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License to Kill? Corporate Liability Under the Alien Tort Claims Act?

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LICENSE TO KILL? CORPORATE LIABILITY UNDER THE ALIEN TORT CLAIMS ACT

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I. INTRODUCTION

For years, large corporations have engaged in business operations in foreign countries to exploit the natural resources available abroad and to achieve higher overall profits by operating at costs substantially lower than these businesses would incur in North America. In the process, citizens of underdeveloped foreign countries are often subjected to gross abuses of their human rights, suffered at the hands of large multinational corporations and the host countries' governments and military forces. Sadly, this horrific reality still holds true today. People are being tortured, raped, and killed at the hands of entities that are in many instances funded by these multinational corporations. Some individuals have had to endure slavery. Others have had to endure forced impregnation.

Until recently, victims of such heinous crimes have been capable of bringing claims against corporations under the Alien Tort Claims Act,[1] ("ATS") in hopes of receiving a favorable judgment, or, in most instances, a large settlement against the corporation for the harm suffered. However, in its September 2010 decision *Kiobel*

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[1] 28 U.S.C. § 1350 (1940) [hereinafter ATS] ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

v. Royal Dutch Petroleum Co., the Second Circuit concluded what no other court has: that corporations are categorically not subject to ATS liability.[2] In *Kiobel*, Nigerian residents filed a putative class action under the ATS, claiming that Dutch, British, and Nigerian corporations engaging in oil exploration and production aided and abetted[3] the Nigerian government in committing human rights abuses in violation of the law of nations. The Second Circuit relied on established precedent in holding that customary international law governs the scope of ATS liability.[4] The court then introduced a new concept to ATS jurisprudence, holding that corporate defendants are not subject to liability for any claims brought under the ATS because they are not subjects of international law.[5] This concept is indeed a novel one because other courts have consistently held that corporations could be liable under the ATS if its conduct did in fact reach the level of an international law violation.[6]

The text of the ATS makes no distinctions as to what class of defendants may be held liable under the ATS. ATS cases typically yield discussion of whether a specific *offense* rises to the level of a violation of the law of nations. In *Kadic v. Karadzic*, the Second Circuit was presented with the novel issue of whether courts may exercise ATS jurisdiction over private individuals (opposed to ATS jurisdiction over governmental or state actors only).[7] The *Kadic* court ultimately held that the ATS *does* apply to private individuals because some offenses violate international law, regardless of who committed them.[8] Challenges to subject matter jurisdiction arise in many, if not all, ATS cases involving corporations. When presented with such challenges, courts have consistently exercised jurisdiction over corporations when plaintiffs allege the corporation

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[2] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145 (2d Cir. 2010).

[3] Aiding and abetting is and has been a common mechanism for courts to exercise jurisdiction under the ATS over private individuals and corporations by establishing a relationship between the individual or corporation and a state actor committing human rights violations against the plaintiffs. I will, however, discuss the concept of aider and abettor liability and its applicable standard later in this article. *See generally* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304 (2008); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 260-264 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010) and *cert. denied*, 131 S. Ct. 122 (2010).

[4] *Kiobel,* 621 F.3d at 128-31; Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Filártiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[5] *Kiobel,* 621 F.3d at 147-48.

[6] Although no court has explicitly held that a particular corporation was liable to a plaintiff in an ATS suit, courts have consistently and deliberately left the possibility open for such claims if brought under the right circumstances. I will discuss these cases in further detail later in this article. *See generally* Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013 (7th Cir. 2011); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009) (court dismissed plaintiffs' claim on substantive grounds, but explicitly acknowledged that corporate defendants are subject to liability under the ATS); Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008) (court rejected defendant's argument that corporate defendants were excluded from the ATS).

[7] Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

[8] *Id.* at 239.

was in a relationship with the government.[9] As the *Kadic* court instructs, certain offenses are so heinous that no governmental relationship is necessary to impose liability under the ATS.[10]

Secondary or assessorial liability, most commonly invoked under the aiding and abetting doctrine, has been and remains an accepted method of bringing non-state actors within the purview of the ATS, even in instances when the claim may not otherwise entitle the plaintiff to relief from that particular defendant. Many commentators claim that the bar for proving assessorial ATS violations has been raised substantially in recent years.[11] Nevertheless, liability under the aiding and abetting doctrine is still an option for victims of human rights violations who can successfully prove such violations were purposely instigated by corporations.[12] The *Kiobel* court erroneously held that corporations, categorically, couldn't be subject to ATS suits because corporations are not subject to customary international law. The *Kiobel* court's holding was incorrect, however, because many courts have exercised ATS jurisdiction over corporate defendants using the aiding and abetting doctrine.[13]

Prior to *Kiobel*, no U.S. court has ever held that corporations *cannot* be held liable for violations of international norms. Although it is also true that no court has ever actually found for the plaintiff in an ATS suit against a corporation, numerous courts, both prior and subsequent to the *Kiobel* decision, have been presented with the issue of corporate ATS liability. These courts have repeatedly acknowledged that corporations may be held liable under the ATS under the right set of circumstances.[14] The *Kiobel* court went against the weight of authority and effectively removed an established and effective means of recourse for victims of offenses committed in violation of the law of nations. The *Kiobel* court de-emphasized the significance of federal court decisions that demonstrate, under various circumstances, that corporations may be held liable for ATS violations. Because *Kiobel* removed corporate defendants from the scope of civil liability under the ATS, and because a corporation is not a person who can be charged, convicted,

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[9] *See generally* Wiwa v. Royal Dutch Petroleum Co., 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (court denies the defendants' motion for summary judgment where plaintiffs allege that two oil companies directed and aided the Nigerian government in violating plaintiffs' rights).

[10] *Kadic*, 70 F.3d at 232.

[11] Jonathan Drimmer & Michael Lieberman, *Drimmer and Lieberman on Talisman Energy and the Alien Tort Statute: The Continuing Threat of Secondary Liability*, 2010 EMERGING ISSUES 5182 (citing *Talisman Energy*, 582 F.3d at 260-64 ("[The Talisman court] held that for a corporation to be liable under the ATS, plaintiffs must show the defendants purposely acted to help the principal commit a human rights violation. A corporation's mere knowledge that its actions contributed to the principal's commission of the offense, held the court, is insufficient")).

[12] *Id.*

[13] *Kiobel*, 621 F.3d at 145; *see generally Talisman Energy*, 582 F.3d at 260-264; Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007) ("[In that] Circuit, a plaintiff may plead a theory of aiding and abetting liability under the [ATS]"); Abdullahi v. Pfizer, Inc., 562 F.3d 163, 188 (2d Cir. 2009) (court reversed the dismissal of the ATS suit because the plaintiffs properly alleged that the drug company's violations of international law were done in concert with the Nigerian government).

[14] *See generally Romero*, 552 F.3d 1303; *Sinaltrainal*, 578 F.3d 1252; *Flomo*, 643 F.3d 1013; *Talisman Energy*, 582 F.3d at 260-64; *Pfizer*, 562 F.3d at 188.

and imprisoned for a crime, it effectively placed large multinational corporations above the law.

In Part II of this article, I will provide a necessary overview of the history of the ATS and its evolution into modern-day relevance. I will discuss the state of ATS law as it pertains to corporations in Part III. Lastly, I will discuss the *Kiobel* decision in detail, describe how the Second Circuit erred in its holding, and suggest that the Supreme Court reverse the *Kiobel* decision on appeal in Part IV.

II. JURISPRUDENCE OF THE ALIEN TORT STATUTE: FROM 1789 TO FILÁRTIGA AND BEYOND

A. Origin

The Alien Tort Claims Act ("ATS") provides 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."[15] The first Congress passed the ATS as part of the Judiciary Act of 1789.[16] Scholars have surmised that the purpose of the ATS was to "ensure the young state's full membership in the international community" by ensuring the rights of foreign dignitaries.[17] The ATS "guarantee[d] that foreign ambassadors [and] ships protected by international law would have a cause of action in federal court for violations of [these] rights"[18] America's founders understood that without this protection, the newly-formed United States would not be welcomed and/or trusted in the "international community" of sovereign nations.[19]

Few cases were brought under the ATS from the time of its codification in 1789 until the 1980s. Only four judicial opinions were issued regarding the ATS in nearly the first two centuries following the statute's enactment.[20] The first of these opinions was recorded in 1795, where the United States District Court for the District of South Carolina granted jurisdiction under the ATS in a dispute over the title of slaves aboard a captured enemy vessel in *Bolchos v. Darrel*.[21] After discussing the issue as to whether the court had jurisdiction to hear the case, the District Court Judge concluded: "[A]s the 9th section of the judiciary act of congress [Act Sept. 24, 1789, 1 Stat. 77] gives this court concurrent jurisdiction with the state courts and circuit

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[15] *See generally* ATS, *supra* note 1.

[16] *Sosa*, 542 U.S. at 712. Because the Act was passed as part of the larger Judiciary Act of 1789, it does not have a name of its own. However, commentators and U.S. courts have commonly referred to § 1350 the Alien Tort Claims Act or the Alien Tort Statute.

[17] Gregory G.A. Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 365 (1999).

[18] *Id.*

[19] Kelsy Deye, *Can Corporations Be Held Liable Under the Alien Tort Claims Act?*, 94 KY. L.J. 649, 650-51 (2005-06).

[20] Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT'L L. & POL'Y 119, 124 (2007).

[21] *Id.*; Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795).

courts of the United States *where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States*, I dismiss all doubt upon this point."[22]

In 1908, the Supreme Court of the United States discussed in *O'Reilly De Camara v. Brooke*, the possible applicability of the ATS in a case where a U.S. officer was accused of illegally seizing a Spanish woman's property in a foreign nation.[23] In that case, the plaintiff alleged that she had the right by title to slaughter cattle in a city-owned slaughterhouse and receive compensation for the same. This title to slaughter cattle was incident to the office of Sheriff of Havana. When the United States took power in Cuba and the Spanish sovereignty ended, the office of the sheriff ended also. She argued that her rights were violated when, although the office of the sheriff no longer existed, the Governor of Havana declared that the title was and void and did not compensate the plaintiff and her family. The Court stated in relevant part: "In any event, the question hardly can be avoided whether the supported tort is '*a tort only in violation of the law of nations*' or of the treaty with Spain."[24]

In that case, the distinction between whether the alleged tort was done in violation of the law of nations or of the treaty with Spain was significant, because pursuant to a treaty entered into with Spain, the plaintiff would lose any claim brought against a United States military official.[25] The United States Congress thus removed the Plaintiff's ability to sue the Governor for tort when it ratified the Governor's action. The plaintiff later argued that her rights, which were violated, were so fundamental that it would be a violation of international law for them to be displaced, even if the action was ratified by Congress.[26] The Court ultimately dismissed the plaintiff's claim because her contention that her fundamental rights were violated was not the basis on which jurisdiction was asserted.[27] From the opinion, an inference can be drawn that had the plaintiff alleged that the violation of her rights constituted a violation of the law of nations, the Court would have to exercise jurisdiction over the matter.

The next recorded judicial reference to the ATS did not come until 1961 in *Adra v. Clift*, when the U.S. District Court for the District of Maryland concluded that in a custody dispute between two aliens, wrongfully withholding custody of a child constituted an actionable tort.[28] The court also found that using an illegal passport to move the child away from her father constituted a violation of the law of nations.[29]

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[22] *Bolchos*, 3 F. Cas. at 810 (emphasis added).

[23] O'Reilly De Camara v. Brooke, 209 U.S. 45 (1908).

[24] *Id.* at 51 (*emphasis added*).

[25] *Id.* at 50.

[26] *Id.* at 51.

[27] *Id.*

[28] Adra v. Clift, 195 F. Supp. 857, 863-64 (D. Md. 1961).

[29] *Id.* at 864-64.

The court's holding in this case was particularly significant because, as I will discuss later in this article, it effectively expanded the scope of the ATS to encompass private individuals and newly discovered violations of international law.[30]

B. ATS Claims: A Modern Application

History shows that Congress only contemplated the ATS to extend to a "modest" set of actions alleging violations of the law of nations. These were originally contemplated as offences against ambassadors, violations of safe conduct, and piracy.[31] It was understood by eighteenth-century courts that violations of the law of nations specifically referred to these types of actions.[32] However, after nearly two hundred years of existence, the ATS received new life, and its scope expanded.

A 1980 decision of the United States Court of Appeals for the Second Circuit gave birth to an extensive, modern wave of ATS jurisprudence.[33] In the landmark case of *Filártiga v. Pena-Irala*, the Second Circuit reversed a district court's dismissal of a wrongful death by torture complaint for want of subject-matter jurisdiction.[34] In *Filártiga*, the appellants brought an action alleging that the appellee kidnapped, tortured, and killed their 17-year old relative in retaliation for his father's political actions and beliefs.[35] The key issue in this case was the definition of the law of nations. In finding that jurisdiction was proper under the "rarely invoked" ATS, the court adopted an "evolving" standard of the law of nations.[36] The court held that the appellee's alleged conduct was committed under the color of governmental authority and in violation of universally accepted norms of international law, therefore subjecting the appellee to liability under the ATS.[37] The *Filártiga* court recognized that over the course of centuries, new technology emerges, relationships among sovereign nations change, and thus new conflicts arise.

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[30] In the last of these four pre "modern-era" ATS cases, decided in 1975, the Ninth Circuit noted that injuries resulting from the evacuation of children from South Vietnam by the U.S. Immigration and Naturalization Service could be addressed using the ATS. *See generally* Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975); Dhooge, *supra* note 20, at 171 n.4.

[31] *Sosa*, 542 U.S. at 718-20. In this case, the first case in which the Supreme Court addressed in detail the history and modern applicability of the ATS and how claims brought under the statute were to be scrutinized, the Court took a historical approach to determining Congress' intent when the ATS was enacted. To date, this is the only Supreme Court decision rendered with significant emphasis on the ATS. Because this decision is still the chief authority on the issue of ATS liability, the historical inferences it made are unanimously accepted and adopted by U.S. district and circuit courts.

[32] *Id.* at 720.

[33] *Filártiga*, 630 F.2d 876.

[34] *Id.* at 890.

[35] *Id.* at 878. Each of the appellants and the appellee were citizens of Paraguay.

[36] *Id.* at 878, 879 n.3; Dhooge, *supra* note 20, at 124.

[37] *Filártiga*, 630 F.2d at 878. "Under the color of official authority" for these purposes refers to acts done by a state official.

Furthermore, it must be inferred that Congress intended the ATS, like every other statute, to have practical effect, and not be placed on the shelves of time and history because of its uselessness.[38] Thus, *Filártiga* moved the ATS jurisprudence out of the box that historically limited its scope to the "modest" set of offenses that were considered violations of the law of nations when the statute was enacted in 1789, by declaring that the law of nations necessarily evolves as the times change.[39] This "evolving" standard of what constitutes the law of nations was later recognized by the Supreme Court, and has been adopted by all of the ATS cases to follow.[40] This demonstrates that modern ATS jurisprudence is not restricted to recognizing the law of nations as it existed in 1789 (at the time the ATS was enacted), but rather as it evolves over time, giving credence to the idea that liability under the ATS should extend to corporations.

"Modern application has provided some assistance in adjudicating claims under the [ATS]."[41] In determining what makes up the law of nations, courts "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[42] Virtually all nations have renounced official torture, but many agreements have placed a "universal condemnation" on torture of any sort.[43] Although torture wasn't originally contemplated as an international law violation when the ATS was enacted, it nonetheless violates "established norms of the international law of human rights," and hence modern-day international law.[44] In effect, the court found that the ATS allowed for adjudication of modern customary international law violations, including human rights violations.

In 2004, the United States Supreme Court issued its only significant ATS decision in *Sosa v. Alvarez-Machain*.[45] In *Sosa*, a Mexican man filed suit in a U.S. district court, alleging that the Drug Enforcement Administration had arranged his arrest in Mexico for a criminal trial in the U.S., for which he was later acquitted.[46] The plaintiff further alleged that another Mexican person was involved in his abduction and was therefore liable under the ATS for violating international law.[47]

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[38] *See Sosa*, 542 U.S. at 719, 730.

[39] *See generally Filártiga*, 630 F.2d 876.

[40] *See generally Sosa*, 542 U.S. 692.

[41] Sonia Jimenez, *The Alien Tort Claims Act: A Tool for Repairing Ethically Challenged U.S. Corporations*, 16 ST. THOMAS L. REV. 721, 734 (2004).

[42] *Filártiga*, 630 F.2d at 881. The court relied on the United Nations Charter in determining that the manner in which nations treat its own citizens is a matter of international concern. USCS U.N. Charter art. 55. The Court quoted the relevant part of Art. 55 of the charter, which provided: "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion. *Id*.

[43] *Filártiga*, 630 F.2d at 880.

[44] *Id.*

[45] *Sosa*, 542 U.S. 692.

[46] *Id.* at 698-99.

[47] *Id.*

The Court ultimately held, in relevant part, that the individual was not entitled to damages under the ATS because his claim was not based on a valid international-law norm.[48] Furthermore, the Court established that the ATS grants jurisdiction for torts committed in violation of international law, but does not create for plaintiffs a new cause of action.[49]

The notion that ATS provides grounds for jurisdiction, but does not provide a new cause of action purported by the Supreme Court in *Sosa* is essentially what the controversy over corporate liability is based upon. The *Kiobel* court erroneously likened corporate liability to a new cause of action, when corporate liability is instead a jurisdictional issue, for which the ATS may be invoked according to *Sosa*.[50] Essentially, plaintiffs in ATS actions must satisfy three fundamental elements: plaintiff must "(1) be an alien, (2) claim a tort, (3) that violates a rule in a U.S. treaty or customary international law that carries personal liability."[51] Whether a claim is actionable under the ATS "must be gauged against the current state of international law, looking to those sources [courts] have long, albeit cautiously recognized."[52] The Supreme Court has adopted the notion that the state of international law is ever evolving, and courts must look to modern norms in adjudicating ATS cases.[53]

While the elements of an ATS claim remain consistent, the Supreme Court has imposed a heightened specificity requirement in determining whether a particular norm constitutes international law.[54] The *Sosa* test requires that claims based on the present-day law of nations must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Supreme Court has] recognized."[55] Although claims alleging violations of the law of nations will be greeted with considerable scrutiny, plaintiffs who can successfully prove that such actions violated a specifically defined and widely accepted international norm will have their claims entertained by federal courts.[56]

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[48] *Id.* at 734-35

[49] *Id.* at 738.

[50] *See generally Kiobel*, 621 F.3d 111.

[51] Paul E. Hagen, Anthony L. Michaels, *The Alien Tort Statute: A Primer on Liability for Multinational Corporations*, SK046 ALI-ABA 121, 125 (May 5-6, 2005). These elements were derived directly from the text of § 1350, with the slight modification to Element 3. This commentary purports to clarify what constitutes the law of nations in light of *Sosa*. "The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Sosa*, 542 U.S. at 724.

[52] *Sosa*, 542 U.S. at 733.

[53] *See generally id.* (adopting *Filártiga*, 630 F.2d 876).

[54] *See Sosa,* 542 U.S. at 732-33.

[55] *Id.* at 725 (this test requires that the international norm on which an alleged violation rests must be as specifically defined and widely accepted as offences against ambassadors, violations of safe conduct, and piracy were in 1789).

[56] *See id.* at 714.

III. THE GREAT DEBATE: CORPORATIONS MAY BE HELD LIABLE UNDER THE ATS

A. Beginning of the ATS as Applied to Corporations

In the modern era of ATS litigation, courts have found themselves increasingly involved in civil suits in which plaintiffs seek ATS relief from corporations. In 1997, when a suit against a large U.S.-based oil company was filed on behalf of 14 Burmese villagers under the ATS for alleged human rights violations, a new way of attacking corporations was discovered.[57] In the landmark case of *Doe v. Unocal*, the complaint alleged that the defendant corporation paid the brutal Burmese military to provide security assistance for the construction of the Yadana (gas) Pipeline project and thus entered into a joint venture with them.[58] Plaintiffs allege that the military committed multiple human rights violations including forced labor, rape, torture and murder in connection with the pipeline project.[59] Plaintiffs claimed that Unocal was aware that these human rights violations were being committed by the military and therefore was liable for these violations.[60]

The U.S. District Court denied Unocal's motion to dismiss, holding that because plaintiffs allege that Unocal was jointly engaged with the state officials committing the violations, subject-matter jurisdiction is proper under the ATS.[61] The District Court later dismissed the case on a motion for summary judgment, holding that Plaintiffs failed to prove that Unocal engaged in state activity or controlled the Burmese military.[62] These claims were dismissed, not because the ATS didn't provide subject-matter jurisdiction over corporate defendants in general, but rather because *these* plaintiffs failed to satisfy their burden of proof.[63] *Unocal* opened the door for numerous future suits involving corporations by establishing that corporations *may* be held liable under the ATS.

B. Individuals May Be Held Liable Under the ATS, Therefore Corporations May Be Held Liable

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[57] *See generally* Mark D. Kielsgard, *Unocal and the Demise of Corporate Neutrality*, 36 CAL. W. INT'L L.J. 185 (2005) (sources vary as to the exact number of Burmese citizens involved in the suit, ranging from 14 to 17); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) *aff'd in part, rev'd in part sub nom*; Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) *on reh'g en banc*; Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005).

[58] *Unocal*, 963 F. Supp. at 884-85.

[59] *Doe I*, 395 F.3d at 939-40.

[60] Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 J. INT'L CRIM. JUST. 745, 750 (2010).

[61] *Unocal,* 963 F. Supp. at 891.

[62] *Doe I*, 395 F.3d at 943-44 (on appeal, the Ninth Circuit affirmed the district court's denial of the defendant-corporation's motion to dismiss, and reversed summary judgment, holding that the District Court placed too high a standard on the plaintiff's claim, and remanded the case for trial).

[63] *See id.*

Defendants in cases in which the ATS was invoked have argued that only government agencies or officials, not individuals, may be subject to liability for violations of the law of nations under the ATS. However, the Second Circuit dispelled that argument in the 1995 case of *Kadic v. Karadzic*, which established that non-state actors could be held liable for international law violations.[64] In *Kadic*, Muslim and Croat citizens of Bosnia brought suit against the self-proclaimed president of the republic of "Srpska" for rape, torture, forced prostitution, forced pregnancy, and summary execution.[65] The plaintiffs claimed that all of these abuses constituted genocide and war crimes in violation of the law of nations.[66] The Second Circuit reversed the United States District Court for the Southern District of New York holding that "acts committed by non-state actors do not violate the law of nations."[67] The court reasoned that the modern-era law of nations' reach is not confined to state action, fundamentally, because the probation against piracy is an early example of the law of nations' applicability to private individuals.[68] Most importantly, the Second Circuit found that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[69]

The *Kadic* court reasoned that private individuals could be held liable for violations of international law because certain specific types of abuses are so bad that they are within the scope of the ATS, regardless of who committed them.[70] The court found that genocide and war crimes do not require state action and individuals may therefore be liable under the ATS for such offenses.[71] Although torture and summary executions do require state action, private individuals may be held liable if acting in concert with a state.[72] Thus, the *Kadic* court essentially set forth the criteria under which private individuals may be held liable under the ATS. Private individuals may be held liable (1) for commissions of war crimes and acts of

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[64] *Kadic,* 70 F.3d at 236-37.

[65] *Id.* at 236.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 239.

[69] *Id.*

[70] *See generally id.*

[71] *Id.*

[72] *See id.* at 239, 241-45. The Second Circuit instructed that acts of genocide and war crimes automatically warrant ATS jurisdiction, while other abuses may fall under ATS jurisdiction if they were done in concert with some associated official action. Here, the court opened the door for ATS liability (and inferably corporate liability) under the important aider and abettor doctrine, which I discuss in further detail later in this article.

genocide;[73] and (2) for working the commission of other human rights abuses, *if* done in concert with a state actor.[74]

ATS cases that address the issue of whether private individuals may be found liable for human rights violations, such as *Kadic* and cases that follow, unanimously conclude that the courts may exercise jurisdiction in these scenarios.[75] The *Kadic* court did not base its holding, which has become universally accepted in the U.S., on any express term in the statute or International tribunal. Rather, it found that certain *acts* constituted violations of the law of nations and therefore subjected its actors (regardless of whether they were state or private individuals) to liability under the ATS.[76] Applying this rationale, the criteria under which private individuals may be subject to ATS liability must include corporations as well.

In the recent Seventh Circuit decision in *Flomo v. Firestone Nat. Rubber Co.*, the court relied in part on *Kadic* to determine that the law of nations obliged the *court* to decide how to enforce the substantive obligations imposed by international law.[77] The *Flomo* plaintiffs brought an ATS suit against the Firestone, alleging that the defendant utilized "hazardous child labor" on its 118,000-acre rubber plantation in Liberia.[78] The plaintiffs alleged that the use of such labor practices violated the law of nations. The court ultimately concluded that the record was not sufficient to infer a violation of international law and therefore dismissed the plaintiffs' claims.[79] The court nevertheless held, in relevant part, that corporations may be held liable under the ATS.[80]

In *Kadic* the significance of the court's exercise of jurisdiction over the private individual simply lies in that it was the first time a U.S. court exercised jurisdiction over *any* defendant other than a state actor. There was nothing in the decision that distinguished private individuals from corporations in any way, except for the reference to piracy as an originally contemplated norm for which the ATS was enacted, and a case that reflected this norm.[81] However, in 1789, large multinational corporations did not exist as they commonly do today. If they had existed, and a case was brought against such a corporation, the courts of the day may very well have ruled in a similar fashion against it. Furthermore, there has never been any distinction between an "aider and abettor" and a corporation. To the contrary, the Second Circuit establishes the standard for aiding and abetting in an ATS case that involved a corporate defendant, thus making the *Kiobel* court's holding that

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[73] *Id.* at 239.

[74] *Id.* at 245.

[75] *See generally Kiobel*, 621 F.3d 111; *Talisman Energy*, 582 F.3d 244; *Pfizer*, 562 F.3d 163; *Khulumani*, 504 F.3d 254; Flores v. Southern Peru Copper Corp., 414 F.3d. 233 (2d Cir. 2003).

[76] *Kadic,* 70 F.3d at 239.

[77] *Flomo*, 643 F.3d at 1020.

[78] *Id.* at 1015.

[79] *Id.* at 1023-24.

[80] *Id.* at 1021, 1025 ("Having satisfied ourselves that corporate liability is possible under the [ATS] . . . .").

[81] *Kadic,* 70 F.3d at 239.

corporations are not subject to international law one that is contradictory to accepted precedent set in the very same circuit and without meaningful precedent.

C. Corporations May be Held Liable under the Aiding and Abetting Doctrine

It is clear from case law precedent that ATS liability under the aiding and abetting doctrine extends to corporate defendants. Although the exact standard by which parties may be found liable in ATS cases under the aiding and abetting doctrine is not clear, courts have generally found that corporations may be held liable for aiding and abetting international law violations.[82] The concept of aiding and abetting liability is critical in the ATS context, because in order for the ATS to provide jurisdiction, the defendant must have allegedly committed a violation of international law.[83] Except under extreme circumstances, only government officials could commit violations of the law of nations.[84] For that reason, unless a private individual or corporation embarks upon genocide or committing war crimes, no violation of international law could be found. The aiding and abetting doctrine is thus an integral arm of the ATS in that it brings private parties that act in concert with the government within the scope of liability.

The differing standards by which courts are to consider whether a corporation may be held liable under the aider and abettor doctrine are set forth in two Second Circuit cases. In *Khulumani v. Barclay Nat. Bank, Ltd.*, a group of plaintiffs brought suit against numerous corporate defendants under the ATS, alleging that the defendants "actively and willingly collaborated with the government of South Africa"[85] in maintaining Apartheid, the racially-based system of repression that benefited South Africa's minority White population, while restricting the majority Black population "in all areas of life."[86] The Second Circuit overturned a district court's dismissal of plaintiffs' ATS claims, holding that the district court erred in finding that ATS jurisdiction could not be based on aiding and abetting international law violations.[87]

In his concurring opinion of *Khulumani*, Judge Katzmann first cautions against confusing the cause of action inquiry set forth in *Sosa v. Alvarez-Mcain* with the jurisdictional analysis under the ATS.[88] Judge Katzmann also found that the concept of aiding and abetting liability is "well established" international criminal law

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[82] Gallagher, *supra* note 60, at 750.

[83] *See generally* ATS, *supra* note 1.

[84] *See generally*, *Kadic*, 70 F.3d 232.

[85] *Khulumani*, 504 F.3d at 258.

[86] *Id.* at 260.

[87] *Id. See In re S. African Apartheid Litig.,* 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2004).

[88] *Khulumani*, 504 F.3d at 264. Judge Katzmann, in criticizing the district court's dismissal of plaintiff's claims, stated that: "[the district court's analysis] conflated the jurisdictional and cause of action analyses required by the ATCA. As a result, the district court mistakenly incorporated a discretionary analysis into the determination of whether it has jurisdiction under the ATCA. Second, it erroneously held that aiding and abetting liability does not exist under international law."

tribunals, and that international law provides the primary source for determining the scope of liability.[89] Thus, who should be held liable under the aider and abettor theory should be governed by international law, the standard being "substantial assistance."[90] Judge Katzmann concluded that aider and abettor liability was so "well established and universally recognized to be considered customary international law for purposes of the [ATS],"[91] and that a defendant may be held liable when the defendant "(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the *purpose* of facilitating the commission of that crime."[92]

Judge Hall also gave a concurring opinion in *Khulumani*, in which he, like Judge Katzmann, recognized that the courts should look to international law to define primary liability under the ATS.[93] However, Judge Hall found that the courts should look to federal common law in defining a standard by which defendants may be held liable under an aider and abettor theory.[94] Judge Hall defined aiding and abetting as "*knowingly and substantially* assisting the commission of a violation of customary international law."[95] Unlike Judge Katzmann's standard, this does not require that

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[89] *Id.* at 270-72. Aider and abettor liability has long been recognized in numerous international treaties, including the Rome Statute of the International Criminal Court, the statutes creating the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). Specifically, the London Charter, which established the International Military Tribunal at Nuremberg following the second World War extended individual liability for aiding and abetting war crimes, specifically stating that "accomplices participating in the formulation or execution of a common plan or conspiracy to commit" any of the crimes triable by the Tribunal would be held responsible. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, E.A.S. 472.

[90] *Id.* at 270, 277. Equally applicable to the question of whether international law extends liability to non-state actors is where to look to determine whether the scope of liability for a violation of international law should extend to aiders and abettors. "[W]hether a norm is sufficiently definite to support a cause of action" raises a "related consideration [of] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732, n. 20.

[91] *See Kadic*, 70 F.3d 232.

[92] *Khulumani,* 504 F.3d at 277 (emphasis added; internal quotations omitted). It is important to note that under Judge Katzmann's standard, mere knowledge that the assistance given to the principle furthered the commission of a violation of an international norm is not sufficient to invoke liability under the ATS.

[93] *Id.* at 286-87.

[94] *Id.* at 284. This differs substantially from Judge Katzmann's conclusion that international law should be the source for determining both what violations invoke primary liability under the ATS (against the actual perpetrator), as well as the standard by which accessorial liability may be imposed (against the aider and abettor).

[95] *Id.* at 287-89; Gallagher, *supra* note 60, at 763 (emphasis added). Judge Hall adopts the holding in *Halberstam v. Welch,* 705 F.2d 472 (D.C. Cir. 1983), which stated the elements of aiding and abetting: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation." *Halberstam*, 705 F.2d, at 477.

the defendant's purpose was to assist the violation. Knowledge that the assistance the defendant provided to the principal was being used to aid in the commission of an international law violation is sufficient to hold the defendant liable under this view. Conversely, Judge Katzmann's standard imposes a heightened *mens rea* requirement, in that the assistance provided to the principal must have been "with the purpose of facilitating the commission of that crime."[96] Under Judge Katzmann's view, it must be the intent of the aiding party to facilitate the wrongdoing for aiding and abetting liability to be imposed, whereas Judge Hall merely requires awareness.[97]

In *Presbyterian Church of Sudan v. Talisman Energy*, the Second Circuit recognized that plaintiffs could seek relief for violations of international norms under the aider and abettor doctrine, but that the court was split as to what the standard for pleading such liability was or should be.[98] Talisman Energy Co. was a Canadian energy company that participated in a consortium with three other oil companies and the Sudanese government for the exploration, production, and development of oil in Sudan in the 1990's and early 2000's.[99] Together, the Sudanese government and consortium built all-weather roads to and from the oil concession areas, and upgraded two airstrips, which were used exclusively by the military.[100] The Sudanese military and government-sponsored militias provided security for the companies' oil operations.[101] In the process of "securing" the oil concessions, the security forces displaced, assaulted, and shot at civilians who lived in nearby villages, and bombed them regularly.[102] The plaintiffs in this case alleged that Talisman aided and abetted the Sudanese government in violating customary international law.[103]

For the purpose of creating binding legal precedent and to dispose the confusion that necessarily arose out of the panel split in *Khulumani*, the *Talisman* court adopted the standard for aider and abettor liability set forth in Judge Katzmann's concurrence as the law of the Second Circuit.[104] The court recognized that Talisman knowingly

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[96] Gallagher*, supra* note 60, at 763.

[97] *Id.*

[98] *Talisman Energy*, 582 F.3d at 258.

[99] *Id.*

[100] *Id.* at 249.

[101] *Id.* at 249-50.

[102] *Id.*

[103] *Id.* at 251.

[104] *Id.* The court recognized that although Judges Katzmann and Korman agreed that "the standard for aiding and abetting liability under the ATS must derive from international law sources" in the judges' concurrence and dissent respectively, Judge Katzmann's concurring opinion nevertheless did not constitute a holding and is therefore not binding precedent. *See* Gallagher, *supra* note 60, at 765.

and substantially assisted the Sudanese government.[105] Nevertheless, the court ultimately dismissed the claims because the plaintiffs could not show that Talisman purposefully aided the government in committing any of the human rights violations.[106] Relying on international law as the source of the standard for aiding and abetting liability, the *Talisman* court held that defendants who *purposefully* aid and abet a violation of international law may be held liable under the ATS.[107]

As noted above, the *Talisman* court held that ATS liability could be imposed if the plaintiffs could prove the elements of aiding and abetting, and clarified the standard for liability under the aiding and abetting doctrine was made law, in the context of a corporate defendant. Yet, in *Kiobel*, the Second Circuit distinguishes corporate liability and aiding and abetting liability as two separate jurisdictional categories.[108] In relying on precedent that establishes that corporations may be held liable for ATS violations through the aider and abettor doctrine, while at the same time holding that there can be *no* corporate liability under the ATS, the *Kiobel* court creates an inconsistency within the jurisprudence of the Second Circuit and others, which removes the ability of legal professionals to accurately identify what the state of the law is.

D. Neither the Text of the ATS, or U.S. Common Law Make Corporations Per-Se Immune from Liability

The text of the ATS places no limitation as to who may be brought as a defendant under the ATS, therefore placing no prohibition on corporations being subject to liability under the ATS.[109] In *Romero v. Drummond Co.*, the Eleventh Circuit expressly rejected a corporate-defendant's argument that the ATS doesn't allow suits against corporations.[110] In *Romero*, a Columbian labor union and relatives of deceased union workers brought suit against the Columbian subsidiary of a U.S. coal mining company.[111] The complaint alleged that executives of the defendant-corporation recruited paramilitary forces to torture and murder union leaders.[112] The court held, in relevant part, that the ATS contains no express exceptions for corporations, and therefore "grants jurisdiction from complaints of torture against corporate defendants."[113]

U.S. ATS jurisprudence has long recognized that corporations are capable of committing substantial human rights violations and should therefore be held liable

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[105] *Talisman Energy*, 582 F.3d at 262-63.

[106] *Id.* at 261-62.

[107] *Id.* at 259.

[108] *Kiobel*, 621 F.3d at 129.

[109] *See generally* ATS, *supra* note 1.

[110] *Romero*, 552 F.3d 1303.

[111] *Id.* at 1309.

[112] *Id.*

[113] *Id.* at 1315.

for those violations. In 1907, The U.S. Attorney General rendered an opinion in a matter involving a U.S. corporation and Mexican nationals.[114] The Attorney General stated that the corporation could be held liable if its actions injured "the substantial rights of citizens of Mexico under the principles of international law or by treaty."[115] More recently, in the case of *Abdullahi v. Pfizer, Inc.*, the Second Circuit held that a prohibition on nonconsensual medical experimentation on human beings constituted a universally accepted norm of customary international law, and consequently the alleged violation committed by the defendant corporation thereof fell within purview of the ATS.[116] Furthermore, in *Talisman*, the Second Circuit adopted a standard under which corporations may be held liable under the ATS.[117] Although the court held that mere knowledge that a corporation's actions contributed to the commission of a human rights violation is insufficient, it nevertheless found that corporations may be held liable if the plaintiffs can demonstrate that the corporation purposefully had such an involvement.[118]

Those in opposition to corporate liability under the ATS have cited no authority that states that corporations are *per se* immune or exempt from liability under the ATS.[119] As pointed out by Judge Leval in his concurring opinion in *Kiobel*: "[n]o court has ever dismissed a civil suit against a corporation, which alleged a violation of the laws of nations, on the ground that juridical entities [such as corporations] have no legal responsibility or liability under that law."[120] Many corporate-defendants that have found themselves on the defending end of ATS litigation have successfully had the claims brought against them dismissed. However, with the exception of the defendant-corporation in *Kiobel*, none of these corporations received these favorable rulings solely because their existence as corporations made them immune from ATS liability or international law. Conversely, numerous ATS cases involving corporate defendants were dismissed because the plaintiffs either failed to properly state their clams, or failed prove that the corporation actually violated a law of nations.[121]

In holding that corporations are not subject to international law and therefore cannot be held liable under the ATS, the *Kiobel* court relied on no positive authority which supported such a conclusion. Instead, the court looked past U.S. ATS cases that impliedly suggest, if not expressly state, that corporations can be held liable under the ATS, if the necessary elements are satisfied in the plaintiffs' pleadings. The accepted interpretation as to what the drafters of the Act contemplated is of what types of actions may be brought under the ATS and whom the Act was intended to

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[114] *Kiobel*, 621 F.3d at 162.

[115] *Id.*

[116] *Pfizer*, 562 F.3d at 188.

[117] *See generally* Drimmer & Lieberman, *supra* note 11; *see generally Talisman Energy*, 582 F.3d at 260-64 (In a case involving numerous corporate defendants, the court adopts Judge Katzmann's concurring opinion in *Khulumani*, which set the standard by which defendants in ATS suits may be held liable under the aider and abettor doctrine); *Khulumani,* 504 F.3d at 287-89.

[118] *Id.*

[119] *Kiobel*, 621 F.3d at 160, 161.

[120] *Id.*

[121] *See Romero*, 552 F.3d 1303; *Talisman Energy*, 582 F.3d 244; Aldana v. Del Monte Fresh Produce, 416 F.3d 1242, 1247 (11th Cir. 2005); *Flores*, 414 F.3d. 233.

protect.[122] Nothing in the ATS or any of the early cases demonstrates that the drafters or early courts intended for the scope of the ATS to extend to government officials as well as private individuals, but not corporations. Although there have been few, if any, outright victories for plaintiffs who bring suits against corporations under the ATS, courts have clearly indicated that they intend for the possibility of corporate liability to remain open.

IV. THE KIOBEL CASE

A. Background

In *Kiobel v. Royal Dutch Petroleum Co.*, the plaintiffs, who were residents of Nigeria, brought suit against three oil companies, alleging that the companies aided and abetted the Nigerian government in committing human rights abuses.[123] The plaintiffs claimed that these abuses violated the law of nations.[124] The plaintiffs claimed that Nigerian military forces shot and killed, beat, raped, and arrested members of their village.[125] The plaintiffs also claimed that the military forces destroyed and looted their property.[126] The plaintiffs alleged that the corporate defendants aided the abuse by providing transportation to the forces, allowed the forces to utilize their property to stage attacks, and compensated soldiers for the attacks.[127] The Second Circuit did not decide whether these defendants were liable under the aiding and abetting doctrine, because it found that corporate defendants were categorically excluded from liability under international law.[128] The court ultimately dismissed the plaintiffs' claims because the ATS did not provide jurisdiction over the corporate defendants.[129]

The majority opinion in *Kiobel* simply and directly held that federal courts had no jurisdiction over corporations under the ATS.[130] The Second Circuit identified that it had looked to international law in determining that government officials, private individuals, and aiders and abettors can be held liable under the ATS, and that a similar inquiry ought to be performed to determine whether corporations can be held liable.[131] This court first looked to international criminal tribunals, particularly the post-World War II Nuremburg Tribunal proceedings to determine what the state of international law was pertaining to corporations.[132] The court specifically identified what is commonly referred to as the "Farben Case," where the International Military

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[122] *See Sosa*, 542 U.S. 692.

[123] *Kiobel*, 621 F.3d at 117.

[124] *Id.* at 123.

[125] *Id*.

[126] *Id*.

[127] *Id.*

[128] *Id*. at 149.

[129] *Id.* at 147.

[130] *Id.* at 145.

[131] *Id.* at 130.

[132] *Id.* at 132.

Tribunal charged twenty-four of I.G. Farben's executives with various war crimes, but did not "charge" the corporate entity.[133] Furthermore, although the court did properly acknowledge that treaties are a proper source for determining the state of international law, and many of them impose liability on corporations, it nevertheless held that such treaties do not create a customary international norm that establishes that corporations are subject to international law.[134]

B. Where the Kiobel Court Went Wrong

The *Kiobel* opinion was wrong on three main fronts. First, the court acknowledged that private parties can be liable for violations of international law under the aiding and abetting doctrine, but concluded that corporations could not.[135]

Any party aiding and abetting a violation of human rights *must* fundamentally be either a private individual or corporation.[136] The case law that the *Kiobel* court accepts and cites to as precedent necessarily establishes that corporations may be liable under the theory of aiding and abetting, because the court specifically set forth the criteria under which the corporate defendant could be held liable under the ATS.[137] Although the court purported to agree with the holding in *Talisman* and Judge Katzmann's concurrence in *Khulumani*, the *Kiobel* court failed to acknowledge the context in which these cases were heard. Both *Talisman* and *Khulumani* were cases in which plaintiffs brought claims against corporate defendants under the ATS.[138] In endorsing the standard for aider and abettor liability set forth in *Talisman*, while at the same time holding that there can be *no* liability imposed against corporate defendants in ATS cases, the *Kiobel* majority opinion created a legal contradiction that should be reconciled.

The *Kiobel* opinion referenced cases in which determinations were made as to whether particular classes of defendants may be held liable under the ATS.[139] The rationale in *Kiobel* reflects a view that "aiders and abettors" are a type of people or entity, such as government actors, private individuals, and corporations. The court stated that: "[w]e have looked to international law to determine whether state officials . . . private individuals . . . and aiders and abettors . . . can be held liable

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[133] *Id.* at 135-36. I.G. Farben was the German chemical conglomerate that was alleged to have substantially assisted Nazi Germany in the development of chemical weaponry during World War II.

[134] *Id.* at 137-39.

[135] *See id*. at 149.

[136] State officials, or individuals acting "under the color of official authority," are established defendants under the ATS, and therefore aiding and abetting liability will not come into play in suits brought against them. *See generally Filártiga*, 630 F.2d 876.

[137] *Kiobel,* 621 F.3d at 129 (acknowledging Judge Katzmann's concurring opinion in *Khulumani* as the law of the Second Circuit, and proper mechanism for analyzing ATS claims under the aiding and abetting doctrine). *See generally Talisman Energy*, 582 F.3d at 258 (adopting Judge Katzmann's analysis in his *Khulumani* concurrence and finding that corporations may be subject to ATS liability upon the plaintiffs' successful demonstration that the corporation provided practical assistance that has a substantial effect on the perpetration of a crime, with the purpose of facilitating that crime).

[138] *Talisman Energy*, 582 F.3d 244; *Khulumani,* 504 F.3d 254 (plaintiffs bringng ATS suit against numerous corporate defendants for assisting and furthering apartheid in South Africa).

[139] *Kiobel,* 621 F.3d at 129.

under the ATS."[140] However, in doing so, the court misapplied the analysis set forth in those cases and drew a conclusion that was hardly supported by the opinions of either of the foregoing cases.

Second, the court acknowledged that private individuals could be held liable under the ATS, but failed to apply the reasoning upon which that determination was based.[141] The *Kiobel* court acknowledged the precedent set by *Kadic*, but disregarded the manner in which the *Kadic* court arrived at its conclusion.[142] The *Kiobel* court stated that international tribunals have never exercised jurisdiction over corporations, therefore corporate liability has not risen to the level of an international norm.[143] It is true that U.S. courts have looked to international criminal law to help show which norms have "definite content" and "widespread acceptance" to constitute what actions violate the law of nations.[144] However, while also recognizing treaties as a source for determining international law, the court placed little significance on the many treaties that impose obligations on corporations.[145]

As Judge Leval stated in his concurring opinion, international tribunals have never imposed any civil liability over *any* sort of private actor.[146] It is therefore a premature conclusion that corporations are, generally, not subject to international law, especially in light of the existence of treaties that impose specific obligations on corporations. The *Kiobel* court bases its decision largely on the Nuremburg Tribunals, which took place before the doctrine of aiding and abetting liability was established.[147] It is universally recognized that courts must rely on international law *as it has evolved* in making determinations of jurisdiction under the ATS.[148]

Lastly, the court erred in finding that corporations, as a general rule, were not subject to international law. The court stated that corporations couldn't be held liable under the ATS because corporate liability does not constitute an international norm.[149] Such an argument presents a noteworthy gap in logic because it compares corporate liability to established international laws, which prohibit "genocide, war crimes, and crimes against humanity."[150] Corporate liability is not and cannot be a

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[140] *Id.* at 130.

[141] *Id.* at 129; *see generally Kadic*, 70 F.3d 232 (imposing ATS liability to private individuals because certain violations of international law are so heinous, that the defendant may be liable, although the defendant was not a public official).

[142] *Kiobel,* 621 F.3d at 130.

[143] *Id.* at 135.

[144] Gallagher, *supra* note 60, at 748.

[145] *Kiobel,* 621 F.3d at 139.

[146] *Id.* at 160 n.11.

[147] The Nuremberg Tribunals followed WWII. *Talisman Energy*, 582 F.3d 244, although not the first case to discuss the doctrine, set the standard for aiding and abetting liability was decided in 2009.

[148] *See generally Sosa*, 542 U.S. 692 (following *Filártiga*, 630 F.2d 876).

[149] *Id.* at 4145-6.

[150] *See Talisman Energy*, 582 F.3d at 257 n. 7.

"norm" in the sense that it is not conduct. Violations of international law norms are actionable in courts. How is "corporate liability" to be violated? Corporate liability is merely a term attached to holding corporations accountable in court for *their* violations of international law norms. Furthermore, the opinions from which the *Kiobel* court drew did not turn on whether liability for a particular group of actors constituted a "norm." Rather, these cases considered whether a class of defendants could be found liable for *violating* an international law norm.[151]

How could the Second Circuit rely on these cases for the substantive aiding and abetting standard for ATS liability, yet ignore the fact that every one of those cases involved corporate defendants, and ultimately find that corporations cannot be held liable under the ATS? The *Kiobel* court reasoned that a footnote in the *Sosa* opinion instructed courts to look at international law to determine whether international law extended the scope of liability of a violation to the perpetrator being sued if the defendant is a private individual or corporation.[152] Even though the *Kiobel* court inquired whether international law extended the scope of liability to corporations, and somehow managed to exclude corporate defendants from liability under the aiding and abetting doctrine, it nonetheless erred in finding that corporations are not subject to international law.[153]

After World War II, "the allied powers dissolved German corporations that had assisted the Nazi war effort," and did so under the authority of customary international law.[154] Additionally, all the assets of I.G. Farben were seized by the allied powers when the company was found to have "knowingly and prominently engaged in building up and maintaining the German war potential."[155] Corporations cannot be thrown in jail, nor can individual officers be held civilly liable for the actions of all of its employees. However, the fact that the allied powers dissolved this corporation and made some of its assets available for reparations, under the authority of international law, for the corporation's assistance to the German war effort clearly demonstrates corporations are indeed subject to international law. Because corporations are subject to international law, the entire U.S. aiding and abetting jurisprudence as relates to the ATS involves corporate defendants, the law of nations is ever evolving, and no court prior to or since *Kiobel* has held that corporations, categorically, are excluded from ATS liability, the *Kiobel* court simply got it wrong.

V. CONCLUSION

It has been said that broad liability under the ATS could open the door for many frivolous lawsuits and consequently stifle investment and competition of U.S.

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[151] *Filártiga*, 630 F.2d 876; *Kadic*, 70 F.3d 232; *Talisman Energy*, 582 F.3d 244.

[152] *Kiobel*, 621 F.3d at 127 (citing *Sosa*, 542 U.S. at 732 n. 20).

[153] *Id.* at 148.

[154] *Flomo*, 643 F.3d at 1017 (citing Control Council Law No. 2, *Providing for the Termination and Liquidation of the Nazi Organizations* (Oct. 10, 1945), reprinted in 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 131 (1945) (it is particularly significant that some of these assets were made available for reparations), www.loc.gov/rr/frd/Military_ Law/enactments-home.html (last visited Jan. 22, 2012).

[155] *Id.* (citing Control Council Law No. 9, *Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof* (Nov. 30, 1945), reprinted in 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 225 (1945), www.loc.gov/rr/frd/Military_ Law/enactments-home.html (last visited Jan. 22, 2012).

multinational corporations abroad.[156] It has also been said that corporations operating abroad will not know what behavior is acceptable under international law, and cause even more confusion under the ATS. In reality, courts have been very strict in limiting the reach of the ATS to allegations of very specific human rights violations. Furthermore, courts have demonstrated that it is extremely difficult for a plaintiff to win an ATS case on the merits because such an outcome has yet to be reached. However, courts have been equally careful to ensure that meritous claims brought against corporations under the ATS are heard.

If the Second Circuit is permitted to ban corporate liability under the ATS, it would do so going against the greater weight of authority which demonstrates that corporations are not exempt from liability under the ATS, and eliminate a meaningful check on how corporations conduct business overseas. Although there have been no outright victories for plaintiffs in ATS cases against corporate defendants, there have been numerous instances in which courts have refused to rule out the possibility of corporate ATS liability. Furthermore, there have been a number of major cases that have settled outside of court, even on the eve of trial, after multiple failed attempts by the defendant corporation to have plaintiffs' ATS claims dismissed.[157] This demonstrates that corporations are fearful of what the outcome of trial could be and would rather not risk such a loss. Without the possibility of liability, corporations will have no incentive to settle ATS cases, and victims of terrible human rights violations will potentially be left without any redress, simply because the actor was a powerful corporation and not a government officer or another private individual. Furthermore, if this is permitted to remain positive law, corporations will be encouraged to engage in whatever conduct that might have a positive impact on its business, regardless of whether its conduct furthers violations of individuals' fundamental rights.

Prior to its holding in *Kiobel*, the law of the Second Circuit was that Corporations could be held liable under the ATS for purposely aiding and abetting human rights violations. However, while acknowledging that precedent purporting to uphold it, the *Kiobel* court held that corporations could not be held liable under the ATS.[158] This holding comes in direct contrast to the precedent set in *Talisman*.[159]

U.S. corporations, attorneys, judges, students, and scholars are all in need of a conclusive, authoritative statement of what the law is. All circuit courts of appeals presented with the issue of corporate liability under the ATS have held that corporations may be found liable when certain specific criteria are met. The Supreme Court denied certiorari in the case of *Abdullahi v. Pfizer, Inc.* less than a month after the Second Circuit issued its *Kiobel* decision. This indicates that the Court intends for corporate liability under the ATS to remain a possibility.[160] The U.S. Supreme Court recently granted certiorari in the *Kiobel* case, apparently recognizing the need for clarity among the circuit courts.[161] The Supreme Court

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[156] *See* Lori Delaney, *Flores v. Southern Peru Copper Corporation: The Second Circuit Fails to Set a Threshold for Corporate Alien Tort Claims Act Liability*, 25 NW. J. INT'L L. & BUS. 205, 225-26 (2004).

[157] *See Unocal,* 963 F. Supp. 880.

[158] *Kiobel,* 621 F.3d at 149.

[159] *See Talisman Energy*, 582 F.3d 244.

[160] *Pfizer*, 562 F.3d 163 (reversing the lower court's dismissal of the plaintiffs' ATS claim against the drug company by finding that nonconsensual medical experimentation constituted a violation of international law, and plaintiffs properly alleged state action).

[161] Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011).

should reverse the *Kiobel* holding that corporations may not be held liable under the ATS, and provide much needed and long awaited clarity on the issue.