Denver Journal of International Law & Policy

Volume 41
Number 1 *Fall/Winter - 44th Annual Sutton Colloquium*

Article 9

April 2020

Sosa's Silence: Kiobel and the Fallacy of the Supreme Court's Limitation on Alien Tort Liability

Webster C. Cash III

SOSA'S SILENCE: *KIOBEL* AND THE FALLACY OF THE SUPREME COURT'S LIMITATION ON ALIEN TORT LIABILITY

*Webster C. Cash III**

I. INTRODUCTION

In *Kiobel v. Royal Dutch Petroleum Co.*,[1] the United States Court of Appeals for the Second Circuit held that corporations could not be liable under the Alien Tort Statute ("ATS") for human rights abuses.[2] The decision has stunning implications for contemporary human rights litigation.[3] Indeed, in the short time since *Kiobel* was decided in September 2010, a large volume of scholarship has examined the case's potential to upset the delicate balance of international law.[4] Moreover, rare for any circuit court opinion, *Kiobel* is the subject of considerable mainstream media coverage.[5] Whether lawyer or newsman, one fact remains

---

* Webster C. Cash III was a participant in courses in Private International Law at The Hague Academy of International Law (Summer 2011). He holds a J.D. from the University of Denver, Sturm College of Law (2011) and a B.A. from The George Washington University (2007). The author would like to thank Professor Ved Nanda for his inspirational teaching and support in drafting this article.

1. 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011).

2. *Id.* at 149.

3. *See* Jonathan Drimmer, Kiobel v. Royal Dutch Shell Petroleum Co. *and the Alien Tort Statute*, LEXISNEXIS COMMUNITIES (Dec. 10, 2010), http://www.lexisnexis.com/community/international-foreignlaw/blogs/internationalandforeignlawcommentary/archive/2010/12/14/jonathan-drimmer-on-kiobel-v-royal-dutch-shell-petroleum-co-and-the-alien-tort-statute.aspx ("Without question, *Kiobel*, breaking with 20 years of federal court decisions on the ATS, is a significant decision. Some 30% of all corporate ATS cases to date have been brought in the Second Circuit, more than any other. Should the decision stand, it is a near certainty that federal courts . . . will follow suit.").

4. *See, e.g.*, Samuel Estreicher & Meir Feder, *Second Circuit Rejects Corporate Liability Under Alien Tort Statute*, N.Y. L.J. (Nov. 5, 2010), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=120 2474420042&Second_Circuit_Rejects _Corporate_Liability_Under_Alien_Tort_Statute; Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 353, 356 (2011); Michael C. Lynch & Lystra Batchoo, *What are the Implications of* Kiobel v. Royal Dutch Petroleum? *Is the Decision a Definitive Statement Against Corporate Liability under the Alien Tort Statute?*, 22 NO. 1 PRAC. LITIGATOR 57, 57-58 (2011).

5. *See* John B. Bellinger III, *Shortening the Long Arm of the Law*, N.Y. TIMES (Oct. 8, 2010), http://www.nytimes.com/2010/10/09/opinion/09iht-edbellinger.html?_r=0 ("Although the court's decision is at present binding only in the New York region, it may be the death knell for most human rights litigation against multinational companies in U.S. courts."); Grant McCool, *US Judges Dismiss Nigerian Violence Case vs. Shell*, REUTERS (Sept. 17, 2010), http://www.reuters.com/article/2010/09/17/royaldutchshell-nigeria-ruling-idUSN1717331220100917; Kevin Anthony Stoda, *Will U.S. Supreme Court Exempt Corporations from Alien Tort Law—Even as U.S. States Can Still Be Brought to Court?*,

clear: to many, *Kiobel* stands for the shallow proposition that corporate profits stemming from business-related human rights abuses may be shielded from victims through the simple act of incorporation.[6] Opponents also assert that absent Congressional action, *Kiobel* will undermine general principles of corporate accountability.[7] They argue that freedom from concern over multi-million dollar class action lawsuits will invite corporations to downgrade their efforts to prevent human rights abuses.[8] Though individual corporate perpetrators—such as Directors and CEOs—remain susceptible to civil damages under the ATS, the general reaction to *Kiobel* appears to be one of cynicism on account of the corporate protection it imparts.

Others yet have focused less on the decision's press-worthy rule relating to corporate damages. Instead, they emphasize *Kiobel*'s seemingly unremarkable holding: "[t]hat international law . . . and not domestic law, governs the scope of liability for violations of customary international law under the ATS."[9] That is, despite virtual unanimity among civilized nations in recognizing tort actions against corporate entities, it is the law of nations ultimately controlling *who* is liable under the ATS. Though this legalese is somewhat unrevealing, the practical effect of the language will be "deeply relevant in other settings"—i.e., when the United States Supreme Court revisits the scope of the ATS.[10]

Accordingly, this Article will discuss this perhaps more sedentary aspect of *Kiobel*—ostensibly, to uncover the court's reasoning and justification for this ruling. In reaching its position, this Article will show that the Second Circuit's interpretation of ATS liability was based partly on an improper reading of footnote twenty in the Supreme Court's seminal ATS case, *Sosa v. Alvarez-Machain*.[11] Importantly, this Article does not suggest that the *Kiobel* court was necessarily incorrect in its conclusion that customary international law precludes juridical

---

OPED NEWS (Oct. 1, 2010), http://www.opednews.com/articles/WILL-U-S-SUPREME-COURT-EX-by-Kevin-Anthony-Stod-100930-11.html.

6. *See generally* Bellinger, *supra* note 5; *see also Kiobel*, 621 F.3d at 149-50 (Leval, J., concurring) ("[O]ne who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.").

7. *See* Marco Simons, *Making Sense of the* Kiobel *Decision and Corporate Liability for Human Rights Abuses*, EARTHRIGHTS INT. (Sept. 22, 2010), https://www.earthrights.org/blog/making-sense-kiobel-decision-and-corporate-liability-human-rights-abuses ("Beyond the U.S., we need to expand the scope of accountability for human rights abuses, both geographically and institutionally. . . .'the U.S. judiciary alone cannot shoulder the burden of providing a forum for adjudicating human rights claims against companies that arise abroad.' If Shell were subject to a strong accountability regime in Nigeria—or even in England, or the Netherlands, where it is headquartered—it wouldn't matter whether it could be sued in the United States.").

8. *See id.*

9. *Kiobel*, 621 F.3d at 126.

10. *See* Marta Requejo, *Kenneth Anderson on* Kiovel [sic] v. Royal Dutch Petroleum, CONFLICT OF LAWS.NET (Sept. 18, 2010), http://conflictoflaws.net/2010/kenneth-anderson-on-kiovel-v-royal-dutch-petroleum/.

11. 542 U.S. 692 (2004).

entities from ATS liability. Instead, it argues simply that the Supreme Court was silent in *Sosa* regarding the scope of the ATS' reach. Because the high Court did not address this issue, it is of course problematic that the Second Circuit augmented its decision by claiming the Court had ruled squarely on the matter. Thus, this Article serves as a warning for future litigants to avoid *Sosa*, as well as portions of *Kiobel*, as the sole legal basis for asserting corporations are immune from liability under the ATS.

Part II will analyze the relevant history of the ATS, as well as the two primary cases that set forth modern ATS jurisprudence—*Filártiga v. Peña-Irala*[12] and *Sosa*. Additionally, Part II will provide necessary background on the widespread pattern of corporate human rights abuses, such that the full magnitude of the *Kiobel* decision can be understood in context. Part III will provide a comprehensive summary of the Second Circuit's disposition of *Kiobel*. Specifically, a detailed analysis of the facts leading up to the plaintiffs' suit in federal court, the district court's holding, the majority opinion, and Judge Leval's stinging concurrence—a separate opinion endorsing the majority's final judgment, but strident enough in its terms to be classified as nothing other than a dissent. In Part IV, this Article will argue that a key ingredient of the Second Circuit's holding—its interpretation of footnote twenty from Justice Souter's landmark opinion in *Sosa*—was fundamentally incorrect and misapplied Supreme Court dicta. Primarily, this Article will show that the Second Circuit misconstrued *Sosa*'s discussion regarding the contours of ATS liability with the separate consideration of whether international law requires that the State serve as the tortfeasor. This Article will conclude by stressing that litigants should not rely on *Kiobel*'s interpretation of *Sosa* alone while not necessarily ignoring the possible crystallization of such a rule through other relevant sources of international law.

II. BACKGROUND

The ATS was enacted by the first Congress as a provision contained in the Judiciary Act of 1789.[13] Despite its prevalence today, the ATS was seldom used after its passage in 1789. During the first 200 years of its existence, the statute was invoked in federal court only twice.[14] Though the ATS underwent a major resurgence in 1980 following *Filartiga*, it was this rather dormant existence that came to define the ATS. Judge Friendly, speaking to the ATS' mysterious origins, noted in his oft-cited remark that "[t]his old but little used section is a kind of legal

12. 630 F.2d 876 (2d Cir. 1980).

13. Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 463 (2007).

14. *See* Andrew M. Scoble, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 133 n.37 (1986).

Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came."[15]

As one scholar surmised, the ATS "is one of the most widely discussed provisions in modern international law."[16] Due to its relatively simple terms, it is surprising that the ATS has been the basis for both countless civil actions and vigorous legal debate. Nevertheless, the ATS serves as the primary tool for foreigners seeking redress concerning international harms. The elegant simplicity of the ATS—in its entirety—is comprised of nothing more than the following text: "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."[17] In other words, under the statute, an ATS plaintiff (1) must be an alien and not of U.S. citizenship, (2) the complaint must sound in tort, and (3) the underlying claim must violate the law of nations.[18] While the first two components seldom serve as a source of disagreement, the third prong—whether the law of nations was violated—is the genesis of endless controversy.[19]

A. Filartiga v. Peña-Irala

The true birth of modern ATS jurisprudence began in 1980, when the United States Court of Appeals for the Second Circuit issued its decision in *Filartiga v. Peña-Irala*. *Filartiga* involved a claim by Dr. Joel Filartiga and his daughter Dolly Filartiga—both of whom were of Paraguayan origin—against a third Paraguayan national for the alleged torture and death of a Filartiga family member.[20] Specifically, the Filartigas asserted that the defendant Peña-Irala, while holding the office of chief of police in Asuncion, Paraguay, kidnapped Dr. Filartiga's son and subsequently tortured him to death.[21] The complaint also alleged that Peña-Irala had brought a Filartiga family member to the home of Peña-Irala to show them the mutilated and tortured corpse.[22] The Filartigas maintained that the killing was in response to their family's known political dissidence against the Paraguayan government.[23] Other attempts by the Filartigas to hold Peña-Irala accountable for his actions resulted only in death threats, intimidation, and the disbarment of Dr. Filartiga's attorney.[24]

15. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated by* Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010).

16. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221, 221 (1996).

17. 28 U.S.C. § 1350 (2006).

18. Nicholas Joy, *Debate: Did Founders Want U.S. Courts to Look Abroad for Monsters to Destroy?*, THE REC. (Nov. 19, 2009), http://hlrecord.org/?p=9920.

19. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004).

20. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

By the late 1970s, Dolly Filartiga had immigrated to the United States. She learned that Peña-Irala was visiting New York.[25] She filed suit in federal court, invoking the ATS as her basis for jurisdiction, for alleged acts of torture in violation of the law of nations.[26] On appeal from a lower court's dismissal, the Second Circuit found that official state torture was a "clear and unambiguous" violation of customary international law.[27] The court held the ATS provided district courts with jurisdiction when "an alleged torturer is found and served with process by an alien within our borders."[28] Also significant was the *Filartiga* court's emphasis that the new body of international human rights—following the events at Nuremberg—was now included in the amorphous definition of the "law of nations."[29]

Thus, *Filartiga* reinvigorated the dormant ATS into a jurisdictional avenue that opened the federal courts to aliens seeking damages for human rights violations constituting a breach of the law of nations. Though the *Filartiga* decision remains highly controversial—and was overruled in some aspects by the Supreme Court in *Sosa*—its basic holding served as the needed catalyst for alien plaintiffs to bring suit in federal courts for human rights violations. Indeed, as Professor Kontorovich has written,

> *Filartiga* transformed the statute into a tool for foreigners to seek redress in federal courts for a variety of abuses committed by governments around the world. While only a few courts of appeals adopted the Second Circuit's view of the statute, this was enough to allow a wide-ranging docket of ATS cases.[30]

B. Sosa v. Alvarez-Machain

Due to a flood of ATS litigation sparked by *Filartiga*, the various circuit courts interpreted the ATS in varying ways—leading to major disparities in the statute's application.[31] In *Sosa v. Alvarez-Machain*, the United States Supreme Court was given the opportunity to clarify some of the confusion among the lower courts and aid in the creation of a uniform approach to the ATS.

In *Sosa*, Mexican national Humberto Alvarez-Machain filed a civil action against the United States Drug Enforcement Administration and several Mexican nationals under, *inter alia*, the ATS for damages resulting from his abduction and transfer to the United States for interrogation related to criminal activity.[32] Alvarez's primary ATS claim was that one of the Mexican nationals who aided in

---

25. *Id.* at 878-79.
26. *Id.* at 879.
27. *Id.* at 884.
28. *Id.* at 878.
29. *Id.* at 880.
30. Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 116 (2004).
31. *See id.*
32. Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004).

the abduction was liable for a tort committed in violation of the law of nations.[33] The United States Court of Appeals for the Ninth Circuit upheld Alvarez's ATS claim.[34] The Supreme Court granted certiorari and reversed.[35]

The Court held that the ATS was solely a jurisdictional statute, and as such, did not create causes of action based on newly accepted aspects of international law.[36] While the Court said Congress could pass legislation to create new claims under the ATS, the Court settled on the interpretation that a "very limited set of claims" were acceptable under the ATS—namely, piracy, offenses against ambassadors, and violations of safe passage.[37] As the Court stated in its own terms:

> [A]lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. 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.[38]

Additionally, the Court held that the ATS covers newer customary international law claims so long as those claims resemble the "historical paradigms" important to and recognized by the framers of the original 1789 Act.[39] To meet this test, the Court noted that the contended aspect of customary international law must be both universal in its acceptance among civilized nations and specific in its definition.[40] The Court, applying the test, declined to condone Alvarez's claim that arbitrary arrest and abduction lacked the requisite universality and specificity to satisfy the new test.[41]

Sosa can thus be seen as a limitation on the seemingly wide-open grant of authority to litigate ATS claims flowing from *Filartiga.* Though *Kiobel* focuses primarily on the extent of *liability* under the ATS, the background of *Sosa*'s facts and holding is central to better understanding how the Second Circuit misinterpreted a key piece of dicta contained in the *Sosa* opinion—especially because it is in *Sosa's* dicta that *Kiobel* formed its conclusion that corporations are immune for liability under the ATS.

33. *Id.*
34. *Id.* at 699.
35. *Id.*
36. *Id.* at 714.
37. *Id.* at 720.
38. *Id.* at 724.
39. *Id.* at 732.
40. *Id.* at 725.
41. *Id.* at 738.

C. A Brief Primer on Contemporary Corporate Human Rights Abuses

Though *Filartiga* and *Sosa* focused on ATS violations perpetrated by individuals or the State, *Kiobel* represents a different breed of ATS claim; those committed by multinational corporations. While many international corporations have worked tirelessly to ensure that human rights are respected and preserved at the hands of company business, this has certainly not been the case in many instances.[42] In the past few decades, several high profile cases of corporate human rights abuses have occurred vis-à-vis environmental disasters—most glaringly, the BP oil spill, the Exxon Valdez oil disaster, and the tragic gas leak in Bhopal, India. Additionally, multinational corporations have also committed large-scale human rights violations in the labor, social, economic, and political contexts. According to a recent United Nations report, a survey of 320 corporate human rights incidents found that corporate entities are involved in "the full range of human rights" abuses.[43]

The ATS has been the most potent tool foreigners have used to sue corporations for harms sustained by company operations.[44] Though the examples are countless, many ATS claims arise from well-known American military entanglements. For instance, in relation to grievous injuries sustained during the Vietnam War, an ATS claim was filed against Dow Chemical for "knowingly providing the U.S. government with a poisonous agent (Agent Orange) to be sprayed on civilians in Vietnam."[45] Likewise, as a byproduct of the longstanding Israeli-Palestinian dispute, suit was filed against Caterpillar Incorporated "for selling D9 bulldozers to the Israel Defense Forces, knowing they would be used to destroy homes and injure or kill the [Palestinian] inhabitants."[46] During the height of the genocide in the Sudan, Talisman Energy was sued under the ATS for "for conspiring to commit human rights violations, including war crimes, while engaged in oil operations . . . ."[47] Last, and in the backdrop of the more recent Iraq War, ATS claims were brought against Blackwater Corporation for firing weapons on Iraqi civilians and Titan Corporation and CACI International for allegedly

42. RALPH G. STEINHARDT, PAUL L. HOFFMAN & CHRISTOPHER N. CAMPONOVO INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES AND MATERIALS 663 (2009).

43. U.N. Special Representative of the Secretary General, *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-related Human Rights Abuse*, 2-3, 29, U.N. Doc.A/HRC/8/5/Add.2 (May23,2008), *available at* http://daccess-ddsny.un.org/doc/UNDOC/GEN/G08/136/61/PDF/G0813661.pdf?OpenElement.

44. CTR. FOR CONSTITUTIONAL RIGHTS, CORPORATE HUMAN RIGHTS ABUSE 3 (2010), *available at* http://ccrjustice.org/files/CCR_Corp.pdf; *see also* Bellinger, *supra* note 5 ("Plaintiffs have filed suits against ExxonMobil, Chevron, Talisman Energy, Rio Tinto and most of the major oil, gas and mining companies for their activities in Indonesia, Burma, Sudan and Papua New Guinea. Suits have also been brought against Coca Cola, Pfizer, Caterpillar and Yahoo for actions in Columbia, Nigeria, Gaza, and China, and against more than 30 companies that did business in apartheid-era South Africa.").

45. CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 44, at 3.

46. *Id.*

47. *Id.*

"conspiring with U.S. officials to torture and abuse people in U.S. custody in Iraq, including the detainees at Abu Ghraib."[48]

While the alleged actions of the corporate and government defendants in *Kiobel* are certainly alarming, as discussed in the next section, similar conduct by multinationals corporations is sadly far from rare. Similarly, application of the ATS as a means of reparation for such harms is an equally prodigious endeavor.

III. *KIOBEL V. ROYAL DUCTCH PETROLEUM CO.*

Since 1958, the Shell Petroleum Development Company of Nigeria ("SPDC")—a subsidiary of Royal Dutch Petroleum ("Royal Dutch") and Shell Transport and Trading Company PLC ("Shell")—has been involved in oil exploration and production in Nigeria's Ogoni region.[49] Due to the environmental implications of oil extraction, locals of the Ogoni region organized the "Movement for Survival of Ogoni People" ("Movement") in order to protest the resulting degradation of the region's land.[50] According to the Ogoni residents, in 1993 SPDC countered the Movement "by enlisting the aid of the Nigerian government to suppress the Ogoni resistance."[51] Between 1993 and 1994, Nigerian military personnel were "alleged to have shot and killed Ogoni residents and attacked Ogoni villages—beating, raping, and arresting residents and destroying or looting property—all with the assistance of defendants [SPDC, Royal Dutch, and Shell]."[52]

To seek both compensation and justice for the ills afflicted upon them, a number of Ogoni region residents brought suit against the SPDC—as well as Royal Dutch and Shell as the parent companies of the SPDC—under the ATS for "aiding and abetting" the Nigerian forces in "alleged violations of the law of nations."[53] Specifically, the plaintiffs focused their ATS claims on "(1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhumane, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction."[54]

A. Procedural History

In September of 2002, the plaintiffs initiated their lawsuit via a putative class action complaint filed in the United States District Court for the Southern District of New York.[55] In March 2003, the defendants "moved to dismiss the Complaint .

48. *Id.*

49. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010).

50. *Id.*

51. *Id.*

52. *Id.* According to the majority, the plaintiffs alleged specifically that the "defendants, *inter alia,* (1) provided transportation to Nigerian forces, (2) allowed their property to be utilized as a staging ground for attacks, (3) provided food for soldiers involved in the attacks, and (4) provided compensation to those soldiers."

53. *Id.*

54. *Id.*

55. *Id.* at 124.

. . on the grounds that Plaintiffs' claims (1) [we]re barred by the act of state doctrine; (2) [we]re barred by the doctrine of international comity; and (3) fail[ed] to state claims on which relief c[ould] be granted."[56] After Magistrate Judge Henry B. Pitman recommended that the motion to dismiss "be denied in all respects," plaintiffs filed an amended complaint in May 2004.[57] The defendants responded to the amended complaint by filing a second motion to dismiss all ATS claims, relying heavily on the *Sosa*.[58]

In September of 2006, the District Court announced that it had denied the defendants' motion to dismiss, and instead, "decided to consider Defendants' *Sosa*-related arguments in support of their assertion that Plaintiffs fail[ed] to state a claim."[59] The court dismissed four of the plaintiffs' original seven claims (aiding and abetting property destruction; forced exile; extrajudicial killing; and violations of the rights to life, liberty, security, and association) because "customary international law did not define those violations with the particularity required by *Sosa*."[60] Alternatively, however, the court allowed the plaintiffs' claims to proceed for the alleged violations centered on "aiding and abetting arbitrary arrest and detention; crimes against humanity; and torture or cruel, inhuman, and degrading treatment."[61] With regard to the remaining three ATS claims, the court "[r]ecogniz[ed] the importance of the issues presented and the substantial grounds for difference of opinion . . . ."[62] In other words, the district court found that these three purported human rights violations did not "clearly run afoul of *Sosa*."[63]

The court certified an interlocutory appeal to the United States Court of Appeals for the Second Circuit to decide whether the remaining three ATS claims were permissible under *Sosa*.[64]

B. The Majority Opinion

On account of the district court's limited role in certifying the validity of plaintiffs' ATS claims, the Second Circuit's approach to *Kiobel* took on a wholly different form. Judge Jose A. Cabranes—writing for the majority—narrowed the issue to the following summation: "Does the jurisdiction granted by the ATS extend to civil actions brought against corporations under the law of nations?"[65] In other words, the court indicated that unlike most other ATS cases—that is, the ones that hinge on whether a particular harm is recognized under the *Sosa* and customary international law ethos—*Kiobel* turned on how far ATS *liability*

56. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 459 (S.D.N.Y. 2006).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Kiobel*, 621 F.3d at 124.
61. *Id.*
62. *Id.*
63. *Kiobel*, 456 F. Supp. 2d at 463.
64. *Id.* at 465-68.
65. *Kiobel*, 621 F.3d at 117.

extended. In the eyes of the reviewing appellate court, the dispositive issue in *Kiobel* was not whether the plaintiffs' claims under the ATS were compatible with *Sosa*, but rather if aliens could bring ATS suits in federal court for alleged harms against juridical persons—namely, corporations.[66]

The court noted that the vast majority of applicable ATS precedent following *Filartiga* focused on suits brought against *individuals*, a fact that prevented appellate courts from discerning the relationship between the ATS and juridical entities.[67] Though many modern legal systems—including the United States—subject corporations to tort liability under their own domestic law, the court stated that the jurisdictional scope of the ATS is governed not by the particular substantive law of *any* nation, but by the contours of "a limited number of offenses defined by customary *international law* . . . ."[68] Thus, as discussed above, the ATS' jurisdictional grant is limited to only a cause of action crystallized under customary international law—conditioned by *Sosa*'s methodology for deriving new tort actions.

As Judge Cabranes opined:

> [T]he ATS requires federal courts to look beyond rules of domestic law, however well-established that may be, to examine specific and universally accepted rules that the nations of the world treat as binding *in their dealings with one another*. As Judge Friendly carefully explained, customary international law includes only "those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*."[69]

Essentially, the court honed a subtle yet crucial distinction in ATS jurisprudence—"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)."[70]

The court dispelled the notion that mere consensus or agreement among civilized nations regarding the validity of a legal norm constitutes its recognition as a viable piece of customary international law.[71] Alternatively, the court made plain that controlling precedents—stemming from *Filartiga*—command that "the nations of the world . . . demonstrate[]" that the legal norm in question be "mutual, and not merely several concern" before rising to the level of an "international law violation within the meaning of the [ATS]."[72] Analyzed in this manner, the majority restated the inquiry in *Kiobel* to center on "whether a plaintiff bringing an

66. *Id.* at 116.
67. *See id.* at 116-17.
68. *Id.* at 117-18 (emphasis added).
69. *Id.* at 118 (emphasis added).
70. *Id.*
71. *Id.*
72. *Id.* (citing Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980)).

ATS suit against a corporation has alleged a violation of customary international law."[73]

1. Emphasis on the Individual, Not the Juridical

In furtherance of the customary international law analysis required by any valid ATS claim, the court emphasized that the contemporary focus of international human rights law after Nuremberg—and more specifically, attaining *justice* for international human rights violations—had shifted away from states and towards individuals.[74] Before the Second World War, the only subjects held accountable for violations of international law and international human rights were States.[75] After the events of World War II and the Holocaust, however, the prosecutors at Nuremberg created a new international norm that would hold individuals personally accountable for their complicity with State functions.[76] The old method had unduly precluded international tribunals from attaining individual liability against government officials responsible for the illegal actions taken under color of state law.[77] As such, the close of the Second World War and the adjoining Nuremberg trials ushered in a major change in international legal jurisprudence: individuals, and not simply states, were now held responsible for violations of international law.[78]

Despite this resounding victory for victims of human rights abuses, the *Kiobel* court qualified use of the term "individual" to relate to its traditional meaning as employed by the Nuremberg prosecutors.[79] According to the court,

> from the beginning . . . the principle of individual liability for violations of international law has been limited to natural persons—not 'juridical' persons such as corporations—because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an "international crime" has rested solely with the individual men and women who have perpetrated it.[80]

The court concluded that this basic framework continued into the second half of the 20th century, as well as into present day practice of modern international

---

73. *Id.*

74. *Id.* at 119.

75. *Id.* at 118.

76. *Id.* at 118-19 (citing Robert H. Jackson, *Final Report to the President Concerning the Nurnberg War Crimes Trial*, 20 TEMP. L.Q. 338, 342 (1946)).

77. *Id.* at 118-19 (citing Jackson, *supra* note 76).

78. *Id.* at 119 (citing Jackson, *supra* note 76).

79. *Id.*

80. *Id.* The court quoted the original words of the Nuremberg attorneys to further their argument: "'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'" *Id.* (quoting *The Nurnberg Trial (United States v. Goering)*, 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946)).

tribunals.[81] As a prime example, the court cited the formation of the International Criminal Court ("ICC")—in which a proposal to confer the ICC with jurisdiction over juridical entities was "soundly rejected."[82]

2. *Sosa* and the Limited Scope of ATS Liability

As discussed *supra*, the ATS empowers federal courts with jurisdiction over claims "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[83] In the wake of Justice Souter's majority opinion in *Sosa*, the ATS has been classified definitively as a jurisdictional provision that does not in and of itself create a cause of action.[84] Though the Supreme Court recognized the validity of ATS claims based on safe conduct, violation of the rights of ambassadors, and piracy—three categories of customary international law applicable at the time of the ATS' passage—the *Sosa* Court "held that federal courts *may* recognize claims 'based on the present-day law of nations' provided that the claims rest on 'norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court had] recognized.'"[85]

More directly related to the disposition of *Kiobel*, however, was the Second Circuit's emphasis on the text contained in footnote twenty of the *Sosa* opinion. Because the main issue before the court turned on the scope of ATS liability, the majority honed its attention to *Sosa's* limited discussion of the matter: "The Court also observed that 'a related consideration is whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual.'"[86] As a cursory conclusion that foreshadowed their coming analysis, the court "conclude[d]—based on international law, *Sosa*, and our own precedents—that international law, and not domestic law, governs the scope of liability for violations of customary international law under the ATS."[87]

i. Domestic Law Does Not Define the Scope of ATS Liability

According to the court—citing well-known international treatises—"'the concept of international person is . . . derived from international law.'"[88] The court found it visibly apparent, particularly from the experience of the Nuremberg

81. *Id.*
82. *Id.*
83. 28 U.S.C. § 1350 (2006).
84. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).
85. *Kiobel*, 621 F.3d at 125-26 (quoting *Sosa*, 542 U.S. at 725) (emphasis added).
86. *Id.* at 126 (quoting *Sosa*, 542 U.S. at 732 n.20).
87. *Id.*
88. *Id.* (quoting 1 *Oppenheim's International Law* § 33, at 120). The court quoted a portion of the Restatement of International Law: "Individuals and private juridical entities can have any status, capacity, rights, or duties *given them by international law or agreement* . . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. II, at 70 (emphasis added).

Tribunal, that "the subjects of international law are determined by international law, and not individual States."[89] Therefore, under the court's analysis, the defendants in *Kiobel* could be liable under the ATS only if customary international law acknowledged corporations and other juridical persons as entities capable of perpetrating international harms.

ii. *Sosa* and Other Relevant Precedent Mandates International Law "Determine the Scope of Liability"

In addition to footnote twenty in *Sosa*'s majority opinion, the court reemphasized the importance of international law as the guardian of which actors may be liable under the ATS by noting a section of Justice Breyer's concurrence. Specifically, the court cited Justice Breyer's language that stated "[t]he norm [of international law] must extend liability to the *type of perpetrator* (e.g., a private actor) the plaintiff seeks to sue."[90] Said in its own words, the Second Circuit opined that "[a]lthough the text of the ATS limits only the category of *plaintiff* who may bring suit (namely, 'aliens'), its requirement that a claim be predicated on a 'violation of the law of nations' incorporates any limitation arising from customary international law on who properly can be named a *defendant*."[91]

This approach, the court concluded, was consistent not only with *Sosa*, but also with long heeded Circuit precedent. Beginning with *Filartiga*[92]—and followed by the prominent ATS cases *Khulumani v. Barclay Nat'l Bank Ltd.*,[93] *Kadic v. Karadzic*,[94] and *Tel-Oren v. Libyan Arab Republic*[95]—the court noted that federal judges consistently linked the scope of the ATS' liability to the precepts of customary international law.[96] The most recent example, the Second Circuit cited its 2009 case, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[97] which held that "footnote 20 of *Sosa*, while nominally concerned with the liability of non-state actors, supports the broader principle that the scope of liability for ATS violations should be derived from international law."[98] Thus, *Presbyterian Church* stands for the proposition that both the scope of the ATS and any substantive tort

89. *Id.* at 126-27.

90. *Id.* at 127-28 (emphasis added).

91. *Id.* at 127 n.30 (emphasis added).

92. Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980) ("[T]he question of federal jurisdiction under the Alien Tort Statute . . . requires consideration of the law of nations . . . .").

93. 504 F.3d 254, 269 (2d Cir. 2007) (Katzmann, J., concurring) ("We have repeatedly emphasized that the scope of the [ATS's] jurisdictional grant should be determined by reference to international law.").

94. 70 F.3d 232, 236 (2d Cir. 1995) (holding that international law governs in terms of deciding whether liability attaches to international law violations committed by non-state actors).

95. 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring) (stating the view that private entities could not be held liable under the ATS for torture).

96. *See Kiobel*, 621 F.3d at 128.

97. 582 F.3d 244 (2d Cir. 2009).

98. *Id.* at 258.

actions be a product of settled customary international law—with both prongs carrying equal weight in an ATS analysis.[99]

Due to the precedent that adhered to the footnote twenty requirement, the court was confident to say it had "little difficulty holding that, under international law, *Sosa*, and our three decades of precedent, we are required to look to international law to determine whether corporate liability for a 'violation of the law of nations'" constituted a part of customary international law.[100] Consequently, the court reasoned that in order to resolve the issue, it had to identify whether corporate liability for international law violations constituted "a norm 'accepted by the civilized world and defined with a specificity' sufficient to provide a basis for jurisdiction under the ATS."[101]

3. Corporate Liability vis-à-vis the Customary International Law Analysis

To begin its analysis of whether corporate liability for violations of the law of nations amounted to a norm of customary international law, the court stressed the difficult task and immense scrutiny involved for such a norm to "attain the status" required.[102] Specifically, in any customary international law analysis, the penultimate process is to consult the correct sources.[103] The mainstay approach to surveying nations for a recognized legal norm—and the primary method used by the court in *Kiobel*—stems from the now famed passage from *Paquete Habana*, a case from the early twentieth century:[104]

> Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subject of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[105]

Heeding this approach, the court said that "with those principles [of *Paquete Habana*] in mind, we consider whether the sources of international law reveal that corporate liability has attained universal acceptance as a rule of customary international law."[106] The court then split its customary international law analysis

99. *Id.* at 259 (noting that "[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place [under the ATS].").

100. *See Kiobel*, 621 F .3d at 128-30.

101. *Id.* at 130 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004)).

102. *Id.* at 131.

103. *See id.* at 131-32.

104. 175 U.S. 677 (1900).

105. *Id.* at 700.

106. *Kiobel*, 621 F.3d at 132.

in to individual sub-categories and analyzed the different sources and their respective treatment of corporate liability in the international arena.

i. International Tribunals

As the bodies primarily responsible for imposing liability for violations of international law, the court first turned its attention to international tribunals and their relationship with corporate liability.[107]

As discussed above, the court placed great emphasis on the history of the Nuremberg Tribunals—largely due to the Nuremberg experience serving as the first instance in which a tribunal prosecuted individuals in addition to states.[108] The Nuremberg Tribunals—authorized through the London Charter—were emphatic that jurisdiction for violations of the law of nations extend to "*natural persons* only."[109] As its bright line example, the court focused on the Nuremberg Tribunals' obvious demurral regarding liability for the well-known Nazi chemical supplier I.G. Farben.[110] The corporation is best remembered for producing "among other things, oil, rubber, nitrates, and fibers . . . harnessed to the purposes of the Nazi state."[111] Additionally, I.G. Farben engaged in widespread human rights violations: "[I]t is no exaggeration to assert that the corporation made possible the war crimes and crimes against humanity perpetrated by Nazi Germany, including its infamous programs of looting properties of defeated nations, slave labor, and genocide."[112] However, the more direct link for the purposes of the Nuremberg prosecutors was I.G. Farben's production of Zyklon B, a lethal insecticide used in Auschwitz's gas chambers.[113]

On account of the obvious human rights violations, twenty-four individuals affiliated with I.G. Farben were indicted and brought before the tribunal.[114] Nevertheless, I.G. Farben itself was not named a defendant at Nuremberg. The court, quoting original materials that covered I.G. Farben's role at Nuremberg, described the thought process of the Nuremberg officials in rendering this decision:

---

107. *Id.*

108. *Id.* at 118-19.

109. *Id.* at 133.

110. *Id.* at 134-36.

111. *Id.* at 134.

112. *Id.* The court elaborated further on the relationship between Nazi officials and I.G. Farben:

> The depth of the partnership [between the Nazi state and I.G. Farben] was reached at Auschwitz, the extermination center [in Poland], where four million human beings were destroyed in accordance with the "Final Solution of the Jewish Question," Hitler's plan to destroy an entire people. Drawn by the almost limitless reservoir of death camp labor, I.G. [Farben] chose to build a great industrial complex at Auschwitz for the production of synthetic rubber and oil. *Id.* at 135.

113. *Id.* at 135.

114. *Id.*

> We have used the term "Farben" as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt . . . the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.[115]

Due partly to this strong language, the Second Circuit stated that "[i]t is thus clear that, at the time of the Nuremberg trials, corporate liability was not recognized as a 'specific, universal, and obligatory' norm of customary international law."[116]

In addition to its analysis of Nuremberg, the court also discussed the applicability of corporate liability for international law violations in the context of modern international tribunals.[117] Specifically, the court focused on the governing charters of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court.[118] In the case of the former Yugoslavia, a relevant report submitted by the tribunal to the Secretary-General of the United Nations showcased the tribunal's explicit rejection of jurisdiction over juridical persons—confining its reach to natural persons only.[119] Likewise, though the history of the Rwanda tribunal did not include an express rejection of juridical jurisdiction similar to the Yugoslavia tribunal, its grant of jurisdiction extended only to natural persons as well.[120]

Moreover, the court focused on the powerful example of the International Criminal Court ("ICC"). The Rome Statute—which sets forth the ICC's jurisdiction—limits the ICC's authority to adjudicate "natural persons" only, aligning it with the approach taken in Nuremberg, Yugoslavia, and Rwanda.[121] Perhaps even more damaging to the plaintiffs' case was a fact steeped in the legislative history of the Rome Statute. According to the court, during promulgation of the statute's terms, the French delegation attempted to add language that would have endowed the ICC with jurisdiction over juridical entities—specifically "corporations."[122] The court then cited the commentators who "have explained, the French proposal was rejected in part because 'criminal liability of corporations is still rejected in many national legal orders' and thus

115. *Id.* (quoting 7 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 ("THE FARBEN CASE") 11-60 (1952)).

116. *Id.* at 135-36.

117. *Id.* at 136.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 137.

would pose challenges for the ICC's principle of 'complementarity.'"[123] According to another treatise detailing the creation of the ICC's jurisdiction, the proposal "was finally withdrawn by the French delegation when it became clear that there was no possibility that a text could be adopted by consensus . . . . [f]or some delegations the whole notion of corporate criminal responsibility was simply 'alien', raising problems of complementarity."[124]

From this commentary, the court was able to derive a simple conclusion regarding the possible customary international law status of corporate liability vis-à-vis international tribunals: "[t]he history of the Rome Statute therefore confirms the absence of any generally recognized principle or consensus among States concerning corporate liability for violations of customary international law."[125]

ii. International Treaties

To further its customary international law analysis—that is, through the method set forth in *Paquette Habana*—the court turned to international treaties and the works of publicists to decipher any cognizable trend in corporate liability under international law.[126] Treaties serve as evidence of customary international law when "an overwhelming majority of States have ratified the treaty, and those States uniformly and consistently act in accordance with its principles."[127] Though, the court emphasized, "[t]hat a provision appears in one treaty (or more) . . . is not proof of a well-established norm of customary international law."[128] The court conceded that while there were numerous ratified treaties centered on "specialized questions" (e.g. a treaty against "Transnational Organized Crime") that included provisions extending corporate liability, the treaties themselves were limited in subject matter and did not adequately incorporate the purpose of protecting human rights.

As the court explained:

> Even if those specialized treaties had been ratified by an "overwhelming majority" of states . . . the fact that those treaties impose obligations on corporations in the context of the treaties' particular subject matter tells us nothing about whether corporate liability for, say, violations of human rights, which are not a subject of those treaties, is universally recognized as a norm of customary international law. Significantly, to

123. *Id.* As defined by the *Kiobel* court "'[c]omplementarity' is the principle, embodied in the Rome Statute, by which the ICC declines to exercise jurisdiction over a case that is simultaneously being investigated or prosecuted by a State having jurisdiction over it." *Id.* at 137 n.39.

124. *Id.* at 137 (quoting Andrew Clapham, *The Question of Jurisdiction Under International Criminal Court over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 157 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000)).

125. *Id.*

126. *Id.* at 137, 140.

127. *Id.* at 137 (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233, 256 (2d Cir. 2003)).

128. *Id.* at 138 (emphasis omitted).

> find that a treaty embodies or creates a rule of customary international law would mean that the rule applies beyond the limited subject matter of the treaty and to nations that have not ratified it. To construe those treaties as so-called 'law-making' treaties—that is, treaties that codify existing norms of customary international law or crystallize an emerging rule of customary international law—would be wholly inappropriate and without precedent.[129]

Because the court found these specialized treaties failed to ripen into a generalized rule of customary international law, basing the existence of a new international norm on a few select treaties would "create friction in our relations with foreign nations and, therefore, would contravene the international comity the statute [ATS] was enacted to promote."[130]

4. Conclusion and Disposition

The majority opinion concluded by holding that the above analysis led to the inevitable disposition that the plaintiffs' claim against the defendants must be dismissed for lack of subject matter jurisdiction under the ATS.[131] Accordingly, the Second Circuit affirmed the lower court's ruling related to its dismissal of the claims against the corporate defendants and reversed the lower court "insofar as it declined to dismiss" the outstanding claims against the defendants.[132]

C. The Concurring Opinion

Judge Leval issued a separate opinion concurring only in judgment. Though he believed the majority correctly dismissed the claims against the defendants—albeit on grounds that the plaintiffs failed to "plead a violation of the law of nations"[133]—the bulk of Judge Leval's concurrence was designed to undermine the majority opinion's primary holding.[134] Judge Leval's disagreement with the majority's approach to ATS liability was strident in both its terms and language.[135] Indeed, even the majority opinion mentioned from the outset of its analysis that they were "perplexed by Judge Leval's repeated insistence that there is no 'basis'" for their holding.[136] According to Judge Leval, the majority's approach would usher in a system where "one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting

129. *Id.* (emphasis omitted) (citations omitted).
130. *Id.* at 141.
131. *Id.* at 149.
132. *Id.*
133. *Id.* at 188, 196 (Leval, J., concurring).
134. *See id.* at 149-88.
135. *See id.*
136. *Id.* at 120 (majority opinion) (quoting *id.* at 151) (Leval, J., concurring) (noting that the majority's position lacked support from adequate precedent and scholarship).

the heinous operation in the corporate form."[137] In a sense, Judge Leval argued, *Kiobel* would usher in a new era of "unscrupulous businesses advantages . . . never before dreamed of."[138]

The main thrust of Judge Leval's concurrence rested on the simple difference between criminal and civil liability.[139] Though the majority cited rather persuasive authority claiming international law is generally blind to the later distinction,[140] Judge Leval found the majority's reliance on *criminal* tribunals to discern a lack of international consensus regarding corporate liability to be wholly misplaced in ATS jurisprudence.[141] This conclusion stemmed from the basic scope and structure of the ATS—a device designed to award plaintiffs civil tort damages for aliens who have been harmed by a violation of the law of nations.[142] If viewed alone as a creature of civil tort law, then ATS liability—according to Judge Leval—cannot be reconciled with the majority's reliance on the refusal of international tribunals to *criminally prosecute* corporations.[143] As Judge Leval opined:

> The reasons why international tribunals have been established without jurisdiction to impose *criminal* liability on corporations have to do solely with the theory and the objectives of *criminal punishment*, and have no bearing on civil compensatory liability. The view is widely held among the nations of the world that criminal punishments (under domestic law, as well as international law) are inappropriate for corporations. This view derives from two perceptions: First, that criminal punishment can be theoretically justified only where the defendant has acted with criminal intent—a condition that cannot exist when the defendant is a juridical construct which is incapable of having an intent; and second, that criminal punishments are pointless and counterproductive when imposed on a fictitious juridical entity because they fail to achieve the punitive objectives of criminal punishment. For these reasons many nations in their domestic laws impose criminal punishments only on natural persons, and not on juridical ones. In contrast, the imposition of civil liability on corporations serves perfectly the objective of civil liability to compensate victims for the wrongs inflicted on them and is practiced everywhere in the world. The fact that international tribunals do not impose *criminal punishment* on corporations in no way supports the inference that corporations are outside the scope of international law and therefore can incur no *civil*

137. *Id.* at 149-50 (Leval, J., concurring).
138. *Id.* at 150.
139. *See id.* at 151.
140. *See id.* at 146-47.
141. *Id.* at 151-52.
142. *Id.* at 151.
143. *See id.*

> *compensatory liability* to victims when they engage in conduct prohibited by the norms of international law.[144]

He then noted that "[i]nternational law distinguishes clearly between them [criminal and civil liability] and provides differently for the different objectives of criminal punishment and civil compensatory liability."[145] The majority's purported legal flaw, that there was no dividing line between the two, prompted Judge Leval to believe that "international law takes no position" and thus grants each nation individual discretion whether they wish to impose civil liability on international tortfeasors.[146]

In addition to his conclusion that criminal punishment of corporations is not a recognized aspect of criminal law, the concurrence also claimed that the majority opinion was inconsistent with *Sosa*, argued that corporations are "subjects" of international law, and took *Sosa*'s footnote twenty out of context.[147] A large portion of Judge Leval's concurrence regarding footnote twenty will be used to develop the main thesis of this Article's analysis in Section IV.

IV. ANALYSIS

As noted above, the Second Circuit relied heavily on footnote twenty of the *Sosa* opinion in holding that liability under the Alien Tort Statute was governed by international, and not domestic, legal norms.[148] This Article will argue that the court's interpretation of footnote twenty was incorrect.

It is crucial to better understand the background of footnote twenty, as the Second Circuit offered little in its majority opinion. Justice Souter's opinion in *Sosa* can be categorized—at least in relevant part to Alvarez's ATS claims—into three main prongs. In the first prong, the Court held the ATS was jurisdictional in nature, affirmed that it had "practical effect the moment it became law"—thus granting jurisdiction for claims based on piracy, safe conduct, and ambassador relations—and devised a historical test for federal courts to confer jurisdiction over additional international "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms."[149]

In the second prong, the Court argued against Justice Scalia's concurrence. Though Justice Scalia agreed that the three 18th century claims were applicable under the ATS, he disagreed that "today's law of nations may ever be recognized legitimately by federal courts in the absence of congressional action."[150] In other words, Justice Scalia believed that the historical test created by the majority—

144. *Id.* at 151-52.
145. *Id.* at 152.
146. *Id.*
147. *Id.* at 164-78.
148. *See id.* at 126 (majority opinion).
149. Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 (2004).
150. *Id.* at 729.

designed to ensure that "the door [to the federal courts] is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today"—was incompatible without further legislation.[151] In response to this argument, Justice Souter noted that the courts "would welcome any congressional guidance in exercising jurisdiction . . . [yet] nothing Congress has done is a reason for us to shut the door to the law of nations entirely."[152]

The third and final prong of *Sosa*—the one in which footnote twenty appears—is the portion of the opinion that applies the Court's new historical test against the specific arbitrary detention claim raised by Alvarez-Machain under the ATS.[153] Footnote twenty appears in the first paragraph of this section—as part of its third and closing sentence—following a series of standard legal principles discussing the criteria for applicable norms of customary international law.[154] In fact, the entire paragraph is devoted to elaborating, more or less, on the *Paquette Habana* approach to discerning customary international law.[155] For instance, the Court noted in the second sentence that an actionable norm of customary international law must be accepted among civilized nations, and quoted *Filartiga*'s well-known passage that "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[156]

In the third and final sentence of the paragraph, the Court included additional substance to its historical test, opining that "the determination whether a norm is sufficiently definite to support a *cause of action* should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts."[157] It is right after the "to support a cause of action" language that Justice Souter inserted footnote twenty. The full text of footnote twenty is as follows:

> A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (C.A.D.C.1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karădzic*, 70 F.3d 232, 239-241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).[158]

151. *Id.*
152. *Id.* at 731.
153. *Id.* at 731-32.
154. *Id.* at 732.
155. *See id.*
156. *Id.*
157. *Id.* at 732-33 (emphasis added).
158. *Id.* at 732 n.20.

A. Liability Distinct from Cause of Action

From the outset, it is obvious that the surrounding text of footnote twenty is focused on one subject only: the requisite methodology for determining whether an ATS *cause of action* is viable. In this sense, the cause of action emphasis is related to the *Paquette Habana* approach for identifying international claims. Nowhere, however, does the opinion's text relate—even remotely—to the issue of ATS *liability*. That is, if the Second Circuit's interpretation of footnote twenty is correct, the language of the footnote is at the very least wholly independent from the text of the opinion itself. It is not a sufficient legal basis to assume the two are linked inextricably; the viability of a substantive legal norm under the ATS is simply a distinct concept from the list of possible defendants subject to ATS liability. The language of the footnote, it then follows, must justify the Second Circuit's position—a requirement that is not met.

The one and only sentence of footnote twenty states that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[159] If read in a vacuum, and without any further guidance, it would perhaps be understandable as to why the Second Circuit felt so strongly that *Sosa* prohibited ATS claims against corporations. In a sense, the language of the footnote is ambiguous with regard to its application of ATS *claims* versus ATS *liability*. Certainly, if other indicators were absent, the Second Circuit would have stronger justification for its holding. The footnote does make clear in simple language that (1) international law controls issues of liability under the ATS and (2) juridical entities, such as corporations, as non-state actors are not definitively liable if international law so directs. The Second Circuit took this language as the basis for engaging in a customary international law analysis to determine whether juridical persons are liable for violations of the law of nations. As discussed *supra* in Part III, the Second Circuit found that the pertinent treaties, norms, and sources indicated the law of nations did not mandate that such entities are liable for international harms.

This analysis is changed, however, when one considers the citations on which footnote twenty relies. Justice Souter included reference to two major ATS circuit court cases—the concurring opinion in *Tel-Oren v. Libyan Arab Republic* and the majority opinion in *Kadic v. Karădzíc*. In *Tel-Oren*, the D.C. Court of Appeals discussed and held, *inter alia*, that torture committed by private individuals does not violate customary international law.[160] Likewise, in *Kadic*, the Second Circuit held that the act of genocide, even if committed by private actors, is a violation of the law of nations.[161] And though these cases appear to discuss the divide between juridical and State actors, they both represent a different premise than the issue

159. *Id.*

160. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring).

161. Kadic v. Karadzic, 70 F.3d 232, 239-41 (2d Cir. 1995).

presented in *Kiobel*: whether the law of nations holds corporate defendants liable for violations of international harms. As Judge Leval said in his dissent, "[n]othing in the *Tel-Oren* or *Kadic* opinions suggests in any way that the law of nations might distinguish between conduct of a natural person and of a corporation. They distinguish only between private and State action."[162] In other words, while *Kiobel* is concerned with the appropriateness of ATS liability for corporations—converse from Nuremberg's jurisdictional grant covering individuals exclusively—the case law serving as the basis for footnote twenty is related uniquely to whether the laws of nations *is still violated*, for a particular internationally recognized harm, *when the perpetrator is a private party rather than the State.*

We are then left with a basic equation for understanding the distinction between footnote twenty and *Kiobel*: footnote twenty pertains to whether an international law violation is *triggered by a particular actor* while *Kiobel* rests on whether a juridical *defendant can successfully be sued under the law of nations.*

B. Applying the Formula to Typical ATS Claims

The distinction outlined above is best understood when applied practically. As an illustrative example, consider two separate cases with an identical fact pattern. In the first case, the issue is controlled by *Kiobel*, and in the second, footnote twenty, *Kadic*, and *Tel-Oren* is the dispositive law.

1. The Private Defendant

The facts are as follows: plaintiff, a man of Sudanese nationality, brings suit in federal district court under the ATS seeking tort damages for genocide. Plaintiff names, among others, a corporation that aided the Sudanese government in carrying out the killings by financing parts of the State's operation. Assume also that the plaintiff can show injury (i.e., the death of a family member), and the corporation is deemed to be complicit in the genocide.

In the first case, we apply *Kiobel.* Since the defendant is a corporation, the issue would turn on whether international law mandates dismissal of the ATS claim by virtue of the defendant's juridical nature. Here, international law has spoken clearly on the extent of liability for genocide. Because those who commit the act of genocide are considered *hostis humani generis* (an enemy of all mankind), a corporate entity may be liable for commission of such an offense. Culpability for the defendant would thus be a foregone conclusion.

Conversely, assume the same set of facts, but footnote twenty is the dispositive law. If applied with due deference to *Kadic* and *Tel-Oren*, plaintiff's claim would now turn on the character of the perpetrator. Instead of *Kiobel*'s concern of whether the corporation could be liable under the law of nations,

162. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 165 (2d Cir. 2010) (Leval, J., concurring).

footnote twenty would seek to ensure that the underlying claim—genocide, in this instance—was itself a cause of action that the juridical entity in question could commit and, irrespective of that entity's private or public composition, still rise to the status of a customary international law violation. In the case of our plaintiff, under the *Kadic* rule, the international norm condemning genocide is so pronounced that it is considered a violation of the law of nations when committed either by a juridical entity or the State. In other words, the private corporation is capable of committing the offense so as to render it a violation of customary international law. This is dissimilar from *Kiobel*, in that it is concerned with a workable cause of action and not potential liability of the defendant.

The key distinction is more evident when analyzing an ATS violation that fails because a private actor cannot serve as the culprit. Assume in *arguendo*, the cause of action brought by the Sudanese plaintiff is torture rather than genocide. Torture, unlike genocide, is a violation of customary international law only when inflicted by State actors. If this were the case, plaintiff's ATS claim against the corporate defendant would clearly not survive as a consequence of footnote twenty and *Tel-Oren*. More precisely, plaintiff will have failed to state a claim recognized under international law because private corporations are precluded from violating the law of nations by engaging in torture. While the result under *Kiobel* is unchanged, the altered claim demonstrates the competing motivation for footnote twenty.

The difference is certainly subtle, but nonetheless persuasive and important. When re-read in this context, footnote twenty takes on another meaning. As Judge Leval wrote:

> If the violated norm is one that international law applies only against States, then "a private actor, such as a corporation or an individual," who acts independently of a State, can have no liability for violation of the law of nations because there has been no violation of the law of nations. On the other hand, if the conduct is of the type classified as a violation of the norms of international law regardless of whether done by a State or a private actor, then "a private actor, such as a corporation or an individual," has violated the law of nations and is subject to liability in a suit under the ATS.[163]

2. The State Defendant

Consider now the case of an ATS claim involving a State-actor defendant with an unsettled cause of action. In this example, plaintiff brings suit against the Sudanese government for accepting bribes to initiate oil operations in various Sudanese villages. Some time after drilling begins, plaintiff alleges an oil company murdered and tortured his family for protesting the negative environmental impact of the company's operations. Plaintiff also names the

163. *Id.* (emphasis omitted).

Sudanese government in the ATS complaint for purported violations of customary international law by aiding and abetting the company by accepting kickbacks to secure corporate oil leases in the region.

Through *Kiobel*, it is clear the Sudanese government is a plausible defendant under international law. As noted above, the ATS clearly delineates the authority of federal courts to hear cases against public actors for violations of customary international law. However, footnote twenty and its related case law would beg the following questions: (1) does international law recognize a cause of action for killings and tortures perpetrated by private companies, and, (2) under international law, does a cause of action exist against a State-actor that aids and abets a private company commit murder and torture? By flipping the issue in *Kiobel*—that is, placing emphasis on the cause of action rather than the defendant—one can better see that footnote twenty controls possible claims instead of possible defendants.

C. Revisiting the Second Circuit's Approach Through a New Lens

A different view of footnote twenty was also supported by an influential *amici*—the European Commission. According to the Commission:

> [O]nly a subset of norms recognized as customary international law applies to non-state actors, such as corporations, and hence only that subset may form the basis of liability against such actors. For example, non-state actors may be liable for genocide, war crimes, and piracy, while torture, summary execution, and prolonged arbitrary detention do not violate the law of nations unless they are committed by state officials or under color of law.[164]

Possible negative reaction to *Kiobel*'s interpretation of footnote twenty should not be surprising. After all, it was contained in a section of *Sosa* devoted entirely to espousing the validity of ATS *claims*. The footnote even follows the phrase "cause *of action*."[165]

To point out the inaccuracy of the Second Circuit's approach, we return to the specific language in *Kiobel*: "based on international law, *Sosa*, and our own precedents—that international law, and not domestic law, governs the scope of liability for violations of customary international law under the ATS."[166] Though other sources of international law may eventually validate the holding of *Kiobel*, what is concerning about the case is that it places undue influence on *Sosa* and internal circuit precedent. The Second Circuit did not interpret the difference between footnote twenty and the issue in *Kiobel* as narrowly as this Article. Citing *Talisman*, the Second Circuit argued that "footnote 20 of *Sosa*, while nominally concerned with the liability of non-state actors, supports the broader principle that the scope of liability for ATS violations should be derived from international

164. *Id.* at 165 n.17.

165. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

166. *Kiobel*, 621 F.3d at 126.

law."[167] It would be hard for the Supreme Court, on review of an appellate decision, to agree that footnote twenty is only "nominally concerned" with liability of non-state actors. The Second Circuit in *Talisman*, like *Kiobel*, appears to have interpreted footnote twenty to turn on whether the law of nations recognizes a cause of action instead of whether a particular defendant is liable for such a violation.

Thus, the Second Circuit's conclusion that footnote twenty controls the issue in *Kiobel* is a clear misinterpretation of the Supreme Court's emphasis on *Tel-Oren* and *Kadic*. It appears the court read the language through the lens of *Kiobel*, and failed to understand the true motivation for Justice Souter's insertion of footnote twenty into *Sosa*. At first blush, the text of the footnote is supportive of *Kiobel*'s holding but, upon further inspection, pertains to a separate issue of ATS jurisprudence. Though other sources of international law—such as the Second Circuit's reliance on international tribunals and the work of scholars—may vindicate *Kiobel*, litigants should be wary of citing *Kiobel* for the proposition that juridical defendants are shielded from liability under the ATS. Instead, they should undergo a typical customary international law analysis, mimicking other portions of the Second Circuit's opinion.

V. CONCLUSION

The purpose of this Article was twofold. First, to provide an objective analysis of the *Kiobel* case—including the factual background, court rulings, and majority and concurring opinions. Second, this Article was designed to show the fallacy that the Second Circuit relied on to bolster its holding that international law dictates the boundaries of ATS liability. Footnote twenty of the *Sosa* opinion, though illuminating in other aspects, is not applicable to the disposition of *Kiobel*. On account of this fallacy, it is important for future ATS litigants to be mindful of the trap *Kiobel* has laid.

The conclusion of this article rests on the following premise: both the *Kiobel* decision and footnote twenty should not serve as the primary basis for asserting the law of nations governs ATS liability. Instead, a wise litigant would be mindful of the Second Circuit's other arguments—the ones flowing from the traditional *Paquette Habana* approach—such as the use of international tribunals, treaties, and academic treatises to either support or undermine the claim that the law of nations is binding on ATS liability and defendants.

167. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258 (2d Cir. 2009).