Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations

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44 CORNELL INT'L L.J. 659 (2011)

"We do not accept the paradox that legal responsibility should be least where the power is the greatest."—Justice Robert H. Jackson, Chief Prosecutor for the United States at the Nuremberg International Military Tribunal[1]

Introduction

In 1958, the Shell Petroleum Development Company of Nigeria (SPDC) began oil exploration in the region of Ogoniland,[2] a 404 square mile area of land inhabited by 500,000 Ogoni, one of the 250 ethnic groups of Nigeria.[3] In response to the negative consequences of oil exploration, the Ogoni people mobilized to form the "Movement for the Survival of the Ogoni People" (MOSOP)[4] in the early 1990s to prevent further oil pollution, which was contaminating their local water supply and ruining their farmland.[5] As protests grew in size and intensity, increased tension led to the killing of four pro-oil Ogonis by a mob.[6] The Nigerian Government responded by reinforcing the Rivers State Internal Security Task Force (Task Force), a military unit created in January 1994 to pacify communal violence.[7] The Task Force commenced raids of Ogoni villages in which "whole communities were collectively punished for real or imputed association with MOSOP."[8] Over the next several months, the Task Force reportedly raided at least sixty towns and villages in Ogoniland.[9] These raids reportedly became almost a nightly occurrence during the summer of 1994 and sometimes involved the indiscriminate shooting of civilians, rape, and

1. ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 73 (1983).
2. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d. Cir. 2010).
3. Joshua P. Newton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L.J. 261, 264 (1997); *see also* HUMAN RIGHTS WATCH, THE OGONI CRISIS: A CASE-STUDY OF MILITARY REPRESSION IN SOUTHEASTERN NIGERIA (1995), *available at* http://www.unhcr.org/refworld/country,,HRW,,NGA,,3ae6a7d8c,0.html [hereinafter HRW REPORT].
4. *Kiobel*, 621 F.3d at 123.
5. *See* HRW REPORT, *supra* note 3.
6. *Id.* The four prominent Ogoni leaders were brutally murdered at a meeting of the Gokana Council of Chiefs and Elders. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

property destruction.[10]

Over a decade later, in 2002, several exiled Ogonis living in the United States brought a suit under the Alien Tort Statute (ATS)[11] in the United States District Court for the Southern District of New York against SPDC and other foreign oil companies for aiding and abetting the human rights violations perpetrated by the Nigerian military forces.[12] While the Second Circuit had previously held that individuals could be liable for aiding and abetting under the ATS,[13] it had never directly addressed whether the ATS extended jurisdiction to the courts to hear civil actions against corporations.[14] On appeal, the Second Circuit, in a 2-1 split, dismissed all claims brought by the Ogonis.[15] Although a customary international legal norm prohibits aiding and abetting human rights violations, the *Kiobel* court reasoned that because no additional preexisting norm of customary international law extended civil liability to corporate actions, corporations could not be subject to liability under the ATS.[16]

It is difficult to overstate the significance of this ruling.[17] Not only did the court rule that corporate defendants in *Kiobel* could not be liable for aiding and abetting under the ATS, but moreover, that *no corporation* could be held liable under the ATS for *any* tort claim. The majority's rule strikes a blow to the efforts of international law to protect human rights[18] because it allows entities that earn profits by commercial exploitation of fundamental human rights abuses to successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.[19] Due to the shallow pockets of individuals and the insulation of state actors by the act of state doctrine, the majority, by sterilizing the ATS's sting against corporate bodies, robs ATS plaintiffs of access to the only entities that could possibly make them whole again.[20]

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10. *Id.*; *see also* AMNESTY INTERNATIONAL, NIGERIA: MILITARY GOVERNMENT CLAMPDOWN ON OPPOSITION 5 (1994) (noting that at least fifty Ogonis were reportedly executed extrajudicially by the Nigerian security forces in the wake of the May 21 murders and that some were shot at close range).

11. 28 U.S.C. § 1350 (2006).

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

13. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 282–83 (2d Cir. 2007) (Katzmann, J., concurring) (noting that the Court did not reach the question of whether corporations could be held liable for violations of customary international law because the defendants did not raise the issue).

14. *Kiobel*, 621 F.3d at 124.

15. *Id.* at 149.

16. *Id.* at 148–49.

17. *See* Abayomi Azikiwe, *U.S. Court Denies the Right to Sue Corporations*, WORKERS WORLD (Sept. 24, 2010), http://www.workers.org/2010/world/nigeria_0930.

18. *Kiobel*, 621 F.3d at 196 (Leval, J., concurring). Judge Leval concurred only in the judgment. He rejected the majority's reasoning, but agreed with the final outcome because the plaintiffs had not shown that the defendants acted with purpose.

19. *Id.* at 149–50.

20. In the months after the *Kiobel* decision, district courts in the D.C. Circuit and Seventh Circuit chose to follow *Kiobel's* lead due to a lack of ATS precedents on point from their own districts. *See* Mohamad v. Rajoub, 634 F.3d 604, 608 (D.C. Cir. 2011); Flomo v. Firestone Natural Rubber Co., 744 F. Supp. 2d 810 (S.D. Ind. 2010). On

This Note argues that ATS liability should extend to corporations, but that a reasonableness test should limit jurisdiction when the controversy implicates substantial foreign interests. If the majority's reasoning were valid, the International Tribunal at Nuremburg, one of the pillars of international law and the case on which the *Kiobel* majority most heavily relies, could not have prosecuted individual actors who had not previously been subjected to international law. The *Kiobel* outcome also conflicts with prior Second Circuit decisions that seemingly allow corporate civil liability under the ATS.[21] Finally, the majority holding in *Kiobel* violates a fundamental rule-of-law principle by excepting from an important international rule the actors with the greatest capacity to violate it. For these reasons, this Note will argue that an additional norm of customary international law extending liability to an actor-type is not required to hold the actor liable under the ATS. Thus, the ATS can provide recovery to human rights victims injured at the hands of corporations.

Nevertheless, the failure of *Kiobel* to soundly preclude corporate cases, given the broad jurisdictional enabling language of the ATS, could give rise to serious consequences that include, but are not limited to: increases in international forum shopping, due process violations, severe burdens on U.S. courts, undue influence by U.S. courts on corporate conduct and commercial economies abroad, and negative impact on international political and legal relations. This Note will also demonstrate how a reasonableness test for international comity can limit the impact of these externalities.

This Note proceeds in six parts. Part I frames the *Kiobel* holding within the current state ATS litigation by outlining the history of the ATS. Part II describes the reasoning of the majority opinion in *Kiobel.* Part III analyzes the majority's argument with respect to the International Military Tribunal at Nuremburg,[22] prior Second Circuit ATS litigation, and the rule-of-law principle that no entity should stand outside of the law. Part IV examines the problems raised by the failure of the *Kiobel* court to preclude corporate liability. Part V explores how a reasonableness test for ATS cases might properly limit U.S. jurisdiction, if courts decline to follow *Kiobel* and instead impose liability on corporations. Part VI considers two possible shortcomings of the reasonableness test.

I. The History of the ATS

A. The Alien Tort Statute

The Alien Tort Statute became law in 1789 as part of the First Judiciary Act and enabled foreign citizens to seek justice for injuries caused by

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appeal, the Seventh Circuit disagreed with the lower court in *Flomo* and held that corporations can be civilly liable under the ATS. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, (7th Cir. 2011) (affirming the district court's decision on different grounds). This holding is directly at odds with the *Kiobel* holding.

21. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244 (2d Cir. 2009).

22. This analysis will incorporate Judge Leval's criminal/civil distinction.

acts of piracy, which by their nature often occurred outside the territory of the United States and the citizen's sovereign.[23] The original language of the statute read "[t]hat the district courts shall have, exclusively of the courts of the several States, cognizance . . . concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[24] The operative part of the ATS—that jurisdiction is granted only for torts in "violation of the law of nations or a treaty of the United States"—has generally remained unchanged.[25]

While treaties clearly delineate obligations and restrict actors' conduct, discerning modes of conduct that fall under the customary umbrella of the "law of nations" presents greater difficulties. Historical sources, like Blackstone's Treatises, provide an insight as to what this term meant at the time of the First Judicial Act.[26] Blackstone defines the law of nations as "a system of rules . . . established by universal consent among the civilized inhabitance of the world; in order to decide all disputes which . . . must frequently occur between two or more independent nations, and the individuals belonging to each."[27] For Blackstone, three primary offenses constitute violations of the law of nations: violation of safe conduct, interference with ambassadors, and piracy on the high seas.[28]

History shows that with the exception of piracy cases, plaintiffs rarely invoked the ATS.[29] However, in 1980, nearly 200 years after the first Judiciary Act, the Second Circuit sparked the modern use of the ATS with its influential decision in *Filartiga v. Pena-Irala*.[30] Thus, after two centuries of disuse, the Second Circuit undertook the task of reviving and reshaping the ATS law-of-nations standard as it applied to U.S. courts. However, because the drafters of the ATS understood common law to "provide a cause of action for [only] the modest number of international law violations . . . at the time,"[31] the court faced an exponentially larger body of modern international law to interpret and analyze.

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23. *See* Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 211 (2008).

24. Federal Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (1789) (current version at 28 U.S.C. § 1350 (2006)).

25. 28 U.S.C. § 1350 (2006); *see also* Mark W. Wilson, *Why Private Remedies for Environmental Torts Under the Alien Tort Statute Should Not Be Constrained by the Judicially Created Doctrines of* Jus Cogens *and Exhaustion*, 39 LEWIS & CLARK ENVTL. L. J. 451, 455 (2009) (noting that the current wording of the ATS was enacted in 1911 by the Federal Judiciary Act of 1911).

26. *See* Wilson, *supra* note 25, at 458.

27. 2 WILLIAM BLACKSTONE, COMMENTARIES *66, *available at* http://www.lonang.com/exlibris/blackstone/bla-405.htm.

28. *Id.* at *68.

29. *See* Wilson, *supra* note 25, at 455.

30. JEFFREY DUNOFF, STEVEN RATNER & DAVID WIPPMAN, INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 300 (3d ed. 2010).

31. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

B. Developing the Standards: ATS Precedents

1. Developing General Standards

In *Filartiga*, Paraguayan plaintiffs, a father and son, brought a complaint against a Paraguayan defendant for wrongfully causing the death of their son.[32] The plaintiffs alleged that the defendant, the former Inspector General of Police in Asunción, kidnapped and tortured the son due to the father's political dissidence.[33] Although the District Court initially dismissed the claims for lack of subject matter jurisdiction, the Second Circuit reversed and held that acts of torture committed by individuals acting under official authority clearly constituted a violation of the laws of nations.[34] In making this determination, the *Filartiga* court looked to the sources from which customary international law is derived—the usage of nations, judicial opinions, and the work of jurists.[35] Because those sources showed the "universal renunciation in the modern usage and practice of nations,"[36] the Second Circuit held that the district court had subject matter jurisdiction under the ATS to hear the plaintiffs' action.[37]

While the number of ATS cases increased in number and diversified in subject matter after *Filartiga*,[38] the Supreme Court has only heard one case on the ATS—*Sosa v. Alvarez-Machain*.[39] In *Sosa*, a Mexican national brought a claim against the United States Drug Enforcement Agency (DEA) under the ATS for allegedly violating his civil rights by kidnapping him in Mexico and bringing him to trial in the United States for the murder of a DEA agent.[40] *Sosa's* singularity makes it an important case for several reasons. First, the Supreme Court determined that the ATS was a jurisdictional grant and did not create a new cause of action.[41] Second, the Court applied the standard of "specific, universal, and obligatory" in its consideration of alleged violations of the law of nations to limit jurisdiction to a narrow category.[42] The Court held that the plaintiff's "illegal detention of

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

33. *Id.*

34. *Id.*

35. *Id.* at 884. In determining which sources were relevant to customary international law, the Second Circuit looked to *The Paquete Habana*, 175 U.S. 677, 700 (1900), which reaffirmed that "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 have made themselves peculiarly well acquainted with the subjects of which they treat."

36. *Filartiga*, 630 F.2d at 883.

37. *Id.* at 878. The Second Circuit proposed in *Flores v. Southern Peru Copper Corp.* that there are three elements necessary to have a valid claim under the ATS: "plaintiffs must (i) be 'aliens,' (ii) claiming damages for a 'tort only,' (iii) resulting from a violation 'of the law of nations' or of 'a treaty of the United States.'" *Flores v. S. Peru Copper Corp.*, 414 F.3d 242, 242 (2d Cir. 2003).

38. *See* DUNOFF, RATNER & WIPPMAN, *supra* note 30, at 302.

39. 542 U.S. 692 (2004).

40. *Id.* at 695. Specifically, the plaintiff alleged that his arbitrary arrest violated customary international law. *Id.*

41. *Id.* at 713.

42. *Id.* at 748 (Scalia, J., concurring). This standard comes from *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994).

less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violate[d] no norm of customary international law so well defined as to support the creation of a federal remedy."[43] Finally, the Supreme Court instructed lower courts to consider whether international law extends the scope of liability for a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.[44]

2. Consideration of Aiding and Abetting and Corporate Liability

After *Sosa* offered these standards, the Second Circuit determined that an actor need not be the principal perpetrator to be liable for under the ATS by holding that aiding and abetting human rights violations constituted a violation of the law of nations.[45] In considering state practice in *Khulumani v. Barclay Nat'l Bank Ltd.*, the Second Circuit held that liability for individuals who aid and abet a violation of international law is a rule that states universally abide by out of a sense of legal obligation and mutual concern.[46] Additionally, looking to treaties and the statutes creating international tribunals, the Second Circuit found the concept of criminal aiding and abetting to be "well established in international law."[47]

Judge Katzmann's concurrence[48] set forth the standard: a "defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime."[49] In determining this standard, Judge Katzmann looked to international law to determine whether the scope of liability for a violation of international law should extend to aiders and abettors.[50] Judge Hall, also concurring, noted that international law does not specify the "means of its domestic enforcement."[51] The combination of these two opinions—that liability should extend to aiding and abetting and that nations have the freedom to determine how to treat violators—intimates that corporate entities can violate the law of nations and be held liable under the ATS.

While *Khulamani* specifically recognized aiding and abetting as a liability-creating offense, the landmark case for corporate liability is *Doe v.*

43. Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004).

44. *Id.* at 732 n.20.

45. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007). Other circuits had previously addressed the possibility of holding a defendant liable for aiding and abetting violations of the law of nations like the Ninth Circuit in *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

46. *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring).

47. *Id.*

48. This concurrence is important because the majorities in both *Talisman Energy* and *Kiobel* rely upon it.

49. *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring).

50. *Id.* at 269.

51. *Id.* at 286 (Hall, J., concurring) (quoting the Brief for the International Law Scholars as Amici Curiae at 5–6).

Unocal Corp.,[52] which allowed such liability. In *Unocal*, Burmese citizens accused Unocal, a subsidiary of an American oil company, of providing the Burmese government with funding for forced labor from which Unocal benefited.[53] While a factual question prevented the Ninth Circuit from holding Unocal liable, it certainly recognized the possibility that corporations could be held liable under the ATS.[54] So long as Unocal met the Ninth Circuit's standards for aiding and abetting, the court reasoned that "Unocal may be liable under the [ATS] for aiding and abetting the Myanmar Military in subjecting Plaintiffs to forced labor."[55]

Although ATS claims against corporations began to increase substantially after *Unocal*,[56] the Second Circuit only flirted with ATS corporate civil liability in cases like *Khulumani* until *Kiobel*. Approximately one year before *Kiobel*, the Second Circuit decided *Presbyterian Church of Sudan v. Talisman Energy*,[57] where it appeared to lay the foundation for corporate liability but declined to address the issue head on. In *Talisman Energy*, Sudanese plaintiffs alleged that a corporation aided and abetted human rights abuses.[58] The main issue on appeal was the requisite *mens rea* for aiding and abetting liability.[59] Guided by the concurring opinions of Judge Katzmann and Judge Hall in *Khulumani*, the majority looked to international law to determine that the defendant must act with purpose.[60] The majority then engaged in a lengthy discussion about whether the defendant corporation, Talisman Energy, acted with purpose.[61] The court's analysis implicitly recognized that corporations could be held liable for aiding and abetting.[62] If corporations cannot be held civilly liable under the ATS, the facts of the case would have been immaterial. Thus, the Second Circuit had plodded toward recognition of ATS corporate liability by the time it heard the *Kiobel* appeal.

II. The Case Preventing Corporate ATS Liability: *Kiobel v. Royal Dutch Petroleum Co.*

A. Historical and Procedural Background

The plaintiffs in *Kiobel* formerly resided in the Ogoni Region of Nige-

52. Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).
53. *Id.* at 939.
54. *Id.* at 953.
55. *Id.* at 947.
56. P.J. Kee, *Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and* Forum Non Conveniens, 83 TUL. L. REV. 495, 501 (2008).
57. Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244 (2d Cir. 2009).
58. *Id.* at 251.
59. *Id.* at 257.
60. *Id.* at 259.
61. *Id.* at 260–65.
62. After it established purpose as a standard, the court actually considered whether *Talisman* acted with purpose. It framed the factual issue as follows: "Therefore, in reviewing the district court's grant of summary judgment to Talisman, we must test plaintiffs' evidence to see if it supports an inference that Talisman acted with the 'purpose' to advance the Government's human rights abuses." *Id.* at 260.

ria.[63] They alleged that the corporate defendants Royal Dutch Petroleum Company (Royal Dutch) and Shell Transport and Trading Company PLC (Shell), through a subsidiary, SPDC, aided and abetted the Nigerian government in committing human rights abuses directed at plaintiffs.[64] Royal Dutch and Shell are incorporated in the Netherlands and the United Kingdom, respectively, while SPDC is incorporated in Nigeria.[65] All defendants are corporations, entities that are "juridical" persons, rather than "natural" persons.[66]

SPDC began oil exploration and production in the Ogoni region of Nigeria in 1958.[67] To protest the environmental impact of SPDC's local oil exploration, some residents of the Ogoni region organized a group named the "Movement for Survival of Ogoni People."[68] When the protests halted oil production,[69] the plaintiffs alleged that defendants responded by enlisting the aid of the Nigerian government to suppress the MOSOP resistance in 1993.[70] Plaintiffs alleged that throughout 1993 and 1994, Nigerian military forces shot and killed Ogoni residents and attacked Ogoni villages—beating children and the elderly, raping and arresting residents, and destroying or looting property—all with the assistance of the corporate defendants.[71] The human rights violations perpetrated by the Nigerian Task Forces constitute what is now more commonly known as the "Ogoni Crisis."[72]

Plaintiffs brought an action against the defendants under the ATS for aiding and abetting the Nigerian government in alleged violations of the law of nations.[73] Specifically, plaintiffs brought claims of aiding and abetting: (1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, 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.[74] Reasoning that the defendants could not be held liable for counts (1), (5), (6), and (7) because inter-

63. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010).
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *See* Newton, *supra* note 3, at 269–70 ("Continuing protests, some violent, led Shell to suspend its operations in Ogoniland in mid-1993, but it continues to exploit oil resources in other parts of the Niger Delta region.").
70. *Kiobel*, 621 F.3d at 123.
71. *Id.*; *see also* HRW REPORT, *supra* note 3 ("Soldiers and mobile police stormed houses, breaking down doors and windows with their boots, the butts of their guns, and machetes. Villagers who crossed their path, including children and the elderly, were severely beaten, forced to pay 'settlement fees,' and sometimes shot. Many women were raped. Security forces randomly arrested and detained several hundred Ogonis, primarily young men . . . Before leaving, troops looted money, food, livestock, and other property. Although major troop movements in the region appear to have tapered off by late August 1994, the security forces reportedly continue to arbitrarily arrest, detain, and beat Ogoni civilians.").
72. *See* HRW REPORT, *supra* note 3.
73. *Kiobel*, 621 F.3d at 123.
74. *Id.*

national law did not sufficiently define those violations, the District Court dismissed those claims.[75] However, the District Court, while denying the defendants' motion to dismiss the three remaining claims, also elected to certify its entire order for interlocutory appeal.[76] Thus, the Second Circuit reviewed all seven claims.[77]

B. The Majority's Reasoning

The majority, which dismissed the entire complaint, split its opinion into two sections. The first part argued that in addition to the presence of an international norm against aiding and abetting, an additional actor-type norm assigning liability to corporations for violating that norm was necessary for corporate ATS liability.[78] The second part argued that no such actor-type norm existed.[79]

First, the *Kiobel* Court determined that international law governed its inquiry by looking to the Restatement (Third) of Foreign Relations Law of the United States and the concept of international personhood.[80] The majority noted that international law is not silent on the question of its subjects,[81] but also admits that "individuals and private juridical entities can have . . . rights or duties given [to] them by international law."[82] As an example delimiting subjects, the majority cited the International Military Tribunal at Nuremberg (IMT), which without precedent for individual liability, held that state officials could be held liable for violation of the specific, universal, and obligatory norms of international human rights.[83] The majority also cited the Supreme Court's instruction in *Sosa* to look to international law to determine the scope of liability.[84] The part of the *Sosa* decision most helpful to the majority's argument is Justice Breyer's concurring opinion, which charged courts to consider "whether *international law* extends the scope of liability to the perpetrator being sued, if the defendant is a private actor."[85]

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75. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d. 457, 464–68 (S.D.N.Y. 2006).
76. *Id.*
77. *Kiobel*, 621 F.3d at 124.
78. *Id.* at 131.
79. *Id.* at 148.
80. *Id.* at 126.
81. *Id.*
82. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II, introductory note (1987) [hereinafter RESTATEMENT].
83. *Kiobel*, 621 F.3d at 126–27.
84. *Id.* at 127.
85. Sosa v. Alvarez-Machain, 542 U.S. 692, 760 (2004) (Breyer, J., concurring). It should also be noted that the ATS does not apply to actions against states. The only basis for jurisdiction over an action by a plaintiff against a foreign state is the Foreign Sovereign Immunities Act. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602–1611 (2009); *see also* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (limiting jurisdiction against foreign sovereigns to those circumstances allowed by FSIA). Section 1605 grants jurisdiction for a suit against a foreign state for a tort that occurred within the borders of the United States. 28 U.S.C. § 1605(a)(5) (2007).

Under the Second Circuit's interpretation of *Sosa*, the norm of international law must extend liability to the type of perpetrator the plaintiff seeks to sue.[86] According to the majority, for an actor to be liable under the ATS, the actor not only has to violate a norm of conduct of customary international law, but there also needs to be a customary international law norm for holding that type of actor liable for violating the particular norm of conduct.[87] The majority considered whether international law extends civil liability to corporations primarily by looking again to the IMT at Nuremberg, which addressed only criminal liability for individuals.[88]

While individual liability for crimes committed in violation of the law of nations during wartime had arisen to a small degree after World War I, it was not until after World War II that such liability was greatly considered.[89] In the wake of the Holocaust, the United States, Great Britain, France, Soviet Union, and twenty-one other states signed the London Charter, which established the IMT to try German war criminals who allegedly orchestrated war crimes, crimes against humanity, and crimes against peace.[90] As mentioned above, the Nazi defendants contended that they could not be guilty of war crimes because international law had never provided punishment for individuals.[91] Despite the lack of precedent for individual liability, the IMT held that "individuals could be punished for violations of international law."[92] However, when the issue of corporate liability arose with respect to I.G. Farben (a German corporation that manufactured Zyklon B, the killing chemical in the gas chambers), the IMT refused to consider imposing *criminal* liability for the corporation.[93] Despite the focus of the IMT in expanding international crimes to encompass individuals, the majority treated the failure of the IMT to criminally prosecute the "most nefarious corporate enterprise known to the civilized world" as clear evidence that corporate liability was not recognized as a norm of customary international law.[94]

After attempting to establish the non-recognition of criminal liability for corporations at the time of the IMT, the majority looked to subsequent international tribunals, treaties, and the works of publicists to further support its position.[95] The majority referenced the two most influential international tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda

86. *Sosa*, 542 U.S. at 760 (Breyer, J., concurring).

87. *Kiobel*, 621 F.3d at 130.

88. *Id.* at 132–36.

89. *See* DUNOFF, RATNER & WIPPMAN, *supra* note 30, at 567 (calling the International Military Tribunal at Nuremberg "[t]he watershed for individual accountability").

90. *Id.* (noting that the IMT tried twenty-two defendants, and convicted all but three of at least one charge).

91. *Kiobel*, 621 F.3d at 127.

92. *Id.*

93. *Id.* at 135.

94. *Id.*

95. *Id* at 136–45.

(ICTR), both of which limit liability to "natural persons."[96] It also cited the International Criminal Court's (ICC) rejection of a French proposal to expand the ICC's jurisdiction beyond natural persons to "juridical persons."[97] The majority found it "abundantly clear" that modern tribunals have not treated corporate criminal liability as a norm of international law since Nuremberg.[98]

The majority then argued that the few international treaties involving corporate liability impose obligations limited specifically to the subject matter of the treaties, and therefore, treaties cannot be sources that support corporate liability in customary international law.[99] Although customary law does not require "universal practice,"[100] the majority further argued that to 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."[101] While such a finding is not necessarily inconsistent with the workings of customary international law,[102] the majority concluded that treaties provide no relief for the Ogonis.[103]

As final support for its position, the majority looked to the work of publicists—in particular the testimony of Professors Christopher Greenwood and James Crawford in *Talisman Energy*. In their testimony, they declared that no tribunal has "so far recognized corporate liability, as opposed to individual liability, in a civil or criminal context on the basis of a violation of the law of nations or customary international law."[104] The professors' comments generally restate the arguments offered by the majority with respect to the express limitations of the ICC, ICTR, and ICTY to natural persons. Accordingly, the majority held that the ATS does not provide subject matter jurisdiction over claims against corporations.[105]

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96. *See* International Criminal Tribunal for the Former Yugoslavia Statute, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), *adopting* The Secretary-General, Report Pursuant to Paragraph 2 of Security Council Resolution 808 ("Report of the Secretary-General"), art. 6, U.N. Doc. S/25704 (May 3, 1993) ("The International Tribunal shall have jurisdiction over *natural persons*. . . ."); Statute of the International Tribunal for Rwanda, art. 5, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

97. *Kiobel*, 621 F.3d at 137.

98. *Id.*

99. *Id.* at 138.

100. *See* DUNOFF, RATNER & WIPPMAN, *supra* note 30, at 78.

101. *Kiobel*, 621 F.3d at 138.

102. Consider when a treaty merely reflects the position of other sources of customary international law, like state practice or the rulings of international tribunals. For instance, it would not be inconsistent with international law to hold a state actor responsible for a universally condemned act like torture, even if the state was not party to the Convention Against Torture. Thus, while the majority points out an alarming consequence of overstating the significance of treaties, this problem is avoided when other sources of international law support the near universality of the idea or norm that the treaty puts forward.

103. *Kiobel*, 621 F.3d at 138 (noting that treaties, "in light of their limited number and specialized subject matter, [cannot] be viewed as crystallizing a norm of customary international law").

104. *Id.* at 143.

105. *Id.* at 149.

In summary, the majority justified its dismissal by driving a wedge between a norm of customary international law and liability for the type of actor that violates it.[106] The majority essentially argued that unless international law explicitly and universally holds corporations criminally liable for a target offense, no corporation can ever be held liable under the ATS. This conclusion is possibly incorrect for several reasons. This Note will now explore why the *Kiobel* majority's presumption is erroneous by considering the IMT at Nuremberg,[107] and then offer support for why corporations could be held civilly liable for violations of the law of nations by looking at consistency with the precedents of *Khulumani*, *Talisman Energy*, and *Citizen's United v. Federal Election Commission*,[108] as well as with general rule-of-law principles.

III. The Possibility of Corporate Liability Under the ATS

A. International Law Sets Forth Its Norms and Nations Have the Power to Prosecute Actors Who Violate Those Norms: *Nuremberg* as an Example

The majority heavily cited the IMT at Nuremberg as support for its proposition that customary international law must denote specific liability for the type of actor that violates its norms.[109] The majority's use of Nuremberg and other criminal tribunals is misguided for two reasons. First, if the majority's major premise were true, individual liability at Nuremberg would have been contrary to international law because there was no *opinion juris* for holding individuals liable for violation of the law of nations at the time of the tribunal. Because this cannot be the case, Nuremburg shows that an actor-type norm is not required to hold an actor liable for a violation of a fundamental norm. Second, the refusal of the IMT, ICTR, and ICTY to prosecute corporations should be interpreted as excluding subjects whose prosecution was not practical given the nature of

106. *Id.*

107. The "dissent" by Judge Leval would hold the corporations liable, and he attacks the majority's failure to distinguish between the criminal nature of the IMT, ICTY, and ICTR, and the civil nature of the ATS. Parts of the dissent will be addressed *infra* in Part III.A, but a brief outline of his argument is helpful here. Judge Leval argues that international criminal precedent refusing to hold corporations liable should have no bearing on corporate civil liability. *Id.* at 151 (Leval, J., concurring) (rejecting the majority's actor-type requirement but concurring in the result because the plaintiff had not shown that the defendant acted with purpose). He contends that because the law of nations takes no position on whether its norms may be enforced by civil actions for compensatory damages, U.S. courts should have the discretion to hear ATS cases brought against corporations. *Id.* at 176. However, for Leval's argument to be successful, it must overcome the majority's presumption that the law of nations must designate liability for a particular type of actor for violating a particular norm. Careful consideration of the IMT at Nuremburg shows not only that the IMT would not have been possible if the IMT followed the *Kiobel* majority (Leval notes this point), but also more forcefully demonstrates that Nuremburg, one of the pillars of international law, stands for the proposition that prior actor-type designation is not a necessary predicate for liability.

108. Citizen's United v. Fed. Election Comm'n, 130 S.Ct. 876 (2010).

109. *Kiobel*, 621 F.3d at 136–45.

the criminal tribunals and not as precedent in support of denying corporate liability under international law.[110]

As to the first point, even the majority pointed out that the "defining legal achievement of the Nuremberg trials is that they explicitly recognized *individual liability* for the violation of specific, universal, and obligatory norms of international human rights."[111] Before the Nuremberg Tribunal, state officials could not be held responsible for the crime of aggression or actions that amounted to human rights violations.[112] In helping set the parameters for the tribunal, Supreme Court Justice Robert H. Jackson, appointed by President Truman to head the Tribunal,[113] addressed this lack of precedent.[114] Jackson focused on the universal, judicial illegality of aggressive war-making and maintained that state officials should not be exempted from an obligation to refrain from such action. According to Jackson, the universality of the crimes prevented the absence of previous individual liability from providing an obstacle to prosecution.[115] He reasoned that international law must grow "through decisions reached from time to time and adapting settled principles to new situations."[116]

The Nazi defendants at Nuremberg actually raised the lack of precedent at trial by arguing that international law concerned the acts of states and provided no punishment for individual state officials.[117] The IMT expressly rejected their argument and held that individuals could be punished for violations of international law.[118] Although it is evident from the IMT that international law, and not individual states, determines its subjects,[119] Nuremberg supports the proposition that the foremost consideration of liability for breach of an international norm is the norm itself. Under Nuremberg, international law permits liability of an actor who violates that norm, even if the international law has never held an actor of that *type* liable.[120]

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110. This is largely the point of Judge Leval's dissent. However, the distinction between the two is moot as applied to corporate civil liability if the law of nations requires an actor-type liability norm. Thus, the first consideration of this argument is paramount.

111. *Id.* at 127.

112. TUSA & TUSA, *supra* note 1, at 73.

113. *Id.* at 67.

114. *Id.* at 73.

115. *See id.* (noting that Jackson, when considering whether state officials could be held liable for the crime of aggression, was "not worried about a lack of precedents or the absence of legislation").

116. *Id.*

117. United States v. Goering (The Nuremberg Trial), 6 F.R.D. 69, 110 (1946).

118. *Id.*

119. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 126 (2d Cir. 2010).

120. This is not to say that international law never prescribes liability for certain types of actors. Often the opposite is true. For instance, certain offenses of international law can only be perpetrated by states. The main point of this Part is to argue that an absence of precedent for holding a certain type of actor liable does not necessarily prevent liability. Because aiding and abetting human rights violations is a norm that clearly applies to private actors, the case for holding corporations liable is stronger.

The *Kiobel* majority's argument is irreconcilably inconsistent with the outcome of Nuremburg. The majority held that an actor is only liable under international law if international law universally accepts liability for that type of actor,[121] but admitted that the IMT, which applied international law, held individual war criminals liable in the absence of precedent for individual liability.[122] Moreover, the IMT was not simply the culmination of years of international case law and legislation to establish individual liability. Rather, it was an abrupt and near revolutionary landmark event in international law. Thus, in keeping with the majority's holding,[123] it cannot be the case that a single international court establishes an international legal norm with a single decision. If the majority's holding were correct, the IMT should not have punished state officials. As few recent scholars have questioned the legal legitimacy of the Nuremberg Tribunal, it seems more likely that the majority's rationale is misguided.

Therefore, with respect to corporate civil liability under international law, Judge Leval's dissent in *Kiobel* aligns itself more closely to the principles of the IMT. Judge Leval argued: "The law of nations sets worldwide norm of conduct, prohibiting certain universally condemned, heinous acts. That body of law, however, takes no position on whether its norms may be enforced by civil actions for compensatory damages."[124] Indeed, Nuremberg illustrates how corporate liability is possible. Because no actor-type precedent is necessary, the non-position of international law with regard to liability for a type of actor does not prevent that actor from being liable.[125] Thus, the IMT did not "accept the paradox that legal responsibility should be least where the power is the greatest."[126]

Secondly, although international law may permit liability for a type of actor without precedent for violating a universal norm, the explicit refusal of international law to recognize such liability may preclude liability based solely on international law. However, such substantial differences exist between civil and corporate liability that one must explore whether the purposes and elements of each liability are sufficiently similar to infer that corporations cannot be held civilly liable under international law from the fact that international tribunals have refused to hold them criminally liable. The majority used the IMT's refusal to criminally prosecute corporations precisely in this way—as support for corporate civil non-liability under the ATS. However, the link between the two is too attenuated to provide for the inference.

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121. *Kiobel*, 621 F.3d at 130.

122. *Id.* at 126–27.

123. *See id.* (arguing that the type of liability must be a universally accepted norm of the civilized world). This precludes the majority from arguing that an extraordinary case, such as Nuremberg, can establish a norm of liability. After all, there was no precedent before Nuremberg, so it is impossible that individual liability before Nuremberg was a universal and specific accepted norm.

124. *Id.* at 153 (Leval, J., concurring).

125. This is contrary to the majority's opinion, which requires universal acceptance of liability for a certain type of actor for the actor to be liable.

126. *See* TUSA & TUSA, *supra* note 1, at 73.

Justice Leval's dissent is perhaps the best exposition of the importance of distinguishing criminal and civil liability under international law. He argued that 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."[127] Moreover, criminal punishment does not achieve its principle objectives when it is imposed on an abstract entity that exists as a purely legal construct.[128] Criminal punishment, which seeks to inflict meaningful suffering upon persons who violate the law, has several objectives including:

- Give society the satisfaction of retribution of seeing that one who has broken its rules and has caused suffering is required in turn to endure suffering.
- Disable the offender from further criminal conduct during imprisonment.
- Change the criminal's conduct, bringing about repentance or at least, his realization that further criminal conduct will result in more severe punishment.
- Dissuade others similarly situated from criminal conduct.[129]

Judge Leval correctly concluded that criminal punishment realizes none of these objectives when its target is a corporation.[130] For this reason, the IMT sought to punish corporate executives and not corporations.[131] The majority cited the non-prosecution of I.G. Farben as a support for its opinion, but the case further underscores the inapplicability of criminal penalties for corporations.[132] 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.[133]

On the other hand, the principal purpose of civil tort liability is to compensate victims of illegal conduct for the harms inflicted on them and

127. *Kiobel*, 621 F.3d at 151 (Leval, J., concurring).

128. *Id.* at 168.

129. *Id.* at 167 (summarizing *Prosecutor v. Kayishema & Ruzindana,* Case No. ICTR-95-1-T, Sentence, ¶ 2 (June 1, 2001)).

130. *Id.* at 168. Leval is certainly right if the criminal punishment is imprisonment, for the nature of a corporation makes this type of punishment impossible. The other criminal alternative would be to impose fines for criminal violations. The problem on the international level would be the recipient. It makes little sense for a corporation to pay the international community as a whole, or the government of the place of the tort—especially in ATS cases where the government is often complicit. The logical and fair conclusion would be to pay the victims to make them whole, which is essentially the function of civil liability.

131. United States v. Krauch (*The IG Farben Trial*), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1080, 1152 (1952) [hereinafter *The IG Farben Trial*].

132. *Kiobel*, 621 F.3d at 135 (quoting *The IG Farben Trial*, *supra* note 131, at 1152, which noted "the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings").

133. United States v. Goering (*The Nuremberg Trial*), 6 F.R.D. 69, 110 (1946). In its proper context, a refusal to limit international law to sovereign states should be read to mean that abstract entities should not be *criminally* liable; it does not follow that abstract entities should not be *civilly* liable.

to restore them to what is rightfully theirs.[134] Unlike the gap between criminal punishment objectives and corporate violators, holding corporations, which earn substantial amounts of gain from these violations, civilly liable would forward the objective of civil liability. International law distinguishes between civil and corporate liability,[135] and thus, a ruling on one type of liability should not be treated as conclusive and binding to the other.[136] Therefore, because the fundamental question of the Nuremberg and subsequent tribunals was that of individual moral responsibility,[137] the decisions to exclude corporations from criminal liability should not influence the possibility of corporate civil liability under international law.

Judge Leval further argued that the distinction is meaningful because there is "an absence of precedent for the majority's rule" that actor-type liability is always required under international law, and, therefore, that courts should have discretion to hear cases against corporations.[138] Because Nuremberg required no such actor-type norm, it actually exists as significant precedent *against* the majority view. Judge Leval's line of reasoning is deficient because it relies on the mere non-existence of precedent denying civil corporate liability under international law to infer permissibility.

Because Nuremberg, a generally accepted and even revered development in international law, stands for the proposition that actor-type precedent is unnecessary, Judge Leval's inference may be avoided. While Judge Leval contends that no precedent exists for the majority's requirement, Nuremburg goes further in demonstrating that such a requirement is misguided. Because the IMT held individuals liable without precedent, it follows that corporations could be held liable without precedent for violating customary international legal norms.[139] Thus, Nuremberg, as a concrete precedent for the non-essentiality of an international law norm for actor-type liability, strengthens the foundation of Leval's civil/corporate distinction and illuminates the possibility of corporate liability under the ATS.

B. *Kiobel* Departs from Second Circuit and Supreme Court Precedent

Although the Nuremberg precedent demonstrates that international law need not specifically designate liability for a certain type of actor before holding the actor liable for a violation of its norms, the absence of

134. *Kiobel*, 621 F.3d at 169 (Leval, J., concurring) (referencing André Tunc, *Preliminary Remarks*, *in* 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3, 96 (André Tunc ed., 1983).

135. *Id.*

136. In addition to the difference in aims of civil and criminal law, application of one country's criminal law to acts that occurred outside its borders is often viewed as more intrusive. *See* RESTATEMENT, *supra* note 82, § 403 cmt. 8 (1987) ("It is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity, and only upon strong justification.").

137. *See* TUSA & TUSA, *supra* note 1, at 155.

138. *Kiobel*, 621 F.3d at 176 (Leval, J., concurring).

139. That is to say that Nuremberg precedent makes prosecution permissible. It bridges the gap of Leval's inference.

explicit international law defining the rights and obligations of corporations under international law is unhelpful to the plaintiffs. Nevertheless, this section will offer support for corporate liability, not because of actual international legal precedent for corporate liability, but rather that international law permits liability for those who violate its norm and that U.S. case law weighs in favor of doing so.

The Second Circuit has explicitly recognized the substantial interest of the United States to hear human rights cases.[140] The *Khulumani* and *Talisman Energy* cases lay the foundation for corporate civil liability as a way to forward that interest. As described above, *Khulumani* held that aiding and abetting human rights violations was an actionable offense under the ATS.[141] While the *Kiobel* majority argued its decision comports with *Khulumani*,[142] it erroneously narrows the focus of Judge Katzmann's concurrence in *Khulumani*, which, according to Judge Katzmann, presented the question of whether the law of nations would "recognize the defendants' responsibility for that violation."[143] In its context, this quote should be read to consider whether international law extends liability to aiders and abettors, and not the *type* of aider and abettor.[144] Because Judge Katzmann stated that international law permits "independent judicial recognition of actionable international norms,"[145] it is clear that he examined the international norm of aiding and abetting liability, and not that norm *as applied to* states, individuals, or corporations.[146] The majority improperly uses international distinctions between abettors and principle actors on the one hand and states and private actors on the other to conclude that

140. *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100 (2d Cir. 2000) ("[T]he district court did not accord proper significance to a choice of forum by lawful U.S. resident plaintiffs or to the policy interest implicit in our federal statutory law in providing a forum for adjudication of claims of violations of the law of nations."). It should be noted, however, that the plaintiffs in *Wiwa* were American citizens. The court also afforded substantial deference to the plaintiff's choice of forum. *See id.* at 101.

141. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 270 (2d Cir. 2007).

142. *Kiobel*, 621 F.3d at 129.

143. *Khulumani*, 504 F.3d at 269 (Katzmann, J., concurring).

144. *Id.* at 277. Judge Katzmann found "no source of international law that recognizes liability for aiding and abetting a violation of international law, but would not authorize the imposition of such liability on *a party* who acts with the purpose of facilitating that violation (provided, of course, that the *actus reus* requirement is also satisfied)." *Id.* (emphasis added).

145. *Id.* at 269 (Katzmann, J., concurring).

146. The *Kiobel* majority similarly misinterpreted Justice Breyer's reference to *Sosa*'s footnote 20, which reads: "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. *Compare Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), *with Kadic v. Karādzíc*, 70 F.3d 232, 239–41 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law)." Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004). This footnote focuses on the distinction between state and private actors. The true import of this statement is that if international law recognizes a norm of conduct for private actors, the norm does not distinguish between the type of private actor.

the international norm in question necessarily distinguishes between types of private actors for allowing civil liability.

Moreover, while *Talisman Energy* is most famous for setting the *mens rea* standard for aiding and abetting at purpose,[147] the majority's reasoning also implied the possibility of corporate liability under the ATS. Instead of simply holding that corporations could not be liable under the ATS and discharging the need to establish a mental state, the *Talisman Energy* court established the mental state and then considered if the defendant corporation *actually* acted with purpose.[148] The majority analyzed four actions undertaken by the defendant and concluded that because the actions could have had "benign and constructive" objectives, did not amount to "substantial assistance," or were not supported by the evidence, the plaintiffs could not show that the defendant acted with purpose.[149] In asserting that mere complicity without showing a purpose is "not enough," the majority's reasoning implies that perhaps the plaintiff's production of direct and incontrovertible evidence of the defendant's purposeful assistance in human rights violations would be "enough" for the court to hold the defendant liable under the ATS.[150]

Additionally, American law currently enables corporations to do nearly everything that natural persons can do and imposes similar obligations.[151] While the *Kiobel* majority seeks to distinguish between corporations and individuals as private legal actors, recent case law suggests a closing gap between the two under American law. For instance, the Supreme Court, in *Citizens United v. Federal Election Commission*,[152] held that political speech does not lose its First Amendment protections simply because its speaker is a corporation and not a natural person.[153] Most importantly, the Court looked at reasons offered in precedent for distinguishing corporations from individuals for First Amendment purposes[154] and expressly rejected these reasons as insufficient to justify blocking one type's political speech but not the other's.[155] While *Citizens United* does not discuss international law, the Court's reasoning demonstrates that because corporations and individuals share fundamental rights, they also share fundamental obligations.

147. Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244, 259 (2d Cir. 2009).

148. *Id.* at 260.

149. *Id.* at 262–63.

150. *Id.* at 263.

151. Jose E. Alvarez, *Are Corporations "Subjects" of International Law?* 4 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Note Series, Working Note No. 10-77, 2010), *available at* http://ssrn.com/abstract=1703465 (noting that corporations "can sue and be sued, be taxed, own property, enjoy constitutional protections, contract, and be criminally prosecuted").

152. 130 S.Ct. 876 (2010).

153. *Id.* at 900.

154. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–59 (1990) (noting that state law affords to corporations "special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets").

155. *Citizens United*, 130 S.Ct. 876, 905 (2010).

International law imposes liability on private actors, and, under the Second Circuit ATS precedent and the *Citizens United* schema, which blend the rights and duties of private individuals and private corporations, it is no stretch to hold private American corporations liable for violating the law of nations. Corporations clearly benefit from international law, and international law can provide for international legal obligations for corporations.[156] Additionally, the amount of wealth within corporations and the amount of damage they can inflict makes individual liability of corporate decision makers undesirable.[157] Therefore, the outcome most consistent with the goals of international law and the framework of the ATS and American corporate law would be for U.S. courts to hold that at least *some* corporations can be held liable under the ATS.

C. *Kiobel* Conflicts with the Rule-of-Law Principle that No Entity Benefiting from the Protection of the Law Should Stand Outside of the Law

In addition to precedential judicial support, rule-of-law principles also favor allowing corporate liability for violations of customary international law. While rule-of-law principles do not create the content of the law of nations, they are highly relevant to the body of international law as guiding principles due to their breadth and modern usage. As one scholar grudgingly mused, "one cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles."[158] Although scholars have primarily analyzed the rule of law's capacity to restrict governmental action and facilitate democracy and free markets, one of the rule of law's fundamental tenets—that no legal entity should stand outside the law—undeniably applies to corporate aiding and abetting. This principle, developed and promulgated by legal philosophers, has been echoed in international tribunals.[159]

The rule of law, defined by Friedrich Hayek,[160] means "that the government in all its actions is bound by rules fixed and announced beforehand."[161] Hayek believed that a government bound by rules would "make it possible to foresee with fair certainty how the authority will use its coercive powers."[162] Hayek warns that a law that is either too weak to prevent

156. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 449 (2001).

157. For a summary of arguments forwarding the inadequacy of individual liability, see *id.* at 473–75.

158. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 95 (1998).

159. *See* TUSA & TUSA, *supra* note 1, at 73 (Justice Jackson quoting Lord Chief Justice Coke's rebuke to James I: "A King is still under God and the law.").

160. Hayek was a staunch proponent of the free market system. Thus, he viewed the rule of law as a means to promote the free market, and this often meant limiting governmental influence where possible. To put it simply, "Hayek regards the rule of law as a system that articulates a free market economy." Alvaro Santos, *The World Bank's Uses of the 'Rule of Law' Promise in Economic Development*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT 255, 263 (Alvaro Santos & David Trubek eds., 2006).

161. FRIEDRICH HAYEK, THE ROAD TO SERFDOM 72 (2007).

162. *Id.*

arbitrary government action or gives the government too much free reign is undesirable because the government will act in its own interest or improperly balance the interests of others when possible.[163] In contrast to the rule of law, such an "arbitrary government"[164] contravenes free market principles because it makes it impossible to foresee with certainty how the government will exercise its powers and prevents individuals from making economic plans based on that certainty.[165] Hayek's example of the arbitrary government demonstrates how the purpose of the rule of law becomes frustrated when important actors can escape the law's reach.

In a similar vein,[166] legal philosopher Joseph Raz, focusing more on the qualities and mechanisms of the rules,[167] saw the rule of law as a means to protect personal autonomy.[168] Raz notes that "observance of the rule of the law is necessary if the law is to respect human dignity."[169] Therefore, a deliberate disregard for the rule of law, such as the actions of Hayek's arbitrary government, violates human dignity because it unreasonably impinges on their right to control the future.[170] Raz's conception of the rule of law supports the proposition that action in violation of the rule of law without consequences frustrates its function. Finally, Raz postulates that "if the law is to be obeyed, *it must be capable of guiding the behavior of its subjects*."[171] It is equally true that if the law does not guide the behavior of its subjects, it is not being obeyed.

According to the Second Circuit, aiding and abetting human rights abuses violates international law norms.[172] This norm has two purposes. First, it seeks to protect all human beings from such violations. Second, it seeks to punish those who commit the violations. An absence of corporate liability for violations prevents fulfillment of both purposes. Like an arbitrary government stifles free market and individual autonomy, unchecked corporate freedom frustrates a norm that is clearly realized by the Second Circuit as fundamental to international customary law.[173]

Moreover, the importance of the aiding-and-abetting norm's preventative purpose increases with the amount of power and influence that the external actor has in effectuating the outcome the norm aims to prevent. For instance, Hayek recognizes that the more the government exercises its arbitrary powers, the less the individual is able to make accurately calculated economic plans.[174] The *Kiobel* majority explicitly identified states

163. *Id.* at 74.
164. *Id.* at 73.
165. *Id.* at 72–73.
166. With respect to the idea that none of the rule of law's subjects should escape its reach.
167. *See* Santos, *supra* note 160, at 260.
168. JOSEPH RAZ, THE AUTHORITY OF THE LAW: ESSAYS ON LAW AND MORALITY 221 (1979).
169. *Id.*
170. *Id.*
171. *Id.* at 214.
172. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 269 (2d Cir. 2007).
173. *Id.* at 270.
174. *See* HAYEK, *supra* note 161, at 73.

and individuals as subjects that can be held liable for violations of the law of nations,[175] but corporations often exert more control over human rights victims than governments.[176] This is certainly the case in *Kiobel*, where SPDC, among others, allegedly ravaged the Ogoniland and contaminated its rivers in a quest for oil, but provided negligible benefits to its inhabitants in return.[177] Therefore, the effect of the *Kiobel* ruling is to uphold a fundamental, universally accepted norm of conduct, but to then exclude actors who have the capacity to violate the norm to the greatest degree and in the most egregious manners. Corporations earn profits by actions the norm seeks to prohibit and can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.[178] Such violations are both contrary to the basic tenets of the rule of law and to the purpose of the particular norm in question.

IV. Problems Raised by the Failure of the *Kiobel* Reasoning and the Allowance of ATS Corporate Cases

A. Corporate Liability Raises Issues Concerning Both Procedural Inefficiency and Foreign Legal Systems

Contrary to the reasoning of the *Kiobel* majority, corporations can be held liable for aiding and abetting human rights violations without a precedent norm of corporate liability for such violations. Nuremberg shows that corporate civil liability under the ATS coheres to international law, and corporate liability is the logical consequence of the *Khulumani* and *Talisman Energy* holdings. Nevertheless, extension of ATS liability past individuals raises several serious issues. Due to corporations' often significant financial resources and domestic influence, corporate regulation is more likely to affect a greater number of people, policies, and governments than individual liability. Because *Kiobel* should not prevent corporate ATS liability, the following problems could arise:[179]

175. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 118 (2d Cir. 2010).

176. *See* Ratner, *supra* note 156, at 461 (noting that "trends in modern international affairs confirm that corporations may have as much or more power over individuals as governments").

177. *See* HRW REPORT, *supra* note 3.

178. *Kiobel*, 621 F.3d at 150 (Leval, J., concurring).

179. This Note focuses on additional problems of hearing corporate cases under the ATS. It largely ignores other problems inherent in ATS litigation in general. For instance, the requirement of exhaustion demanded by many U.S. courts mandates that the courts consider the competency of foreign courts, which undermines comity. *See* PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc., 138 F.3d. 65, 73 (2d Cir. 1998) ("considerations of comity [should] preclude a court from adversely judging the quality of a foreign justice system"); *see also* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2008) (holding that ATS cases are properly considered for exhaustion). This risk to comity is present in all ATS cases. Hearing corporate cases would only affect this risk to the extent that allowing corporate ATS cases would increase the number of times federal courts would evaluate foreign justice systems. Additionally, this list is not exhaustive.

(1) **International Forum Shopping and Congestion of U.S. Courts.** As noted in *Kiobel*, the Alien Tort Statute is a jurisdictional provision unlike any other in American law, and of a kind apparently unknown to any other legal system in the world in that it is a statutory grant of universal jurisdiction.[180] A new capacity to sue corporations combined with no ceiling on recovery would likely further incentivize plaintiffs to bring suits in the United States when some should be properly brought elsewhere. Because the number of ATS claims would likely increase, a risk of court congestion would arise.[181]

(2) **Absence of Notice for the Defendant.** Because the Dutch, Nigerian, and British defendants in *Kiobel* operated in Nigeria, they likely presumed Nigerian law would govern their actions. To hold similarly situated defendants liable for a crime yet to be recognized by international law as applicable to corporations would raise due process issues of notice.[182]

(3) **Procedural Inefficiency Due to the Availability and Location of Evidence.** The majority of the evidence presented and of the witnesses in *Kiobel* were located outside of the United States. For example, while some eyewitnesses have been exiled to the United States,[183] others, including Nigerian soldiers or defense witnesses, likely remain in Nigeria. Similarly, corporate records of communication with the Nigerian government will likely be found either in Nigeria or the place of incorporation of the defendant. Therefore, in *Kiobel*-like cases, the U.S. legal system will often be no better than the third-best option from a procedural efficiency standpoint.

(4) **Undue Influence on Extraterritorial Legal Systems, Markets, and Commerce (Territoriality).** Even though U.S. courts would act under the ATS, the principles of sovereignty underlying international law do not disappear in cases of universal jurisdiction.[184] Holding Dutch and British corporations (enterprises in third-states[185]) liable for an offense with no connection to the U.S. could directly affect labor markets, international trade, and stock value without the United States having a substantial connection to the controversy. In addition, while regulation could raise corporations' standard of care, it may also deflect foreign direct investment by making corporations more reluctant to invest in developing countries with possible human rights problems.

(5) **International Political Backlash/Undue Influence on Foreign Relations.** Despite the universality of the norms allegedly violated by the

180. *Kiobel*, 621 F.3d at 115.

181. Although recent scholarship has shown that human rights victims have been relying less on the Alien Tort Statute to bring claims, if corporate liability became a possibility under the ATS, an increase in ATS suits against corporations would be the most likely result. *See* Jonathan Drimmer, *Jonathan Drimmer on Kiobel v. Royal Dutch Shell and the Alien Tort Statute*, 2010 EMERGING ISSUES 5442, Dec. 10, 2010, at 4.

182. While this risk would be substantially reduced once precedent is clearly determined, the notice issue is a real concern present in expanding liability.

183. *Kiobel*, 621 F.3d at 123.

184. *See, e.g.*, Attorney-General of the Gov't of Israel v. Eichmann, 36 I.L.R. 5, ¶ 44 (Dist. Ct. Jerusalem 1961) (*reprinted* in relevant part, 56 AM. J. INT'L L. 805 (1962)) (considering how violations to Argentina's sovereignty could affect its application of universal jurisdiction).

185. These are states that are neither the United States nor the place where the tort occurred.

defendant corporations, the states where the defendants are incorporated may view an ATS claim as infringing on their territorial sovereignty. This view could cause negative feelings towards the United States and thus hamstring the U.S. executive branch in negotiating with the Dutch and British governments in areas of foreign relations. Similarly, such litigation could also unduly influence Dutch and British foreign policy with Nigeria.

(6) **Reciprocal Effect—Foreign Courts Holding U.S. Corporations Liable for Violations Occurring Outside the Territory of the Foreign Sovereignty.** Because U.S. courts would hold foreign corporations liable for violating the law of nations, other countries may uphold jurisdiction when plaintiffs in those states bring suits against United States corporations. This is especially undesirable when the forum state has no connection with the U.S. corporation or its conduct.

The first three problems mostly concern the smooth functioning of the U.S. legal system and procedural fairness, while the latter three concern foreign relations and comity. Although corporate liability is possible under the ATS, U.S. courts should not hear cases when U.S. litigation would unreasonably implicate these concerns.

Cases where the defendant is an American corporation (as opposed to a corporate entity incorporated in a foreign country) present less risk of these problems. While forum shopping still presents risk, using the defendant's place of incorporation as the forum makes sense, and mitigates the procedural inefficiencies. After precedent is established, these cases present little risk of notice due process violations, and likely do not directly affect the conduct of any foreign corporations or commerce. After all, the idea that U.S. law can extend to American corporations conducting business abroad is nothing new.[186] Corporate liability under the ATS forwards the protective principle of the custom against aiding and abetting, and does so reasonably—within the confines of international practice and domestic law.

Contrarily, cases with foreign defendants and foreign corporations, like in *Kiobel*, present all of these concerns. The U.S. courts should not hear them easily, and this Note will now shift focus to how to properly limit jurisdiction in cases involving only foreign parties. The foreign policy concerns implicated in corporate cases should compel U.S. courts to decline jurisdiction where the defendant lacks any real connection to the forum and the courts of another state, tied to the controversy, can afford the plaintiff an adequate opportunity to have his case heard. Although the *Kiobel* court relied on an interpretation of customary international law to dismiss the suit against Royal Dutch,[187] U.S. courts have used various procedural mechanisms to avoid complicated corporate aiding-and-abetting

186. *See, e.g.*, Foreign Corrupt Practices Act of 1977, Pub. L. No. 95–213, 91 Stat. 1494 (2010) (criminalizing corrupt actions, such as giving or receiving bribes, undertaken by U.S. citizens or corporations even if the conduct occurs abroad).

187. *Kiobel*, 621 F.3d at 149.

cases.[188] However, no currently available mechanism adequately addresses these foreign relations concerns, particularly with respect to the third state involved.

B. The Currently Used Mechanisms to Address the Problems Raised by Corporate ATS Cases

In avoiding corporate cases in the past, U.S. courts have considered the following theories: an actor-type predicate norm under customary international law,[189] *forum non conveniens*,[190] prudential exhaustion,[191] act of state,[192] and political question.[193] Because this section aims solely to demonstrate that these doctrines do not adequately consider the comity and territoriality issues raised by corporate ATS cases, a detailed account of the history and requirements of each doctrine is beyond the scope of this Note. A general description of these doctrines should sufficiently demonstrate that, with respect to *Kiobel*-like cases, these doctrines do not adequately consider the interests of the third-state involved.

The doctrines of *forum non conveniens* and exhaustion act as procedural alternatives for the actor-type norm erroneously required by the *Kiobel* majority.[194] *Forum non conveniens* allows U.S. courts to dismiss cases where the ends of justice strongly indicate that the case should be tried elsewhere (based on public and private interest factors).[195] Although *forum non conveniens* analysis considers problems (1), (2), and (3), it does not consider issues of international comity or foreign relations.[196] Additionally, some scholars have argued that the doctrine itself lacks consistency with the goals of the ATS.[197] The other procedural doctrine, prudential exhaustion, stands for the proposition that U.S. courts should only hear cases where a plaintiff has demonstrated that the courts of his home country are incapable of providing a fair hearing or reasonable recovery.[198] Third-state interests as outlined in problem (4) clearly fall outside the scope of prudential exhaustion, which considers only the relationship between the United States and the country where the tort transpired.

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188. *See, e.g.*, Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2008) (remanding to the district court to answer whether the plaintiff had shown that he had exhausted local remedies for relief); Adamu v. Pfizer, 399 F. Supp. 2d 495, 506 (S.D.N.Y. 2005) (holding that the factors of the case clearly weighed in favor of dismissing the plaintiffs claim on the grounds of *forum non conveniens*).

189. *Kiobel*, 621 F.3d at 149.

190. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d. 163 (2d Cir. 2009).

191. *See, e.g.*, Sarei v. Rio Tinto, PLC, 550 F.3d 822 (9th Cir. 2008).

192. *See, e.g.*, Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

193. *See, e.g.*, Sarei v. Rio Tinto, PLC, 456 F.3d 1069, (9th Cir. 2006).

194. For discussion of the actor-type predicate norm, see *supra* Part III.

195. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

196. *See* Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495, 505 (S.D.N.Y. 2005). When considering the *Gilbert* public interest factors, the court looked narrowly towards immediate local interests rather than the impact of litigation on territoriality and comity.

197. *See* Kee, *supra* note 56, at 522 (noting that because the ATS requires that the tort occur in a foreign country, all ATS cases will a priori fall within *forum non conveniens*).

198. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

Similarly, the act-of-state and political-question doctrines do not address problem (4) and, thus, likely do not apply. The act-of-state doctrine forbids U.S. courts from inquiring into the public acts of a recognized sovereign power within its own territory.[199] This doctrine does not apply to *Kiobel*-like cases, because although the acts of the corporate defendants have some ties to foreign sovereigns, the corporations in question do not act under the color of government action.[200] Finally, the political-question doctrine renders controversies nonjusticiable if they revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the executive branch.[201] Although the political-question doctrine addresses foreign relations concerns and reciprocity—problems (5) and (6)—it looks internally to constitutional power structure rather than to the judicial and commercial interests of third-states. The doctrine, which has been criticized as vague and unpredictable,[202] also likely does not apply to *Kiobel*-like cases because courts have ruled that similar controversies do not constitute political questions.[203]

Due to the specific function of these mechanisms, concerns of third-party state territoriality and comity fall outside of their individual scopes. If *Kiobel* is overturned or not followed, U.S. courts will need to address the changing landscape of ATS litigation by either adapting existing jurisdiction-limiting tests or developing new ones. Rather than relying on the *Kiobel* actor-type requirement and other mechanisms, courts should apply a reasonableness test grounded in the doctrine of international comity, which generally means deference to a foreign nation's legislative, executive, or judicial enactment.[204] Because corporate civil liability under interna-

199. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

200. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010) (noting that the defendants were charged with providing only assistance rather than acting under the control of the Nigerian government).

201. Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221, 230 (1986).

202. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 149 (5th ed. 2007) (noting that the factors relied upon by the court "seem useless in identifying what constitutes a political question"). *Compare* Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1206 (9th Cir. 2007) (holding that transnational corporate activity inciting a civil war did not constitute a political question even though the State Department asserted interest in the ATS case) *with* Hereros v. Deutsche Afrika-Linien Gmblt & Co., 232 Fed. Appx. 90, 95–96 (3d Cir. 2007) (holding that the issue of slave labor merited status as a political question because the judiciary was poorly equipped to address the issue).

203. *See* Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1100 (9th Cir. 2006). *Rio Tinto* presented a similar issue to *Kiobel.* In *Rio Tinto*, plaintiffs from Papua New Guinea alleged that a mining organization had aided the government in committing crimes against humanity and inciting a civil war. However, the Ninth Circuit held that the controversy did not present a political question. *Id.* So long as judicially manageable standards existed to resolve the controversy in *Kiobel*, the case would likely not constitute a non-justiciable political question. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (outlining, *inter alia*, such a requirement).

204. Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289, 342 (S.D.N.Y. 2009).

tional law presents a new recognition of liability, U.S. courts must proceed with caution.[205]

V. Development of the Reasonableness Test for ATS Jurisdiction Under the Umbrella of International Comity

A. Description of the Reasonableness Test

A more detailed and expansive reasonableness test for declining jurisdiction based on the Restatement of Foreign Relations Law of the United States § 403 could supplement the doctrines described above by considering the interests of all countries with contacts to the case.[206] Because § 403 applies to prescriptive jurisdiction[207] it can offer some guidance as to when federal courts should hear corporate ATS cases. The Restatement prohibits states from exercising prescriptive jurisdiction when exercising such jurisdiction would be unreasonable[208] and offers relevant factors to determine reasonableness.[209] Courts should consider these factors with respect to the facts of corporate ATS cases:

> (a) the link of the activity to . . . the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) [t]he importance of regulation to the regulating state, . . . and the degree to which the desirability of such regulation is generally accepted.
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal, or economic system;

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205. Sosa v. Alvarez-Machain, 542 U.S. 692, 727–28 (2004) (warning that "many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution").

206. Courts have only applied international comity in a handful of ATS cases. This is likely because cases could be dismissed for other reasons. However, when courts have applied the doctrine, application has been amorphous. *See Sarei v. Rio Tinto*, 456 F.3d 1069. This note examines how the doctrine should be applied, absent a conflict of laws requirement and with consideration of § 403. Should courts require a conflict of laws to exist, the § 403 test should still apply, but it should be seen as independent of the international comity doctrine.

207. Jurisdiction to prescribe means that a state may make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court. RESTATEMENT, *supra* note 82, § 401(a). ATS jurisdiction, based on violations of the law of nations, is best characterized as universal jurisdiction, which is a basis for prescriptive jurisdiction under the Restatement. *See id.* § 404.

208. *Id.* § 403(1).

209. *Id.* § 403(2).

> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.[210]

Because the ATS applies only to violations of the law of nations,[211] some of these factors, like § 403(2)(h), may become less relevant. However, application of the § 403 standard would address the comity concerns unaddressed by the procedural and doctrinal mechanisms. The Restatement also takes into account the potential undue influence on foreign commerce and impact on international political relations,[212] as well as a third state's interest in hearing the case.[213] Finally, by taking into account the interest of other countries, U.S. courts will also minimize the chance that foreign legal systems will arbitrarily hear cases against U.S. corporations when the corporation has no connection with the forum.

As a preliminary matter, courts should not consider the interests of states that do not provide an adequate alternative forum.[214] Therefore, in corporate ATS cases, so long a third state provided an adequate forum a U.S. court should dismiss if, when weighing the § 403 factors, it finds U.S. jurisdiction to be unreasonable.[215] In addition to the practical advantages of the reasonableness test, the Restatement has support in recent precedent. For instance, the Supreme Court has recognized the importance of the factors raised in § 403 when considering the appropriateness of the extraterritorial application of U.S. law.[216] The Second Circuit, in *Kiobel*, relied on the Restatement as an authority on international law.[217] Courts, in deciding whether to invoke international comity, frequently look to § 403 to decide whether it is reasonable to exercise prescriptive jurisdic-

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210. *Id.* These considerations are not exhaustive. *Id.* § 403 cmt. b.
211. Alien Tort Statute, 28 U.S.C. § 1350 (2006).
212. RESTATEMENT, *supra* note 82, § 403(2)(e).
213. *Id.* § 403(2)(g).
214. This is also a requirement of *forum non conenviens*. For a discussion of what constitutes an adequate alternative forum, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1982) (reasoning that a reduced amount of recovery does not make an alternative forum inadequate).
215. This Note aims primarily to point out that courts should consider § 403 factors when faced with jurisdictional questions. Section 403 contemplates that there may be variation in what courts find reasonable. While some courts may require that a true conflict of laws be present for a dismissal based on international comity, the foreign relations concerns implicated by corporate regulation suggest that the absence of a true conflict should not bar dismissal. In fact, deferring to foreign courts with similar laws that have a greater interest actually forwards the principle of *forum non conveniens*, which requires an adequate alternative forum where the plaintiff can have his or her case heard. Even though the conflict of laws problem implicates two different doctrines, it is somewhat paradoxical to hold that a case should not be dismissed when no alternative forum exists while also holding that a case should only be dismissed if the alternative forum's law conflicts with U.S. law to such a degree that the outcome of the case may be different.
216. *See, e.g.*, Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 542 U.S. 155, 164 (2004).
217. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 126 (2d Cir. 2010).

tion.[218] Therefore, application of a § 403 reasonableness test to ATS corporate cases would represent a natural extension of the international-comity doctrine.

B. Application of the Reasonableness Test to *Kiobel*

Under the facts of *Kiobel*, the exercise of jurisdictions by federal courts would likely be unreasonable. Section 403(2), factors (a) and (b) weigh strongly in favor of litigation in Nigeria, the Netherlands, or Great Britain.[219] The alleged tortious activity took place mostly in Nigeria and involved Dutch, Nigerian, and British citizens or corporations. Even though Royal Dutch has an American subsidiary, Shell Oil,[220] the United States has neither a link to the territory of the tortious activity nor to the actual parties involved. Because the United States lacks such a link, litigation in the United States would present practical obstacles to an expeditious trial.[221] While the United States has an interest in hearing cases that involve violations of the law of nations[222]—factor (c)[223]—the justified expectation of the parties would be frustrated by the application of the law of a forum that has little nexus with the controversy—factor (d).[224] Extraterritorial regulation by the United States of Royal Dutch would also have negative economic, comity, and political consequences warned against in Part V.A and raised as a consideration in § 403(2)(e).[225]

The Netherlands and Great Britain have a greater importance in regulating because regulation will impact their own corporations.[226] For example, under U.S. law, plaintiffs could receive so large a recovery against Shell[227] that the amount would offend the deliberate recoverable limit placed on suits by British courts. Thus, even if the plaintiff met his burden for exhaustion, the court should still dismiss the case to either the Netherlands or Great Britain, each of which have a substantially greater interest in corporate regulation. In this case, U.S. law should not displace British or Dutch law with respect to how the defendants would be punished if faced

218. Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1199 (C.D. Cal. 2002), *aff'd in part, vacated in part, rev'd in part*, Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007). The district court's ruling on international comity was upheld on appeal. *Id.* at 1211.

219. RESTATEMENT, *supra* note 82, § 403(2)(a), (b).

220. *See Who We Are*, SHELL OIL, http://www.shell.us/home/content/usa/aboutshell/who_we_are (last visited May 29, 2011) (stating that Shell Oil operates in the United States).

221. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). This concern is addressed by *forum non conveniens*, but it is offered to show that the § 403 test could consider procedural efficiency if necessary.

222. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100 (2d Cir. 2000).

223. RESTATEMENT, *supra* note 82, § 403(2)(c).

224. *Id.* § 403(2)(d).

225. Although the test does not take into account the impact of litigation on U.S. foreign relations (this concern is within the purview of the political question doctrine), such deference may have the same outcome with respect to the preservation of foreign relations that the political question doctrine aims to realize.

226. RESTATEMENT, *supra* note 82, § 403(2)(g).

227. This entity is the British corporation named as a defendant in *Kiobel*. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010).

with an unfavorable ruling.[228] Such a result would largely avoid negative impacts on foreign relations or a reciprocal effect on U.S. corporations. Although § 403 analysis would not preclude dismissal on other grounds, it would act as the only safeguard to comity and international relations when dismissal on other currently available grounds is unjustified.

VI. Assessing Two Potential Problems with the § 403 Reasonableness Test

While implementing a § 403 reasonableness test for exercising jurisdiction in ATS cases against corporations would properly contemplate the possible impact of retained jurisdiction on foreign relations, the test raises at least two concerns. First, application of § 403 in *Kiobel*-like cases will almost always result in dismissal, and thus will leave the plaintiff with no recourse while potentially causing choice of law problems abroad. Second, the § 403 analysis, as a discretionary test, increases court flexibility and thereby risks inconsistent or uneven legal application. This section will address these issues.

A. Section 403 Reasonableness Will Often Yield Dismissal in Cases Involving Third States and No American Defendants

In *Kiobel*-like cases with foreign corporate defendants, § 403 balancing will often yield dismissals because factors (a) and (b) focus on contacts. If the courts of the plaintiff's home state cannot afford him a fair opportunity to hear his case and U.S. courts dismiss his case to the courts of the place of incorporation of the defendant, the plaintiff's recovery then becomes contingent upon the law of the transferee court. Because many countries lack statutory enactments that grant jurisdiction to hear cases that allege violations of international law,[229] plaintiffs may have no choice but to allege breaches of the transferee forum's domestic law. This change could result in the transferee court having no jurisdiction prescribed by domestic law. Moreover, even if the transferee court found that it had jurisdiction to hear the case, application of domestic choice of law could result in the tangled mess of a European court applying Nigerian tort law to actions that transpired in Nigeria.[230]

Nevertheless, deference to foreign legal systems should be the foremost jurisdictional consideration, especially when the cases do not involve American defendants. The general principle of territoriality underlying

228. International law allows leeway for countries to decide how to punish violators of international law. Khulumani v. Barclay Nat'l. Bank Ltd., 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J., concurring).

229. *Kiobel*, 621 F.3d at 115.

230. *See* Swiss Federal Code on Private International Law, art. 133 (2007), translated by Umbricht Attorneys, Zurich (Switzerland), *available at* http://www.umbricht.ch/pdf/SwissPIL.pdf ("If the tortfeasor and the injured party do not have their place of habitual residence in the same State, the claims shall be governed by the law of the State in which the tort was committed.").

§ 403 supports such a conclusion.[231] Thus, dismissing nearly all cases involving only foreign parties where an adequate alternative forum exists is likely the result that balances principles of comity with the rights of the plaintiff. Because under international law each nation should deal with violators as it sees fit,[232] the United States should not police corporate action where other nations are better positioned to do so. Additionally, because the § 403 test would allow U.S. courts to hear ATS cases where a strong U.S. interest or other relevant contacts counterbalance the connection of corporate defendants to other sovereigns, not all cases would be dismissed. As such, the § 403 test presents a solution that favors the plaintiff more than the impossibility of corporate liability under *Kiobel*.[233] While the influence of territoriality and international relations on ATS jurisdictional decisions will likely come at the expense of some plaintiffs' recoveries, foreign interest should be a foremost consideration.[234]

Additionally, recent court decisions suggest that foreign courts have become more receptive to hearing complaints of plaintiffs who allege that corporations have violated their human rights.[235] Courts of Australia, England, Wales, and Canada have all heard such claims.[236] Thus, dismissal does not necessarily preclude recovery. Moreover, while a reasonableness test might frequently result in dismissals, it preserves the plaintiff's capacity to sue corporations under the ATS, and that ability acts as a powerful bargaining chip during settlement talks. For instance, despite several legal obstacles facing the Nigerian plaintiffs in *Wiwa*, they negotiated a settlement with Royal Dutch Shell for $15.5 million.[237] A recent multi-million dollar settlement between British Petroleum and Colombian farmers further demonstrates how such settlement power also extends to cases abroad.[238] Therefore, a test that dismisses cases when exercising jurisdiction would be unreasonable would strike a proper balance between foreign relations concerns and respect for the plaintiff's position.

B. Section 403 Balancing Risks Uneven and Unpredictable Application

In addition to possible unfairness to plaintiffs, § 403 analysis may present a source of confusion and inconsistent decisions by courts due to the

231. *See* RESTATEMENT, *supra* note 82, § 402 (laying out the concept of territoriality).
232. Khulumani v. Barclay Nat'l. Bank Ltd., 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J., concurring).
233. *Kiobel*, 621 F.3d at 149.
234. *See supra* Part IV.
235. *See* Drimmer, *supra* note 181, at 4 (noting that transnational tort cases against corporations are now being raised abroad).
236. *See id.* (citing *Ramirez v. Copper Mesa Mining Corp.*, CV09-37504 (Ont. Sup. Ct. filed March 3, 2009) (Canada); *Dagi v. The Broken Hill Proprietary Company Ltd., [1997] 1 V.R. 428* (Australia); *Lubbe v. Cape Plc., [2000] 4 All E.R. 268* (England); *Guerrero v. Monterrico Metals PLC*, [2009] EWHC 2475 (QB)).
237. Jim Lobe, *Saro-Wiwa Settlement Latest Vindication of 1789 Law*, INTER PRESS SERVICE, Jun. 9, 2009, *available at* http://ipsnews.net/news.asp?idnews=47156.
238. *See* Drimmer, *supra* note 181, at 4 (referencing *Pedro Emiro Florez Arroyo v. BP Petroleum (Colombia) Ltd.*, Particulars of Claim, Claim No. HQO8X00328 (High Court of Justice Dec. 1, 2008)).

discretion allowed by the Restatement. Although the reasonableness test has many factors, its application will often result in dismissal when the defendant is foreign and retained jurisdiction when the defendant is American. Having a rule (not based on reasonableness) that dismisses cases with foreign defendants would likely have the advantages of predictability, clarity, and consistency.[239]

While a sacrifice of some consistency is inevitable, a discretionary test better addresses the nature and magnitude of the concerns raised by transnational corporate aiding-and-abetting cases. The degree to which litigation in the United States forum legitimately affronts an interest of a foreign sovereign[240] can only be determined by weighing the interest of another country in connection with the controversy against the value to the United States of domestic litigation. The shortcoming of using a rule-based solution to determine ATS jurisdiction over corporations is most evident in ATS cases involving multiple corporate defendants. For instance, if one of the three defendants in *Kiobel* were American and had little role in the alleged tortious activity, it would make little sense to ignore the impact of litigation on the Dutch and British economies and U.S. relations with those countries for the sake of an easily determinable outcome. The comity concerns raised by extraterritorial application of U.S. law simply cannot be adequately addressed by a numerical calculus. Additionally, because many of the § 403 factors concern questions of nexus, most cases involving solely foreign parties would be dismissed unless there is a strong U.S. interest in the case. Thus, a § 403 reasonableness test for ATS jurisdiction over corporations would offer some degree of consistency. In preserving the plaintiff's right to sue while offering some predictability, the § 403 test cures a glaring omission of current doctrines with respect to the negative externalities possibly created by corporate ATS liability.

Conclusion

Contrary to the *Kiobel* holding, corporations can be held liable for aiding and abetting human rights violations under customary international law without a precedent norm of corporate liability for such violations. If the majority were correct, the IMT at Nuremberg, one of the pillars of international law, would have misinterpreted customary international law by prosecuting individuals. Thus, Nuremberg demonstrates that corporate civil liability under the ATS can cohere to international law, and corporate liability is the logical consequence of *Khulumani* and *Talisman Energy*, which implicitly recognize corporate liability so long as the defendant acts with purpose. Nevertheless, possible expansion of ATS liability to corporations would raise concerns ranging from procedural inefficiencies to the corrosion of comity and foreign relations. The severity and risk of these

239. *See* Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989) (noting that compared to discretionary tests, rules offer the advantages of predictability and consistency).

240. Jota v. Texaco, Inc., 157 F.3d 153, 160 (2d Cir. 1998).

concerns magnify in cases like *Kiobel*, which lack U.S. parties on either side.

While procedural mechanisms such as *forum non conveniens* and exhaustion address the procedural efficiency issues, the problems of comity and foreign relations do not fall within the doctrines' scope. Although the political-question doctrine does address the latter concerns to some degree, it may not apply in some circumstances, like *Kiobel*, where the U.S. executive branch has not asserted an interest in the case and another country has a strong interest in having the controversy litigated in its own forum. Because the § 403 reasonableness test considers foreign relations interests and U.S. connections, U.S. courts should apply it to ATS cases involving corporations. Moreover, even if federal courts do follow *Kiobel*, the reasonableness test for international comity could still inform jurisdictional decisions in ATS cases involving foreign individuals as defendants when the controversy implicates a strong interest of another sovereign. Nevertheless, if human rights victims, like the Ogonis, acquire the capacity to sue corporations under the ATS, U.S. courts will need to carefully consider jurisdictional limits. Yet, such consideration represents the next step. The realization of relief must first begin with the possibility of relief. The International Military Tribunal at Nuremburg and Second Circuit precedent, at a very minimum, illuminate this possibility.