THE CONUNDRUM OF CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

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D. The Sharp Line of Demarcation Between States and Corporations No Longer Exists: The Corporation as a Quasi-Public Actor

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I. INTRODUCTION

The Alien Tort Statute (ATS),1 invoked by human rights advocates as a dynamic means of enforcing customary international law (international law),2 permits aliens (non-U.S. citizens) to file civil claims in U.S. courts for violations of international law.3 Not all violations of international law are cognizable under the ATS; only misconduct that exhibits a particularly identifiable and strong transnational dimension (e.g., impacting the mutual interests of nations) and that is sufficiently egregious is actionable pursuant to the ATS.4 The type of misconduct alleged usually involves human rights abuses.5 As a type of litigation that touches a spectrum of issues, including corporate governance, international law, and complex human rights issues, ATS litigation has engendered intense analysis and spirited scholarship.6

1 Alien Tort Statute, 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”). The terms Alien Tort Statute (ATS) and Alien Tort Claims Act refer to the same statute and are used interchangeably in literature about the topic. This Article references it as the ATS.

2 See Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 116 n.3 (2d Cir. 2010) (“In this opinion we use the terms ‘law of nations’ and ‘customary international law’ interchangeably.”); see also David H. Moore, Medellín, the Alien Tort Statute, and the Domestic Status of International Law, 50 VA. J. INT’L L. 485, 486–87 (2010) (“The statute has provided the practical context in which the debate over [customary international law]’s domestic status has occurred.”). While often relied upon in the human rights context, the ATS was originally utilized and is equally valid in commercial contexts. Matt. A. Vega, Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Bribery Under the Alien Tort Statute, 31 MICH. J. INT’L L. 385, 393–94, 429, 447 (2010).

3 28 U.S.C. § 1350. The full text of the ATS reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Id.

4 See Joel Slawotsky, The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable Under the Alien Tort Claims Act, 17 DUKE J. COMP. & INT’L L. 131, 132 (2006) (explaining that only claims that implicate the “mutual concern of the nations of the world” are permitted under the statute); see also id. at 154 n.163 (quoting case law that notes the transnational and egregious elements).

5 However, the statute itself does not limit the type of conduct. See Vega, supra note 2, at 388 (opining that global bribery may be cognizable under the ATS).

6 See, e.g., M. Anderson Berry, Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute, 27 BERKELEY J. INT’L L. 316 (2009) (discussing the difference between the definitions of “foreigner” and “alien” as it relates to the ATS); Lucien J. Dhooge, The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism, 35 GEO. J. INT’L L. 3 (2003) (suggesting that courts confronted with ATS claims have provided adequate guidance to global corporations); Tyler Giannini & Susan Farbstein, Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights, 52 HARV. INT’L L.J. ONLINE 119 (2010), http://www.harvardilj.org/2010/11/online_52_giannini_farbstein/ (examining the effect that a recent ATS case may have on corporate accountability in conflict
For more than two decades, U.S. courts have held that, in addition to individuals, private corporations owe duties under customary international law and have liability under the statute. In recent years, corporations have become prime defendants and the focus of ATS litigation. Clearly, presuming that they may face potential liability under the ATS, corporations have both settled and proceeded to trial, rather than moving to dismiss. Both Yahoo! and Shell Oil settled ATS suits filed against them, while Chevron and Drummond Corporation proceeded to trial and obtained defense verdicts.

zones); 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 (2011) (challenging the view that the ATS imposes liability on corporations for violations of customary international law); Moore, supra note 2, at 486–87; Eric A. Posner, Climate Change and International Human Rights Litigation: A Critical Appraisal, 155 U. PA. L. REV. 1925, 1928 (2007) (noting that ATS litigation “is the most prominent and effective means for litigating international human rights claims”); Slawotsky, supra note 4 (arguing that the default of not recognizing ATS claims related to financial fraud is no longer valid); Vega, supra note 2 (arguing that an alien should be able to bring an ATS claim for personal or economic injuries based upon foreign bribery).

7 See, e.g., In re Estate of Marcos, 25 F.3d 1467, 1473 (9th Cir. 1994) (holding that the district court had jurisdiction over former Philippines president Ferdinand Marcos under the Alien Tort Act and that “[t]he prohibition against official torture carries with it the force of a jus cogens norm, which enjoys the highest status within international law” (citation omitted)).

8 See, e.g., Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103–04 (2d Cir. 2000) (subjecting two foreign holdings companies to jurisdiction under the Alien Tort Claims Act); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 445 (D.N.J. 1999) (“No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law.”).


10 See Rod Khavari, Comment, Executive Order 13303: Is the Bush Administration Choosing Corporations over Human Rights Actions Instituted via the Alien Tort Claims Act?, 14 TULSA J. COMP. & INT’L L. 119, 129 (2006) (“Transnational corporations and the U.S. government have felt that the [ATS] is an awakening monster, threatening corporations and their investments as opposed to being the savior for human rights victims and survivors.”).

11 Rampell, supra note 9.


13 Bowoto v. Chevron Corp., 621 F.3d 1116, 1121 (9th Cir. 2010) (“These plaintiffs brought claims under the [ATS], Nigerian law, and California law. The jury rendered a verdict in favor of Chevron on all claims, and Plaintiffs now appeal. . . . We . . . affirm the district court’s judgment.”).

14 Romero v. Drummond Co., 552 F.3d 1303, 1309 (11th Cir. 2008) (“[O]ne claim for relief
Overturning its precedent, the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*—a virtual earthquake of an opinion—held that corporations do not have obligations under international law and, thus, cannot have liability under the ATS. In *Kiobel*, the majority held that pursuant to Supreme Court ordered guidance in the *Sosa* opinion, federal courts are to examine international law to decide the question of whether that “‘law extends the scope of liability for a violation of a given norm to the perpetrator being sued.’” The *Kiobel* court, relying upon that footnote, examining international law, and citing to international criminal tribunals, treaties, and scholarship, found such law did not encompass corporate liability. The court held “[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.” According to the Second Circuit, it is now up to Congress to decide whether the statute can impose corporate liability, but “[f]or now, and for the foreseeable future, the [ATS] does not provide subject matter jurisdiction over claims against corporations.” Lower courts in the Second Circuit have dismissed cases based upon the *Kiobel* decision.

Taken to its logical conclusion, *Kiobel* holds that corporations can conduct business any way they deem proper without concern of liability under the statute. As noted by Tyler Giannini and Susan Farbstein, “the decision create[d] unprecedented opportunities for corporate actors to shield that Drummond aided and abetted the killings, which were war crimes, remained. At a trial of that claim, the jury returned a verdict for Drummond. . . . We affirm.”

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15 See, e.g., In re S. Afr. Apartheid Litig., 617 F. Supp. 2d 228, 254 (S.D.N.Y. 2009) (“On at least nine separate occasions, the Second Circuit has addressed [ATS] cases against corporations without ever hinting—much less holding—that such cases are barred.”).

16 621 F.3d 111 (2d Cir. 2010), reh’g denied, 642 F.3d 268 (2d Cir. 2011), reh’g en banc denied, 642 F.3d 379 (2d Cir. 2011). Judges Cabranes and Jacobs formed the majority. Id. Judge Leval joined in the dismissal based upon a lack of evidence that the defendant acted purposely to aid and abet the alleged wrongful conduct. Id. at 153–54. Judge Leval disagreed with respect to corporate liability. Id. at 149–53.


18 *Kiobel*, 621 F.3d at 120 (quoting *Sosa*, 542 U.S. at 732 n.20).

19 Id. at 132–37.

20 Id. at 137–41.

21 Id. at 142–45.

22 Id. at 148–49.

23 Id. at 119.

24 Id. at 149.

themselves from liability for clear abuses of international law through incorporation.”

*Kiobel*’s ruling has academic support. For example, Julian Ku supports the *Kiobel* ruling and argues against corporate liability under the ATS. Ku argues that international law is applicable only to states. He believes that although individuals “may” have liability under certain limited circumstances, corporations cannot. “Non-state parties, such as private individuals, organizations, or corporations, owe duties under only domestic laws and cannot violate international law directly.”

Notwithstanding this scholarly support, there are compelling reasons to conclude that corporations should have liability under the ATS. There is nothing to indicate that corporations were excluded by the statute and the available evidence indicates that, to the contrary, corporations were always envisioned as part of the class of potential ATS defendants. In addition, the zealous reliance by *Kiobel* on the *Sosa* footnote is misplaced. The footnote does not stand for the proposition that federal courts should examine international law to find whether a class of defendants, such as corporations, can be sued under the statute. Rather, the Supreme Court merely articulated that international law should be examined to determine whether the type of misconduct at issue can be allocated to various actors such as public or private entities. Moreover, international law does not mandate the manner of its enforcement; such mechanisms are reserved for the individual states to implement.

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26 Giannini & Farbstein, *supra* note 6, at 121.
27 Ku, *supra* note 6, at 354–55 (“For over two decades, U.S. courts have held that private corporations owe duties under customary international law and can be subject to lawsuits under the [ATS]. . . . Despite this wide support, the view that corporations can be liable for violations of customary international law under the ATS is wrong.”). *But see* Roger P. Alford, *Apportioning Responsibility Among Joint Tortfeasors for International Law Violations*, 38 PEPP. L. REV. 233, 234 (2011) (“There is no question that international law grants rights and imposes duties on entities other than states.”).
28 Ku, *supra* note 6, at 355 (“Indeed, customary law has only endorsed direct private-actor liability in the context of international criminal law, and even this somewhat-uncertain liability extends only to natural persons.”).
29 *Id.* at 364.
30 See, e.g., Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011) (“All but one of the cases at our level hold or assume . . . that corporations can be liable.”).
31 See, e.g., Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254, 263 (2d Cir. 2007) (“The citation to *Sosa*’s footnote 21 indicates only that the district court considered the views of those governments in assessing ‘the collateral consequences that would result from finding a new international law violation,’ and does not suffice to demonstrate that the court (again contrary to its stated intentions) adopted *sub rosa* the defendants’ political question arguments.” (citation omitted)).
Regarding international law and corporate liability, the Kiobel court’s reliance on international criminal rulings to prove corporations are not liable under international law is misplaced because criminal law is fundamentally different from civil tort law and the ATS is a civil liability statute. Moreover, corporations are subject to civil law and, increasingly, criminal law. International law unquestionably protects corporate rights, and, therefore, corporations should be subject to obligations. Finally, the distinction between “states” and “corporations” cited by liability opponents is outdated and does not comport with our globalized world. The distinction is blurred as the roles of states and corporations are interchangeable.

This Article is divided as follows: Part II provides an overview of the ATS including a review of the recent major appellate decisions on corporate liability. In Part III, the Article addresses the question of whether corporations should be liable under the ATS. The Article points out that several persuasive reasons militate in favor of finding corporate liability. These reasons include the following: the fact that nothing in the ATS suggests that corporations should be excluded; the absence of proof that courts need to consult international law on the issue; the fact that corporations do have obligations under international law; and the erosion of the formalistic distinction between “state” actors and “private” actors. Part IV provides a brief conclusion.

II. A BRIEF OVERVIEW OF ALIEN TORT LITIGATION

The ATS provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”\textsuperscript{32} The statute allows non-U.S. citizens to sue defendants in federal court for tortious conduct constituting a violation of international law or a treaty. For nearly two hundred years, relatively few cases were filed pursuant to the ATS.\textsuperscript{33} This relative dormancy ended when, in Filartiga v. Pena-Irala, the Second Circuit issued a landmark ruling whereby the statute was relied upon to find that state-sponsored torture was actionable.\textsuperscript{34} The issue in Filartiga was whether torture constituted a “violation of the law of nations” and was, thus, cognizable under the ATS.\textsuperscript{35} For the case to be actionable, plaintiffs needed to establish that there was an international consensus with respect to torture

\textsuperscript{33} See IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (noting the dearth of cases).
\textsuperscript{34} 630 F.2d 876 (2d Cir. 1980).
\textsuperscript{35} Id. at 878 (quoting Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified at 28 U.S.C. § 1350 (2006))).
being a violation of international law. According to the Second Circuit, “It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS].”

Filartiga held that, in determining whether specific conduct constitutes a violation of international law when there are no relevant treaties or other laws, a court should examine judicial opinions, scholarly works, and custom. Significantly, the court stated that international law has to be applied as it is used “today” and not from two hundred years prior, noting that international law evolves over time. The Second Circuit accordingly found that torture was a “well-established, universally recognized norm” of international law, which was cognizable under the statute.

After Filartiga, plaintiffs vigorously commenced filing ATS cases. Such cases included ones against government officials alleging various human rights abuses. Plaintiffs also commenced suits against corporations that usually alleged that the defendants aided and abetted the government or officials in violating international law.

In Sosa, the Supreme Court held that the statute grants jurisdiction to federal courts and permits them to adjudicate cases brought by aliens for a few specific violations of international law, noting such law was part of federal common law. The Court observed that at the time of its enactment the statute was intended to encompass the three primary and contemporaneous violations of international law: piracy, offenses against ambassadors, and violations of safe passage. However, the Court endorsed the Filartiga view that international law develops over time and held courts were available to entertain claims for violations of “present-day law of nations” so long as they “rest on a norm of international character accepted by the civilized world and define with a specificity comparable to the

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36 Id. at 888.
37 Id.
38 Id. at 880–81.
39 Id. at 881.
40 Id. at 881, 887.
41 Id. at 888.
42 See, e.g., In re Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994).
45 Id. at 720.
46 Id.
features of the 18th-century paradigms we have recognized.”

Sosa cited approvingly to Filartiga: “The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided Filartiga . . . .” Simultaneously, the Court urged caution with respect to embracing the types of international law violations that should be cognizable. The Court provided some guidance: to come within the ambit of the ATS, a violation should “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.”

Thus, subject to diligent gatekeeping, the federal courts were empowered to adjudicate cases brought by aliens for violations of international law other than the three original paradigm examples. Since the Sosa decision, a variety of such claims have been filed, and the courts continue to grapple with many vigorously debated issues including whether local remedies must be exhausted prior to filing an ATS suit and whether the ATS contemplates secondary liability (and, if so, whether the standard of liability should be knowledge or purpose). Some of the litigation filed against corporations has included: claims against a pharmaceutical company for the failure to obtain informed medical consent for drug testing that resulted in death and serious personal injuries; claims that a multinational energy company aided and abetted a government scheme to torture and murder political dissidents; claims that an energy company aided and abetted crimes against humanity by fueling military equipment used to commit these acts; and allegations that a multinational high-tech corporation colluded with a government to track down a religious group’s members who were later tortured and murdered. Until the Kiobel ruling, corporations were presumed by courts and litigants to be within the sphere of potential defendants in ATS suits. However, the

47 Id. at 725.
48 Id. at 731.
49 Id.
50 Id. at 725.
51 See infra Part II.A.2 (discussing, via the Kiobel concurring opinion, these debated issues).
53 Mouawad, supra note 12.
54 Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009), cert. denied, 131 S. Ct. 122 (2010).
56 See supra note 8 (noting cases that have held, either implicitly or explicitly, that
Kiobel ruling, discussed below, cast serious doubt as to ATS claims against corporate defendants.

A. The Kiobel Decision: Corporations Cannot Have Liability

1. Majority Opinion

Plaintiffs, residents of the Ogoni Region of Nigeria, filed suit under the ATS against international oil corporations for allegedly aiding and abetting the Nigerian government in committing violations of international law. Purportedly, the conduct occurred during the suppression of resident protests in the 1990s against the environmental degradation of the area. Defendants were accused of aiding and abetting the conduct by providing payment, food, and transportation to the Nigerian military. Plaintiffs claimed that, among other offenses, government soldiers beat, raped, and murdered civilians.

The Second Circuit rejected the claims against the corporate defendants and provided a two-step analysis. First, the court referenced and adopted a footnote in the Sosa ruling, wherein the Court stated that federal courts must examine international law to decide the question of whether that “law extends the scope of liability for a violation of a given norm to the perpetrator being sued.” Kiobel, thus, held that the question of whether corporations could be liable in a U.S. court must be determined by international law.

Second, the court evaluated international law by reviewing decisions of international tribunals, treaties, and scholarship. The Kiobel ruling found that corporate liability is not part of international law. The court referenced the fact that the London Charter, which established the International Military Tribunal at Nuremberg (NMT), permitted jurisdiction corporations may have liability under the ATS).

57 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010).
58 Id.
59 Id.
60 Id.
61 Id. at 126 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)).
62 Id. at 132–37.
63 Id. at 137–41.
64 Id. at 142–45.
65 Id. at 145. This Article does not engage in a review of Kiobel’s possible misstatements of international law. For an excellent review of those potential misunderstandings regarding the holdings of the international tribunals, see Andrei Mamolea, The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap, 51 SANTA CLARA L. REV. 79, 100–11 (2011), and Giannini & Farbstein, supra note 6.
66 Agreement for the Prosecution of the Major War Criminals of the European Axis, Annex,
to the tribunal only over natural persons. The court relied heavily upon the fact the NMT declined to impose liability on corporations and, instead, focused on individual liability. Since Nuremberg, international tribunals have consistently sought to hold only individuals liable for violations of international law. The court referenced the fact that the jurisdictions of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court are limited to natural persons, noting that ICTR and ICTY charters expressly limit jurisdiction to “natural persons.”

 Kiobel also relied on the NMT’s decision to refuse the imposition of corporate liability on I.G. Farben (Farben). The Farben entity was referenced in Kiobel as “the most nefarious corporate enterprise known to the civilized world.” Farben manufactured the agent that the German military used to asphyxiate detainees at concentration camps. The majority stated:

The refusal of the [NMT] to impose liability on [Farben] is not a matter of happenstance or oversight. This corporation’s production of, among other things, oil, rubber, nitrates, and fibers was harnessed to the purposes of the Nazi state, and it is no exaggeration to assert that the corporation made possible the war crimes and crimes against humanity perpetrated by Nazi Germany, including its infamous programs of looting properties of defeated nations, slave labor, and genocide.


67 See Kiobel, 621 F.3d at 133–34 (relying significantly on the London Charter to prove that international law is applicable only to individuals and not to corporations, basing the natural persons argument on the Charter’s use of the terms “persons,” “individuals,” and “members”).

Id. The Court noted that the London Charter “grant[ed] the tribunal jurisdiction to ‘try and punish persons . . . whether as individuals or as members of organizations.’ ” Id. (quoting London Charter, supra note 66, art. 6).

68 Id. at 134–35. For a novel discussion as to the reason the NMT decided to pursue individuals and not Farben, see infra notes 170–74 and accompanying text.

69 Kiobel, 621 F.3d at 136.


71 Kiobel, 621 F.3d at 135.

72 Id.

73 Id. at 134.
The majority continued:

But [Farben] was not charged, nor was it named in the indictment as a criminal organization. In issuing its judgment, the [NMT] pointedly observed that “the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings.” The Tribunal emphasized: “We have used the term ‘Farben’ as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt . . . the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.”74

The court found that “[n]o corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights.”75 The NMT did not impose liability on Farben, but, rather, prosecuted its management.76 Based upon its analysis of the NMT and other international tribunals, Kiobel held that a corporation (as opposed to natural persons) cannot have liability under international law.77

The Kiobel court then examined treaties and noted that international treaties may offer some evidence of international law depending upon how many nations have ratified such treaties and whether they are customarily enforced.78 The court conceded the existence of some treaties incorporating corporate liability.79 However, the court was not persuaded because “that those treaties impose obligations on corporations in the context of the treaties’ particular subject matter tells us nothing about whether corporate liability for, say, violations of human rights, which are not a subject of those treaties, is universally recognized as a norm of customary international law.”80 The court found that despite “provisions imposing corporate liability

74 Id. at 135 (quoting United States v. Krauch (The Farben Case), 8 N.M.T. 1081 (1952) (emphasis added by Kiobel)).
75 Id. at 148.
76 Id. at 135.
77 Id. at 148–49.
78 Id. at 137.
79 Id. at 138.
80 Id.
in some recent specialized treaties,” these treaties fail to demonstrate that corporate liability is a norm of international law.\footnote{Id. at 139.}

\textit{Kiobel} next turned to legal scholarship.\footnote{Id. at 142.} The court explored the opinions of two international law experts (who were representing a corporate defendant in an unrelated case),\footnote{The procedural backdrop to the \textit{Kiobel} opinion is unconventional. \textit{See} Giannini & Farbstein, supra note 6, at 120 n.1 (describing the procedural backdrop of \textit{Kiobel}). The court addressed the issue sua sponte—the issue was neither briefed nor before the Second Circuit. \textit{Id.; see also} Erin Foley Smith, \textit{Right to Remedies and the Inconvenience of Forum Non Conveniens: Opening U.S. Courts to Victims of Corporate Human Rights Abuses}, 44 COLUM. J.L. & SOC. PROBS. 145, 160 (2010) (“The decision came as a surprise to advocates, particularly because neither party to the case had raised or briefed that particular issue.”). The \textit{Kiobel} court relied upon the expert opinions of a corporate defendant in the unrelated \textit{Talisman} litigation. \textit{Kiobel}, 621 F.3d at 143–44.} and found their opinions convincing. Each expert had submitted affidavits in a different ATS litigation and opined that international law does not recognize corporate liability.\footnote{\textit{Kiobel}, 621 F.3d at 143.} The majority opinion also referenced law journal articles and found that the proponents of corporate liability were either counsel to plaintiffs or expressed the view that corporate liability was a goal rather than a norm of international law.\footnote{Id. at 144 nn.47–48.} However, the \textit{Kiobel} court was not unanimous on these issues. The next section discusses Judge Leval’s vigorous objections to the majority’s no liability holding.

2. Judge Leval’s Concurrence

Judge Leval joined in dismissing the suit, but for evidentiary reasons.\footnote{Id. at 153–54 (Leval, J., concurring).} Plaintiffs did not allege that the defendants actively or directly participated in the wrongdoing. Rather, they accused the defendants of aiding and abetting the conduct.\footnote{Id. at 123 (majority opinion).} Judge Leval, citing to the Second Circuit’s requirement that to impose secondary liability plaintiffs must establish that a defendant acted “with a purpose,” found such evidence lacking.\footnote{Id. at 154 (Leval, J., concurring).} He stated:

\begin{quote}
We recently held in [\textit{Talisman}] that liability under the ATS for \textit{aiding and abetting} in a violation of international human rights lies only where the aider and abettor acts \textit{with a purpose} to bring about the abuse of human rights. Furthermore,
\end{quote}
the Supreme Court ruled in [Ashcroft v. Iqbal] that a complaint is insufficient as a matter of law unless it pleads specific facts supporting a plausible inference that the defendant violated the plaintiff’s legal rights. Putting together these two rules, the complaint in this action would need to plead specific facts that support a plausible inference that the Appellants aided the government of Nigeria with a purpose to bring about the Nigerian government’s alleged violations of the human rights of the plaintiffs. . . . [T]he allegations of the Complaint do not succeed in meeting that test. I therefore agree with the majority that the claims against the Appellants must be dismissed, but not on the basis of the supposed rule of international law the majority have fashioned.89

Further, Judge Leval disagreed with the majority’s claim that corporations can have no liability under the statute. He noted that under the holding, corporations could potentially get away with the most outrageous misconduct simply by acting in a corporate form.90 Judge Leval argued that the majority’s position was judge-made rather than a reflection of international law:

[T]here is no basis for this contention. No precedent of international law endorses this rule. No court has ever approved it, nor is any international tribunal structured with a jurisdiction that reflects it. (Those courts that have ruled on the question have explicitly rejected it.) No treaty or international convention adopts this principle. And no work of scholarship on international law endorses the majority’s rule. Until today, their concept had no existence in international law.91

He criticized the majority’s reliance on the various international tribunals saying that those bodies were looking to impose criminal responsibility as opposed to civil compensation.92 According to the concurrence, a crucial

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89 Id. (citations omitted).
90 Id. at 149–50 (“According to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims’ claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.”).
91 Id. at 149–51.
92 Id. at 163.
distinction exists between criminal and civil jurisdiction because corporations are not the customary focus of criminal punishment.93

In addition, Judge Leval stated that, while international law norms are established by international law, the method of implementation is not mandated by international law.94 He commented:

[I]nternational law says little or nothing about how those norms should be enforced. It leaves the manner of enforcement, including the question of whether there should be private civil remedies for violations of international law, almost entirely to individual nations. While most nations have not recognized tort liability for violations of international law, the United States, through the ATS, has opted to impose civil compensatory liability on violators and draws no distinction in its laws between violators who are natural persons and corporations.95

Thus, according to Judge Leval, international law determines whether the conduct constitutes a violation of international law, but each state, pursuant to that sovereignty’s domestic law, determines which actors can be defendants and what rules of enforcement are permitted.96 Since American tort law controls, and corporations may have liability under U.S. law, corporations may have liability under the statute. Expectedly, the decision was contested immediately. The following section describes the post-

3. Post-Ruling Procedural Developments in Kiobel

In a 5–5 split, the Second Circuit denied a petition for an en banc rehearing.97 The dissenting judges stated that “this case presents a significant issue and generates a circuit split” and referred to Judge Leval’s concurrence as “scholarly and eloquent.”98 According to the dissenting judges, the two-judge majority opinion in Kiobel was “very likely incorrect as to whether corporations may be found civilly liable under the [ATS] for violations of

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93 Id. at 166–67.
94 Id. at 152.
95 Id.
96 Id.
97 Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 379 (2d Cir. 2011).
98 Id. at 380 (Lynch, J., dissenting).
such fundamental norms of international law as those prohibiting war crimes and crimes against humanity. 99

One dissenter, Judge Katzmann, referred to the issue as one “of extraordinary importance” and added an intriguing element to the dissent. 100 He stated that the Kiobel majority’s reliance on his concurring opinion in Khulumani to support the no-corporate-liability view was wrong. 101 According to Judge Katzmann, there is “no inconsistency between the reasoning of [his] opinion in Khulumani and Judge Leval’s well-articulated conclusion, with which [he] fully agree[s], that corporations, like natural persons, may be liable for violations of the law of nations under the [ATS].” 102 The statements of the dissenting judges leave no doubt that they believe corporations may be liable under the statute.

Plaintiffs filed a petition for certiorari; 103 the defendant filed its brief in opposition; 104 and plaintiffs filed the reply brief. 105 The Court will need to decide whether to address the corporate liability issue or to defer the question.

Parallel to the certiorari petition, two appellate court rulings handed down rulings in the same week that both questioned Kiobel’s analysis and conclusion. Those two rulings are discussed in the next section.

4. The View from the D.C. and Seventh Circuits: Kiobel Is Wrong

In the aftermath of Kiobel, “[r]umors of corporate liability’s demise in the context of ATS litigation” were rampant. 106 Several scholars sided with Kiobel’s holding or presumed that it would sway other appellate courts to rule similarly. For example, Julian Ku noted: “In a blockbuster opinion that could spell the end of the vast bulk of [ATS] litigation, the U.S. Court of Appeals for the Second Circuit has held that corporations cannot be liable for violations of customary international law under the [ATS].” 107 According to

99 Id.
100 Id. (Katzmann, J., dissenting).
101 Id.
102 Id. at 380–81.
107 Julian Ku, Goodbye to the Alien Tort Statute? Second Circuit Rejects Corporate Liability for Violations of Customary International Law, OPINIO JURIS (Sept. 17, 2010), http://opiniojuris.o
another scholar, “[t]here’s going to be a huge reduction in [ATS] litigation if [Kiobel] holds up.”\footnote{Stephen Bainbridge, 
No Corporate Liability Under Alien Tort Statute?, PROFESSORBAINBRIDGE.COM (Sept. 17, 2010), http://www.professorbainbridge.com/professorbainbridgecom/2010/09/no-corporate-liability-under-alien-tort-statute-contrast-citizens-united.html.} Roger Alford opined that “[t]he slow, quiet demise of the ATS continues. Without further support from the Supreme Court, it appears that the statute is in free fall.”\footnote{Roger Alford, 
Torture by Non-State Actors Not Actionable Under ATS, OPINIO JURIS (June 17, 2011), http://opiniojuris.org/2011/06/17/torture-by-non-state-actors-not-actionable-under-ats/.} However, two July 2011 cases suggest that the rumors of the ATS’s demise vis-à-vis corporate liability have been premature.\footnote{Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011); Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011).}

In the Seventh Circuit’s opinion in \textit{Flomo v. Firestone Natural Rubber Co.}, the court held that corporations may indeed have liability in ATS suits.\footnote{\textit{Flomo}, 643 F.3d. at 1013. The court also rejected defendant’s argument that the ATS could not be applied extraterritorially. “Courts have been applying the statute extraterritorially (and not just to violations at sea) since the beginning; no court to our knowledge has ever held that it doesn’t apply extraterritorially; and \textit{Sosa} was a case of nonmaritime extraterritorial conduct yet no Justice suggested that therefore it couldn’t be maintained.” \textit{Id.} at 1025. The \textit{Flomo} ruling rejecting the extraterritoriality argument makes sense. As referenced infra text accompanying note 118, it would seem counterintuitive to apply the presumption against extraterritoriality. \textit{See} Morrison v. National Australian Bank Ltd., 130 S. Ct. 2869, 2878 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”). However, the presumption is rebuttable. As noted by the Supreme Court, to rebut the presumption, plaintiffs are not required to show that Congress used specific language to the contrary, i.e., that the statute explicitly states overseas conduct is covered. Plaintiffs can overcome the presumption if the text and/or context lead to the conclusion that the drafter’s intent was to allow extraterritorial application of the statute. “Assuredly context can be consulted as well.” \textit{Id.} at 2883. Both the text and context support \textit{Flomo’s} rejection of the extraterritoriality argument. The plain text of the ATS allows aliens to file claims for violations of international law. Such violations would presumably take place overseas. Moreover, as the Supreme Court noted in \textit{Sosa}, the intent of the drafter was to allow aliens to file claims for several cardinal offenses. One of these paradigmatic offenses is piracy which occurs outside the borders of the United States. \textit{See supra} text accompanying note 46. Based upon both the plain text of the ATS and its context, it would be odd if the enactment of the ATS was done with the intention that it not cover overseas conduct.} It stated that the factual premise of the majority opinion in the \textit{Kiobel} case is incorrect.\footnote{\textit{Id.}}

The court completely disagreed with the Second Circuit and found that international law had in fact been used by the NMT to punish
corporations. Using uncomplicated words, the court used the following analogy:

If a corporation complicit in Nazi war crimes could be punished criminally for violating customary international law, as we believe it could be, then a fortiori if the board of directors of a corporation directs the corporation’s managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation can be civilly liable.

The D.C. Circuit, in *Doe v. Exxon*, also held corporations may indeed have liability in ATS suits. *Exxon* delivered another blow to *Kiobel*, calling the Second Circuit’s *Kiobel* opinion internally inconsistent and illogical. The court found that the analysis in *Kiobel* conflates the norms of conduct at issue in *Sosa* and the rules for any remedy to be found in federal common law at issue here;

114 *Id.*
115 *Id.* at 1019. Interestingly, the court noted “the plaintiffs concede that corporate liability for such violations is limited to cases in which the violations are directed, encouraged, or condoned at the corporate defendant’s decision making level.” *Id.* at 1020–21. This suggests the court had in mind the doctrine of vicarious liability and was leaving open the possibility of limiting corporate liability to circumstances when directors or senior officers ratify or approve the wrongful conduct.
116 654 F.3d 11, 15 (D.C. Cir. 2011). The court initially addressed Exxon’s argument that the ATS does not apply based upon the presumption against extraterritoriality. “Citing Morrison, Exxon contends that a ‘strong presumption . . . against extending [federal statutes] to encompass conduct in foreign territory’ militates against recognizing a common law aiding and abetting claim based on human rights violations committed in a foreign country.” *Id.* at 21 (citation omitted). The court rejected Exxon’s argument citing to the legislative history surrounding the enactment of the TVPA (implicitly endorsing the ability of hearing ATS claims based upon conduct in foreign countries) and *Sosa*’s implicit rejection of the extraterritoriality argument (citing to the U.S. government’s brief in *Sosa* which no Justice apparently agreed with). *Id.* at 26. Applying the presumption against extraterritoriality in ATS cases does not appear to comport with the intent of Congress. The statute allows aliens to sue for damages based upon violations of international law which naturally would be envisioned to take place outside the United States. See Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 V A. L. Rev. 1019 (2011) (arguing that the presumption against extraterritoriality should not apply to ATS litigation because the ATS implements international law which naturally involves foreign nations and is thus distinguishable from statutes relating to domestic concerns).
117 *Exxon*, 654 F.3d at 50–55 (noting “a number of problems with the analysis in *Kiobel*”). “In sum, the majority in *Kiobel* not only ignores the plain text, history, and purpose of the ATS, it rests its conclusion of corporate immunity on a misreading of footnote 20 in *Sosa* while ignoring *Sosa*’s conclusion that federal common law would supply the rules regarding remedies.” *Id.* at 54–55.
even on its own terms, its analysis misinterprets the import of footnote 20 in Sosa and is unduly circumscribed in examining the sources of customary international law.\textsuperscript{118}

Citing both scholar Louis Henkin and Judge Edwards’ concurrence in Tel-Oren,\textsuperscript{119} the Exxon court concluded that international law itself provides no remedies for its violations.\textsuperscript{120} Rather, individual nations are to determine whether and how such violations should be addressed.\textsuperscript{121} The court stated:

[T]he ATS provides federal jurisdiction where the conduct at issue fits a norm qualifying under Sosa implies that for purposes of affording a remedy, if any, the law of the United States and not the law of nations must provide the rule of decision in an ATS lawsuit.

Consequently, the fact that the law of nations provides no private right of action to sue corporations addresses the wrong question and does not demonstrate that corporations are immune from liability under the ATS.\textsuperscript{122}

The court held the domestic remedy for violations of international law is left for the individual nations and that, therefore, the ATS may be used to enforce international law norms.\textsuperscript{123} According to Exxon, Kiobel is inherently contradictory inasmuch as the Kiobel majority concedes that individuals from a corporation may have liability. If, as the court in Kiobel admits, individuals have liability, then a juridical entity may also have liability.\textsuperscript{124}

The decision is noteworthy in that in broad terms, it embraces the ATS plaintiffs’ bar arguments that corporations may have liability under international law citing to the physical destruction and confiscation of corporate assets of Farben by the Allied forces after World War II.\textsuperscript{125}

\textsuperscript{118} \textit{Id.} at 41.
\textsuperscript{119} Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring).
\textsuperscript{120} Exxon, 654 F.3d at 41–42.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} at 42.
\textsuperscript{123} \textit{Id.} at 54–55.
\textsuperscript{124} \textit{Id.} at 55.
\textsuperscript{125} \textit{Id.} at 52–53; see also \textit{Id.} at 52 n.42 (citing Jonathan A. Bush, The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said, 109 Colum. L. Rev. 1094, 1239 (2009)) (noting in the Nuremberg process indicates that corporations are not liable for violations of international law).
Both the *Flomo* and *Exxon* opinions sharpen the circuit split with *Kiobel* and support the need for court-ordered resolution of the corporate liability question. Given the significance of the issue, it is likely the Supreme Court will have to provide much-needed guidance. In the following Part, the Article explains why corporations should be liable under the ATS.

III. DO CORPORATIONS HAVE LIABILITY UNDER THE ATS?

Both courts and parties have presumed that the statute is applicable to corporations. For example, both Yahoo! and Shell Oil settled ATS suits filed against them.\(^{126}\) On the other hand, Chevron proceeded to trial and obtained a defense verdict.\(^{127}\) Drummond Corporation also proceeded to trial and obtained a defense verdict.\(^{128}\) These defendants presumed corporations may have liability under the ATS or they would have moved for dismissal. Yet as *Kiobel* ruled, and some scholars opine, corporations ought not to have liability under the ATS. Notwithstanding this opposition, as the next section discusses, the historical record is void of evidence supporting that position.

A. The Absence of Proof That the Drafters Intended to Exclude Corporations

There is nothing in the ATS itself, in any congressional amendments, or in the historical record to indicate such a restrictive view of the statute. Since corporations were in existence at the time the ATS was enacted,\(^ {129}\) and

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\(^{126}\) Corporations have settled cases and gone to trial presumably based on the premise that a corporate defendant may have liability under the statute. See, e.g., Mouawad, *supra* note 12 (describing a settlement paid by Shell in order to avoid a trial where allegations of their involvement in the murder of a pro-environmentalist were at issue); Rampell, *supra* note 9 (detailing a large settlement paid by Yahoo! in order to avoid a trial where allegations of their involvement in giving the Chinese government dissident information were at issue).

\(^{127}\) Bowoto v. Chevron Corp., 621 F.3d 1116, 1121 (9th Cir. 2010) (“These plaintiffs brought claims under the [ATS], Nigerian law, and California law. The jury rendered a verdict in favor of Chevron on all claims, and Plaintiffs now appeal. . . . We . . . affirm the district court’s judgment.”).

\(^{128}\) Romero v. Drummond Co., 552 F.3d 1303, 1309 (11th Cir. 2008) (“[O]ne claim for relief that Drummond aided and abetted the killings, which were war crimes, remained. At a trial of that claim, the jury returned a verdict for Drummond. . . . We affirm.”).

\(^{129}\) For a similar rationale, see Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 926–27 (2010) (Scalia, J., concurring) (“The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak. To the contrary, colleges, towns and cities, religious institutions, and guilds had long been organized as corporations at common law and under the King’s charter . . . . The dissent offers no evidence—none whatever—that the First Amendment’s unqualified text was originally understood to exclude such associational speech from its protection.”).
the ATS did not exclude corporations, one could infer the statute was not
intended to exclude corporations.\footnote{For a review of historical references in U.S. law demonstrating that international law was not “limited” to natural persons and, in fact, includes private corporations, see Jordan J. Paust, NonState Actor Participation in International Law and the Pretense of Exclusion, 51 VA. J. INT’L L. 977, 985–89 (2011).}

Moreover, the purpose of the statute was to provide redress in the federal
courts for aliens who had suffered a violation of their rights under
international law. Conferring immunity on corporations conflicts with this
purpose. For example, from its enactment, the ATS was applied to some
private actors, such as pirates.\footnote{See Martha Lovejoy, Note, From Aiding Pirates to Aiding Human Rights Abusers: Translating the Eighteenth-Century Paradigm of the Law of Nations for the Alien Tort Statute, 12 YALE HUM. RTS. & DEV. L.J. 241, 243 (2009) (noting liability to entities that helped pirates).} To distinguish between a private individual
engaged in piracy and a corporation engaged in the same misconduct does
not advance the statute’s goals.

Supporting the view that corporations may have liability is an Attorney
General position cited by \textit{Sosa} which clearly envisioned corporate plaintiffs.
\textit{Sosa} referenced the 1795 Attorney General opinion of William Bradford:

\begin{quote}
Bradford . . . was asked whether criminal prosecution was
available against Americans who had taken part in the French
plunder of a British slave colony in Sierra Leone. Bradford
was uncertain, but he made it clear that a federal court was
open for the prosecution of a tort action growing out of the
episode: “But there can be no doubt that the company or
individuals who have been injured by these acts of hostility
have a remedy by a civil suit in the courts of the United States;
jurisdiction being expressly given to these courts in all cases
where an alien sues for a tort only, in violation of the law of
nations, or a treaty of the United States . . . .”
\end{quote}

Under this opinion, corporations could be plaintiffs in a civil action filed
pursuant to the ATS. Indeed, the Supreme Court has held that corporations
have a right to sue under the statute, finding congressional intent in
authorizing “aliens” to be plaintiffs in ATS suits included corporations as
omitted).} It would be surprising if corporations wielded the advantage of

\begin{footnotesize}
\begin{itemize}
\item[130] For a review of historical references in U.S. law demonstrating that international law was not “limited” to natural persons and, in fact, includes private corporations, see Jordan J. Paust, NonState Actor Participation in International Law and the Pretense of Exclusion, 51 VA. J. INT’L L. 977, 985–89 (2011).
omitted).
\item[133] Barrow S.S. Co. v. Kane, 170 U.S. 100, 106 (1898) (holding that the term “aliens” in the
Judiciary Act has “always been held by this [C]ourt to include corporations”).
\end{itemize}
\end{footnotesize}
being a plaintiff while simultaneously enjoying immunity from suit.\(^{134}\) As the Supreme Court has held, “The [ATS] by its terms does not distinguish among classes of defendants . . . .”\(^{135}\)

Corporate liability is ever more sensible today. Corporations wield enormous power in our globalized, free enterprise-oriented world. “The ‘Corporation’ assumes a central position in modern economic life. This is due mainly to the fact that major portions of our economic activities are performed by corporations.”\(^{136}\) Based on Supreme Court precedent that the ATS does not distinguish between classes of defendants, the failure of Congress to amend the statute, and the failure of the statute to explicitly exclude corporations, there is a complete absence of any indication that the intent of the drafters was to exclude corporate liability. The next section will examine whether the Sosa decision really obligates courts to review international law in ascertaining whether corporations can have liability.

B. Do Courts Need to Examine the Question of Whether Corporations May Have Liability Under International Law?

Kiobel relies substantially on the Sosa footnote for the proposition that courts must consult international law to ascertain whether a given defendant may be sued under the ATS.\(^{137}\) As the following section discusses, this interpretation of the footnote is incorrect.

1. Sosa Does Not Require Courts to Examine International Law to Determine Whether a Corporation Can Be a Defendant

Opponents of corporate liability argue that, according to a footnote in the Sosa ruling,\(^{138}\) the question of corporate liability is controlled by international law and that, pursuant to same, there is no recognition of corporate liability. The Kiobel court adopted this view and used it as a linchpin in their recent decision.\(^{139}\) However, the footnote does not explicitly

\(^{134}\) And according to the 1907 opinion of Attorney General Charles Bonaparte, a corporation could be sued under the statute. Mexican Boundary—Diversion of the Rio Grande, 26 Op. Att’y Gen. 250, 252–53 (1907).


\(^{137}\) Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 128–29 (2d Cir. 2010).

\(^{138}\) See Ku, supra note 6, at 392 (“The Sosa Court made it clear that the courts hearing ATS claims must determine whether international law contains a universally accepted rule and defines that rule specifically and uncontroversially to include defendant’s alleged conduct.”).

\(^{139}\) Kiobel, 621 F.3d at 127–31.
state or imply that an issue existed regarding whether a corporation has liability under international law. Rather, the Court held in Sosa that international law controls the question of whether the specific conduct alleged gives rise to liability if the defendant is a private nonstate actor.\textsuperscript{140}

The context of the footnote and the reference to the D.C. Circuit’s Tel-Oren opinion make it clear that the Court was not questioning the viability of suing corporations. In footnote 20 the Court states: “A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”\textsuperscript{141}

The context of the Sosa footnote demonstrates that Kiobel’s reliance on it is misplaced. The footnote itself cites to the Tel-Oren ruling.\textsuperscript{142} In a concurring opinion in Tel-Oren, Judge Edwards grappled with the question of whether torture conducted by a nonstate actor was cognizable under the statute.\textsuperscript{143} After consulting sources of international law, Edwards asserted that a private terrorist organization could not be sued under the statute for torture since torture was not a \textit{jus cogens} offense and that, therefore, only a state actor could be liable for such conduct.\textsuperscript{144} Edwards argued that since international law imposes obligations on private parties for \textit{jus cogens} violations and because torture had not risen to the level, the nonstate actor terrorist entity was not liable.\textsuperscript{145} Judge Edwards did not distinguish between a juridical person, such as a terrorist organization or corporation, and a private individual.\textsuperscript{146} Such a distinction would be illogical. The only issue is whether the actor is public or private (the latter encompassing individuals and organizations, such as corporations). Sosa’s footnote stated that courts should examine international law to determine whether nonstate actors, such as corporations, have liability for the specific misconduct alleged.\textsuperscript{147} The footnote, in fact, supports the view that corporations may have liability since corporations are included as a type of private actor defendant within the scope of the statute.\textsuperscript{148}

Therefore, the Sosa footnote stands for the proposition that whether a private actor (including a corporation) has liability for the specific conduct (as opposed to requiring a state actor) is governed by international norms.

\begin{thebibliography}{99}
\bibitem{Sosa} \textit{Sosa}, 542 U.S. at 733 n.20.
\bibitem{Id} Id.
\bibitem{Id} Id.
\bibitem{Id} Id.
\bibitem{Tel-Oren} \textit{Tel-Oren v. Libyan Arab Republic}, 726 F.2d 774, 791 n.20 (D.C. Cir. 1984).
\bibitem{Id} \textit{Id.} at 794–95 (Edwards, J., concurring).
\bibitem{Id} Id.
\bibitem{Id} Id.
\bibitem{Sosa} \textit{Sosa}, 542 U.S. at 733 n.20.
\bibitem{Id} \textit{Id.}
\end{thebibliography}
This is hardly remarkable or surprising as courts have long held that, to
determine whether a specific tortious act is cognizable under the statute,
international law must be consulted.\footnote{See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).} Such a holding makes perfect sense. Federal courts must consult customary international law to determine whether a violation of international law did in fact occur and this may depend on whether the actor was private (i.e., an individual or a corporation) or whether a state committed the act. The next section will discuss whether it is U.S. domestic law or international law that controls America’s domestic enforcement of international law norms.

2. Under International Law, States Implement and Enforce Standards of International Law According to Their Own Domestic Legal Systems

International law does not delineate the means of its domestic enforcement.\footnote{See Giannini & Farbstein, supra note 6, at 124 (“Compliance and enforcement should not be conflated with the existence of the norm in question . . . . In contrast to the international norms, enforcement has traditionally been left to the domestic arena.”).} As Judge Leval stated in his \textit{Kiobel} concurrence, international law does not provide for, let alone mandate, the particular domestic implementation of liability for violations of international law.\footnote{Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 152 (2d Cir. 2010) (Leval, J., concurring).} Under international law, enforcement responsibilities lie with the sovereign and individual nations to establish the specific remedies to enforce international law. As an example of this principle, the International Convention for the Suppression of the Financing of Terrorism states:

\begin{quote}
Each State Party, \textit{in accordance with its domestic legal principles}, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.\footnote{International Convention for the Suppression of the Financing of Terrorism art. 5(1), Dec. 9, 1999, 2178 U.N.T.S. 197 (emphasis added).}
\end{quote}

Another example is the U.N. Convention Against Corruption.\footnote{United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.} This international convention provides for a \textit{domestic} remedy for punishing acts of corruption. According to Article 38:

\begin{quote}
Each State Party, \textit{in accordance with its domestic legal principles}, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.\footnote{International Convention for the Suppression of the Financing of Terrorism art. 5(1), Dec. 9, 1999, 2178 U.N.T.S. 197 (emphasis added).}
\end{quote}
Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences.\footnote{Id. art. 38 (emphasis added).}

These provisions corroborate Judge Leval’s view that international law provides for the nations to enforce international law according to their particular domestic principles.

Judge Edwards’ concurring opinion in \textit{Tel-Oren} supports this position. Addressing Judge Bork’s claim that the \textit{Tel-Oren} plaintiffs could not sue absent a “right” to sue granted by international law, Judge Edwards noted that Judge Bork had absolutely no authority for this position.\footnote{Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring).} Judge Edwards stated the “lack of evidence [supporting this position] is not surprising, because it is clear that international law itself . . . does not require any particular reaction to violations of law . . . . Whether and how the United States wished to react to such violations are domestic questions.”\footnote{Id. at 777–78 (citations omitted).}

Judge Edwards continued:

The law of nations thus permits countries to meet their international duties as they will. In some cases, states have undertaken to carry out their obligations in agreed-upon ways, as in a United Nations Genocide Convention, which commits states to make genocide a crime or in bilateral or multilateral treaties. Otherwise, states may make available their municipal laws in the manner they consider appropriate. As a result, the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws. Indeed, given the existing array of legal systems within the world, a consensus would be virtually impossible to reach—particularly on the technical accoutrements to an action—and it is hard
even to imagine that harmony ever would characterize this issue.\textsuperscript{157}

Since international law does not articulate, let alone obligate, the manner of its domestic enforcement, to read the \emph{Sosa} footnote as preventing the ATS from enforcing international law vis-à-vis corporations seems counterintuitive at best. Given the impossibility of achieving a consensus on its implementation, holding the ATS inapplicable to a corporation acts to defeat the goals of international law. If a corporation cannot be held liable for violations of international law, the goals of international law are thwarted.

Accordingly, international law determines whether the specific conduct alleged is of a sufficiently definitive character to constitute a violation of international law. The domestic law of the United States controls the procedural aspects of its enforcement. The United States allows corporate liability for tortious conduct, and, therefore, a corporation may be liable for violating international law in a suit filed under the ATS.

\textbf{C. Do Corporations Have Obligations Under International Law?}

The ATS is a civil tort statute, and, as such, the issue of corporate criminal liability does not control the question of whether corporations have civil liability. However, since \emph{Kiobel} and other opponents of such liability reference criminal law, this Article addresses such liability. Aside from being irrelevant, reliance on criminal law is misplaced because corporate actors are increasingly the subject of criminal liability. One scholar has commented that “there is no support for the claim that corporate criminal liability is so outmoded or anomalous that it should be eliminated,” but rather that its use is increasing in frequency.\textsuperscript{158}

With respect to civil liability, a venerable international law treatise stated that corporations do have obligations under and are subject to international law: “Private individuals, or public and private corporations may . . . become the subjects of [international] law in regard to rights growing out of their international relations with foreign sovereigns and states, or their subjects and citizens.”\textsuperscript{159} This landmark treatise from a leading scholar is crystal clear and supports the conclusion that international law encompasses liability for corporations and private individuals as it does for states.

\textsuperscript{157} \textit{Id.} at 778 (emphasis added) (citations omitted).
\textsuperscript{158} Sara Sun Beale, \textit{A Response to the Critics of Corporate Criminal Liability}, 46 AM. CRIM. L. REV. 1481, 1493 (2009).
\textsuperscript{159} \textit{Henry Wheaton, Elements of International Law} 28 (6th ed. 1855).
1. Criminal Liability

Opponents of corporate liability correctly note that international criminal tribunals have not sought to prosecute juridical entities. This lack of prosecution is offered as proof that international law does not recognize corporate responsibility. Accordingly, this fact is proffered as the reason that international tribunals have prosecuted individuals but not corporations.

The *Kiobel* majority, relying principally on various international tribunals, found that corporate criminal liability for international law violations has not been well-established. For example, NMT prosecuted corporate officials for international law crimes as private individuals. However, in the NMT, the issue was whether private nonstate actors could be liable for certain violations such as crimes against humanity and war crimes. The NMT found that international law undeniably applies to private nonstate actors.

*Kiobel* and other corporate liability opponents place great emphasis on international criminal tribunals. While it can be argued that the issue is not definitively resolved, criminal liability is fundamentally different and the fact that international criminal law tribunals did not prosecute corporations is irrelevant in the context of corporate civil liability in ATS litigation. The

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160 See generally Ku, supra note 6, at 383 (citing to the Rome Statute’s limitation of liability to individuals). But see Doe v. Exxon, 654 F.3d 11, 36 (2011) (“The Rome Statute, which created the International Criminal Court (ICC), is properly viewed in the nature of a treaty and not as customary international law.”).

161 Ku, supra note 6, at 383.


163 Id. at 138. For a detailed critique of *Kiobel’s* findings based upon an author’s belief the decision demonstrated “profound ignorance” and was full of “misinformation” about international law, see Mamolea, supra note 65, at 100–11.


165 Id. at 103.

166 Id. at 102; see also United Nations Convention on the Prevention and Punishment of the Crime of Genocide art. IV, Dec. 9, 1948, 78 U.N.T.S. 277 (“Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”).

167 See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 16 (2d ed. 2001) (“It remains unclear . . . whether international law generally imposes criminal responsibility on groups and organizations.”).

168 There is a colorable argument that the decision not to prosecute corporations bore no connection to international law but was undertaken for other reasons such as political and
ATS is not a law providing for criminal penalties and does not encompass criminal punishment. The wording of the statute refers to a tort—there is no reference to criminal conduct. Reliance on criminal law is, therefore, not persuasive, and the fact that international criminal tribunals have not assessed the criminal liability of corporations is inconsequential.

Another reason to reject the reliance on criminal tribunals is found in the dynamic explanation proffered by Giannini and Farbstein for why the NMT failed to prosecute corporations. In their analysis of the NMT, Giannini and Farbstein explained that the prosecution of Farben was impossible due to the prior dismantling of the company. The company’s assets were confiscated and compensation was given to injured parties and some manufacturing facilities were physically destroyed. In other words,

The fact that other remedies had already been enacted explains the Allies’ decision not to prosecute criminally the corporate entity. This series of actions represents a deliberate and conscious decision by the Allied Control Council to sanction severely a juristic entity that had closely collaborated with and supported the Nazi regime.

Thus, Farben was given the ultimate sanction—“corporate death.” As noted by Giannini and Farbstein, this ultimate punishment preceded the criminal prosecutions. Thus, corporate liability opponents’ reliance on the lack of NMT prosecutions is misplaced.

Kiobel’s belief 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” is not without critics. Professor Paust refers to Kiobel’s analysis as “manifest error” that led to the wrong holding. Historically, in contrast to the United States,

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169 Alien Tort Statute, 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only . . . .” (emphasis added)).
170 Giannini & Farbstein, supra note 6, at 129.
171 Id. at 129–30.
172 Id. at 129.
173 Id. at 130 (“To contend that the lack of charges against the corporation indicates anything about corporate liability under international law ignores the simple fact that it made little sense to sue [Farben], given the penalties already imposed and the reality that [Farben’s] remaining assets were held by the Allied Control Council itself by that time.”).
174 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 119 (2d Cir. 2010).
175 Paust, supra note 130, at 977 n.1, 978 n.2.
various continental European nations’ legal regimes excluded corporations from criminal liability preferring to impose liability on individuals as opposed to a legal body, such as a corporation. But, as corporations have become more embedded in our globalized world, this view has already changed. Professor Lederman describes the shift:

The last two decades have created a new socio-political-economic reality, characterized by a thriving common market in Europe, changes in the political regimes of Eastern Europe, intensive privatization processes in many countries that shifted many areas of activity to the non-governmental sector, and the creation of mega-multinational-corporations that are the result of acquisitions, mergers and takeovers. In a process that peaked in the second half of this century, legal bodies have actually assumed control of all forms of commerce and industry, to the extent that no economic endeavor is deemed possible without their involvement. This socio-economic reality has dictated, to a large extent, the change in the law’s approach to the imposition of penal liability on corporations. Policy setters in various legislative and law enforcement bodies sensed that attaining effective, and mainly trouble-free, control of the economy through criminal law depends on a sweeping subordination of the legal bodies themselves, as far as possible, to criminal proceedings. All this without restricting the scope of the personal criminal liability incumbent on management ranks or on those actually involved in breaking the law.

In short, the realities of our interconnected world and the immense financial power wielded by large corporations militate strongly in favor of

177 The fact that U.S. law permits such liability provides yet an additional reason for the irrelevancy of the criminal law tribunals. As discussed, international law leaves to the individual states the specific means of its enforcement. Moreover, the domestic laws of the United States permit corporate liability. See supra Part II.B.2. Thus, reference to international tribunals is misplaced.


179 See, e.g., Beale, supra note 158, at 1493 (“[S]everal European jurisdictions that previously made no provision for corporate criminal liability have created such liability, and others have expanded existing bases of corporate liability for crimes.”).

180 Lederman, supra note 178, at 644 (emphasis added).
subjecting corporate conduct to criminal liability. For example, over twenty
years ago, the Council of Europe\(^{181}\) recognized this need and recommended
the adoption of corporate criminal liability in European Community
nations.\(^{182}\) Further, the Netherlands had already commenced allowing
corporate criminal liability before the European Council recommendation,
while others subsequently adopted the change.\(^{183}\)

As Professor Lederman notes, “The Dutch courts had seemingly
anticipated this recommendation and, in the mid-1970s, shifted course in this
direction. France, on the other hand, changed its criminal law on this issue
following the recommendation, and in the early 1990s erased the prohibition
against rendering corporations (personnes morales) criminally liable.”\(^{184}\)

Lederman notes that in the 1990s

legal bodies in England have been charged with manslaughter,
and some have even been convicted . . . . In Israel also, this
struggle has finally been decided. For the first time, an explicit
provision concerning corporate liability has been legislated in
the general section of the criminal code, and the Supreme Court
has stated that “in principle, there is no reason for failing to
impose criminal liability on a corporation for the perpetration
of manslaughter.”\(^{185}\)

According to Beale, criminal liability is fast becoming the rule rather than
the exception.\(^{186}\)

Beginning in the 1970s, nations throughout western European
[sic] began creating or expanding corporate criminal liability,
rather than contracting or eliminating it. Some of the
legislation affected small nations. For example, legislation in


\(^{182}\) Committee of Ministers, Council of Europe, Recommendation on Liability of Enterprises
Having Legal Personality for Offences Committed in the Exercise of their Activities,

\(^{183}\) See Lederman, supra note 178, at 645.

\(^{184}\) Id. (emphasis added) (footnote omitted).

\(^{185}\) Id. at 645–46 (footnote omitted).

\(^{186}\) Beale, supra note 158, at 1493. A significant exception is Germany. However, even in
Germany, corporations may be fined through administrative bodies and supervised by
criminal courts. Moreover, an active debate is underway with scholars arguing for actual
corporate criminal liability. See Sara Sun Beale & Adam G. Safwat, What Developments in
Western Europe Tell Us About American Critiques of Corporate Criminal Liability, 8 BUFF.
the Netherlands and Denmark provided that corporations are, in general, liable for all offenses within each nation’s general criminal code. In 1995, Finland imposed a new form of negligence-based criminal liability on corporations, and in 2003 Switzerland, for the first time, imposed criminal liability on corporations. But perhaps the most significant legislation was adopted in 1992 when France enacted a revised penal code that provided, for the first time, for corporate criminal liability. More recently, a 2000 amendment effectively expanded the scope of corporate liability under French law. Additionally, transnational European organizations have recommended that their member states provide for criminal or quasi-criminal liability on organizations for specific types of offenses.187

This emphasis on corporate criminal liability for bribery is exemplified in the United Kingdom’s anti-bribery law. Pursuant to U.K. law, there is a separate offense for commercial enterprises for the failure to prevent the bribery—an offense distinct and separate from the act of bribery itself.188 A “relevant commercial organization”189 is guilty of an offense if a person associated with the organization bribes another person intending to obtain or retain business or an advantage in the conduct of business for the organization.190 Pursuant to the U.K. anti-bribery law, corporations are included in the law.191 Another example is Australia, where corporations may also have liability.192 Further, the Organization for Economic Cooperation and Development (OECD) anti-bribery convention also demonstrates an adoption of corporate liability.193

A recent example is the Trafigura case. In June 2010, defendant corporation Trafigura was fined and held criminally responsible by a Dutch court for the impermissible dumping of toxic waste.194 The case arose from a

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187 Beale, supra note 158, at 1493–94 (footnotes omitted).
188 Bribery Act, 2010, c. 23, § 7(1) (Eng.).
189 Id. § 7(5) (a “relevant commercial organization” includes U.K. corporations and partnerships as well as corporations and partnerships from anywhere in the world that conduct business in the U.K.).
190 Id. § 7(1).
191 Id. § 7(5).
2006 illegal dumping of toxic waste in the Ivory Coast and the resulting injuries to thousands of people.\textsuperscript{195} The injured parties were poisoned from the waste leading to deaths and serious injuries.\textsuperscript{196}

In the United States, corporate criminal liability has long been recognized and is well embedded in the American judicial system:

The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of \textit{respondeat superior}. \textit{See United States v. Basic Constr. Co.}, 711 F.2d 570, 573 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions.").\textsuperscript{197}

Both federal and state courts in the United States routinely have corporate defendants in their courtrooms defending a variety of criminal prosecutions. Accordingly, even in the criminal liability context, corporate liability is increasingly the norm.\textsuperscript{198} For example, international law recognizes the importance of corporate responsibility in the areas of terrorist financing and money laundering.\textsuperscript{199} With respect to international bribery, there is a strong global effort toward combating corruption, corporate responsibility, and liability.\textsuperscript{200} The preceding section demonstrated the essentially unanimous

\textsuperscript{195} \textit{Id.}
\textsuperscript{196} \textit{Id.}
\textsuperscript{200} \textit{See generally} Civil Law Convention on Corruption, Nov. 4, 1999, Europ. T.S. No. 174 (outlining steps to be taken in the civil context in the international fight against corruption); Criminal Law Convention on Corruption, Jan. 27, 1999, Europ. T.S. No. 173 (outlining steps to be taken in the criminal context in the international fight against corruption); \textit{Group of States Against Corruption} (GRECO), COUNCIL EUR., http://www.coe.int/t/dghl/monitoring/
trend towards and perhaps norm for the imposition of corporate criminal liability. The next section explores how corporate liability for civil damages already exists.

2. Civil Liability

The vast majority of jurisdictions permit civil suits against corporations. Given that ATS suits against corporations are civil rather than criminal, an examination of whether corporate civil liability is an accepted norm of international law is most relevant. Unlike criminal liability, there is no doubt about a juridical organization’s civil liability for causing tort damage.

In a nutshell, as pointed out by a recent report of the International Commission of Jurists on corporate complicity in international crimes, “[i]n every jurisdiction, despite differences in terminology and approach, an actor can be held liable under the law of civil remedies if through negligent or intentional conduct it causes harm to someone else.” Civil liability therefore gives more latitude than criminal liability . . . (1) it applies indiscriminately to natural and legal persons whereas criminal law often restricts the liability of legal persons; (2) the characterization of a negligent or intentional conduct is not subject to the principle of legality; (3) it operates on a lower standard of proof than does criminal liability and; (4) it offers an independent source of financial redress for victims.201

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Corporations also enjoy rights and face liabilities under international law including those arising out of international treaties. Illustrative are the rights conferred by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Indeed, corporations have filed claims in the European Court of Human Rights for an infringement on corporate rights.

One of the most important treaties used frequently by both international corporations and states are bilateral investment treaties (BITs). These have become quite prominent in international law. “BITs and similar cross-national instruments, such as Chapter 11 in the North American Free Trade Agreement (‘NAFTA’), have rapidly proliferated over the past few decades.” Corporations routinely file claims under investment treaties. The most prominent forum for these disputes is the World Bank’s International Center for Settlement of Investment Disputes (“ICSID”). Many ... tribunals adopt a relatively progressive approach in interpreting BIT clauses, intervening in numerous instances in local regulatory or legislative acts that are viewed as conflicting with such cross-national legal norms.

Corporations’ claims for damages based upon violations of investment treaties are decided under international law. This demonstrates that

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206 Lehavi, supra note 205, at 449.

207 Id. (citations omitted).

208 See Metalclad Corp. v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)97/1, para. 70 (Aug. 30, 2000), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC542_En&caseID=C155 (“A Tribunal established pursuant to NAFTA Chapter Eleven, Section B must decide the issues in dispute in accordance with NAFTA and applicable rules of international law. (NAFTA Article 1131(1)). In addition,
corporations are invoking international law to their benefit, since the claimant is alleging a host state’s breach of its international treaty obligations. For example, in 1999, Methanex Corporation filed claims under NAFTA against the United States, alleging that California’s MTBE (a gasoline additive and water contaminant) reduction plan constituted unequal and unfair treatment and would result in an illegal taking of its “property right.”

Although the claim was ultimately denied, Methanex’s claim was brought as all investment treaty claims are—pursuant to international law. The Methanex arbitration tribunal stated:

[Under Article 38(1) of the Statute of the International Court of Justice,] Methanex has rightly emphasised the reference in Article 1131(1) to “applicable rules of international law”, and in this respect Methanex relies on Article 38(1) of the Statute of the International Court of Justice. It provides:

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of

NAFTA Article 102(2) provides that the Agreement must be interpreted and applied in the light of its stated objectives and in accordance with applicable rules of international law.”.


210 Id. para. 1.
the various nations, as subsidiary means for the determination of rules of law.”

Thus, investment treaty arbitration panels use international conventions, customs, and general principles of law as outlined sources of international law per Article 38(1) and represent a clear example of corporations invoking international law. 212 If a corporation has the right to invoke rights under international law, a corporation should also be subject to civil liability under international law. Predictably, with rights come obligations. To confer rights on corporations without the associated obligations is not reasonable. Vesting corporations with rights, such as the right to file claims, while simultaneously exonerating them for tort damage created by violating international law, does not make sense and, moreover, encourages violation of international law.

D. The Sharp Line of Demarcation Between States and Corporations No Longer Exists: The Corporation as a Quasi-Public Actor

Opponents of corporate liability may point to the historical dichotomy between “corporations” and “states” as underpinning the argument that only states have obligations under international law. As Professor Alford notes, in the past international law was relegated to sovereign nations. 213 Therefore, “‘sovereign States exclusively are International Persons—i.e. subjects of International Law’ and neither ‘monarchs, diplomatic envoys, private individuals . . . churches . . . chartered companies, nor . . . organized wandering tribes’ enjoyed the status of ‘International Persons’ who are ‘subject[s] of the Law of Nations.’” 214

According to liability opponents, the ATS is only applicable to “states” as states are the principal actors in “international law.” According to the Kiobel majority, “customary international law includes only ‘those standards, rules

211 Id. para. 3.
212 See, e.g., Apotex Inc. v. United States of America, U.S. DEP’T STATE, http://www.state.gov/s/l/c27648.htm (last visited Dec. 13, 2011) (“Apotex Inc., a Canadian pharmaceuticals corporation, alleges that U.S. courts committed errors in interpreting federal law, and that such errors are in violation of NAFTA Article 1102 (national treatment) and Article 1105 (minimum standard of treatment under international law). Apotex also alleges that the challenged U.S. court decisions expropriated Apotex’s investments under NAFTA Article 1110.”).
213 Alford, supra note 27, at 234 (citing 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 125 (3d ed. 1920)).
214 Id. (quoting 1 OPPENHEIM’S INTERNATIONAL LAW 16 n.1 (Robert Jennings & Arthur Watts eds., 9th ed. 1992)).
or customs (a) affecting the relationship between states or between an
individual and a foreign state, and (b) used by those states for their common
good and/or in dealings inter se.”

In essence, opponents claim that international law is only concerned with
the rights and obligations of states. While acknowledging that private
individuals may have obligations for certain conduct, such as war crimes,
crimes against humanity, and genocide, a distinction is made between private
individuals and private corporations. Describing individual liability for
violations of international humanitarian law as “revolutionary,” Kiobel
explained that international law only concerns state to state relations.
Even when international law recognizes private actor liability in limited
circumstances it is in the context of states’ obligations to its citizens.
Therefore, since corporations are private actors and the purpose of
international law is to regulate conduct and relations between states,
corporations cannot have obligations under international law.

However, there is academic disagreement. As noted by Professor Paust:

> For centuries, there have been vast numbers of formally
recognized actors in the international legal process other than
the state, although far too many assume incorrectly that
traditional or classical international law had been merely state-
to-state and that under traditional international law individuals
and various other nonstate actors did not have rights or duties
based directly in international agreements or customary
international law.

According to Paust, there exists a significant array of geographically
diverse nonstate actors which have been subject to international law. He

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Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.)).
216 Ku, supra note 6, at 377–79.
217 Id. at 365–66 (noting that the court in Doe v. Unocal Corp. “did not separately analyze
whether a private corporation, as opposed to a natural person, could be liable under this
218 Ku, supra note 6, at 379; Kiobel, 621 F.3d at 118.
219 Ku, supra note 6, at 379 (“The result of these developments is that certain forms of
international law extended the scope of its protections to nationals against their own states
(international human rights law) and other forms of international law extended the scope of its
duties to individuals (international humanitarian law). Although revolutionary, these
developments did not replace the traditional operation of international law via state-to-state
relations.”).
220 Paust, supra note 130, at 977.
221 Id. at 978.
describes the attempt to limit obligations to formal states as a “mendacious myth”\(^{222}\) and cites to various circumstances where nonstate actors have indeed been subject to international law.\(^{223}\)

However, assuming \textit{arguendo} Kiobel’s reference to international law governing the corporate liability question is correct, notwithstanding any traditional relegation of international law to “states,” corporations are now crucial actors in international business and have taken the mantle of economic leadership and development once relegated primarily to nation states. As Justice Scalia noted in his concurrence in \textit{Citizens United}, corporations are “the principal agents of the modern free economy.”\(^ {224}\) This fact alone militates strongly in favor of rejecting a formalistic “no liability” view.

In addition, scholars have criticized any distinction as having been completely wrong. For example, Professor Paust states:

\begin{quote}
[F]or the last 250 years, international law has not been merely state-to-state. At best, claims to the contrary have been profoundly mistaken. At worst, they have been part of layered lies and attempts by malevolent myth-mongers to exclude and oppress others, to deny responsibility, or to support radical revisionist ambitions. A claim that the only actors with formal participatory roles or recognized rights and duties other than the state have been natural individual persons is similarly mistaken. For example, international law [reaches] such non-individual entities and other actors as a company, corporation, union, vessel, courthouse, insurgent, belligerent, tribe, free city, people, and nation, among others.\(^ {225}\)
\end{quote}

Further, as a New York district court noted, “Limiting civil liability to individuals while exonerating the corporation directing the individual’s action . . . makes little sense in today’s world.”\(^ {226}\)

While, traditionally, a line of demarcation existed, that line is becoming blurred. Corporations are becoming active private actors in the public arena, taking a role in traditionally state functions. The public functions of education, policing, and defense operations no longer depend exclusively on

\begin{itemize}
  \item \(^{222}\) Id.
  \item \(^{223}\) Id. 978–98.
  \item \(^{225}\) Paust, \textit{supra} note 130, at 1003–04.
  \item \(^{226}\) \textit{In re “Agent Orange” Prod. Liab. Litig.}, 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005).
\end{itemize}
public actors within a specific nation state; they are affected by private corporations conducting business across borders, often as quasi-public actors. Indeed, large multinational corporations have been referred to as virtual “states.” As such, there is no reason to treat corporations differently than states.

Simultaneously, the private sector functions of providing private liquidity and capital market investment are no longer the exclusive province of private entities. States are operating in the business world as private actors through vehicles such as sovereign wealth funds (SWFs), whereby they actively invest in world equity markets, demonstrating convincingly that states are involved in the private sector. States also own private sector businesses through State Owned Enterprises (SOEs). Thus, the traditional role of the private sector is no longer relegated exclusively to corporations.

1. Corporations Acting in the Public Sphere

Those with the view that states are the principal actors within their boundaries must recognize that states often outsource to corporations the performance of traditionally state services. There are various traditional state
roles which are increasingly being undertaken by private entities including the. These roles span the gamut, including health care, welfare, education, prisons, police, imprisonment, military defense, and other traditional governmental services.231 Historically state roles have been replaced by corporations and the depth of outsourcing of public functions is receiving increased attention.232 “The most common form of privatization in this arena has been outsourcing, an arrangement in which the government contracts with a private entity to render goods or services previously provided by the government.”233

The privatization of prisons serves as an example of this outsourcing phenomenon. Prisons are no longer the exclusive domain of the state. Commencing in the 1980s and 1990s, “governments began to rely more heavily upon the private sector for the provision of corrections services for adults. As a result, a significant number of state and federal prisoners are now in the custody of private entities.”234

Indeed, corporations are influential in shaping decisions of nation states.235 One scholar notes, “The world has . . . changed, and long-standing legal concepts are being increasingly challenged by dramatic cross-border developments that no longer allow domestic land laws to exist in isolation, but instead present pressing issues of cross-influences, regionalism, and universalism.”236

Although states were once the primary vehicle to impose obligations, now corporations are taking a substantial role. An example “is the manner in which the enforcement of human rights in the crucial area of labour rights is moved from states and international organizations to market actors via the idea of [corporate social responsibility].”237

233 Roger A. Fairfax, Jr., Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization, 2010 U. CHI. LEGAL F. 265, 266.
234 Id. at 271 (footnotes omitted).
236 Lehavi, supra note 205, at 427.
Another example is governmental outsourcing to corporations of drafting health policy and regulations. For example, the U.K. has asked food corporations to assist drafting policy on food and alcohol.238

In addition to wielding enormous economic power, corporations increasingly engage in state-like activity as a result of the privatization of traditional state functions (e.g., the management of prisons, public welfare programs, public utilities, and wars) and the tendency of corporations to elect to operate in environments where state power is weak or non-existent.239

Given the fact that corporations are acting much like public actors it would be unfair if a private actor could obtain immunity for civil damages by virtue of it being a corporate entity. There would also be substantial incentive for misconduct if the actor knows there is an exemption of civil liability.240 Indeed, as noted by Tyler Giannini and Susan Farbstein, the Kiobel holding “potentially incentivizes states to abdicate state duties to corporations because incorporation may effectively insulate all parties—states, armed groups, and corporations—from liability.” 241

2. States Acting in the Private Sphere

A similar shift has occurred in the private sector. The historical activities of the private sector, including investment in the equity and debt markets, the ownership of shares in other private sector corporations, and providing investment capital, are no longer solely the role of the private corporation.242 States are increasingly taking on a private actor role.243 The emergence of SWFs as financial superstars is one example. SWFs, and their state owners,

238 Felicity Lawrence, McDonald’s and PepsiCo to Help Write UK Health Policy, GUARDIAN, Nov. 13, 2010, at 1 (“The Department of Health is putting the fast food companies McDonald’s and KFC and processed food and drink manufacturers such as PepsiCo, Kellogg’s, Unilever, Mars and Diageo at the heart of writing government policy on obesity, alcohol and diet-related disease, the Guardian has learned.”).


240 See, e.g., N.Y. Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481, 494–95 (1909) (noting that there is “no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents . . . . If it were not so, many offenses might go unpunished.” (citation omitted)).

241 Giannini & Farbstein, supra note 6, at 123.


243 Id.
are increasingly acquiring ownership stakes in corporations all over the globe. 244 Whether a SWF controls, dominates, or outright buys a corporation, there can be no doubt that such activity represents involvement in a traditionally nonstate activity resulting in states conducting business as private actors.

Another example of the blurring of the demarcation is the SOE, which is often a corporate entity. 245 SOEs are involved in direct or partial ownership of business projects and joint venture partnerships with other states and corporations on a global basis. 246 Again, this constitutes a form of traditional private corporate activity being conducted by states as private actors conducting business on an international scale.

Since states are engaging in private actor functions the distinctions between states and corporations are eviscerating. Accordingly, the theoretical underpinning for holding only states as bearing international legal obligations has similarly been largely eliminated:

This participation of states directly in markets (production, ownership, finance and the like) is not merely in the old and now fairly tame form of public, central planning-based, political regimes, or the sort of ownership that traditionally constituted state enterprises, i.e. mercantilist/Marxist-Leninist undertakings with a long and well understood history and purpose. What distinguishes this sovereign activity from its mid-20th Century form is the willingness of states not only to limit their control of internal economies, but also to invest their financial wealth outside their national borders. In this respect, states assume the very role of the private economic actors that they once feared so much. The 21st Century is witnessing a dramatic rise in the willingness of states to project economic power both at home and in host states through the same economic vehicles that threatened the states’ power in the 20th Century. The facilitating cause of this change in approach is the creation of the very system that frees economic actors from the constraints of territory and more closely binds public actors thereto. Just as private economic entities may now cross borders to affect transactions that maximize their wealth, so states are now discovering that they might do the

244 Id.
245 Backer, supra note 230, at 61–63.
246 Id.
same thing. Economic globalization does not exclude private market participants from its system of freely moving capital. Just as private actors are subject to the regulation and control of the sovereign in whose territories they act, states acting outside their borders as participants in local economic activity assume a similar character. Consequently, some states seem to have become, to some extent, pools of national economic wealth, the power of which matches or exceeds their traditional sovereign power.247

Thus, the roles of corporations as purely private actors and that of states as purely public actors are no longer in effect.248 Each distinct role has been replaced with a mixed role. Given the reality of corporations being wealthier than states, our interconnected and interdependent world, and the blurring of the distinction of roles between states and corporations, the failure to impose obligations upon corporations because corporations are distinct from states is no longer valid. “Traditional legal concepts are thus being exceedingly challenged by recent geopolitical, economic, and intellectual factors that no longer allow land laws to exist in isolation. Rather, these challenges present pressing issues of strong cross-influences, regionalism, and universalism.”249

The mixture of state and corporate roles unquestionably prevents states from being purely public actors and prevents corporations from being purely private actors. To impose legal obligations on states but disallow these same obligations on corporations is makes little sense in today’s world where both states and corporations have similar or even identical interests. This coalition of interests underscores the blurring of the distinction between states and corporations.

In international relations, there are no enduring values as in the case of interpersonal relations. For states, there are mostly shifting interests of a passing nature. The states’ goals of power and wealth are in frequent contrast with the human goals of justice and peace aspirations. The protagonists of state

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247 Id. at 10–11 (emphasis added) (footnotes omitted).
248 See id. at 59 (“It is clear that SWFs represent a multifaceted nexus point for the convergence of public and private law. On the one hand, SWFs encompass attempts by states to participate in global markets like private individuals. On the other hand, SWFs may govern by other means. SWFs potentially allow states to convert private markets into public arenas through which they might project political and regulatory power abroad.” (footnotes omitted)).
249 Lehavi, supra note 205, at 438.
interests all too often prevail over those advocating justice and peace.\textsuperscript{250}

Similar to state interests, corporations also have no enduring values other than goals of financial power and wealth. Why should corporations be treated differently particularly in today’s global economy where states act in the private realm and private corporations do so in the public arena? There is a lack of compelling reasons supporting the view that courts should treat corporations differently so as to exempt them from liability.

IV. CONCLUSION

Given the evolving notion of states as private actors and the implications for private corporations, the Supreme Court will need to address the issue at some point. Because of the circuit split and the importance of corporate liability, the Court may very well accept review of \textit{Kiobel} or, alternatively, may grant cert in a different ATS suit, such as \textit{Exxon} or \textit{Flomo}, particularly if the court wants to address corporate liability alongside the issue of the standard for secondary liability.

The high stakes and significance of the corporate liability issue increase the likelihood that the Supreme Court will accept at least one corporate suit to resolve the liability question. Substantial support exists for the view that corporations should be liable under the ATS. These reasons include: the dearth of proof that corporate defendants were excluded by the statute’s drafters; the \textit{Kiobel} court’s misplaced reliance on the \textit{Sosa} footnote; the lack of an enforcement mandate in international law; that corporations are subject to civil law and criminal law; and the blurring of the once sharp public-private distinction. All of these points undermine the argument that international law is relegated only to states, and that the Court should, therefore, reject corporate immunity in ATS suits.