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Michael J. Kelly

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ATROCITIES BY CORPORATE ACTORS: A HISTORICAL PERSPECTIVE

*Michael J. Kelly**

Corporations have been around for centuries. Their entire operating principle is to generate profit. All other purposes are ancillary. However, people within corporations and running corporations make decisions for these entities and sometimes those decisions lead to criminal conduct in pursuit of that profit motive. History provides several examples of such conduct playing out in egregious ways, from the time of the British East India Company's exploitation of the Asian Indian subcontinent in support of Great Britain's colonial expansion to the time of I.G. Farben's exploitation of slave labor during World War II in support of German military efforts. Efforts today to hold corporations accountable for international crimes such as genocide are informed by these historical examples and arguments to finally do something about it are buttressed by them as well.

Corporations have been around a long time—certainly since the time of the Roman Empire.¹ As long as they have been around, some have invariably engaged in egregious conduct in furtherance of their central driving animus—profit. While many early corporations were formed to carry out the public good, today the vast majority of corporations are private entities designed to maximize profit for their shareholders.² A few private companies with medieval origins are still in business, in one form or another, and remain engaged in an array of economic activity:

The world's oldest family business, Kongō Gumi, started to build and restore temples in 578 in Japan. Europe's oldest

* Interim Dean and Professor of Law, Creighton University School of Law. Professor Kelly holds the Senator Allen A. Sekt Endowed Chair in Law at Creighton University and serves on the International Board of Directors and as President of the U.S. National Section of L'Association Internationale de Droit Pénal (AIDP). This article is derived from a chapter on historical instances of corporate criminal accountability in Dean Kelly's book, *Prosecuting Corporations for Genocide* (Oxford University Press 2016).

1. RICHARD D. HARTLEY, *CORPORATE CRIME: A REFERENCE HANDBOOK* 6 (2008).
2. See WESLEY B. TRUITT, *THE CORPORATION* 1-27 (2006) (discussing the timelines of various corporations' origins and their development into modern times); MIRIAM F. WEISMANN, *CORPORATE CRIME & FINANCIAL FRAUD* 6 (2012).

business is a winery in France, Goulaine, which set up shop around the year 1000. The oldest corporation run in a more sophisticated way, comparable to large corporations today, is Stora Kopparberg, a Swedish mine that was granted a charter from King Magnus II of Sweden in 1347.³

To be sure, corporate business combinations have brought much good to the world—both for the people they employ and the skilled jobs they create, and for the societies that benefit from their innovation and wealth creation. Corporations are the key component in capitalist systems. Indeed, the capitalist model, now well proven to be the best economic paradigm, is the most widely adopted model, and undergirds the entire global economic system. Economic benefits would not flow without corporations as a central feature in this process.

Moreover, the vast majority of companies go about their business in a very benign way—engaging in the economic activity for which they are chartered. However, as is the case with any group of people or entities, a few will always choose to take the path of illegal conduct that yields large short-term gains at the expense of moral integrity and societal well-being. An individual defrauding a bank is no different from a corporation defrauding an investor. The first is a natural person, the second, an artificial person. Both are answerable to the law for their actions.

This is not a new phenomenon. Criminal conduct has been regulated for as long as societies have existed and, most probably, even before civilization itself.⁴ Part of a well-ordered society is a general agreement about social conduct that is reflected in the law of that society⁵. Transgressors are punished—whether by a term of years, fines, or some other more extreme form. Companies, as citizens of these societies, are also potential transgressors. As such, they should not escape punishment for wrongdoing.

This article provides critical historical context for understanding the legal treatment of companies that commit such wrongdoing. Moreover, the examples explored in this article demonstrate that lack of criminal enforcement against such companies *as companies* cripple the effort to seek justice against them.

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3. CHRISTIAN STADLER, ENDURING SUCCESS: WHAT WE CAN LEARN FROM THE HISTORY OF OUTSTANDING CORPORATIONS 6 (2011) (Kongō Gumi continues to operate as a wholly owned subsidiary of the Takamatsu Corporation, which absorbed it in 2006, and Stora Kipparberg has merged with a Finnish firm, Enso Oyj, to form StoraEnso).
 4. MICHAEL J. KELLY, PROSECUTING CORPORATIONS FOR GENOCIDE 16 (2016).
 5. *Id.*

Section I traces the experience of two early joint ventures—the Dutch East India Company and the British East India Company. Both were founded as the Dutch and British Empires were expanding rapidly into Asia.⁶ The home powers needed an economic arm to develop their far-flung colonies and work cooperatively with national military and diplomatic corps that were on site.⁷ The mission of these companies was to establish stable colonial economic units, found new profitable trade routes, and secure monopolies on key commodities.⁸ The brutality with which both companies pursued these objectives led to human rights abuses, slavery, and ultimately, genocide.⁹ Eventually, the weight of negative public opinion in the Netherlands and Great Britain brought them both down.¹⁰

Section II discusses the role of corporations in the context of wartime in the early twentieth century. In both world wars, companies were major players furthering the efforts of their home states.¹¹ But the German corporations displayed a much more egregious callousness toward humanity than other companies in other warring states. Developing poison gas for battlefield use in World War I, and deploying gas to the extermination camps and openly using slave labor in World War II, sets German companies apart from the rest generally and the I.G. Farben firm in particular.

Section III provides the most recent update on civil liability within the United States of foreign corporations engaged in tortious conduct abroad via the *Kiobel* case.¹² While prosecution of corporations for criminal conduct has been possible in the United States for the past century, it's rarely used.¹³ When it is, the target is typically an American firm, not a foreign one.¹⁴ The prosecution of British Petroleum is a notable exception.¹⁵ Cases brought under the Alien Tort Statute by foreign plaintiffs against foreign firms for atrocities abroad proliferated in the 1990s and the 2012 decision in *Kiobel* are the latest articulation by the U.S. Supreme Court on this legal pathway to enforce the law on corporations.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

In each section, the legal result proves unsatisfactory. Despite occasional show trials of individual officers directing unspeakable brutality toward native populations, the Dutch and British East India Companies were dismantled by parliamentary actions demanded by political pressure, not legal resolution.¹⁶ The decision not to prosecute I.G. Farben and other German companies after the fall of the Third Reich was, again, a political decision.¹⁷ When postwar trials were conducted against individual officers of these firms in the American occupation sector, the prosecution was unable in many instances to make allegations against each officer stick.¹⁸ Had those allegations been compounded collectively and alleged against a corporate body, they likely would have stuck. Finally, *Kiobel* significantly narrowed the scope of future civil litigation in the United States against foreign corporations engaged in atrocities by requiring a new minimum contacts test that will make it more difficult to bring such actions.¹⁹

I. HISTORICAL PERSPECTIVE—THE DUTCH AND BRITISH EAST INDIA COMPANIES

History presents multiple examples of atrocities committed or aided by corporate entities.²⁰ The largest multinational companies during the period of European colonization—the Dutch and British East India Companies—rank among the chief corporate culprits. Working in tandem with the military forces of their respective home governments, these corporations wrought havoc with local populations in their colonies on many levels.²¹ Both were implicated in well-known genocides²².

A. Dutch East India Company

The Dutch East India Company (Vereenigde Oost-Indische Compagnie; VOC) was considered to be the first international mercantile joint stock enterprise and the first multinational corporation.²³ The VOC was founded by the Estates-General of the Netherlands in 1602, and was headed by a group of directors, the

16. *Id.* at 16-17.

17. *Id.* at 17.

18. *Id.*

19. *Id.* at 16-17.

20. See Hartley, *supra* note 1 (outline of history of corporations and their connection to atrocities).

21. Kelly, *supra* note 4, at 17.

22. *Id.*

23. Lindsay J. Thompson, *Colonialism*, in *ENCYCLOPEDIA OF BUSINESS ETHICS AND SOCIETY*, 347, 348-49 (Robert W. Kolb ed., 2008).

Seventeen Gentlemen.²⁴ The VOC held a Dutch monopoly of trade in Asian waters from the Cape of Good Hope onward.²⁵ It was organized as a joint stock company formed from several smaller companies. The Dutch created a structure of modern colonialism under which businessmen would work in conjunction with their home country, raising capital for ventures by pooling their individual assets under a single company.²⁶ Investors received transferrable shares of stock in the company and received profits according to their proportion of shares, thus forming an early form of limited liability.²⁷

This unique joint-stock structure allowed the VOC to be a dominant global force for over two centuries.²⁸ Image 1, below, demonstrates the scale and reach of VOC operations. The sheer magnitude of the VOC, and the diffusion of liability which initially made it powerful, ultimately led to structural and organizational deficiencies.²⁹ These internal deficiencies weakened the VOC in the face of its competitors, primarily the British East India Company (EIC), and ultimately led to the company's demise.³⁰ The VOC eventually declared bankruptcy and was dissolved in 1798.³¹

24. Lee H. Igel, *The Dutch East India Company*, in *ENCYCLOPEDIA OF BUSINESS IN TODAY'S WORLD*, 539, 540 (Charles Wankel ed., 2009).

25. *See The Dutch East India Company*, COMMITTEE FOR THE DEVELOPMENT OF THE DUTCH CANON, <http://entoen.nu/voc/en> [<https://perma.cc/62UT-2EF8>] (last visited Mar. 22, 2015) (describing creation and history of the VOC).

26. Kelly, *supra* note 4, at 17.

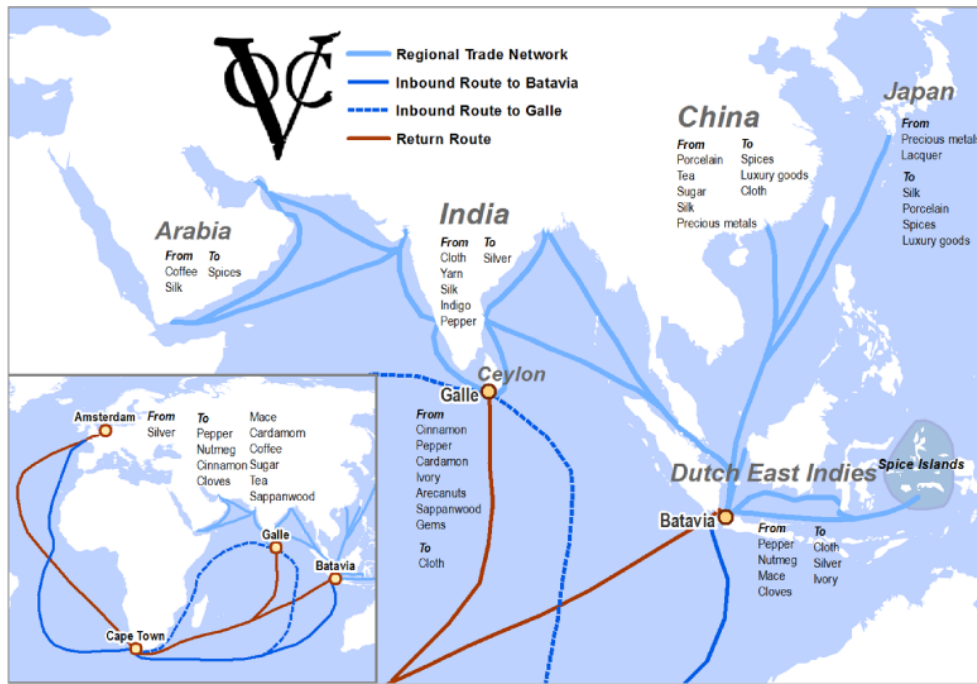
27. Igel, *supra* note 24, at 539.

28. *Id.* *See also* Thompson, *supra* note 23, at 349 (noting how the VOC was a dominant commercial force for over two centuries until declaring bankruptcy).

29. Thompson, *supra* note 23, at 349

30. Igel, *supra* note 24, at 540.

31. Thompson, *supra* note 23, at 349.



The VOC was established with the purpose of opening up trade to India, Persia, Japan, and eventually China.³² Becoming profitable almost instantly, the VOC achieved much of its success through abuse of indigenous populations. The VOC “maintain[ed] coercive or inequitable relationships with local populations” and was thus able to build its business by “buying low and selling high.”³³ The VOC was also known for establishing its global stronghold by force, carrying on Holland’s war with Portugal to establish its initial footholds in the East Indies.³⁴ In 1620, the VOC forcibly evicted the English from the Banda Islands and captured a monopoly over nutmeg and cloves as part of their lucrative spice trade that resulted in the elimination of all local trade and the subjugation of local islanders who came under Dutch “protection” as the chief source of labor.³⁵ This laid the groundwork for the VOC’s first genocidal episode.

In 1621, the indigenous population of the tiny Banda islands decided they no longer were going to participate in this system. At which point Jan Pietersz Coen, VOC’s governor-general in the region, responded by having them all, to a man, woman and

32. *Id.*

33. Igel, *supra* note 24, at 540.

34. MARK LEVINE, GENOCIDE IN THE AGE OF THE NATION STATE 243 (2005).

35. *Id.*

child, exterminated or deported as slaves or ethnic soldiers to other islands, with an entirely new indentured population shipped in from all over Asia to replace them.³⁶

In the Batavia Massacre of 1740, the VOC responded to Chinese uprisings over sugar prices by confining the Chinese inside the walls of Batavia, stripping them of their weapons, and massacring them.³⁷ Ten thousand Chinese were killed within the city walls and many more outside the city were killed.³⁸ Of the approximately 80,000 Batavian Chinese, it is estimated that only around 3,000 survived.³⁹ The Dutch then declared an open season on the Chinese of Java, leading to massacres in Semarang, Surabaya, and Gresik.⁴⁰

The VOC also had substantial involvement in the slave trade.⁴¹ The VOC imported African and Asian slaves to work as laborers and servants in their Batavia outpost, their settlement at the Cape of Good Hope, the plantations of the Spice Islands of Indonesia, and their other trading posts.⁴² Between 1687 and 1688, there were approximately 66,350 slaves in the Dutch Indian Ocean Establishments.⁴³ The VOC also transported Indonesian, Indian, and Ceylonese slaves.⁴⁴

Little information indicates that the VOC was ever reprimanded for its human rights abuses, most likely because the corporation dissolved before the Dutch outlawed slavery in the Anglo-Netherlands Treaty of 1814.⁴⁵ Governor-General of the Dutch East Indies, Adriaan Valckenier, was tried for his involvement in the Batavia Massacre, but died in prison before the trial completed.⁴⁶

36. *Id.*

37. R. J. RUMMEL, *DEATH BY GOVERNMENT* 57 (1994).

38. *Id.*

39. *Id.*

40. A. R. T. Kemasang, *Overseas Chinese in Java and Their Liquidation in 1740*, 19 *SOUTHEAST ASIAN STUD.* 123, 137 (1981).

41. Richard B. Allen, *Satisfying the “Want for Labouring People”:* *European Slave Trading in the Indian Ocean, 1500–1850*, 21 *J. WORLD HIST.* 45, 54 (2010).

42. *Id.*

43. *Id.*

44. *Id.*

45. PAUL E. LOVEJOY, *TRANSFORMATIONS IN SLAVERY: A HISTORY OF SLAVERY IN AFRICA* 290 (2nd ed. 2000).

46. A. W. Stellwagen, *Valckenier en Van Imhoff [Valckenier and Van Imhoff]*, 9 *ELSEVIER’S GEÏLLUSTREERD MAANDSCHRIFT* 209, 211 (1895).

B. British East India Company

Great Britain dealt with its colonial possessions in a typically paternalistic manner—with various degrees of control over governance, diplomacy, defense (both internal and external), and economic policy.⁴⁷ Social and religious policy was left largely to local governance.⁴⁸ Generally, the more the colonial population resembled Britain, racially, religiously, and culturally, the more latitude was accorded in governance on all sectors.⁴⁹ The less analogous the local population was to Britain, the less discretion was given to local governance.⁵⁰ Consequently, British possessions such as Canada, Australia, and New Zealand enjoyed much more local control than did India, Kenya, or South Africa.⁵¹

European powers engaged in widespread colonial activity during and after the Age of Discovery, primarily to harness natural resources, labor, and agricultural goods for the benefit of the home country.⁵² Britain followed the model of the Dutch in achieving these ends, via a close collaboration between the government and a joint-stock company. For each major possession, there was a corporation—the Hudson's Bay Company, the African Company (in various forms), the South Sea Company, and the East India Company.⁵³

The British East India Company was the largest of these concerns. In his mid-nineteenth-century apology/history of the British East India Company, Sir John Kaye tips his hand as to the attitude of the company entering India early on: “The servants of the Company had been for nearly two centuries regarding the natives of India only as so many dark-faced and dark-souled Gentiles, whom it was their mission to over-reach in business, and to overcome in war.”⁵⁴ That attitude formed a foundational approach for the company doing business in the British Raj that rendered the itinerant abuses and atrocities which were, if not foreseeable, at least predictable.

47. ANDREW PORTER, *THE OXFORD HISTORY OF THE BRITISH EMPIRE: VOLUME III: THE NINETEENTH CENTURY* 8 (2009).

48. *Id.* at 222.

49. See Labbeus R. Wifley, *How Great Britain Governs Her Colonies*, 9 *Yale L. J.* 207, 211 (1900) (justifying these distinctions because of “...an enormous native population and a very low type of culture.”).

50. *Id.*

51. *Id.*

52. STEPHEN TULLY, *CORPORATIONS AND INTERNATIONAL LAWMAKING* 33 (2007).

53. Kelly, *supra* note 4, at 200.

54. JOHN WILLIAM KAYE, *THE ADMINISTRATION OF THE EAST INDIA COMPANY* 2-3 (1853).

The British East India Company (EIC) began with 101 London merchants who petitioned the Privy Council for a grant of incorporation as a “trading company with special privileges.”⁵⁵ Queen Elizabeth I officially created the EIC by grant of a royal charter on December 31, 1600, giving the company trading rights east of the Cape of Good Hope.⁵⁶ This charter essentially granted the EIC a fifteen-year monopoly on English trade to countries east of the Cape of Good Hope and the Strait of Magellan.⁵⁷ The EIC was a joint-stock company made up of 125 shareholders that was administered by a governor and 24 directors elected annually.⁵⁸ The EIC initially had difficulty funding its voyages and thus used separate, terminable stocks for each voyage where members had the option of subscribing or not subscribing to a particular voyage.⁵⁹ The EIC introduced its first long-term joint stock financing in 1613 and switched to an even longer-term form in 1621.⁶⁰

55. KENNETH ANDREWS, TRADE, PLUNDER, AND SETTLEMENT 256 (1984).

56. Patit Paban, *The British East India Company*, in ENCYCLOPEDIA OF BUSINESS ETHICS AND SOCIETY, 191 (Robert W. Kolb ed., 2008).

57. Andrews, *supra* note 55, at 261.

58. Paban, *supra* note 56, at 191.

59. Andrews, *supra* note 55, at 262.

60. *Id.*



Set against a backdrop of over twenty years of failed attempts by Englishmen to re-enter the Orient, the main purpose of the company was to open trade in the “East Indias,” and more specifically, to obtain a share of the Indonesian pepper and spice market.⁶¹ Since England was still at war with Spain and Portugal, the EIC made clear that its purpose was commerce rather than combat, and initially made no attempts to acquire bases or colonies in Asia.⁶² The EIC’s refusal to take spoils from war, a policy that drastically departed from that of the Dutch, contributed to the company’s early financial difficulties.⁶³ The EIC’s main competitor was the Dutch East India Company.⁶⁴

Despite its antiwar proclamations, the EIC, from its inception, willingly used force to defend itself and accomplish its commercial objectives. From its initial arrival in Surat in 1608, the EIC used a combination of diplomacy and force to overcome resistance from the

61. *Id.* at 256, 265.

62. *Id.* at 262.

63. *Id.* at 262.

64. *Id.* at 267.

Portuguese and locals, and establish its foothold in India.⁶⁵ Once the EIC entered India, it used a combination of bribery, physical force, and commercial efficiency to overcome local merchants.⁶⁶ The EIC built its own ships that were heavily armed, enough to withstand opposition from the Portuguese or the VOC.⁶⁷ Image 2, above, reflects the EIC's dominance of South Asia.

The EIC's most egregious and well-known oppressive conduct occurred in its administration of affairs in Bengal from 1772 to 1785, a system "accused of condoning the exploitation of patronage, the abuse of bribery, systematic extortion and oppression of the Company's subjects."⁶⁸ Though a supporter of protecting indigenous culture, Warren Hastings, the EIC's governor-general of Bengal during the time period, refused to compromise for the sake of peace and was known for settling conflicts with "diplomacy, bribery, threats, force, audacity, and resolution."⁶⁹ While Hastings' tactics proved effective, they also raised significant ethical questions, and his achievements were "steeped in controversy."⁷⁰ Hastings was also accused of draining Bengal's resources to fund wars to further the EIC's dominance.⁷¹

The EIC's dominance of the Indian subcontinent was ultimately seen as necessary, "driven both by EIC economic interests and the idea that to 'stop is dangerous; to recede ruin.' From the British perspective, defeating India's armies handily enhanced their reputation among local rulers, while defeat or retreat had the opposite effect. This meant terrorizing not only the enemy but also local populations during battle."⁷² The ruthlessness with which the EIC achieved that policy rivals both ancient tactics undertaken by Genghis Khan in the westward expansion of the Mongol Empire and modern tactics undertaken by the Islamic State in the establishment of its caliphate from the ruins of Iraq and Syria.⁷³ The key difference is that the driving force in the former example was traditional imperial aims, the driving force in the latter example is religious

65. *Id.* at 270-71.

66. *Id.* at 274.

67. *Id.* at 276.

68. Chris Monaghan, *In Defense of Intrinsic Human Rights: Edmund Burke's Controversial Prosecution of Warren Hastings, Governor-General of Bengal*, 1 *LAW, CRIME & HIST.* 58, 59 (2011).

69. *Id.* at 72.

70. *Id.*

71. *Id.*

72. DAVID M. CROWE, *WAR CRIMES, GENOCIDE, AND JUSTICE: A GLOBAL HISTORY* 65 (2014).

73. Kelly, *supra* note 4, at 23.

domination, and the driving force in the EIC example was consolidation of economic dominance in furtherance of corporate interests.⁷⁴

The marriage of EIC control and British military advantage led to genocidal conduct against natives, including when “[t]he future Duke of Wellington, known for his humanity during the Napoleonic Wars, ordered his troops to burn entire villages and loot them completely during a campaign in Malabar in 1800.”⁷⁵ In many cases, the EIC wielded its own army “built around a strong cadre of British officers and large numbers of Sepoys, who were the backbone of the British forces in India.”⁷⁶

The EIC also had a significant role in the African slave trade, “shipping Madagascar slaves to India and the East Indies.”⁷⁷ The EIC initially used slaves at its Benkulen fort and pepper factory during the seventeenth and eighteenth centuries, after the “sickly place” resulted in the death of many Englishmen.⁷⁸ The slaves worked fourteen-hour days, performing both menial tasks and military functions.⁷⁹ The slaves were housed in a locked brick compound and fed an inferior diet.⁸⁰ The EIC took part in both the East and West African slave trade, transporting thousands of slaves.⁸¹

The EIC’s corporate gambit also included drug-running. Without the EIC, the Opium Wars would not likely have occurred, as the EIC’s heavy involvement in opium trafficking served as the catalyst for the conflict.⁸² Though publicly condemning the opium trade, the EIC worked through proxy vessels to smuggle significant amounts of opium into China during the early nineteenth century.⁸³

74. *Id.*

75. CROWE, *supra* note 72, at 65.

76. *Id.*

77. Frenise A. Logan, *The British East India Company and African Slavery in Benkulen, Sumatra, 1687–1792*, 41 J. NEGRO HIST. 339, 339 (1956).

78. *Id.* at 340.

79. *Id.* at 342-43.

80. *Id.* at 343-44.

81. *Britain and the Slave Trade*, THE NATIONAL ARCHIVES, <http://www.nationalarchives.gov.uk/slavery/pdf/britain-and-the-trade.pdf> [<https://perma.cc/Q5FY-GX7S>] (last visited Oct. 21, 2017); see Allen, *supra* note 41, at 46 (explaining the transportation of slaves from 1759 to 1765).

82. See D.A. Levy, *Opium*, THE MARITIME HERITAGE PROJECT, <http://www.maritimeheritage.org/news/opium.html> [<https://perma.cc/L5BZ-VLS6>] (last visited Oct. 21, 2017) (stating that the EIC controlled the production of opium over the entire Indian subcontinent and smuggled mass amounts of opium into China).

83. *Id.*

The planned addiction of millions of Chinese, engineered by the EIC in order to create an opium market it could then supply, was one of the more heinous actions taken in the name of profit. But this story is actually the story of two addicted societies. By the late eighteenth century, England had become addicted to tea, supplied chiefly by China: importing 15 million pounds per year by 1785.⁸⁴ However, the only currency China accepted for its tea was silver, of which the British had little.⁸⁵ Spain, the chief supplier of silver coinage, had sided with the colonies during the American Revolution and silver was still in short supply to Britain.⁸⁶ So “British traders had to find something China wanted as much as the British wanted tea. . . . The solution to this predicament lay in opium.”⁸⁷ Although initially resistant to opening this illegal trade for fear that it would undermine legal business interests, the EIC soon realized the profit to be made by supplying smugglers dwarfed other business opportunities:

The profits were too enormous for the Company to ignore. It sold opium at auction in India for four times the amount it cost to grow and process. In 1773, opium earned the Company £39,000. Twenty years later, the annual revenue from opium sold in China alone had ballooned to £250,000. . . . Between 1806 and 1809, China paid out seven million Spanish dollars for opium.⁸⁸

Opium addiction was initially limited to the Chinese upper class, as the EIC kept prices artificially high. However, as the Industrial Revolution allowed Britain to mass-produce textiles, India became a chief market.⁸⁹ But India was cash poor.⁹⁰ What it did have was opium.⁹¹ The solution to this dilemma then, was to widen the opium market in China so India could boost opium production to increase its cash flow to purchase British textiles.⁹² The EIC ceased operations by the time mass addiction in China reached its full extent and crippled

84. W. TRAVIS HANES III & FRANK SANELLO, OPIUM WARS: THE ADDICTION OF ONE EMPIRE AND THE CORRUPTION OF ANOTHER 20 (2002).

85. *Id.*

86. *Id.* at 21.

87. *Id.* at 20.

88. *Id.* at 21.

89. *Id.* at 22.

90. *See id.* (stating that to pay for cotton, India needed to sell more opium).

91. *Id.* at 22.

92. *Id.* at 22.

the empire.⁹³ Nevertheless, the EIC's illicit opium trafficking in China contributed to the degradation of Chinese society.⁹⁴

Despite engaging in various illicit activities and human rights abuses, by the early eighteenth century, the EIC had achieved great political power and protection from the Crown.⁹⁵ The EIC received little reprimand for its actions because, for political and financial reasons, the Crown prevented it from coming under parliamentary control.⁹⁶ When Parliament introduced the India Bill in 1783 in an attempt to bring the EIC under its regulation, King George III went so far as to say "whoever voted for the India Bill were not only not his friends, but he should consider them as his enemies."⁹⁷

Eventually, however, England developed more of a social conscience that slowly became aware of egregious conduct in its name around the globe. Hastings was impeached for his conduct in Bengal, though many critics argue that his behavior was not flagrant enough to violate the mores of the time.⁹⁸ Though Hastings was ultimately acquitted, Edmund Burke used his impeachment as an opportunity to generate public awareness of the EIC's corruptness and unethical tactics.⁹⁹ Hasting's trial lasted from 1788 to 1795, and was a public spectacle, with attendance tickets sold to royalty and other famous persons.¹⁰⁰ Knowing that he lacked the evidence necessary to succeed with impeachment, Burke used the opportunity to sway the general public with morality rhetoric and turn them against Hastings.¹⁰¹

The trial represented a new intolerance of Parliament of human rights abuses.¹⁰² The ethically questionable activities of the EIC also spurred other public outcry, such as British protests against the slave trade in the seventeenth century.¹⁰³ The EIC was eventually pulled under parliamentary control with the India Act of 1784, which created a Board of Control "to exercise political, military, and

93. Levy, *supra* note 82.

94. *Id.*

95. Monaghan, *supra* note 68, at 64.

96. *Id.*

97. *Id.* at 63.

98. *Id.* at 74.

99. *Id.* at 86.

100. *Id.* at 93.

101. *Id.* at 94.

102. *Id.* at 106.

103. Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 49 (2002).

financial superintendence over British possessions in India.”¹⁰⁴ Aggressive EIC tactics in the lands it controlled continued unabated, however. By the middle of the nineteenth century, even members of the British Parliament were ascribing torture and murder to the EIC:

[House of Commons Debate, April 18, 1856, Statement of Mr. Murrrough (MP-Bridport).] Take, again, the case of the Maharanees of Nagpore, which is a case of torture, not, I admit, in a violent sense of the word, by the application of the kittee to the hands, or powdered chillies to the eyes of these ladies (for those are expedients which I believe the hon. Company reserve for the extortion of confession or revenue), but torture not less acute, because prolonged and mental. On the death of the late Maharajah, his widows, in the undoubted exercise of their rights, according to Hindoo law, proceeded to nominate his infant successor to the vacant gadee, upon which British troops marched into Nagpore, threw the Ministers and the relatives of the late Sovereign into the common gaol, swept away the private property of the widows to the extent of two millions and a half, filled the palace of these illustrious ladies with Sepoys, under the command of a British officer, and deprived them of the means of even exercising the rights of their religion until they had extorted from them a release of their legal rights. Sir, two of these ladies are now no more—no discussion in this House can affect them—whether, borne down by accumulated indignities, they perished by poison administered by their own hands, or by the servants and at the instance of the Directors, is one of those fell mysterious secrets which fiends, both human and unearthly, have conspired to consign to the dark archives of hell; but be this how it may, the Company are equally their murderers.¹⁰⁵

Because the EIC faced severe criticism for failing to prevent the Indian Rebellion of 1858, the British government ultimately revoked

104. Alexander Hugo Schulenburg, *British East India Company Governance: 1200 to 1900: South, Central, and West Asia*, in *CULTURAL SOCIOLOGY OF THE MIDDLE EAST, ASIA, & AFRICA: AN ENCYCLOPEDIA* IV82, IV84 (Andrea L. Stanton, Edward Ramsamy, Peter J. Seybolt, & Carolyn M. Elliott eds., 2012).

105. 141 PAR. DEB., H.C. (3d ser.) (1856) 1208-09 (U.K.), available at <http://hansard.millbanksystems.com/commons/1856/apr/18/revenues-of-india> [<https://perma.cc/K74H-8YTV>] (statement of Mr. Murrrough).

the EIC's charter in 1858.¹⁰⁶ The EIC was nationalized and the Crown took over all Indian possessions and armed forces.¹⁰⁷

II. RECENT HISTORY—WORLD WAR I, WORLD WAR II, AND I. G. FARBEN

When a nation goes to war, everyone is expected to support the effort. Natural persons enlist or are drafted into the military, and legal persons put their corporate abilities to work for the state. As noted in the previous section, early on, corporations became involved in the colonization and wartime activities of their home states—ostensibly in support of national aims, but never at a loss.¹⁰⁸ Great Britain left most of the work of colonization, and subsequent military repression of indigenous populations, to the British East India Company during the seventeenth and eighteenth centuries.¹⁰⁹ A contemporary in 1827 noted with respect to the British East India Company: “A company which carries a sword in one hand and a ledger in the other—which maintains armies and retails tea, is a contradiction.”¹¹⁰ The Netherlands followed a similar paradigm via the Dutch East India Company,¹¹¹ which supplemented its Asian labor force with slaves and forced labor from local colonial populations.¹¹²

In the United States, corporations profited wildly during the American Civil War—providing armies in the field with everything from weapons to uniforms to food.¹¹³ As in the case of modern corporate complicity in atrocities such as genocide, the promise of large profits with little cost and no negative consequences¹¹⁴ proved

106. International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations: India*, 2 (2011), <http://www.indianet.nl/pdf/AccessToJustice.pdf> [<https://perma.cc/5QUR-DAD3>]

107. Schulenburg, *supra* note 104, at IV84.

108. Sandy Keeney, *The Foundations of Government Contracting*, 5 J. CONT. MGMT. 7 (2007).

109. LEO J. BLANKEN, RATIONAL EMPIRES: KERRY INSTITUTIONAL INCENTIVES AND IMPERIAL EXPANSION 111–38 (2012).

110. *Id.* (quoting J. R. McCulloch, Peers (1995)).

111. See generally KERRY WARD, NETWORKS OF EMPIRE: FORCED MIGRATION IN THE DUTCH EAST INDIA COMPANY (2009); Ghulum A. Nadri, *Networks of Empire: Forced Migration in the Dutch East India Company (review)*, 22 J. World Hist. 393 (2011).

112. Jan Lucassen, *A Multinational and Its Labor Force: The Dutch East India Company, 1595–1795*, 66 INT'L LAB. & WORKING CLASS HIST. 12, 14 (2004).

113. Keeney, *supra* note 108, at 16.

too tempting for many companies to resist providing low-cost, low-quality merchandise:

Profiteering and fraud were the hallmarks of government business during the Civil War. Hasty mobilization, loose enforcement, large-scale emergency buys, and lack of coordination at the federal level led to a situation very attractive to people looking for a quick fortune. J.P. Morgan was one example among many. In 1861, before hostilities broke out, the government auctioned off 5,000 obsolete and dangerous guns. Morgan, through an agent, bought them for \$3.50 each. He then turned around and sold them as new to General Fremont in St. Louis for \$22 each. When soldiers tried to fire them, they exploded as often as not. . . .¹¹⁵

This tradition of reliance on corporate support for national defense continues today, albeit with better product results. Companies like Halliburton and Dyncorp provide both support and security to military operations,¹¹⁶ and companies like Raytheon and General Dynamics provide matchless weaponry.¹¹⁷ Yet, President Dwight D.

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114. See Tyler Marshall, *Germany Was Hub of Iraq Arms Network in Europe*, L.A. TIMES, Feb. 15, 1991, http://articles.latimes.com/1991-02-15/news/mn-1086_1_purchasing-network/2 [perma.cc/YL67-D5PU] (“And so it was that [Germany] whose government policy bans the export of weapons to [Iraq] and whose official statistics show that it shipped only \$31 million of the \$25 billion in arms imported by Iraq during the 1980s, became the pivotal supplier to the most horrific elements of Hussein’s war machine. The lure of such profits also drew numerous smaller German companies, apparently willing to ignore or deny the reality of their business, for such a onetime economic windfall.”).
115. Keeney, *supra* note 108, at 27-8; see also JAMES A. HUSTON, *THE SINEWS OF WAR: ARMY LOGISTICS 1775–1953* 180 (1966), available at https://history.army.mil/html/books/030/30-4/cmhPub_30-4.pdf [perma.cc/4CUJ-VMA3] (stating “[p]rofiteers and unscrupulous trades lost no opportunity to take advantage of the loose enforcement of rules and regulations...to turn government requirements into private fortunes.”).
116. Chalmers Johnson, *The War Business*, HARPER’S, Nov. 2003, at 54, 56, available at <http://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=2&sid=543097ba-f2ec-4da7-860b-a1b61a9f34b4%40sessionmgr4006> [perma.cc/QD5T-CNGY]; David Hbler, *DynCorp Revenues Spurred by Continued Strong Contract Demand*, WASH. TECH., Mar. 22, 2012, available at <https://washingtontechnology.com/Articles/2012/03/22/DynCorp-revenues.aspx?p=1> [perma.cc/B2GV-ACQ3].
117. *Raytheon Wins \$81M Contract to Develop Weapons System for Army*, WASH. BUS. J., July 25, 2012, available at https://www.bizjournals.com/washington/blog/fedbiz_daily/2012/07/raytheon-wins-81m-contract-to-develop.html?sprint [perma.cc/XNT9-

Eisenhower eloquently warned the nation and the world of the perils of a military-industrial complex that could grow, if unchecked, to wield disproportional influence.¹¹⁸ He was describing the emerging Cold War synergy between corporations, the military, and the government. That synergy cemented itself and has long outlasted the conflict it was created to counter.

Perhaps most tragically, this confluence of corporate activity, military need, and government guidance revealed its true terrible potential in Hitler's Germany during World War II. German corporations, like those of other countries, operated within a legal framework sanctioned by their home government—in this case the Third Reich. Consequently, the atrocities they were complicit in perpetrating during the Holocaust were legal under German law at that time. However, they remained reprehensible and in violation of international law.

At the height of the war one in every five workers supporting the economy of the Third Reich was a forced laborer.¹¹⁹ By the beginning of 1944, this amounted to 10 million workers—6.5 million of whom were civilian forced laborers within Germany, 2.2 million were prisoners of war, and 1.3 million were in camps outside Germany proper.¹²⁰ German companies have paid billions of dollars in reparations to victims and survivors as a result.¹²¹

Most notably, Germany began to pay reparations to Israel soon after the war for the crimes of the Holocaust.¹²² More recently, German industry recognized, in the face of large class-action lawsuits, that it must compensate survivors and families of those subjected to

YKT3]; Dustin Walsh, *General Dynamics Land Systems Wins Contract for Weapons Station*, BUS.WEEK, June 3, 2010, <http://www.craigslist.com/article/20100603/FREE/100609926/general-dynamics-land-systems-wins-contract-for-weapons-station#perma.cc/9HS2-SPZJ>.

118. President Dwight D. Eisenhower, Farewell Address (Jan. 17, 1961), available at https://www.ourdocuments.gov/print_friendly.php?flash=true&page=transcript&doc=90&title=Transcript+of+President+Dwight+D.+Eisenhowers+Farewell+Address+%281961%29 [perma.cc/YYE7-L23D].

119. John C. Breyer & Stephen A. Schneider, *Forced Labor Under the Third Reich: Part One*, NATHAN ASSOC. INC., at 3 (1999), available at <http://www.nathaninc.com/sites/default/files/Pub%20PDFs/Forced%20Labor%20Under%20the%20Third%20Reich%2C%20Part%20One.pdf> [perma.cc/UD8K-JNZ6].

120. *Id.*

121. *Id.* at 1.

122. Frederick Honig, *The Reparations Agreement Between Israel and the Federal Republic of Germany*, 48 AM. J. INT'L L. 564 (1954).

forced labor in the German wartime economy.¹²³ First, in 1998, Volkswagen created a \$12 million fund to compensate slave laborers used in its factories during World War II.¹²⁴ Volkswagen's action was "the first time a German company acknowledged its 'moral and legal responsibility' to compensate Nazi-era slave laborers."¹²⁵

The following year, faced with similar litigation, over 3,500 German companies, including Audi, BMW, Krupp, Leica Camera, Siemens, Daimler Benz, Volkswagen, Hugo Boss, and Bayer,¹²⁶ together with the German government, paid a massive \$4.4 billion settlement to compensate the victims of their own corporate abuses.¹²⁷

A. *The I.G. Farben Case*

"Since 1916, eight of the main German chemical firms were joined together in what was called 'a community of interest'—'*Interessen Gemeinschaften*' or abbreviated 'I.G.'"¹²⁸ This community of interest, Farben, had "nearly a total monopoly of German chemical production at the beginning of World War II and, undoubtedly, was one of the main cartels in the world."¹²⁹ A supervisory council, the *Aufsichtsrat*, and a board of directors reporting to the *Aufsichtsrat*, the *Vorstand*, controlled Farben.¹³⁰ Farben initially took an anti-Nazi position, but "when the movement to war was defined, it converted itself into one of Hitler's most powerful allies as the fueling impulse of the German

123. STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 208-210 (2003).

124. BARBARA SALAZAR, CONG. RESEARCH SERV., RL30262, *THE HOLOCAUST—RECOVERY OF ASSETS FROM WORLD WAR II: A CHRONOLOGY (MAY 1995 TO PRESENT)* 14 (2000), available at https://digital.library.unt.edu/ark:/67531/metacrs1247/m1/1/high_res_d/RL30262_2000Jul31.pdf [perma.cc/35BN-4GFK].

125. *Id.*

126. MICHAEL R. MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S* 20 (2009), available at <http://web.a.ebscohost.com/ehost/ebookviewer/ebook/bmxlYmtfXzMwMzIxMl9fQU41?sid=03fc7beb-083c-4837-ac0b-a2e5524ae454@sessionmgr4010&vid=0&format=EB&rid=1> [perma.cc/4YEE-92Q7].

127. *Facts and Figures on Funding Activities*, STIFTUNG "ERINNERUNG, VERANTWORTUNG & ZUKUNFT" (Dec. 31, 2016), <http://www.stiftung-evz.de/eng/the-foundation/facts-and-figures.html> [perma.cc/BE9X-LPA8].

128. Alberto L. Zuppi, *Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert*, 66 LA. L. REV. 495, 501 (2006).

129. *Id.* at 501-2.

130. *Id.* at 502.

war machine.”¹³¹ Farben had made a number of scientific discoveries, including the production of synthetic rubber and gasoline from coal, which was crucial to the Nazi war plan.¹³²

Farben played a leading role in Hitler’s war machine, assisting in the rearmament of Germany in preparation for the war.¹³³ According to an extensive Pentagon study of Farben’s involvement in the war, submitted to Congress in 1945, “Without I.G.’s immense production facilities, its far-reaching research and world-wide economic power, the German war could never have been waged.”¹³⁴ From the earliest days of Hitler’s rise to power in Berlin, his regime colluded with members of the Farben board, some of whom were already “ardent Nazis.”¹³⁵ The mutuality of purpose between the Reich and Farben first played out in the occupation of forced German occupation of the Sudetenland portion of Czechoslovakia. In a telegram transmitted between the Reich and Farben “on September 30, 1938, the day of the Nazi occupation of Sudetenland . . . I.G. had been promised at least 7 days before the German troops marched into Czechoslovakia that one of its experts would be installed as commissar of the chemical and dyestuffs factories of the Sudetenland, factories which I.G. subsequently acquired.”¹³⁶

After Germany’s defeat, Nazi war criminals were prosecuted before the International Military Tribunal at Nuremberg. The first Military Tribunal prosecuted high-level Nazi leaders. The second Tribunal prosecuted Nazi industrialists, including the corporate leaders of Farben.¹³⁷ “All of the defendants [in the *Farben* case] were indicted for the planning, preparation, initiation and waging of wars of aggression, and invasions of other countries (count one); plunder and spoliation (count two); slavery and mass murder (count three); and common plan of conspiracy (count five).”¹³⁸ In addition, “[a]ll of the defendants, with one exception, were members of the German Labor Front, most of them belonged to the Nazi Party, and three were additionally indicted for membership in the SS (count four).”¹³⁹

131. *Id.*

132. *Id.*

133. *Eliminations of German Resources for War, Hearings Before a Subcommittee of the Committee on Military Affairs*, 79th Cong. 978 (1945), available at https://archive.org/stream/bub_gb_5XnsAAAAMAAJ#page/n3/mode/2up [perma.cc/E6F7-H39M].

134. *Id.*

135. *Id.*

136. *Id.*

137. Kelly, *supra* note 4, at 30.

138. *Id.*

139. *Id.*

The decision not to prosecute Farben as a company was political, not legal:

Corporate criminal liability—ultimately abandoned at Nuremberg in favor of individual liability for owners and directors—was seriously explored by the prosecution staff and “never rejected as legally unsound,” as legal historian Jonathan Bush explains, elaborating that “these theories of liability were not adopted, but not because of any legal determination that they were impermissible under international law.”¹⁴⁰

A desire to follow the path established by the Jackson prosecution team in the first Nuremberg trial may also have informed the decision not to prosecute Farben as a corporate entity. “Instead, prosecutors in the subsequent proceedings [like the *Farben* case] made a tactical decision to follow the lead of the main IMT tribunal and proceed with trials against individuals.”¹⁴¹

Nuremberg prosecutors could have far more easily prosecuted and convicted the I.G. Farben company as a corporate entity and then followed this conviction with individual criminal prosecutions of corporate officers on the basis of their participation in the criminal schemes once those schemes were established by a conviction of the entire company, not on the basis of membership in the company, as was the case with prosecutions of Gestapo officers once that organization was judged to be a criminal organization. Farben, Krupp, and the other German companies that formed the economic buttresses of Hitler’s war machine were large corporations but not criminal organizations. The results of the *Farben* trial bear out this conclusion.

Of the 23 accused, 13 were convicted, the other 10 were acquitted. None of the accused was found guilty of taking part in a war of aggression. There were convictions for war crimes and crimes against humanity, relating to the plundering and spoliation of foreign property and participation in the slave labour programme. Compared with the maximum sentences foreseen in Control Council Law 10—the death penalty and life imprisonment—the sentences imposed, between one and half and eight years of imprisonment, were generally felt to be moderate. Since the time spent in pre-trial detention was deducted from the sentence, most of the convicted were released after a few months of detention; the remaining ones were granted amnesty in 1951.¹⁴²

140. *Id.*

141. *Id.* at 31.

142. *Id.* at 31.

Indeed, the decision to go after individual corporate officers instead of the company allowed defense attorneys to throw up an array of plausible deniability claims mixed with something approaching the superior orders defense common in military contexts:

Former prisoners and British prisoners of war had come to Nuremberg, faced direct examination and cross-examination in November 1947, and vividly portrayed the brutal reality in the camp and at the I.G. Farben construction site. Defense counsel had little with which to counter that; ‘the defense attorneys limited themselves to relativizing the individual responsibility of the accused and to invoking Befehlsnotstand, ‘orders from above.’ It was not easy for the prosecution to ascribe individual elements of the offense to the agents of the firm. . . .¹⁴³

Moreover, the prosecution had to show a much wider base of knowledge for each defendant on each count in order to succeed in the absence of a prior judicial finding of corporate knowledge—which would have eased this burden considerably.¹⁴⁴ For example, with respect to Count 1, aggressive war, “the Tribunal found that with regard to Hitler’s plans neither ‘common knowledge’ nor ‘personal knowledge’ on the part of the accused could be established.”¹⁴⁵ With respect to Count 2, plundering and taking control of foreign companies as the Third Reich expanded into Poland, Norway, and France, the Tribunal found that while I.G. Farben clearly committed all these acts as a company, “there was no proof that all the accused had violated international law by participating in these acts in a way justifying punishment. While they had all attended the relevant IG meetings at which transactions in the occupied territories were discussed, only eight of the accused had appropriately been informed of the actual course of ‘negotiations’ with the companies and of the compulsory methods applied.”¹⁴⁶

With respect to Count 3, I.G. Farben’s involvement in the horrors at Auschwitz, individual knowledge, again, proved an insurmountable hurdle on the delivery of poison gas charge and the medical experiments charge. Although it was clearly established that Farben had manufactured Zyklon B, which was used to kill inmates at Auschwitz, and had delivered “quite extraordinarily huge quantities of the poison” to the SS, “the Tribunal was not convinced that the accused really knew about the criminal purpose for which the

143. *Id.* at 31.

144. *Id.* at 32.

145. *Id.* at 32.

146. *Id.* at 32.

substance supplied was used.”¹⁴⁷ Nor was it persuaded that the accused knew anything about the “criminal methods of the camp doctors” who were deliberately infecting inmates with the typhoid virus and then using Farben drugs for testing on those inmates.¹⁴⁸ The prosecution cleared the individual knowledge hurdle on the slave labor charge, but only because it was undeniable—the fact of slave labor was apparent to everyone on site. Farben had specifically built plants next to Auschwitz, depicted in Images 3 and 4 below, in order to exploit the available slave labor necessary for plant operations in the absence of working-age men who were away fighting the war.¹⁴⁹

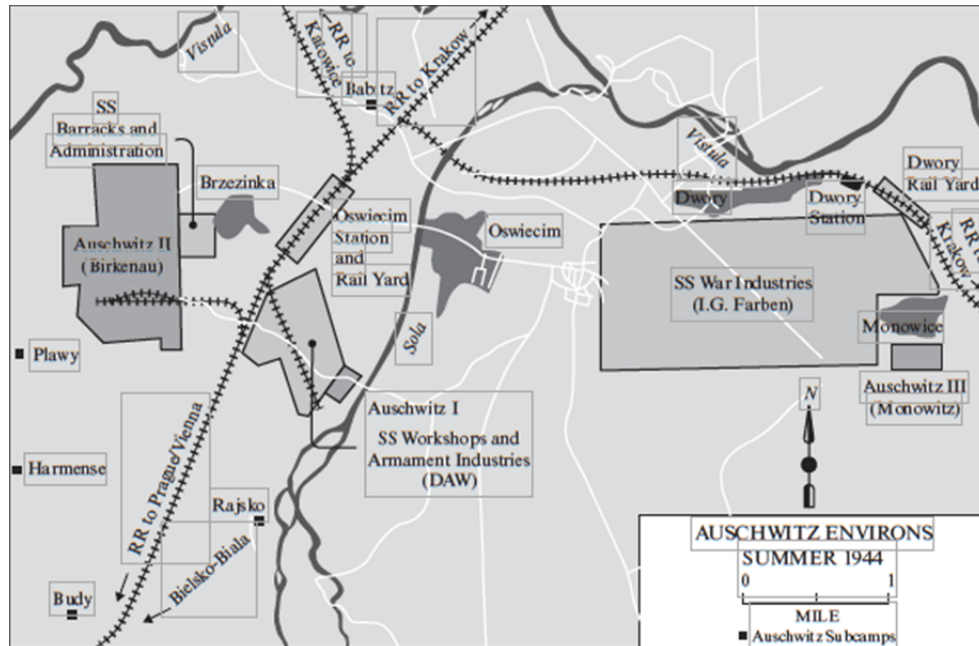


IMAGE 3 Proximity of I.G. Farben Complex to Auschwitz.

147. *Id.* at 32.

148. *Id.* at 32.

149. *Id.* at 32.



Nevertheless, the Tribunal was sympathetic to the defense argument that the accused had no moral choice but to accept the slave labor; therefore, it was “excused.”¹⁵⁰

For all counts, and the first two charges in Count 3, the prosecution could more easily have shown collective knowledge by prosecuting the corporation and then constructive knowledge for the individual officers afterward. But as the Tribunal noted in its judgment, “the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings.”¹⁵¹ Why prosecute individual corporate officers instead of the company itself? Some believe the change in political emphasis by Washington as it prepared to counter the rising Soviet threat explains the shift.¹⁵² The decision to treat companies politically rather than legally, as noted by Bush above, coincided with an apparent decision to put these assets and their personnel at the disposal of a friendly

150. *Id.* at 32.

151. *Id.* at 32.

152. *Id.* at 34.

government being built up on the new front line with Russia as a result of the “tension of coping with the past and shaping the future.”¹⁵³

[A]fter the start of investigations and before the conclusion of the Farben trial, American foreign policy was undergoing a turnabout in its attitude to Germany in general and German industry in particular. Under the influence of US Treasury Secretary Henry Morgenthau, the original goal was the “industrial disarmament” of Germany. Later on, in 1945–46, the US Administration adopted the Truman Doctrine, which sought to refrain from severe reprisals against the industrialists. German industry was not to be “purged”; it was to be recruited in view of the new communist enemy coming up on the horizon.

In the Farben trial, Morgenthau’s ideas of tough dealing with representatives of German industry. . . . were conducted by the aptly named “Morgenthau boys” [including Farben prosecutor] Josiah DuBois, who met with opposition from Washington even as main proceedings opened, culminating in the express advice from home that convictions for crimes against humanity were to be avoided.¹⁵⁴

With respect to the charges in Count 3 (slave labor, poison gas, and medical experiments), the prosecution began strong, but failed to sway the Tribunal on major points.¹⁵⁵ On the slave labor issue, the prosecution alleged that Farben not only used inmates of concentration camps for labor, but it also mistreated, terrorized, tortured, and murdered those inmates.¹⁵⁶ The prosecution alleged that “through the instrumentality of Farben, and otherwise, [the defendants] embraced, adopted, and executed the forced labor policies of the Third Reich, thereby becoming accessories to and taking a consenting part in the commission of war crimes and crimes against humanity. . . .”¹⁵⁷ Included in the Third Reich’s forced labor policies were the following instructions, “All the men must be fed, sheltered and treated in such a way as to exploit them to the highest possible extent at the lowest conceivable degree of expenditure.”¹⁵⁸

153. *Id.* at 34-5.

154. *Id.* at 35.

155. *Id.* at 35.

156. *Id.* at 35.

157. *Id.* at 35.

158. *Id.* at 35.

World War II severely depleted Germany's labor force.¹⁵⁹ At the same time, the Reich Labor Office forced industries to meet fixed production quotas.¹⁶⁰ It also controlled the allotment and supervision of available labor and prescribed strict regulations regarding the relationship between employers and employees. For example, "[i]ndustries were prohibited from employing or discharging laborers without the approval of the [Reich Labor Office]."¹⁶¹ The defendants asserted that these regulations as well as the serious penalties for violating the regulations, including confinement in a concentration camp or death, forced them to resort to slave labor. They argued that they lacked criminal intent.¹⁶²

Although the majority of the Tribunal accepted this defense of necessity, Judge Paul Herbert stated in his dissent that the evidence did not support this defense. He stated, "On the contrary, the record shows that Farben willingly cooperated and gladly utilized each new source of manpower as it developed."¹⁶³ For Judge Herbert, the evidence showed that Farben accepted and sought out forced workers, including inmates at concentration camps.¹⁶⁴ Farben initiated the plans to build a new plant at Auschwitz.¹⁶⁵ It was not forced to build a plant there by the Third Reich. Further, Farben knew from the start that slave labor, including the use of inmates from the Auschwitz concentration camp, would be the primary source of labor for that project.¹⁶⁶ Judge Herbert wrote, "To permit the corporate instrumentality to be used as a cloak to insulate the principle corporate officers who approved and authorized [that] course of action from any criminal responsibility therefore is a leniency in the application of principles of criminal responsibility which, in my opinion, is without any sound precedent under the most elementary concepts of criminal law."¹⁶⁷

There were a number of documents produced at the Tribunal that showed that Farben officials knew slave labor was being used in their plants. The defendants "[were] highly cultured, socially-bonded, and strongly linked with the highest level of decision-making—a true

159. *Id.* at 35.

160. *Id.* at 35.

161. *Id.* at 35.

162. *Id.* at 35.

163. *Id.* at 35.

164. *Id.* at 35.

165. *Id.* at 35-6.

166. *Id.* at 36.

167. *Id.* at 36.

scientific and managerial aristocracy.”¹⁶⁸ Further, the Monowitz concentration camp “was surrounded with electrically charged barbed wire fence, watchtowers, and guards provided by the SS.”¹⁶⁹ It would be difficult to believe that Farben officials did not have specific knowledge of the use and treatment of concentration camp inmates in their own plants.

On the poison gas and medical experiments issues, the prosecution alleged that Farben supplied Nazi officials with poisonous gas used to exterminate the inmates at concentration camps.¹⁷⁰ Prosecution also alleged that Farben supplied Nazi officials with deadly pharmaceuticals to use in medical experimentations on inmates of concentration camps.¹⁷¹ Although the Tribunal found that Farben did, in fact, supply Nazi officials with poisonous gases used to exterminate inmates of concentration camps and with pharmaceuticals used in medical experimentations on inmates of concentration camps, it held that the defendants were not guilty of aiding, abetting, or ordering, or even consenting to, these crimes.¹⁷² The Tribunal found that the evidence was insufficient to prove that the defendants had specific knowledge of the criminal use of the poisonous gas and pharmaceuticals.¹⁷³

Farben had a 42.5 percent interest in the firm Degesch, which manufactured Zyklon B, a gas widely used as an insecticide before World War II.¹⁷⁴ The Tribunal stated that “[t]he proof [was] quite convincing that large quantities of [Zyklon B] were supplied to the SS by Degesch and that it was used in the mass extermination of inmates of concentration camps, including Auschwitz.”¹⁷⁵ Despite this, the Tribunal found that “neither the volume of production nor the fact that large shipments were destined to concentration camps would alone be sufficient to lead [the Tribunal] to conclude that those who knew of such facts must also have had knowledge of the criminal purposes to which this substance was being put.”¹⁷⁶ The Tribunal further noted that there was a “well-known need for insecticides wherever large numbers of displaced persons, brought in from widely scattered regions, are confined in congested quarters lacking adequate

168. Zuppi, *supra* note 128, at 510.

169. *Id.* at 504.

170. *Id.* at 508.

171. *Id.* at 508.

172. *Id.* at 508.

173. *Id.* at 508.

174. Kelly, *supra* note at 37.

175. *Id.*

176. *Id.*

sanitary facilities.”¹⁷⁷ The Tribunal thereby found the evidence insufficient to establish guilt.¹⁷⁸ It found the evidence insufficient to show each defendant’s specific knowledge that the gas was actually being used to exterminate inmates of the concentration camps.¹⁷⁹

The prosecution alleged that the defendants knowingly supplied vaccines and pharmaceuticals to the SS to test the effectiveness of the drugs on inmates of concentration camps.¹⁸⁰ The prosecution asserted that these medical experiments were conducted without the consent of the inmates, and resulted in bodily harm and death to a number of inmates.¹⁸¹ The Tribunal found “that healthy inmates of concentration camps were deliberately infected with typhus against their will and that drugs produced by Farben, which were thought to have curative value in combating said disease, were administered to such persons by way of medical experimentation, as a result of which many of such persons died.”¹⁸²

Despite this, the Tribunal determined that the evidence did not sufficiently establish that the individual defendants were guilty of ordering, aiding, abetting, or consenting to these experiments.¹⁸³ The Tribunal noted that defendants could reasonably have assumed that the large quantities of drugs shipped to concentration camps were used for legitimate purposes.¹⁸⁴ The threat of an epidemic of typhus, spotted fever, or other similar diseases always exists where a large number of people are forced to live in close proximity and in unsanitary conditions.¹⁸⁵ The Tribunal also found that Farben stopped providing drugs to the SS when it began to suspect that the drugs were being used improperly.¹⁸⁶

A properly conducted prosecution of Farben as a corporate entity would have likely avoided many of these traps. Using a complicity standard of knowledge to impute parts of what each individual defendant knew to a unified whole on the part of the company could have been accomplished through corporate minutes, transactional records, and aggressive cross-examination. After establishing that, fitting the individual officers into the mosaic of criminal liability

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 37-8.

186. *Id.* at 38.

would have made much more sense to the bench and painted a more complete picture of the entire criminal liability of the company and its officers. This would likely have resulted in more convictions on more charges against each man. Thus, the relative failure of the *Farben* case ironically makes the case for corporate criminal prosecution for genocide.

In the words of Judge Herbert in his concurrence, “If a single individual had combined the knowledge attributable to the corporate entity and had engaged in the course of action under the same circumstances as that attributable to the corporate entity, it is extremely doubtful that a judgment of acquittal could properly be entered.”¹⁸⁷ Exactly. The company itself was that “single individual” that should have been prosecuted.

III. MODERN HISTORY—THE *KIOBEL* LITIGATION

Unfortunately, the tradition of corporate involvement in genocide and other human rights violations, as exemplified by the Dutch and British East India Companies and I.G. Farben did not end with the twentieth century. *Kiobel v. Royal Dutch Petroleum Company*,¹⁸⁸ is an example of a modern attempt to hold corporations accountable for aiding and abetting in human rights abuses, albeit in the civil law sense. In *Kiobel*, petitioners brought claims against two holding corporations and their subsidiary under the Alien Tort Statute (ATS),¹⁸⁹ for violations of the law of nations. Although the ATS was originally designed by the first U.S. Congress to bring claims against individuals when British and French citizens in North America needed a right of redress in U.S. federal courts, it evolved in modern times to include claims against corporations as well.¹⁹⁰

In *Kiobel*, the petitioners, former residents of Ogoniland, Nigeria, brought suit in the U.S. District Court for the Southern District of New York against the respondents, Royal Dutch Petroleum Company and Shell Transport and Trading Company, PLC, holding companies incorporated in the Netherlands and England, respectively, and their joint subsidiary Shell Petroleum Development Company of Nigeria,

187. *Id.* at 38.

188. *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (2013).

189. Alien’s Action for Tort, 28 U.S.C. § 1350 (1948).

190. Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 159, 160 (2014) (noting that since the 1990s, 200 cases have been brought against transnational corporations for their (often vicarious) roles in “violating customary international human rights norms” in countries where those corporations did business).

Ltd. (SPDC).¹⁹¹ The complaint alleged that residents of Ogoniland had begun protesting the environmental effects of SPDC's activities and that the respondents recruited the Nigerian government, who crushed the demonstrations by looting property and carrying out acts of violence, such as rape and murder.¹⁹² The complaint further alleged that "respondents aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for attacks."¹⁹³ After these attacks, the petitioners moved to the United States, where they were granted political asylum and resided as legal residents at the time of the suit.¹⁹⁴

The petitioners alleged jurisdiction under the ATS.¹⁹⁵ They requested relief under customary international law.¹⁹⁶ "The ATS provides, in full, that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'"¹⁹⁷ The petitioners alleged that the "respondents violated the law of nations by aiding and abetting the Nigerian government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction."¹⁹⁸ The District Court dismissed the first, fifth, sixth, and seventh claims, finding that they were not supported by the alleged facts. The court denied respondents' motion to dismiss with respect to the remaining claims, but certified its order for interlocutory appeal.¹⁹⁹

Subsequently, the Second Circuit Court of Appeals determined that "the law of nations does not recognize corporate liability" and thereby dismissed the petitioners' entire complaint.²⁰⁰ Part of the Second Circuit's holding, however, rested on a misreading of the Nuremberg trials; incorrectly conflating the decision not to prosecute German corporations after World War II with the legal impossibility

191. Kiobel, *supra* note 190, at 1662.

192. *Id.*

193. *Id.* at 1662.

194. *Id.*

195. *Id.* at 1663.

196. *Id.*

197. *Id.* (quoting 28 U.S.C. §1350 (1948)).

198. *Id.*

199. *Id.*

200. *Id.*

of doing so.²⁰¹ The U.S. Supreme Court granted *certiorari*.²⁰² After hearing oral arguments, the Court required that the parties address an additional issue, “Whether and under what circumstances the [ATS] 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.”²⁰³

This pivotal move by the Court changed the question from whether a corporation may be sued at all under the ATS, to whether a corporation may be sued under the ATS for acts violating the law of nations, committed outside the United States. This made a critical difference. If the Court had affirmed the Second Circuit’s decision with respect to the former question, it would have completely barred one means of holding corporations accountable in the United States for egregious human rights violations. “By ruling that the scope of liability for a violation of a given international norm does not extend to corporations, the Second Circuit majority [in *Kiobel v. Royal Dutch Petroleum Company*, 621 F.3d 111 (2d Cir. 2010) *aff’d*, 133 S. Ct. 1659 (2013),] in the words of concurring Judge Leval, ‘deal[t] a substantial blow to international law and its undertaking to protect fundamental human rights.’”²⁰⁴ That decision would “potentially incentiviz[e] states to abdicate state duties to corporations because incorporation may effectively insulate all parties—states, armed groups, and corporations—from liability.”²⁰⁵

Rather than address whether corporations may be sued at all under the ATS, the Court decided to address whether corporations may be sued under the ATS for acts committed outside the territory of the United States.²⁰⁶ This implies that corporations may indeed be held liable under the ATS.²⁰⁷ In its analysis, the Court first noted that “the [ATS] provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action.”²⁰⁸ Rather, “[i]t . . . allows federal courts to recognize certain causes of

201. Kelly, *supra* note 4, at 39-40.

202. *Id.* at 40.

203. *Id.*

204. Tyler Giannini & Susan Farbstain, *Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights*, 52 HARV. INT’L L.J. 119, 121 (2010).

205. *Id.* at 123.

206. *Kiobel v. Royal Dutch Petroleum Company*, 133 S. Ct. 1659, 1664 (2013) 1664.

207. Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from Kiobel’s “Touch and Concern” Test*, 66 HASTINGS L.J. 443, 448 (2015).

208. *Kiobel*, *supra* note 208, at 1663.

action based on sufficiently definite norms of international law.”²⁰⁹ The Court stated that in *Kiobel*, the issue was not “whether petitioners . . . stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign.”²¹⁰

When discerning whether Congress’s statutes apply abroad, courts generally apply a presumption against extraterritorial application. This presumption against extraterritorial application “provides that ‘[w]hen a statute gives no clear indication of an extraterritorial application, it has none.’”²¹¹ The Court reasoned that “[t]his presumption ‘serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.’”²¹² The Court determined that this presumption against extraterritorial application similarly applies to causes of action brought under the ATS.²¹³ The Court explained that “the potential [foreign policy] implications . . . of recognizing . . . causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”²¹⁴

A presumption against extraterritorial application may be rebutted, however, when the statute manifests a “clear indication of extraterritoriality.”²¹⁵ But the Court found nothing in the language of the ATS that evinced a clear intent that the statute had extraterritorial reach.²¹⁶ Further, nothing in the historical background surrounding the ATS’s enactment suggested that Congress had clearly intended for the statute to have extraterritorial reach.

At the time of the ATS’s enactment, there were “‘three principal offenses against the law of nations’ . . . identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy.”²¹⁷ The Court stated that “[t]he first two offenses have no necessary extraterritorial application”²¹⁸ Rather, Blackstone defined

209. *Id.* at 1664.

210. *Id.*

211. *Id.* (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 248 (2010)).

212. *Id.* (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

213. *Id.*

214. *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

215. *Id.* at 1665 (quoting *Morrison*, 561 U.S. at 265)).

216. *Id.* at 1666 (quoting *Sosa*, 542 U.S. at 724).

217. *Id.*

218. *Id.*

both as taking place within the forum nation.²¹⁹ The first two offenses thereby provide no support that Congress intended the ATS to have an extraterritorial reach. Piracy, however, generally occurred outside the territory of the United States, on the high seas, which are typically treated as foreign soil with respect to the presumption against extraterritorial application.²²⁰

Although the ATS provides jurisdiction in the United States for causes of action against pirates, even when the illegal conduct is committed outside the United States, the Court “[did] not think that the existence of a cause of action against [pirates was] a sufficient basis for concluding that other causes of action under the ATS reach conduct that . . . occurs within the territory of another sovereign.”²²¹ The Court reasoned that pirates do not operate within a specific jurisdiction, making them “fair game” for the United States, or any other nation, to bring a case against them without triggering negative foreign policy consequences.²²² Pirates are in their own category, and the application of the ATS with respect to them does not imply a general intent by Congress for the ATS to apply extraterritorially. Additionally, “there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.”²²³ The Court concluded that “the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.”²²⁴

Applying the presumption against extraterritoriality to the facts in *Kiobel*, namely that the respondents’ acts that violated the law of nations occurred outside the United States, the Court found petitioners’ suit to be barred.²²⁵ The Court stated “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”²²⁶ The Court added that “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”²²⁷ It thereby affirmed the Second Circuit’s dismissal of the petitioners’ complaint, but for very different reasons. Thus, conceptually, corporations can still be sued

219. *Id.*

220. *Id.* at 1667.

221. *Id.*

222. *Id.*

223. *Id.* at 1668.

224. *Id.* at 1669.

225. *Id.*

226. *Id.*

227. *Id.*

for violations of international law, but the “touch and concern” nexus with the United States must be met in order for such cases to proceed.

However, the Court neither explained what factors would sufficiently displace the presumption against extraterritorial application nor what factors would be sufficient to justify an extraterritorial reach. In his concurring opinion, Justice Kennedy stated that the Court rightfully “[left] open a number of significant questions regarding the reach and interpretation of the [ATS].”²²⁸ In Justice Breyer’s concurring opinion, he agreed with the Court’s holding, but not its reasoning. He noted that the Court’s reliance on the presumption against extraterritorial application “offers only limited help in deciding the question presented, namely ‘under what circumstances the [ATS] . . . 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.’”²²⁹ The Court “makes clear that a statutory claim might sometimes ‘touch and concern the territory of the United States . . . with sufficient force to displace the presumption.’”²³⁰ However, the Court “leaves for another day the determination of just when the presumption against extraterritoriality might be ‘overcome.’”²³¹

Justice Breyer stated that rather than rely on the presumption against extraterritoriality, he would find jurisdiction under the ATS where: “(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American interest in preventing the United States from becoming a safe harbor (free or civil as well as criminal liability) for a torturer or other common enemy of mankind.”²³²

The Court in *Kiobel* narrowed the scope of claims that may be brought under the ATS by applying a presumption against extraterritoriality and by putting in place a new test, namely that “ATS claims that ‘touch and concern the territory of the United States’ with ‘sufficient force’ may overcome the presumption, but ‘mere corporate presence’ of the kind presented in *Kiobel* is insufficient.”²³³ But without guidance as to what is sufficient to satisfy the “touch and concern” connection with the territory of the United

228. *Id.* (Kennedy, J., concurring).

229. *Id.* at 1673 (Breyer, J., concurring) (quoting *Kiobel*, 133 S. Ct. at 1663).

230. *Id.* (majority opinion) (quoting *Kiobel*, 133 S. Ct. at 1669).

231. *Id.*

232. *Id.* at 1671.

233. Paul L. Hoffman, *Kiobel v. Royal Dutch Petroleum Co.: First Impressions*, 52 COLUM. J. TRANSNAT’L L. 28, 35 (2013).

States, it is difficult to predict the effect *Kiobel* will have on corporate liability for violations of the law of nations. Despite this narrowing, the ATS still “has the potential to provide a [foreigner] with a civil remedy from a U.S. court based upon a variety of customary international law violations committed by a foreign national and occurring in the territory of a sovereign other than the United States.”²³⁴ This potential would especially be realized if lower courts “give full force to the [ATS]’s terms as permitted by *Kiobel* and not reactively assume even that a ‘foreign-cubed’ case (a case with solely foreign plaintiffs and defendants and injury in a foreign country) cannot itself have sufficient U.S. features to displace the presumption against extraterritoriality.”²³⁵

Since the Supreme Court handed down the *Kiobel* decision, not all lower courts have given full force to the ATS. In fact, some courts have applied the reach of the ATS narrowly, interpreting the presumption against extraterritoriality to be a very difficult barrier to overcome.²³⁶ Other courts, however, have allowed claims under the ATS for acts committed outside the United States.²³⁷ The differences in lower court decisions reflect the federal courts’ uncertainty in interpreting *Kiobel* and the touch and concern test. The federal courts that have addressed the ATS and its extraterritorial reach typically fall into one of five camps:

[T]hose that read *Kiobel* to require that the law of nations violation occur in the United States in order to displace the presumption against extraterritoriality (These courts view the law of nations violation as the direct—and, indeed, ultimate—injury and do not hold that a predicate act giving rise to the direct injury could itself constitute a law of nations violation.); those that read the case to require that only relevant conduct (as distinguished from the law of nations violation) occur in the United States in order to displace the presumption; those that read the case to allow U.S. citizenship (or residency) to displace the presumption; those that read the case to disallow U.S. citizenship to displace the presumption; and those that read the case to acknowledge that only Congress can displace a statute’s presumption against extraterritoriality.²³⁸

234. Doyle, *supra* note 208, at 446–47.

235. *Id.* at 447.

236. *See id.* at 456 (“In three of the four [Circuit] cases decided, the courts dismissed the ATS claims on the ground that no relevant conduct occurred in the United States”).

237. *See id.* at 460 (Fourth Circuit, in *Al Shimari II*, found that Plaintiff’s claims sufficiently touched and concerned the United States).

238. *Id.* at 455–56.

In addressing the ATS's extraterritorial reach, the courts also differ in their interpretation of the touch and concern test.²³⁹ In fact, some courts did not even address it.²⁴⁰ These differing court opinions "show the need for a coherent test to determine when the presumption against the extraterritorial application of a statute should be displaced."²⁴¹ The following cases demonstrate how the nine circuits have addressed the issue of the ATS's extraterritorial reach.

In *Cardona v. Chiquita Brands International, Inc.*,²⁴² "[o]ver four thousand Colombians brought actions against Appellant Chiquita Brands International, Inc., and Chiquita Fresh North LLC (collectively, 'Chiquita'), alleging claims involving torture, personal injury, and death under the Torture Victims Protection Act and the [ATS]."²⁴³ The alleged acts that violated the law of nations were committed in Colombia.²⁴⁴ Because none of the relevant conduct took place in the United States, the court dismissed the plaintiffs' case.²⁴⁵ However, the court did not attempt to explain touch and concern or even relevant conduct. "The court seemed to consider only direct harm—that which the plaintiffs alleged to have occurred in Colombia—to be the kind of harm cognizable by the ATS."²⁴⁶ The court did not consider the plaintiffs' allegations that Chiquita's activities in the United States were in furtherance of its illegal foreign activities, nor did it consider the fact that Chiquita was a corporation based in the United States.²⁴⁷ Rather, it simply stated, "There is no allegation that any torture occurred on U.S. territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force."²⁴⁸ The court maintained a "strict and sole allegiance to the question of the location of the direct harm as dispositive of ATS jurisdiction."²⁴⁹

Similarly, in *Balintulo v. Daimler AG*,²⁵⁰ the court barred the plaintiffs' claims under the ATS, but did not provide any explanation

239. *Id.* at 456.

240. *Id.* at 457.

241. *Id.* at 456.

242. *Cardona v. Chiquita Brands International, Inc.*, 760 F.3d 1185 (11th Cir. 2014).

243. *Id.* at 1187.

244. *Id.* at 1188.

245. *Id.* at 1189.

246. Doyle, *supra* note 208, at 457.

247. *Id.*

248. *Cardona*, 760 F.3d at 1191.

249. Doyle, *supra* note 208, at 457.

250. *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013).

with respect to touch and concern or relevant conduct. *Balintulo* involved putative class-action suits brought on behalf of victims of South African apartheid.²⁵¹

[T]he plaintiffs assert[ed] that the South African subsidiary companies of the named corporate defendants—Daimler, Ford, and IBM (the “defendants”)—aided and abetted violations of customary international law committed by the South African government . . . [by] s[elling] cars and computers to the South African government, thus facilitating the apartheid regime’s innumerable race-based depredations and injustices, including rape, torture, and extrajudicial killings.”²⁵²

The court found that “federal courts may not, under the ATS, recognize common-law causes of action for conduct occurring in the territory of another sovereign”²⁵³ and the plaintiffs’ claims were thereby barred.²⁵⁴ The court disagreed with the plaintiffs’ arguments that “whether the relevant conduct occurred abroad is simply one prong of a multi-factor test, and the ATS still reaches extraterritorial conduct when the defendant is an American national.”²⁵⁵ The court opined, “[I]f all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*.”²⁵⁶

For both the Eleventh Circuit and the Second Circuit, the dispositive fact was that the acts in violation of the law of nations occurred outside the United States. The courts in *Cardona* and *Balintulo* determined that they were bound by *Kiobel*’s holding and that claims brought under the ATS are barred if the “relevant conduct” occurred outside the United States. However, neither court elaborated on what “relevant conduct” is. The courts also determined that mere corporate citizenship was not enough to bring an action under the ATS when the “relevant conduct” occurred outside the United States. “Such a conclusion, in part, rejects the opportunity to fully engage the question of the ATS’s reach, inclusive of determining why corporate citizenship is insufficient to displace the presumption, if that is indeed the view of the court.”²⁵⁷ The *Kiobel* decision left room “for a definition of touch and concern that includes relevant conduct, ranging from conduct that is material to a customary

251. *Id.* at 175.

252. *Id.* 179–80.

253. *Id.* at 181.

254. *Id.* at 193.

255. *Id.* at 189.

256. *Id.* at 190.

257. Doyle, *supra* note 208, at 458.

international law violation to the customary international law violation itself, given the significance placed on the location of all material conduct at international law.”²⁵⁸ The *Kiobel* decision also left room “for a touch and concern test that includes corporate citizenship, given the significance placed on nationality at international law.”²⁵⁹ This was room that the Eleventh Circuit and Second Circuit chose not to take.

The Ninth Circuit interpreted *Kiobel* similarly to the Eleventh Circuit and Second Circuit. In *Mujica v. AirScan, Inc.*,²⁶⁰ the plaintiffs brought a suit against American corporations for their involvement in a bombing in Colombia.²⁶¹ The court concluded that “Plaintiffs’ ATS claims against Defendants [were] based solely on conduct that occurred in Colombia, and the only nexus with the United States that Plaintiffs allege is the fact that both Defendants [were] U.S. corporations.”²⁶² The court held that “[the plaintiffs’] ATS claims [did] not touch and concern the territory of the United States ‘with sufficient force to displace the presumption against extraterritorial application . . . and that they must be dismissed.’”²⁶³ The Sixth Circuit would likely interpret *Kiobel* similarly. In *Mwangi v. Bush*,²⁶⁴ a Kentucky district court noted that because all of the relevant conduct alleged in the complaint occurred in Kenya, the court lacked jurisdiction under the ATS.²⁶⁵

The Fourth Circuit interpreted *Kiobel* differently from the Eleventh Circuit and Second Circuit. In *Al Shimari v. CACI Premier Technology, Inc.*,²⁶⁶ the plaintiffs, foreign nationals, brought suit under the ATS against CACI Premier Technology, Inc. (CACI), an American corporation, “for the torture and mistreatment of foreign nationals at the Abu Ghraib prison in Iraq.”²⁶⁷ The court held that the *Kiobel* decision did not bar the plaintiffs from bringing their

258. *Id.* at 459.

259. *Id.*

260. *Mujica v. AirScan, Inc.*, 771 F.3d 580 (9th Cir. 2014).

261. *Id.*

262. *Id.* at 596.

263. *Id.* (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669) (2013)).

264. *Mwangi v. Bush*, No. 5: 12-373-KKC, 2013 U.S. Dist. WL 3155018, at 1 (E.D.K.Y. June 18, 2013).

265. *Id.* at *4.

266. *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014).

267. *Id.* at 520.

claims under the ATS.²⁶⁸ The court applied a fact-based analysis, in which it noted that the Court in *Kiobel* “stated that the claims, rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force, suggesting that courts must consider all the facts that give rise to the ATS claims, including the parties’ identities and their relationship to the causes of action.”²⁶⁹ The court also noted that in cases involving substantial ties to the United States, “it is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory.”²⁷⁰

In *Al Shimari*, the plaintiffs alleged that the acts of torture were committed by American citizens employed by an American corporation and that the acts occurred at “a military facility operated by United States government personnel.”²⁷¹ The plaintiffs not only alleged that CACI employees committed the acts of torture but also that CACI managers knew of the torture, attempted to cover it up, and encouraged it.²⁷² The court determined that these facts touched and concerned the United States with sufficient force to displace the ATS’s presumption against extraterritoriality.²⁷³ “By recognizing the legal significance of the defendant’s alleged conduct in the United States, the courts in *Al Shimari* . . . advanced two key tenets: (1) ATS jurisdiction can be premised on a claim of aiding and abetting a customary international law violation, even if the aiding and abetting occurs in the United States and the direct injury occurs abroad; and (2) aiding and abetting a customary international law violation is itself a customary international law violation.”²⁷⁴ Additionally, the court took the defendant corporation’s citizenship into consideration when determining whether a claim under the ATS touches and concerns the United States.

In the First Circuit, a Massachusetts district court determined that a claim may be brought under the ATS when the defendant is an American citizen and a substantial part of the conduct occurred in the United States. In *Sexual Minorities Uganda v. Lively*,²⁷⁵ the plaintiff was an organization located in Uganda that advocated for the

268. *Id.* at 530-31.

269. *Id.* at 527.

270. *Id.* at 528.

271. *Id.*

272. *Id.* at 529.

273. *Id.* at 530.

274. Doyle, *supra* note 208, at 462.

275. *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013).

equal rights of lesbian, gay, bisexual, transgender, and intersex people (collectively “LGBTI”).²⁷⁶ The plaintiff brought a law suit, in part under the ATS, against the defendant, an American citizen, for “help[ing] coordinate, implement, and justify ‘strategies to dehumanize, demonize, silence, and further criminalize the LGBTI community’ in Uganda.”²⁷⁷ The plaintiff further alleged that although the defendant’s acts of discrimination were focused substantially on Uganda, he and his illegal acts were based in the United States.²⁷⁸ The court found that “the restrictions established in *Kiobel* on extraterritorial application of the ATS [did] not apply to the facts as alleged in this case, where Defendant is a citizen of the United States and where his offensive conduct is alleged to have occurred, in substantial part, within [the United States].”²⁷⁹

In the Third Circuit Court of Appeals case, *Ben-Haim v. Neeman*,²⁸⁰ the court noted that claims may not be brought under the ATS when all of the relevant conduct occurred outside the United States.²⁸¹ The court held that “the conduct that formed the basis of the ATS claims [in *Ben-Haim*] took place in Israel” and the court thereby lacked subject matter jurisdiction over those claims.²⁸² In *Krishanti v. Rajaratnam*,²⁸³ a New Jersey district court determined that, unlike in *Ben-Haim*, some of the relevant conduct occurred in the United States and the court thereby had subject matter jurisdiction.²⁸⁴ In *Krishanti*, the plaintiffs brought an action against a Sri Lankan terrorist organization, a Sri Lankan nongovernmental organization, and individual defendants who founded a charitable organization that helped fund the terrorist organization, for aiding and abetting in crimes against humanity. The court determined that because the individual defendants held certain meetings and conducted fundraising in United States, and because one of the individual defendants was an American citizen, the court had subject matter jurisdiction over the individual defendants.²⁸⁵

276. *Id.* at 309.

277. *Id.* at 311 (citing Dkt. No. 27, Am. Compl. ¶ 7).

278. *Id.* at 309.

279. *Id.* at 310.

280. *Ben-Haim v. Neeman*, 543 F. App’x 152 (3d Cir. 2013).

281. *Id.* at 155.

282. *Id.*

283. *Krishanti v. Rajaratnam*, No. 2:09-CV-05395 JLL, 2014 WL 1669873 (D.N.J. Apr. 28, 2014).

284. *Id.* at *10.

285. *Id.* at *13-14.

The Eight Circuit and Tenth Circuit have not yet ruled on the extraterritoriality of the ATS in light of *Kiobel*. The Fifth Circuit also has not ruled directly on the extraterritoriality of the ATS, but it stated in dicta that it is doubtful that jurisdiction under the ATS may be extended “to a tort committed by a foreign official in a foreign country.”²⁸⁶ In the Fifth Circuit, the court held in *Murillo v. Bain*²⁸⁷ that in a case where the relevant conduct and the parties involved had nothing to do with the United States, the ATS may not be presumed to apply.²⁸⁸

The variety of approaches, albeit fact-driven, taken by these courts to ATS litigation in the wake of *Kiobel*, indicates unsettled waters. The extraterritoriality issue risks promoting forum-shopping by prospective plaintiffs if some circuits are viewed as more friendly to ATS litigation and more lenient on determining what scenarios “touch and concern” the U.S. If that happens, the Supreme Court could intervene once again. Of course, the danger of further intervention by the Supreme Court is the possibility that the justices actually take up the question of whether corporations can be subjects of litigation at all for ATS purposes, and rule in the negative. This danger calls for further persuasive case law supporting the proposition that companies can indeed be prosecuted for genocide. Logically, if corporations can be prosecuted for genocide, they can certainly be sued for civil damages in tort.

CONCLUSION

In each of the instances outlined above if the corporation had been prosecuted *as a corporation*, the greater societal need of justice being satisfied could have been met. Moreover, with the threat of criminal indictment on the table, a deterrent value can be inserted into corporate risk assessment decision-making that could effectuate a chilling effect, dampening the likelihood of corporate participation or complicity in conduct leading to an atrocity. Until corporations can be prosecuted for their criminal conduct under international law and in more jurisdictions than those in the common law world, corporations will likely continue to be complicit in the most heinous of crimes.

286. *Sikhs for Justice v. Badal*, 736 F.3d 743, 745 (7th Cir. 2013).

287. *Murillo v. Bain*, No. CIV.A. H-11-2373, 2013 WL 1718915 (S.D. Tex. Apr. 19, 2013).

288. *Id.* at *3.