The Alien Tort Statute: A Vehicle for Implementing the United Nations Guiding Principles for Business and Human Rights and Promoting Corporate Social Responsibility

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Introduction

IN 2005, PROFESSOR JOHN RUGGIE of the Harvard Kennedy School, an eminent authority on corporate citizenship and responsibility, received a United Nations ("U.N.") mandate to propose measures aimed at strengthening the human rights performance of transnational corporations.[1] His task was a difficult one. Global governance has historically been carried out through a Westphalian-type, state-centered system;[2] however, the rapid growth of transnational corporations—largely spurred by globalization—has transformed the traditional state-dominated social order. This transformation highlights the need for an international framework that would guide and regulate the activities of transnational corporations.[3]

In the context of an emerging sentiment that human rights standards should be relevant among non-state actors,[4] Ruggie embarked

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1. Molly Lanzarotta, *John Ruggie on Business Practice and Human Rights*, HARVARD KENNEDY SCHOOL INSIGHT (Apr. 29, 2011), http://www.hks.harvard.edu/news-events/publications/insight/markets/john-ruggie; Lene Wendland & John E. Grova, *UN Human Rights Council Endorses New Guiding Principles on Business and Human Rights*, UNITED NATIONS OFF. AT GENEVA (June 16, 2011), http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/3D7F902244B36DCEC12578B10056A48F?OpenDocument.

2. John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 819 (2007).

3. Joel Slawotsky, *Doing Business Around the World: Corporate Liability under the Alien Tort Claims Act*, 2005 MICH. ST. L. REV. 1065, 1066 (2005).

4. *Id.*; Peter Muchlinski, *International Business Regulation: An Ethical Discourse in the Making?*, *in* HUMAN RIGHTS AND THE MORAL RESPONSIBILITIES OF CORPORATE AND PUBLIC SECTOR ORGANIZATIONS 81, 90 (Tom Campbell & Seumas Miller, eds., 2004).

on a field research journey spanning several years which involved state governments, corporations, business associations, investors and various other stakeholders around the world.[5] His efforts culminated in the creation of the U.N. Guiding Principles on Business and Human Rights ("Guiding Principles")—"a global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity."[6] The Guiding Principles were released in early 2011[7] and in an unprecedented move the U.N. Human Rights Council ("Council") formally endorsed them later that year.[8] Even though Ruggie did not have the power to create actual legal norms, the Council's sanction "establishe[d] the Guiding Principles as the authoritative global reference point for business and human rights,"[9] and as a standardized yet sufficiently flexible platform for action that could be implemented on an international scale.[10] Indeed, key businesses and organizations have already incorporated the Guiding Principles into their work.[11]

Given that Ruggie's framework may well serve as the basis for a subsequent binding instrument or may itself influence the development of customary international law,[12] this article explores the question of whether, as a policy matter, current American legislation—particularly the Alien Tort Statute ("ATS")—can be seen as an example of an effective way that a state could implement the Guiding Principles domestically. In doing so, the paper also examines the value of the ATS as a means of achieving corporate social responsibility on the global plane. Part I introduces the Guiding Principles, the "protect, respect and remedy" framework that they are based on and the problems that they seek to address. Part II expounds on the ATS and the highly controversial issue of corporate liability under the statute before conducting a critical analysis of relevant circuit-level jurisprudence and evaluating the extent to which such case law achieves the

5. Wendland & Grova, *supra* note 1.

6. Lanzarotta, *supra* note 1.

7. *Id.*

8. *Id.*

9. Wendland & Grova, *supra* note 1.

10. Michael Connor, *Business and Human Rights: An Interview with John Ruggie*, BUS. ETHICS (Oct. 30, 2011), http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/.

11. Mark Taylor, *Why States Were Right to Endorse Ruggie's Guiding Principles*, LAWS OF RULE (June 30, 2011), http://www.lawsofrule.net/2011/06/30/ruggie-releases-guiding-principles/.

12. John H. Knox, *The Human Rights Council Endorses "Guiding Principles" for Corporations*, 20 AM. SOC'Y INT'L L. INSIGHTS 1 (Aug. 1, 2011), http://www.asil.org/pdfs/insights/insight110801.pdf.

Guiding Principles' main goals. The article concludes by highlighting pertinent recent developments—specifically an impending Supreme Court decision that may disallow corporate liability under the ATS.

I. The Guiding Principles and the "Protect, Respect and Remedy" Framework

A. The Rise of the Transnational Corporation

International law has traditionally been preoccupied with the conduct of states, even though corporations—particularly in the last few decades—have proven capable of interfering with the enjoyment of human rights.[13] Even though it is now well-established that individuals have human rights under international law and duties under international criminal law, this redefinition has impacted legal persons such as corporations only tangentially: they possess certain rights under international law, but generally cannot be held criminally liable.[14]

This remedial gap in international law has become increasingly controversial in the last two decades as transnational corporations have become "'the dominant form of organization responsible for the international exchange of goods and services' . . . and . . . [have] found themselves in the startling position of outperforming the national economies of states . . . ."[15] In light of the tremendous geopolitical clout that transnational corporations have accumulated, a parallel sentiment has emerged that they should be held to a standard of accountability similar to that owed by state actors.[16] Admittedly, transnational corporations have contributed to the productive and technological upgrading of many host countries, particularly in the developing world, by providing them with additional capital, know-how and access to global markets.[17] At the same time, however, they have unsurprisingly tended to set up operation in states with business-conducive climates, which typically presupposes low labor costs as well

13. *Developments in the Law—Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2030 (2001) [hereinafter *Developments in the Law*].

14. *Id.* The fact that corporate entities lack obligations under international criminal law can be attributed to the fact different states treat the issue differently in their domestic legal systems, with some states not recognizing corporate criminal liability. *Id.*

15. Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48 TEX. INT'L L.J. (forthcoming Fall 2012) (citing Raymond Vernon, *Transnational Corporations: Where are They Coming From, Where are They Headed?*, 1 TRANSNAT'L CORPS. 7 (1992)).

16. *See id.*

17. Slawotsky, *supra* note 3, at 1066.

as lax rules governing the protection of individuals and the environment.[18] Combined with the ever-increasing exposure of corporate governance problems worldwide, this tendency has caused much concern about transnational corporations' human rights violations in vulnerable regions.[19]

B. From Early Solutions to the Guiding Principles

The impact of corporate conduct on human rights first attracted the attention of the U.N. in the late 1990s, triggering in 2003 the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("draft Norms").[20] The draft Norms resembled a treaty and "sought to impose on companies, directly under international law, the same range of human rights duties" that are applicable to states.[21] Once transmitted to the now-defunct U.N. Commission on Human Rights ("Commission"), however, the draft Norms proved to be highly polarizing.[22] As they rested on the assumption that international law is *directly* applicable to corporations, giving rise to a host of duties—a claim that has otherwise been overwhelmingly rejected by scholars and commentators alike[23]—they faced tremendous opposition from the business community and were rejected by the Commission in 2004.[24]

Albeit ultimately unsuccessful, the draft Norms received the support of numerous human rights groups and clearly demonstrated that the question of transnational corporate accountability was, more than ever, at the forefront of the global agenda.[25] Thus, in 2005, the Com-

18. Marion Weschka, *Human Rights and Multinational Enterprises: How Can Multinational Enterprises be Held Responsible for Human Rights Violations Committed Abroad?*, 66 ZAÖRV 625, 626 (2006).

19. Slawotsky, *supra* note 3, at 1068.

20. John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 820 (2007).

21. The Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 2, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Final Report*]. They envisioned that corporate compliance with such duties would be monitored by national and international agencies, and that the victims would be provided with effective remedies. Ruggie, *supra* note 2, at 820.

22. Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. U. J. INT'L HUM. RTS. 1, 47 (2008).

23. John H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, 3 (Aug. 16, 2011) (unpublished manuscript) (on file with author and SSRN), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916664.

24. Duruigbo, *supra* note 22, at 242 & n.142.

25. Ruggie, *supra* note 2, at 821.

mission requested the U.N. Secretary-General Kofi Annan to appoint a special representative, whose mandate would be to "identify and clarify international standards and policies in relation to business and human rights . . . and submit views and recommendations for consideration by the Commission."[26] The challenge for Ruggie, Annan's appointee, was to work in the shadow of the draft Norms, which is why, at the very outset of his mandate, he distanced himself from the idea that human rights law can impose direct obligations on transnational corporations.[27] He instead took the position that—except for genocide, torture, slavery or other particularly heinous human rights violations that amount to international crimes[28]—non-state actors such as corporations do not have a per se duty to observe human rights.[29] As a result, Ruggie's approach did not directly invoke but instead drew on human rights law in advocating for heightened standards for corporate behavior.[30]

By conceiving a framework that synchronizes existing state and business practices, and that is largely consistent with the law as it is as opposed to advancing "exaggerated legal claims"[31] like the draft Norms, Ruggie ensured the practical enforceability and significance of his work. In June 2011, Ruggie's pragmatism culminated in the Council's formal endorsement of the Guiding Principles.[32] Even though the Guiding Principles are not legally binding, the Council's sanction establishes them as a global standard and an "authoritative focal point for both states and businesses."[33] Furthermore, they have already been espoused and employed by state governments, companies, civil society, workers' organizations, human rights institutions, and investors.[34] They are thus expected to play an increasingly important role in the future, forming part of customary international law or even influencing the passage of a legally binding instrument.[35]

26. *Id.*

27. Knox, *supra* note 23, at 11.

28. The Special Representative of the Secretary-General, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 61, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter *Interim Report*].

29. Connor, *supra* note 10.

30. Knox, *supra* note 23, at 15–16.

31. *Interim Report*, *supra* note 28, ¶ 59; Lanzarotta, *supra* note 1.

32. *Id.; see also* Knox, *supra* note 23, at 15.

33. Lanzarotta, *supra* note 1.

34. *Final Report*, *supra* note 21, ¶ 7.

35. *See* Knox, *supra* note 12.

C. The "Protect, Respect and Remedy" Framework

The Guiding Principles' framework consists of three pillars—"protect, respect and remedy"—that form an interrelated system of preventative and remedial measures.[36] The "protect" pillar postulates that, under the existing international human rights regime, states have a fundamental duty to protect against human rights abuses committed by state agents and third parties, including businesses.[37] Under the "respect" pillar, business enterprises ought to exhibit corporate responsibility, meaning that they "should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[38] The corporate responsibility to respect human rights contemplates actions above and beyond compliance with applicable laws.[39] Indeed, it presupposes the performance of what Ruggie describes as "human rights due diligence"—a process that includes "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[40] Finally, the "remedy" pillar emphasizes the need for greater access by victims to effective remedies; these include state-administered judicial, administrative, legislative or other remedies, as well as company-administered, non-judicial grievance mechanisms that may address issues early on before they escalate into lawsuits.[41]

II. Corporate Liability Under the Alien Tort Statute

The Alien Tort Statute consists of a single sentence: "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."[42] Specifically, it allows aliens to bring claims in federal courts for gross human rights violations committed in the U.S. or abroad.[43] The U.S. is the only country to permit such suits, in which the defendants are often not American, are being sued for "conduct that occurred wholly outside of the U.S., . . . impacted foreign citizens alone, and . . . had no effect whatsoever within the

36. *Final Report*, *supra* note 21, ¶ 6.
37. *Id.*
38. *Id.*
39. Connor, *supra* note 10.
40. *Final Report*, *supra* note 21, ¶ 17.
41. *Id.* ¶¶ 25, 29.
42. 28 U.S.C. § 1350 (2006).
43. *See id.*

U.S."[44] Some recent circuit-court decisions have interpreted the ATS to apply not just to state actors, but to corporations as well—both American and foreign.[45] By enabling federal courts to establish jurisdiction over business entities, the ATS seems to function in the spirit of the Guiding Principles, which seek to promote corporate responsibility. As a result, the ATS—as a policy matter—could be seen as an example of an effective way that a nation-state could implement the Guiding Principles' "protect, respect and remedy" framework. Part II introduces the issue of corporate liability under the ATS generally, analyzes some circuit-level jurisprudence on the issue of whether TNCs could be held liable under the ATS, and concludes by evaluating the extent to which such case law achieves the framework's three goals.

A. Corporate Liability Under the Alien Tort Statute

While the ATS has been on the books since 1789, for years it remained an enigma. For example, there is no record of legislative debate on its purpose and "consensus of what Congress intended has proven elusive."[46] Indeed, it had essentially fallen into desuetude until 1980, when, in *Filartiga v. Peña-Irala*,[47] the Second Circuit found a Paraguayan citizen liable for tortious acts committed in Paraguay, but emphasized that the statute only applies to state actors or, as was the case there, private individuals acting under the color of official authority.[48] In its 2004 decision in *Sosa v. Alvarez-Machain*,[49] the Supreme Court held that it is international as opposed to domestic law that informs what constitutes a violation of "the law of the nations" under the ATS.[50] The Court nonetheless left open the question of which body of law is applicable to ascertaining the categories of potential perpetrators that can be held liable for such violations.[51] Depending

44. Jack Auspitz, *Corporate Social Responsibility and the Business Lawyer*, NAT'L SECURITY L. 2 (Apr. 10, 2008), *available at* http://www.nationalsecuritylaw.net/National%20Security%20Law.Auspitz.Alien%20Tort%20Statute%20Litigation%20(2008).pdf.

45. *See* discussion *infra* Part II.B.

46. Sosa v. Alvarez-Machain, 542 U.S. 692, 718–19 (2004).

47. 630 F.2d 876 (2d Cir. 1980).

48. *Id.* at 878–84. The case was brought by a Paraguayan couple, the Filartigas, whose seventeen-year old son was kidnapped, tortured and murdered by Peña-Irala, a state official, allegedly motivated by Mr. Filartiga's political activities. *Id.* at 878.

49. 542 U.S. 692 (2004).

50. *Id.* at 728, 732–33 & n.21.

51. *Id.* at 732 n.20 ("A related question is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual.").

on whether they choose to prioritize international or domestic law in the context of perpetrator identity, the federal appellate courts that have considered the issue have reached varying results; the overwhelming majority, however, concluded that corporations, similar to states, could be held liable under the ATS.[52] Only one circuit court has held otherwise.[53]

B. Circuit Split on the Issue of Corporate Liability Under the Alien Tort Statute

1. Second Circuit: No Access to Effective Remedy

Kiobel v. Royal Dutch Petroleum Company[54] came before the Second Circuit in 2010 and involved residents of the Ogoni region in Nigeria.[55] The plaintiffs argued that the defendant oil company—Royal Dutch Shell, incorporated in the Netherlands and the United Kingdom, respectively—aided and abetted the Nigerian government in the commission of human rights violations against them since 1958.[56] They specifically alleged that, at the insistence and financial inducement of the company, the government suppressed local environmental protests, raped and killed residents of the region, and frequently destroyed their property.[57] The Second Circuit acknowledged that, from the perspective of a legal culture that is well accustomed to the concept of corporate liability, it may seem tempting to conclude that corporations should be subject to liability under the ATS.[58] However, the court reasoned that the statute requires courts to look to international law instead: "the fact that corporations are liable as juridical persons under domestic law does not mean that they are liable under international law (and, therefore, under the ATS)."[59] The Second Circuit thus held that the oil company is not subject to ATS liability since customary international law does not recognize the notion of corporate liability for international crimes.[60]

Kiobel provides a strong—if not blatant—example of a scenario in which all three pillars of the "protect, respect and remedy" framework were violated. Royal Dutch Shell did not abide by their corporate re-

52. *See* discussion *infra* Part II.B.
53. *Id.*
54. 621 F.3d 111 (2d Cir. 2010).
55. *Id.* at 123.
56. *Id.*
57. *Id.*
58. *Id.* at 117.
59. 621 F.3d at 118.
60. *Id.* at 120.

sponsibility to respect human rights, hardly employed due diligence to avoid infringing on the rights of others and failed to address the adverse impacts associated with their operations. The Nigerian government also neglected to discharge its duty to protect against human rights abuses involving business enterprises. The "remedy" pillar—which emphasizes redress, "both for its significance to victims as well as the crucial preventative role effective and dissuasive remediation processes can have"[61]—was violated as well. Company-administered, non-judicial grievance mechanisms were likely unavailable, or at the very least were ineffective. Given that the plaintiffs brought their claims in the United States, judicial remedies under Nigerian law were also presumably either lacking or unsuccessfully exhausted. In denying ATS jurisdiction over Royal Dutch Shell, the Second Circuit denied the plaintiffs access to a judicial remedy in federal court. Unfortunately, the court's decision in *Kiobel* reflects a view on corporate accountability that is dramatically out of tune with the Guiding Principles and their emphasis on preventative and remedial measures.

2. Eleventh Circuit: Pleading Obstacles

Two years before the Second Circuit decided *Kiobel*, the Eleventh Circuit became the first federal appellate court to address the issue of corporate liability under the ATS. In its 2008 decision in *Romero v. Drummond Company, Inc.*,[62] the court held that the ATS "grants jurisdiction from complaints against corporate defendants[,]" simply stating that it was bound by its own precedent—namely, a 2005 case that found state action, but did not in fact directly address the question of whether corporations could be sued as private actors.[63] Even though it provided no glimpses of its reasoning, the Eleventh Circuit most recently affirmed this ruling in *Sinaltrainal v. Coca-Cola Company*.[64] That case—originally filed in the District Court for the Southern District of Florida—involved a Colombian workers' union which alleged in four separate claims that Coca-Cola and its bottling subsidiary collaborated with local paramilitary and police to intimidate, kidnap and torture several bottling facility union leaders and murdered another.[65] The

61. Haley St. Dennis, *Kiobel Case Reminder of Remedy Gaps Still to be Bridged*, INST. FOR HUMAN RTS. & BUS. (Feb. 28, 2012), http://www.ihrb.org/commentary/staff/kiobel-case-reminder-of-remedy-gaps-still-to-be-bridged.html.

62. 552 F.3d 1303 (11th Cir. 2008).

63. *Id.* at 1315; *see also* Aldana v. Del Monte Fresh Produce, Inc., 416 F.3d 1242, 1242 (11th Cir. 2005).

64. 578 F.3d 1252, 1258–60 (11th Cir. 2009).

65. *Id.*

Southern District of Florida dismissed all claims pointing out the bottler's agreements did not give Coca-Cola any meaningful control over the facility's operations and labor policies as the plaintiffs had alleged.[66] In the absence of such control, the court could not find concerted action between Coca-Cola and the paramilitaries.[67] On appeal, the Eleventh Circuit upheld the dismissal of the suits against the company.[68]

This negative outcome hardly signaled the Eleventh Circuit's changing attitude toward the issue of corporate liability under the ATS. Instead, the court reiterated that "corporate defendants are subject to liability under the ATS[,]"[69] and dismissed the plaintiffs' claims on a technicality—a failure to sufficiently plead factual allegations under *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.[70] With its 2007 decision in *Twombly*, the Supreme Court established a heightened pleading standard for federal civil lawsuits, requiring plaintiffs to "plead enough facts to state a claim to relief that is plausible on its face"—not merely conceivable.[71] With *Iqbal*, decided two years later, the Court clarified *Twombly*, stating that "the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements."[72] In *Sinaltrainal*, the Eleventh Circuit did not expressly state whether ATS claims were subject to such a heightened pleading standard,[73] but affirmed much of the district court's reasoning, thus adopting *Twombly* and *Iqbal*'s "facial plausibility" test.[74] Pursuant to this test, the court found that the plaintiffs' allegations were too vague and their deductions too unwarranted, and that such an "attenuated chain of conspiracy" failed to "nudge their claims across the line from conceivable to plausible."[75]

66. Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1354–55 (S.D. Fla. 2003).

67. *Id.* at 1355.

68. *Sinaltrainal*, 578 F.3d at 1252.

69. *Id.* at 1263.

70. *Id.* at 1263–70. With *Twombly* and *Iqbal*, the Supreme Court established a heightened pleading standard. *See* Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

71. *Twombly*, 550 U.S. at 570.

72. *Iqbal*, 556 U.S. at 663. Writing for the majority, Justice Kennedy further noted that "determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense." *Id.* at 663–64.

73. *Sinaltrainal*, 578 F.3d at 1265 n.14 ("We need not, and specifically do not, decide whether a heightened pleading standard may be used in evaluating the elements of an ATS . . . claim.").

74. *Id.* at 1260.

75. *Id.* at 1268.

By not officially exonerating Coca-Cola for the events that had transpired in Colombia and by giving the workers' union an opportunity to seek redress, *Sinaltrainal* is much more in line with the Guiding Principles than *Kiobel*. Indeed, while the plaintiffs may have lost, it has been cogently argued that, in the modern day and age, ATS litigation is hardly limited to the four corners of the courtroom or to traditional motion practice:

> Old-fashioned motions and pleadings are now accompanied by public-relations campaigns complete with documentaries, community organizing, political lobbying and efforts to drive down stock prices of companies and multinationals with a U.S. presence. [It is] all part of an effort to inflict maximum punishment on companies that choose to fight, trying to force them into lucrative settlements for alleged conduct overseas, and to pressure foreign courts in cases filed abroad.[76]

Thus, even if the success of an ATS claim seems unlikely, media coverage, political campaigns and boycotts can cause reputational harm and financial detriment to the defendant company that can be valuable in instilling corporate responsibility to respect human rights.[77] In light of this, the mere act of giving victims of human rights violations an opportunity to sue could, to some extent at least, fulfill the Guiding Principles' "respect" pillar, which imposes on business enterprises the responsibility of acting with due diligence to avoid infringing upon the rights of others. Despite the dismissal in *Sinaltrainal*, for instance, "Coca-Cola was not left unscathed, suffering damage to its image and lost contracts."[78] Furthermore, public pressure against corporate defendants could force them into sizeable settlements for

76. Jonathan Drimmer, *Think Globally, Sue Locally*, WALL ST. J., June 19, 2010, *available at* http://online.wsj.com/article/SB10001424052748704002104575291101685354766.html.

77. *See id.*; Lauren A. Dellinger, *Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building Better Business Reputation*, 40 CAL. W. INT'L. L.J. 55, 58 (2009) ("[I]f publicly-traded multinational corporations wish to maintain high profit margins and continue to reap the benefits of globalization, they must implement sound Corporate Social Responsibility (CSR) measures related to human rights . . . thereby . . . enabling corporations to avoid the costs of both ATS litigation and reputational harm."); Sarah A. Altschuller et al., *United States of America: Local Human Rights Environment*, EUR. LAW. (Mar. 18, 2011), http://www.europeanlawyer.co.uk/referencebooks_26_508.html.

78. Theresa Adamski, *The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations*, 34 FORDHAM INT'L L.J. 1502, 1536 (2011); *see also* Drimmer, *supra* note 76 ("It was no coincidence that a lawsuit filed against Coca Cola . . . [in] February [2010] in New York City's federal court coincided with a release of a documentary called 'The Coca Cola Case.' The documentary featured the [plaintiffs'] lawyers in the case—concerning allegations of violence against workers at a Guatemala bottling facility—and five others like it in Turkey and Colombia.").

alleged misconduct overseas,[79] thereby giving meaning to the Guiding Principles' "remedy" pillar as well.

Nevertheless, the *Sinaltrainal* court's demand for high pleading specificity may create significant obstacles for human rights plaintiffs in the Eleventh Circuit.[80] Prior to *Twombly* and *Iqbal*, notice pleading provided plaintiffs with greater access to courts and thereby provided meaningful access to essential discovery mechanisms. The current *Iqbal/Twombly* regime precludes many plaintiffs' access to the courts by forcing them to "arrive in federal courts already armed with enough information to convince judges that their allegations are plausible"[81] without the benefit of discovery. Such a heightened pleading requirement and investigatory burden may well prevent meritorious claims from being filed altogether, particularly in light of the fact that the average ATS defendant—a large, wealthy and powerful transnational corporation—is significantly better positioned than the average ATS plaintiff—be it a Colombian union or a group of long-suffering Ogoni residents—to ferret out the information that is necessary to resolve a suit on the merits.[82] The Eleventh Circuit may consequently fall short of providing the effective remedies that are so integral to the Guiding Principles' framework.

In this regard, it is worth emphasizing that the Guiding Principles speak to a state's duty to provide such remedies *domestically*.[83] ATS litigation, however, often revolves around events that took place in an overseas jurisdiction, and around parties that are all foreign—meaning that some cases that are brought in federal court do not have a nexus to the United States.[84] Indeed, the ATS is a unique statute, which allows parties to bring lawsuits that they may not be able to bring elsewhere, and turns the federal courts into a highly attractive venue for human rights plaintiffs.[85]

79. Drimmer, *supra* note 76.

80. *Civil Procedure—Pleading Requirements—Eleventh Circuit Dismisses Alien Tort Statute Claims Against Coca-Cola Under* Iqbal*'s Plausibility Pleading Standard*, 123 HARV. L. REV. 580, 584 (2009) [hereinafter *Pleading Requirements*].

81. *Id.*

82. *Id.*

83. *Final Report*, *supra* note 21, ¶ 25 ("As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through political, administrative, legislative or other appropriate means, that when such abuses *occur within their territory and/or jurisdiction* those affected have access to effective remedy." (emphasis added)).

84. *Pleading Requirements*, *supra* note 80, at 584.

85. *See* Sarah A. Altschuller, *U.S. Supreme Court Review of Corporate Liability Under the Alien Tort Statute—an Overview of the Oral Arguments in* Kiobel v. Royal Dutch Petroleum, CORP. SOC. RESP. & L. (Feb. 28, 2012), http://www.csrandthelaw.com/2012/02/articles/

Curbing lax pleading may thus serve the important purpose of preventing ATS litigation from infringing on sovereign states' interests to adjudicate disputes arising within their borders and U.S. foreign policy, or from exerting considerable settlement pressures on corporate defendants whose reputations are on the line, regardless of how plausible the allegations are.[86] Given the fundamental uniqueness of the ATS, the very fact that foreign human rights plaintiffs are allowed to have their day in federal court—even if they are burdened with procedural obstacles—may be enough to meet the Guiding Principles' expectations. On the other hand, one might argue that remedies should be more available not because the Guiding Principles are binding or because the U.S. has a connection to the case, but simply because this would better reflect the spirit of the "protect, respect and remedy" framework—a framework that has already achieved the status of a global standard.[87]

3. The Seventh, Ninth and D.C. Circuits: Further Procedural Obstacles

Whereas the Eleventh Circuit found it sufficient to merely state that business entities can be held liable under the ATS, other federal appellate courts—specifically the Seventh, Ninth and D.C. Circuits—have made more meaningful attempts to explain their finding of ATS jurisdiction over corporate defendants.[88] At the same time, however, these courts "have begun to constrain the ability of plaintiffs to file such cases . . . by employing domestic procedural devices that limit the application of international law in domestic courts."[89]

The plaintiffs in *Sarei v. Rio Tinto, PLC*[90] were residents of Bougainville, Papua New Guinea,[91] where the defendant company Rio

litigation/alien-tort-statute/us-supreme-court-review-of-corporate-liability-under-the-alien-tort-statute-an-overview-of-the-oral-arguments-in-kiobel-v-royal-dutch-petroleum/.

86. *Pleading Requirements*, *supra* note 80, at 584.

87. *See* Taylor, *supra* note 11.

88. *See* Flomo v. Firestone Natural Rubber Co., LLC, 643 F.3d 1013 (7th Cir. 2011); Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011). The First, Third, Fourth, Fifth, Eighth and Tenth Circuits have yet to address the issue of corporate liability under the ATS. Sarah A. Altschuller, *The Federal Courts and Corporate Liability under the Alien Tort Statute*, CORP. SOC. RESP. & L. (Sept. 27, 2010), http://www.csrandthelaw.com/2010/09/articles/litigation/alien-tort-statute/the-federal-courts-and-corporate-liability-under-the-alien-tort-statute/.

89. Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 728 (2012).

90. 671 F.3d 736 (9th Cir. 2011).

91. *Id.* at 742.

Tinto—a British-Australian mining group headquartered in London—began constructing a mine in the 1960s.[92] The plaintiffs alleged that, as a result of the mine's construction and operation, Rio Tinto displaced villages, destroyed the rainforest, polluted the environment, systematically discriminated against its local workers by establishing a differential wage system and forcing them to live in slave-like conditions, and ultimately "'ripped apart' the culture, economy, and life of Bougainville."[93] In the late 1980s, the local residents started an uprising, which quickly descended into civil war.[94] The plaintiffs further alleged that during the war, the government—pressured by Rio Tinto—"encouraged and supported [a] food and medical blockade that resulted in the deaths of thousands of people . . . ."[95]

Unlike the *Kiobel* court, the Ninth Circuit thought it more appropriate to focus not on whether a particular international institution has been held criminally liable, but on whether international law extends its prohibitions to the perpetrators in question.[96] In that regard, the court pointed to a decision by the International Court of Justice, which had held that genocide—whether committed by an individual, a state or an amorphous, loosely-affiliated group—is always a violation of international law.[97] Since all these types of actors can commit genocide and since the prohibition on doing so is a universal *jus cogens* norm, the Ninth Circuit concluded that it is only reasonable to assume that corporations can commit genocide under international law as well.[98]

Even though it permitted corporate liability under the ATS, the Ninth Circuit very clearly indicated its willingness to impose strict exhaustion-of-remedies requirements in cases against corporations.[99] Specifically, it noted that "'[t]he defendant bears the burden to plead and justify an exhaustion requirement, including the availability of local remedies.'"[100] Moreover, simply initiating a lawsuit in a foreign state would be insufficient. Instead, the plaintiffs must "obtain a final

92. Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116, 1121 (C.D. Cal. 2002).
93. *Id.* at 1121–24.
94. *Id.* at 1124–26.
95. *Sarei*, 671 F.3d at 779. Specifically, the plaintiffs claimed that the government "bombed civilian targets, engaged in wanton killing and acts of cruelty, burned houses and villages, raped women, and pillaged." *Sarei*, 221 F. Supp. 2d at 1142.
96. *Sarei*, 671 F.3d at 743–44.
97. *Id.* at 759–60 (quoting Bosnia and Herzegovina v. Serbia, 2007 I.C.J. 91, ¶ 167 (Feb. 26)).
98. *Id.*
99. Childress, *supra* note 89, at 728.
100. *Id.* (citing *Sarei*, 550 F.3d at 831–32).

decision of the highest court in the hierarchy of courts in the legal system at issue, or show that the state of the law or availability of remedies would make further appeal futile."[101] In practice, such requirements function very similarly to the pleading standard employed by the Eleventh Circuit in *Sinaltrainal* because requiring human rights plaintiffs to go through the entire judicial system in their respective foreign jurisdictions would make it substantially more difficult for them to bring their claims in federal courts. This may consequently create redress gaps that are inconsistent with the Guiding Principles' "remedy" pillar.

Decided only a month before *Sarei*, *Doe v. Exxon Mobil Corporation*[102] was filed by residents of the Aceh province in Indonesia.[103] Plaintiffs alleged that Exxon Mobil—which operated a natural gas facility in Aceh and employed members of the Indonesian military as security—aided and abetted these military members in committing atrocities against the plaintiffs including "genocide, extrajudicial killing, torture, crimes against humanity, sexual violence, and kidnapping . . . as part of a systematic campaign of extermination of the people of Aceh . . . ."[104] The District Court for the District of Columbia dismissed the case on three bases: that aiding and abetting was not actionable under the ATS, that such an inquiry would amount to an impermissible interference with Indonesia's sovereignty, and that sexual violence was not a violation of the law of nations.[105] In reversing the district court, the D.C. Circuit distinguished between substance and procedure. Specifically, the court found that—whereas it is substantive international customary law that determines what types of tortious conduct are actionable under the ATS—whether or not corporations can be held liable is not part of that substantive inquiry.[106] The court then examined the ATS in a historical context and determined that its purpose—to avoid foreign entanglement—does not make it reasonable to legislate only against individuals when cor-

101. *Sarei*, 550 F.3d at 732; Childress, *supra* note 89, at 728–29.

102. 654 F.3d 11 (D.C. Cir. 2011).

103. *Id.* at 15.

104. *Id.* (internal citations omitted).

105. Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005).

106. *Exxon*, 654 F.3d at 42 ("[T]he fact that the law of nations provides no private right of action to sue corporations addresses the wrong question and does not demonstrate that corporations are immune from liability under the ATS. There is no right to sue under the law of nations; no right to sue natural persons, juridical entities, or states.").

porations are capable of performing acts that can incite conflict as well.[107]

The plaintiffs in *Exxon*—similar to the plaintiffs in other recent ATS cases—did not plead only ATS claims, but also "claims in diversity or supplemental claims, alleging the same facts as a violation of state or foreign law."[108] While a perfectly reasonable guess might be that such claims would fare poorly in federal court, the choice-of-law analysis employed by different courts has been inconsistent.[109] In *Exxon*, for example, the district court applied Delaware and District of Columbia law to events that had occurred in Indonesia—specifically to the question of whether it can award punitive damages even though Indonesian law does not authorize them—because of the strong interest that the U.S. had in applying domestic law to its corporations.[110] Whereas applying U.S. damages law meant that the plaintiffs could obtain substantial awards, it also meant that their state-law claims would be dismissed on the basis of American prudential-standing doctrines.[111] This rationale—although currently limited to the D.C. Circuit—"could serve to end nearly all human-rights litigation filed by aliens in the United States courts."[112]

Finally, the plaintiffs in *Flomo v. Firestone National Rubber Company*[113]—Liberian nationals—filed a claim against the American company Firestone, which operated a large rubber plantation in Liberia through a subsidiary and employed thousands of people who lived on the plantation with their families.[114] The plaintiffs alleged that Firestone indirectly used "hazardous child labor on the plantation in violation of customary international law" by setting daily quotas that were so difficult to meet that the employees would often "dragoon their wives or children into helping them . . . ."[115] The Seventh Circuit held that business entities can be liable under the ATS and observed that

107. *Id.* at 46–47 ("[T]he Founders and the First Congress recognized that the inability to respond to such violations could lead to the United States' entanglement in foreign conflicts when a single citizen abroad offended a foreign power by violating the law of nations. . . . The historical context, in clarifying the text and purpose of the ATS, suggests no reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e., corporations, to do so.").

108. Childress, *supra* note 89, at 744.

109. *Id.* at 744–45.

110. *Id.* at 745.

111. *Id.* at 746.

112. *Id.*

113. 643 F.3d 1013 (7th Cir. 2011).

114. *Id.* at 1015, 1023.

115. *Id.*

the *Kiobel* majority was simply wrong in stating that customary international law does not recognize corporate liability reasoning that at the end of the Second World War the allied powers relied on customary international law to dissolve certain German corporations that had assisted the Nazi effort.[116] The court further noted that, even if there is no such precedent, "[t]here is always a first time for litigation to enforce a norm there has to be."[117]

More fundamentally, however, in rejecting *Kiobel*'s rationale, the Seventh Circuit argued that there are no compelling reasons as to why corporations have rarely been held civilly liable for violations of customary international law, except perhaps for a desire to limit liability to "abhorrent conduct—the kind of conduct that invites criminal sanctions."[118] In finding that corporate liability is actionable under the ATS, the court emphasized that international law only imposes substantive obligations leaving it up to the states to enforce them as they see fit either through criminal or civil liability.[119] The *Flomo* court therefore attached little significance to the historical difference between civil and criminal actions against business entities, observing that corporate criminal liability is a rarely-used method of social control only because of the wide availability of corporate tort remedies throughout the world.[120]

Despite this cogent analysis that is ostensibly favorable to human-rights plaintiffs, *Flomo* set a particularly high *mens rea* standard for ATS liability, thereby still constraining the ability of plaintiffs to file such cases.[121] Specifically, the Seventh Circuit provided that "corporate liability for . . . violations [of customary international law] is limited to cases in which the violations are directed, encouraged, or condoned at the corporate defendant's decisionmaking level."[122] Stated differently, the Seventh Circuit allows corporate liability only in instances when the defendant company's management was an active participant in the tortious decision-making process.[123]

In contrast, the D.C. Circuit in *Exxon* held that mere knowledge would be sufficient to satisfy the scienter requirement for aiding and

116. *Id.* at 1017.
117. *Id.*
118. *Id.* at 1018.
119. *Flomo*, 643 F.3d. at 1020.
120. *Id.* at 1019.
121. *Id.* at 1020–21 (expressing objection "not to corporate liability for violations of customary international law but to the scope of such liability").
122. *Id.*
123. *Id.*

abetting liability under the ATS.[124] To arrive at this holding, the *Exxon* court examined precedent from the International Criminal Tribunals for the Former Yugoslavia and Rwanda, as well as from the Nuremberg tribunals, demonstrating that they used a "knowledge" standard.[125] Consequently, the Seventh Circuit's "purposeful intent" standard—which, as some scholars would agree, does indeed misinterpret customary international law[126]—will make it more difficult for human rights plaintiffs to prove *mens rea* and will limit their access to effective remedy.

In sum, the Seventh, Ninth, Eleventh and D.C. Circuits have all allowed corporate liability under the ATS but have nonetheless instituted various procedural limitations on the ability of plaintiffs to sue in federal court for business entity-inflicted trans-national harms. Thus, even though these courts have interpreted the ATS and international law broadly so as to benefit human rights plaintiffs, they have also indicated a propensity to restrict either the application of international law in—or the access of foreign plaintiffs to—federal courts. As they make it more difficult for alleged victims to obtain redress, such procedural barriers are at odds with the Guiding Principles' three-pillar framework, which has already achieved the status of a global standard for prevention and remediation in the context of human rights abuses linked to business activity.[127]

Conclusion

In October 2011, the Supreme Court granted the plaintiffs' petition for a writ of certiorari in *Kiobel* to determine whether corporations can be held liable under the ATS.[128] At oral argument, which took place in February 2012, the Justices seemed split on the fundamental question that was at issue: whether international law must expressly provide for corporate liability in order for business entities to be proper defendants under the ATS, or whether corporate liability is instead a procedural question that can be decided by domestic

124. *Exxon*, 654 F.3d at 39.

125. *Id.*

126. *See* Angela Walker, Comment, *The Hidden Flaw in Kiobel: Under the Alien Tort Statute the Mens Rea Standard for Corporate Aiding and Abetting is Knowledge*, 10 NW. U. J. INT'L HUM. RTS. 119, 120–21 (2011).

127. *See* Knox, *supra* note 12.

128. Mike Sachs, *Supreme Court to Rule on Corporate Personhood for Crimes Against Humanity*, HUFFINGTON POST (Oct. 17, 2011), http://www.huffingtonpost.com/2011/10/17/supreme-court_n_1015953.html.

courts.[129] Furthermore, even though the issue was not directly before the Court, Chief Justice Roberts, Justice Kennedy and Justice Alito each questioned whether ATS cases could be brought in U.S. courts to begin with, considering that they concern abuses committed abroad.[130] In an unusual move, in March 2012, the Court requested additional briefing on this very question and will re-hear the case during its 2012–2013 term.[131] "The Court's request for supplemental briefing highlights the general importance to the Court of avoiding the international friction that would inevitably result were the United States to decide cases arising from actions conducted entirely abroad."[132] As extraterritoriality is now part of the inquiry, *Kiobel* could have far broader implications than was originally anticipated.[133] In particular, the Court could avoid the corporate liability question altogether by simply finding that the ATS does not apply extraterritorially.[134]

The ATS is only one example of the Court's "hardline" approach to the extraterritorial application of American statutes, which is mostly due to the fact that "so many statutes fail to provide sufficient historical evidence of contrary congressional intent to support a successful rebuttal."[135] This, however, is hardly the case with the ATS. The very text of the statute—as well as "the noticeable absence of a discussion on the presumption against extraterritoriality in *Sosa*"—strongly suggests that federal courts have ATS jurisdiction over conduct that takes place overseas.[136] There are therefore several reasons why it behooves the Supreme Court to rule not only that the ATS applies extraterritorially, but also that it can be used to hold business entities liable.

First, in the landmark *Citizens United v. Federal Election Commission*,[137] the Supreme Court recognized corporations as "persons" in

129. Altschuller, *supra* note 85.

130. *Id.*

131. Tyler Giannini & Susan Farbstein, Kiobel *Update: Supreme Court Orders Re-argument and Supplemental Briefing on Extraterritoriality*, HARV. INT'L HUMAN RTS. CLINIC (Mar. 6, 2012), http://harvardhumanrights.wordpress.com/2012/03/06/kiobel-update-supreme-court-orders-re-argument-and-supplemental-briefing-on-extraterritoriality/.

132. Lisa Sokolowski, *U.S. Supreme Court Orders Reargument in* Kiobel, PRODUCT LIABILITY MONITOR (Mar. 9, 2012), http://product-liability.weil.com/alien-tort-statute/us-supreme-court-orders-reargument-in-kiobel/#axzz1tWr3OmUm.

133. *Id.*

134. *Id.*

135. Michelle K. Fiechter, Note, *Extraterritorial Application of the Alien Tort Statute: The Effect of* Morrison v. National Australia Bank, Ltd. *on Future Litigation*, 97 IOWA L. REV. 959, 978–79 (2012).

136. *Id.* at 979.

137. 130 S.Ct. 876 (2010).

the context of free speech and held that they can engage in unrestricted independent spending for political purposes[138]. If society is to grant companies such unique powers and privileges, it is only reasonable for the Court to strengthen corporate accountability in order to balance out the expansion of corporate rights.[139]

Second, allowing business entities to be sued for human rights violations under the ATS would readily comport with the Guiding Principles and the "protect, respect and remedy" framework that they espouse. As Ruggie's work is likely to become even more influential in the future and may even inspire a legally binding instrument, the U.S. may wish to remain at the forefront of human rights protection by providing the rest of the world with an example of an effective way that a state can implement the Guiding Principles domestically.

Finally, and in a similar vein, it has been argued over and over again that "corporations retain a significant potential for positively shaping the world we live in . . . ."[140] The Guiding Principles unambiguously demonstrate the international community's commitment to harnessing this potential and minimizing the adverse impact of corporate action on the enjoyment of human rights.[141] By allowing corporate liability under the ATS, the Supreme Court would ensure that individuals like the child laborers in Liberia or the residents of Bougainville, Papua New Guinea can seek a remedy for the abuses they endured regardless of where they took place.[142] Indeed, the ATS is at present one of the very few legal mechanisms available to human rights plaintiffs who want to bring claims against business entities.[143] To fulfill the Guiding Principles' basic premise stressing effective prevention and remediation, however, federal courts need to reconsider the hefty procedural requirements that they have imposed on such plaintiffs because they have the unfortunate potential to deter highly urgent and legitimate claims.

138. *Id.* at 913.

139. Walker, *supra* note 126, at 145; *see also* Citizens United v. FCC, 130 S.Ct. 876 (2010).

140. Blitt, *supra* note 15.

141. *Id.*

142. Fiechter, *supra* note 135, at 979. Such a holding would not simply be consistent with the Guiding Principles; rather, it would inure to the benefit of transnational corporations themselves, as they have a stake in enduring profitability. *See* Blitt, *supra* note 15. In that regard, a strong argument can be made that, in the long run, corporations are going to thrive better if they heed to the basic rights of the people in whose communities they operate. If the social ills in those communities are appropriately addressed, transnational corporations might be in a stronger position to extract long-term, sustainable profits. *See id.*

143. Dennis, *supra* note 61.