinion,<sup>229</sup> but before default judgment could be lodged against him, the district court realized that while the issue of subject matter jurisdiction had been settled, it still needed to contend with the ambiguity of the statute:

[What is] the nature of the “action” over which the [ATS] affords jurisdiction[?] Does the “tort” to which the statute refers mean a wrong “in violation of the law of nations” or merely a wrong actionable under the law of the appropriate sovereign state? The latter construction would make the violation of international law pertinent only to afford jurisdiction. The court would then, in accordance with traditional conflict of laws principles, apply the substantive law of [the place the tort occurred]. If the “tort” to which the statute refers is the violation of international law, the court must look to that body of law to determine what substantive principles to apply.<sup>230</sup>

The court found two reasons to look to the law of nations for the substantive cause of action. First, it is a better policy: if the ATS was solely jurisdictional, and the cause of action had to be provided by the sovereign State where it occurred, it could “invi[t] frustration of the purposes of international law by individual states that enact immunities for government personnel or other such exemptions or limitations.”<sup>231</sup>

<sup>229</sup> Peña had been deported for overstaying his visa. *Filártiga v. Peña-Irala*, 630 F.2d 876, 878–79 (2d Cir. 1980). However, given his characterization by Judge Kaufman, he may not have wanted to appear: “the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.” *Id.* at 890.

<sup>230</sup> *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984).

<sup>231</sup> *Id.* at 863.

Second, in U.S. federal courts, it makes sense to apply international law because U.S. common law incorporates the customary law of nations.<sup>232</sup>

Turning to *Filártiga*, the court found customary international law, as recorded in the U.N.'s torture convention, enjoins the nations of the world to compensate torture victims "in accordance with national law."<sup>233</sup> Following the instructions of the law of nations, the court looked to the laws of Paraguay.<sup>234</sup> It found that Paraguay's Constitution prohibited the act of torture, that its criminal code penalized torturers, and that its civil code provided remedies of pecuniary damages, "moral damage[s]," and costs and attorney's fees, but not punitive damages.<sup>235</sup> However, the court perceived that "punishment is an appropriate objective under the law of nations," and, since "the interests of the global community transcend those of any one state," the court "conclude[d] that it is essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture."<sup>236</sup>

Importantly, the district court recognized the international law norm condemning torture into a judge-made common-law private right of action that allowed redress of tortious conduct in U.S. courts.<sup>237</sup> To accomplish this task, it drew on the recorded norms of international (criminal) law to formulate that a cause of action existed.<sup>238</sup> Then, because international law deferred to individual nations for enforcement, the court consulted the interests of international law before applying remedies available (only) under U.S. law.<sup>239</sup> Judge Katzmann, as discussed above, made this process explicit in *Khulumani*, detailing how the Second Circuit "has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the AT[S]."<sup>240</sup>

This is patchwork-quilt jurisprudence. But it reflects a well-reasoned interpretive solution grounded in a moral imperative to prevent norms of international law from becoming "mere benevolent yearnings never to be given effect."<sup>241</sup>

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<sup>232</sup> *Id.* (citing *Filártiga*, 630 F.2d at 886; *The Nereide*, 13 U.S. 388, 422 (1815); *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

<sup>233</sup> *Id.* (quoting the Declaration on the Protection of All Persons from Being Subjected to Torture, art. 11, G.A. Res. 3452, U.N.Doc. A/1034 (1975)).

<sup>234</sup> *Filártiga* at 862.

<sup>235</sup> *Id.* at 865.

<sup>236</sup> *Id.* at 863, 865.

<sup>237</sup> *Id.* at 862.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 863–64.

<sup>240</sup> *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 270 n.5 (2d Cir. 2007).

<sup>241</sup> *Filártiga*, 577 F. Supp. at 863.

## B. “Arising Under” vs. “In Violation Of”

The problem of the cause of action in ATS cases has bedeviled judges and advocates. The statute provides jurisdiction only, so a cause of action must either be found or formulated. Judge Bork in *Tel-Oren* would require that plaintiffs find causes of action arising under international law. The *Kiobel* majority agreed, noting that international law has created causes of action in other contexts, and that some of the rules of law are procedural rather than substantive.<sup>242</sup> For example, maritime pirates or human rights violators could be subject to universal jurisdiction for their offenses, because universal jurisdiction is a specific and universal norm that has arisen over time by custom.<sup>243</sup>

The ATS, by its terms, does not require that an explicit cause of action be found in a specific body of law. In this respect, the ATS differs from the other statutes that confer jurisdiction in federal courts. For federal question jurisdiction, “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”<sup>244</sup> A civil action does not arise under a law or treaty unless the law or the treaty explicitly provides for such lawsuits.

The *Kiobel* majority, like Bork, erred by treating the ATS as if it contains the words “arising under.” As the Second Circuit noted in *Kadic*, “[b]ecause the Alien Tort Act requires that plaintiffs plead a ‘violation of the law of nations’ at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible ‘arising under’ formula of section 1331.”<sup>245</sup> The court stated that ATS claims had heightened pleading standards that require plaintiffs to “adequately plead[] a violation of the law of nations,” and not “merely a colorable violation.”<sup>246</sup>

Since the passage of the TVPA, the searching review need not be so perplexing. Congress reviewed the policy reasons favoring and disfavoring the extensive litigation under the ATS; it concluded that U.S. leadership on human rights was a national priority, and it provided civil remedies to be an effective way of imposing justice on oppressors. Furthermore, the TVPA’s causes of action are examples that should

<sup>242</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117–18 (2d Cir. 2010).

<sup>243</sup> Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENGLAND L. REV. 311 (2001).

<sup>244</sup> 28 U.S.C. §1331 (2006).

<sup>245</sup> *Kadic v. Karadžić*, 70 F.3d 232, 238 (2d Cir. 1995) (internal citations omitted); see also Beth Stevens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 40 (2002).

<sup>246</sup> *Kadic*, 70 F.3d at 238.

serve to clear up some of the “lurking issues” in ATS jurisprudence.<sup>247</sup> The ATS absolutely applies extraterritorially.<sup>248</sup> Principles of exhaustion apply, so plaintiffs must first fail to obtain judicial remedies in the place where the tort occurred or show the attempt to be futile, before petitioning U.S. courts for relief under the ATS. There is no indication that such an attempt was made in Nigeria by the Wiwa/Kiobel plaintiffs.<sup>249</sup>

#### V. THE *KIOBEL* MAJORITY ERRED IN APPLYING THE LAW OF NATIONS

Even assuming, for the sake of argument, that international law must hold a corporation liable for a human rights violation before the ATS will do so, the majority should have undertaken a thorough review of corporate liability in international law. The majority rightly begins at Nuremberg, where modern human rights law was born. But the majority fails to consider some sources that ought to have been considered. International fora *have* imposed civil liability against corporate actors for aiding and abetting human rights atrocities. The preeminent and precedent-setting example of this practice comes from *I.G. Farben*. In this regard, *Kiobel* exercised an unforgivable lack of imagination when consulting sources of international law.

##### *A. Civil Litigation Against I.G. Farben Establishes an International Norm of Corporate Liability*

The *Kiobel* majority found that international law supported liability for individuals, but not corporations, in the trial of I.G. Farben executives (but not Farben itself) in the wake of World War II.<sup>250</sup> Although the *Farben* trial was carried out by an American Military Tribunal, both the Second Circuit and the Supreme Court have treated the Nuremberg trials as “international tribunals.”<sup>251</sup> The decisions of these tribunals, along with decisions of the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, are accorded great weight.

The majority felt it was decisive that there was no criminal liability for Farben in 1948, and no liability for corporations in international

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<sup>247</sup> *Kiobel*, 621 F.3d at 117 (noting issues the majority did not reach in *Kiobel*).

<sup>248</sup> *Contra Sarei v. Rio Tinto*, 625 F.3d 561 (9th Cir. 2010) (Kleinfeld, J., dissenting).

<sup>249</sup> Posner, not surprisingly, disagrees with the exhaustion requirement: “[I]magine having been required to file suit in a court in Nazi Germany complaining about genocide, before being able to sue under the Alien Tort Statute.” *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1025 (7th Cir. 2011).

<sup>250</sup> *Kiobel*, 621 F.3d at 121.

<sup>251</sup> *Id.* at 132.

criminal courts thereafter. The minority contested this point on logical grounds: a lack of *criminal* liability in the 1940s should not logically imply a lack of *civil* liability for present-day corporate malfeasance.<sup>252</sup> The majority shot back that “the customary international law of human rights does not impose any form of liability on corporations (civil, criminal, or otherwise).”<sup>253</sup>

However, liability *was* imposed on I.G. Farben. After the war, the Allies concluded that Farben could not continue to exist in its current form. Allied forces ordered the company to wind up business, instituted a “decartelization,” and broke the company into smaller units.<sup>254</sup> This “corporate capital punishment” was entirely appropriate, and it was carried out under the auspices of the same Allied coalition that established the war crimes tribunals at Nuremberg and individual liability for crimes committed during wartime. This point was picked up by both the Seventh Circuit and D.C. Circuit, which cite several laws of the Allied Control Council.<sup>255</sup> In 1945, “[l]egally, the corporation was under Allied control and was managed and represented to the outside world by the Tri-partite I.G. Farben Control Group (TRIFCOG).”<sup>256</sup>

The documents surrounding the dissolution of Farben are intriguing. The goal of this corporate division did not appear to be an appropriation of assets as prizes of war. Rather, the company breakup was seen to be a just solution: nothing bearing Farben’s name could ever be allowed to profit again. It effectively refutes the majority’s contention that the law of nations has never imposed any form of liability on a corporation.

Yet another indicator of the majority’s myopia was a failure to mention Farben’s liability for the torts it committed against individuals. Although Farben continued to exist “in liquidation” until 2003, it was beset by claims from those it had enslaved during the war.

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<sup>252</sup> *Id.* at 147.

<sup>253</sup> *Id.*

<sup>254</sup> Allied High Commission (AHC) Law 35, “Dispersal of the Assets of I.G. Farbenindustrie AG,” (August 1950), ordered the liquidation of the corporation and separated its three main subsidiaries: BASF (a founding member of Farben in 1921, now the largest chemical company in the world), Bayer, and Hoechst.

<sup>255</sup> *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d at 1013, 1016, and *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 31, 52 (D.C. Cir. 2011), (both citing, *inter alia*, Control Council Law No. 9, “Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof,” Nov. 30, 1945, reprinted in 1 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 225 (1945)).

<sup>256</sup> Joachim Rumpf, *Norbert Wollheim’s Lawsuit Against I.G. Farbenindustrie AG i.L.* at 5 (2010), available at [http://www.wollheim-memorial.de/files/1059/original/pdf\\_Joachim\\_Rumpf\\_Norbert\\_Wollheims\\_Lawsuit\\_against\\_IG\\_Farbenindustrie\\_AG\\_iL.pdf](http://www.wollheim-memorial.de/files/1059/original/pdf_Joachim_Rumpf_Norbert_Wollheims_Lawsuit_against_IG_Farbenindustrie_AG_iL.pdf).

A young man named Norbert Wollheim had been deemed “fit for work” on the ramp at Auschwitz in early 1943. He was transferred to Buna camp, where he was forced to work under constant threat of death from SS guards until the arrival of Stalin’s troops in 1945. In 1950, living in Lübeck after the war, Wollheim heard of the liquidation, asked an attorney to look into the matter, brought the legal issue before TRIFCOG, and was given permission to file a claim. “Permission for institution of proceedings was required because German courts no longer had jurisdiction over I.G. Farben following its sequestration in 1945.”<sup>257</sup> TRIFCOG was an international body, and it indicated that a civil claim could go forward against a corporate defendant.

Wollheim filed his suit in Frankfurt am Regional Court, alleging harms suffered during his forced labor, and demanding 10,000 Deutsche Marks in compensation (\$42,000 in 1951, roughly \$365,000 in 2011).<sup>258</sup> Farben was assigned an attorney, who argued that the SS, not Farben, was responsible for Wollheim’s detention and maltreatment. Unable to reach a settlement, Wollheim prepared for trial using many of the materials compiled by prosecutors for Case 6 of the Nuremberg Tribunals against the company’s executives. After eight days of testimony from other laborers and Farben managers, the Frankfurt court found for Wollheim, and explicitly held that the corporation breached an affirmative duty to ensure humane treatment of its workers:

[F]rom the abovementioned statements of the witnesses for the accused, the court infers an appalling indifference on the part of the accused *and its people* to the plaintiff and the Jewish prisoners, an indifference that is comprehensible only if one assumes, with the plaintiff, that the defendant and its people at that time really did not consider the plaintiff and the Jewish prisoners to be full-fledged human beings, toward whom a duty of care existed.<sup>259</sup>

Although this judgment was issued by a national court in Germany, the Allied tribunal granted jurisdiction because the German court did not have *kompetenz-kompetenz* for this dispute.<sup>260</sup> This means that a

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<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 6; Klageschrift [statement of claim], November 3, 1951. Hessisches Hauptstaatsarchiv Wiesbaden (=HHStAW), Abt. 460, No. 1424 (*Wollheim v. IG Farben*), vol. I, pp. 1–6, available at [http://www.wollheim-memorial.de/files/964/original/pdf\\_Anklageschrift\\_Wollheim-Prozess\\_3-11-1951.pdf](http://www.wollheim-memorial.de/files/964/original/pdf_Anklageschrift_Wollheim-Prozess_3-11-1951.pdf).

<sup>259</sup> Urteil im Wollheim-Prozess, June 10, 1953, p. 481 *as translated in* Rumpf, *supra* note 256, at 10 (emphasis added).

<sup>260</sup> This principle of law means the court did not have the power to determine its own jurisdiction. In this respect, the German courts differ from the approach that U.S. federal courts take to subject matter jurisdiction.

precedent exists of an international tribunal granting personal and subject-matter jurisdiction over a civil action for a tort committed in violation of the law of nations by a juridical entity. Prima facie violations of human rights (in this case, forced labor) were established.<sup>261</sup> After jurisdiction was granted under international law, the case proceeded according to the domestic law of Germany (a foreshadowing of the district court's patchwork solution in *Filártiga*). And importantly, the court's judgment was against Farben which now had international legal personality.<sup>262</sup> Wollheim's claim has several points of similarity with subsequent ATS actions against corporations, and it should have direct bearing on whether the courts of the Second Circuit can hear the case against Royal Dutch/Shell.

Wollheim's victory inspired another suit by Rudolf Waschmann, who was 17 when he was sent to Monowitz camp in 1943. He performed forced labor for I.G. Farben until the war's conclusion. He then emigrated to the U.S., became a citizen in 1950, was drafted into the military, and transferred to a post in Germany. As a U.S. service member, he had recourse to file suit in a court established by the Allied High Commission in Manheim—an actual international tribunal—that followed American procedural law but used German substantive law.<sup>263</sup> The case was quickly settled, but crucially, this occurred after jurisdiction had been granted.<sup>264</sup>

The civil actions against Farben, far from showing an international custom that precludes corporate liability, instead show that the international community has: (1) set a relatively low bar for corporate veil-piercing (there was relatively little discussion as to *whether* Farben's executives could be tried as war criminals for participation in Hitler's "Final Solution"); (2) established the ability to effectively impose a "death sentence" of sorts—bankruptcy—against a corporation; and (3) further allowed individual victims of human rights abuses to sue for the individualized harms they suffered. Other post-*Kiobel* scholarship has affirmed the implications of Farben's liability for "regulating corporate activity in conflict zones."<sup>265</sup> Judge Cabranes, writing that

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<sup>261</sup> Rumpf, *supra* note 256, at 8.

<sup>262</sup> *Id.* at 9.

<sup>263</sup> *Id.* at 15–18.

<sup>264</sup> *Id.*

<sup>265</sup> Tyler Giannini & Susan Farbstain, *Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights*, 52 HARV. INT'L L.J. 119, 123 (2010).

“[international law] has never extended the scope of liability to a corporation,”<sup>266</sup> is incorrect.

*B. Further Examples of Corporate Liability in International Law Missed by Kiobel*

Violations of international norms by corporate actors can result in a foundation for liability under international law. For example, the ICJ held that if the United States had effective control of Nicaraguan Contras and their military operations, it could be vicariously liable for their violations.<sup>267</sup> Harold Koh points out several more violations of international law for which corporations may incur liability:

The International Labor Organization (ILO) Tripartite Declaration, for example, obliges corporations not to interfere with employees’ rights to form unions and not to use child or slave labor. Nuclear treaties, such as the Paris Convention, and oil spill treaties hold shipowners and operators of nuclear facilities liable for damage or loss of life to persons and property from private nuclear accidents or oil spills. Hazardous waste conventions, such as those concluded at Basel, impose strict liability on corporate generators of hazardous waste. The OECD Anti-Bribery Convention effectively holds corporations liable for bribery.<sup>268</sup>

The majority addresses a few of these treaties, but discounts them because they impose liability only in their specific fields.<sup>269</sup> But set in a broader context, such as Koh provides, one can see these treaties as part of a clear trend in international law toward a greater assignment of benefits and obligations for transnational corporations. Indeed, the majority’s adherence to the view of law expressed by Justice Holmes “confuses the existence of responsibility with the mode of implementing it.”<sup>270</sup> Steven Ratner goes on to argue that this “rich doctrine” leads to the conclusion that “decision makers [ought to be able to] transpose the primary rules of international human rights law and the secondary rules of state and individual responsibility onto corporations.”

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<sup>266</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d at 111, 120 (2d Cir. 2010) (emphasis in original).

<sup>267</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 64-65 (June 27); see also Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 499 (2001).

<sup>268</sup> Koh, *supra* note 133, at 264–65 (internal citations omitted).

<sup>269</sup> *Kiobel*, 621 F.3d at 138.

<sup>270</sup> Ratner, *supra* note 267, at 481.

*Kiobel* should be decided with a view to its context: an increasingly globalized world in which transnational corporations have (in many cases) assumed more raw power than many sovereign States. “If corporations are such significant actors in international relations and law, then can they not assume the obligations currently placed on States or individuals, based on those sets of rules of responsibility?”<sup>271</sup> Businesses have a customary duty of care, especially when operating in areas governed unscrupulously. Even if corporate entities are not yet liable for the specific tort alleged in *Kiobel*, there is certainly no absence of corporate liability in international law.

One of the most notable developers of this area of law, John Ruggie, an advisor to the UN secretary-general,<sup>272</sup> has proposed a three-pillar framework for corporate human rights responsibility.<sup>273</sup> Under this framework, States have an obligation to protect their citizens against human rights abuses, corporations and NGOs have a responsibility to respect human rights, and victims must have access to effective judicial or nonjudicial remedies.<sup>274</sup> Ruggie recently published a draft of guiding principles<sup>275</sup> that, while currently constituting “soft law,” may in time become customary and obligatory upon transnational corporations everywhere. “Ruggie’s approach is appealing precisely because it departs from the hierarchical rigidity embedded in demarcating “subjects” and “objects” of international law. Ruggie’s delineation of corporate responsibility is bottom-up, not top-down.”<sup>276</sup> More and more, we see corporations talking about “social responsibility” in addition to their traditional responsibility to earn profits for shareholders.<sup>277</sup>

All the foregoing indicates that even if international law covers the “gap” in the Alien Tort Statute, it may not be long before the *Kiobel* majority could indeed point to an international custom that establishes a principle of universal justice to regulate transnational entities.

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<sup>271</sup> *Id.* at 492.

<sup>272</sup> UN Secretary-General’s Special Representative on Business & Human Rights, available at <http://www.business-humanrights.org/SpecialRepPortal/Home>.

<sup>273</sup> Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N.Doc. A/HRC/8/5 (Apr. 7, 2008).

<sup>274</sup> *Id.*

<sup>275</sup> GUIDING PRINCIPLES FOR THE IMPLEMENTATION OF THE UNITED NATIONS ‘PROTECT, RESPECT AND REMEDY’ FRAMEWORK, Nov 22, 2010. <http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>.

<sup>276</sup> Alvarez, *supra* note 66, at 48.

<sup>277</sup> E.g. Peter Voser, Profits and Corporate Social Responsibility - Remarks to the Shell Annual Reception 2011, available at [http://www.shell.com/home/content/media/speeches\\_and\\_webcasts/2011/voser\\_london\\_15022011.html](http://www.shell.com/home/content/media/speeches_and_webcasts/2011/voser_london_15022011.html).

## VI. CONCLUSION

The *Kiobel* majority misinterpreted the Alien Tort Statute. An ATS claim need not “arise under” international law *or* federal law. By the terms of the statute, an action may be heard when an alien plaintiff claims an injury caused by a *jus cogens* violation and committed by a defendant who is subject to personal jurisdiction in a U.S. court. Some *jus cogens* violations require State action as an element of the offense. But other egregious behavior, such as piracy or human trafficking, is universally prohibited—this behavior will violate the law of nations whether the actor is public, private, or corporate.

In 1991, Congress reauthorized the ATS, giving the 200-year-old statute a new purpose: upholding international human rights law. The modern Congress intended the ATS to provide a unique and powerful means of vindicating human rights abuses that occurred overseas. Congress understood that the application of the ATS to this purpose might cause some friction in U.S. foreign relations but believed that such tension was “a small price to pay” for justice of this magnitude. The boundaries for possible ATS defendants are defined by the reach of federal personal jurisdiction. Furthermore, since corporations can be ATS plaintiffs, they cannot effectively argue that they should be barred from being ATS defendants.

Neither the ATS, *Sosa*, nor any other federal law “requires” that international law extend liability to a corporate entity before the ATS will do so. The boundaries for possible ATS defendants are defined by the reach of federal personal jurisdiction. Furthermore, since corporations can be ATS plaintiffs, they cannot effectively argue that they should be barred from being ATS defendants.

“Corporate liability” is not a norm that needs to be found. The requirement for a “violation” relates to conduct prohibited by *jus cogens*. Thus, the ATS comprehends some actions that could never arise in an international tribunal. The ATS does not incorporate, as the majority claims, the personal jurisdiction of international tribunals into the subject-matter jurisdiction requirements of the ATS. What’s more, the majority’s result, as a matter of policy, allows potential tortfeasors to escape liability simply because the wrongs were committed under the auspices of a transnational corporation. It would be preferable for potential tortfeasors to escape liability because a trier of fact finds that they were not responsible for the alleged torts.

Even if the majority is correct in assuming that the silence of the ATS regarding defendants indicates a gap to be filled by international law principles, the majority was wrong to conclude that international law has never extended liability to a corporation. Civil actions against I.G.

Farben establish a precedent for ATS litigation. Farben's dissolution—a corporate death penalty—by the Allies cannot not be understood as “spoils of war” or explained away by any other legal theory. The dissolution of Farben was punitive justice for crimes against humanity attributed to the corporate body as a whole.

Finally, even if the majority is correct that these precedents do not establish a universally recognized custom subjecting transnational corporations to human rights principles today, John Ruggie and others are hard at work building international regimes that will bind them. As Judge Edwards predicted, the clear “trend in international law is toward a more expansive allocation of rights and obligations to entities other than states.”<sup>278</sup> What's more, other courts may fill the void created by the *Kiobel* majority. “Even if America drops the baton, another country may well pick it up.”<sup>279</sup>

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<sup>278</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984).

<sup>279</sup> *Trial Trails: An American Court Blocks Human-Rights Suits Against Businesses* THE ECONOMIST, Oct. 7, 2010, available at <http://www.economist.com/node/17199924>.