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Corporate Liability Under the Alien Tort Statute: Can Corporations Have Their Cake and Eat It Too?

Alison Bensimon[†]

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I. Introduction

The Alien Tort Statute ("ATS"), often referred to as the Alien Tort Claims Act, an old but relatively unknown law, in its entirety consists of the following passage:

> "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the *laws of nations* or a treaty of the United States."[1]

The ATS, enacted as part of the first United State's Judiciary Act in 1789,[2] has obtained new life after laying dormant for almost two hundred years—becoming the subject of heated debate following a 1978 Paraguayan lawsuit that accused a former Paraguayan official of torture.[3] Subsequently, hundreds of plaintiffs filed

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1 28 U.S.C. §1350 (2012) (emphasis added).

2 Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 459 (2011).

3 Jonathan C. Drimmer, *Is Second Circuit Ruling a "Talisman" Against Alien Tort Statute Suits?*, Legal Backgrounder, Feb. 12, 2001 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that torture violated the law of nations as understood under the ATS and remanded the case to the district court for further proceedings consistent with its holding that federal jurisdiction existed for claims of torture under the ATS). This case involved Dr. Joel Filartiga and his daughter who brought a

under the ATS to seek redress for a variety of alleged human rights violations committed across the globe.[4] Today, the ATS represents the primary tool for United States courts to consider international norms and human rights violations against nation-states, state actors, private individuals, and corporations that are actually, or allegedly accused of violating international law.[5]

The ATS is a powerful tool as it permits alien plaintiffs to sue foreign defendants in United State courts for violations of international laws committed abroad.[6] The ATS has evolved into a final option for victims seeking civil remedies.[7] Consequently, the ATS is rapidly growing as a risk for multi-national corporations.[8] *Kiobel v. Royal Dutch Petroleum*[9]—the most recent case involving the ATS and the second case to reach the Supreme Court of the United States—represents an opportunity for foreign plaintiffs to obtain a legal victory against corporate America.[10] In February 2012, the Court heard oral arguments on whether corporations can be sued under the ATS for human rights violations, but

suit against America Norberto Pena-Irala, the Inspector General of Police in Asuncion, Paraguay, for wrongfully torturing and killing Filartiga's son, Joelito, in retaliation for Filartiga's political opposition. *Id.*

[4] *Id.*

[5] Donald J. Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 104 (2005).

[6] Ron A. Ghatan, *The Alien Tort Statute and Prudential Exhaustion*, 96 CORNELL L. REV. 1273, 1273 (2011).

[7] Michael Bobelian, *Supreme Court Eyes Scope Of Controversial Alien Tort Statute*, FORBES (Mar. 23, 2012, 12:16 P.M.), http://www.forbes.com/sites/michaelbobelian/2012/03/23/supreme-court-eyes-scope-of-controversial-alien-tort-statute/2/; *see also* Ghatan, *supra* note 6, at 1297 (explaining the benefits of the ATS). The three major benefits include:

> *First*. . .ATS suits can promote accountability and provide a public voice to victims of terrible human rights abuses when no other forum is available. . . *Second*, is that ATS litigation may help to raise public and political awareness of human rights abuses that might not gain attention otherwise. . . *Third*, ATS litigation might advance U.S. participation in the development of customary international law.

Id.

[8] *Id.*

[9] *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 117 (2d Cir. 2010) (Twelve Nigerian plaintiffs are accusing three foreign oil companies—incorporated in the Netherlands, Britain, and Nigeria—affiliated with Shell—whose footprints are in the United States—of providing resources to the Nigerian government to torture, murder, and conduct other human rights violations); *see* Bobelian, *supra* note 7 (providing a historical background of Shell and its connection with Nigeria). This article explains that:

> Shell dug its first oil wells in Texas in 1953 and has extracted oil from the Gulf of Mexico for half a century. The company's American operations accounted for fifteen percent of its global oil and gas production last year. According to its 2011 [a]nnual [r]eport, the oil giant had 20,000 employees and generated $91 billion in revenue (nearly twenty percent of its global sales) in the United States; one-fifth of its assets were based in this country. This nation also saw the highest capital expenditures by Shell over the past three years and was the company's leading source of natural gas, followed by Malaysia and Nigeria. The connections between the United States and Nigerian oil were equally substantial. Nigeria was the fifth largest exporter of crude oil to the United States in 2011: fourth largest in 2010. And Shell brought a significant percentage of that Nigerian oil here. It's not difficult to figure out why: Nigeria represented Shell's largest source of crude oil and natural gas liquids production last year.

Id.

[10] Michael Bobelian, *Supreme Court Revisits Corporate Liability For Human Rights Violations*, FORBES (Sept. 28, 2012, 2:07 P.M.), http://www.forbes.com/sites/michaelbobelian/2012/09/28/supreme-court-revisits-corporate-liability-for-human-rights-violations/.

did not issue a ruling and asked the parties to analyze whether the ATS has extraterritorial application—in other words, "[s]hould the law apply to acts committed abroad, regardless of who committed them?"[11]

This comment analyzes the crux of *Kiobel*: (1) whether ATS applies to corporations and; (2) whether the ATS applies to human rights violations overseas.[12] This comment will focus on the ATS and corporate liability, specifically the reach of the ATS under *Kiobel* and whether corporations can be held accountable for human rights violations under the ATS. Part II traces the ATS's background by outlining its history, precedents, and evolution within the international context.[13] And, Part III considers aiding and abetting and corporate liability through the analysis of *Doe I. v. Unocal Corp.*, *Sosa v. Alvarez-Machain*, and the "law of nations."[14]

After providing a factual description of *Kiobel*, Part IV follows *Kiobel*'s historical and procedural background and analyzes the majority's opinion, specifically how the opinion's creation of a corporate exception is contrary to the purpose of the ATS and international law. Lastly, Part IV will focus on the policy concerning corporate liability under the ATS.[15] Then, Part V asserts that the Court has two options when faced with both the immediate and larger questions and outlines the reasons *Kiobel* should be overturned. Part V also recommends various tactics that foreign plaintiffs should use as an alternative in seeking remedy.[16] Finally, Part VI concludes that corporations should be found liable for violating human rights abroad, and that the Court should overturn *Kiobel*.[17]

II. Background

A. History of the Alien Tort Statute

Although Congress passed the ATS as part of the Judiciary Act of 1789, the ATS remained untouched for nearly two hundred years.[18] The ATS allows aliens to seek redress in United States courts for injuries caused by acts in violation of

[11] *Id.*

[12] Care2 Causes Editors, *Esther Kiobel Gets Her Day at the Supreme Court*, CARE2 (Oct. 13, 2012 1:00 P.M.), http://www.care2.com/causes/esther-kiobel-gets-her-day-at-the-supreme-court.html.

[13] *See infra* Part II (tracing the ATS's background—its history, precedents, and evolution—within the international scope).

[14] *See infra* Part III (discussing the considerations of aiding and abetting and corporate liability under *Unocal* and analyzing *Sosa* and the "law of nations").

[15] *See infra* Part IV (providing the factual, historical, and procedural background of *Kiobel*, analyzing its majority opinion and its shortcomings and flaws, bringing to light specific problems raised by the failure of the *Kiobel* reasoning and the allowance of ATS corporate cases, explaining how *Kiobel*'s majority opinion is contrary to the purposes of the ATS and international law—making it an outlier—and focusing on the policy concerning corporate liability under the ATS).

[16] *See infra* Part V (arguing that the Court has two options when faced with the immediate questions in *Kiobel*, arguing why the Court should overturn *Kiobel*, and looking forward in recommending useful tactics).

[17] *See infra* Part VI (concluding that the Court should overturn the *Kiobel* decision and find for corporate liability when violating human rights abroad).

[18] Ghatan, *supra* note 6, at 1275.

human rights outside the territory of the United Sates.[19] History shows that while foreign plaintiffs rarely invoked the ATS in the past, precedent demonstrates that in 1980, nearly two centuries after the ATS became law, the Second Circuit's influential decision in *Filartiga v. Peña-Irala*[20] revived the statute.[21] Subsequently, in *Doe I v. Unocal Corp.*,[22] the Ninth Circuit held that the foreign plaintiffs could bring claims of forced labor, rape, and murder under the ATS against the defendant, Unocal, thereby holding that a corporate defendant could be held liable for aiding and abetting under the ATS.[23] Although the Ninth Circuit granted *en banc* review, the *en banc* panel never heard the case because the parties agreed to settle, dismissing all claims.[24]

In 2010, the Second Circuit held in *Kiobel* that corporations—but, not individuals such as corporate employees, managers, officers, or directors—are exempt from liability under the ATS.[25] In holding that customary international law does not recognize corporate liability, the *Kiobel* decision has become an outlier in international law.[26]

United States courts generally allow foreign plaintiffs to bring only a limited number of claims under the ATS, resulting in the dismissal of most ATS complaints.[27] The claims that courts tend to allow under the ATS include genocide, torture, summary execution, disappearance, war crimes, crimes against humanity, slavery, arbitrary detention, and cruel, inhuman, or degrading treatment.[28] Because the ATS only reemerged in recent years, courts are slowly determining its modern meaning, while acknowledging that because every case brought under the ATS includes accusations against foreign corporations, individuals acting in another country, or foreign states themselves, they involve questions of foreign relations.[29] District courts face difficulties in assuming the role of arbitrators in

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19 Matthew E. Danforth, *Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations*, 44 Cornell Int'l L.J. 660, 662-63 (2011).

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

21 Danforth, *supra* note 19, at 663.

22 *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

23 Ghatan, *supra* note 6, at 1276.

24 *Id.*; Anthony J. Sebok, *Unocal Announces It Will Settle A Human Rights Suit: What Is The Real Story Behind Its Decision?*, FindLaw.com (Jan. 10, 2005), http://writ.news.findlaw.com/sebok/20050110.html (stating that "[m]any commentators argued that the risks to Unocal of bad publicity arising from the testimony of the villagers were so high that a settlement made better sense from an economic point of view," but explaining this is not necessarily indicative of Unocal's guilt or who caved in settlement agreements first).

25 Ghatan, *supra* note 6, at 1276.

26 *See infra* Part IV.D (analyzing the shortcomings and flaws raised by the *Kiobel* reasoning, specifically explaining how *Kiobel*'s majority opinion is contrary to the purposes of the ATS and international law—making it an outlier).

27 Ghatan, *supra* note 6, at 1277.

28 *Id.*

29 *Id.*

determining what constitutes a violation of the "law of nations"[30] and discerning modes of conduct that fall under the evolving concept of the "law of nations."[31]

B. ATS Precedents in Developing General Standards and the Evolution of the Evolution of the ATS in the International Context

While the district court in *Filartiga* initially dismissed the claims for a lack of subject matter jurisdiction, the Second Circuit reversed and held that individuals who committed tortious acts under official authority clearly constituted a violation of the laws of nations.[32] In its decision, the Second Circuit looked to sources from which customary international law is derived, specifically to the usage of nations, judicial opinions, and the work of jurists, allowing the Second Circuit to hold that the district court had subject matter jurisdiction under the ATS to hear the plaintiffs' action.[33]

Since *Filartiga*, the Supreme Court has only heard two cases implicating the ATS: *Sosa*[34] and *Kiobel*.[35] Until *Sosa* in 2004, neither the Court nor Congress provided useful guidance for the lower courts in regards to the application of the

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[30] *Id.* at 1278; *see Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding that the United States Drug Enforcement Agency (DEA) did not have authority to kidnap a Mexican national for a crime under the ATS because he fit the "foreign country" exception to waive the government's immunity). The case involved a Mexican national, allegedly murdering a DEA agent, who brought a claim against the DEA under the ATS for allegedly violating his civil rights by kidnapping him in Mexico and bringing him to trial in the United States for the murder of the DEA agent. *Id.*

[31] Ghatan, *supra* note 6, at 1278; *see* Danforth, *supra* note 19, at 663 (giving a "law of nations" definition). The law of nations is defined as:

> Historical sources, like Blackstone's Treatises, provide an insight as to what this term meant at the time of the First Judicial Act. Blackstone defines the law of nations as: 'a system of rules. . .established by universal consent among the civilized inhabitance of the world; in order to decide all disputes which. . .must frequently occur between two or more independent actions, and the individuals belonging to each.' For Blackstone, three primary offenses constitute violations of the law of nations: violation of safe conduct, interference with ambassadors, and piracy on the high seas.

Id.

[32] Danforth, *supra* note 19, at 664.

[33] *Id.*

[34] *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (the first United States Supreme Court case involving the ATS where the court was tasked with deciding whether: 1) the [ATS] allows private individuals to bring suits against foreign citizens for cimmitting a crime abroad that violated the law of nations or trieaties of the United States; and 2) a private individual can bring suit under the Federal Tort Claims Act for an arbitrary arrest that was planned in the United Sates but implemented in a foreign country).

[35] *See* Danforth, *supra* note 19, at 664 (discussing the reasons why the singularity in *Sosa* makes it an important case). The "Standards" set by the Court are as follows:

> [*First*], the Supreme Court determined that the ATS was a jurisdictional grant and did not create a new cause of action. [*Second*], the Court applied the standard of 'specific, universal, and obligatory' in its consideration of alleged violations of the law of nations to limit jurisdiction to a narrow category. The Court held that the plaintiff's 'illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violate[d] no norm of customary international law so well defined as to support the creation of a federal remedy.' [*Finally*], the Supreme Court instructed lower courts to consider whether international law extends the scope of liability for a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.

Id.

ATS, leaving the ATS inaccessible, unused, and largely unknown.[36] But, since that decision, there has been an expansion in ATS cases.[37]

III. Discussion

A. A Consideration of Corporate Liability for Aiding and Abetting in *Doe I v. Unocal Corp.*

Following the standards established in *Sosa*, the Second Circuit determined that aiding and abetting human rights violations is a violation of the law of nations and an actor need not be the principal perpetrator to be liable under the ATS.[38] In *Kulumani v. Barclay Nat'l Bank Ltd.*, the Second Circuit considered state practice[39] in holding that individuals who aid and abet are in violation of international law.[40] The Second Circuit also looked to treaties and statutes that create international tribunals and found the concept of criminal aiding and abetting to be a customary and "well-established practice in international law."[41]

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[36] *See* Kochan, *supra* note 5, at 105-6 (providing an anlysis of the evoluation of the ATS).

[37] *Id.* at 106, 110 (outlining an expansion in ATS cases). This expansion included:

> (1) [ATS's] disuse and dormancy; (2) acceptance of liability under the ATS for official state acts, including its recognition as a statute providing both jurisdiction and a cause of action and liability evidenced by noncompliance with customary international law outputs; (3) the movement toward an acceptance that quasi-state, and, indeed, private individuals, could be liable for violations of customary international law; (4) the ATS jurisdiction, involv[ing] suits against private individuals and corporations; and (5) the first guidance from the U.S. Supreme Court, [which makes] the idea of expansive evolution and predictions for the future of the ATS evolution remain a bit indeterminate.

Id. at 107. The article also outlines the evolution of the ATS litigation:

> [T]he evolution of ATS litigation began in 1980 when the ATS was raised from dormancy [with *Filartiga*], and a federal appeals court found that suits based on customary international law for human rights abuses could be entertained under the ATS.

Id. at 103. The cases expanded most notably again in 1995 [with the Kadic v. Karadzic, 70 F.3d 232 (2d. Cir. 1995) decision where the Second Circuit held that the ATS applies to actions by state actors or even private individuals that are in violation of the most egregious portions of law identified as customary international law. According to Kadic, state action is not necessary for a recognizable violation of the law of nations to exist. The court expanded upon the principles it enunciated in Filartiga, noting that international law is consistently evolving. *Id.* Also noting the expansion in litigation as having:

> [e]volved further in 1997 [with *Unocal*] when a federal district court held that a private corporation was subject to ATS jurisdiction for alleged human rights abuses abroad. Since then, dozens of lawsuits against private actors—principally corporations—have been filed. Since the U.S. Supreme Court finally addressed the ATS in part in 2004, the continued evolution and the form that the evolution will take is now in flux awaiting future applications in light of the Supreme Court's limited guidance provided by its interpretation of the ATS in *Sosa v. Alvarez-Machain*.

Id.

[38] Danforth, *supra* note 19, at 664-65.

[39] *See id.* (citing *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007)).

[40] *Id.*

[41] *Id.* (citing *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring)). This sets forth the standard:

> A defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.

Id. at 277 (Hall, J., concurring). In determining this standard, Judge Katzmann looked to international law to determine whether the scope of liability for a violation of international law should extend to aiders and abettors. *Id.* at 269. Also citing Judge Hall's concurrence, which noted that: "[I]nternational law does

While *Khulamani* recognized aiding and abetting as a liability-creating offense, *Unocal* is the landmark case for finding corporate liability.[42] In *Unocal*, the Ninth Circuit hesitated from directly holding Unocal liable due to a factual question, but it recognized the possibility that corporations could be held liable under the ATS.[43] The court reasoned that as long as the defendant Unocal met the Standards established in *Sosa* for aiding and abetting, this defendant may be liable under the ATS for aiding and abetting in international human rights violations.[44]

Following *Unocal*, claims against corporations substantially increased, but it was not until *Kiobel* that these claims received great attention.[45] *Presbyterian Church of Sudan v. Talisman Energy*, in preceding *Kiobel*, laid the foundation for corporate liability, but declined to rule on the issue.[46] The *Talisman* court laid the groundwork for the recognition of ATS corporate liability for the *Kiobel* appeal when it held that in order for a court to find a corporation liable of aiding and abetting under international law, the defendant must meet the necessary *mens* rea, requiring the defendant to act with purpose.[47] Other circuits, including the Ninth Circuit and the Eleventh Circuit—both popular venues for corporate ATS lawsuits—directly disagreed with the *Talisman* ruling but, concurred with the idea that courts can find aiding and abetting liability under international law where the defendants are aware that their conduct will facilitate a harm without a showing of purpose or intent.[48]

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not specify the 'means of its domestic enforcement.'" *Id.* at 286 (Hall, J., concurring) (quoting the Brief for the International Law Scholars as Amici Curiae at 5-6). Also concluding that: "The combination of these two opinions—that liability should extend to aiding and abetting and that nations have the freedom to determine how to treat violators— intimates that corporate entities can violate the law of nations and be held liable under the ATS." Danforth, *supra* note 19, at 665.

[42] Danforth, *supra* note 19, at 666; *see also Doe I v. Unocal Corp.*, 395 F.3d 932, 956 (9th Cir. 2002). The country of Burma was renamed Myanmar in 1989 after the military government took power and provided the Burmese government with funding for forced labor from which Unocal benefited. *Unocal*, 395 F.3d at 937. The renaming, however, remains a contested issue and those groups in opposition continue to use the name "Burma." While the U.S., Australia, Canada and the U.K. use "Burma," the United Nations uses "Myanmar" (quoting "One threshold question in *any* ATCA case is whether the alleged tort is a violation of the law of nations. We have recognized that torture, murder, and slavery are . . . violations of the law of nations."). *Unocal*, 395 F.3d at 945. The court also identified that forced labor was a modern day form of slavery. *Unocal*, 395 F.3d at 946. The Ninth Circuit reheard the case in 2003 and vacated its previous holding. *John Doe I v. Unocal Corp.*, 403 F.3d 708, 708 (9th Cir. 2005). Nevertheless, *Unocal* eventually decided to settle the case. *See Sebok*, *supra* note 24, at 2 (stating that "many commentators. . .argued that the risks to Unocal of bad publicity arising from the testimony of the villagers were so high that a settlement made better sense from an economic point of view," but explaining this is not necessarily indicative of Unocal's guilt or who caved in settlement agreements first).

[43] Danforth, *supra* note 19, at 666.

[44] *Id.* (quoting *Unocal*, 395 F.3d at 947).

[45] *Id.*

[46] *Id.*; *see also Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 247 (2d Cir. 2009) ("Sudanese plaintiffs alleged that a corporation, Talisman, assisted the government in aiding and abetting human rights abuses.").

[47] *Id.*

[48] *See* Drimmer, *supra* note 3, at 468-69 n. 76-77 (listing a few cases where the courts have concluded that corporate defendants in ATS cases cannot be liable under the aiding and abetting theory); *see also* Kochan, *supra* note 5, at 117 (listing cases involving aiding and abetting or vicarious liability theories).

B. *Sosa v. Alvarez-Machain* and the "Law of Nations"

In 2004, the Court heard *Sosa*, its first ATS case, and sought to set limits on the claims plaintiffs could bring under the ATS.[49] The Court interpreted the ATS in the context of the intent of the drafters and the claims recognized under it in 1789.[50] The Court found that, "[w]hen Congress passed the [ATS] it only had, at most, three specific violations of the law of nations in mind: offenses against ambassadors, violations of safe conduct, and piracy."[51] Next, the Court considered the modern usage of the ATS, leading the majority to give five arguments in favor of its conclusion that in determining what claims a plaintiff is able to bring under the ATS, district courts should act with caution:

> First, the Court stated that the prevailing interpretation of the common law changed since the enactment of the ATS. Second, *Erie Railroad Co. v. Tompkins*[52] and its progeny have greatly limited the scope of federal common law. Third, the Court argued, it is best to leave the creation of private rights of action to the legislature. Fourth, ATS litigation can possibly affect U.S. foreign relations. The Court stressed that lower courts should be 'particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.' Fifth, the courts lack a congressional mandate to define violations of the law of nations.[53]

Despite its explicit reasoning, the Court failed to provide clear guidance in regards to what claims a foreign plaintiff can bring under the ATS.[54] Specifi-

[49] *See* Ghatan, *supra* note 6, at 1278 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004)); *see* Kochan, *supra* note 5, at 120-26 (further analyzing the *Sosa* decision); *see also* Drimmer, *supra* note 2, at 459. The courts:

> have construed the key relevant substantive term of the ATS—'violations of the law of nations'—to cover a limited class of alleged harms that are interpreted according to international law principles. Those principles include torture, extrajudicial killing, genocide, war crimes, crimes against humanity, forced labor, slave labor, child labor, human trafficking, forced disappearances, prolonged arbitrary detention or arrest, forced exile, rights of association (in the labor context), systematic racial discrimination and cruel, and inhuman or degrading treatment.

Id.

[50] Ghatan, *supra* note 6, at 1278 (citing Sosa v. Alvarez-Machain, 542 U.S. at 712-24).

[51] Sosa, 542 U.S. at 720.

[52] *Id.* (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)) ("Erie. . .was the watershed in which we denied the existence of any federal 'general' common law, which largely withdrew to havens of specialty.")); see Ghatan, supra note 6, at 1278 (discussing the Court's analysis of the ATS in context by turning its focus to the modern use of the ATS).

[53] Ghatan, supra note 6, at 1278-79 (citing Sosa v. Alvarez-Machain, 542 U.S. at 720-29).

[54] *Id.* at 1279 (citing Sosa v. Alvarez-Machain, 542 U.S. at 725-29):

> On the one hand, it determined that 'judicial power should be exercised on the understanding that the door [of the ATS] is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.' The term 'narrow class' provides the impression that the Court did not want the ATS to be a basis for claims of violations of any and all customary international laws. District courts are to act as doorkeepers, ensuring that certain claims cannot be brought under the ATS. On the other hand, instead of defining exactly what claims a plaintiff can bring, the Court provided a vague standard for district courts to use in fulfilling their doorkeeping function: '[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.'

cally, the Court's reasoning was notably silent about how to compare the present-day law of nations to the paradigms existing when Congress passed the ATS in the eighteenth century.[55] In other words, while stating that foreign plaintiffs can only bring a limited number of claims for violations of customary international laws under the ATS, the Court did not specify which particular claims comprised this narrow class.[56]

IV. Analysis

A. Facts Giving Rise to Kiobel v. Royal Dutch Petroleum

The Niger Delta region of Nigeria has a history of being plagued by poverty, human rights violations, and environmental disaster.[57] In the 1990s, the defendants in *Kiobel* started drilling for oil in Niger Delta.[58] In opposition to the oil drilling, the Ogoni people started a resistance against what the Ogoni people saw to be a reckless oil development in the region, which the Nigeria's military dictatorship violently suppressed.[59]

In *Kiobel*, the plaintiffs accused oil companies Royal Dutch Petroleum ("Royal Dutch") and Shell Transport and Trading Company PLC ("Shell"), through a subsidiary, SPDC, of helping the former dictatorship in crimes against humanity—including arresting, torturing, and summarily executing twelve falsely charged members of the Ogoni tribe, as well as other innocent Ogoni residents.[60] These crimes were allegedly perpetrated by the Nigerian government with the active collaboration of Royal Dutch and Shell in retaliation against the Ogoni tribe members for their attempt to peacefully disrupt SPDC's operations in protest of the devastating health and environmental effects of the unregulated oil drillings.[61] Esther Kiobel brought her claims under the ATS on behalf of her late husband, Barinem Kiobel, one of the twelve-tribe members who were tortured.[62] Barinem Kiobel was executed following a sham trial in which, the plaintiffs believed, SPDC played a central role.[63]

Kiobel reached the Court after a federal appeals court ruled, for the first time, that the ATS could not hold corporations liable for violating human rights

Id.

[55] *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. at 720).

[56] *Id.* (citing *Sosa v, Alvarez-Machain*, 542 U.S. at 720).

[57] Vincent Warren, *Supreme Court holds U.S. Rights Legacy in the Balance*, CNN.COM (Sept. 27, 2012), http://www.cnn.com/2012/09/27/opinion/warren-supreme-court-alien-tort-law/index.html.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*; Peter Weiss, *The Question Before the US Supreme Court in Kiobel v Shell*, GUARDIAN.CO.UK (Feb. 28, 2012), http://www.guardian.co.uk/commentisfree/cifamerica/2012/feb/28/question-before-supreme-court-kiobel-v-shell; *see* Bobelian, *supra* note 7; *see* Danforth, *supra* note 19, at 660-61 (giving a detailed description and analysis of the facts and rulings of *Kiobel*).

[62] Warren, *supra* note 57; *see* Weiss, *supra* note 61 (providing a factual analysis of *Kiobel*).

[63] Warren, *supra* note 57.

abroad.[64] The Court did not initially rule on the issue, but instead ordered the case to be re-argued on the question, "whether and under what circumstances [the ATS] applies to any human rights violations, and by individuals, that take place outside the United States," and not just on the application of the ATS to corporations.[65]

Kiobel has attracted great interest in the legal community with over twenty *amicus curiae* briefs submitted for the plaintiffs, including briefs by many human rights organizations and the United States government, and almost as many *amicus curiae* briefs on behalf of the defendants by multi-national corporations, trade associations, and the governments of both the United Kingdom and the Netherlands.[66] The *amicus curiae* briefs for the defendants argued that there was a lack of precedent holding that corporations can be sued under international law, and this dearth of support is proof that an international principle on which to base ATS claims is lacking.[67] In response, the victims pointed to the fact that German companies were broken up and dissolved by the Allies after the Second World War for their use of slave labor and other crimes, as evidence illuminating an international principle on which to base ATS claims.[68]

B. *Kiobel's* Historical and Procedural Background

The plaintiffs, former residents of the Ogoni Region of Nigeria, alleged that the corporate defendants—entities that are "juridical" persons rather than "natural persons"—aided and abetted the Nigerian government in committing human rights abuses.[69] The defendants, Royal Dutch and Shell, are both incorporated in the Netherlands and the United Kingdom, respectively, while SPDC is incorporated in Nigeria.[70]

In 1958, some residents of the Ogoni region organized a group called the "Movement for Survival of Ogoni People" (the "Movement") to protest the impact of SPDC's oil exploration and production in the Ogoni region of Nigeria.[71] The plaintiffs alleged that, in 1993, when the Movement stopped the oil production as a result of the Movement's protest of the environmental impact of the defendants' local oil exploration, the defendants responded by enlisting the aid of the Nigerian government to suppress the resistance.[72] Specifically, the plaintiffs further claimed that throughout 1993 and 1994, the Nigerian military forces beat, raped, arrested, and killed Ogoni residents and violently attacked and destroyed

64 *Id.*; *see* Weiss, *supra* note 61 (discussing the question presented before the United States Supreme Court in *Kiobel*).

65 Warren, *supra* note 57.

66 *See* Weiss, *supra* note 61 (discussing the impact of *Kiobel* on the legal community).

67 *Id.*

68 *Id.*

69 Danforth, *supra* note 19, at 666-67.

70 *Id.* at 667.

71 *Id.*

72 *Id.*

Ogoni villages with the assistance of the corporate defendants.[73] These human rights violations perpetrated by the Nigerian government are commonly known as the "Ogoni Crisis."[74]

As a result of the defendants' alleged human rights violations, the plaintiffs brought an action against the defendants under the ATS for allegedly aiding and abetting the Nigerian government of (1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.[75]

The district court reasoned that the defendants could not be held liable for counts one, five, six, and seven because international law did not sufficiently define those violations, and thus dismissed those claims.[76] However, the court denied the defendants' motion to dismiss the three remaining claims and elected to certify its entire order for interlocutory appeal, leading the Second Circuit to a review of all seven claims.[77]

C. *Kiobel*'s Majority Opinion

In 2010, the Second Circuit ruled on the *Kiobel* case, holding, for the first time,[78] that corporations are not proper defendants under the ATS and finding that customary international law does not recognize corporate liability.[79] In contrast to other circuit courts, the Second Circuit invoked *Sosa* and held that human rights violations committed by corporations abroad were not sufficiently explicit, defined, or expressed under international law to justify jurisdiction in United States courts.[80] The majority, however, found that the ruling does not eliminate a plaintiff's right to bring a suit against an individual, including a corporate employee, manager, officer, or director.[81] On October 17, 2011, the Supreme Court granted certiori in *Kiobel*.[82]

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[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 667-68.

[77] *Id.* at 668.

[78] *See* Ghatan, *supra* note 6, at 1277-78 ("[N]o other circuits have ruled that customary international law does not recognize corporate liability.").

[79] Susan Farbstein, et al, *The Alien Tort Statute and Corporate Liability*, 160 U. PA. L. REV. 99, 99 (2011); *see also* Ghatan, *supra* note 6, at 1276 (analyzing the Second Circuit's majority opinion in *Kiobel*); Danforth, *supra* note 19, at 668-71 (giving a more in depth analysis and description of the majority opinion).

[80] *See* Farbstein et al., *supra* note 79, at 99 (summarizing the Second Circuit's majority opinion in *Kiobel*).

[81] *See* Ghatan, *supra* note 6, at 1276 ("[B]ecause the majority based its opinion on the norms of customary international law, which are subject to adaptation, it is possible that in a future case the Second Circuit will determine that corporate liability has become a norm under customary international law.").

[82] *See* Farbstein et al., *supra* note 79, at 99 (providing a chronological timeline for *Kiobel*).

D. Shortcomings and Flaws Raised by the *Kiobel* Reasoning

In its ruling on *Kiobel*, the Supreme Court will decide whether the lower court's decision is, as Judge Richard Posner put it, an "outlier" in more than fifteen years of corporate ATS litigation.[83] In finding that corporations cannot be liable under the ATS, the Second Circuit's decision in *Kiobel* marked an important departure from the idea of *Filartiga* and from ATS cases dating from the mid-1990s, which all ruled against corporations and for the allowance of the use of the ATS as a significant tool for foreign survivors of violent human rights abuse to seek redress for their harms.[84] It follows that if the Court affirms the Second Circuit's ruling, *Kiobel* will become the outlier in ATS litigation.[85]

Before *Kiobel*, courts dissected ATS cases by focusing on establishing appropriate standards for aiding and abetting liability, among other contested issues, but did not question the fundamental issues on whether corporations were to be exempted from liability under the ATS for committing human rights violations abroad.[86] As such, it may be that the drafters of the ATS never perceived the possibility of a corporate carve-out, as courts before *Kiobel* rightly understood that if a non-state actor can be held liable for violations of international law, then that actor can either be a private individual or a corporation.[87] Therefore, the history, purpose and language of the text of the ATS all demonstrate that the decision reached in *Kiobel* is deeply inconsistent with previous ATS rulings.[88]

Additionally, *Kiobel*'s numerous dissents echo Judge Posner's position on the Second Circuit's ruling.[89] Specifically, Judge Leval's dissent in the opinion pointed out the flaws of the majority approach and its broad implications: "By

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[83] *Id.* at 100.

[84] *Id.* at 101; *see also* Brief for Petitioners at 19, *Kiobel v. Royal Dutch Petroleum Co.*, 10-14919 (Dec. 14, 2011) 2011 WL 6396550 ("Excluding corporations from the universe of permissible ATS defendants would have the perverse effect of sending alien tort plaintiffs to state courts, precisely the opposite of the drafters' intent.").

[85] *Id.* at 100.

[86] *See id.* at 108.

[87] *Id.* ("As Judge Richard Posner from the Seventh Circuit noted, '[A]ll but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable.'") (quoting *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011)).

[88] *Id.* at 108-09. The statute, which was enacted in 1789, was:

> [a] significant component of the Founders' efforts to ensure that the young United States would comply with its obligation to uphold, respect, and enforce the law of nations. The Framers sought a federal forum to discharge this duty because states— and state courts in particular—had proven ineffective. Through the statute, the drafters intended to create a meaningful civil remedy ("tort only") for aliens harmed by violations of the law of nations. The statute extends this remedy to "all causes," confirming congressional intent to provide plaintiffs with broad remedies. Tellingly, the text of the ATS restricts the identity of the plaintiff but places no limit on the type of defendant subject to suit. To now read such a corporate exception into the statute runs counter to both the Framers' broad remedial intent and the statute's plain text.

Id. at 112 (quoting *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 196 (2d Cir. 2010) (Leval, J., concurring) ("I cannot, however, join the majority's creation of an unprecedented concept of international law that exempts juridical persons from compliance with its rules. The majority's rule conflicts with two centuries of federal precedent on the ATS, and deals a blow to the efforts of international law to protect human rights."). *Id.*

[89] *Id.*

adopting the corporate form, such an enterprise could have hired itself out to corporate Nazi extermination camps or the torture chambers of Argentina's dirty war, immune from civil liability to its victims."[90] Furthermore, Judge Leval noted that the majority undermined a central purpose of international law expressed in *Filartiga*: in protecting corporate profits earned through abuse of human rights, the Second Circuit's reasoning is in opposition to the international law objective of protecting against human rights violations.[91] Subsequently, in his dissent, Judge Katzmann pointed out that the Second Circuit's denial to rehear the case *en banc* deviated from the principle that corporations and natural persons alike may be liable for violations of the law of nations under the ATS.[92]

Moreover, the ATS decisions issued by federal district courts and the Seventh Circuit firmly rejected the Second Circuit's logic in *Kiobel* by pointing out the flaws in the court's reasoning.[93] Three flaws in particular stand out from these decisions: (1) *Kiobel* misinterpreted the structure of international law; (2) the historical proposition in regards to the criminal trials at Nuremberg underlying *Kiobel* is incorrect and;[94] (3) the *Kiobel* majority opinion's outcome falls short of upholding the purpose of the ATS.[95]

The majority decision in *Kiobel* is troubling because it stems from the Circuit where the modern era of the ATS cases began, in a country that has a history of respecting human rights and has a system that allows victims a means of redress

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[90] *Id.* at 101 (quoting *Kiobel*, 621 F.3d at 150 (Leval, J., concurring)).

[91] *Id.*

[92] *See id.* at 101-02 (quoting *Kiobel*, 642 F.3d at 381 (Katzmann, J., dissenting from denial of rehearing)).

[93] *See id.* at 102 (discussing subsequent ATS decisions rejecting *Kiobel*'s logic).

[94] *See* Danforth, *supra* note 19, at 671-75 (providing a more in depth description of the possibility of corporate liability under the ATS while using Nuremberg as an example). A further analysis is given of the Nuremberg trials, a series of military tribunals by the Allied forces of World War II, most notable for the prosecution of members of major political, military, and economic leadership of the Nazi Germany, indicted for aggressive war, war crimes, and crimes against humanity, who were brought to trial before the International Military Tribunal in the city of Nuremberg, Bavaria, Germany, in 1945 and 1946, at the Palace of Justice. *Id.* at 669. This analysis indicates that:

> [w]hile individual liability for crimes committed in violation of the law of nations during wartime had arisen to a small degree after World War I, it was not until after World War II that such liability was greatly considered. In the wake of the Holocaust, the United States, Great Britain, France, Soviet Union, and twenty-one other states signed the London Charter, which established the IMT to try German war criminals who allegedly orchestrated war crimes, crimes against humanity, and crimes against peace. As mentioned above, the Nazi defendants contended that they could not be guilty of war crimes because international law had never provided punishment for individuals. Despite the lack of precedent for individual liability, the IMT held that 'individuals could be punished for violations of international law.' However, when the issue of corporate liability arose with respect to I.G. Farben (a German corporation that manufactured Zyklon B, the killing chemical in the gas chambers), the IMT refused to consider imposing criminal liability for the corporation. Despite the focus of the IMT in expanding international crimes to encompass individuals, the majority treated the failure of the IMT to criminally prosecute the 'most nefarious corporate enterprise known to the civilized world' as clear evidence that corporate liability was not recognized as a norm of customary international law.

Id.

[95] *See* Farbstein et al., *supra* note 79, at 102-03 (citing in part *Kiobel*, 621 F.3d 111, 150 (2d Cir. 2010) (Leval, J., concurring)).

against those who have committed human rights violations.[96] The District Court for the Southern District of New York, the Seventh Circuit, and the Ninth Circuit have all noted that because the purpose of the ATS is to continuously allow victims to pursue corporate and individual accountability for violent human rights crimes, it would come as no surprise if the Court follows the spirit of *Filartiga* and rejects the Second Circuit's decision, making *Kiobel* a temporary outlier.[97]

Moreover, contrary to the reasoning of the majority in *Kiobel*, Nuremberg shows that even with a lack of precedent for corporate liability, corporations can be held liable for aiding and abetting human rights violations, and that corporate liability under the ATS is consistent with international law.[98] According to Danforth, in preventing corporate ATS liability, various problems could arise:[99]

> (1) [I]nternational forum shopping and congestion of United States courts;[100] (2) absence of notice for the defendant;[101] (3) procedural inefficiency due to the availability and location of evidence;[102] (4) undue influence on extraterritorial legal systems, markets, and commerce (territoriality);[103] (5) international political backlash/under influence on

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[96] *Id.* at 103.

[97] *Id.*

[98] *See* Danforth, *supra* note 19, at 680 (discussing the problems raised by the failure of the *Kiobel* reasoning and the allowance of the ATS corporate cases).

[99] *Id.* at 680-82.

[100] *Id.* at 681 (noting that "in *Kiobel*, the Alien Tort Statute is a jurisdictional provision unlike any other in American law, and of a kind apparently unknown to any other legal system in the world in that it is a statutory grant of universal jurisdiction."). Additionally noting that, "[a] new capacity to sue corporations combined with no ceiling on recovery would likely further incentivize plaintiffs to bring suits in the United States when some should be properly brought elsewhere. Because the number of ATS claims would likely increase, a risk of court congestion would arise." *Id.*

[101] *Id.* ("Because the Dutch, Nigerian, and British defendants in Kiobel operated in Nigeria, they likely presumed Nigerian law would govern their actions. To hold similarly situated defendants liable for a crime yet to be recognized by international law as applicable to corporations would raise due process issues of notice.").

[102] *Id.* (discussing that "[t]he majority of the evidence presented and of the witnesses in Kiobel were located outside of the United States."). Further giving the example that:

> [w]hile some eyewitnesses have been exiled to the United States, others, including Nigerian soldiers or defense witnesses, likely remain in Nigeria. Similarly, corporate records of communication with the Nigerian government will likely be found either in Nigeria or the place of incorporation of the defendant. Therefore, in Kiobel-like cases, the U.S. legal system will often be no better than the third-best option from a procedural efficiency standpoint.

Id.

[103] *Id.* (explaining that "[e]ven though U.S. courts would act under the ATS, the principles of sovereignty underlying international law do not disappear in cases of universal jurisdiction."). Further explaining that:

> [h]olding Dutch and British corporations (enterprises in third-states) liable for an offense with no connection to the U.S. could directly affect labor markets, international trade, and stock value without the United States having a substantial connection to the controversy. In addition, while regulation could raise corporations' standard of care, it may also deflect foreign direct investment by making corporations more reluctant to invest in developing countries with possible human rights problems.

Id.

> foreign relations;[104] (6) reciprocal effect—foreign courts holding United States Corporations liable for violations occurring outside the territory of the foreign sovereignty.[105]

The first three issues concern the "smooth functioning of the [United States] legal system and procedural fairness," while the last three issues concern "foreign relations and comity."[106]

V. Proposal

Although the immediate questions before the Court concern the reach of the ATS and whether it will continue to allow foreign plaintiffs, like those in *Filartiga* and *Kiobel*, to pursue and hold accountable those who were responsible for the perpetration of heinous acts against their suffering, and whether corporations can be held accountable for such acts, the larger question is whether the United States wants "to be a leader or a laggard in upholding international rights."[107] In regards to the latter, others will recognize the narrowing of the ATS as the United States would be separating itself from its history of leading support for human rights.[108] In regards to the former, if the Court reverses the *Kiobel* decision, it will maintain consistency with its history and demonstrate to the people of United States—and the world at large—that United States citizens and foreign citizens are entitled to certain fundamental rights, which the United States will help enforce against any person—human or corporate.[109]

According to *Bobelian*, in deciding *Kiobel*, conservatives have two options that would be favorable to the business community but, at the same time, disagreeable with the history and purpose of the ATS and with the history of the United States in its fights against human rights violations.[110] The first option is to rule that corporations are not liable under international human rights laws.[111] This option is problematic because although shielding corporations from liability

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104 *Id.* at 681-82. Stating that:

> Despite the universality of the norms allegedly violated by the defendant corporations, the states where the defendants are incorporated may view an ATS claim as infringing on their territorial sovereignty. This view could cause negative feelings towards the United States and thus hamstring the U.S. executive branch in negotiating with the Dutch and British governments in areas of foreign relations. Similarly, such litigation could also unduly influence Dutch and British foreign policy with Nigeria.

Id.

105 *Id.* at 682 ("Because U.S. courts would hold foreign corporations liable for violating the law of nations, other countries may uphold jurisdiction when plaintiffs in those states bring suits against United States corporations. This is especially undesirable when the forum state has no connection with the U.S. corporation or its conduct.").

106 *Id.*

107 *See* Warren, *supra* note 57 (discusisng the legacy of the United States as a result of the Supreme Court's ruling in *Kiobel*).

108 *Id.*

109 *Id.*

110 *See* Bobelian, *supra* note 10 (discussing the two opportunities the Court in *Kiobel* has in order to make a favorable ruling for the business community).

111 *Id.*

could be an abuse of the law, it *is* inconsistent with granting them protections (*e.g.*, limited liability for shareholders) and constitutional rights if they are not being held accountable for the same responsibilities and standards as human beings.[112] The second, more extreme, option is for the Court to strike down the use of the ATS for human rights violations committed abroad for both corporations and human beings.[113]

Consequently, the Court should of overturned *Kiobel.*[114] On Monday, October 7, 2011, the Court granted certiorari and there were many indications, specifically two main reasons, to support the Court's reversal of *Kiobel.*[115] The first main reason being that the Second Circuit's decision misinterpreted the Supreme Court ruling in *Sosa*, where the Supreme Court presented the standard for determining whether a violation of a recognized norm of customary international law that could be construed as a tort is in violation of the law of nations for ATS purposes.[116] The Second Circuit also misinterpreted the *Sosa* footnote in determining whether a norm is sufficiently definite to support a cause of action, which states, "[r]elated 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."[117] The Second Circuit misunderstood this footnote to indicate that international law provides a standard form of liability for different types of juridical persons claiming that the language of the footnote requires courts to look to international law to determine their jurisdiction over ATS claims against a particular class of defendants, ostensibly including corporations.[118] Contrary to the Second Circuit's understanding, in reading the footnote it becomes clear that the *Sosa* Court was not suggesting that an international law standard regarding the differentiation of individuals from corporations existed, but rather was suggesting that a standard about whether private actors as opposed to state actors can be held liable under the ATS.[119] Further, the *amicus curiae* briefs of International Law Scholars, which supported the granting of certiorari, argued that in accordance with text and terms of the ATS, the language of the footnote demonstrates that the *Sosa* Court was referring to a single class of non-state actors (natural and juristic individuals), not

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112 *Id.*

113 *Id.*

114 *See* Farbstein et al., *supra* note 79, at 104 (arguing that the Supreme Court should overturn *Kiobel*).

115 *Id.*

116 *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698-99 (2004) (quoting 28 U.S.C. § 1350)).

117 *Id.* (citing *Sosa*, 542 U.S. at 732 n.20).

118 *Id.* (citing *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010)).

119 *Id.* at 105. Explaining that:

> [t]he footnote continues on to compare Judge Edwards's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984), which detailed an insufficient consensus on whether torture by private actors violates international law, with *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (2d Cir. 1995), which found a sufficient consensus that genocide by private actors violates international law.

Id.

two different classes, as was hastily presumed by the *Kiobel* Second Circuit majority.[120]

The second reason the Supreme Court should of overturned the Second Circuit decision is the substantial historical evidence—specifically, the Nuremberg trials and subsequent courts' reliance on the outcome,[121] which proposes that international law identifies that juridical persons, such as corporation, can be found in violation of international law, proving that international law has recognized that actors other than natural persons can commit international law violations.[122] Several federal courts have relied on the Nuremberg trials to support notion of civil corporate liability for international law violations.[123] For example, in *In re Agent Orange*, the district court acknowledged that in the Nuremberg trials, especially in the proceedings against German corporate executives, the culpable parties were the "corporations through which the individuals acted."[124] The *In re Agent Orange* court further explained that, "[l]imiting civil liability to individuals while exonerating the corporate directing the individual's action. . .makes little sense in today's world."[125] Thus, a review of that case, and those other cases similarly relying on the Nuremberg trials, demonstrate the degree to which United States courts are citing to Nuremberg as precedent for corporate liability in the context of violations of the law of nations.[126]

Both the district court and the Seventh Circuit in *Kiobel* highlighted the point that it is irrelevant whether there is an international law "standard" for civil liability for violations of international law as these violations can be punished in domestic courts through the remedy provided by a civil suit left to individual states.[127] For these reasons, the Court should have overturned *Kiobel* and re-

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[120] *Id.* ("Indeed, as the International Law Scholars point out, the Supreme Court has previously noted that the 'Alien Tort Statute by its terms does not distinguish among classes of defendants.'" (citing Brief for International Law Scholars as Amici Curiae Supporting Petitioners, for Writ of Certiorari, *Kiobel v. Royal Dutch Petroleum Co.*, 10-14919 (Dec. 14, 2011) 2011 WL 6396550) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).)

[121] *See Id.* at 102-03 (for an in-depth analysis of Nuremberg, which indicates that international law has acknowledged that actors other than natural persons can violate international law). *See generally* Brief of Amici Curiae International Law Scholars in Support of Petitioners at 6, *Kiobel v. Royal Dutch Petroleum*, 10-14919 (Dec. 14, 2011) 2011 WL 6396550.

[122] *Id.*

[123] *Id.*

[124] *In re Agent Orange Prod. Liab. Litigation (In re Agent Orange)*, 373 F. Supp. 2d 7, 57 (E.D.N.Y. 2005). In the case, several Vietnamese nations sued the manufacturers and distributors of Agent Orange, a herbicide used during the Vietnam War, arguing that the use of chemicals was in violation of the law of nations. *Id.* at 15. It should be noted however, that the case was dismissed on the grounds that use of such chemicals was not a violation of customary international law at the time. *Id.* at 145.

[125] *Id.* at 58-9.

[126] *See Presbyterian Church of Sudan v. Talisman Energy, Inc. (Presbyterian Church I)*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *reaffirmed in Presbyterian Church of Sudan v. Talisman Energy, Inc. (Presbyterian Church II)*, 374 F. Supp. 2d 331, 333-34 (S.D.N.Y. 2005) (citing Nuremberg trials in reaffirming previous holding of corporate liability). *See also Bowoto v. Chevron Corp*, 2006 WL 2455752, at *9 (N.D. Cal. 2006).

[127] *See* Farbstein et al., *supra* note 79, at 106 (arguing for the irrelevance of an international "standard").

jected the Second Circuit's majority reasoning that there is no civil liability under the ATS for corporations that violate the laws of nations.[128]

Additionally, plaintiffs, like Kiobel, could benefit from following in the footsteps of the plaintiffs in *Talisman*[129]—a case that ended up being dismissed after a corporate defendant prevailed in court for a decade.[130] The court's dismissal in *Talisman* was presumably the result of the array of tactics used by the Presbyterian Church of Sudan, which included: protests, a stock divestment campaign targeting institutional investors, political pressures in the United States and Canada coordinated by multiple NGOs, and the employment of effective media tactics.[131] The impact of these tactics was evidenced by the falling of the defendant's, Talisman, stock price, despite the success of its oil operations in Sudan, and was acknowledged by Talisman when, instead of choosing to continue its operation, it succumbed to the multi-faceted pressures by selling its interest to an Indian state-controlled oil and gas company, which lacked the same commitment to local development and peace efforts.[132] *Talisman* demonstrates the effectiveness of these tactics that are increasingly frequent in transactional tort cases.[133]

Further, on a legislative basis, pursuant to the district court's approach in *In re Sinaltrainal*, courts should impose a heightened pleading standard in transactional tort cases, including ATS cases, when considering the inherent difficulties and expenses associated with litigation.[134] Finding that the ATS requires plaintiffs to establish that a tort was committed in violation of international law, the court noted that the complaint must identify the specific international law that the defendant allegedly violated—a higher standard of pleading than is traditionally required under the Federal Rules of Civil Procedure.[135] The court also noted that it would be appropriate to require a heightened pleading standard in determining whether the facts pled in the complaints sufficiently showed that the defendants violated the law of nations.[136] It further explained that a higher pleading standard would help to ensure courts proceed cautiously in recognizing new theories under the ATS, as instructed in *Sosa*,[137] and that a higher standard may be justi-

[128] *Id.*

[129] Drimmer, *supra* note 2, at 521.

[130] *See generally Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009).

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *See* Drimmer, *supra* note 2, at 525 (referencing *In re Sinaltrainal*, 474 F. Supp. 2d 1273, 1275 (S.D. Fla. 2006), *aff'd in part vacated in part, Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009)). In this case, the corporate entities were accused of being vicariously liable, through theories of conspiracy, aiding and abetting, or joint action, for the violent actions of paramilitary members—whose actions were regarded as an attempt to intimidate union members and squelch union activity. *Id.*

[135] *Id.*

[136] *See* Drimmer, *supra* note 2, at 525 (quoting *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1275 (S.D. Fla. 2006)).

[137] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (discussing in further details the higher pleading standard).

fied when considering the risk that vague, conclusory, and weakened allegations may allow individuals to unjustifiably accuse corporate entities and abuse the judicial process in pursuing political agendas.[138]

VI. Conclusion

The ATS and the use of international law in litigation have rapidly increased in recent years. The ATS's swift evolution increasingly remains the center of a debate concerning whether or not corporations should be held liable under the ATS for human rights violations committed abroad. The Second Circuit's majority reasoning in *Kiobel* is contrary to the basic purposes of the ATS and international law—if corporations are shielded from liability for human rights violations under the ATS, then the ATS cannot achieve its purpose in redressing genocide or crimes against humanity perpetrated by corporations in violation of international law. As suggested by a diverse range of sources, corporate liability under the ATS is, in fact, consistent with international law. Although the ATS is now widely known, its future still remains uncertain. Lawyers and academics alike hope that the Supreme Court's decision in *Kiobel* will provide more concrete guidance and truly define the ATS's future.

VII. Afterward

The Court issued a decision on *Kiobel v. Royal Dutch Petroleum* on April 17, 2013.[139] The decision was unanimous in the holding that Royal Dutch was not liable under the ATS, but split 5-4 on its rationale, resulting in dismissal.[140] Justice Roberts wrote in the majority opinion that the decision was governed by "the presumption against extraterritoriality,"[141] meaning that, "Congress is presumed not to intend its statutes to apply outside the United States unless it provides a 'clear indication' otherwise."[142]

Specifically, the Court stated that, in 1789, Congress intended for the ATS "to provide foreign ambassadors the ability to seek redress in the federal courts if they were attacked while in the United States."[143] The Court also noted that, for American courts to assert jurisdiction over human rights violations committed abroad, may have negative foreign policy ramifications for the United States, and in the case that it would, any decision to permit such suits should be made by Congress exclusively, not by the courts.[144]

Nevertheless, the Court's recognition of the presumption against extraterritorial application of the ATS still left hope for the future of tort suits under the ATS by recognizing that ATS cases in which a portion of the conduct occurred over-

[138] *See* Drimmer, *supra* note 2, at 525 (citing *In re Sinaltrainal*, 474 F. Supp. 2d at 1275).

[139] *Kiobel v. Royal Dutch Petroleum*, No. 10-1491, slip op. at 1 (U.S. April 17, 2013).

[140] *Id.* at 14.

[141] *Id.* at 6.

[142] *Id.* at 6-7.

[143] *Id.* at 9.

[144] *Id.* at 13.

seas may still be sustainable, so long as at least some portion of "the relevant conduct" occurred within the United States.[145] Although the Court also stated that mere corporate presence in the United States is insufficient to qualify as the requisite conduct to bring a corporation under the ATS, it never spelled out just what conduct would qualify.[146]

Further still, the concurring opinions acknowledged the possibility for plaintiffs to raise claims arising out of a corporation's operations in a country where alleged human rights abuses occurred.[147] Specifically, Justice Kennedy's concurring opinion gives Kiobel-like plaintiffs hope:

> Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the [Torture Victim Protection Act] nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.[148]

Another alternative exists. Some commentators believe that plaintiffs may be able to assert their allegations of overseas human rights abuses as common law tort actions alleging violations of state law.[149] Because "states are largely free to craft their tort law without interference from the federal government, [. . .] plaintiff's lawyers barred from raising overseas human rights claims in federal court under the ATS may well decide to file their lawsuits in state courts instead."[150]

Although the *Kiobel* Court decision made it more difficult for human rights activists to sue United States corporations for human rights violations overseas, it left enough room for activists to sue corporations, in the foreseeable future, for their overseas activities.[151] At least for the time being, United States-based corporations continue to have many of the same rights as individuals,[152] without the same responsibilities. In the wake of *Kiobel* therefore, these corporations will continue to have their cake and eat it too while doing business abroad.

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145 *Id.* at 14.

146 *Id.*

147 *Kiobel*, No. 10-1491, slip op. (Kennedy, J., concurring).

148 *Id.*

149 Rich Samp, *Supreme Court Observations: Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation*, FORBES (Apr. 18, 2013, 10:52 A.M.), http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-a-tort-litigation/.

150 *Id.*

151 *Id.*

152 *See Citizens United v. Federal Election Com'n*, 588 U.S. 310, 342 (2010) (finding that corporations have the same right to freedom of speech under the First Amendment as do individuals).