

Interpreting Liability Under the Alien Tort Statute

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INTRODUCTION

The Alien Tort Statute (“ATS”) grants federal courts jurisdiction to hear civil claims brought by aliens for torts committed in violation of the law of nations or a treaty of the United States.¹ This peculiar law has opened courtroom doors to lawsuits brought by non–U.S. citizens for international law violations perpetrated around the world. Indeed, as the Second Circuit once stated, it is “a jurisdictional provision unlike any other in American law and of a kind apparently unknown to any other legal system in the world.”²

Although the First Congress adopted the statute in 1789 as part of the Judiciary Act, it went largely unused for about 170 years.³ The First Congress, concerned with its “inability to ‘cause infractions of treaties, or of the law of nations to be punished,’” originally enacted the ATS to

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1. 28 U.S.C. § 1350 (2013) (“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.”).

2. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 115 (2d Cir. 2010).

3. *Id.* at 115–16.

enforce the law of nations domestically.⁴ A lack of drafting history, however, and the brevity of the text of the statute itself have given courts an opportunity to interpret what the ATS means and how it was meant to be used.⁵ Judge Friendly highlighted this point when he called the statute “a legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came.”⁶

After years of nonuse, the ATS experienced a revival in 1980 when the Second Circuit took jurisdiction over a suit brought by Paraguayan citizens against a Paraguayan Inspector General of Police for human rights abuses in contravention of international law.⁷ From then on, the ATS became a means by which human rights abuse victims would seek civil redress for their injuries. And as litigation of human rights violations under the ATS continued after *Filartiga*, so too did the group of defendants that plaintiffs sought to hold accountable expand.⁸ From state actors, to private individuals, to corporations, plaintiffs sought to cast the ATS net farther and wider, seeking compensation for their wrongs and recognition of the fact that human rights abuses are not committed by state actors alone, but also by private individuals and corporations.

After *Filartiga*, most courts faced with these new types of defendants would uphold jurisdiction and find that they could be liable for their alleged wrongs.⁹ The opinions, however, failed to fully explain their conclusions. With the statute itself silent on the classes of defendants it contemplated,¹⁰ judges were free to interpret and explain exactly how liability arose under the ATS. And while these opinions incorporated new classes of defendants into the statute’s reach, they failed to draw a

4. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004) (citing J. Madison, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed. 1893)).

5. See Mara Theophila, “Moral Monsters” Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After *Kiobel v. Royal Dutch Petroleum Co.*, 79 FORDHAM L. REV. 2859, 2863 (2011).

6. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

7. *Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980); see also *Kiobel*, 621 F.3d at 116 (“in 1980, the statute was given new life, when our Court first recognized in *Filartiga v. Pena-Irala* that the ATS provides jurisdiction over (1) tort actions, (2) brought by aliens (only), (3) for violations of the law of nations . . . including, as a general matter, war crimes and crimes against humanity—crimes in which the perpetrator can be called ‘*hostis humani generis*, an enemy of all mankind.’” (citing *Filartiga*, 630 F.2d at 890)).

8. *Filartiga*, 630 F.2d at 878 (claims brought against a state official); *Kadic v. Karadzic*, 70 F.3d 232, 236–37 (2d Cir. 1995) (claims brought against a private individual); *Kiobel*, 621 F.3d at 117 (claims brought against corporations).

9. *Filartiga*, 630 F.2d at 878 (finding that the ATS provides jurisdiction over a claim against a state official); *Kadic*, 70 F.3d at 236 (finding that the ATS provides jurisdiction over a claim against a private individual); *Romero v. Drummond*, 552 F.3d 1303, 1315 (11th Cir. 2008) (finding that the ATS provides jurisdiction over a claim against a corporation).

10. See *Amerada Hess Shipping Corp. v. Argentine Republic*, 488 U.S. 428, 438 (1988) (“The Alien Tort Statute by its terms does not distinguish among classes of defendants . . .”).

link between the given defendant's obligation to uphold international law norms and liability under the ATS.¹¹ The absence of this link would prove crucial to the development of a Circuit split on whether corporations can be tried as ATS defendants.¹²

On September 17, 2010, the Second Circuit rejected corporate liability under the ATS in *Kiobel v. Royal Dutch Petroleum Co.*¹³ By doing so, the Second Circuit split from other courts that had previously upheld jurisdiction over corporate ATS cases.¹⁴ The Second Circuit drew from its own precedent and from a footnote in *Sosa v. Alvarez-Machain*,¹⁵ the only Supreme Court decision on the ATS, to find that liability under the statute is governed by international law. The Court held that, because no norm of customary international law holds corporations liable for human rights violations, the ATS does not provide jurisdiction over such claims.¹⁶

This holding elicited a backlash of subsequent Circuit court decisions upholding corporate liability under the ATS.¹⁷ The Circuit split exposed a choice of law debate among the courts that centers on whether international or domestic law should govern liability.¹⁸ One side of the

11. Professor Kenneth Anderson described this issue in terms of a "hinge" under the ATS. See Kenneth Anderson, *Extra Thoughts on Today's 2nd Circuit ATS Decision*, OPINIO JURIS (Sept. 17, 2010, 10:49 PM), <http://opiniojuris.org/2010/09/17/extra-thoughts-on-todays-2nd-circuit-ats-decision/>. He claimed the statute contains a threshold part and a substantive part, and that the question plaguing courts is "whether the threshold that serves as a hinge to swing over to connect and kick start the substantive part of the ATS, so to speak, the US domestic tort law substance, must be international law." *Id.* Similarly, Mara Theophila opined that "the Second Circuit's interpretation of the ATS [in *Kiobel*] unjustifiably conflates the threshold question of what constitutes a violation with the secondary issue of who can be held liable under the statute." Theophila, *supra* note 5, at 2862. See also *id.* at 2902–04. This Note reclassifies the issue addressed by Anderson and Theophila as a gap in ATS jurisprudence between a defendant's obligation to uphold international law norms and a defendant's liability under the statute. This Note provides a close reading of ATS case law in order to demonstrate how the gap was first posited in the Second Circuit's opinion in *Filartiga* and continued throughout ATS jurisprudence. Rather than continuing the gap, the *Kiobel* decision instead attempted to fill it by applying international law to determine liability under the ATS. See *infra* Part II.B.

12. See Joseph G. Finnerty III et al., *CIRCUIT SPLIT WIDENS Corporate Liability Under the Alien Tort Statute*, 53 No. 11 DRI For Def. 78 (2011). Most recently, the Ninth Circuit furthered the Circuit split by upholding corporate liability under the ATS in *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011).

13. 621 F.3d 111 (2d Cir. 2010).

14. See, e.g. *Romero v. Drummond*, 552 F.3d 1303 (11th Cir. 2008). See also Frank Cruz-Alvarez & Laura E. Wade, *The Second Circuit Correctly Interprets the Alien Tort Statute: Kiobel v. Royal Dutch*, 65 U. MIAMI L. REV. 1109, 1109 n.6 (2011) (listing cases prior to *Kiobel* that upheld jurisdiction over corporate defendants).

15. 542 U.S. 692, 733 n.20 (2004).

16. *Kiobel*, 621 F.3d at 145.

17. See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011). See also *infra* Part III.

18. The choice of law debate under the ATS had been brewing before *Kiobel* for some time.

debate, like the court in *Kiobel*, would apply international law to determine whether corporations can be sued, while the other would resolve the issue by applying domestic law. Using different interpretations of precedent and the footnote from *Sosa*, each post-*Kiobel* decision upheld jurisdiction over ATS claims against corporate defendants. While each court reached the same holding, some determined corporate liability by using international law while others applied domestic.

This Note will explore the development of the Circuit split over corporate liability under the ATS. Part I will track how ATS decisions prior to *Kiobel* adjudicated liability under the statute without ever truly addressing it. By leaving room for future judges to interpret the ATS to either include or exclude corporate liability, these decisions paved the way for the aforementioned choice of law debate. More specifically, Part I will explain how two key cases from the Second Circuit and the Supreme Court's opinion in *Sosa* failed to locate a defendant's liability in either international or domestic law. Each decision explained the defendant's international law obligation and upheld liability under the ATS, but left gaps in its reasoning by failing to draw a link between the two.

Part II will explore the current Circuit split, starting with an analysis of the Eleventh Circuit's take on corporate liability before contrasting it with the Second Circuit's decision in *Kiobel*. Part III analyzes the backlash against *Kiobel* in the District of Columbia, Seventh, and Ninth Circuits. Part IV then applies a theory of legal interpretation as a framework for explaining how the Circuit courts were able to reach such different holdings on corporate liability by reading their own policy into precedent and their interpretations of *Sosa*'s murky footnote.

On October 17, 2011, the Supreme Court granted certiorari in *Kiobel* to review the corporate liability question.¹⁹ This Note concludes in Part V with a suggestion that the Supreme Court should now explicitly fill the gap in ATS case law by linking a defendant's obligations under international law to its liability under the ATS with domestic law. Domestic law holds corporations accountable for their torts,²⁰ and the

See generally Willam R. Casto, *The New Federal Common Law of Tort Remedies For Violations of International Law*, 37 RUTGERS L.J. 635 (2006); Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008); Odette Murray et al., *Exaggerated Rumours of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of Kiobel*, 12 MELB. J. INT'L L. 57 (2011).

19. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011) (No. 10-1491).

20. *See Doe*, 654 F.3d at 57 ("Given that the law of every jurisdiction in the United States and of every civilized nation, and the law of numerous international treaties, provide that corporations are responsible for their torts, it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for 'shockingly egregious violations of

ATS should be no exception. Answering the choice of law debate in favor of corporate liability gives victims of human rights violations worldwide a forum for redress and positions the United States as a leader in the human rights field.

I. INTERPRETING A DEFENDANT'S LIABILITY UNDER THE ATS—
HOW THE SECOND CIRCUIT GOT TO *KIOBEL*

A. *Beginning in Filartiga v. Pena-Irala*

The current Circuit split over corporate liability can be traced back to the Second Circuit's decision in *Filartiga v. Pena-Irala*.²¹ *Filartiga* revived litigation under the ATS and led courts to expound upon different issues under the statute that had never before been addressed.²² The *Filartiga* Court's description of a plaintiff and defendant's rights and obligations under the ATS laid the foundation for future disagreement among the courts about corporate liability.

The *Filartigas*, citizens of Paraguay, brought suit under the ATS against Americo Norberto Pena-Irala, in his individual capacity, for the wrongful death of their son, Joelito.²³ The *Filartigas* claimed that Pena-Irala, a Paraguayan police official, caused Joelito's wrongful death through the use of torture.²⁴ As such, the *Filartigas* sought to hold him civilly liable under the ATS for a tort in violation of the law of nations.²⁵

The Second Circuit upheld jurisdiction, finding the plaintiffs had alleged a violation of "established norms of the international law of human rights, and hence the law of nations," namely, deliberate torture by a government official.²⁶ Where no treaty is implicated, the Court found that established norms of the law of nations were to serve as the standard against which a defendant's tortious conduct would be measured.²⁷ If a defendant transgressed a rule of international law, the Court could take jurisdiction. The Second Circuit thus required a violation of

universally recognized principles of international law.'" (citing *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983)).

21. 630 F.2d 876 (2d Cir. 1980).

22. See Geoffrey Pariza, *Genocide, Inc.: Corporate Immunity to Violations of International Law After Kiobel v. Royal Dutch Petroleum*, 8 LOY. U. CHI. INT'L L. REV. 229, 232 (2010–2011) ("The Second Circuit Court of Appeals, which has been at the forefront of almost all significant ATS litigation, breathed new life into the ATS in 1980 with its seminal case, *Filartiga v. Pena-Irala*, where it held that deliberate torture under the color of law violated universally accepted norms and was against the law of nations.").

23. *Filartiga*, 630 F.2d at 878–79.

24. *Id.* at 879.

25. *Id.* at 878–79.

26. *Id.* at 880.

27. *Id.* at 880–81.

“well-established, universally recognized norms of international law”²⁸ as the basis for jurisdiction under the ATS.

The Court turned to sources of international law to determine whether deliberate torture by a government official violated an established norm of the law of nations.²⁹ Because the law of nations changes and evolves over time, the Court used sources to “interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”³⁰ Conduct constituting a violation of the law of nations under the ATS would change over time because customary international law standards would continue to develop through the centuries. After scanning the sources of international law, the Court found that “there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state’s power to torture persons held in custody.”³¹

In its analysis of international law sources, the Court shifted between a discussion of the *rights* of individuals in international law to be free from torture, the *obligation* on states in international law to refrain from violating these rights, and the *norms* of international law against which a defendant’s conduct must be measured. The Court found universal agreement that “international law confers fundamental rights upon all people vis-à-vis their governments,”³² and that “the *right* to be free from torture,”³³ as promoted by the United Nations Charter and explicitly granted in the Universal Declaration of Human Rights, is one of them. The Court further found a corresponding *obligation* on states to refrain from torture, as evidenced by United Nations Declarations.³⁴ Together, the right to be free from torture and the concomitant obligation on states to respect that right make up a norm of customary international law that prohibits the official use of torture.³⁵ The Court found further evidence of this rule in “numerous international treaties and accords” and in the “constitutions of over fifty-five nations.”³⁶

In sum, the Court’s jurisdictional analysis identified a plaintiff’s right under international law and a corresponding international law obligation on states. Together, these elements constitute a norm of the law of nations actionable under the ATS.³⁷ The Court, however, failed to clar-

28. *Id.* at 888.

29. *Id.* at 880–81.

30. *Id.* at 881.

31. *Id.*

32. *Id.* at 885.

33. *Id.* (emphasis added).

34. *Id.* at 883.

35. *Id.* at 884.

36. *Id.* at 883–84.

37. *Sosa* later confirmed this jurisdictional analysis. See *Sosa v. Alvarez-Machain*, 542 U.S.

ify whether a defendant's liability arises from international or domestic law. More specifically, the Court failed to link the obligation on states under *international law* to refrain from torture to the liability of Pena-Irala as a defendant *under the ATS*. While international law prohibits officially perpetrated torture, Pena-Irala would be liable in his individual capacity. But from where exactly did Pena-Irala's liability for torture arise?

In the beginning of the opinion, the Court held "that deliberate torture perpetrated *under color of official authority* violates universally accepted norms of the international law of human rights."³⁸ The Court then never addressed whether or how international law extends the same obligation that it places on states to state actors individually. The only mention of an individual's responsibility for official torture is the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture.³⁹ The Declaration defines torture as "any act by which severe pain of suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official" and provides that victims of torture must have "redress and compensation in accordance with national law" when an act of torture "has been committed by or at the instigation of a public official."⁴⁰

While the U.N. Declaration includes public officials in its definition of torture, the obligation to refrain from that act is ultimately on member states, which must provide a remedy under domestic law for torture committed by their public officials.⁴¹ The Second Circuit's holding that the prohibition against official torture is a "well-established, universally recognized" standard of customary international law is therefore not equivalent to a finding that customary international law imposes liability on individual state officials for acts of torture. Customary international law imposes that liability on states themselves. At the same time, however, the Court did not explain whether domestic or international law governs liability.

692, 725 (2004) ("[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."). See also Theophila, *supra* note 5, at 2867-68 ("The [*Sosa*] decision put to rest the question of which body of law—international or domestic—should guide the inquiry of what constitutes a violation of the law of nations in an ATS lawsuit.").

38. Filartiga, 630 F.2d at 878 (emphasis added).

39. *Id.* at 882-83.

40. *Id.* at 883-84 (citing the Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975)).

41. *Id.* at 882-83 ("The Declaration expressly prohibits any state from permitting the dastardly and totally inhuman act of torture.").

In *Kiobel*, the Second Circuit would later find that a defendant's liability under the ATS must derive from an established norm of customary international law.⁴² The Court would then decline jurisdiction by holding that international law places no liability on corporations.⁴³ As one article noted, however, "[h]ad the *Filartiga* Court asked itself whether any international tribunal had ever held an individual liable — whether civilly or criminally — for committing torture, it would have found no such examples at that time."⁴⁴ This proposition sheds light on *Filartiga*'s failure to address whether liability derives from domestic or international law. Does the fact that there was no international tribunal available to hold an individual defendant liable for torture at the time mean that there was also no corresponding customary international law rule? If so, would it have mattered to the Court at all whether customary international law extended this prohibition to state actors individually? The Court did not answer these questions, but the Supreme Court must now do so explicitly when it decides *Kiobel*.

B. *Private Actor Liability in Kadic v. Karadzic*

In 1995, the Second Circuit issued another influential ATS opinion in *Kadic v. Karadzic*.⁴⁵ After addressing state actor liability in *Filartiga*, the Court next faced the question of whether a private individual could be liable under the ATS.⁴⁶ By answering this question in the affirmative, without distinguishing whether private actor liability derives from domestic or international law, *Kadic* contributed to future disagreement among the Circuit courts over corporate liability.⁴⁷

The plaintiffs, victims of human rights atrocities committed by the Bosnian-Serb military forces during the Bosnian civil war, sued Karadzic, President of the Bosnian-Serb republic and commander of the military forces, in his individual capacity under the ATS.⁴⁸ The plaintiffs claimed they had sustained injuries "committed as part of a pattern of systematic human rights violations directed by Karadzic and carried out by the military forces under his command."⁴⁹ Specifically, they claimed that Karadzic was liable for "brutal acts of rape, forced prostitution,

42. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 130 (2d Cir. 2010).

43. *Id.* at 148–49.

44. Murray et al., *supra* note 18, at 76.

45. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

46. *Id.* at 236.

47. Compare *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 50 (D.C. Cir. 2011) (citing *Kadic* in support of its holding of corporate liability under the ATS) with *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 130 (2d Cir. 2010) (citing *Kadic* in support of its denial of corporate liability under the ATS).

48. *Kadic*, 70 F.3d at 236–37.

49. *Id.* at 237.

forced impregnation, torture, and summary execution, carried out by the Bosnian-Serb military forces” during the war.⁵⁰ In holding that private actors could be liable for certain violations of international law, the Second Circuit rejected the District Court’s finding that a remedy under the ATS requires state action and that, because the Bosnian-Serb military faction was not a state, it could not be liable.⁵¹

The Court began its analysis of private actor liability by referring to three requirements for federal subject-matter jurisdiction under the ATS: “(1) an alien sues (2) for a tort (3) committed in violation of the law of nations (*i.e.*, international law).”⁵² In light of this framework, the Court first phrased the question presented as “whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state,”⁵³ but then later rephrased it as “whether the plaintiffs have pleaded violations of international law.”⁵⁴ By rewording the question presented, the Court effectively sidestepped the question of whether a defendant’s liability derives from international or domestic law. The first phrasing suggests that the issue is whether *domestic law* holds private individuals liable to remedy violations of the law of nations. The second phrasing suggests that the issue is whether *international law* holds private actors liable for violations of its norms, thereby giving rise to a “violation of the law of nations” actionable under the ATS.⁵⁵ In the end, the Court would answer neither directly.

The Court examined different sources to answer the private actor liability question, and ultimately found that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”⁵⁶ The Court first cited case law and William Blackstone to show how piracy is an “example of the application of the law of nations to the acts of private individuals.”⁵⁷ The work of other academic scholars is cited as evidence that prohibitions against slave trade and war crimes have also been applied to private individuals,⁵⁸ and a 1795 opinion of Attorney General Bradford further found that the ATS could remedy violations of customary international law committed by private persons.⁵⁹

Next, the Court looked to the Restatement (Third) of Foreign Rela-

50. *Id.* at 236–37.

51. *Id.* at 237.

52. *Id.* at 238.

53. *Id.* at 236.

54. *Id.* at 238.

55. 28 U.S.C. § 1350 (2013).

56. *Kadic*, 70 F.3d at 239.

57. *Id.*

58. *Id.*

59. *Id.* at 239–40.

tions Law, which states that “[i]ndividuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide.”⁶⁰ This section of the Restatement discusses entities that are considered persons under international law, meaning those that have “have legal status, personality, rights, and duties under international law and whose acts and relationships are the principal concerns of international law.”⁶¹ The Court then cited § 404 of the Restatement: “A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism. . . .”⁶² The Court reasoned that the inclusion of crimes such as piracy, war crimes, and genocide in this section shows that “offenses of ‘universal concern’ include those capable of being committed by non-state actors.”⁶³ Thus, a state can create domestic law remedies, such as the ATS, for violations of customary international law capable of being committed by private actors.⁶⁴

The Court then analyzed each alleged human rights abuse (genocide, war crimes, torture, and summary execution) to determine whether international law has attributed responsibility to private actors for each. The Court determined that “the proscription of genocide has applied equally to state and non-state actors”⁶⁵ and that “the liability of private individuals for committing war crimes has been recognized since World War I and was confirmed after World War II.”⁶⁶ For support of its finding on genocide, the Court cited U.N. Resolutions declaring genocide a crime under international law, “whether the perpetrators are ‘private individuals, public officials or statesmen’” and affirming Article 6 of the Agreement and Charter Establishing the Nuremberg War Crimes Tribunal, which punished individual offenders.⁶⁷ The Court also cited the Convention on the Prevention and Punishment of the Crime of Genocide, which extended punishment to private individuals, and the Genocide Convention Implementation Act of 1987, which criminalized genocide “without regard to whether the offender is acting under color of law.”⁶⁸

60. *Id.* at 240 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (2011)).

61. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. II, introductory note (2011).

62. *Kadic*, 70 F.3d at 240 n.4 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (2011)).

63. *Id.* at 240.

64. *Id.*

65. *Id.* at 242.

66. *Id.* at 243.

67. *Id.* at 241 (citing G.A.Res. 96(I), 1 U.N.GAOR, U.N. Doc. A/64/Add.1, at 188–89 (1946)).

68. *Id.*

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For war crimes, the Court looked to Common Article 3 of the Geneva Conventions, “which binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents.”⁶⁹ Because international law prohibits individuals from committing genocide and war crimes, Karadzic could be liable under the ATS. The torture and summary execution claims were also actionable “to the extent that they were committed in pursuit of genocide or war crimes.”⁷⁰

One judge ruling on corporate liability later cited *Kadic* for its distinction in international law between norms that extend their reach to the conduct of private actors and those that are limited to the conduct of states.⁷¹ Under the ATS, international law comes into play only when deciding if the defendant’s conduct can amount to an actionable violation of the law of nations. Domestic law, however, governs liability. Because corporations are private actors, domestic law would hold them liable for their tortious conduct to the same extent as private individuals.⁷² As such, *Kadic* can be read as supporting corporate liability under the ATS. The Second Circuit in *Kiobel*, however, would later cite *Kadic* as supporting its rejection of corporate liability.⁷³ *Kiobel* found that *Kadic* looked solely to international law to determine private actor liability.⁷⁴ The *Kiobel* Court therefore offered *Kadic* in support of its theory that an international law rule of corporate liability is a prerequisite to jurisdiction in corporate ATS cases.

The *Kadic* opinion allows for such diametrically opposed readings because the Court never defined which law governs liability under the ATS. The Court searched international law to determine whether certain forms of conduct were violations of the law of nations when performed by private, as opposed to state, actors. The Court, however, never revealed where liability derived. This failure is evident from the sources cited. The Court quoted works that frame private actor liability as a remedy governed by domestic law, but simultaneously used sources that uphold private actor liability under international law. Furthermore, while the Court questioned whether international law proscriptions might extend to private individuals, it concurrently asked whether individuals had been punished under international law for violations of those proscriptions. The Second Circuit’s failure to situate a defendant’s liability

69. *Id.* at 243.

70. *Id.* at 244.

71. *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 50–51 (D.C. Cir. 2011); *see also infra* Part III.A.

72. *Doe*, 654 F.3d at 50–51.

73. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 128–30 (2d Cir. 2010).

74. *Id.* at 130.

in *Kadic* thus left ample room for different readings of corporate liability in future ATS cases.

C. *Continuing to Overlook Liability in Sosa v. Alvarez-Machain*

The first ATS case to reach the Supreme Court prior to *Kiobel* was *Sosa v. Alvarez-Machain*, decided in 2004.⁷⁵ Alvarez-Machain (“Alvarez”), a Mexican national, brought suit against Sosa, a Mexican national hired by the DEA to seize Alvarez, alleging false arrest in violation of the law of nations and seeking damages under the ATS.⁷⁶ *Sosa* settled the question of whether the ATS is merely a jurisdictional statute, “addressing the power of the courts to entertain cases concerned with a certain subject” or one that creates or authorizes the courts to create a “right of action without further congressional action.”⁷⁷ The Court held that the statute is “only jurisdictional,” but that Congress enacted it “on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”⁷⁸ At the time of its enactment, these violations included a “violation of safe conducts, infringement of the rights of ambassadors, and piracy,” as identified by William Blackstone in 1769 in reference to the “three specific offenses against the law of nations addressed by the criminal law of England.”⁷⁹

The Court further found that actionable violations of the law of nations under the ATS can be expanded beyond these three original offenses, but that each violation must “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.”⁸⁰ The Court thus set a “standard or set of standards for assessing the particular claim” raised by any plaintiff by defining the level of specificity that a norm of international law would have to reach in order to be actionable under the ATS.⁸¹ Claims for violations of any international law norm must have “as definite content and acceptance among civilized nations” as the three offenses originally offered by Blackstone.⁸² Other Circuit Court decisions had confirmed this point and had found that “for purposes of civil liability, the torturer has become—like the pirate and slave trader before

75. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

76. *Id.* at 698.

77. *Id.* at 714.

78. *Id.* at 711, 724.

79. *Id.* at 715.

80. *Id.* at 725.

81. *Id.* at 731.

82. *Id.* at 732.

him—*hostis humani generis*, an enemy of all mankind.”⁸³

The Court opined in a footnote, which would later become controversial in corporate liability cases, that “[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”⁸⁴ Footnote twenty then went on to compare Judge Edwards’ concurrence in *Tel Oren v. Libyan Arab Republic*, which found “insufficient consensus in 1984 that torture by private actors violates international law,” to *Kadic*, which found “sufficient consensus in 1995 that genocide by private actors violates international law.”⁸⁵

Much like the Second Circuit in *Filartiga* and *Kadic*, the Supreme Court first looked to the current state of international law to determine whether the plaintiff had pled a “‘specific, universal, and obligatory’” norm of international law sufficient to constitute an actionable violation by the defendant.⁸⁶ The Court thus looked to international law sources to determine whether arbitrary arrest violated a norm of customary international law.⁸⁷

Alvarez offered two international agreements, the Universal Declaration of Human Rights (“Declaration”) and the International Covenant on Civil and Political Rights, in support of his proposed rule of international law prohibiting arbitrary arrest by a government official.⁸⁸ The Court rejected this rule and stated both that “the Declaration does not of its own force impose obligations as a matter of international law” and that “the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”⁸⁹

Alvarez then turned to other sources of customary international law, including a survey of national constitutions, a decision of the International Court of Justice (“ICJ”), and authority from the federal courts for support of a rule against arbitrary arrest⁹⁰ (also referred to by the Court as “officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances”).⁹¹ The Court also rejected this assertion, finding the rule

83. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

84. *Sosa*, 542 U.S. at 733 n.20.

85. *Id.*

86. *Id.* at 732 (citing *In re Estate of Marcos Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

87. *Sosa*, 542 U.S. at 733–37.

88. *Id.* at 734.

89. *Id.* at 734–35.

90. *Id.* at 734–35, 736 n.27.

91. *Id.* at 736.

too broad.⁹²

While *Kiobel* would later state that *Sosa* instructs lower courts to look to “customary international law to determine *both* whether certain conduct leads to ATS liability *and* whether the scope of liability under the ATS extends to the defendant being sued,” the Supreme Court’s analysis of international law sources suggests that a different reading of *Sosa* is also possible.⁹³ While the Supreme Court analyzed whether a prohibition against officially sanctioned arbitrary arrest was a norm of customary international law, it never addressed the defendant’s liability in relation to this norm. From the opinion, it is clear that the Court searched international law to determine whether *Sosa*’s conduct violated the law of nations. It is not clear, however, if *Sosa*’s potential liability under the ATS would derive from a parallel liability under customary international law or whether domestic law would govern.

If, as *Kiobel* would have it, courts are to look in international law for a rule extending liability to the perpetrator being sued, it seems that *Sosa* would have addressed whether customary international law had ever held state officials liable for arbitrary arrest. As one article put it, “[i]f the majority in *Kiobel* are correct, and the only violations of international law actionable under the *ATS* are international crimes, then the Supreme Court could have been much more succinct in its dismissal of Alvarez-Machain’s claim in *Sosa*: there is no *crime* of arbitrary detention or deprivation of liberty in international law (except perhaps in the context of war).”⁹⁴ The *Kiobel* Court’s conclusion that “international law, and not domestic law, governs the scope of liability for violations of customary international law under the *ATS*” ignores this interpretation.⁹⁵

The Supreme Court’s use of the Restatement (Third) of Foreign Relations Law further illustrates the gap in its analysis. The Court cited § 702: “a state violates international law if, as a matter of state policy, it practices, encourages, condones . . . prolonged arbitrary detention.”⁹⁶ The Court then explained that “[a]ny credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority.”⁹⁷ The Court thus implied that if *Sosa*’s arbitrary detention had been more extreme, he could have

92. *Id.* (“Alvarez cites little authority that a rule so broad has the status of a binding customary norm today.”).

93. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 128 (2d Cir. 2010).

94. Murray et al., *supra* note 18, at 83.

95. *Id.* at 126.

96. *Id.* at 737 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (2011)).

97. *Id.*

been liable under the ATS. Because the international law obligations discussed in the Restatement run to states, however, it is unclear where the Court would have derived liability.

II. *KIOBEL* V. *ROYAL DUTCH PETROLEUM CO.* AND THE CURRENT CIRCUIT SPLIT

The three cases discussed in Part I provide a background against which the *Kiobel* Court rendered its decision on corporate liability. Far from a settled understanding of the ATS, these decisions failed to locate a defendant's liability in either international or domestic law. The gap in these opinions has been exposed in subsequent Circuit court cases on corporate liability, as courts struggled to resolve the issue. Part A of this section analyzes two Eleventh Circuit cases as an example of contrast to the Second Circuit's decision in *Kiobel*. These two decisions largely presumed corporate liability and thus avoided the issue altogether. Part B of this section addresses the majority opinion in *Kiobel*, and how the Court seized upon gaps in ATS jurisprudence to reject corporate liability. By doing so, the Court went directly against its own precedent and that of other Circuit courts, such as the Eleventh, which had previously upheld corporate liability.⁹⁸ *Kiobel* thus marked the beginning of the Circuit split on corporate liability that would eventually lead to the Supreme Court.

A. *Corporate Liability in the Eleventh Circuit*

The Eleventh Circuit upheld corporate liability under the ATS in two recent cases, both decided before *Kiobel*.⁹⁹ *Romero* and *Sinaltrainal* both found that corporations could be liable under the ATS by relying either on the text of the statute, precedent, and/or a state actor/private actor distinction drawn from *Kadic*. By relying on these arguments, the Eleventh Circuit effectively presumed corporate liability and avoided a thorough analysis of the issue. Much like the previous Second Circuit decisions and the Supreme Court decision in *Sosa*, the Eleventh Circuit evaded the question of whether a defendant's liability is governed by international or domestic law.

In *Romero*, a Colombian trade union, its leaders, and relatives of its deceased leaders sued Drummond Co., a Colombian subsidiary of a coal mining company in Alabama, its parent company, and executives (here-

98. See Cruz-Alvarez & Wade, *supra* note 14, at 1109 n.6 (listing pre-*Kiobel* decisions upholding corporate liability).

99. *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).

inafter referred to as “Drummond”).¹⁰⁰ The plaintiffs alleged that Drummond had violated international law by hiring Colombian paramilitary operatives to torture and kill its union leaders and sought to hold the corporation liable for damages under the ATS.¹⁰¹ The Eleventh Circuit rejected Drummond’s argument against corporate liability, finding that the District Court had subject-matter jurisdiction to hear the claim.¹⁰²

To support this holding, the Court stated that “[t]he text of the Alien Tort Statute provides no express exception for corporations,”¹⁰³ and pointed to precedent, including *Aldana v. Del Monte Fresh Produce, Inc.*¹⁰⁴ As one commentator reveals, however, “[t]he *Aldana* court simply assumed that a corporate entity could be held liable without any discussion of the issue.”¹⁰⁵ The Eleventh Circuit in *Romero* thus upheld corporate liability by relying on a case that merely presumed it. As such, *Romero* simply failed to locate the source of an ATS defendant’s liability.

The Eleventh Circuit again upheld corporate liability in *Sinaltrainal*.¹⁰⁶ The plaintiffs, trade union leaders, sued their employers, bottling companies in Colombia and Coca-Cola companies allegedly connected to these employers (hereinafter referred to as “Coca-Cola”), alleging that Coca-Cola had conspired with Colombian paramilitary forces to torture and murder them.¹⁰⁷ Although the Court affirmed the District Court’s dismissal because the plaintiffs had not sufficiently pled state action,¹⁰⁸ the opinion nonetheless made it clear that corporations could liable under the ATS.¹⁰⁹

In its analysis of corporate liability, the Court relied on precedent, as it did in *Romero*, but also looked to a private actor/state actor distinction drawn from the Second Circuit’s decision in *Kadic*. The Court first stated that early ATS cases involved state actors, “but subsequent cases have expanded the scope of the ATS to impose liability on private indi-

100. *Romero*, 552 F.3d at 1308–09.

101. *Id.*

102. *Id.* at 1315.

103. *Id.*

104. *Id.* (“the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants”).

105. Theophila, *supra* note 5, at 2882; see also Julian 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, 372 (discussing how, “[e]ssentially, the argument for corporate liability under the ATS rests on the failure of the U.S. courts even to spot the issue for decades. The long line of cases not discussing the issue became, oddly, the precedent (even binding precedent in some cases) for deciding that such liability was accepted.”).

106. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).

107. *Id.*

108. *Id.* at 1267.

109. *Id.* at 1263.

viduals and corporations.”¹¹⁰ The Court cited the *Kadic* holding that “acts such as genocide and war crimes ‘violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.’”¹¹¹ The Court also referenced *Romero* and *Aldana*: “[i]n addition to private individual liability, we have also recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations.”¹¹²

In *Sinaltrainal*, the Eleventh Circuit again avoided locating liability in either international or domestic law by relying on precedent that never resolved the issue. By using *Kadic* to discuss corporate liability, however, the Court seemed to suggest that corporations are just like any other private actor, which *Kadic* had previously found liable under the ATS. Ultimately, the Court’s silence on how to frame the corporate liability question left it far from resolved.

B. *The Second Circuit’s Interpretation of Corporate Liability in Kiobel v. Royal Dutch Petroleum Co.*

Kiobel presented the first opportunity for the Second Circuit to directly consider the question of whether corporations can be liable under the ATS.¹¹³ The plaintiffs, Nigerian citizens, sued Dutch, British, and Nigerian oil corporations (hereinafter referred to as “Royal Dutch”), alleging they “aided and abetted the Nigerian government in committing human rights abuses.”¹¹⁴ The *Kiobel* majority interpreted footnote twenty from *Sosa* and prior case law as situating liability under the ATS in international law. The Court thereby explicitly answered the question that had eluded other courts. Simultaneously, however, the *Kiobel* opinion moved drastically away from cases that had previously upheld corporate liability under the ATS.¹¹⁵

When addressing whether Royal Dutch could be liable, Judge Cabranes’ majority opinion noted: “the substantive law that determines our jurisdiction under the ATS is neither the domestic law of the United States nor the domestic law of any other country. . . . [T]he ATS requires federal courts to look beyond the rules of domestic law—however well-established they may be—to examine the specific and universally accepted rules that the nations of the world treat as binding *in their deal-*

110. *Id.*

111. *Id.* (citing *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995)).

112. *Id.*

113. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 (2d Cir. 2010).

114. *Id.* at 123.

115. See *supra* note 14; see also Murray et al., *supra* note 18, at 59 (“In almost all of the ATS cases against corporations, the question of whether a corporation should be sued appears to have been assumed, with neither defendants raising it as a concern, nor courts considering it.”).

ings with one another.”¹¹⁶ From this sentence, it is instantly apparent that Judge Cabranes would situate the issue of corporate liability under the ATS firmly in international law.

To begin his analysis, Judge Cabranes first cited *Sosa*'s holding. Although the ATS is a jurisdictional statute, “the drafters understood that ‘the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.’”¹¹⁷ Courts must look to customary international law to determine which narrow set of claims, based on “‘norms of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court had] recognized,’” support a cause of action under the ATS.¹¹⁸

Judge Cabranes then took footnote twenty from *Sosa* and incorporated its text into his corporate liability analysis.¹¹⁹ Drawing from its language, Judge Cabranes concluded “based on international law, *Sosa*, and our own precedents—that international law, and not domestic law, governs the scope of liability for violations of customary international law under the ATS.”¹²⁰ To determine whether to take jurisdiction under the ATS, courts must look “to customary international law to determine *both* whether certain conduct leads to ATS liability *and* whether the scope of liability under the ATS extends to the defendant being sued.”¹²¹

In so holding, Judge Cabranes failed to fully address the private actor/state actor language in footnote twenty. Footnote twenty can also be interpreted as asking whether private actors can violate the given international law norm at all, rather than questioning whether an international law norm holds that private actor liable.¹²² As one article puts it, “whether the *norm* of international law includes a state action requirement is a different question to whether international law itself holds persons liable for breach of the norm. The first question, about norms, must be answered by reference to international law; the second, regarding liability, will be resolved by federal courts applying federal common law.”¹²³ By rejecting this interpretation, Judge Cabranes situated the corporate liability issue in international law.

116. Kiobel, 621 F.3d at 118.

117. *Id.* at 125 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004)).

118. *Id.* at 125–26 (citing *Sosa*, 542 U.S. at 725).

119. *Sosa*, 542 at 733 n.20. To recall, footnote twenty pondered “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 an individual.” *Id.*

120. Kiobel, 621 F.3d at 126.

121. *Id.* at 128.

122. *Id.* at 163–65 (Leval, J. concurring); *see also* Theophila, *supra* note 5, at 2902–2904; Murray et al., *supra* note 18, at 78; Pariza, *supra* note 22, at 248.

123. Murray et al., *supra* note 18, at 78.

To justify his interpretation, Judge Cabranes analyzed the subjects of international law. Pointing to the Restatement (Third) of Foreign Relations Law, he emphasized that the subjects of international are those entities that “‘have legal status, personality, rights, and *duties* under international law’”¹²⁴ International law only creates enforceable obligations for those entities that it defines as international persons, and those obligations must extend to the proposed defendant under the ATS in order for the court to have jurisdiction.¹²⁵ In this case, if there is an international law norm prohibiting the specific human rights violations alleged, then corporations must also be “subjects of the customary international law of human rights” in order for the violations to be actionable under the ATS.¹²⁶ The opinion thus aligned a defendant’s liability under the ATS with that defendant’s liability under international law. As the opinion would explain, corporate liability had to be rejected because international human rights law has only extended its obligations to individuals and states.¹²⁷

Judge Cabranes also cited Second Circuit precedent in support of his interpretation of footnote twenty. He reiterated that footnote twenty was an instruction to lower courts to “look to *international law* to determine [their] jurisdiction over ATS claims against a particular class of defendant, such as corporations.”¹²⁸ Judge Cabranes found that this “instruction . . . did not involve a revolutionary interpretation of the statute – in fact, it had long been the law of this Circuit.”¹²⁹ He cited *Filartiga* and *Kadic* for support, and found that each had searched international law to determine liability: “We have looked to international law to determine whether state officials, *see Filartiga*, . . . [and] private individuals, *see Kadic*, . . . can be held liable under the ATS.”¹³⁰

Though Judge Cabranes interpreted precedent as applying international law to determine liability under the ATS, a different reading of the case law suggests the opposite. As noted in Part I.A, the *Filartiga* court did not necessarily look to international law to determine whether state officials can be liable under the ATS.¹³¹ While it held that official torture was a prohibited norm of customary international law, the Court did not explicitly locate the liability of a state official for torture in interna-

124. *Kiobel*, 621 F.3d at 126 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, pt. II, at 70 introductory note (emphasis added)).

125. *Id.* at 126–27.

126. *Id.* at 126 n.28.

127. *Id.* at 127.

128. *Id.*

129. *Id.* at 128.

130. *Id.* at 130.

131. *See infra* Part I.A.

tional law. Similarly, as noted in Part I.B, the Court in *Kadic* did not necessarily look to international law to determine whether private individuals can be liable under the ATS.¹³² *Kadic* may have only recognized that private actors, like state actors, can violate norms of international law.

Turning to the case at hand, Judge Cabranes consulted the sources of international law to determine whether there is a “norm of corporate liability under customary international law.”¹³³ He found that “no international tribunal of which we are aware has *ever* held a corporation liable for a violation of the law of nations.”¹³⁴ Indeed, the International Military Tribunal of Nuremberg, established by the London Charter, exercised jurisdiction over “*natural persons only*.”¹³⁵ Judge Cabranes therefore deduced that “corporate liability was not recognized as a ‘specific, universal, and obligatory’ norm of customary international law.”¹³⁶ As an example, he cited the “refusal of the military tribunal at Nuremberg to impose liability on I.G. Farben,” a corporation that produced substances used by the Nazis to perpetrate war crimes and crimes against humanity.¹³⁷

Judge Cabranes found that the absence of a customary international law norm imposing liability on corporations persisted today, in light of more recently established international tribunals, such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, neither of which extended jurisdiction to corporations.¹³⁸ He further opined that the Rome Statute, which established the International Criminal Court, explicitly limited its jurisdiction to natural persons despite a proposal by the French delegation to include juridical persons with its reach.¹³⁹ Judge Cabranes classified this as an “*express rejection . . . of a norm of corporate liability in the context of human rights violations*.”¹⁴⁰

Lastly, international treaties and scholarly works are cited as proof that no customary international law norm of corporate liability exists. Although some international treaties impose liability on corporations, Judge Cabranes found them insufficient to establish a customary rule of international law.¹⁴¹ The works of Professor James Crawford and Pro-

132. *See infra* Part I.B.

133. *Id.* at 131.

134. *Id.* at 132.

135. *Id.* at 133.

136. *Id.* at 136 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

137. *Id.* at 134.

138. *Id.* at 136–37.

139. *Id.*

140. *Id.* at 139.

141. *Id.* at 141.

fessor Christopher Greenwood further confirmed “customary international law does not recognize liability for corporations that violate its norms.”¹⁴²

Corporations therefore could not be liable under the ATS because “customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations.”¹⁴³ The Court could not take jurisdiction over the case because the plaintiffs had not alleged a violation of the law of nations. Under *Kiobel* then, no matter how egregious a corporation’s participation in human rights violations, victims can find no redress under the ATS unless and until corporations are consistently and universally held liable on the international plane.

III. BACKLASH IN THE CIRCUIT COURTS AGAINST THE SECOND CIRCUIT’S INTERPRETATION OF CORPORATE LIABILITY

Kiobel was the first Circuit court decision to explicitly reject corporate liability under the ATS; Seventh Circuit Judge Posner would later call it an “outlier.”¹⁴⁴ Subsequent decisions in the District of Columbia, Seventh, and Ninth Circuits called into question the Second Circuit’s reading of footnote twenty in *Sosa* and its overall interpretation of corporate liability.¹⁴⁵ Judge Cabranes’ application of international law under the ATS created a backlash in these three Circuit courts and led to a Circuit split. Part III will explore how the District of Columbia, Seventh, and Ninth Circuit each addressed and rejected the *Kiobel* majority opinion in their corporate liability decisions. These decisions illustrate how a single judge’s interpretation of the ATS changed the course of developing law. Judge Cabranes’ attempt to settle the corporate liability issue in *Kiobel* revealed wide gaps in ATS jurisprudence and the need for Supreme Court review.

A. *The District of Columbia Circuit—Doe v. Exxon Mobil Corp.*

Less than a year after the Second Circuit’s decision in *Kiobel*, the D.C. Circuit confronted the corporate liability question. The *Doe* plaintiffs, Indonesian villagers from the Aceh territory, sued Exxon Mobil and its subsidiaries, alleging violations of the law of nations under the

142. *Id.* at 143–44.

143. *Id.* at 120.

144. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011). Judge Posner stated that “[a]ll but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable.” *Id.*

145. *Id.*; *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011).

ATS.¹⁴⁶ The plaintiffs claimed they had suffered human rights violations at the hands of members of the Indonesian military hired by Exxon to provide security for the company at its Aceh facility.¹⁴⁷ The plaintiffs appealed after the District Court dismissed their claims, and Exxon filed a cross-appeal arguing for the first time that corporations could not be liable under the ATS.¹⁴⁸ Exxon's argument that it was "entitled to corporate immunity because customary international law does not recognize corporate liability for human rights violations" echoed the majority's reasoning in *Kiobel*.¹⁴⁹

The D.C. Circuit rejected Exxon's argument.¹⁵⁰ The Court declined to follow *Kiobel* "because its analysis 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; 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."¹⁵¹ The D.C. Circuit instead offered a different interpretation of the ATS and its jurisprudence that grounded corporate liability in domestic law.

The Court characterized corporate liability as an issue of remedy for violations of "substantive international law norms" actionable under the ATS.¹⁵² While *Sosa* explained that courts must look to international law to determine whether the defendant's conduct constitutes a violation of its norms, the question of corporate liability "is whether a corporation can be made to pay damages for the conduct of its agents in violation of the law of nations."¹⁵³ This is a question that the D.C. Circuit, unlike the Second Circuit, found to be unanswered by *Sosa*.¹⁵⁴ Because international law leaves the matter of remedy to domestic law, "the law of the United States and not the law of nations must provide the rule of decision in an ATS lawsuit."¹⁵⁵ As such, domestic law governs corporate liability, and domestic law "has been uniform since its founding that corporations can be held liable for the torts committed by their agents."¹⁵⁶

The D.C. Circuit's decision thus created a split with the Second Circuit by offering a fundamentally different reading of corporate liabil-

146. Doe, 654 F.3d at 14–15.

147. *Id.* at 15.

148. *Id.*

149. *Id.* at 17.

150. *Id.* at 41.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 42.

156. *Id.* at 57.

ity under the ATS. The Court stated: “The Second Circuit’s approach overlooks the key distinction between norms of conduct and remedies . . . and instead conflates the norms and the rules (the technical accoutrements) for any remedy found in federal common law. And in so doing, the majority in *Kiobel* . . . misreads footnote 20 in *Sosa*, on which it primarily relies”¹⁵⁷ The D.C. Circuit understood footnote twenty as distinguishing between whether “certain forms of conduct were violations of international law when done by a state actor . . . and not when done by a private actor.”¹⁵⁸ For the court, the key distinction in footnote twenty is between private actors and state actors.¹⁵⁹ If private actors can violate international law norms, then corporations, as private actors, can too.

B. *The Seventh Circuit—Flomo v. Firestone Natural Rubber Co.*

Judge Posner’s ruling in *Flomo v. Firestone Natural Rubber Co.* widened the Circuit split by upholding corporate liability under the ATS and relying on domestic law, much like the D.C. Circuit. In *Flomo*, twenty-three Liberian children sued Firestone Natural Rubber Co. (“Firestone”) for using hazardous child labor on their rubber plantation in Liberia, in violation of the law of nations.¹⁶⁰ The plaintiffs appealed to the Seventh Circuit after the District Court granted summary judgment in favor of Firestone.¹⁶¹

Although Judge Posner ultimately found that the hazardous child labor conditions alleged by the plaintiffs did not rise to the level of customary international law violations,¹⁶² he nonetheless addressed the issue of corporate liability under the ATS and found “no objection” to it.¹⁶³ Judge Posner rejected Firestone’s argument, which echoed the majority’s reasoning in *Kiobel*, “that because corporations, unlike individuals, have never been prosecuted for criminal violations of customary international law, there cannot be a norm, let alone a ‘universal’ one, forbidding them to commit crimes against humanity and other acts that the civilized world abhors.”¹⁶⁴

Judge Posner found that “[t]he factual premise of the majority opinion in the *Kiobel* case is incorrect.”¹⁶⁵ The *Kiobel* majority had gotten

157. *Id.* at 50.

158. *Id.*

159. *Id.*

160. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1015 (7th Cir. 2011).

161. *Id.* at 1015.

162. *Id.* at 1021–23.

163. *Id.* at 1021.

164. *Id.* at 1017.

165. *Id.* at 1017.

their history wrong because the “allied powers dissolved German corporations that had assisted the Nazi war effort, along with Nazi government and party organizations—and they did so on the authority of customary international law.”¹⁶⁶ Regardless, even if “no corporation *had* ever been punished for violating customary international law . . . [t]here is always a first time for litigation to enforce a norm.”¹⁶⁷

Judge Posner delineated a “distinction between a principle of [customary international] law, which is a matter of substance, and the means of enforcing it, which is a matter of procedure or remedy.”¹⁶⁸ To Posner, “[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them.”¹⁶⁹ An example illuminated this principle:

If a corporation has used slave labor at the direction of its board of directors, then whether the board members should be prosecuted as criminal violators of customary international law—or also or instead be forced to pay damages, compensatory and perhaps punitive as well, to the slave laborers—or, again also or instead, whether the corporation should be prosecuted criminally and/or subjected to tort liability—all these would be remedial questions for the tribunal, in this case our federal judiciary, to answer in light of its experience with particular remedies and its immersion in the nation’s legal culture, rather than questions the answer to which could be found in customary international law.¹⁷⁰

Judge Posner would have courts turn to domestic law to decide whether and to what extent to hold corporations liable for violations of customary international law norms. He highlighted this point with “treaties that explicitly authorize national variation in methods of enforcing customary international law.”¹⁷¹ Where the *Kiobel* majority went wrong, then, was by looking to international law to determine whether corporate liability constituted a customary international law norm.¹⁷² As one scholar points out, the *Flomo* court “criticize[s] the majority in *Kiobel* for failing to distinguish between the norm of international law relevant to establishing the requisite conduct and the rules of remedy (determined by US federal common law).”¹⁷³

166. *Id.*

167. *Id.*

168. *Id.* at 1019.

169. *Id.*

170. *Id.* at 1019–20.

171. *Id.* at 1020.

172. *Id.* at 1019. Posner went on to state: “If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the Alien Tort Statute could ever be successful, even claims against individuals; only the United States, as far as we know, has a statute that provides a civil remedy for violations of customary international law.” *Id.*

173. Justine Nolan, *A Response to Odette Murray, David Kinley and Chip Pitts*, OPINIOJURIS

C. *The Ninth Circuit—Sarei v. Rio Tinto, PLC*

Most recently, the Ninth Circuit joined the Eleventh, D.C., and Seventh Circuits in upholding corporate liability under the ATS in *Sarei v. Rio Tinto, PLC*.¹⁷⁴ While the D.C. and Seventh Circuits upheld corporate liability by applying domestic law, the Ninth Circuit did so by applying international law instead. In *Sarei*, the plaintiffs, current and former residents of the island of Bougainville in Papua New Guinea, sued Rio Tinto mining group under the ATS.¹⁷⁵ The plaintiffs alleged that Rio Tinto's operations in Bougainville led to violations of international law committed against them, including genocide, crimes against humanity, war crimes, and racial discrimination.¹⁷⁶

The Court first addressed the issue of whether the ATS itself bars corporations from all liability.¹⁷⁷ The Court relied on the concurring opinion in *Kiobel*, which found that “no principle of domestic or international law supports the majority’s conclusion that the norms enforceable through the ATS—such as the prohibition by international law of genocide, slavery, war crimes, piracy, etc.—apply only to natural persons and not to corporations, leaving corporations immune from suit and free to retain profits earned through such acts.”¹⁷⁸ The Court further found that the text of the ATS itself and its legislative history provide no complete bar to corporate liability, citing the D.C. Circuit opinion in *Doe* for support.¹⁷⁹

The Court then looked to international law and found that *Sosa* required “an international-law inquiry specific to each cause of action asserted.”¹⁸⁰ For each claimed violation of a customary international law norm under the ATS, then, the Court must “consider separately each violation of international law alleged and which actors may violate it.”¹⁸¹ The Court then applied this analysis to each alleged violation of customary international law.

The Court’s analysis of the plaintiff’s genocide claim is illustrative of this framework. The Court first held that the prohibition against genocide is an “internationally accepted norm,” the violation of which is

(Dec. 8, 2011, 7:00 AM), <http://opiniojuris.org/2011/12/08/a-response-to-odette-murray-david-kinley-and-chip-pitts-by-justine-nolan/>.

174. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011).

175. *Id.* at 742.

176. *Id.* at 742–43.

177. *Id.* at 747.

178. *Id.* (citing *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 153 (2d Cir. 2010) (Leval, J. concurring)).

179. *Sarei*, 671 F.3d at 748 (citing *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011)).

180. *Id.* at 748.

181. *Id.*

actionable under the ATS.¹⁸² Using the *Sosa* standard,¹⁸³ the Court found evidence in the Genocide Convention, Rome Statute, and proclamations of the ICJ that genocide amounts to an international norm.¹⁸⁴ The Court then looked to international law to determine whether it holds corporations liable for genocide.¹⁸⁵ Drawing from the ICJ, the Court found evidence of corporate liability in international law.¹⁸⁶

By keeping the corporate liability analysis in international law, the Ninth Circuit did not stray so far from *Kiobel* as the Seventh and D.C. Circuits had. The Court stated that, “[w]e, like the Second Circuit, have also taken guidance for our analysis from a footnote in *Sosa* and asked ‘whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued.’”¹⁸⁷ But, rather than looking to see whether international law had ever held a corporation liable for a violation of an international law norm, the Court asked “whether international law extends its prohibitions to the perpetrators in question.”¹⁸⁸

IV. THE CIRCUIT SPLIT ON CORPORATE LIABILITY—JUDGES AS READERS OF THE ATS

In his essay titled *Law as Interpretation*, Ronald Dworkin compares judges’ opinions to a chain literary exercise in which a group of novelists join together to collectively write a novel.¹⁸⁹ In the chain exercise, each novelist writes a piece of the novel and passes it on to the next, “interpreting and creating” as they go.¹⁹⁰ Dworkin explains his comparison of novelists in the chain exercise to judges engaged in legal analysis:

[e]ach judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collec-

182. *Id.* at 758.

183. Under *Sosa*, plaintiffs must plead a violation of a “specific, universal, and obligatory” international norm in order for the court to take jurisdiction under the ATS. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (citing *In re Estate of Marcos Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

184. *Sarei*, 671 F.3d at 758–59.

185. *Id.* at 759–61.

186. *Id.* The Court found that the ICJ had held that “an amorphous group, a state, and a private individual may all violate the *jus cogens* norms prohibiting genocide,” thus “corporations likewise can commit genocide under international law because the prohibition is universal.” *Id.* at 761.

187. *Id.* at 760 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) (quoting *Sosa*, 542 U.S. at 732 n.20)).

188. *Id.* at 760–61.

189. Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 540–43 (1982).

190. *Id.* at 541.

tively *done*, in the way that each of our novelists formed an opinion about the collective novel so far written. . . . Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He *must* interpret what has gone before because he has a responsibility to advance the enterprise at hand rather than to strike out in some new direction of his own.¹⁹¹

Dworkin illustrates his theory with an example of an Illinois judge who must decide whether an aunt can recover from a negligent driver for emotional harm she suffered upon hearing on the telephone that her niece (or nephew) had been run over by a car.¹⁹² In Dworkin's hypothetical, the Supreme Court of Illinois had previously ruled that "a negligent driver who ran down a child was liable for the emotional damage suffered by the child's *mother*, who was standing next to the child on the road."¹⁹³ Based on this precedent, the judge may be forced to choose between two interpretations: (1) "negligent drivers are responsible to those whom their behavior is likely to cause physical harm . . . for whatever injury—physical or emotional—they in fact cause; or (2) "negligent drivers are responsible for any damage they can reasonably be expected to foresee if they think about their behavior in advance."¹⁹⁴ The latter interpretation would find the defendant liable to the aunt, while the former would not.¹⁹⁵ In this hypothetical case, the judge "must decide which of these two principles represents the better 'reading' of the chain of decisions he must continue."¹⁹⁶

Dworkin's theory of legal analysis can be used as a framework for understanding the development of the corporate liability issue under the ATS. Each judge struggled to advance and develop legal analysis of a defendant's liability in light of the new contexts in which these cases were brought over time—beginning with suits against state actors,¹⁹⁷ then against private actors,¹⁹⁸ and finally against corporations.¹⁹⁹ Each judge passed along his interpretation of international law, the rights vindicated and obligations imposed by the ATS, the text and history of the

191. *Id.* at 542–43.

192. *Id.* at 529.

193. *Id.* (emphasis added).

194. *Id.* at 543.

195. *Id.*

196. *Id.*

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

198. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

199. *See, e.g. Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

statute, and precedent, each changing and developing the law as the classes of defendants expanded.

Dworkin's theory also elucidates how the Second Circuit arrived at its interpretation of corporate liability in *Kiobel*. Judge Cabranes was able to interpret corporate liability the way he did based on prior analyses of liability under the ATS.²⁰⁰ Prior decisions left open and unanswered the choice of law question. While previous judges had applied international law to determine a plaintiff's rights under the ATS, they left gaps in their interpretations of a defendant's liability.

The language of footnote twenty in *Sosa* also gave the *Kiobel* Court an opportunity, as Dworkin would have it, to determine what it believed to be the "better 'reading'" of corporate liability.²⁰¹ Because prior decisions had failed to situate a defendant's liability in either international or domestic law, the *Kiobel* Court was able to choose a theory "about the 'meaning' of that chain of decisions"²⁰² grounded firmly in international law. The Supreme Court's phrasing of footnote twenty allowed for this interpretation.²⁰³ Read literally, the footnote can be interpreted just as *Kiobel* did,²⁰⁴ requiring judges to determine whether customary international law has extended liability to the perpetrator being sued in each case.²⁰⁵

As discussed in Part III, the *Kiobel* opinion set off a backlash among other Circuit courts. Each of these post-*Kiobel* decisions interpreted precedent and the impact of *Sosa* differently.²⁰⁶ The D.C. Circuit in *Doe* and the Seventh Circuit in *Flomo* directly opposed *Kiobel* by applying domestic law to the corporate liability question,²⁰⁷ while the

200. See *supra* Part II.B.

201. Dworkin, *supra* note 189, at 543.

202. *Id.*

203. *Sosa*, 542 U.S. at 733 n.20 ("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.").

204. See Murray et al., *supra* note 18, at 60 (discussing how footnote twenty "lends ammunition to the argument that the 'scope of liability' for a violation of international law pursuant to the ATS — as regards which perpetrators may be held liable (that is, only state actors, or also non-state actors) — must be determined by international law. This footnote has been used by both district and circuit courts to frame a 'choice of law' debate.").

205. The literal definition of liability also lends support to this view: "The quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment." BLACK'S LAW DICTIONARY (9th ed. 2009).

206. See generally *supra* Part III.

207. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 42 (D.C. Cir. 2011) ("That the 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."); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1020 (7th Cir. 2011) ("International law imposes substantive obligations and the individual nations decide how to enforce them.").

Ninth Circuit in *Sarei* applied international law.²⁰⁸ While the D.C. and Seventh Circuits both acknowledged that international law extends the same obligations to corporations that it does to private individuals,²⁰⁹ the Courts rested their holdings on corporate liability in domestic, rather than international, law. The Ninth Circuit, however, used footnote twenty in much the same way that *Kiobel* did, yet it reached the opposite result.²¹⁰

These differing interpretations of corporate liability highlight the gaps in ATS case law, left behind since *Filartiga* and *Kadic*, and widened by the murky language of footnote twenty in *Sosa*.²¹¹ In his essay, Dworkin explains how a judge's interpretation of the law along the "chain enterprise" necessarily includes a political element.²¹² He states:

Judges develop a particular approach to legal interpretation by forming and refining a political theory sensitive to those issues on which interpretation in particular cases will depend; they call this their legal philosophy. It will include both structural features, elaborating the general requirement that an interpretation must fit doctrinal history, and substantive claims about social goals and principles of justice. Any judge's opinion about the best interpretation will therefore be the consequence of beliefs other judges need not share.²¹³

The *Kiobel* Court similarly incorporated a policy against corporate liability into its decision by using legal interpretation. As one article stated, "the theory that deeper policy rationales and general opposition to the ATS informed the majority opinion in *Kiobel* received resounding confirmation with the issue of the judgment denying the plaintiffs petition for panel rehearing on 4 February 2011."²¹⁴

V. INTERPRETING FOOTNOTE TWENTY AND THE ATS TODAY

America has been a staunch protector of the rule of law. The case before the Supreme Court reminds me that [sic] of the difference between "negative peace" and "positive peace." The absence of human rights crimes is negative peace, but the presence of justice indicates positive peace. In a positive-peace society, the Alien Tort Statute shows that the rights of the most disenfranchised and

208. See *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 760–61 (9th Cir. 2011).

209. See *Id.* at 761 ("Both courts [the D.C. and Seventh Circuits] noted that, while I.G. Farben was not criminally prosecuted after World War II, it was dissolved and its [sic] assets seized.").

210. *Id.* at 760–61.

211. One commentator warned of this type of gap filling in ATS jurisprudence before the Second Circuit decided *Kiobel*. See *Ku*, *supra* note 105, at 35–36.

212. Dworkin, *supra* note 189, at 543.

213. *Id.* at 545.

214. Murray et al., *supra* note 18, at 89–90 (citing *Kiobel* Panel Rehearing (2d Cir., No. 06-4800-cv, Feb. 4, 2011)).

*oppressed are just as important as the rights of the richest and most powerful.*²¹⁵

On October 17, 2011, the Supreme Court granted the *Kiobel* Plaintiffs' petition for certiorari.²¹⁶ In its reading of the previous "chain of decisions"²¹⁷ under the ATS, the Supreme Court should now apply domestic law to the corporate liability issue. The Court should interpret precedent and footnote twenty from *Sosa* to incorporate a policy of international corporate responsibility into the ATS. By locating a defendant's liability in domestic law, the Court would eliminate the possibility that corporations could escape liability for human rights violations by virtue of the mere fact that they are corporations.

On December 21, 2011, the United States filed a Brief as *Amicus Curiae* in support of the Plaintiffs,²¹⁸ which provides a framework through which the Court should now determine corporate liability under the ATS.²¹⁹ In its Brief, the United States called *Kiobel* a misreading of international law and footnote twenty from *Sosa*,²²⁰ and urged that

215. Desmond Tutu, *Desmond Tutu: Will U.S. rule for rights of S. Africans?*, Columnists' Opinions, USA TODAY (Sept. 30, 2012, 3:36 PM), <http://www.usatoday.com/story/opinion/2012/09/30/desmond-tutu-supreme-court-south-african/1603943/>.

216. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S.Ct. 472 (Oct. 17, 2011).

217. Dworkin, *supra* note 189, at 543.

218. Brief for the United States as Amicus Curiae Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (No. 10-1491), 2011 WL 6425363 (Dec 21, 2011).

219. The Supreme Court heard oral argument on the corporate liability issue on February 28, 2012. See Transcript of Oral Argument, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (No. 10-1491). On Mar. 5, 2012, the Court issued an Order expanding the question presented. See Order for Reargument, 132 S.Ct. 1738 (Mar. 5, 2012). The Court ordered the parties to file supplemental briefs addressing the following question: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Id.* The United States filed a Supplemental Brief answering this question in the negative, which, if followed, would ultimately lead to an outcome for the Defendants based on the extraterritoriality issue. See Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (No. 10-1491), 2012 WL 2161290 (Jun. 11, 2012). Interestingly, the United States maintained its original position in support of the Plaintiffs on the corporate liability issue. *Id.* at 27. The United States would therefore leave open the possibility that a proper ATS defendant might include a U.S. corporation or a foreign corporation where the alleged conduct occurred within the United States or on the high seas. *Id.* at 21. The Court heard re-argument on October 1, 2012, and a final decision is expected in 2013. See Transcript of Oral Argument, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (No. 10-1491). While extraterritoriality is beyond the scope of this Note, the broadening of the question presented gives the Court an opportunity to avoid resolving the corporate liability issue altogether if it decides that the ATS does not apply extraterritorially. Even if the Court rules against extraterritorial application, it should nevertheless side with the United States' position on corporate liability and hold that domestic law applies. As such, the Court would both avoid future uncertainty on whether corporations are proper ATS defendants and leave room for future lawsuits against them in narrow circumstances.

220. Brief for the United States as Amicus Curiae Supporting Petitioners, *Kiobel v. Royal*

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“[w]hether corporations should be held accountable for those violations [of international law norms] in private tort suits under the ATS is a question of federal common law.”²²¹ This argument largely tracks those courts and commentators who have said that international law applies only when determining whether a defendant’s conduct violates a substantive international law norm. Courts first “must conduct a norm-by-norm assessment to determine whether the actor being sued is within the scope of the identified norm.”²²² Depending on whether the defendant is a private or state actor, courts will look to the substantive norm of international law to see if it applies. For example, if the defendant is a private actor, “the court must consider whether private actors are capable of violating the international-law norm at issue.”²²³

The United States then argued that, “[o]nce it is established that the international norm applies to conduct by an actor, it is largely up to each state to determine for itself whether and how that norm should be enforced in its domestic law.”²²⁴ A defendant’s liability under the ATS is thus decided and governed by domestic law. Because corporations are considered persons under domestic law and are “capable of being sued in tort,” they may also be liable under the ATS.²²⁵ For the United States, international law in fact supports a finding of corporate liability because “[b]oth natural persons and corporations can violate international-law norms that require state action. And both natural persons and corporations can violate international-law norms that do not require state action.”²²⁶

The ATS sets the United States apart as one of the only forums in the world to offer civil redress for human rights violations committed worldwide. As history and the development of case law under the ATS demonstrate, corporations have become increasingly implicated in human rights violations. By allowing corporate lawsuits under the ATS to be considered, we will incentivize corporations to promote respect for human rights globally. The Supreme Court’s decision in *Kiobel* should therefore use domestic law to link a defendant’s obligation under international law to its liability under the ATS. *Kiobel* is an opportunity to

Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (No. 10-1491), 2011 WL 6425363 (Dec 21, 2011), at 18.

221. *Id.* at 7.

222. *Id.* at 18.

223. *Id.* at 17.

224. *Id.* at 19.

225. *Id.* at 26.

226. *Id.* at 21; *see also Id.* at 27–31.

use the ATS as a beacon of leadership in the human rights field and to show other nations that human rights abusers will be held responsible for their actions. The opportunity should not be missed.