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GENOCIDE, INC.: CORPORATE IMMUNITY TO VIOLATIONS OF INTERNATIONAL LAW AFTER *KIOBEL V. ROYAL DUTCH PETROLEUM*

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I. Introduction

A nameless Multinational Corporation (MNC) enters into an agreement with the government of some nondescript underdeveloped nation to construct an oil pipeline. The MNC is concerned with its profits and completing its pipeline, while the foreign government is concerned with modernizing and bringing foreign investment to its underdeveloped country. The native population is only concerned with scraping out whatever meager existence is possible. But, now the natives are being forced from their land to permit the MNC to build its pipeline. The natives are tied to their land. It is all they have, and it is all they know. Many flee, some protest, and others take action. They raid the MNC's construction site and supply trains and sabotage the pipeline. The MNC is furious. Delays in the project are costing millions.

Although the MNC was given assurances by the local government that security for the project would be provided and that the local populace would not be an issue, the local forces are ill equipped, largely untrained, and corrupt. A decision is made by the MNC that it would be more cost effective to hire its own contractors to handle security and deal with the locals. The contractors it hires are good at what they do. The methods they use are brutal but effective. Systematically, they hunt down and kill the locals responsible and those that aid or abet them. Torture, rape, mutilation, amputation, whatever gets the job done. Within a few weeks the native resistance has been quelled and the project is back on schedule. Those that are still alive have no redress in their own country. The government is largely corrupt and not interested in their plight.

As horrific as this scenario sounds, in the world of Alien Tort Statute (ATS) litigation, it is a tale that is all too common.[1] Until recently, the victims of these atrocities could find redress in American courts through use of the ATS, a statute that allows aliens to bring suit against others for violations of international law.[2] Suits under the ATS present two options: (1) a violation of the law of nations or

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[1] This scenario was created using one of Judge Leval's scenarios from Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 158, 164 (2d Cir. 2010); *see also* Church of Sudan v. Talisman Energy Inc., 582 F.3d 244, 248-50 (2d Cir. 2009) (Sudanese plaintiffs alleged that a Canadian oil company assisted the Sudanese government in a campaign of genocide, crimes against humanity, and war crimes); Bowoto v. Chevron Corporation, 557 F. Supp. 2d 1080, 1083-84 (N.D. Cal. 2008) (Nigerian villagers alleged that Chevron aided the Nigerian government in attacks against the local populace); Galvis Mujica v. Occidental Petroleum Corp., 564 F.3d 1190, 1197 (9th Cir. 2009) (plaintiffs alleged that Occidental instigated and guided a Columbian bombing attack on a village killing 17 civilians).

[2] 28 U.S.C. § 1350 (2011). This statute is also referred to as the Alien Tort Claims Act (ATCA), but since the U.S. Supreme Court referred to 28 U.S.C. § 1350 as the Alien Tort Statute in *Sosa*, ATS has

(2) a violation of a treaty of the United States.[3] Most litigation and debate has understandably centered on the first option. To bring a successful claim under the first option of the ATS, a plaintiff must allege that: (1) he is an alien; (2) a tort has been committed; and (3) that that tort is in violation of the law of nations.[4]

For the past thirty years, plaintiffs like the ones described above have successfully brought a litany of cases under the ATS, suing state actors, non-state actors, and corporations for violations of international law.[5] However, a recent decision by the Second Circuit Court of Appeals could change that. The Second Circuit sounded the death knell for an entire class of putative ATS litigants in *Kiobel* by holding that corporations cannot be held liable for violations of international law, thereby creating corporate immunity for an entire host of crimes from genocide to slavery.[6] This very controversial decision by the Second Circuit did not go unnoticed. Almost immediately after it was handed down, the blogosphere and the legal community at large were in an uproar over the soundness of the court's reasoning along with the implications for its holding.[7] This Note seeks to explore the rationale for the court's holding to include the historical backdrop of the ATS and make a determination as to whether the court arrived at the correct position concerning corporate ATS liability.

Part II of this Note discusses the history of the ATS, to include the impetus for its passage and several seminal ATS cases that have expanded and shaped the ATS. Part III is an in depth analysis of the Second Circuit's holding in *Kiobel* including the concurrence. Part IV explores several of the arguments from *Kiobel* and their soundness. Finally, Part V looks at the negative impact the *Kiobel* decision will have on future ATS plaintiffs litigating against corporate defendants.

II. Background

A. The Beginning

The passage of the ATS was heavily influenced by English law and more specifically by the legal commentaries of William Blackstone.[8] Blackstone

become the most widely used term to reference the statute. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[3] The law of nations in modern parlance is usually referred to as international law. Both are used interchangeably in this note.

[4] 28 U.S.C. § 1350.

[5] *See* discussion *infra* Part II.

[6] Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 148-49 (2d Cir. 2010).

[7] *See generally* Julian Ku, *Goodbye to the Alien Tort Statute? Second Circuit Rejects Corporate Liability for Violations of Customary International Law*, OPINIO JURIS (Sep. 17, 2010), http://opiniojuris.org/2010/09/17/goodbye-to-ats-litigation-second-circuit-rejects-corporate-liability-for-violations-of-customary-international-law/; Trey Childress, *Keitner on Kiobel and the future of the Alien Tort Statute*, CONFLICT OF LAWS (Sept. 22, 2010), http://conflictoflaws.net/2010/keitner-on-kiobel-and-the-future-of-the-alien-tort-statute/.

[8] *See* William R. Castro, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 489-90 (1986).

counseled that the law of nations must be included as part of domestic common law as a way for a nation to protect itself from other sovereigns.[9] This is because during Blackstone's time, the mistreatment of a country's citizens in other nations was the preferred excuse for going to war.[10] In his commentaries, Blackstone set forth the principle offenses against the law of nations that should be guarded against: (1) violations of safe conducts; (2) infringement on the rights of ambassadors; and (3) piracy.[11] The fledgling United States had a real interest in providing redress for torts committed by aliens against aliens as a way to "maintain neutrality in the face of warring European powers."[12] Additionally, the United States wished to assure the other nations of the world that it would abide by and enforce the law of nations.[13] However, under the Articles of Confederation, the Continental Congress was really powerless to provide any redress, as the "Marbois affair" so aptly illustrates.[14]

In Philadelphia, in May of 1784, Chevalier de Longchamps, a Frenchman, assaulted and battered Francis Barbe de Marbois, a member of the French legation, first in front of the French Ambassador in the Ambassador's house and then again a few days later in the streets of Philadelphia.[15] The international community was outraged with the assault of a foreign diplomat within the United States and demanded that Congress take action.[16] Even though the Continental Congress was wholly impotent and could do little more than symbolically sanction de Longchamps, he was subsequently brought to trial in a Pennsylvania state court, where he was found guilty of violations of both the common law and the law of nations.[17] The court held that to determine whether a crime against the law of nations had been perpetrated, one must look at the "practices of different Nations, and the authority of writers."[18] After doing so the court found that all nations were in agreement that ambassadors were protected under the law of nations.[19]

After the ratification of the Constitution, Congress was no longer confined by the inadequacies of the Articles of Confederation and passed the ATS as part of the Judiciary Act of 1789.[20] Originally a one-line tort statute, believed to be penned by Oliver Ellsworth, the ATS stated that:

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9 *Id.*

10 *See* Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 63-64 (1988).

11 Castro, *supra* note 8, at 498-90.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 491-94; Respublica v. De Longchamps, 1 U.S. 111, 111-12 (1784).

16 Castro, *supra* note 8, at 491-94.

17 *De Longchamps*, 1 U.S. at 116-18; *see* Castro, *supra* note 8, at 491-94.

18 *De Longchamps*, 1 U.S. at 116.

19 *Id.*

20 Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 50 (1923).

> [T]he District Courts. . .shall. . .have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for tort only in violation of the law of nations or a treaty of the United States.[21]

B. Resurgence

After passage of the ATS, the statute remained largely dormant for close to two hundred years.[22] Relatively unchanged from its original incarnation, today the ATS states that "[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."[23] The only difference of note between the present ATS and its predecessor is that state courts no longer have jurisdiction over ATS claims.[24]

The Second Circuit Court of Appeals, which has been at the forefront of almost all significant ATS litigation, breathed new life into the ATS in 1980 with its seminal case, *Filartiga v. Pena-Irala*, where it held that deliberate torture under the color of law violated universally accepted international norms and was against the law of nations.[25]

In reaching its decision the court consulted the following sources to determine whether torture was a violation of international law: (1) scholarly writings; (2) international customs, i.e. generally accepted practices; (3) judicial decisions; and (4) international conventions.[26] After conducting its analysis, the court found that the law of nations evolves over time and what may have at one point been only comity among nations could ripen into a rule of international law.[27] Therefore, courts must not interpret the law of nations as it existed in 1789 when the ATS was enacted, but as it is today, which included torture by state officials.[28]

Besides arguing that torture was a violation of the law of nations, the plaintiffs also asserted that the ATS in effect created new rights for aliens by providing an independent cause of action in U.S. courts for aliens.[29] The court rejected this view, holding that the ATS was merely a jurisdictional statute that gave federal

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[21] *Id.*; Judiciary Act of 1789, 1 Stat. 73, 77.

[22] *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Claims Statute*, 18 N.Y.U. J. INT'L L. & POL'Y 1, 4-5 nn.15-16 (1985) (of twenty-one reported cases brought under the ATS prior to *Filartiga*, only two were successful).

[23] 28 U.S.C. § 1350 (2011).

[24] *See* Judiciary Act of 1789, 1 Stat. 73, 77.

[25] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). In *Filartiga*, Dolly Filartiga and her father, who were both Paraguayan citizens, brought suit in federal district court against another Paraguayan citizen, Americo Norberto Pena-Irala, a high ranking police official, for the torture and murder of their brother/son in violation of the law of nations. The district court subsequently dismissed the action for lack of subject matter jurisdiction.

[26] *Id.* at 880 (citing The Paquete Habana, 175 U.S. 677, 700 (1900)).

[27] *Id.* at 881.

[28] *Id.*

[29] *Id.* at 887.

courts the power to adjudicate the rights of aliens that already existed in international law.[30]

The Second Circuit's decision in *Filartiga* ushered in a new era for ATS litigation. After the decision was handed down, more than 100 similar cases were brought almost immediately.[31] Post *Filartiga*, courts have held that federal courts have ATS jurisdiction over a wide range of crimes, such as genocide, war crimes, summary execution, forced disappearance, slavery, prolonged detention, and cruel, inhuman, and degrading treatment.[32] However, the lasting impact of *Filartiga* is not merely a growth in litigation. The case stands for the proposition that plaintiffs are not constrained by the law of nations as it existed in Blackstone's time, but that the law of nations is fluid and constantly changing. Additionally, the case stands for the proposition that individuals have rights that are recognized by international law and redress is available in U.S. courts when those rights have been violated.[33]

A few years after *Filartiga*, the D.C. Circuit Court of Appeals handed down a *per curiam* opinion in *Tel-Oren v. Libyan Arab Republic* that was somewhat at odds with the Second Circuit's holding.[34] The case in actuality consists of three opinions, all at odds with each other, as all three justicies affirmed the dismissal of the case, but each wrote his own concurrence.

Judge Edwards's opinion largely adopted the Second Circuit's rationale in *Filartiga*. However, he distinguished *Tel-Oren* from *Filartiga* in that in *Tel-Oren* the torture and other violations of the law of nations were not done under the color of law by state actors and therefore, not actionable.[35] Judge Edwards also agreed with the Second Circuit that the law of nations was not static, but he was not prepared to hold that torture by non-state actors had arisen to a level where it was universally recognized as *hostis humani generis*, an enemy of all mankind, such as piracy or slavery.[36] Besides limiting the Second Circuit's holding in *Filartiga* to state actors, Judge Edward's opinion really brought nothing new to

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30 *Id.*

31 MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE 5 (Martinus Nijhoff 2009).

32 Daniel Disken, *The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 815-16 (2005); *see* Tracy Bishop, *Cause of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International Law*, 21 CAUSES OF ACTION 2d 327 (2010) (Part II.A§7 covers the post Filartiga expansion of private persons culpable under the ATS. Part II.C on parties states that persons perpetrating certain crimes like genocide, slavery, and war crimes and/or persons acting under "the color of law" may be prosecuted under the law of nations).

33 See Jeffery M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v Pena-Irala*, 22 HARV. INT'L L. J. 53 (1981) for a detailed discussion of the post Filartiga state of the ATS.

34 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775-76 (D.C. Cir. 1984) (parenthetical is same as above).

35 *Id.* at 795.

36 *Id.* at 794-95.

the field, and much the same could be said of Judge Robb's concurrence. Judge Robb argued that the case presented a nonjusticiable political question.[37]

Judge Bork's concurrence, on the other hand, has been widely controversial and has garnered much criticism.[38] In his lengthy concurrence, Judge Bork essentially stated that: (1) international law does not create a cause of action for individuals unless the law itself so provides; (2) the law of nations is only concerned with states and not individuals; and (3) because of the first two propositions, Congress only intended the ATS to apply to Blackstone's original three violations.[39] Judge Bork's concurrence stands at the opposite end of the spectrum form the *Filartiga* decision and is the narrowest interpretation of the ATS to date.[40] However, a majority of the circuits still follow *Filartiga*, and as a direct result of the *Tel-Oren* decision and more specifically Judge Bork's concurrence, Congress passed the Torture Victims Protection Act (TVPA) in 1991, which provides redress in the form of civil damages for citizens and aliens who are victims of torture.[41] The legislative history of the TVPA is also supportive of the *Filartiga* decision and the Second Circuit's rationale.[42]

C. The Second Wave

The Second Circuit weighed in on the issue of the liability of non-state actors for violations of the law of nations a few years later in another landmark case, *Kadic v. Karadzic*.[43] The Second Circuit agreed with the DC Circuit that certain acts such as torture and summary execution were only violations of the law of nations when committed under the color of law.[44] But, the court further held that

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[37] *Id.* at 823.

[38] *Id.* at 777-78; *see* Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92, 92-105 (1985); *see also* William S. Dodge, *The Historical Origins of the Alien Tort Statue: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 238-43 (1996).

[39] *Tel-Oren*, 726 F.2d at 813-16; *see* D'Amato, *supra* note 38, at 96-98.

[40] KOEBELE, *supra* note 31, at 26.

[41] Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as 28 U.S.C. § 1350); *see* Diskin, *supra* note 32, at 817; *see* KOEBELE, *supra* note 31, at 5-6.

[42] Torture Victims Protection Act § 2 (the legislative history cites and supports the *Filartiga* decision).

[43] In *Kadic*, Bosnian Muslims and Croats brought suit against Radovan Karadzic for numerous human rights violations, to include: genocide, rape, forced prostitution, forced impregnation, torture, and summary execution. Karadzic was the self-proclaimed leader of Srpska, a putative Bosnian-Serb state which was not recognized by the international community, and had ultimate control over all of the Bosnian-Serb forces that committed the alleged atrocities. After the suit was brought, Karadzic moved for dismissal on several grounds, but the district court dismissed the action because of lack of subject matter jurisdiction, holding that "acts committed by non-state actors do not violate the law of nations." Kadic v. Karadzic, 70 F.3d 232, 236-37, 43 (2d Cir. 1995) (citing *Doe v. Karadzic*, 866 F. Supp. 734, 738 (S.D.N.Y. 1994)). In other words, since Srpska was not a recognized state, Karadzic could not be a state actor and, therefore, could not violate international law. See Alan Frederick Enslen, *Filartiga's Offspring: The Second Circuit Significantly Expands The Scope of the Alien Tort Clam Act with its decision in Kadic v. Karadzic*, 48 ALA. L. REV. 695, 696 (1997) for an in depth analysis of *Kadic*.

[44] *See Kadic*, 70 F.3d at 243-44.

acts, such as genocide, war crimes, and slavery, were violative of the law of nations regardless of who committed them.[45]

The Second Circuit's opinion in *Kadic* significantly widened the scope of the ATS by allowing plaintiffs to file suit against non-state actors.[46] This decision has probably been just as influential as the court's decision in *Filartiga*, if not more so. After the decision was handed down there was again a flurry of activity and a rapid increase in litigation, but this time instead of being directed at state actors, it was directed predominately at corporations.[47] Defendant's included oil companies such as Chevron, Texaco, Occidental, Royal Dutch Shell, and Talisman and mining companies such as Freeport-McMoRan, Newport, Rio Tinto, and the Southern Peru Copper Corporation.[48] There have also been several other well-known defendants such as Coca-Cola, Fresh Del Monte Produce, The Gap, Daimler-Chrysler, Ford, DynCorp, and Pfizer.[49] In fact, almost half of the ATS cases brought today involve corporate defendants.[50]

D. The Supreme Court Weighs in

After the *Kadic* decision was handed down, fairly clear battle lines had been drawn concerning the scope of the ATS and its ability to cover new causes of action and defendants. The Second Circuit, with its seminal cases *Filartiga* and *Kadic*—allowing new causes of action and suits against natural and ostensibly juridical persons—was at one end of the spectrum, and Judge Bork's concurrence in *Tel-Oren*—disallowing any new causes of action or classes of defendants—lay at the other. The field was ripe for the Supreme Court to step in and put several of these disagreements to rest. Unfortunately, the only time that the Supreme Court has weighed in on the ATS, to date, was in *Sosa v. Alvarez-Machain* in 2004, and as far as parties interested in the corporate aspects of the ATS were concerned, it was not an ideal case.[51]

The Defendant sided with Judge Bork, arguing that the ATS only gives federal courts jurisdiction, but does not allow for the creation of new causes of action.[52] Whereas, the Plaintiff took the other extreme by arguing that the ATS granted

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45 The court further held that it was irrelevant whether Srpska was a recognized state or not. It was sufficient that it held itself out to be one. *See id.* at 244-45.

46 *Id.*

47 KOEBELE, *supra* note 31, at 6.

48 *Id.*

49 *Id.*

50 *Id.*

51 In *Sosa*, the Drug Enforcement Agency (DEA) paid Mexican Nationals to kidnap a Mexican physician and bring him to the United States. The physician was wanted by the DEA because he was believed to have prolonged the life of a DEA agent so that members of the Mexican drug cartel could torture and eventually kill him. After the physician stood trial in the United States and had returned to Mexico, he brought suit against the DEA and one of the Mexican Nationals involved in his kidnapping. The claim he brought against the Mexican national alleged that he was subject to an unlawful arrest and detention in violation of the law of nations. Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004). *See generally* Beth Stephens, *Corporate Liability Before and After Sosa v. Alvarez-Machain*, 56 RUTGERS L. REV. 995, 996 (2004).

52 *See Sosa*, 542 U.S. at 712.

federal courts the authority to create new causes of action for violations of the law of nations.[53] The Court rejected the Defendant's argument, and therefore Judge Bork's contentions outright, holding that under his construction, the statute would have been stillborn.[54] After an examination of the legislative history and the historical backdrop, the Court concluded that Congress most certainly intended the statute to have practical effect and that common law would provide a cause of action.[55] The Court's construction of the ATS also rejected the Plaintiff's view, as causes of action are created at common law and not by the judiciary.[56] This decision was simply an affirmation of the Second Circuit's holding in *Filartiga.*

The Court further affirmed the *Filartiga* decision by holding that the law of nations was not static and that new causes of action could be recognized.[57] The Court, however, urged extreme caution on the lower courts in recognizing additional causes of action.[58] The Court's reasoning was that: (1) our conception of the common law has changed over the last two hundred years; today instead of discovering what the law is, courts are seen as creating it;[59] (2) because the Court essentially abolished the existence of federal common law in *Erie v. Tompkins*, restraint should be shown;[60] (3) the creation of a private right of action is better left to the legislature;[61] (4) the creation of new causes of action could have far reaching collateral consequences affecting the foreign relations of the United States and the international community at large;[62] and (5) it is not the place of the judiciary to seek out and create new causes of action.[63] The Court summarized its position by holding that "judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping and thus open to a narrow class of international norms today."[64]

In rendering its decision, the Court declined to develop its own standard to determine what constituted a definite international norm to be considered part of the law of nations. Besides holding that any new cause of action recognized should be just as definite and accepted among civilized nations as Blackstone's original causes, the Court approvingly cited several of the circuits' tests and constructions for propositions, such as *hostis humani genereis*, an enemy of all mankind, and violations of norms that are specific, universal, and obligatory.[65] In a

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[53] *Id.* at 713.

[54] *Id.* at 714.

[55] *Id.* at 724.

[56] *Id.*

[57] *Id.* at 724-25.

[58] *Id.* at 725.

[59] *Id.*

[60] *Id.* at 726 (citing Erie v. Tompkins, 304 U.S. 64, 58 (1938)).

[61] *Id.* at 727.

[62] *Id.* at 727-28.

[63] *Id.* at 728.

[64] *Id.* at 729.

[65] *Id.* at 732 (citing *Filartiga*, 630 F.2d at 890; *Tel-Oren*, 726 F.2d at 781).

footnote which has become the source of much controversy, Justice Souter also stated that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[66] After looking at these various standards, the Court ultimately concluded that being illegally detained for one day did not constitute a violation of the law of nations and dismissed the physician's claims.[67]

Although, all the justices concurred in the decision and much of the opinion, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas did not join the portion of the opinion related to the creation of new causes of action through the use of federal common law.[68] In Justice Scalia's view, the *Erie* decision eliminated the federal common law and, therefore, what Congress originally intended was irrelevant.[69] The only thing that mattered was the present authority of the courts, which in his view were only granted jurisdiction under the ATS.[70] Justice Scalia also cited the reasons the Court used to counsel the lower courts on the dangers of hastily creating new causes of action as reasons for not allowing them to do so.[71] To illustrate his point he used the *Kadic* decision as an example of what could happen when the lower courts were able to create new causes of action.[72] While the *Sosa* decision may have lain to rest the *Filartiga*-Bork debate, it failed to answer the question of whether corporations could be held liable for violations of international law.[73]

Amazingly enough, even with the amount of ATS litigation directed at corporations, courts have largely avoided the issue of corporate liability.[74] The Eleventh Circuit aside, courts have generally assumed that it is possible to hold corporations liable for violations of international law, but declined to hold one way or the other and largely dismissed cases on other grounds, much to plaintiffs' chagrin.[75] The Supreme Court is no exception. Most recently, the Court

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[66] *Id.* at 732 n.20; *see* discussion *infra* Part IV.A (discussing how both proponents and opponents of corporate liability see what they want to in this quotation with the former believing that it infers that corporations can be held liable and the later claiming that they cannot).

[67] *Sosa*, 542 U.S. at 738.

[68] *Id.* at 739.

[69] *Id.* at 744. However, this note does not address *Erie* issues concerning the ATS; b*ut see* William S. Dodge, *Bridging Erie: Customary International Law in the U. S. Legal System After Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT'L 87, 100-08 (2004) (discussing a synopsis of the *Erie* issues).

[70] *Id.*

[71] *Id.* at 746-47.

[72] *Id.* at 748.

[73] See Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241 (2004) for a discussion of *Sosa*; *see also* Naomi Norberg, *The US Supreme Court Affirms the Filartiga Paradigm*, 4 J. INT'L CRIM. JUST. 387, 392 (2006).

[74] *See* Rosaleen T. O'Gara, *Procedural Dismissals Under the Alien Tort Statute*, 52 ARIZ. L. REV. 797, 802 (2010).

[75] *See* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1245, 1253 (11th Cir. 2005); *see also* Romero v. Durmmond Co., 552 F.3d 1303, 1315 (11th Cir. 2008); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009) (citing *Romero* and *Aldana*); *see also* O'Gara, *supra* note 74. Some plaintiffs have met with success reaching settlements outside the court room. *See* Doe v. Unocal,

was given the opportunity to answer this question in *Talisman* but declined to do so.[76] In a much criticized decision that will certainly have a chilling effect on corporate ATS cases if allowed to stand, the Second Circuit held that the aiding and abetting liability standard for corporations required a mental state of purpose rather than mere knowledge.[77] Both parties requested certiorari, with the plaintiff's requesting a reversal, while the defendant filled a cross petition raising the issue of corporate liability.[78] The Court subsequently denied both petitions.[79]

III. Discussion

Kiobel, which was recently decided by the Second Circuit, deviated from the judicial patterns of avoidance and confronted corporate liability head on.[80] The Second Circuit again blazed a trail by being the first appellate court to make a detailed analysis of whether corporations can be held liable for violations of international law under the ATS.[81] In *Kiobel*, residents of the Ogoni region of Nigeria alleged that Royal Dutch Petroleum, along with Shell, had aided and abetted the Nigerian government in committing human rights abuses against them.[82] Specifically, the plaintiffs alleged that the Nigerian government had engaged in: (1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the right to life, liberty, security, and association; (6) forced exile; and (7) property destruction.[83] The plaintiffs also alleged that Royal Dutch and Shell had aided and abetted the government by: (1) providing transportation for Nigerian forces; (2) allowing their property to be used as a staging area for government attacks on the plaintiffs; and (3) providing food and compensation to the

403 F.3d 708 (2nd Cir. 2005); *see also* Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377 (S.D. N.Y. 2009); *see also* Bloomberg News, *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES (Dec. 14, 2004), *available at* http://www.nytimes.com/2004/12/14/business/14unocal.html; *see also* Mark Fass, *Shell Agrees to $15.5 Million Settlement in Nigeria Case,* N.Y. L.J. (June 9, 2009), *available at* http://www.law.com/jsp/article.jsp?id=1202431321301.

[76] Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) [hereinafter "*Talisman* 2009"]; Presbyterian Church of Sudan v. Talisman Energy, Inc., 131 S.Ct. 79 (2010) [hereinafter "*Talisman* 2010"]; Talisman Energy, Inc. v. Presbyterian Church of Sudan, 131 S.Ct. 122 (2010) [hereinafter "*Presbyterian* 2010].

[77] *Talisman* 2009, *supra* note 76, at 259; *see* Kevin Jon Heller, *Talisman Energy-Amateur Hour at the International Law Improv*, OPINIO JURIS (Oct. 6, 2009), *available at* http://opiniojuris.org/2009/10/06/talisman-energy-amateur-hour-at-the-international-law-improv/; JOHN RUGGIE, REMARKS FOR ICJ ACCESS TO JUSTICE WORKSHOP 8 (2009), *available at* http://198.170.85.29/Ruggie-remarks-ICJ-Access-to-Justice-workshop-Johannesburg-29-30-Oct-2009.pdf.

[78] Petition for Writ of Certiorari, 2010 WL 1602093 (Apr. 15, 2010); Brief of Talisman Energy Inc. in Opposition to Petition for a Writ of Certiorari, 2010 WL 2544898 (Jun. 21, 2010).

[79] *See* cases cited *supra* note 76.

[80] *Kiobel*, 621 F.3d at 115.

[81] *Id.* at 123; *see* cases cited *supra* note 75 (although the Eleventh Circuit has looked at the issue, its decisions are largely devoid of any analysis. Rather the court has taken the path that most courts have and assumed that since natural persons may violate the law of nations, juridical persons may as well.).

[82] *Kiobel*, 621 F.3d at 123.

[83] *Id.*

government forces involved in the attacks.[84] The matter came before the court on an interlocutory appeal to decide several issues, but the only one of any importance was whether jurisdiction under the ATS extended to corporations.[85]

A. The Majority

The majority opinion, authored by Judge Cabranes, held that it did not.[86] The majority began its opinion by asserting that "[f]rom the beginning. . .the principle of individual liability for violations of international law has been limited to natural persons-not 'juridical' persons such as corporations."[87] The court further explained that this was because the moral responsibility for crimes rests solely with individuals and that the provisions of international law can only be enforced by punishing individuals.[88]

1. International Law Governs the Scope of Corporate Liability

After emphasizing that corporations are not traditionally the subjects of international law, the court moved on to make a determination as to whether corporations could nonetheless be held liable for violations of international law.[89] Relying almost entirely on footnote 20 from *Sosa*, the court concluded that customary international law determined whether or not corporations could be liable for violations of the law of nations.[90] The court held that 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.'"[91] It further held that this language "requires that we look to *international law* to determine our jurisdiction over ATS claims."[92] The court also cited Justice Breyer's concurrence in *Sosa* approvingly, where he stated that "[t]he norm [of international law] must extend liability to the *type of perpetrator* (*e.g.* a private actor) the plaintiff seeks to sue."[93]

The court went on to cite the Restatement of Foreign Relations Law of the United States, *Oppenheim's International Law*, the Nuremburg Trials, and several of its past decisions for this same proposition.[94] When looking at its past decisions, the court specifically asserted that it had always followed the method prescribed in *Sosa*, "by looking at international law to determine *both* whether

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[84] *Id.*

[85] *Id.* at 124.

[86] *Id.* at 120.

[87] *Id.* at 119.

[88] *Id.*

[89] *Id.* at 125.

[90] *Id.* at 127-31.

[91] *Id.* at 127 (citing *Sosa*, 542 U.S. at 732 n.20).

[92] *Id.*

[93] *Id.* at 127-28 (citing *Sosa*, 542 U.S. at 760).

[94] *Id.* at 126-28.

certain conduct leads to ATS liability *and* whether the scope of liability under the ATS extends to the defendant being sued."[95] The court concluded that in order to ensure that it had jurisdiction to hear a claim under the ATS, it 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."[96]

2. *Corporations cannot be held Liable for Violations of International Law*

After concluding that international law governs whether or not corporations could be held liable under the ATS, the court turned its attention to the sources of international law, specifically international tribunals, international treatises, and the work of publicists.[97] Concerning tribunals, the court found it "particularly significant. . .that no international tribunal. . .has *ever* held a corporation liable for a violation of the law of nations."[98] Focusing on the Nuremburg trials, the court first took notice of the fact that the London Charter, which established the International Military Tribunal (IMT), only granted jurisdiction over "*natural persons.*"[99] The court also pointed out that while the charter did grant the IMT jurisdiction to declare organizations criminal, this only had the effect of allowing the IMT to prosecute individuals for membership in those organizations.[100] The court then used the Farben case to illustrate its point, by holding that "[t]he refusal of the [IMT]. . .to impose liability on I.G. Farben is not a matter of oversight."[101] The court went on to approvingly cite several passages from the Farben case, which stated that Farben itself was not on trial and that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[102]

After concluding that at the time of the Farben trial international law did not recognize corporate liability, it moved on to more recent tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and concluded that they also declined to hold corporations liable for violations of international law.[103] The court also asserted that the history of the Rome Statute, and more specifically, the rejection of the French delegation's proposal to grant the International Criminal

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[95] *Id.* at 128.

[96] *Id.* at 129 (citing Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 270 (2d Cir. 2007)).

[97] *Id.* at 132, 137, 142.

[98] *Id.* at 132.

[99] *Id.* at 133 (citing Article 6 of the London Charter). While the drafters of the London Charter probably intended it to apply to natural persons, it should be noted that Art. 6 only says "persons." *See* LONDON CHARTER art. 6 *in* YALE LAW SCHOOL, THE AVALON PROJECT, *available at* http://avalon.law.yale.edu/imt/imtconst.asp.

[100] *Id.* at 134 (citing Article 10 of the London Charter).

[101] *Id.*

[102] *Id.* at 135 (citing The Nuremburg Trial, 6 F.R.D. 69, 110 (1946)).

[103] *Id.* at 136.

Court (ICC) jurisdiction over corporations, confirmed that there is an "absence of any generally recognized principle. . .concerning corporate liability for violations of customary international law."[104]

Next, the court briefly turned to the subject of international treaties.[105] Suffice it to say that the court found there were some specialized treaties concerning corporate liability but nothing that was far reaching enough to create a norm of customary international law.[106] Lastly, the court examined the work of scholars, to which it also gave little weight. The court citied three noted scholars, two of whom were paid expert witnesses for the defendant in *Talisman* and argued the same day as *Kiobel*, for the proposition that no national court outside the United States nor any international tribunal had thus far recognized corporate liability for violations of customary international law.[107]

The court concluded that "customary international law has steadfastly rejected the notion of corporate liability for international crimes."[108] The court also held that the nations of the world "have determined that moral and legal responsibility for heinous crimes should rest on the individual whose conduct makes him or her *hostis humani generis*, an enemy of all mankind."[109] However, nothing in the opinion prohibited suits under the ATS against officers, directors, and employees of a corporation that aids and abets violations of international law.[110]

B. The Concurrence

Judge Leval's lengthy concurrence is more of a scathing dissent insofar as it completely rejects the majority's rationale. Judge Leval argued that there is no basis in international law for the proposition that individuals can violate international law, but corporations cannot.[111] He first examined the focus of international law on humanitarian and moral concerns, (i.e. prohibiting heinous actions that violate definable, universal, and obligatory norms, such as genocide, slavery, war crimes, and torture).[112] He then pointed out, through a series of examples, how the majority's construction of the law is in direct conflict with these overarching objectives.[113]

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104 *Id.* at 137.

105 *Id.*

106 *Id.* at 140.

107 *Id.* at 143.

108 *Id.* at 120.

109 *Id.* at 149.

110 *Id.*

111 *Id.* at 151.

112 *Id.* at 155.

113 *Id.*

1. The Majority Frustrates the Purpose of International Law

Judge Leval examined several scenarios in which corporations themselves are committing violations of the law of nations.[114] Using the Farben case and sex slavery as examples, he asserted that as long as groups that utilize slave labor incorporate, they would escape liability and be free to retain any profits that their venture made under the majority's construction of the law.[115] He also pointed out that even though the IMT did not prosecute Farben, it did make a finding that Farben had violated international law.[116]

Next, Judge Leval utilized the example of Somali pirates to make two points.[117] First, modern pirates operate much like corporations and/or trusts and could easily incorporate to avoid liability.[118] Second, corporations generally own large vessels and if they were seized by pirates, the corporation would have no redress under the ATS or any other provision, since according to the majority, corporations are not recognized at international law.[119] Lastly, he created a scenario whereby a corporation has tried to get a local government to curb an indigenous population in order for the corporation to exploit natural resources.[120] After the government fails to do so sufficiently, the corporation takes matters into its own hands and facilitates the removal of these peoples.[121] In essence, instead of aiding and abetting, the corporation itself is committing genocide. He also made the same arguments concerning aiding and abetting liability.[122]

Judge Leval concluded that all of these scenarios demonstrate that the majority's holding only frustrates the objectives of the law of nations by allowing corporations to not only act with impunity while conducting these atrocities but also to retain their profits.[123] He further argued that the majority's decision serves no rational purpose and furthers no objective of the international community.[124]

2. The Lack of and Misapplication of Precedent

The next section of Judge Leval's concurrence focused on what he argued is the majority's lack of precedent for its holding.[125] Citing a litany of ATS cases brought against corporations, he makes the argument that no court, to date, has ever dismissed a suit against a corporation "on the grounds that juridical entities

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114 *Id.* at 155-57.

115 *Id.* at 155-56.

116 *Id.* at 155.

117 *Id.* at 156-57.

118 *Id.*

119 *Id.*

120 *Id.* at 157.

121 Id.

122 *Id.* at 157-59.

123 *Id.* at 159.

124 *Id.* at 160.

125 *Id.*

have no legal responsibility or liability under [the law of nations]."[126] Judge Leval asserted that quite the opposite is true; courts have rejected the argument outright when it has been raised.[127] Judge Leval also asserted that no international tribunal has ever been structured in a manner that is consistent with the majority's construction.[128] The thrust of his contention is that the tribunals that the majority points to are only concerned with criminal liability of individuals and that no tribunal has ever had the jurisdiction to consider private civil remedies regardless of whether they pertained to corporations or private individuals.[129]

3. *Deficiencies in Reasoning*

A major portion of the Concurrence also vehemently opposed the majority's use of Footnote 20 from *Sosa*.[130] Judge Leval asserted that Footnote 20 stands for the exact opposite proposition for which the majority is using it.[131] According to Judge Leval, Justice Souter included Footnote 20 specifically to address whether or not the conduct complained of is a violation of international law when committed by a non-state actor.[132] For example, in *Tel-Oren*, torture was not found to be a violation of international law when not committed by a state actor, and in *Kadic*, genocide was.[133] In other words, the statement "if the defendant is a private actor such as a corporation or an individual" is not to be read as foreclosing liability on corporations, but rather stands only for the proposition that courts need to make a determination as to whether the conduct in question constitutes a violation of the law of nations when committed by a non-state actor.[134] In Judge Leval's estimation, the Court was not implying that natural persons and corporations were to be treated differently under the ATS, rather they were to be treated identically.[135]

Judge Leval followed this by a rather lengthy section he termed "[t]he deficiencies of the majority's reasoning."[136] A large portion of this section deals with the failure of the majority to make any delineation between criminal and civil liability.[137] By first examining the refusal to empower international tribunals with the power to impose criminal penalties on corporations, Judge Leval

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126 *Id.* at 161.

127 *Id.*

128 *Id.* at 163.

129 *Id.*

130 *Id.*

131 *Id.* at 164.

132 *Id.* at 165.

133 *Id.*

134 *Id.* (citing *Sosa*, 542 U.S. at 760 (2004)).

135 *Id.*

136 *Id.* at 165-78.

137 *Id.* at 166-70.

declared the majority's argument to be a non sequitur.[138] He argued that the reason that these tribunals have not been granted jurisdiction to impose criminal sanctions against corporations has nothing to do with the fact that they cannot do so at international law, but rather that corporations are at their heart an "it," and it is not possible for an "it" to have criminal intent, which is widely recognized as a precondition to criminal punishment.[139] There are several purposes of criminal punishment: (1) giving society the satisfaction of retribution; (2) taking away the perpetrators ability to commit further crimes; (3) curbing the offenders conduct by imposing punitive sanctions; and (4) dissuading others from engaging in such conduct.[140] These objectives would not be met by punishing an abstract entity such as a corporation and, in fact, may be undermined by misdirecting energy away from the real perpetrators.[141]

While criminal punishment is not a viable instrument when wielded against juridical persons, Judge Leval argued that civil liability is a more appropriate vehicle because its focus is on the compensation of victims and restoring them to their previous form.[142] Holding a corporation civilly liable is the best option, since it is the corporation that has derived a profit from the violations of international law, and the corporation is, therefore, in the best position to compensate its victims.[143] Even if it were possible for the victims to sue the defendants individually as the majority suggests, it is unlikely that they would be able to do so in the first instance or collect an adequate amount in the second.[144] Additionally, Judge Leval argued that while many nations do not impose criminal sanctions against corporations, civil liability is universally recognized.[145]

Judge Leval also attacked that majority's assertion that international law does not distinguish between civil and criminal liability.[146] He pointed to the fact that the tribunals cited by the majority were only given criminal jurisdiction and have never addressed civil damages for anyone, whether individuals or corporations.[147] However, in some instances they have advised victims to seek civil damages in other forums.[148] In support of his argument, he also pointed to monetary reparations awarded by the International Court of Justice (ICJ) and its predecessor the Permanent Court of International Justice (PCIJ) for the proposition that civil liability is recognized as distinct from criminal liability in the international community.[149] Furthermore, international law treats criminal and civil lia-

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138 *Id.* at 166.

139 *Id.* at 166-67.

140 *Id.* at 167.

141 *Id.* at 168.

142 *Id.* at 169.

143 *Id.*

144 *Id.*

145 *Id.* at 169-70 (citing the Chairman of the Rome Statute's Drafting Committee).

146 *See id.* at 170.

147 *Id.* at 171.

148 *Id.*

149 *Id.*

bility differently.[150] In both cases, due to the varying legal systems of the world, international law does not prescribe the manner in which punishment or compensation must be delved out.[151] However, where there is criminal liability, international law requires punishment, whereas civil liability is left to the states, which are free to fashion a remedy and hold violators liable if they see fit.[152]

Another closely related point of Judge Leval's argument is that the majority has a fundamental misunderstanding of how international law operates by insisting that a lack of widespread agreement within the international community concerning the imposition of civil liability against corporations means there can be no such liability.[153] Judge Leval agreed with the majority that the place to look for violations of international law is international law, but he believed that international law takes no position as to whether civil liability should be imposed against corporations.[154] International law is primarily concerned with norms of conduct and prohibiting certain acts such as genocide, torture, slavery, and war crimes.[155] In certain instances, international law demands the imposition of criminal punishment, but it nevertheless allows each state to make its own determination concerning civil liability.[156] It does not exempt corporations.[157] The ATS does not award civil damages for violations of the law of nations because international law requires that it do so.[158] Damages are awarded because the law of nations prohibits certain conduct and allows each state to implement its own procedures concerning its violation.[159] The United States has chosen to do so through the ATS and civil liability.[160] The fact that other nations have not chosen to follow suit is inconsequential.[161]

The majority has also taken *Sosa* out of context concerning "a 'norm' that must command virtually universal acceptance among the civilized nations as a rule of international law."[162] The majority cites this passage for the proposition that liability may not be imposed against a corporation unless there is a "'norm' generally accepted throughout the world for the imposition of tort liability on. . .a corporate violator of the law of nations."[163] What the Court was addressing, however, was whether the norms of conduct violated were violations of interna-

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150 *Id.* at 172.

151 *Id.* 173-74.

152 *Id.* 172-73.

153 *Id.* at 174.

154 *Id.* at 174-75.

155 *Id.* at 175.

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 Id.

161 *Id.* at 176-77.

162 *Id.* at 177 (citing *Sosa*, 542 U.S. at 732).

163 *Id.*

tional law as opposed to merely widely recognized rules of domestic law.[164] According to the majority's construction, corporations would still be in violation of the norms of international law, but liability could not be imposed.[165] This is entirely different from the *Kadic-Tel-Oren* distinction between violations of international law that can be committed by non-state actors and those that can only be committed by states.[166] If a non-state actor cannot commit a certain violation, such as torture, then it is not a violation of the law of nations when committed by a non-state actor.[167] However, this is not what the majority is arguing. The majority is stating that violations committed by corporations would still constitute violations of the law of nations, but corporations would be unable to be held liable for them.[168] Judge Leval looks to the concurrence in *Sosa* for the proposition that this construction could not have been what the Court meant.[169] If courts have to look to international law to determine whether there is a widespread practice of awarding civil damages for violations of the law of nations, then the *Filartiga* line of cases could not stand, as there is no such widespread practice.[170] If this were the case, then the majority could not have disagreed with the concurrence's insistence that further legislation was needed in order to allow damages to be awarded.[171]

Judge Leval also takes issue with the majority's contention that corporations are not subjects of international law.[172] The majority does not cite any authority for this proposition; furthermore, this view has not been widely held since before the Second World War.[173] The IMT during the Nuremburg trials clearly recognized corporate obligations at international law.[174]

The IMT found in the Flick, Farben, and Krupp cases that these various corporations had all violated international law.[175]

Lastly, Judge Leval criticized the majority for the complete lack of scholarly support in its argument.[176] The majority did not cite one published work in its opinion.[177] The only scholarship employed by the majority consisted of the affidavits of two professors hired by the defendants in *Talisman*, which were addressing specific questions asked by the court.[178] After examining these

164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.* at 178.
170 *Id.*
171 *Id.* (citing *Sosa*, 542 U.S. at 746-47).
172 *Id.* at 179.
173 *Id.*
174 *Id.*
175 *Id.* at 180.
176 *Id.* at 181.
177 *Id.*
178 *Id.* at 182.

affidavits, Judge Leval concluded that the majority had taken them out of context, and that they only stand for the proposition that no court outside the United States has held corporations liable for violations of international law.[179] Judge Leval then produced several works of scholarship that support his position, that international law leaves the decision of whether to impose civil remedies to corporations to individual nations.[180]

IV. Analysis

The majority's opinion in *Kiobel* marks a drastic departure from the general consensus among U.S. courts that corporations can be held liable for violations of international law.[181] For nearly 20 years, the question has not even been an afterthought when adjudicating ATS claims, with courts assuming that because private persons could be liable for violations of the law of nations, juridical persons, could too.[182] Before *Kiobel*, the Eleventh Circuit was the only circuit to have directly addressed the issue, holding that "[t]he text of the Alien Tort Statute provides no express exception for corporations and the law of this Circuit is that this statute grants jurisdiction from complaints. . .against corporate defendants."[183] The relative ease with which the Eleventh Circuit disposed of the matter is illustrative of the view that most courts have taken. However, as lengthy as the opinion in *Kiobel* is, it disposes of the matter almost as dismissively as the Eleventh Circuit did.

While the arguments of both the majority and the concurrence are at times disingenuous, one can only conclude after examining the majority opinion that its argument is completely without merit and wholly lacking support. Judge Leval's concurrence goes to great lengths to point out the complete lack of support for the majority's bold assertions, and it would be pointless to rehash all his arguments here.[184] However, several assertions of both sides do warrant further examination.

A. *Sosa,* Footnote 20, and the Scope of International Law

The majority opinion can be broken down into two parts. The first is the proposition that *Sosa* commands the lower courts to make a determination as to who can be held liable, i.e. individuals, corporations, or states, for violations of

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179 *Id.* at 182-84.

180 *Id.* at 185.

181 Abdullahi v. Pfizer, Inc., 562 F.3d 163, 187 (2d Cir. 2009); *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 314 (S.D.N.Y. 2003); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000); *see* also Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 258 (2d Cir. 2008); Bigio v. Coca-Cola Co., 239 F.3d 440, 447 (2d Cir. 2000); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103-04 (2d Cir. 2000); *Kadic*, 70 F.3d at 236.

182 *Abdullahi*, 562 F.3d at 187; *Agent Orange*, 373 F. Supp. 2d at 58; *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 314; *Unocal Corp.*, 110 F. Supp. 2d at 1303; *see also Khulumani*, 504 F.3d at 258; *Bigio*, 239 F.3d at 447; *Wiwa*, 226 F.3d at 103-04; *Kadic*, 70 F.3d at 236.

183 *Romero*, 552 F.3d at 1315.

184 *Kiobel*, 621 F.3d at 150.

international law.[185] This is as opposed to whether the conduct in question constitutes a breach of international law when perpetrated by a certain actor. The second is to make a determination as to whether liability for the defendant has become universally recognized, so as to become a specific, universal, and obligatory norm of international law.[186] The court relied almost exclusively on the Supreme Court's holding in *Sosa,* and more specifically on footnote 20 when making the first determination.[187] The language that the court used, maintaining that the Supreme Court essentially commands that footnote 20 be employed in the manner in which the court utilizes it, and generally the weight the majority accords a one-sentence piece of dicta tucked away in a footnote is a little alarming and greatly detracts from their argument.[188] The majority's assertion that the previous holdings of the court also followed this rule is also disingenuous, since the previous decisions involved whether conduct constituted a breach of international law when committed by type of actor and not whether those actors were capable of being liable for violating international law.[189]

At any rate, the interpretations of both the majority and the concurrence concerning the first portion of the opinion are nothing new. Each side sees what it wants to see, with corporate defendant's siding with the majority and plaintiff's siding with the concurrence.[190] The only difference heretofore was that courts had largely discounted the corporate interpretation and equated corporations to natural persons.[191] Judge Leval's interpretation is more than likely the one that Justice Souter intended to make. The most obvious reason is that the end of footnote 20 instructs courts to "[c]ompare *Tel-Oren*. . . (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic*. . . (sufficient consensus in 1995 that genocide by private actors violates international law)."[192] If read in its entirety, nothing in the footnote says anything about whether some entities can be held liable for violations of international law while others may not. It simply implies that a distinction be made between conduct that is only a violation of international law when committed by a state actor as opposed to non-state actors, "such as a corporation or individuals."[193]

Another oft cited reason that would suggest Judge Leval's interpretation is correct revolves around the nature of the ATS. The ATS is a hybrid statue that deals with both international law and private U.S. tort law. In order to maintain

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185 *Id.* at 125.

186 *Id.* at 131.

187 *Id.* at 127.

188 *Id.* ("[t]he Supreme Court instructed . . . [t]hat language requires . . .").

189 *Id.* at 128; *see Filartiga,* 630 F.2d at 889; *see Kadic,* 70 F.3d at 239-41; *see Tel-Oren,* 726 F.2d at 791-95.

190 Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer,* 8 J. INT'L CRIM. JUST. 745, 751 (2010).

191 *Id.*; *see Abdullahi,* 562 F.3d at 187; *Agent Orange,* 373 F. Supp. 2d at 58; *Presbyterian Church of Sudan,* 244 F. Supp. 2d at 314; *Unocal Corp.,* 110 F. Supp. 2d at 1303; *see also Khulumani,* 504 F.3d at 258; *Bigio,* 239 F.3d at 447; *Wiwa,* 226 F.3d at 103-04; *Kadic,* 70 F.3d at 378.

192 *Sosa,* 542 U.S. at 732 n.20.

193 *Id.*

an ATS claim an alien must sue in tort for a violation of international law.[194] So even though the determination of a violation is governed by international law, outside of the alien requirement, the determination of who may file suit is governed by domestic law, which allows suits against corporations.[195] Judge Leval addresses this point, by asserting that international law predominantly leaves questions of prosecution and/or civil liability up to each individual nation.[196]

Lastly, something not addressed by the court, but not unknown to those familiar with the inner workings of the Supreme Court, is the fact that the very nature of the Court would lend credence to the argument that footnote 20 was not meant to infer that corporations are to be treated differently than natural persons.[197] *Sosa* did not raise the question of corporate liability under the ATS and, therefore, it is almost unfathomable to believe that the Court would answer a question of such importance, which was not addressed, on a whim, and in a one-sentence footnote.[198]

Ultimately, the question will only be answered definitively when either enough circuits weigh in on the issue, or the Supreme Court sees fit to clarify what it meant in footnote 20. The majority's interpretation of footnote 20, however, does not foreclose the possibility of finding corporations liable for violations of international law. It merely points courts to international law for the answer. This leads to the second portion of the court's opinion and its determination that corporations cannot be liable for violations of international law.[199]

B. Corporate Liability for Violations of the Law of Nations

The majority essentially argues that because no corporation has ever been held criminally liable for a violation of international law, no corporation can be held liable for such a violation.[200] Judge Leval correctly attacks this proposition as "illogical, misguided, and based on misunderstandings of precedent."[201] As touched upon briefly by Judge Leval, international law is not concerned with parties, or liability, or even a ready forum to prosecute crimes.[202] It is concerned with obligations and prohibitions on certain types of conduct, such as genocide, war crimes, and slavery.[203] The fact that a corporation has never been tried for a

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194 28 U.S.C. § 1350 (2010).

195 KOEBELE, *supra* note 31, at 209.

196 Kiobel, 621 F.3d at 175.

197 *See generally* Hormel v. Helvering, 312 U.S. 552, 556 (1941) (holding that the Court generally does not address issues not before it).

198 *Id.*

199 *Kiobel,* 621 F.3d at 131.

200 *See* discussion *supra* Part II.A.2.

201 *Kiobel,* 621 F.3d at 151.

202 *Id.* at 157.

203 Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility,* 111 YALE L.J. 443, 476 (2001); Volker Nerlich, *Core Crimes and Transnational Business Corporations,* 8 J. INT'L CRIM. JUST. 895, 899 (2010); Andrei Mamolea, *The Future of Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap,* 51 SANTA CLARA L. REV. 79, 94-95 (2010).

criminal violation of international law has nothing to do with whether it is capable of violating international law and/or can be found liable for such violations.[204]

The majority, however, emphasizes that "no international tribunal. . .has *ever* held a corporation liable for a violation of the law of nations."[205] The central focus for this argument, and really the only definitive source that the majority relies on, are the Nuremberg Tribunals.[206] The majority held that "[t]he refusal of the military tribunal at Nuremburg to impose liability on I.G. Farben is not a matter of happenstance or oversight."[207] However, a historical investigation conducted by Jonathon A. Bush, which is conspicuously absent from the majority's analysis, essentially trounces this argument.[208] Bush's investigation sheds light on the backdrop of the Nuremberg Tribunals and makes it clear that criminally prosecuting German businesses, such as I.G. Farben, Krupp, and Flick, for war crimes was seriously considered.[209] The idea of dissolving German corporations for their crimes and implementing reparations was "[h]igh on the list of various options" considered by the Allies.[210] It is also clear that Control Council Law No. 10 did not place any bar on charging corporations for violations of international law as the majority contended.[211]

Ultimately, the rationale for not criminally prosecuting German corporations rested solely on prudential considerations and not any prohibition or rejection of the possibility as the majority argued.[212] Post-war Germany was in shambles. Allied bombing had destroyed most of Germany's industry; famine was rampant; and with the war over, the Soviet threat was looming.[213] There was a very real need to rebuild and mobilize the German economy as quickly as possible. Additionally, companies like I.G. Farben were huge cartels of enormous proportions, with tentacles encircling the globe, and entire economies dependent upon them.[214] This was the first instance where the argument "too big to fail" surfaced. The problems within Germany coupled with what dissolving/severely penalizing these corporations could do to the global economy were sufficient motivation for the Allies to forego corporate prosecution.[215] The after-effects of the war guilt clauses from the Treaty of Versailles were also not lost on the

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[204] Ratner, *supra* note 203, at 476; Nerlich, *supra* note 203, at 899; Mamolea, *supra* note 203, at 94-95.

[205] *Kiobel*, 621 F.3d at 132.

[206] *Id.*

[207] *Id.* at 134.

[208] Jonathon A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1096-1100 (2009).

[209] *Id.* at 1118.

[210] *Id.* at 1119.

[211] *Id.* at 1151.

[212] *Id.* 1117-24.

[213] *Id.*

[214] *Id.* at 1117-18.

[215] *Id.* at 1117-24.

Allies, and while there was a desire to punish the Germans, nobody wanted a repeat of the war the world had just suffered through.[216] Nuremberg may have revolutionized international law by holding private individuals liable for violations of international law for the first time, but what it did not do was foreclose on the idea of corporate liability.

If anything, Nuremberg stands for the opposite proposition when the record is examined in total, especially the *Farben* case. Despite the majority's assertions to the contrary, Farben was definitely present in the court room and very much on trial.[217] All 23 Farben defendants were not only charged individually, but also as "acting through the instrumentality of Farben."[218] Farben even had corporate counsel present in the courtroom throughout the proceedings and was allowed to give a closing statement on the corporation's behalf.[219] Whether Farben was ever directly charged or not is not dispositive of the fact that the corporation was most certainly brought to trial along with its 23 employees.

A related concern that the majority also takes from Nuremberg as a reason to not prosecute corporations, is the fact that the moral responsibility for crimes rests with men and not the vehicles they use to commit them.[220] Judge Leval explains away this fact by stating that the nature of criminal law and its focus on punishment is ill equipped to handle juridical entities.[221] Neither of these arguments is worth making; the court is comparing apples to oranges. Even though corporations may be juristic persons, the fact remains that they are not persons. A corporation is an "it" and cannot have intent. This does not mean, however, that corporations cannot commit crimes against international law or that punishing them for these crimes may not be beneficial. States also cannot have intent, since they are also abstract entities, but no one would argue that they cannot be held liable for violations of international law.[222]

Professor Ratner specifically addresses these issues in his essay *Corporations and Human Rights: A Theory of Legal Responsibility*.[223] A large portion of his work is dedicated to the fact that corporations do not fit neatly into either category of rules, those governing states or those governing individuals.[224] His proposed solution was to blend certain aspects of each category together creating a hybrid set of rules to govern corporations. For instance, to hold an individual criminally liable there is a *mens rea* requirement, which is obviously too strin-

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216 *Id.* at 1119.

217 *Id.* at 1224.

218 *Id.*

219 *Id.*

220 Throughout its opinion, the court in *Kiobel* takes several quotations from the IMT out of context and this is no exception. 621 F.3d at 119. See Mamolea, *supra* note 203 at 100-11 to view these various quotes in context.

221 *See* discussion *supra* notes 140-43 and accompanying text.

222 Ratner, *supra* note 203, at 522 (states are not considered to be "liable," but the actions are attributed to them).

223 *Id.* at 492-96, 518-24.

224 *Id.* at 492-96.

gent and an impractical requirement when dealing with a corporation.[225] On the other hand, when dealing with states there is no intent requirement and the violations are merely attributed to the state.[226] Again, this requirement would be too onerous to place on a corporation. Professor Ratner advocates using a duty of care standard, whereby, if a corporation could show that it used due diligence to prevent violations of international law it could absolve itself of any wrong doing.[227] Thus, intent is not necessary to find a corporation liable for a violation of international law.

While Professor Ratner was speaking theoretically of what could or should be, courts should not be constrained by the fact that it has yet to happen in the international arena. As Judge Leval points out again and again, maintaining such a dogmatic and overly formalistic view of international criminal liability frustrates the objectives of international law and creates unjust results.[228] As has already been shown, international law is not concerned with parties; it is only concerned with obligations. And some obligations, described as core crimes, such as prohibitions on genocide, war crimes, and slavery, are imposed on everyone. The mere fact that corporations have yet to be prosecuted for violations of these core crimes on the international stage is irrelevant.

This closely tracks another argument that has been raised several times, most recently by Judge Leval, but also by other courts and several commentators. It can be termed the "why not" argument.[229] There is no compelling reason not to hold corporations liable for their violations of international law. If individuals are held liable for violations and states are held liable for violations, then why should the law grant corporations a free pass? While corporate officers and directors may indirectly benefit from corporate violations, such as when profit margins increase from the use of slave labor, it is the corporation itself that is deriving benefit from the violation. So, why should a corporation not disgorge its profits and pay them as damages to the people that it has wronged? In a recent article, Professor Ku argues that the main policy reason for not holding corporations liable for violations of international law is because it is too difficult to determine when criminal acts should be attributed to a corporation and when they should not.[230] This argument seems hardly worth making. Just because it would be a lengthy and somewhat difficult process, to do as Professor Ratner advocates, and create a third standard which would apply to corporations, is no reason not to impose liability for corporate crimes against international law. International law is not concerned with "victimless" white collar crimes that may

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225 *Id.* at 522-23.

226 *Id.*

227 *Id.* at 523-24.

228 *See* discussion *supra* Part III.B.

229 *Kiobel*, 621 F.3d at 160; *Agent Orange*, 373 F. Supp. 2d at 54, 59; Ratner, *supra* note 203, at 461; Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 264 (2004); *see also* Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 802 (2002).

230 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, 387 (2010).

not warrant the effort it would take to effectively prosecute, but the most heinous crimes possible. These are crimes that make all who commit them *hostis humani generis*, an enemy of all mankind. Unless a better argument against the imposition of liability against corporations can be made, U.S. courts are hardly justified in failing to impose liability because it would be an arduous task.

V. Impact

If allowed to stand, *Kiobel* will have a tremendous impact on the future of ATS litigation concerning corporate defendants. The Second Circuit has traditionally been at the forefront of ATS litigation with a majority of courts following its precedents and the *Kiobel* decision continues that practice. The decision has already had a negative impact on ATS plaintiffs complaining of human rights violations, child labor, and environmental contamination, within the Second Circuit and at least two other cases within the Seventh Circuit have also adopted the rationale from *Kiobel*.[231]

There is, however, a chance that the holding may be overturned. The Plaintiffs in *Kiobel* filed for an *en banc* review by the Second Circuit, which was subsequently denied.[232] As the case was allowed to stand, it will more than likely make its way to the Supreme Court. There is arguably a circuit split between the Second and Eleventh Circuits concerning corporate liability.[233] Additionally, there is an important legal question that as of yet has been unanswered by the Court: whether corporations can be liable for violations of international law? It is always difficult to predict how the justices on the Court will vote, but it seems like there will be some substantial resistance to overturning the Second Circuit's decision. Justices Scalia and Thomas made no secret of the fact that they would strip courts of their ability to create new causes of action under the ATS in their concurrence in *Sosa*.[234] As has already been discussed, this was because in their combined opinion, *Erie* stripped Federal Courts of their ability to create common law with its proclamation that "[t]here is no federal general common law."[235] The Justices also implied that courts could not be entrusted with the creation of new causes of action because: first, they did not have the wherewithal to predict or deal with the possible far reaching implications; and second,

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231 *See* Mastafa v. Chevron Corp., No. 10 Civ 5646(JSR), 2010 WL 4967827 at *3 (S.D.N.Y. 2010) (dismissing plaintiffs' complaint alleging Chevron had aided Sadam Hussein commit human rights abuses because corporations cannot be liable for violations of international law); *see* Aziz v. Alcolac Inc., 2009 cv 00869, *appeal docketed*, No. 10-1908 (4th Cir. Dec. 8, 2010) (requesting dismissal on the grounds that corporations cannot be liable for violations of international law under the ATS); Flomo v. Firestone Natural Rubber Co., 744 F. Supp. 2d 810, 818 (S.D. Ind. 2010) (dismissing Liberian children's claims of child labor, holding that corporate liability is not a rule of customary international law); Viera v. Eli Lilly & Co., 1:09-cv-0495-RLY-DML, 2010 WL 3893791 at *5 (S.D. Ind. Sept. 30, 2010) (dismissing Brazilian residents' claims of environmental contamination because ATS action may not be maintained against corporate defendant).

232 *See* Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010), *pet. reh'g denied*, 2011 WL 338048 (2d Cir. Feb. 4, 2011).

233 *See* discussion *supra* notes 75, 81, 183.

234 *See Sosa*, 542 U.S. at 739-42.

235 *Id.* at 741 (citing *Erie*, 304 U.S. at 78).

the power to create new causes of action intruded on the purview of the "political branches."[236] It would be well within the realm of possibility for Chief Justice Roberts and Justice Alito to join them in a drive to limit the scope of the ATS. However, Justices Breyer, Ginsburg, and Kennedy were all in favor of ensuring the continued relevance of the ATS in *Sosa* and remain on the Court along with two new Obama appointees, Justices Kagan and Sotomayor.[237]

It should also be noted that all the justices on the Court cautioned restraint when recognizing new causes of action, and while this may not be a new cause of action per se, allowing corporations to be held liable for violations of international law could have far reaching collateral consequences.[238] The continued practice of U.S. courts extraterritorially applying the ATS does not resonate well with most nations. Several nations, along with foreign treaty and trade-based organizations, have continually protested application of the ATS to foreign corporations.[239] In their estimation, the ATS is not a force for good in the world allowing victims of heinous crimes to obtain some limited form of redress, but rather the U.S. violating customary norms of international law by impinging on the sovereignty of other nations with what has been termed its "International Civil Court."[240] The United States has also not gone to any great lengths to ingratiate itself to the world community by refusing to become a member of the International Criminal Court and vociferously arguing against foreign court's jurisdiction over U.S. officials.[241] Outcry in the international community has thus far gone unnoticed, but the diplomatic and political consequences associated with the application of the ATS to corporations may be the catalyst these groups need to be heard.

VI. Conclusion

The majority's holding in *Kiobel* substantially misconstrues general tenants of international law and twists prior precedents to conform to its conclusions. Holding corporations liable for violations of international law may well be outside the scope of the original impetus for the passage of the ATS, but to quote Judge Weinstein, "[l]imiting civil liability to individuals while exonerating. . .corporation[s]. . .makes little sense in today's world."[242]

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[236] *Id.* at 746-48.

[237] *See id.* at 695, 751.

[238] *Id.* at 725-28.

[239] *See* John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Aboard: The Alien Tort Statute and other Approaches,* 42 VAND. J. TRANSNAT'L L. 1, 8-13 (2009); *see* Brief of European Commission as Amicus Curiae in Support of Neither Party at 4-5, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339); *see* Brief of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner at 6, *Sosa*, 542 U.S. 692 (No. 03-339).

[240] Bellinger, *supra* note 239, at 8-9.

[241] *Id.*

[242] *Agent Orange,* 373 F. Supp. 2d at 58.