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How the Second Circuit Eviscerated the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum Co.

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By Scott Allbright*

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I. INTRODUCTION

The Court of Appeals for the Second Circuit is widely credited with resuscitating the 1789 Alien Tort Statute (“ATS”) in its landmark 1980 decision, *Filartiga v. Pena-Irala*. In *Kiobel v. Royal Dutch Petroleum Co.*, it addressed the liability of corporations for violations of customary international law and fundamentally altered decades of human rights litigation. Since *Filartiga*, the Second Circuit has been known for deciding ATS cases. The court entered into uncharted territory, though, as it attempted to deal with a claim made by a group of Nigerian plaintiffs who alleged that “Dutch, British, and Nigerian corporations engaged in oil exploration and production aided and abetted the Nigerian government in committing violations of the law of nations” so as to promote their exploratory efforts. In ultimately determining that corporate liability does not exist under the ATS, the majority misconstrued its own precedent and that of other circuits, the Supreme Court’s interpretation of the ATS in *Sosa*

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2 28 U.S.C. § 1350 (2010): “The District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The ATS is also referred to by the courts as the “Alien Tort Claims Act” (“ATCA”), they are used interchangeably in some opinions.

3 630 F.2d 876 (2d Cir. 1980).

4 (“*Kiobel*)” 621 F.3d 111 (2d Cir. 2010).

5 *See* Lori Delaney, *Flores v. Southern Peru Copper Corporation: The Second Circuit Fails to Set a Threshold for Corporate Alien Tort Liability*, 25 NW. J. INT’L L. & BUS. 205, 208 (2004); *see also* id. at 116. A representative sample of ATS cases decided by the Second Circuit include: *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Vietnam Ass’n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

6 *But see* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 261 n.12 (2d Cir. 2009) (assuming without deciding that corporations may be liable for violations of customary international law).

7 *Kiobel*, 621 F.3d 111, 117 (emphasis added).

8 *Id.* at 189-90 (Leval, J., concurring). It was said at one point that the defendants’ “smooth economic activities” could not continue without increased “ruthless military operations.” *Id.*

9 *Id.* at 148-49 (majority opinion).
v. Alvarez-Machain, the principles and goals of international law, scholarly commentary, and the earliest available interpretations of the ATS. Its decision should not be allowed to stand.

The ATS was enacted as part of the Judiciary Act of 1789. The panel quoted Judge Friendly who said that it is a “‘legal Lohengrin’-‘no one seems to know whence it came.’” Summarizing the court’s holding in Filartiga, the panel noted that the ATS supports jurisdiction for tort claims brought by aliens for violations of the law of nations or “customary international law.” It is clear that there is essentially no suggestion of any original legislative intent in its enactment. The Supreme Court has said that it was “enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time [of enactment].” Justice Souter, in Sosa, recognized that “the birth of the modern line of [ATS] cases [began] with Filartiga v. Pena-Irala.” The Filartiga decision has been credited with bringing the ATS back into relevance. The holding in Kiobel threatens the ATS as well as Filartiga’s very existence.

In Part II, this note will introduce and analyze other important ATS cases. First, it will examine the series of ATS cases decided by the Second Circuit, starting with Filartiga and culminating with its recent opinion in Presbyterian Church of Sudan v. Talisman Energy, Inc. This will be followed by a review of ATS cases decided in other circuits. Part II will also include

10 542 U.S. 692 (2004). Sosa was unanimous, but it drew a concurring opinion from Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) and one from Justice Breyer. Justice Scalia took issue with what he saw as a “reservation of discretionary power in the Federal Judiciary” in regards to the ATS. Id. at 739. Justice Breyer would add a “further consideration” to the Court’s ATS decision and ask “whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.” Id. at 761.

11 See, e.g., Kiobel. at 115-16.

12 Id. at 116 (quoting IIT v. Vencap, Inc., 519 F.2d 1001, 1015 (2d Cir. 1975)).

13 Id. at 116 n.3. (the court explained that the terms are synonymous (citing Flores v. S. Peru Copper Corp., 414 F. 3d 233, 237 (2d Cir. 2003) and The Estrella, 17 U.S. (Wheat.) 298, 307 (1819))).

14 See Gottridge & Galvin, supra note 1, at 89.


16 Id. at 724-725.

17 582 F.3d 244 (2d Cir. 2009), cert. denied, 131 S. Ct. 79 (2010).
an analysis of the Supreme Court’s decision in *Sosa v. Alvarez-Machain*, since it is the only case decided by the Court under the ATS.\(^\text{18}\) That portion will focus on the majority’s treatment of the ATS as well as highlight important points made by Justices Scalia and Breyer—all very important in fully dissecting *Kiobel*. Part III will provide an overview of the opinions in *Kiobel* to demonstrate the judges’ arguments and to introduce the most contentious issues. Part IV will analyze the majority and concurring opinions’ treatment of *Sosa* as well as their respective treatment of appellate precedent. Also in this section will be an analysis of both judges’ readings of customary international law and scholarly commentary, a very important issue in the case. The note will conclude with a critique of the *Kiobel* opinions, a look at the present state of the litigation, some thoughts on what *Kiobel* could mean to the future of ATS litigation, and a suggestion of Supreme Court review and recommendation of reversal.\(^\text{19}\)

II. DEVELOPING A CONTEXT: THE ALIEN TORT STATUTE IN THE COURTS

A. Adopting an Orphan: The Second Circuit and the ATS

1. Breaking New Ground

In *Filartiga v. Pena-Irala*, Paraguayan citizens brought suit against the Inspector General of the Paraguayan police for the torture and death of the son of one of the plaintiffs in alleged retaliation for the father’s political activities.\(^\text{20}\) The complaint was initially dismissed for lack of subject-matter jurisdiction.\(^\text{21}\) The panel held that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”\(^\text{22}\) Therefore, the ATS provided jurisdiction.

\(^{18}\) *Kiobel*, 621 F.3d at 117.

\(^{19}\) At this time, all rehearing attempts in the Second Circuit have been exhausted. See discussion *infra* Parts V.A.2-3.

\(^{20}\) *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

\(^{21}\) *Id.*

\(^{22}\) *Id.*
The defendants challenged the statute’s constitutionality, but the court rejoined that Congress had the power to enact it because anything related to the law of nations was within federal common law powers. The court cited Blackstone for historical reinforcement. Concluding that the dismissed claims had to be reversed, the court eloquently opined that “[i]n the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture,” and that the holding “is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.” With that, the resuscitation of the ATS began.

2. Allowing ATS Jurisdiction Over Non-State Actors for Genocide

In *Kadic v. Karadzic*, the plaintiffs were ethnic minorities from the former Yugoslavia allegedly subjected to “rape, forced prostitution, forced impregnation, torture, and summary execution” as part of a “genocidal campaign conducted in the course of the Bosnian civil war” by the defendant, the president of a self-proclaimed republic. The trial court dismissed the complaints for lack of subject-matter jurisdiction. On appeal, the plaintiffs asserted jurisdiction under the ATS. The defendant argued that the ATS did not cover non-state actors, and that he, as the leader of merely a “self-proclaimed” state, was technically a non-state actor. The unanimous panel disagreed with this assessment of the ATS, and it held that violations of the law

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23 Id. at 885.
24 Id. at 886.
25 Id. at 890.
26 70 F.3d 232, 236 (2d Cir. 1995).
27 Id. at 236.
28 Id. at 236-37.
29 Id. at 236.
30 Id. at 238.
31 Id. at 239.
of nations are violations independent of state or non-state actor status. The court allowed ATS jurisdiction over non-state actors and reversed the dismissal of the complaint.

3. ATS Suits Against Corporations

_Khulumani v. Barclay Nat. Bank Ltd._ could have preempted _Kiobel_, but the defendant did not raise the defense of corporate liability, and the court did not decide it. The complaint was brought by South Africans who alleged that a corporate defendant acted in concert with the South African government to sustain apartheid. The trial court dismissed the complaints for lack of subject-matter. The panel vacated the order. In a concurrence cited often in _Kiobel_, Judge Katzmann noted that he felt that the trial court erred by “conflating the jurisdictional and cause of action analyses required by the ATCA” and by disallowing a claim for aiding and abetting apartheid under international law. He also noted that the circuit seemed to consistently view individual and corporate liability in the same light. Another judge concurred in the dismissal, but argued that corporations should not be liable under the ATS. Nevertheless, the suit proceeded- the corporate liability defense neither argued nor decided.

4. Assuming Corporate Liability Under the Law of Nations

The plaintiffs in _Presbyterian Church of Sudan v. Talisman Energy, Inc._ were Sudanese citizens who alleged that the defendant aided and abetted human rights abuses by the Sudanese

32 Id.
33 Id. at 251.
34 504 F.3d 254 (2d Cir. 2007) (per curiam).
35 Id. at 282-83 (Katzmann, J., concurring) (since the defendants did not raise the issue, the court did not decide whether corporations are liable under customary international law).
36 Id. at 258.
37 Id. at 259.
38 Id. at 260 (2-to-1 opinion).
39 Id. at 264 (Katzmann, J., concurring) (This opinion is frequently noted in _Kiobel_ by both the majority and concurrence- it will be discussed thoroughly later.).
40 Id. at 282-83.
41 Id. at 292 (Hall, J., concurring in part, dissenting in part).
42 582 F.3d 244 (2d Cir. 2009), _cert. denied_, 131 S. Ct. 79 (2010).
government, specifically torture, war crimes, complicity in genocide, and crimes against humanity. The complaint was dismissed by the trial court for subject-matter jurisdiction under the ATS. Finding that the complaint had no suggestion of intentional involvement, the panel affirmed. While the claims had to be dismissed, the court opined in a footnote that “[w]e will also assume, without deciding, that corporations such as Talisman may be held liable for the violations of customary international law.” Prior to Kiobel, this was the furthest that this circuit had addressed corporate liability under the law of nations.

B. The ATS Across America

1. The Ninth Circuit: The Corporate Mindset

In Doe I v. Unocal Corp., the plaintiffs “allege[d] that the Defendants directly or indirectly subjected the villagers to forced labor, murder, rape, and torture when the Defendants constructed a gas pipeline through the Tenasserim region [of Myanmar].” The court addressed the meaning of “the law of nations” and the allegations. It said that a “threshold question in any ATCA case against a private party, such as Unocal, is whether the alleged tort requires the private party to engage in state action for ATCA liability to attach . . . .”

The ATS-related allegation in Doe I was forced labor. The court drew guidance from the Second Circuit’s decision in Kadic v. Karadzic, and held that certain crimes “do not require state action when committed in furtherance of other crimes.” The court looked to its precedent

43 Id. at 247.
44 Id. at 253.
45 Id. at 247.
46 Id. (Jacobs, C.J., Cabranes and Leval, JJ.).
47 Id. at 247-48 (emphasis added).
48 Id. at 261 n.12.
49 Doe I, 395 F.3d at 936.
50 Id. at 944-45.
51 Id. at 945.
52 Id. at 947.
53 Id. at 945-46.
and found that “forced labor is a modern variant of slavery” and “is among the ‘handful of crimes . . . to which the law of nations attributes individual liability . . .’.” The court used evidentiary standards as propounded by recent international criminal tribunals to determine how international law views aiding and abetting. The panel held that a jury could find the relevant actus reus and mens rea of aiding and abetting forced labor, and it reversed summary judgment. Preceding an en banc hearing, the case was settled out of court and dismissed.

2. The Eleventh Circuit: ATS Textualism

In *Romero v. Drummond Company, Inc.*, the plaintiffs alleged that a corporate defendant paid to have members of a Colombian trade union tortured. The defendant argued that the ATS does not allow suits against corporations, but the court easily dispatched with that, stating that “[t]he text of the Alien Tort Statute provides no express exception for corporations . . .” and it observed that “the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants.” The panel was referring to *Aldana v. Del Monte Fresh*

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54 *Id.* at 946 (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794-95 (D.C. Cir. 1984) (Edwards, J., concurring)).
55 *Id.* at 950.
56 *Id.* at 952 (“[P]ractical assistance or encouragement which has a substantial effect on the perpetration of the crime of, in the present case, forced labor.”).
57 *Id.* at 953 (“[A]ctual or constructive (i.e., reasonable) knowledge that the accomplice's actions will assist the perpetrator in the commission of the crime.”).
58 *Id.*
59 395 F.3d 978 (9th Cir.2003). While the opinion granting the hearing ordered that the “panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court,” *id.* at 979, the rationale was nonetheless accepted by three circuit judges. *See Doe I*, 395 F.3d at 963 (Reinhardt, J., concurring) (“As to that [ATS], I agree with the majority that material factual disputes exist regarding plaintiffs' claims for forced labor used in connection with the Yadana Pipeline Project. I also agree with the majority that if plaintiffs prove their allegations, Unocal may be held liable under the Act for the use of forced labor . . . ”). Thus, its arguments are worth considering.
61 403 F.3d 708 (9th Cir. 2005).
62 552 F.3d 1303 (11th Cir. 2008).
63 *Id.* at 1308-09.
64 *Id.* at 1314.
65 *Id.* at 1315.
 Produce, N.A., Inc., the panel held that a corporate defendant could be liable for torture under the ATS. The blanket defense of incorporation, as argued by Drummond, was not even raised by the defendant, nor discussed by the panel. Combining the plain text of the ATS and its own case history, the panel had no trouble finding corporate liability.

3. The District of Columbia Circuit: Adding Another Split

In Saleh v. Titan Corp., Iraqi citizens brought an ATS suit, alleging abuse, against a pair of military contractors who staffed the Abu Ghraib prison during the second Iraq war. Titan argued that circuit precedent does not apply the ATS to claims brought against private parties. The panel noted that the Supreme Court had not yet decided if there was a difference between state and private actors under the ATS. The court acknowledged that this determination currently divided it from the Second Circuit, and it refuted the plaintiffs’ contention that the Court, based on the language in the footnote, “must have implicitly determined that a private actor could be liable,” it termed that factor irrelevant. The court agreed with Titan and held that “although torture committed by a state is recognized as a violation of a settled international norm, that cannot be said of private actors.” Thus, the court determined that the remaining claims had to be dismissed since the ATS exempts corporations.

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66 416 F.3d 1242 (11th Cir. 2005).
67 Id. at 1253.
70 Id. at 2.
72 See Saleh, 580 F.3d at 13.
73 Id. at 14. (referring to Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)).
74 Id.; see also Petition for Writ of Certiorari, Saleh v. CACI International, No. 09-1313 (U.S. Apr. 26, 2010), 2010 WL 1725595 (“Whether the Court of Appeals erred by finding, contrary to all other circuits . . . that Petitioners’ claims for torture and other war crimes cannot be brought against private actors under the Alien Tort Statute.”).
75 Id.
76 Id. at 15.
77 Id. at 17.
C. The Supreme Court Enters the Game

1. The Majority Opinion: Setting the Standard

The issue in Sosa v. Alvarez-Machain\(^\text{78}\) started when Alvarez-Machain (“Alvarez”) was indicted by a federal grand jury for torturing and killing a United States Drug Enforcement Agency (“DEA”) operative in Mexico.\(^\text{79}\) The US tried un成功fully to get help from the Mexican government to apprehend him; it decided to employ a group of Mexican citizens to seize him.\(^\text{80}\) He was taken from his home, kept in a hotel overnight, and then flown to Texas where he was arrested, tried, and acquitted.\(^\text{81}\) Alvarez sued his kidnapper and several DEA agents under the ATS.\(^\text{82}\) How the Court handled the ATS claim is of vital importance in the ensuing discussion of how the Second Circuit panel misconstrued the Supreme Court’s rationale.

The trial judge gave summary judgment to Alvarez.\(^\text{83}\) The decision was affirmed by a panel of the Ninth Circuit;\(^\text{84}\) a deeply divided en banc circuit also affirmed it.\(^\text{85}\) The judges applied circuit ATS precedent to hold that it “not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations.”\(^\text{86}\)

The majority recognized “a clear and universally accepted norm prohibiting arbitrary arrest and detention. . . . codified in every major comprehensive human rights instrument and is reflected in

\(^{78}\) 542 U.S. 692 (2004).
\(^{79}\) Id. at 697.
\(^{80}\) Id. at 698.
\(^{81}\) Id.
\(^{82}\) Id. (Alvarez also brought a claim under the Federal Tort Claims Act but this is not relevant here.).
\(^{83}\) Id. at 699.
\(^{84}\) Alvarez-Machain v. United States, 266 F.3d 1045, 1064 (9th Cir. 2001).
\(^{85}\) Alvarez-Machain v. United States, 331 F.3d 604, 641 (9th Cir. 2003) (6-5 decision).
\(^{86}\) Id. at 612.
at least 119 national constitutions." Thus, the arrest and detention violated the law of nations.

The DEA petitioned the Supreme Court which granted certiorari.

The Court’s opinion was fractured. In Part III, Justice Souter addressed Alvarez’s claim that the ATS not only gave jurisdiction to the federal courts to hear claims for violations of the law of nations, but also gave them the power to create new causes of action for violations of international law. As to the jurisdictional claim, Justice Souter noted that § 1350 was placed in Section 9 of the Judiciary Act, a section devoted to federal jurisdiction. Souter called the origination argument “implausible.” For further evidence of the intended nature of the ATS, Souter cited a commentator who wrote that “[the ATS] clearly does not create a statutory cause of action.” Thus, the Court found that the ATS was intended to “address[] the power of the courts to entertain cases concerned with a certain subject.”

Souter then moved to a discussion of the “law of nations” as the term was understood in 1789. Referring to Blackstone, Souter found that English law narrowed the law of nations to the “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” He concluded that this was likely considered by the first Congress when it enacted the statute.

87 Id. at 620.
88 Id. (emphasis added).
90 The Court’s opinion was unanimous as to Parts I and III. Part II of the Court’s opinion analyzed the FTCA claim. Part IV garnered just 6 votes and was challenged by the concurrence of Justice Scalia, along with Chief Justice Rehnquist and Justice Thomas.
91 Sosa, 542 U.S. at 713.
92 Id.
93 Id.
95 Id. at 714.
96 Id. at 714-15.
97 Id. at 715 (citing 4 William Blackstone, Commentaries on the Laws of England 68 (1769)).
98 Id.
He observed that the Continental Congress was concerned with such issues but failed to get the individual states to provide appropriate remedies.\textsuperscript{99} The new government dealt with this problem by vesting the federal judiciary with power under the ATS.\textsuperscript{100}

Bemoaning the fact that there is virtually no congressional record or legislative history relevant to the ATS, Souter looked to the writings of commentators and concluded that “a consensus understanding of what Congress intended has proven elusive.”\textsuperscript{101}

He then explained that the history of the ATS allows two inferences.\textsuperscript{102} The first is that the statute is seemingly self-executing in that it does not require any future act of Congress to vest it with any further authority.\textsuperscript{103} Souter made further note of Congress’ attentiveness to the law of nations as discussed by Blackstone.\textsuperscript{104} The other inference Souter drew is that the ATS was designed to “furnish jurisdiction for a relatively modest set of actions” and that, according to Blackstone, such offenses typically involved states- not individuals.\textsuperscript{105}

Continuing the quest for a historical understanding of the ATS, Souter discussed the opinion of an Attorney General, who, in 1795 “made it clear that a federal court was open for a tort” resulting from Americans who aided “the French plunder of a British slave colony in Sierra Leone.”\textsuperscript{106} Souter felt that he must have presumed the ATS to provide jurisdiction for common law claims.\textsuperscript{107} Ultimately, Souter determined that Congress intended the ATS to have “practical

\textsuperscript{99} \textit{Id.} at 715-16.
\textsuperscript{100} \textit{Id.} a 717.
\textsuperscript{101} \textit{Id.} at 718-19.
\textsuperscript{102} \textit{Id.} at 719.
\textsuperscript{103} \textit{Id.}
\textsuperscript{104} \textit{Id.} (emphasis added).
\textsuperscript{105} \textit{Id.} at 720.
\textsuperscript{106} \textit{Id.} at 721 (citing 1 Op. Atty. Gen. 57 (1795)).
\textsuperscript{107} \textit{Id.}
[jurisdictional] effect” and that it would provide a cause of action limited to the “modest number of international law violations with a potential for personal liability at the time.”

In Part IV, Justice Souter set out the standard for evaluating ATS claims. He noted that Congress has never materially altered the ATS. Souter held that courts hearing ATS claims for violations of the law of nations should ensure that such claims “rest on a norm of international character accepted by the civilized world” which is “defined with a specificity comparable to the features of the 18th-century paradigms [the Court, noting Blackstone] has recognized.”

He said that “judicial caution” is important in ATS suits because there is tremendous room for interpretation of international norms under this rule. Souter cited Erie v. Tomkins’s impact on federal common law and opined that the Court has been exceedingly wary of major alterations of substantive law by courts as opposed to legislatures. He wrote that the Court has adhered to legislatively-created causes of action, with the judiciary having little or no role therein. He commanded that courts consider the Executive’s role in foreign relations and how interference by the courts in allowing new claims by aliens could hurt international relations. Souter cautioned that there is “no congressional mandate to seek out and define new and debatable violations of the law of nations.” Lastly, Souter noted that the Senate, in ratifying the Covenant on Civil and Political Rights in 1992, “expressly declined to give the federal courts

108 Id. at 724.
109 Id. at 724-25.
110 Id. at 725.
111 Id. (emphasis added).
112 Id. at 725-26.
113 Id. at 726.
114 Id. at 727.
115 Id. at 727-28.
116 Id. at 728.
the task of interpreting and applying international human rights law.”117 The Court’s mandate is firm but appropriate.

Justice Souter then turned to the criticisms raised by Justice Scalia’s concurring opinion.118 In response to Scalia’s desire to “close the door” to ATS claims beyond those explicitly noted by Blackstone, he cited several cases to show that American law has always been, not only open to, but bound by, international legal norms.119 Some examples include:

- “[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances;”120
- “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination;”121 and
- “[T]he Court is bound by the law of nations which is a part of the law of the land.”122

He argued that these statements support the proposition that American law should be open to new international norms beyond those recognized at Blackstone’s time.123 Souter’s comment that “the position [the Court] takes today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala* . . . ” is very appropriate here.124

Lastly, Souter outlined the Court’s criteria for determining whether a particular claim is sufficient under the ATS.125 He looked to a case from 1820 that described the specificity with

117 *Id.*
118 *Id.* at 728-29.
119 *Id.* at 729-30.
120 *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964)) (internal quotation marks omitted).
121 *Id.* at 730 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)) (internal quotation marks omitted).
122 *Id.* (quoting *The Nereide*, 9 Cranch 388, 423 (1815) (Marshall, C.J.)) (internal quotation marks omitted).
123 *Id.* at 730-31.
124 *Id.* at 731.
125 *Id.* at 731-32.
which “piracy” was defined under international law.\footnote{United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820).} Souter held that “claims for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when [the ATS] was enacted” should not lie.\footnote{\textit{Sosa}, 542 U.S. at 732.}\footnote{\textit{Id.} at 732-33 (alteration by court).}\footnote{\textit{Id.} at 732 n.20.} Furthermore, such a calculation “should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”\footnote{\textit{Id.} at 732 n.20.} The element of discretion is thus very important.

In Footnote 20, a footnote that will be brought up repeatedly in \textit{Kiobel}, Souter added: “A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”\footnote{Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring).} Also therein, Souter noted a District of Columbia Circuit ATS case\footnote{Kadic v. Karadzic, 70 F.3d 232, 239-41 (2d Cir. 1994).} he described as finding that there was an “insufficient consensus in 1984 that torture by private actors violates international law” and a Second Circuit case\footnote{\textit{Sosa}, 542 U.S. at 732 n.20.} he described as finding a “sufficient consensus in 1995 that genocide by private actors violates international law.”\footnote{See \textit{id.} at 726; see also \textit{id.} at 726 n.27.} Souter said that Alvarez tried to argue that his situation constituted a violation of customary international law, but, like the first example, he did not make a compelling case.\footnote{See \textit{id.} at 726; see also \textit{id.} at 726 n.27.}

Even more went against Alvarez in this regard as Souter referred to the Restatement (Third) of Foreign Relations Law of the United States and inferred that “[a]ny credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of
positive authority.”\textsuperscript{134} He summarized Alvarez’s claim and said that it was aspirational and lacked specificity.\textsuperscript{135} Thus, the claim was insufficient to establish a violation of customary international law and was therefore jurisdictionally deficient insofar as the ATS is concerned.\textsuperscript{136}

2. Justice Breyer’s Concurrence: “One Further Consideration”

After he summarized the majority’s holding, Justice Breyer stated that he wished to add an additional criterion to the court’s analysis.\textsuperscript{137} Justice Breyer said that courts should consider “whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement” and how this fits in an increasingly “interdependent world.”\textsuperscript{138} He views this as a way to ensure that the application of the ATS by American courts helps, and does not hurt, international relations.\textsuperscript{139} His concern for comity stems especially from suits arising abroad.\textsuperscript{140} Breyer noted that international law may reflect a universal agreement that certain kinds of behavior should be prosecuted and included in this torture, genocide, crimes against humanity, and war crimes.\textsuperscript{141} Breyer argued that because such an agreement exists it makes sense for various nations to allow civil prosecution for these (and, of course, others which may fit in the limited category) infractions.\textsuperscript{142} While he noted that this traditionally concerns criminal jurisdiction, civil jurisdiction over the same matters should work just the same.\textsuperscript{143} Because many foreign criminal tribunals combine civil and criminal matters, “universal criminal jurisdiction

\textsuperscript{134} \textit{Id.} at 737.
\textsuperscript{135} \textit{Id.} at 738.
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.} at 760-61 (Breyer, J., concurring).
\textsuperscript{138} \textit{Id.} at 761.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.} at 762 (referring to Prosecutor v. Furundzija, Case No. IT-95-17/1-T, ¶¶ 155-156 (International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Territory of Former Yugoslavia Since 1991, Dec. 10, 1998); Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 277 (Sup. Ct. Israel 1962)).
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.}
necessarily contemplates a significant degree of civil tort recovery as well.” Breyer found no sufficient consensus in regards to the present issue, and he restated his conclusion that the ATS does not provide for Alvarez to recover.

3. Justice Scalia’s Concurrence: Going Too Far

Justice Scalia declined to join Part IV of the majority opinion because it called for the “reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms.” He termed it a “judicial lawmaking role.” In light of these concerns, his opinion deserves mention.

Justice Scalia agreed entirely with the Court’s assessment of the ATS as a jurisdictional statute. He cited a commentator for the principle that “the fact that a rule has been recognized as [customary international law], by itself, is not an adequate basis for viewing that rule as part of federal common law.” He concluded that to create a federal common law out of customary international law and to create a tort claim out of it under the ATS is “nonsense upon stilts.”

Scalia said that the point of departure between his opinion and the majority’s is the element of judicial discretion. Such federal common law power, he pointed out, was destroyed by *Erie v. Tomkins* and the Court’s decision seems to allow for the kind of judicial lawmaking that would not have been considered at the time of the ATS’s enactment.

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144 Id. at 762-63.
145 Id. at 763.
146 Id. at 739 (Scalia, J., concurring).
147 Id.
148 Id. at 743.
150 Id.
151 Id. at 744.
152 Id. at 744-45.
Scalia’s overarching concerns dealt with the potential expansion of judicial lawmaking and the lessening of the grip of judicial restraint.\textsuperscript{153} He said that \textit{Kadic v. Karadzic},\textsuperscript{154} is an example of a court finding a cause of action based on an international norm even though Congress had enacted a statute conforming to the norm and specifically saying that courts were \textit{not to create} any new rights.\textsuperscript{155} Scalia concluded that the law of nations-based creation of new civil claims is a “20th-century invention of international law professors and human rights activists,” and that the Founders would be “appalled” by the kind of discretion authorized by the majority to apply international norms to American law.\textsuperscript{156}

With this understanding of the Supreme Court’s rationale identified, and with the relevant concerns and considerations noted, enter the decision of the Second Circuit and how the \textit{Kiobel} majority goes awry in applying them.

III. \textit{Kiobel v. Royal Dutch Petroleum Co.}

A. Factual Allegations

In \textit{Kiobel v. Royal Dutch Petroleum Co.},\textsuperscript{157} the plaintiffs alleged that Royal Dutch Petroleum Company (“Royal Dutch”) and Shell Transport and Trading Company (“Shell”), through a subsidiary, aided and abetted the Nigerian government in perpetrating human rights abuses in violation of the law of nations to aid the companies’ oil exploration.\textsuperscript{158}

Shortly after the exploratory efforts began, the people of the Ogoni region, where these events took place, organized the Movement for Survival of Ogoni People, (“MOSOP”) and

\textsuperscript{153} See id. at 747-48.
\textsuperscript{154} See supra Part II.A.2.
\textsuperscript{155} See id. at 748-49.
\textsuperscript{156} Id. at 749-50.
\textsuperscript{157} 621 F.3d 111 (2d Cir. 2010).
\textsuperscript{158} Id. at 189 (Leval, J., concurring); \textit{see also} Kiobel v. Royal Dutch Petroleum Co. (“\textit{Kiobel I}”), 456 F. Supp. 2d 457, 464-67 (S.D.N.Y. 2006) (Plaintiffs’ claims were “Extrajudicial Killings,” “Crimes Against Humanity,” “Torture/Cruel, Inhuman and degrading Treatment,” “Arbitrary Arrest and Detention,” “Rights to Life, Liberty, Security and Association,” “Forced Exile,” and “Property Destruction.”).
began to protest the presence of the companies. The plaintiffs alleged that since 1993 the companies funded and directed a military campaign by the Nigerian government to suppress the protestors. They also alleged that the companies met to “formulate a strategy to suppress” the Ogonis which included help from the Nigerian government in the form of various raids and attacks carried out by the military giving money, shelter, and food in trade for greater security for their drilling operations. When this was not enough to suppress the protestors, the military created a special forces-type brigade which, over a four-month span:

[B]roke into homes, shooting or beating anyone in their path, including the elderly, women and children, raping, forcing villagers to pay ‘settlement fees,’ bribes and ransoms to secure their release, forcing villagers to flee and abandon their homes, and burning, destroying or looting property, and killed at least fifty Ogoni residents.

Id. at 190.

Members of MOSOP were held without charges or hearings, sometimes for over a month. They were allegedly beaten and given insufficient rations and other important services. Following their arrests, members of MOSOP were tried and convicted (in a court system which allegedly controlled by Royal Dutch and Shell) and then executed.

B. Procedural Posture

The defendants moved to dismiss the complaint by alleging its failure to meet the specificity required by Sosa. The court noted the vagueness in Sosa, and analyzed the claims “on the assumption that the Filartiga [v. Pena-Irala] holding controls, and [said it would]

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159 Id.
160 Id.
161 Id.
162 Id.
163 Id.
164 Id.
165 Id.
dismiss claims only where they clearly run afoul of Sosa."\textsuperscript{166} The court relied on Presbyterian Church of Sudan v. Talisman Energy Inc., and determined that if something were a violation of the law of nations, aiding and abetting that crime was a crime, too.\textsuperscript{167}

The court dismissed claims for “Property Damage,”\textsuperscript{168} “Forced Exile,”\textsuperscript{169} “Rights to Life,” “Liberty, Security and Association,”\textsuperscript{170} and “Extrajudicial Killings.”\textsuperscript{171}

As to the plaintiffs’ claim of “Torture/Cruel, Inhuman and Degrading Treatment,” the court found that claims could be made out.\textsuperscript{172} The court also allowed the claims for “Arbitrary Arrest and Detention,”\textsuperscript{173} and “Crimes Against Humanity.”\textsuperscript{174}

The District Court certified its decision to the Court of Appeals because it felt that “substantial ground for difference of opinion” exists regarding post-Sosa ATS claims.\textsuperscript{175}

\textbf{C. The Majority Opinion}

The court began by discussing its history with the ATS, noting the unique and complex nature of such claims.\textsuperscript{176} Judge Cabranes noted that as recently as 2009 the court had heard cases

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\textsuperscript{167} Id. at 463-64.
\textsuperscript{168} Id. (“[P]roperty destruction committed as part of genocide or war crimes, and not property destruction alone violates the law of nations,” but that since “Plaintiffs have not alleged genocide or war crimes. . . . Plaintiffs’ claim for property destruction is dismissed.”).
\textsuperscript{169} Id. (“The Court is unaware of any federal court decision in which a court has considered, much less allowed, a claim for forced exile pursuant to the ATS. In light of Sosa’s limiting principles, the Court dismisses Plaintiffs’ claim for forced exile.”).
\textsuperscript{170} Id. (“[N]o particular or universal understanding of the civil and political rights [as alleged in the claim].”).
\textsuperscript{171} Id. at 464-65. (“Plaintiffs have not directed the Court to any international authority establishing the elements of extrajudicial killing, and the Court is aware of none.”).
\textsuperscript{172} Id. (“Although Sosa does not delineate which forms of torture are actionable under the ATS, the Court is persuaded that Plaintiffs’ allegations (taken together, if not alone) are sufficient to state a claim.”).
\textsuperscript{173} Id. at 465-66. The court reached this conclusion by inferring from Sosa’s commentary holding that a single day’s detention was insufficient to raise a claim of detention under the ATS that a detention lasting a much longer time, in this case, up to a year, could be enough to bring an ATS claim and therefore let this claim proceed.
\textsuperscript{174} Id. at 467 (“Where, as here, Plaintiffs have sufficiently alleged claims for torture and arbitrary detention, . . . and have also alleged that these crimes were committed as part of an intentional, systematic attack against a particular civilian population, a claim for crimes against humanity is actionable under the ATS.” (citing Wiwa v. Royal Dutch Petroleum Co., 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002))
\textsuperscript{175} Id. at 468 (internal citations omitted).
\textsuperscript{176} Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115-16 (2d Cir. 2010).
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involving corporate defendants.\textsuperscript{177} The applicable legal standard, he said, is to determine whether “absent a relevant treaty of the United States . . . a plaintiff bringing an ATS suit against a corporation has alleged a violation of customary international law.”\textsuperscript{178} He concluded that customary international law does not recognize corporate liability, and in construing Footnote 20 in \textit{Sosa} he held that corporations are not seen as subjects amenable to suit under international law.\textsuperscript{179} Thus, these allegations cannot come under the ATS’s jurisdiction.\textsuperscript{180} Not only is there no norm for such jurisdiction, he said, there is actually authority against such a practice.\textsuperscript{181}

Judge Cabranes noted the circuit’s ATS history and the fact that it had heretofore decided cases involving corporations but that it had explicitly passed on deciding whether the defendants were actually liable, even in cases where it allowed the suit to proceed against the corporate defendant.\textsuperscript{182} He explained that these prior assumptions had absolutely no bearing on the present case, and proceeded to outline the court’s two-part analysis.\textsuperscript{183} The first step is to “consider which body of law governs the question-international law or domestic law;” the second is to “consider what the sources of international law reveal with respect to whether corporations can be subject to liability for violations of customary international law.”\textsuperscript{184}

Judge Cabranes looked at the language in \textit{Sosa} concerning “modest number[s] of international law violations” and “norms . . . accepted by the civilized world.”\textsuperscript{185} He concluded that international law is the source to look to for ATS suits.\textsuperscript{186}

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\textsuperscript{177} \textit{Id.} at 117 n.10.
\textsuperscript{178} \textit{Id.} at 118.
\textsuperscript{179} \textit{Id.} at 120.
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.} at 121 n.21.
\textsuperscript{182} \textit{Id.} at 124-25.
\textsuperscript{183} \textit{Id.} at 125.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.} at 126.
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He then looked to whether international law governs the matter of those who are subjects of international law.\textsuperscript{187} Cabranes noted that subjects of international law have “legal status, personality, rights, and duties under international law.”\textsuperscript{188} He concluded that it is the province of international law, not individual states, to define subjects.\textsuperscript{189} Starting with the Nazi prosecutions at Nuremburg, he said that individuals are subjects of international law.\textsuperscript{190} He found that international law retains the exclusive power to determine who is subjected to its authority.\textsuperscript{191}

Judge Cabranes held that under \textit{Sosa} the court is obliged to find within the expanse of international law the standard for the appropriate type of actor subject to its authority.\textsuperscript{192} He added that this is consistent with circuit precedent that has often referenced international norms or standards in answering ATS questions.\textsuperscript{193} It is a conjunctive test where liability must be determined for the allegation \textit{and} the actor.\textsuperscript{194} Thus, the court must determine whether, under international law, there is an established norm under which corporate defendants can be liable.\textsuperscript{195}

Beginning the search for the norm, Judge Cabranes cited \textit{Sosa} for the proposition that “a norm must be ‘specific, universal, and obligatory’” to apply to the ATS.\textsuperscript{196} Furthermore, he noted that the Supreme Court suggested that, in looking for international legal norms where there is no other clearly labeled source; a court should give weight to the “works of jurists and commentators. . . . [f]or trustworthy evidence of what the law really is.”\textsuperscript{197}

\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.} (quoting Restatement (Third) of the Foreign Relations Law of the United States, pt. II, at 70 introductory note) (internal quotation marks omitted) (emphasis added by court).
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.} at 126-27.
\textsuperscript{191} \textit{Id.} at 127.
\textsuperscript{192} \textit{Id.} at 127-28.
\textsuperscript{193} \textit{Id.} at 128.
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{Id.} at 130.
\textsuperscript{196} \textit{Id.} at 131 (quoting \textit{Sosa v. Alvarez-Machain}, 542 U.S. 692, 732 (2004)).
\textsuperscript{197} \textit{Id.} (quoting \textit{Sosa}, 542 U.S. at 733-34) (internal quotation marks omitted).
Judge Cabranes’s search for international legal norms began with the Nuremburg trials. He noted that the tribunal was given authority over “natural persons only,” but did have the power to proclaim an organization “criminal.” Cabranes pointed out that the tribunal, in a case where a corporation had been deemed criminal, explicitly stated that it was exercising jurisdiction over the employees, and that it was proscribed from doing so as to the company itself. He concluded that at least as of the end of World War II, international law applied liability to states and individuals, and explicitly not to corporations.

Judge Cabranes then ventured into a discussion of international tribunals in more recent years, looking at the one established to handle the crisis in Yugoslavia in the 1990s. In dealing with violations of international humanitarian law, the tribunal was vested with authority over “natural persons to the exclusion of juridical persons.” Cabranes noted that the Rome Statute of the International Criminal Court “limit[ed] its jurisdiction to “natural persons.” Noting that the Rome Statute, in the words of a commentator, “implicitly negates-at least for its own jurisdiction-the punishability of corporations and other legal entities,” he concluded that even the later tribunals do not recognize corporate liability in regards to the law of nations.

Moving from tribunals to treaties, Cabranes then mentioned that circuit precedent on the relevance of treaties to international law is that they “will only constitute sufficient proof of a norm of customary international law if an overwhelming majority of States have ratified the

198 Id. at 132-33.
199 Id. at 133.
200 Id. at 134.
201 Id. at 135-36.
202 Id. at 136.
204 Id. (quoting The Rome Statute of the International Criminal Court, art. 25(1), opened for signature July 17, 1998, 37 I.L.M. 1002, 1016) (internal quotation marks omitted).
205 Id. at 136-37 (quoting ALBIN ESER, INDIVIDUAL CRIMINAL RESPONSIBILITY, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 767, 778 (Antonio Cassese et al. eds., 2002)) (internal quotation marks omitted).
treaty.” 206 He noted that some treaties have extended liability to corporate actors, but say nothing of their applicability to human rights violations. 207 He also found “no historical evidence of an existing or even nascent norm of customary international law imposing liability on corporations for violations of human rights.” 208 Cabranes concluded that there is an insufficient basis to find a norm of international law regarding corporate liability. 209

As to the works of commentators, Cabranes added that two international law professors stated that customary international law does not impose liability on corporations. 210 He noted that scholars supporting corporate liability see it more as a goal to be achieved than as reality. 211 Finding a lack of a universal norm of corporate liability in the writings of scholars, Judge Cabranes concluded that corporate liability is not a norm under customary international law. 212

Applying these conclusions as to the determination of applicable law, and the scope of liability under international law, Judge Cabranes concluded that, at least for the time being, there is no recognition within the law of nations which accords liability to corporations for violations of customary international laws. 213

D. Judge Leval’s Concurring Opinion

Judge Leval called the majority opinion overbroad and unjustified and charged that it allows those who incorporate to violate international law at will without fear of civil prosecution.

206 Id. at 137.
207 Id. at 139.
208 Id.
209 Id. He admitted that there is an emerging trend, just not a substantive one.
210 Id. at 143.
211 Id. at 144 n.48.
212 Id. at 145.
213 Id. at 149 (not disclosing the possibility that such liability could eventually become a norm of customary international law).
under the ATS. While he stated that he fully supports the dismissal of the claim, he could not subscribe to the rule of law created by the majority. Leval said that the majority opinion does significant damage to *Filartiga v. Pena-Irala*, as well as to human rights litigation.

He began his assault against the majority opinion by suggesting that international law would desire the rule that was explicitly rejected by the majority. Leval noted examples of behavior that, under this rule, would not face ATS liability due to their incorporated status. Acknowledging the outrageous situations possible under the court’s holding, he stated that the “incompatibility of the majority’s rule with the objectives of international law does not conclude the argument.”

Leval proposed that there is an “absence of any reason, purpose, or objective for which international law might [adopt]” the majority’s rule. Noting that the world has encouraged the growth of juridical entities by giving them all sorts of rights and powers, he concluded that to allow this and then to hold them immune from suit would be absurd.

Judge Leval argued that the majority opinion does not rest on any legal precedent. He cited various Second Circuit cases where corporate liability was either assumed or not raised. He then referred to ATS cases from other courts where corporate liability was challenged and

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214 *Id.* at 149-50 (Leval, J., concurring); see also Marta Requeno, *Kenneth Anderson on Kiovel (sic) v. Royal Dutch Petroleum*, Conflict of Laws.net Blog, http://conflictoflaws.net/ (characterizing Judge Leval’s concurrence as more of a dissent).
215 *Id.* at 154.
216 *Id.* at 150-51.
217 *Id.* at 154.
218 *Id.* at 155-57 (incorporated slave trade and piracy).
219 *Id.* at 159.
220 *Id.*
221 *Id.* at 160 (citing Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT’L HUMAN RIGHTS 304, 322 (2008) (“I am not aware of any legal system in which corporations cannot be sued for damages when they commit legal wrongs that would be actionable if committed by an individual.”)).
222 *Id.*
223 *Id.* at 161 n.12; *cf. supra* Part II.A.4.
upheld. He noted that a 1907 opinion said that “an American corporation could be held liable under the ATS to Mexican nationals if the defendant's ‘diversion of the water [of the Rio Grande] was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty.”

Also, as early as 1795 corporations were considered by the Attorney General as subjects who could sue under the statute. Leval concluded that there is no support for the majority’s holding in prior ATS jurisprudence.

He addressed international tribunals and their relevance. He found that since they have been designed to handle criminal matters and do not handle civil issues, the majority’s argument that they have been denied from handling such matters is meaningless.

Turning to Footnote 20 in Sosa, Leval asserted that the majority misconstrued the meaning of the language therein concerning classes of defendants. Judge Leval concluded that, on the contrary, the text does not distinguish between types of private actors, and the only implication from it suggests that the Court combined private defendants into one class.

Judge Leval discussed what he called “deficiencies of the majority’s reasoning.” He said that the argument that corporations face no criminal liability under international law is a basis for their having no civil liability under the same rules is flawed. Referring to the principle that criminal law punishes intent he saw no reason to apply criminal rationales to civil law. He then quoted a member of the Rome Statute Drafting Committee for the argument that:

224 Id. at 161 n.14. The importance of these decisions will be discussed infra in Part IV.C.
225 Id. (quoting 26 Op. Att'y Gen. 252, 253 (1907)) (internal quotation marks omitted).
226 The ATS was enacted as part of the Judiciary Act of 1789.
227 Id. (citing 1 Op. Att'y Gen. 57 (1795)).
228 Id. at 163.
229 Id.
230 Id. at 163-64.
231 Id. at 165.
232 Id.
233 Id. at 166.
234 Id.
Despite the diversity of views concerning corporate criminal liability, ‘all positions now accept in some form or another the principle that a legal entity, private or public, can, through its policies or actions, transgress a norm for which the law, whether national or international, provides, at the very least damages.’

Id. at 168 (quoting M. CHÉRIF BASSIOUNI, Crimes Against Humanity in International Criminal Law 379 (2d rev. ed. 1999)).

Leval argued that it is illogical to conclude, as the majority did, that since criminal tribunals do not have jurisdiction over corporations that corporations are not subjects of international law.235

Judge Leval then argued that international law leaves issues of civil liability to the determination of the respective states.236 He mentioned that Oscar Schachter, a famed United Nations scholar, wrote that, while it is not necessary for states to allow damages for violations of international law, it is generally left to them to determine what remedies they wish to provide those seeking relief.237 As a final example in support of this proposition, Leval cited the Convention on the Prevention and Punishment of the Crime of Genocide which calls upon states to make “effective penalties” for such violations.238 Thus, states are permitted to select whichever remedy they deem more effective.239

Leval continued with the contention that “the absence of widespread agreement among the nations of the world to impose civil liability on corporations means that they can have no liability under international law.”240 Stating that he has no problem with the premises of the argument, but only with its application, he proceeded to analyze each proposition.241 As to the first step, whether “the place to look for answers whether any set of facts constitutes a violation

235 Id. at 170.
236 Id. at 171.
237 Id. at 172.
238 Id. at 173.
239 Id. at 174.
240 Id.
241 Id.
of international law is to international law,” he noted that international law is concerned with certain behaviors, leaving remedies to the states. Further, he wrote that international law does not absolve corporations of liability, and in line with this, allows states to proscribe the relevant measures. He asserted that the majority opinion undermines the hopes of international law of having individual states create and enforce remedies for its violations.

He addressed the premise that “principles of local law, even if accepted throughout the world, are not rules of international law unless they are generally accepted throughout the civilized world as obligatory rules of international law”- its corollary being that “there is no widespread practice in the world of imposing civil liability for violation of the rules of international law” and that no civil liability exists. Leval argued that an “award of damages under the ATS is not based on a belief that international law commands [corporate] civil liability,” and he found it to be an irrelevant and unnecessary determination as to whether international law requires corporate violators to be liable. Similarly, he noted that there is no international consensus stipulating that individuals are liable in tort for similar violations.

Next, Leval restated his claim that the majority misinterpreted Sosa to require international norms to extend precisely to the type of actor making the type of violation and the manner of assessing liability. Noting that a majority of the Supreme Court in Sosa supported awarding damages under the ATS, he pointed out that this would make no sense if the Court were to require unanimity among nations as to specific remedies, and that since this is the view

242 Id.
243 Id. at 175.
244 Id.
245 Id.
246 Id.
247 Id. at 175-76.
248 Id. at 176.
249 Id. at 176-77.
taken by the Second Circuit majority, it cannot be correct.\textsuperscript{250} Thus, he concluded that Cabranes misinterpreted \textit{Sosa}, in terms of customary liability, in a way that does not make sense.\textsuperscript{251}

Leval asserted that the majority opinion did not cite to any sources which say that corporations are not subjects under international law; he suggested that multiple sources say the opposite.\textsuperscript{252} He referred to a report of the Nuremburg tribunal for a statement which explicitly referenced juridical entities.\textsuperscript{253} Furthermore, and related to this, was the finding that IG Farben was “criminal”- allowing the criminal prosecution of its employees.\textsuperscript{254} Combining these observations with the early opinions of the Attorneys General, Leval concluded that corporations must be considered subjects within the scope of international law.\textsuperscript{255}

Judge Leval next discussed how the majority, in line with the Supreme Court’s instruction in \textit{The Paquete Habana}, looked to the writings of scholars for evidence of the state of international law.\textsuperscript{256} Leval claimed that the majority referred to no supportive scholastic works and disregarded such material insofar as the material opposes its viewpoint.\textsuperscript{257} Again referring to the distinction between criminal and civil law, he concluded that while “it is absolutely correct that the rules of international law do not provide civil liability against any private actor and do not provide for any form of liability of corporations” as referred to by some of the majority’s sources, this does not mean that the rules of international law do not bind corporations.\textsuperscript{258}

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\textsuperscript{250} \textit{Id.} at 178.
\textsuperscript{251} \textit{Id.}
\textsuperscript{252} \textit{Id.}
\textsuperscript{253} \textit{Id.} at 180.
\textsuperscript{254} \textit{Id.; see also id.} at 134 (majority opinion) (“This corporation's production of, among other things, oil, rubber, nitrates, and fibers was harnessed to the purposes of the Nazi state, and it is no exaggeration to assert that the corporation made possible the war crimes and crimes against humanity perpetrated by Nazi Germany, including its infamous programs of looting properties of defeated nations, slave labor, and genocide.”).
\textsuperscript{255} \textit{Id.} at 180-81.
\textsuperscript{256} \textit{Id.} at 181.
\textsuperscript{257} \textit{Id.} at 185.
\textsuperscript{258} \textit{Id.} at 186.
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Leval then discussed some issues that the majority had with his opinion. He addressed its contention that his position is inconsistent with his prior stances and argued that the inferences he drew from international law were correct and that the majority’s were mistaken.

The final part of Leval’s opinion outlined the facts and procedural history of the case and his conclusion that they were insufficient to state a cause of action under the federal pleading standards. Thus, regardless of corporate liability, this action still could not proceed.

E. The Clear Angst Between the Majority and Concurring Opinions

While the most vital differences between the majority and concurring opinions have been mentioned above and will be analyzed below, it is worth pointing out the significant bitterness which pervades the opinions. In the opening pages of the majority opinion, Judge Cabranes wrote that he and Chief Judge Jacobs “are keenly aware that he calls our reasoning ‘illogical’ on nine separate occasions.” Later, he suggested that Judge Leval was intellectually dishonest for disagreeing with the court’s holding although he agreed with a similar holding in a case decided only a year earlier. The majority termed part of Judge Leval’s analysis of customary international law “inappropriate.” While Leval called the majority opinion “illogical, misguided, and based on misunderstandings of precedent,” Cabranes (perhaps tellingly) admitted that “if our effort is misguided, higher judicial authority is available to tell us so.” This note urges just such review.

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259 Id. This will be briefly mentioned here since Part IV is more concerned with analyzing the differences between the two opinions.
260 Id.
261 Id. at 187.
262 Id. at 188-96.
263 Id. at 122 (majority opinion).
264 Id. at 129 (referring to Presbyterian Church of Sudan v. Talisman, supra Part II.A.4)
265 Id. at 146.
266 Id. at 151 (Leval, J., concurring).
267 Id. at 122-23 (majority opinion).
IV. THE SECOND CIRCUIT’S INTERPRETATION OF CASE LAW AND INTERNATIONAL SOURCES

A. Sosa v. Alvarez-Machain

1. Footnote 20

The *Kiobel* majority first misconstrued the Supreme Court’s language when it used Footnote 20 of *Sosa* to make a determination of the type of defendant liable under international law.\(^{268}\) The Supreme Court held that a court must determine “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”\(^ {269}\) The proper meaning of this instruction is even evident from Judge Cabranes’s analysis immediately following the quotation where he notes that States and individual people have been liable, but that corporations have never been liable.\(^ {270}\) Interestingly, the majority’s analysis seems to imply what the majority seemed to miss, that the language of Footnote 20 only differentiates between public and private actors; the use of the phrase “such as” serves to indicate that the Supreme Court is explaining merely what a private actor *is*, not that there is a difference between *types* of private actors.

Leval pointed this out when he referred to the part of *Sosa* where the footnote was.\(^ {271}\) There, Souter referred to two ATS decisions and noted the issue of whether or not a consensus existed as to a particular law being violated by, specifically, “private actors.”\(^ {272}\) The term, used twice in the footnote’s parenthetical and in the note itself, should have the same meaning in both places. Thus, it appears that the majority made an unnecessary and incorrect distinction.

\(^{268}\) *Id.* at 120.


\(^{270}\) *Kiobel*, 621 F.3d at 118.

\(^{271}\) *Id.* at 163-64 (Leval, J., concurring).

\(^{272}\) *Sosa*, 542 U.S. at 732 n.20. The cases were: *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by *private actors* violates international law) and *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by *private actors* violates international law) (emphasis added in both).
Later, the majority applied Justice Breyer’s concurring opinion to try to draw further meaning from Footnote 20. Breyer wrote that “the norm must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue.” While the majority tried to say that this gives further evidence of the necessary differentiation between individuals and corporations, Breyer’s use of “private actor” provides no more enlightenment than Footnote 20, and seems to repeat the principle supporting the conflation of private parties under the ATS. Judge Leval’s statement that “far from implying that natural persons and corporations are treated differently for purposes of civil liability under the ATS, the intended inference of the footnote is that they are treated identically,” assessed it well. However, in a subsequent footnote, the majority addressed this issue, saying that the Supreme Court did not need to differentiate between such parties, but this comes off as merely a weak defense to Judge Leval’s claim, and the majority quickly moved on to other matters.

Interestingly, a subsequent amicus brief pointed out that in an opinion referenced in neither Sosa nor Kiobel, the Supreme Court had stated that the ATS “by its terms does not distinguish among classes of defendants . . . .” There, the Court was concerned with the vitality of the ATS in light of the Foreign Sovereign Immunities Act, but held that the ATS retained “the same effect . . . with respect to defendants other than foreign states.” So, while neither Sosa nor Kiobel referenced this case, it should have some bearing on the proper interpretation of a defendant within the bounds of the ATS and should, at minimum, suggest that the proper reading is that which does not distinguish between private defendants.

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273 See Kiobel, 621 F.3d at 127-28.
274 Sosa, 542 U.S. at 760 (Breyer, J., concurring) (emphasis added) (alteration in original).
275 Kiobel, 621 F.3d at 165 (Leval, J., concurring).
276 Id. at 129 n.31 (majority opinion).
278 Argentine Republic, 488 U.S. at 438.
2. Norms of International Law

In addressing whether corporate liability is a norm of international law, the majority noted that “[t]o attain the status of a rule of customary international law, a norm must be ‘specific, universal, and obligatory.’” In determining what a “norm” is, the majority mentioned that the Supreme Court instructs courts to look to “sources we have long, albeit cautiously, recognized” such as the writings of scholars, but that the Court also warns that “[a]greements or declarations that are merely aspirational” are not useful.

As to the criteria of a norm being “specific, universal, and obligatory,” the majority opinion appeared to once again mistake the language in Sosa. In the portion of the opinion where the Supreme Court grappled with crafting a standard to define violations, it quoted lower courts that had dealt with ATS issues. The Court opined that it was “persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.” Souter called this “generally consistent with the reasoning of many of the courts and judges who faced the issue.” Lastly, the Court used the language “sufficiently definite to support a cause of action;” “sufficiently definite” is not the same as “specific” and “universal.” It does not appear that the Supreme Court did anything more than articulate a broad standard of judicial analysis, and in doing so, merely offered examples of standards that have worked for appellate courts, but definitely not saying that the

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279 Kiobel, 621 F.3d at 131 (quoting Sosa, 542 U.S. at 732).
280 Id.
281 Sosa, 542 U.S. at 732-33.
282 Id. at 732 (emphasis added).
283 Id.
284 Id.
highest standard must apply. The cautionary words of Justice Scalia’s concurrence speak to his fear that the Court had left too much room for determining violations of international law.285

Judge Leval noticed this and said that if this were the case, no civil liability could have been extended under earlier (specifically Second Circuit) ATS cases since “[t]here was no wide adherence among the nations of the world to a rule of civil liability for violation of the law of nations.”286 And, he concluded, since the Supreme Court at no point spoke negatively of the prior history of ATS cases which found liability, this cannot make sense, and the Court could not have meant for that to be inferred.287 Were the majority’s reading of Sosa in this context correct, the entire line of ATS cases that allowed suits to proceed would have been incorrect.288 Judge Leval’s analysis of Sosa appears to be on point; the majority seems to have misinterpreted it.

Judge Leval’s position is further supported by an amicus brief which argued that merely because corporations had not been subjected to punishment for violation of international human rights norms that they were not potentially subject to punishment for such violations.289 Citing the Permanent Court of International Justice, the amici pointed out that “international norms could not be inferred from the absence of domestic proceedings.”290 The amici concluded that the ATS does not require that international law “recognize a right to sue,” and that it “requires only that the tort be ‘committed’ in violation of a specific, universal, and obligatory norm of international law.”291 Leval’s argument is once again justified at the expense of the majority.

285 See discussion infra at Part II.C.3.
286  Kiobel, 621 F.3d at 178 (Leval, J., concurring).
287 Id.
288 Id.; cf. Brief for International Law Scholars as Amici Curiae Supporting Appellants at 5-7, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (No. 06-4800-cv) (making a similar argument to that used by Judge Leval).
289 Brief for International Law Scholars as Amici Curiae Supporting Appellants at 3, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (No. 06-4800-cv).
290 Id. at 3 n.2 (citing Lotus Case, (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 4) (first emphasis added).
291 Id. at 5 (emphasis removed).
B. Looking Inward: Second Circuit Precedent

The majority was correct that the issue of corporate liability under the ATS had so far been undecided in the Second Circuit.\textsuperscript{292} It is very important, however, to note the “assumed without being decided” issue present in many of the cases.\textsuperscript{293} As recently as 2009, the Second Circuit held that a claim against a corporation could proceed.\textsuperscript{294} In \textit{Khulumani v. Barclay Nat. Bank Ltd.}, one judge on the panel, Judge Katzmann, referring to recent decisions, including \textit{Sosa}, noted that the Second Circuit has “repeatedly treated the issue of whether corporations may be held liable under the [ATS] as indistinguishable from the question of whether private individuals may be.”\textsuperscript{295} While the opinion of only one judge, this conclusion deserves more weight than is given to it by the majority opinion since it is recent and the judge who made it was competent to analyze the circuit’s recent case history in coming to that determination.

In \textit{Presbyterian Church of Sudan v. Talisman Energy, Inc.},\textsuperscript{296} the panel, which included Judge Leval, did just that and accepted the rationale of Judge Katzmann’s concurrence in \textit{Khulumani} to be circuit precedent.\textsuperscript{297} The majority and Judge Leval sparred over the meaning of Katzmann’s comments in \textit{Khulumani} with Judge Leval saying that Judge Katzmann supports the idea that there is no distinction between private actors.\textsuperscript{298}

Related to the earlier discussion of Footnote 20 of \textit{Sosa} and the Supreme Court’s mention of prior Second Circuit ATS cases, Judge Leval noted that in neither of those cases did the panels “suggest[.] in any way that the law of nations might distinguish between conduct of a natural

\begin{footnotes}
\textsuperscript{292} Compare id. at 117 n.10 with id. at 160 n.11 (Leval, J., concurring).
\textsuperscript{293} See supra Part II.A.4.
\textsuperscript{294} \textit{Kiobel}, 621 F.3d at 161 n.12 (referring to Abdullahi v. Pfizer, 562 F.3d 163 (2d Cir. 2009)).
\textsuperscript{295} \textit{Khulumani} v. Barclay Nat. Bank Ltd., 504 F.3d 254, 282-83 (2d Cir. 2007) (Katzmann, J., concurring).
\textsuperscript{296} 582 F.3d 244 (2d Cir. 2009).
\textsuperscript{297} \textit{Kiobel}, 621 F.3d at 129 (majority opinion).
\textsuperscript{298} Id. at 161 n.13 (Leval, J., concurring).
\end{footnotes}
person and of a corporation. They distinguish[ed] only between private and State action.”

Cabranel asserted, however, that there is a two-step analysis employed by Judge Katzmann that Judge Leval missed. Cabranes stated that the second part is whether the “law would recognize the defendants’ responsibility for that violation,” but there is nothing there which details whether Judge Katzmann believes there to be a viable difference between types of defendants. Nothing suggests that Judge Katzmann, whose opinion has been adopted as “the law of the circuit,” made a distinction between ATS defendants beyond the already-mentioned state actor versus non-state actor characterization. Furthermore, an appellate judge from another circuit judge has read Katzmann’s opinion for the proposition that corporations are liable under the ATS. In the explanation of Footnote 20 in the context of his summation, Katzmann even said that he believed the Supreme Court was “classifying both corporations and individuals as ‘private actor[s].’” Cabranes did not address that. The majority’s assertion about Leval’s “mistake” is, itself, mistaken. Circuit precedent supports a finding of corporate defendant liability under the ATS and says nothing either explicitly or implicitly to the contrary.

C. Looking Outward: The ATS in Other Circuits

Since it determined that international law governs the scope of inquiry, the majority did not look to any domestic sources, other than Sosa, for guidance. If it had looked at the interpretation given to the ATS by other circuits then it might have thought differently.
The majority should have felt compelled to make this investigation, as it cited to Supreme Court language in *The Paquete Habana* which instructed that “‘where there is no treaty and no controlling executive or legislative act or judicial decision,’ customary ‘[i]nternational law is part of our law.’”

The portion of *The Paquete Habana* from which the majority drew this quote focused on general ways in which a court making an assessment should proceed. That Court suggested looking to scholars where other helpful sources were lacking. The *Kiobel* majority interpreted the *Sosa* Court’s reading of *The Paquete Habana* to avoid writings which were merely “aspirational.” Such a reading is reasonable and desirable; it is more likely to produce accurate results. For purposes of developing an understanding of international legal matters, it would make sense that case law from other courts on the same or similar issue would also be beneficial, and certainly not “aspirational.” The Supreme Court itself looked for some guidance from appellate courts which had handled ATS claims. Thus, recent cases from other Courts of Appeal should have carried some weight in the panel’s determination of relevant law.

Judge Leval recognized several instances where other courts found corporate liability under the ATS; two cases which he noted are particularly relevant. However, he did not go into them in any detail. His goal in citing to *Romero v. Drummond Company, Ltd.* seems similar to when he discussed older Second Circuit cases which had simply assumed corporate liability. The majority’s reaction to *Romero* would likely have been similar to its dismissing

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306 *Id.* at 125 n.26 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).
307 *See* *The Paquete Habana*, 175 U.S. 677, 700 (1900).
308 *Id.* at 700-01.
309 *See Kiobel*, 621 F.3d at 131.
311 *See Kiobel*, 621 F.3d at 161 nn.12 & 14 (Leval, J. concurring) The most important of the cases Judge Leval referred to are *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005) and *Romero v. Drummond, Inc.*, 552 F.3d 1303 (11th Cir. 2008).
312 His citations of them served only to provide examples; he made no citations to their legal reasoning.
313 *See supra* Parts II.A.4, IV.B.
the relevance of prior Second Circuit cases that had assumed liability\textsuperscript{314} since the underlying precedent did not truly address corporate liability.\textsuperscript{315} The majority may also have pointed out that the Eleventh Circuit did not analyze corporate liability under customary international law.\textsuperscript{316} Nevertheless, the absence of any discussion of \textit{Romero} is noticeable.

Leval could have used the Ninth Circuit’s analysis in \textit{Doe I v. Unocal Corp.} to support his argument as the panel there explicitly combined all private parties into one category\textsuperscript{317} before addressing their liability under the ATS.\textsuperscript{318} The majority’s rebuttal to this would likely have been a rehashing of its analysis of \textit{Sosa’s} Footnote 20, arguing that the panel misinterpreted the Court.\textsuperscript{319} Nevertheless, the \textit{Doe I} panel’s gloss of the term “party” lends further support to the conclusion that the Supreme Court did not intend to suggest that there is a difference between types of private parties under the ATS.\textsuperscript{320}

The \textit{Kiobel} majority should have looked at the analysis done by the District of Columbia Circuit in \textit{Saleh v. Titan Corp.} The court there looked to international law and found that there was no justification for holding a private party liable for torture.\textsuperscript{321} The court supported this by saying that the Supreme Court had not clarified private actor liability, much less corporate liability, under the ATS,\textsuperscript{322} the reading subscribed to by the majority in \textit{Kiobel}.\textsuperscript{323} Judge Leval may have countered this by arguing with the \textit{Saleh} plaintiffs\textsuperscript{324} that the footnote accepted,

\begin{thebibliography}{99}
\bibitem{314} See supra Part IV.B.
\bibitem{315} See supra Part II.B.2.
\bibitem{316} Compare supra Part II.C.2. with Parts III.C and III.D.
\bibitem{317} See supra text accompanying note 51.
\bibitem{318} See supra Part II.B.1. At least one sitting Second Circuit judge has accepted the aiding and abetting rationale expressed in therein. \textit{See Khulumani v. Barclay Nat’l Bank Ltd.}, 504 F.3d 254, 287 (2d Cir. 2007) (Hall, J., concurring).
\bibitem{319} See supra text accompanying notes 268-276.
\bibitem{320} See supra text accompanying notes 277-78.
\bibitem{321} See \textit{Saleh} v. Titan Corp., 580 F.3d 1, 15 (D.C. Cir. 2009).
\bibitem{322} Id. at 14.
\bibitem{323} See supra text accompanying notes 268-276.
\bibitem{324} See supra text accompanying note 75.
\end{thebibliography}
without explicitly stating, that such private actors could be liable. Judge Leval’s conclusion that the Court did not intend to suggest a difference between private actors seems more apt.\textsuperscript{325}

The Second Circuit is the most experienced court at handling ATS matters. However, it is not the only one. Based upon a review of decisions rendered by other Courts of Appeal, both the majority and Judge Leval could have benefited their arguments and understanding of the ATS by some reliance on the rationales expressed by other courts.

D. What the International Community Would Do

1. As Early as Nuremberg

After determining that international law “governs the scope of liability” in ATS cases, the majority looked to determine the proper subjects of international law.\textsuperscript{326} It stated that a subject of international law has “legal status, personality, rights, and duties.”\textsuperscript{327} Judge Leval agreed with this, but noted that this “terminology has come to mean nothing more than asking whether the particular norm applies to the type of individual or entity charged with violating it, as some norms apply only to States and others apply to private non-state actors.”\textsuperscript{328}

Both sides then discussed the Nuremburg tribunals and reached different conclusions. The majority argued that “[t]he 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.”\textsuperscript{329} It then cited to Justice Jackson’s conclusion that the ruling “‘made explicit and unambiguous what was theretofore . . . implicit in International Law,’

\textsuperscript{325} Cf. supra text accompanying notes 278-79.
\textsuperscript{326} \textit{Kiobel}, 621 F.3d at 126.
\textsuperscript{327} \textit{Id.} (citing \textit{RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES}, pt. II, at 70 introductory note)) (emphasis removed).
\textsuperscript{328} \textit{Id.} at 179 (Leval, J., concurring).
\textsuperscript{329} \textit{Id.} at 127 (majority opinion).
namely, ‘... that ... individuals are responsible.’” \(^{330}\) This, it argued, shows that international law defines who is liable under international law. \(^{331}\) On the other hand, Judge Leval cited to the tribunal for the proposition that corporations could be seen as liable for violating the law of nations, thus allowing their employees to be tried for the crimes; this, he argued, shows that corporations are indeed seen as subjects under international law. \(^{332}\) The language used by the tribunal, explicitly referencing “juristic persons,” persuasively suggests that Leval is correct.

Furthermore, the majority put a lot of weight into the fact that neither the London Charter nor the post-World War II tribunals charged a corporation with a crime. \(^{333}\) While corporations were not punished, it does not stand for the proposition that they are not subjects and cannot be punished. Such references could easily suggest that corporations were recognized as subjects under international law at that time, but merely that they were not punished in those instances.

However, even that proposition is incorrect since the entities had already faced “judicial death through dissolution” and therefore punishment by the tribunal was impossible. \(^{334}\) The dissolutions themselves were accomplished by a treaty signed by the major powers. \(^{335}\) Clearly, juridical entities were recognized; clearly, juridical entities were punished – in the 1940s.


\(^{331}\) Id.

\(^{332}\) Id. at 180 (Leval, J., concurring) (citing VIII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS (1952) “Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified ... is in violation of international law ... Similarly where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of [international law].”).

\(^{333}\) Id. at 134-35 (majority opinion).

\(^{334}\) Brief for Nuremberg Scholars as Amici Curiae Supporting Appellants at 8, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (No. 06-4800-cv) (arguing in support of en banc rehearing).

\(^{335}\) Id. at 9 (citing Agreement Between Governments of the United Kingdom, United States of America, and Union of Soviet Socialist Republics, and the Provisional Government of the French Republic on Certain Additional Requirements to Be Imposed on Germany, Art. 38, reprinted in Supplement: Official Documents, 40 AM. 1. INT'L. L. 1, 29 (1946) (Article 38 reads: “The National Socialist German Workers’ Party (NSDAP) is completely and finally abolished and declared to be illegal.”)); see also 1 OPPENHEIM’S INTERNATIONAL LAW 1204 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1996) (“[R]elatively extensive participation in a treaty, coupled with a subject matter
Nor was this the only World War II-related instance where the liability and punishment of corporations was addressed. At the Potsdam and Yalta Conferences, the parties contemplated the “dismantling [of] Germany’s industrial assets,”\textsuperscript{336} the “dissolution of private corporations,”\textsuperscript{337} the “seizure of industrial factories,”\textsuperscript{338} and the “restitution of confiscated properties and reparations to both the states and individuals who had suffered harm.”\textsuperscript{339} The seizure of Farben’s assets was a penalty “as drastic as any that could be imposed on a juristic entity.”\textsuperscript{340}

Considering this evidence, it cannot be said that corporations were not seen as subject to, and punishable by, international law. They simply faced a different kind of punishment from the private actors associated with them.\textsuperscript{341} The majority’s contention that customary international law “has never extended the scope of liability to a corporation”\textsuperscript{342} cannot be taken seriously.

2. Recent Developments

The impact and scope of international law has grown since the Nuremberg tribunals, and to exemplify this, Judge Leval cited a string of Second Circuit cases where the court allowed international law claims to be brought by juridical entities against Cuba.\textsuperscript{343} How could a corporation bring suit against another nation for a violation of international law if it were not of general significance and stipulations which accord with the general sense of the international community, do establish for some treaties . . . assist the acceptance of the treaty's provisions as customary international law.”\textsuperscript{344}

\textsuperscript{336} Id. at 10.
\textsuperscript{337} Id.
\textsuperscript{338} Id. at 10-11.
\textsuperscript{339} Id. at 11.
\textsuperscript{339} Id. at 12.
\textsuperscript{340} See id. at 14.
\textsuperscript{341} Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010).
recognized as a subject of international law? Judge Leval answered, correctly, that they could
not; they must be subjects of international law.\textsuperscript{344}

The trial judge in \textit{Talismen} noted that “precedent from the European Court of Justice has
held that corporations may be held liable for human rights violations such as discrimination.”\textsuperscript{345} This same judge observed that “[e]xtensive Second Circuit precedent further indicates that
actions under the ATCA against corporate defendants for such substantial violations of
international law . . . are the norm rather than the exception.”\textsuperscript{346} His summation seems justified
by the prior decisions of the Second Circuit. Such examples serve to further Judge Leval’s
assertion that corporations are subjects of international law.

In summarizing another difference between the majority opinion and Judge Leval’s,
Judge Cabranes noted that “corporate liability is not a norm that we can recognize and apply in
actions under the \textit{ATS} because the customary international law of human rights does not impose
any form of liability on corporations (civil, criminal, or otherwise).”\textsuperscript{347} To this, Leval responded,
the international tribunals which have been established, such as the one at Nuremburg that
declared Farben to be a criminal organization, have not had jurisdiction to award civil damages
against anyone, much less a corporation.\textsuperscript{348} The reason for this has already been shown above.

Leval made no assertion that customary international law \textit{mandates} the imposition of
damages on defendants, but stated that such matters are for the individual nations to determine
and that the US, through the \textit{ATS}, has made its determination in favor of awarding damages.\textsuperscript{349}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 181.
\item Presbyterian Church of Sudan \textit{v. Talisman Energy, Inc.} 244 F. Supp. 2d 289, 318 (S.D.N.Y. 2003) (citing Case
\item \textit{Id.} at 319.
\item \textit{Kiobel}, 621 F.3d at 147 (majority opinion).
\item \textit{Id.} at 183 (Leval, J., concurring).
\end{enumerate}
\end{footnotesize}
Then he added that “the basic position of international law with respect to civil liability is that States may impose civil compensatory liability on offenders, or not, as they see fit.”

Furthermore, the Ninth Circuit has held that “what is a crime in one jurisdiction is often a tort in another jurisdiction, and this distinction is therefore of little help in ascertaining the standards of international human rights law.” Also, burdens of proof in international criminal law are often similar to American civil standards, blurring any kind of clear line. Lastly, the panel there noted that lower courts “are increasingly turning to the decisions by international criminal tribunals for instructions regarding the standards of international human rights law under our civil ATCA.” Thus, the line of demarcation seems to be, at best, foggy.

Since the United States is “[a] legal culture long accustomed to imposing liability on corporations” it would make sense that Congress would choose to impose civil liability for violations of customary international law. Finally, leaving determinations of civil liability to the various nations also meshes with the various international laws that leave criminal punishment of juridical entities to the determination of the various states.

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350 Kiobel, 621 F.3d at 172 (Leval, J., concurring); see also Kiobel, 621 F.3d at 172 n.28 (citing Convention on the Prevention and Punishment of the Crime of Genocide, art. V, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 (obligating state parties “to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide”) (emphasis added).
352 Id.
353 Id.
354 Kiobel, 621 F.3d at 117 (majority opinion).
355 Id. at 169 n.23 (Leval, J., concurring) (“Several international conventions explicitly recognize the diversity in nations’ domestic laws regarding the imposition of criminal sanctions on legal or juridical persons. These conventions require State parties to impose criminal sanctions on legal persons, or where that is not possible under the individual nation’s domestic law, non-criminal sanctions. See Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), entered into force Jan. 18, 2002 (“Subject to the provisions of its national law, each State Party shall take measures . . . to establish the liability of legal persons. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.”); Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business transactions, art. 3, Nov. 21, 1997, DAFFE/IME/BR(97)20,
E. Guidance from “the Works of Jurists and Commentators”

The Supreme Court has said that courts should look to “the works of jurists and commentators” for “trustworthy evidence of what the law really is.” In Sosa, the Court said that Alvarez did not carry his burden of using these sources to demonstrate that his treatment violated any international norms. Judge Cabranes cited to minimal scholarly sources to support his argument. He referred to the affidavits of two international law professors for the proposition that “customary international law does not recognize liability for corporations that violate its norms” and “no international judicial 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.” Judge Leval pointed out that the question that derived this answer asked only whether the professor knew of a decision recognizing corporate liability for a violation of the law of nations, and not for him to make an assertion as to the state of international law. The professor, Leval added, even said:

When the terms of an international treaty become part of the law of a given state—whether (as in most common law jurisdictions) by being enacted by parliament [i.e., Congress enacting the ATS] . . . corporations may be civilly liable for wrongful conduct contrary to the enacted terms of the treaty just as they may be liable for any other conduct recognized as unlawful by that legal system.

Id. at 183 (quoting Decl. of James Crawford ¶ 4) (internal quotation marks omitted).

entered into force Feb. 15, 1999 (“The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties . . . In the event that under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions.”).

356 Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).
357 Id. at 737. He referred to only one such source.
358 Kiobel, 621 F.3d at 143 (majority opinion) (citing Decl. of James Crawford ¶ 10, Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 07-0016 (2d Cir. Jan. 22, 2009)).
359 Id. at 182. This is also corroborated by the amicus brief submitted by the International Law Scholars. See Brief for International Law Scholars as Amici Curiae Supporting Appellants at 7-12, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (No. 06-4800-cv) (arguing that international law supports the awarding of damages and obliges states to enact remedies for its violations).
This, would, if anything, support Leval’s opinion. The majority opinion cited two treatises and the Restatement, but Leval noted that in none of these sources did the majority find anything which supported the principle of no corporate liability under customary international law. He pointed out that if this were the case, strange as it seemed to him, that these authors would have made such a notation. This is an interesting and valid point.

The majority referred to a 2009 book for the proposition that “despite trends to the contrary, the view that international law primarily regulates States and in limited instances such as international criminal law, individuals, but not [transnational corporations], is still the prevailing one among international law scholars.” Leval, reading further, found that:

‘[T]he ATS, although incorporating international law, is still governed by and forms part of torts law which applies equally to natural and legal persons unless the text of a statute provides otherwise,’ and that international law does not prevent a State ‘from raising its standards by holding [transnational corporations] which are involved [in] or contribute to violations of international law liable as long as the cause of international law is served because international law leaves individual liability (as opposed to State liability), be it of a natural or a legal person, largely to domestic law.’

Id. at 172 n.38 (quoting KOEBELE, supra note 363, at 208).

Following this, it is evident that according to an author cited by the majority, a state may hold a corporate defendant liable for a breach of the law of nations. Judge Leval also cited that text for the statement that “the ATS ‘applies equally to natural and legal persons’ and that international law does not bar States from imposing liability on a corporation, as international law leaves civil liability to domestic law.” Here, again, Judge Leval had the stronger argument.

360 Id. at 183-84.
361 Id. at 181-82 (referring to the majority opinion’s citations to Oppenheim's International Law and Brierley's The Law of Nations).
362 Id.
363 Id. at 143 (majority opinion) (quoting MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ATS 196 (2009)) (alteration by court) (internal quotation marks omitted).
364 Id. at 181 n.38 (Leval, J. concurring) (quoting KOEBELE, supra note 363, at 208).
Leval cited another scholar, who in 2009, wrote that “[a]lleged perpetrators of crimes under international law that do not require any showing of state action, including piracy, genocide, crimes against humanity, enslavement, and slave trading, can be sued under the ATS. Generally, the prospective private defendants can be individuals, corporations, or other entities.” Note that there is no distinction made; it does not appear that one is necessary. This is in line with the plain reading of Footnote 20, Justice Breyer’s concurrence, and the pre-Kiobel cases which assumed corporate liability.

Finally, he noted that while the majority opinion dismissed some scholarly opinions as aspirational, in reality they are not. For example, Cabranes quoted Steven Ratner saying that “the universe of international criminal law does not reveal any prosecutions of corporations per se . . . .” However, Ratner’s sentence concluded: “an important precedent nonetheless shows the willingness of key legal actors to contemplate corporate responsibility at the international level.” Ratner discussed I.G. Farben and its war crimes trials before noting that the court made continued reference to corporations, including Farben, having “responsibilities,” “obligations,” and “duties” that they had breached. The majority made this same contention. This lends credence to Leval’s later quotation of Ratner for the summation that “international law has already effectively recognized duties of corporations.” Thus, the claim that the author is “aspirational” is refuted by examples supplied by the author himself. Leval concluded that Cabranes’ holding is not buttressed by any scholarship; Leval felt he had sufficient scholarship to

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365 Id. at 185 (quoting Peter Henner, Human Rights and the ATS: Law, History, and Analysis 215 (2009)).
366 See id. at 185 n.45; see also id. at 143 n.48 (majority opinion).
368 Ratner, supra note 367, at 477.
369 Id. at 477-78.
370 See supra note 187 (“legal status, personality, rights, and duties”).
371 Kiobel, 621 F.3d at 185 n.45 (Leval, J., concurring) (quoting Ratner, supra note 369, at 475) (internal quotation marks omitted).
support his viewpoint.\textsuperscript{372} Such an analysis should please the Supreme Court which would no doubt expect to see citations to various scholars of international law in this matter. If there was anything supporting the majority, it would seem, as Judge Leval pointed out, that they would have brought it to the forefront. Thus, the argument is empty in this respect.

\textit{F. The Earliest Interpretations}

Two opinions issued by United States Attorneys General pull in favor of Judge Leval in the debate over the nature of a “subject” of international law.\textsuperscript{373} A 1907 opinion interpreted the ATS to say that an American corporation could be held liable.\textsuperscript{374} A 1795 opinion advised that a British company could sue under the ATS.\textsuperscript{375} The ATS was enacted in 1789. The Attorney General’s opinion only six years later should bear significant weight in interpreting the statute.

In \textit{Sosa}, the Supreme Court spoke approvingly of the 1795 opinion.\textsuperscript{376} This is contrary to the majority’s assessment that “neither opinion does anything more than baldly declare that a corporation can \textit{sue} under the ATS . . . or that a corporation can \textit{be sued} under the ATS” and “neither opinion gives any \textit{basis} for its assumptions about customary international law.”\textsuperscript{377} The Supreme Court’s comments suggest that courts should give weight to these opinions. Thus, Leval’s use of the opinions in his analysis was correct and in line with the Court’s instructions.

\textsuperscript{372} \textit{Id.} at 186.  
\textsuperscript{373} \textit{See supra} Parts III.C, III.D.  
\textsuperscript{374} \textit{Kiobel}, 621 F.3d at 180.  
\textsuperscript{375} \textit{Id.}  
\textsuperscript{376} \textit{See Sosa v. Alvarez-Machain}, 542 U.S. 692, 721 (2004) (stating that Attorney General “made it clear that a federal court was open for the prosecution of a tort action . . .”); \textit{see also supra} notes 106-08.  
\textsuperscript{377} \textit{Kiobel}, 621 F.3d at 142 n.44 (majority opinion).
V. CONCLUSION

A. The Future of ATS Litigation

1. Aftershocks

Since *Kiobel*, multiple ATS suits against corporations have been dismissed citing its rationale.\(^{378}\) Clearly, the impact has been immediate.\(^{379}\) It has been called “a blockbuster opinion that could spell the end of the vast bulk of ATS litigation.”\(^{380}\) Though this is only one decision, the Second Circuit’s deep history with the ATS is likely to carry great weight nationwide.\(^{381}\)

Judge Leval argued that Judge Cabranes’s rationale undermines the renowned *Filartiga v. Pena-Irala* decision,\(^{382}\) and because of this fear, within days of the opinion, and before the dismissals noted above, an en banc review had been suggested by one of the lawyers who had argued *Sosa*.\(^{383}\) But, by an evenly divided vote\(^{384}\) as part of an interesting post-decision process,\(^{385}\) the Second Circuit denied the petition for en banc rehearing.\(^{386}\) The petition for

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\(^{381}\) *Kiobel*, 2011 WL 338151, at *2 (2d Cir. Feb. 4, 2011) (Katzmann, J., dissenting from the denial of rehearing in banc).

\(^{382}\) *Kiobel*, 621 F.3d at 150-51 (Leval, J., concurring).


\(^{385}\) *See Glenn Lamm*, *High Court’s Denial of Cert a De Facto Endorsement of Recent Alien Tort Statute Ruling?*, THE LEGAL PULSE (Oct. 4, 2010), http://wlplegalpulse.com/2010/10/04/high-courts-denial-of-cert-a-de-facto-endorsement-of-recent-alien-tort-statute-ruling/.
rehearing by the panel was also denied.\textsuperscript{387} The stage is now set for the Supreme Court\textsuperscript{388} to clarify its holding in \textit{Sosa} and its interpretation of customary international law.\textsuperscript{389}

\textbf{2. More Intra-Panel Discord}

The panel’s vote against a rehearing was predictable.\textsuperscript{390} But, there was a twist. Chief Judge Jacobs’s opinion against rehearing commended the “scholarly force” and “academic consistency” of Leval’s concurrence.\textsuperscript{391} He said that Judge Leval’s opinion wrongly focused on the ability of individual states to determine questions of liability and that “no account need be taken of how customary international law is enforced in our courts.”\textsuperscript{392} To demonstrate the incompatibility of this, he pointed out that international law has been concerned with how American courts operate by using examples of extradition cases where transfer was refused based on the use of the death penalty.\textsuperscript{393}

Jacobs transitioned to a policy analysis of how the imposition of corporate civil liability by American courts could be seen as an unjustified extraterritorial application of American law.\textsuperscript{394} He quoted Thabo Mbeki, former President of South Africa, who said “[South Africans] consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of

\textsuperscript{387} \textit{Kiobel} v. Royal Dutch Petroleum Co., Nos. 06-4800-cv, 06-4876-cv, 2011 WL 338048 (2d Cir. Feb. 4, 2011).
\textsuperscript{388} As of June 6, 2011, no petition for certiorari has been filed. However, a second petition for en banc rehearing has been filed. George Conk, \textit{Kiobel: Second Petition for Rehearing En Banc Filed, OTHERWISE} (Feb. 27, 2011, 12:33 AM), http://blackstonetoday.blogspot.com/2011/02/kiobel-second-petition-for-rehearing-en.html. The plaintiffs have 90 days from the entry of the final judgment denying rehearing to file their petition. \textit{See} Sup. Ct. R. 13.1 and Fed. R. App. P. 36(a).
\textsuperscript{390} \textit{Kiobel}, 2011 WL 338048.
\textsuperscript{391} \textit{Id.} at *1 (Jacobs, C.J., concurring in denial of panel rehearing). This is odd when viewed in light of the sparring evidenced in the original opinion. \textit{See supra} Part III.E.
\textsuperscript{392} \textit{Id.}
\textsuperscript{393} \textit{Id.}
\textsuperscript{394} \textit{Id.} at *2.
our country . . .” as an example of how much of the world feels about American courts deciding such matters. 395 Adopting Mbeki’s term, “judicial imperialism,” Jacobs suggested that American courts adjudicating foreign issues could negatively impact American foreign policy. 396

Judge Leval lashed out at Chief Judge Jacobs’s opinion and said that it “sheds new light on the motives that underlie[d] the majority’s ruling.” 397 He did not go so far as to suggest that Jacobs advocates eliminating the ATS, but noted that Jacobs’s policy concerns are not within the province of federal judges. 398 Jacobs, Leval said, casts too wide a net in eliminating corporate liability. 399 The policy rationale in the Chief Judge’s opinion is clear.

Jacobs’s support for the notion of “judicial imperialism” cuts a broad swath. 400 It can be read to minimize or even eliminate suits under the ATS. 401 Matters referred to by Mbeki, those “central to the future” of foreign nations, were arguably present in the earlier ATS cases that found liability, such as Kadic v. Karadzic 402 and Khulumani v. Barclay Nat. Bank Ltd. 403 The issues in those two cases were important to the future of the nations involved and were also determined to be sufficiently within the norms of international law to be brought under the ATS. It cannot work both ways. If Chief Judge Jacobs is so concerned about perceptions of “judicial imperialism” resulting from the ATS, perhaps it should be repealed— a job for Congress.

Of course there is language in Sosa which could defend Jacobs’s position. He concluded: “ATS suits against corporations are foreclosed . . . in order to promote international comity, to

395 Id. (quoting President Thabo Mbeki, Statement by President Thabo Mbeki to the National Houses of Parliament and the Nation, on the Occasion of the Tabling of the Report of the Truth and Reconciliation Commission (Apr. 15, 2003) (internal quotation marks omitted).
396 Id. at *2-3 (quoting President Thabo Mbeki, Response to National Assembly Question Paper (Nov. 8, 2007)) (internal quotation marks omitted).
397 Kiobel, 2011 WL 338048, at *4 (Leval, J., dissenting from the denial of rehearing).
398 Id.
399 Id. at *4-5.
400 See id.
401 See id.
402 See supra Part II.A.2 (genocide committed by self-appointed government).
403 See supra Part II.A.3 (complicity in government-run apartheid).
administer efficient handling of cases, and to avoid the use of our courts to extort settlements.”

Support for this could come from Justice Souter’s admonitions against federal courts creating too many causes of action and certainly from Justice Scalia’s comments regarding any new ATS claims. However, nothing in Sosa speaks to judicial efficiency or to the fear of extorted settlements, and those are both broader policy questions, ill-suited for this court.

Breyer’s concurrence most strongly supports part of the summation made by Jacobs where Breyer asked courts to consider “whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.” While relevant, this “notion of comity” was not addressed by the Sosa majority in quite this manner. Souter noted concern that courts could overstep their bounds, but it was along the lines of “suits . . . that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.” There also does not seem to be an issue of limiting a foreign government’s power over its corporate citizens since it is merely an exercise of jurisdiction, and one clearly contemplated by Congress in enacting the ATS and in the statute’s continued vitality and relatively unchanged status.

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405 See supra text accompanying notes 109-117.
406 See supra Part II.C.3.
407 See Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117 (2d Cir. 2010) (the majority referred to ATS suits as “uncommon” at the appellate level, if this is so, courts would not seem to be overwhelmed).
408 For two examples where corporations have settled ATS claims see id. at 116 n.7.
410 Id. at 727-28.
411 Id. at 727.
412 See, e.g., id. at 725. It stands to reason that Congress could have amended the ATS to preclude corporate liability as there is never a question of corporate influence in politics, see, e.g., Arthur R. Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 DUKE L. J. 1, 11 (2010) (mentioning how corporate lobbying efforts helped to enact heightened pleading standards which greatly favored business interests in litigation), and since courts like the Second Circuit have already been assessing liability against corporations. See supra Parts II.A.4, II.B.2.
light of prior ATS cases not negatively criticized by the Supreme Court, and the Court’s statement that new claims are not foreclosed, this consideration does not seem to be reached by applying liability to corporations. The policy considerations which permeate Chief Judge Jacobs’s opinion do not withstand criticism.

As to Jacobs’s concern that corporate defendants would be bullied into settlements, Leval pointed out that there are safeguards in place to prevent excessive jury verdicts; defendants should not be concerned. After summarizing the arguments made by Jacobs, he concluded that Jacobs sided with Cabranes out of a “desire to protect large transnational corporations from the expenses of discovery and damage awards and from the ‘judicial imperialism’ of United States judges discharging their responsibilities under an act of Congress.” Judge Leval has a strong argument that the justifications raised by Jacobs were based on policy. While Jacobs’s opinion regarding a rehearing does not entirely undermine the panel opinion, it does speak to Jacobs’s motives for siding with Cabranes and forming a majority.

3. Solidifying the Intra-Circuit Split

The en banc vote was a split of ten active members of the court, but without the newest member, Judge Lohier. There was no reason given, nor could there have been one, why Lohier did not get to vote for a rehearing, although he would not have been able to vote in the

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413 See supra text accompanying notes 287-88.
414 See supra text accompanying notes 123-24. This is made even clearer by Justice Scalia’s concurrence. See supra Part II.C.3.
416 Id. at *5-8.
417 Id. at *9.
419 Simons, supra note 418 (suggesting that Chief Judge Jacobs’s policy-based opinion may weaken the panel’s holding in other jurisdictions).
420 Id.; 2d Cir. INT. OP. P. 35.1(b) (“Only an active judge may vote to determine whether a case should be heard or reheard en banc. A judge’s status as an active or senior judge for the purpose of an en banc poll is determined on the date of entry of the en banc order.”) (emphasis added).
rehearing itself. Leval, a senior judge, was actually disallowed from the rehearing vote despite the fact the he would, of course, have been allowed to take part in the rehearing. Lohier’s vote to rehear could have resulted in Leval’s vote in the proceeding. How this would have gone can be speculated upon by an analysis of the order denying en banc rehearing.

Judge Leval’s presence was felt in the opinions that dissented from the denial of en banc rehearing filed by Judges Lynch and Katzmann. Lynch was joined by Katzmann and two others and he noted the new circuit split between the Second and Eleventh Circuits, and he stated that he felt “essentially for the reasons stated by Judge Leval in his scholarly and eloquent concurring opinion . . . that the panel majority opinion is very likely incorrect as to whether corporations may be found civilly liable under the Alien Tort Statute.” That makes for a hypothetical six votes in favor Leval’s opinion were an en banc hearing to have taken place.

The truly interesting opinion was Judge Katzmann’s which noted the dispute between Judges Cabranes and Leval over the meaning of his concurrence in Khulumani v. Barclay Nat. Bank Ltd. He said that he “see[s] no inconsistency between the reasoning of my opinion in Khulumani and Judge Leval's well-articulated conclusion, with which I fully agree, that

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421 2D CIR. INT. OP. P. 35.1(d) (“Only an active judge or a senior judge who either sat on the three-judge panel or took senior status after a case was heard or reheard en banc may participate in the en banc decision. A judge who joins the court after a case was heard or reheard en banc is not eligible to participate in the en banc decision.”) (emphasis added).
422 Samp, supra note 385; 2D CIR. INT. OP. P. 35.1(b) (“Only an active judge may vote to determine whether a case should be heard or reheard en banc. A judge’s status as an active or senior judge for the purpose of an en banc poll is determined on the date of entry of the en banc order.”) (emphasis added).
423 2D CIR. INT. OP. P. 35.1(c) (“[A] senior judge who sat on the three-judge panel is eligible to participate in the en banc hearing or rehearing.”).
424 The same Judge Katzmann whose concurring opinion in Khulumani v. Barclay Nat. Bank Ltd., supra note 297, was adopted as circuit precedent and the meaning of which was disputed by Judges Cabranes and Leval in Kiobel.
425 Lynch did not mention Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009), supra note 69. The panel opinion in Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) is not relied upon here for the reasons stated above. See supra note 59.
427 The six votes are the three other who subscribed to Lynch’s opinion, Judge Hall’s statement in Khulumani, see supra note 303, and, of course, Leval himself.
428 Kiobel, 2011 WL 338151, at *2 (Katzmann, J., dissenting from the denial of rehearing en banc).
corporations, like natural persons, may be liable for violations of the law of nations under the ATCA.\textsuperscript{429} Thus, the debate over circuit precedent concerning types of defendants liable under the ATS was settled.\textsuperscript{430} There could not have not been a better arbiter of that distinction.

The sharp division amongst the Second Circuit, a highly-regarded authority in the ATS, lends further support to the importance (necessity?) of Supreme Court review and clarification of what is now a circuit split over an increasingly important issue.

4. Eschewing Obligations

If not for the reasons already articulated concerning interpretation of various precedents, the majority’s opinion is wrong for another reason, a more abstract one. Judge Leval made note of it in his opinion when he argued that the majority’s holding was contrary to the goals and objectives of international law. Taking the poignant language of the Supreme Court, Judge Leval opined that the law of nations covers crimes where the violator is “hostis humani generis, an enemy of all mankind.”\textsuperscript{431} If the majority truly believed that such language aptly describes the goals of international humanitarian law, and there is no reason to doubt that it did, then what it argued in this case was that the norms of international law do not operate so as to punish all violators of international law. While the decision denies liability for corporations under the ATS, the majority suggested that there are other methods for achieving relief; thus, this is not so harmful of a decision.\textsuperscript{432} This cannot be reconciled with the goal of the ATS of allowing suits and making no distinction between private defendants. Such arguments do nothing to assist victims seeking compensation under the ATS.

\textsuperscript{429} Id.
\textsuperscript{430} See supra Part IV.B
\textsuperscript{432} Id. at 122 (majority opinion); compare Kiobel v. Royal Dutch Petroleum Co., Nos. 06-4800-cv, 06-4876-cv, 2011 WL 338048, at *6 (2d Cir. Feb. 4, 2011) (Jacobs, C.J., concurring in denial of panel rehearing) (arguing that the actual number of cases affected by the ruling is minimal) with Kiobel, 2011 WL 338048, at *6 (Leval, J., dissenting from denial of panel rehearing) addressing this argument as misguided).
Following the denial of rehearing, Judge Leval addressed the matter of private military contractors as a future area of ATS litigation. As the United States and other nations continue to contract out for privatized military and security services, the potential for suits arising from these operations will likely grow. If there is no recourse under the ATS for victims of abuse in these circumstances, the goals of international human rights laws are undermined.

Oscar Schachter wrote that “international law . . . is more than a given body of rules and obligations. It involves purposive activities undertaken by governments, directed to a variety of social ends.” Congress sought to have the United States undertake its role in preserving international law and the sanctity of human life by enacting the ATS. The court should not have interfered with this perfectly rational exercise of congressional authority.

B. Final Thoughts

The Second Circuit majority opinion misconstrued vital language in the only Supreme Court case decided under the ATS. Taking what was either a misguidedly strict view of, especially, Footnote 20, or an outright desire to interpret the ATS so as to not allow recovery against a corporation, the majority did a disservice to Supreme Court precedent. The search for entirely universal norms, as Cabranes argued to be necessary under Sosa, was also mistaken.

The majority again erred on the subject of interpretation of Second Circuit and other relevant appellate precedent, which, considering the brief history of ATS litigation, is the only jurisprudence available. It asserted that circuit precedent calls for a determination of the type of defendant who can be liable and distinguishes between corporations and individuals. This

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433 Kiobel, 2011 WL 338048, at *6 (Leval, J., dissenting from the denial of rehearing).
434 For a current example, see the discussion of Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009), supra Part II.B.3.
435 See Brief for International Law Scholars as Amici Curiae Supporting Appellants at 14-15, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (No. 06-4800-cv) (“The panel majority’s approach thus conflicts with the obligation of States to provide a meaningful remedy for such abuses.”).
436 OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 2 (1991). For more on Schachter and why he is important see Kiobel, at 172 n.29 (Leval, J., concurring).
approach was demonstrably incorrect. It essentially analyzed the famous and lauded *Filartiga v. Pena-Irala* decision right out of relevance. Where other circuits decided issues related to this case, the majority opinion was silent and the concurring opinion made only slight reference.

Review of those cases reveals a marked jurisprudential divide. The en banc comments of Judge Katzmann provide further support for Judge Leval, while the rehearing opinion of Chief Judge Jacobs reveals the possibility that the majority opinion was motivated by policy concerns. All of this serves to sufficiently divide the judges of the Second Circuit. The divide between the Second, Eleventh, and District of Columbia Circuits further highlights the importance of review.

Judges Cabranes and Leval came to different conclusions on the issue of “subjects of international law.” Based on an analysis of the Nuremberg tribunals and a series of Second Circuit cases, and buttressed by the summation by a Second Circuit District Judge in another ATS case, Judge Leval’s contention that corporations are indeed subjects of international law carries the day. Subsequent submissions by amici also supported Judge Leval.

The two judges also differed on the imposition of civil liability against corporations under international law as their interpretations of international tribunals and relevant statutes led them to opposite conclusions. Cabranes argued that there is no such thing within the scope of international law while Leval argued persuasively that international law leaves such determinations to the various states and that the United States is free to allow suits to enforce violations of the law of nations. This kind of freedom is in accord with the international laws which allow individual states to determine criminal punishment for corporations.

The “works of jurists and commentators” can be a great aid in analyzing ATS cases. The majority opinion made little use of them, as pointed out by Judge Leval who used them to
showcase his arguments and to provide more support for his conclusions. As above, evidence submitted by amici argued in favor of Leval. The Supreme Court would be sure to use them.

Finally, the interpretations given by the judges of the panel as to the two Attorney General opinions, in light of the Supreme Court’s reading of one of them, again highlighted the differences in their reasoning, and again reasserted the supremacy of Judge Leval’s reasoning.

Throughout his opinion, Judge Leval made stronger, and more accurate, interpretations, arguments, and conclusions based on precedent, and the earliest available interpretations of the ATS by United States Attorneys General. He made better use of international legal sources, and his use of scholastic works strongly supported his argument.

The majority suggested that Congress could amend the ATS to give federal courts jurisdiction over corporations. For the reasons discussed, such a change would be superfluous. The only amendment needed is to the rationale of the majority opinion. Until then, the future and viability of the ATS, and much of international human rights litigation, hangs in the balance.