

EXAGGERATED RUMOURS OF THE DEATH OF AN ALIEN TORT? CORPORATIONS, HUMAN RIGHTS AND THE REMARKABLE CASE OF KIOBEL

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*Over the past 15 years or so, we have become accustomed to assuming that corporations are proper subjects of litigation for alleged infringements of the ‘law of nations’ under the Alien Tort Statute (‘ATS’).¹ But, in a dramatic reversal of this line of reasoning, the United States Court of Appeals for the Second Circuit in *Kiobel v Royal Dutch Petroleum* (‘*Kiobel*’),² has dismissed this assumption and concluded that corporations cannot be sued under the ATS. This article explores the Court’s reasoning and the ramifications of the decision, highlighting the ways in which the *Kiobel* judgment departs from both Supreme Court and Second Circuit precedent. The authors take to task the critical failure of the majority in *Kiobel* to distinguish between the requirements of legal responsibility at international law and that which is necessary to invoke ATS jurisdiction in the US District Courts. In the context of the maturing debates over the human rights responsibilities of corporations, the authors point to the political as well as legal policy implications of *Kiobel* and underscore the reasons why the case has already attracted such intense interest and will continue to excite attention as a US Supreme Court challenge looms.*

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¹ 28 USC § 1330.

² 621 F 3d 111 (2nd Cir, 2010) (‘*Kiobel*’).

I INTRODUCTION

Since the landmark decision by the United States Court of Appeals for the Second Circuit ('Second Circuit')³ in *Filártiga v Peña-Irala* ('Filártiga')⁴ in 1980, when the Paraguayan relatives of Joelito Filártiga sued a former Paraguayan Inspector General of Police for the torture and death of Filártiga in Paraguay, aliens have been bringing tort claims in US federal courts against foreign nationals or foreign companies for violations of international law in foreign lands. The *Alien Tort Statute* ('ATS'),⁵ also known as the *Alien Tort Claims Act* and enacted as part of the *Judiciary Act of 1789*⁶ by the First US Congress,⁷ was a little known and little used provision of US law until it was brought to life in the Second Circuit in 1980. Since *Filártiga*, aliens have been bringing claims under the *ATS* for egregious human rights abuses against war criminals,⁸ oil companies,⁹ chemical manufacturers,¹⁰ financial institutions,¹¹ political groups¹² and private military companies,¹³ to name but a few. From war crimes and genocide in the Republika Srpska,¹⁴ to torture, summary execution and enforced disappearances in the Philippines,¹⁵ involuntary medical experimentation on children in Nigeria,¹⁶ and corporate complicity in the conduct of governments from apartheid-era South Africa¹⁷ to human rights abuses in present day Burma or Sudan¹⁸ — the factual allegations of *ATS* cases describe some of the worst outrages against human dignity known to mankind.

And yet, ironically, the same circuit court that gave new life to this remarkable statute has attempted to sound the death knell for the *ATS*.¹⁹ In appeals in *Presbyterian Church of Sudan v Talisman* ('Talisman')²⁰ and *Kiobel v*

³ All US Circuit Courts of Appeals will be referred to by their numbered circuit, for example, the Ninth Circuit.

⁴ 630 F 2d 876 (2nd Cir, 1980) ('Filártiga').

⁵ 28 USC § 1330. Section 1330 in its entirety provides: '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.'

⁶ Ch 20, 1 Stat 73–93.

⁷ Section 1330 was originally enacted in the *Judiciary Act of 1789* ch 20 § 9, 1 Stat 73, 77.

⁸ *Kadic v Karadzic*, 70 F 3d 232 (2nd Cir, 1995) ('Kadic').

⁹ *Wiwa v Royal Dutch Petroleum*, 226 F 3d 88 (2nd Cir, 2000) ('Wiwa'); *Presbyterian Church of Sudan v Talisman Energy Inc*, 582 F 3d 244 (2nd Cir, 2009) ('Talisman'); *Doe v Unocal Corp*, 395 F 3d 932 (9th Cir, 2002) ('Unocal').

¹⁰ *Re Agent Orange Product Liability Litigation*, 373 F Supp 2d 7 (ED NY, 2005) ('Agent Orange'); *Vietnam Association for Victims of Agent Orange v Dow Chemical Company*, 517 F 3d 104 (2nd Cir, 2008).

¹¹ *Khulumani v Barclays National Bank*, 504 F 3d 254 (2nd Cir, 2007) ('Khulumani').

¹² *Tel-Oren v Libyan Arab Republic*, 726 F 2d 774 (DC Cir, 1984) ('Tel-Oren'), which among its defendants named the Palestine Liberation Organization.

¹³ *Re XE Services Alien Tort Litigation*, 665 F Supp 2d 569 (ED Va, 2009) ('XE Services').

¹⁴ *Kadic*, 70 F 3d 232 (2nd Cir, 1995).

¹⁵ *Re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F 3d 1467 (9th Cir, 1994).

¹⁶ *Abdullahi v Pfizer*, 562 F 3d 163 (2nd Cir, 2009) ('Pfizer').

¹⁷ See *Re South African Apartheid Litigation*, 617 F Supp 2d 228 (SD NY, 2009) ('Apartheid Litigation').

¹⁸ *Unocal*, 395 F 3d 932 (9th Cir, 2002); *Talisman*, 582 F 3d 244 (2nd Cir, 2009).

¹⁹ John Bellinger, 'Shortening the Long Arm of the Law', *International Herald Tribune* (Paris), 9 October 2010, 8.

²⁰ 582 F 3d 244 (2nd Cir, 2009).

Royal Dutch Petroleum ('*Kiobel*')²¹ — both involving corporations accused of complicity in human rights abuses perpetrated in, respectively, Sudan and Nigeria — the Second Circuit has, in two successive blows, all but permanently closed the *ATS* door which the US Supreme Court had left 'ajar subject to vigilant doorkeeping'²² — at least in its own circuit.

In the case of *Kiobel*, on 17 September 2010 the Second Circuit decided, in a 2–1 decision, that corporations could not be held liable under the *ATS* because there was no norm of customary international law that recognised the liability of corporations for violations of international law.²³ The effect of this ruling, should it survive a Supreme Court appeal,²⁴ is that jurisdiction under the *ATS* in the Second Circuit will henceforth be limited to claims against natural persons. While early *ATS* cases were predominantly against natural persons,²⁵ for at least the last 14 years, since the filing of the complaint in *Doe v Unocal* ('*Unocal*')²⁶ in 1997, corporations have been the subject of suits under the *ATS*. Since *Unocal*, corporations ranging across different sectors, including financial institutions,²⁷ food and beverage manufacturers,²⁸ extractive industries,²⁹ private military firms,³⁰ car and machinery manufacturers,³¹ and pharmaceutical companies,³² have been sued under the *ATS*. In almost all of the *ATS* cases against corporations, the question of whether a corporation could be sued appears to have been assumed, with neither defendants raising it as a concern, nor courts considering it.³³ This is understandable given the difficulty of identifying logical reasons why corporate or juridical persons should be distinguished from natural persons. Indeed, the argument was not even raised by the defendants in *Kiobel*

²¹ 621 F 3d 111 (2nd Cir, 2010).

²² *Sosa v Alvarez-Machain*, 542 US 692, 729 (2004) ('*Sosa*').

²³ *Kiobel*, 621 F 3d 111 (2nd Cir, 2010). The plaintiffs — residents of the Ogoni Region in Nigeria — allege that Shell, through its local subsidiary, aided and abetted the Nigerian Government in committing a series of human rights abuses against the plaintiffs between 1993 and 1995 that included extra-judicial killing; beating, raping, and arresting residents; and destroying or looting property.

²⁴ *Kiobel* has already survived the plaintiffs' petitions for panel rehearing and rehearing *en banc*, which were both denied on 4 February 2011. Panel rehearing was denied 2–1, and rehearing *en banc* was denied in a 5–5 split decision: see below Part VII. The plaintiffs have appealed to the US Supreme Court: see Esther Kiobel et al, 'Petition for the Writ of Certiorari', Submission in *Kiobel v Royal Dutch Petroleum*, 6 June 2011.

²⁵ Predominantly, but not exclusively — for instance, the 1984 judgment in *Tel-Oren*, 726 F 2d 774 (DC Cir, 1984) concerned a suit against a state (Libya), the Palestine Liberation Organization and various Arab organisations.

²⁶ 395 F 3d 932 (9th Cir, 2002).

²⁷ *Khulumani*, 504 F 3d 254 (2nd Cir, 2007).

²⁸ *Doe v Nestle*, 748 F Supp 2d 1057 (CD Cal, 2010) ('*Nestle*'); *Sinaltrainal v Coca-Cola*, 578 F 3d 1252 (11th Cir, 2009).

²⁹ *Talisman*, 582 F 3d 244 (2nd Cir, 2009); *Unocal*, 395 F 3d 932 (9th Cir, 2002); *Wiwa*, 226 F 3d 88 (2nd Cir, 2000); *Bowoto v Chevron* 621 F 3d 1116 (9th Cir, 2010); *Romero v Drummond*, 552 F 3d 1303 (11th Cir, 2008) ('*Romero*').

³⁰ *XE Services*, 665 F Supp 2d 569 (ED Va, 2009).

³¹ Daimler Chrysler, Ford Motor Company and General Motors were among the defendants in *Apartheid Litigation*, 617 F Supp 2d 228 (SD NY, 2009); *Corrie v Caterpillar*, 503 F 3d 974 (9th Cir, 2007).

³² *Pfizer*, 562 F 3d 163 (2nd Cir, 2009).

³³ See below n 119 and the cases cited therein. See also Julian G Ku, 'The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking' (2011) 51 *Virginia Journal of International Law* 353, 365–70.

itself, but rather in the appeal in *Talisman*,³⁴ heard at the same time as *Kiobel*.³⁵ The fact that an issue so fundamental as whether corporations can be sued under the *ATS* had not before been raised by defendants, or canvassed more often by courts as a matter of course when exercising jurisdiction over corporate defendants, raises the obvious question: why *Kiobel*, why now? What has changed in the landscape of *ATS* jurisprudence or otherwise that such an argument suddenly became viable, and, potentially, dispositive?

The answer to that question, in part, stems from a single footnote in the one and only Supreme Court judgment to substantively address the construction of the *ATS*, *Sosa v Alvarez-Machain* ('*Sosa*').³⁶ The 'Delphic'³⁷ footnote 20 of Justice Souter's opinion in *Sosa* lends ammunition to the argument that the 'scope of liability' for a violation of international law pursuant to the *ATS* — as regards which perpetrators may be held liable (that is, only state actors, or also non-state actors) — must be determined by international law.³⁸ This footnote has been used by both district and circuit courts in subsequent cases to frame a 'choice of law' debate. That is, having identified a violation of international law cognisable under the *ATS*, the debate then centres on related questions of the 'scope of liability' — for example, of private actors as opposed to state actors, doctrines of secondary or accessory liability (such as aiding and abetting, or joint criminal enterprise), or even questions of corporate liability — and whether the law governing these issues is domestic (for example, federal common law) or international law. The debate about 'choice of law' under the *ATS* in fact predates the Supreme Court's decision in *Sosa*, but since the Supreme Court failed to clarify the question (or, in seeking to clarify it, inadvertently stirred it up again), the debate persists.³⁹ In order to understand how a ruling so remarkable as that in *Kiobel* can appear to spring forth as if from nowhere, it is important to trace this 'choice of law' debate which has been winding its way through circuit courts since *Tel-Oren v Libyan Arab Republic* ('*Tel-Oren*')⁴⁰ and which, after *Sosa*, continues to plague district courts dealing with *ATS* claims.

We begin by identifying three phases in the 'choice of law' debate. The first phase, addressed in Part II, concerns the source of law for causes of action under the *ATS*: does the *ATS* create a statutory cause of action, does it grant jurisdiction to federal courts to recognise federal common law causes of action, or does the *ATS* only permit the recognition of causes of action that exist in international law? While the Supreme Court settled this first phase of the debate in its 2004

³⁴ 582 F 3d 244 (2nd Cir, 2009).

³⁵ See below nn 122, 124.

³⁶ 542 US 692 (2004).

³⁷ As it was described by Judge Hall in *Khulumani*, 504 F 3d 254, 286 (2nd Cir, 2007). See below n 86.

³⁸ For the content of footnote 20 of Justice Souter's opinion in *Sosa*, 542 US 692, 733 (2004), see below n 73 and accompanying text.

³⁹ Note, however, that a number of commentators, both before and after *Sosa*, have argued persuasively that the question of 'choice of law' ought to be settled in favour of federal common law. See, eg, Beth Stephens et al, *International Human Rights Litigation in US Courts* (Martinus Nijhoff, 2nd ed, 2008) 35–7. See also Paul L Hoffman and Daniel A Zaheer, 'The Rules of the Road: Federal Common Law and Aiding and Abetting under the Alien Tort Claims Act' (2003) 26 *Loyola of Los Angeles International and Comparative Law Review* 47.

⁴⁰ 726 F 2d 774 (DC Cir, 1984).

Sosa judgment, it further agitated the second phase of the debate regarding secondary liability with its infamous footnote 20. We discuss this second choice of law debate — and the use and abuse of footnote 20 of *Sosa* — in Part III. While the debate over secondary or aiding and abetting liability is by no means settled, we argue in Part III that the adoption by the Second Circuit of international law as the source of law for determining the rules on secondary liability under the *ATS* has helped pave the way for the third phase of the debate on corporate liability. In respect of the third phase, in Part IV we turn to the reasoning of the Second Circuit in *Kiobel*, which ruled that the source of law for corporate liability under the *ATS* is international law. From this conclusion, the majority in *Kiobel* argues that there is no norm of corporate liability in customary international law, and therefore that there can be no liability of corporations under the *ATS*.

We disagree with this argument. In Part V, we elaborate our three key criticisms of the *Kiobel* majority's reasoning. We argue, first, that the 'choice of law' for corporate liability under the *ATS* is federal common law, not international law; secondly, that in its analysis of *ATS* liability, the majority erroneously reduces the 'law of nations' to international crimes; and thirdly, that contrary to the majority, international law recognises that corporations can violate its norms. This analysis of *ATS* jurisprudence demonstrates that there persists a patent need for clarity from the Supreme Court on the scope of the statute. We conclude in Parts VII and VIII by critiquing the policy rationales for the Second Circuit's restrictive approach to the *ATS*, as made explicit in its judgment on the denial of panel rehearing of *Kiobel* on 4 February 2011.⁴¹

II THE CHOICE OF LAW DEBATE FOR CAUSES OF ACTION: FROM TEL-OREN TO SOSA

Among the earliest of the many heated debates and split judgments that the *ATS* has produced is the debate between Judge Edwards and Judge Bork of the District of Columbia Circuit Court of Appeals in *Tel-Oren*.⁴² The case involved a claim by Israeli citizens against the Libyan Arab Republic, the Palestine Liberation Organization ('PLO'), and other Arab organisations in respect of an attack perpetrated by 13 armed members of the PLO along the highway between Haifa and Tel Aviv, including the taking hostage of a civilian bus, which ended in 34 dead and 87 injured. The plaintiffs claimed under the *ATS* for multiple tortious acts in violation of the law of nations and treaties of the US, including torture and terrorism. In deciding whether to follow the Second Circuit's ruling in *Filártiga*, the two judges who considered the substance of the *ATS* claim dramatically split on the necessary elements to enliven the Court's jurisdiction under the *ATS*.⁴³

Judge Edwards adopted the formulation in *Filártiga* that the *ATS* provides a right of action. Judge Bork, by contrast, held that the *ATS* does not confer such a right. In the absence of a right to sue conferred by international law, for example

⁴¹ *Kiobel v Royal Dutch Petroleum Co* (2nd Cir, No 06-4800-cv, 4 February 2011) ('*Kiobel Panel Rehearing*').

⁴² 726 F 2d 774 (DC Cir, 1984).

⁴³ Judge Robb stated that he would have dismissed the case on the basis that it raised a non-justiciable political question: see *Tel-Oren*, 726 F 2d 774, 823–7 (DC Cir, 1984).

in a ratified treaty, or by a statute passed by the US Congress, Judge Bork held that the plaintiffs did not have a cause of action.⁴⁴ However, in Judge Edwards' view:

The Second Circuit did not require plaintiffs to point to a specific right to sue under the law of nations in order to establish jurisdiction under section 1350; rather, the Second Circuit required only a showing that the defendant's actions violated the substantive law of nations. In contrast, Judge Bork would deny jurisdiction to any plaintiff — presumably including those in *Filártiga* — who could not allege a specific right to sue apart from the language of section 1350 itself.⁴⁵

Judge Edwards correctly notes that international law does not create the rules concerning when a violation is actionable in domestic legal systems, except where states have agreed by treaty on certain responses, such as in the *Genocide Convention*,⁴⁶ which requires all state parties to criminalise genocide and related offences in their municipal legal systems.⁴⁷ Ordinarily, international law permits states to construct their municipal laws as they see fit and to meet their international duties as they will.⁴⁸ 'As a result', Judge Edwards observed, 'the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws'.⁴⁹ Thus, 'to require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves would be to effectively nullify the "law of nations" portion of section 1350'.⁵⁰

Judge Bork, by contrast, would have required either that domestic municipal law clearly provide for a cause of action, or that the law of nations provide not only the substantive rules to be violated but also the cause of action — the right to sue for any breach — before the *ATS* would be enlivened.⁵¹ Judge Bork argued that this construction would not render the statute a nullity since at the time of the *ATS*'s enactment in 1789, Congress would have had in mind the three offences against the law of nations that were recognised at that time by William Blackstone — violation of safe-conducts, infringement of the rights of ambassadors, and piracy.⁵² However, in Judge Edwards' view, this concession is specious, since, on Judge Bork's construction of the *ATS*, it would need to be

⁴⁴ *Tel-Oren*, 726 F 2d 774, 808–19 (DC Cir, 1984). Having canvassed treaties, common law, congressional enactments, and customary international law, Judge Bork determined that none of those sources provided a cause of action.

⁴⁵ *Ibid* 777.

⁴⁶ *Convention on the Prevention of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').

⁴⁷ *Tel-Oren*, 726 F 2d 774, 778 (DC Cir, 1984).

⁴⁸ *Ibid*.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*.

⁵¹ *Ibid* 816–19. Judge Bork further argues at 822 that:

Since international law does not, nor is it likely to, recognize the capacity of private plaintiffs to litigate its rules in municipal courts, as a practical matter only an act of Congress or a treaty negotiated by the President and ratified by the Senate could create a cause of action [under s 1350].

⁵² *Ibid* 813–14.

shown that the law of nations created a private right of action to avenge the three violations enumerated by Blackstone — a task which ‘would require considerable skill since the law of nations simply does not create rights to sue’.⁵³ Rather, Judge Edwards points out that Blackstone makes clear that it was

the municipal laws of England, not the law of nations, that made the cited crimes offenses: ‘The principal offenses against the law of nations, *animadverted on as such by the municipal laws of England*, are of three kinds: 1. Violations of safe conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.⁵⁴

In the *ATS* suits which followed *Tel-Oren*, federal courts adopted the approach of Judge Edwards in finding that the *ATS* is more than a hollow grant of jurisdiction and permits suits in tort for violations of the law of nations. As we explore further below, one of the most significant features of the majority’s reasoning in *Kiobel* is that it effectively returns to this debate about causes of action, and dramatically reverses the line of precedent which followed *Tel-Oren*, by implicitly siding with Judge Bork’s approach.

The US Supreme Court finally weighed in on the *ATS* debate in its 2004 judgment in *Sosa*,⁵⁵ ruling that the *ATS* was a jurisdictional statute only and thus did not itself create a statutory cause of action,⁵⁶ but that ‘at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law’.⁵⁷ The Supreme Court considered the historical record and concluded that in enacting the *ATS*, the First US Congress had intended that district courts would ‘recognize private causes of action for certain torts in violation of the law of nations’,⁵⁸ though Congress probably only had in mind ‘those torts corresponding to Blackstone’s three primary offences [against the law of nations]: violation of safe conducts, infringement of the rights of ambassadors, and piracy’.⁵⁹ Further, the Supreme Court concluded that no development since 1789 had precluded present day federal courts from exercising their power and discretion to recognise new causes of action ‘under the law of nations as an element of common law’.⁶⁰ In short, in the exercise of their federal common law discretion, courts can recognise new causes of action in common law based on violations of the law of nations. The Supreme Court counselled a restrained conception of this discretion, however, and considered that

courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized.⁶¹

⁵³ Ibid 799.

⁵⁴ Ibid 779 (emphasis in original), quoting William Blackstone, *Commentaries on the Laws of England* (Welsby ed, 1854) vol 4, 67.

⁵⁵ *Sosa*, 542 US 692 (2004). Justice Souter delivered the majority opinion of the Court.

⁵⁶ Ibid 724.

⁵⁷ Ibid 712–13.

⁵⁸ Ibid 724.

⁵⁹ Ibid.

⁶⁰ Ibid 724–5.

⁶¹ Ibid 725.

In a separate opinion in *Sosa*, Justice Scalia, while agreeing with the majority that the ATS is jurisdictional only, argued that after the Supreme Court's 1938 decision in *Erie*⁶² (which held that federal courts have no authority to derive 'general' common law) there should be no further independent judicial recognition of actionable international norms under the ATS.⁶³ The majority, however, rejected this view and found that the judicial power persists, but should only be exercised 'on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today'.⁶⁴ Drawing on the facts that: (1) *Erie* did not bar any judicial recognition of new substantive rules and that post-*Erie* jurisprudence has 'identified limited enclaves in which federal courts may derive some substantive law in a common law way';⁶⁵ (2) for two centuries the Supreme Court has affirmed that 'the domestic law of the United States recognizes the law of nations';⁶⁶ and (3) the First Congress 'assumed that federal courts could properly identify some international norms as enforceable in the exercise of [s] 1330 jurisdiction',⁶⁷ the majority rejected Justice Scalia's contention that the modern conception of federal common law strips federal courts of their capacity to recognise enforceable international norms under the ATS. Indeed, the Supreme Court noted that

[t]he position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filártiga v Pena-Irala*, and for practical purposes the point of today's disagreement has been focused since the exchange between Judge Edwards and Judge Bork in *Tel-Oren v Libyan Arab Republic*.⁶⁸

The majority in *Sosa* thereby adopted Judge Edwards' side of the debate, and rejected that of Judge Bork, holding that the ATS requires no further act of Congress nor the identification in international law of a right to sue before a plaintiff can assert a cause of action. While the statute is jurisdictional, federal courts can cautiously recognise new causes of action based on the law of nations in federal common law, a power and discretion that federal courts would have possessed at the time of enactment of the ATS, and, while since limited, has not been eradicated by the modern doctrine of the common law.

As pointed out by Judge Kimba Wood in the district court judgment preceding the appeal to the Second Circuit in *Kiobel*,⁶⁹ however, the *Sosa* court did not enumerate all conceivable causes of action available by 'adopt[ing] specific criteria for determining when a court has jurisdiction over a

⁶² *Erie Railroad Co v Tompkins*, 304 US 64 (1938) ('Erie').

⁶³ *Sosa*, 542 US 692, 740–51 (2004).

⁶⁴ *Ibid* 729.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* 729–30.

⁶⁷ *Ibid* 730.

⁶⁸ *Ibid* 731 (citations omitted).

⁶⁹ *Kiobel v Royal Dutch Petroleum Company*, 456 F Supp 2d 457 (SD NY, 2006).

claim pursuant to the *ATS*.⁷⁰ Rather than state positive criteria, the *Sosa* court's standard was framed as a negative test: that the 'federal courts should not recognize private claims under federal common law for violations of any international law norm ... [unless the norm is] "specific, universal, and obligatory"'.⁷¹

The Court in *Sosa* further counselled that

the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.⁷²

As noted above, in the much-discussed footnote 20 to the opening clause ('whether a norm is sufficiently definite to support a cause of action'), the Supreme Court noted:

A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v Libyan Arab Republic*, 726 F 2d 774, 791–795 (CADC 1984) (Edwards J, concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v Karadzic*, 70 F 3d 232, 239–241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).⁷³

Thus, while *Sosa* gave some guidance over the source of the substantive norms actionable in an *ATS* suit — federal common law as reflecting the law of nations, in addition to the treaty ground — and confirmed that it was open to federal courts, within limits, to recognise new causes of action based on the violation of modern international norms, the Supreme Court by no means identified complete criteria for the recognition of new causes of action. Further, since Alvarez-Machain's claim in *Sosa* for arbitrary detention failed at the first jurisdictional hurdle (the norm of international law argued was not of comparable specificity, universality, or definitiveness to 18th century paradigms), the Supreme Court did not need to decide, and only mentioned in passing, other issues frequently litigated in the *ATS* context, including the alleged 'state action' requirement for violations of certain international legal norms, the possible application of the exhaustion of local remedies rule, and 'case-specific deference to the political branches'.⁷⁴ The Supreme Court did not even touch on the debate concerning the source of law for secondary liability (for example, aiding and

⁷⁰ *Ibid* 461.

⁷¹ *Sosa*, 542 US 692, 732 (2004), quoting *Re Estate of Marcos Human Rights Litigation*, 25 F 3d 1467, 1475 (9th Cir, 1994); see also above n 61 and accompanying text; Judge Katzmann in *Khulumani*, 504 F 3d 254, 266 (2nd Cir, 2007), describing this as a 'minimum requirement' identified by the *Sosa* Court.

⁷² *Sosa*, 542 US 692, 732–3 (2004).

⁷³ *Ibid* 732 n 20.

⁷⁴ *Ibid* 733 n 21.

abetting),⁷⁵ or the question of corporate liability. We consider the debates over these topics in the next two sections.

III THE CHOICE OF LAW DEBATE FOR SECONDARY LIABILITY: FROM *UNOCAL*, TO *KHULUMANI* AND TO *TALISMAN*

Well before the Supreme Court entered into the *ATS* debate in *Sosa*, however, district and circuit courts across the US were grappling with practical questions regarding *ATS* suits against corporations. Unlike suits against natural persons, which usually allege the direct participation of the defendant in the violation of international law, suits against corporations typically plead that the defendant, through knowing and practical assistance, aided and abetted or conspired with a direct perpetrator of an international law violation, usually the government of the country in which the corporation operated.⁷⁶ For example, in *Unocal*,⁷⁷ Burmese villagers sued Unocal for complicity in a campaign of human rights abuses conducted by the Burmese military, including forced relocation, forced labour, rape, torture and murder, as the military secured the route for the construction of a pipeline by Unocal.

Thus, one of the more difficult and divisive questions for courts faced with corporate *ATS* suits concerns secondary liability — such as accessory liability or complicity. Issues include: (1) whether there can be liability for aiding and abetting or complicity under the *ATS*; (2) if so, from where the test for aiding and abetting and complicity liability should be drawn — that is, whether international law or federal common law; and (3) what that test or standard should be, and in particular, what degree of assistance and mental knowledge or intent is required on the part of the accessory.

Many of these issues are still in flux. In almost every circuit court to consider it, the question of accessory liability has drawn significant minority opinion or divided the court. We do not attempt here to resolve the debate, which continues

⁷⁵ Note, however, that various district courts and circuit courts have interpreted footnote 20 of *Sosa* as a comment on the source of law issue for secondary liability: see, eg, *Khulumani*, 504 F 3d 254 (2nd Cir, 2007) and *Talisman*, 582 F 3d 244 (2nd Cir, 2009), discussed below in Part III, and *Nestle*, 748 F Supp 2d 1057, 1078–9 (CD Cal, 2010). In our view, footnote 20 is principally concerned with the ‘state action’ requirement. While some may argue (and have argued) that it inferentially supports the position that the question of secondary liability should be determined by reference to international law, the footnote itself merely notes and does not answer the question of whether the ‘scope of liability’ extends to private actor perpetrators such as corporations or individuals, although it does recognise that evolving customary international law norms can and have influenced this question in contexts involving strong norms such as that against torture. The footnote certainly does not go so far as to mandate that questions of corporate liability be determined by international law. See further below Part III.

⁷⁶ Note that some corporate *ATS* cases, however, allege the direct perpetration of violations by the corporation itself. See, eg, the *ATS* claims against CACI and Titan for involvement in abuse and torture of detainees at Abu Ghraib prison, *Ibrahim v Titan Corp*, 391 F Supp 2d 10 (D DC, 2005); the claim against Pfizer for the non-consensual testing of a meningitis drug on children in Kano State in Nigeria, *Pfizer*, 562 F 3d 163 (2nd Cir, 2009); see also discussion below at text accompanying nn 168–72, and the claim against Blackwater (now XE Services) for the death and injury of civilians in the Nisour Square shooting in Baghdad in 2007, *XE Services*, 665 F Supp 2d 569 (ED Va, 2009).

⁷⁷ 395 F 3d 932 (9th Cir, 2002).

to generate prodigious academic commentary,⁷⁸ but rather to sketch a short history of the issue of accessory liability in *ATS* suits, insofar as that debate lays the groundwork for the more recent controversy over corporate liability.

The Ninth Circuit once looked like it was going to be the first circuit to resolve this question in *Unocal*. In its 2002 ruling, the court agreed that there could be aiding and abetting liability under the *ATS*, but split on the source of the standard — the majority said international law, Judge Reinhardt said federal common law.⁷⁹ The issue was to be reheard *en banc*, but the case settled prior to rehearing, which rendered the prior circuit court decision of no precedential value.⁸⁰

The question subsequently came before the Second Circuit in *Khulumani v Barclay National Bank* ('*Khulumani*'),⁸¹ a class action under the *ATS* relating to damages claims by South African residents against corporations that allegedly collaborated with the South African government to maintain the system of apartheid, yet the court failed to reach a conclusion on the standard for aiding and abetting liability. While two of the three judges agreed in a *per curiam* opinion that there could be aiding and abetting liability under the *ATS*,⁸² they split on the question of the source of law to apply on this point. Judge Katzmann applied international law as he perceived it, drawing on art 25 of the *Rome Statute*⁸³ and arguing (probably incorrectly)⁸⁴ that international law requires the demonstration that a defendant acted with the 'purpose' of facilitating the commission of a crime.⁸⁵ Judge Hall, by contrast, based the standard on federal common law and thus held that the relevant mens rea standard to apply was that

⁷⁸ See, eg, Chimène I Keitner, 'Conceptualizing Complicity in Alien Tort Cases' (2008) 60 *Hastings Law Journal* 61; Andrei Mamolea, 'The Future of Corporate Aiding and Abetting Liability under the Alien Tort Statute: A Roadmap' (2011) 51 *Santa Clara Law Review* 79; Ingrid Wuerth, 'The Alien Tort Statute and Federal Common Law: A New Approach' (2010) 85 *Notre Dame Law Review* 1931.

⁷⁹ *Unocal*, 395 F 3d 932, 947–51 (9th Cir, 2002) (per the majority opinion, articulating a test for aiding and abetting based on international law of 'knowing practical assistance or encouragement that has a substantial effect on perpetration of the crime'); and see the concurring opinion of Judge Reinhardt at 963–78, who concludes that the law to apply for 'third-party liability' (as he terms it) is federal common law: at 964–9; and applying three theories of liability found in US law: agency, joint venture liability, and reckless disregard: at 969–76.

⁸⁰ Refer to the order of the Ninth Circuit dated 14 February 2003, *Doe I v Unocal Corp*, 395 F 3d 978 (9th Cir, 2003), vacating the earlier panel judgment in *Unocal*, 395 F 3d 932 (9th Cir, 2002).

⁸¹ 504 F 3d 254 (2nd Cir, 2007).

⁸² Judges Katzmann and Hall. Judge Korman, who dissented in part, would have dismissed the case as non-justiciable under the political question doctrine, or alternatively, on the basis that there was a failure to demonstrate that the corporations acted under colour of law, or that corporations could not be liable under the *ATS*. Judge Korman's views on corporate liability constitute the first judicial opinion, even if a minority one, that corporations cannot be held liable under the *ATS*. While the issue of corporate liability had been raised by defendants on two earlier occasions — in *Talisman* and *Agent Orange* — the argument was rejected by the district court in each case. See *Agent Orange*, 373 F Supp 2d 7, 55–9 (ED NY, 2005); *Talisman* 244 F Supp 2d 289, 308–19 (SD NY, 2003).

⁸³ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

⁸⁴ See below nn 99–100 and accompanying text.

⁸⁵ *Khulumani*, 504 F 3d 254, 275–7 (2nd Cir, 2007).

the defendant must ‘knowingly’ assist in the principal violation.⁸⁶ The third judge, Judge Korman, agreed with Judge Katzmann’s ‘purpose’ standard putatively based on international law, but otherwise dissented,⁸⁷ so there was no majority opinion on this point of source of law.⁸⁸ Thus, as in *Unocal*, it was ‘left to a future panel’⁸⁹ to determine the question.

It was not long before another panel of the Second Circuit received that opportunity, with the question of aiding and abetting liability arising again in *Talisman*.⁹⁰ In that case, Chief Judge Jacobs, writing for the court, adopted

⁸⁶ Ibid 284–9, where Judge Hall argues at 286 that:

In addition to the delineation of the standard by which federal courts derive primary violations of international law, the *Sosa* opinion also contains numerous dicta. ... It remains inescapable, however, that *Sosa* at best lends Delphian guidance on the question of whether the federal common law or customary international law represents the proper source from which to derive a standard of aiding and abetting liability under the *ATS*. Lacking the benefit of clear guidance, I presume a federal court should resort to its traditional source, the federal common law, when deriving the standard.

⁸⁷ Ibid 337. Judge Korman declares that:

I concur in section IIA of Judge Katzmann’s opinion that rejects Judge Hall’s argument that the scope of liability for the violation of the norm of international law must be decided by reference to our own domestic law. I concur as well in section IIB of Judge Katzmann’s opinion that articulates the elements of aiding-and-abetting liability as defined in article 25(b) and (c) of the *Rome Statute*. These elements are consistent with, if not mandated by, customary international law.

⁸⁸ On remand from the Second Circuit, District Court Judge Scheindlin, in a carefully reasoned opinion, adopted Judge Katzmann’s approach of looking to the *Rome Statute* as the minimum core consensus among states, but held that ‘purpose’ under the *Rome Statute*, properly read in light of the rest of the statute and the position at customary international law, amounted to a ‘knowledge’ standard. See *Apartheid Litigation*, 617 F Supp 2d 228, 255–62 (SD NY, 2009).

⁸⁹ Judge Katzmann says in his opinion in *Khulumani*, 504 F 3d 254, 277 n 13 (2nd Cir, 2007) that:

In light of this conclusion [that a defendant may be held liable under international law for aiding and abetting the violation of that law by another], I need not address the plaintiffs’ argument that a theory of aiding and abetting liability could be supplied by domestic federal common law even if such liability did not exist under international law.

Judge Hall later notes that ‘[b]ecause I find that federal common law provides a standard by which to assess aiding and abetting liability, I do not address the alternative argument that such a standard may be derived from international law’: at 286. Judge Hall further notes at 286 n 4 that

Judge Katzmann, in his concurring opinion, declines to address whether federal common law provides a standard by which to determine aiding and abetting liability in this case. ... It is thus left to a future panel of this Court to determine whether international or domestic federal common law is the exclusive source from which to derive the applicable standard.

On the error in thinking that there is an ‘exclusive source’ for the standard, see below nn 103–5 and accompanying text.

⁹⁰ 582 F 3d 244 (2nd Cir, 2009). In *Talisman*, current and former Sudanese residents allege that Talisman Energy, a Canadian energy company, collaborated with the Sudanese government in a policy of ‘ethnically cleansing’ civilian areas to facilitate oil exploration in southern Sudan. The government’s alleged human rights abuses included extrajudicial killing, forced displacement, military attacks on civilian targets, confiscation and destruction of property, kidnappings, rape and enslavement, directed at the non-Muslim African population of southern Sudan, and designed to create a ‘cordon sanitaire’ around oil exploration areas. Collectively, the plaintiffs allege this conduct amounted to genocide.

'[Judge Katzmann's] proposed rule as the law of this Circuit'.⁹¹ Thereby, the Second Circuit held that, first, international law was the source of law for determining the standard for aiding and abetting liability,⁹² and secondly, that the standard under international law was that articulated by Judge Katzmann in *Khulumani*: the provision by a defendant of 'practical assistance to the principal which has a substantial effect on the perpetration of the crime', where the defendant provides that assistance 'with the purpose of facilitating the commission of that crime'.⁹³

It is important at this juncture to note, however, that in agreeing with Judge Katzmann that '*Sosa* and our precedents send us to international law to find the standard for aiding and abetting liability',⁹⁴ the court in *Talisman* adds that 'footnote 20 of *Sosa*, while nominally concerned with the liability of non-state actors, supports the broader principle that the scope of liability for ATS violations should be derived from international law'.⁹⁵ In fact, this overstates both the content of footnote 20 of *Sosa* and the reliance which Judge Katzmann puts on it. In *Khulumani*, Judge Katzmann principally draws on Second Circuit precedent that demonstrates that the ATS's *jurisdictional* grant should be determined by reference to international law — that is, the jurisdictional threshold question of whether plaintiffs have alleged a *violation* of international law.⁹⁶ Judge Katzmann notes that this view is 'also consistent' with the Supreme Court's opinion in *Sosa* at footnote 20, by explaining that

[w]hile this footnote specifically concerns the liability of non-state actors, its general principle is equally applicable to determine whether the scope of liability for a violation of international law should extend to aiders and abettors.⁹⁷

This is all in the context of Judge Katzmann wanting to 'maintain the appropriate scope of [ATS] jurisdiction by requiring that the specific conduct allegedly committed by the defendants sued represents a violation of international law'.⁹⁸ Importantly, Judge Katzmann is not saying that international law determines whether a cause of action exists under the ATS — his inquiry is limited to the jurisdictional requirements of the statute in the sense of whether the conduct alleged amounts to a violation of an international norm, and whether, in this case, conduct that constitutes aid and assistance to a principal perpetrator is thus a violation of international law that is cognisable under the ATS.

In various journal articles discussing these developments concerning accessorial liability in Second Circuit jurisprudence, many commentators have taken the view that the court in *Talisman* was correct to look to international law to determine the standard on aiding and abetting liability, but that it had failed to

⁹¹ *Talisman*, 582 F 3d 244, 258 (2nd Cir, 2009).

⁹² *Ibid* 259.

⁹³ *Ibid* (adopting the 'purpose' standard) and at 258 (endorsing the test laid out by Judge Katzmann in *Khulumani*, 504 F 3d 254, 277 (2nd Cir, 2007)).

⁹⁴ *Ibid* 259. See also Judge Katzmann in *Khulumani*, 504 F 3d 254, 269 (2nd Cir, 2007).

⁹⁵ *Talisman*, 582 F 3d 244, 258 (2nd Cir, 2009).

⁹⁶ *Khulumani*, 504 F 3d 254, 269 (2nd Cir, 2007).

⁹⁷ *Ibid*.

⁹⁸ *Ibid* (emphasis added).

identify the correct standard under customary international law.⁹⁹ According to these commentators, customary international law applies a ‘knowledge’ standard, as set out at the Nuremberg tribunals and developed in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) and the International Criminal Tribunal for Rwanda (‘ICTR’). The reliance on art 25(3) of the *Rome Statute* by Judge Katzmann in *Khulumani* and adopted by the Second Circuit in *Talisman* was in error: not only was this provision a political compromise and not intended to reflect the standard at customary international law, it was also read in isolation (by Judge Katzmann and the *Talisman* court) from art 30 of the *Rome Statute* which deals with the mental elements of offences. Read in context, and in light of customary international law, the supposed ‘purpose’ element in art 25(3) of the *Rome Statute* can in fact be satisfied where the defendant acts in the *knowledge* that his or her actions will facilitate the offence.¹⁰⁰

Thus, the battleground appeared to be international law, and for the most part, commentators thought this to be a good thing, consistent with the Supreme Court’s comments in *Sosa*, even if some judges were misinterpreting their sources of international law. The decision in *Kiobel*, however, changes all that. By making international law the battleground for the ‘scope of liability’, the Second Circuit paved the way for a subtle sleight of hand — if the ‘scope of liability’ for a violation of international law must be determined by international law, then for a corporation to be liable for a violation of the law of nations, international law must directly bind corporations, or, in the majority’s terms, corporations must be ‘subjects’ of international law. In the following section, we set out the *Kiobel* majority’s reasoning, followed by certain of its most fundamental flaws. But before we do so, we make a few final comments on accessorial liability.

Judge Hall in *Khulumani* opined that it would be ‘left to a future panel of this Court to determine whether international or domestic federal common law is the exclusive source from which to derive the applicable standard [of aiding and abetting liability].’¹⁰¹ While the Second Circuit has declared that it will apply international law, all circuits do not follow suit, and it is certainly not clear that the Supreme Court would do so if faced with the question. In this regard, recent amicus briefs submitted by the US in *ATS* cases have expressed the view that, applying *Sosa*, questions of aiding and abetting liability are questions of federal

⁹⁹ See, eg, Keitner, above n 78, (arguing that aiding and abetting liability should be governed by international law, and that the mens rea standard under international law is ‘knowledge’); Mamolea, above n 78, 120–32 (arguing that international law should govern the question of aiding and abetting liability, but that *Talisman* was wrong to apply the *Rome Statute*); see also David Scheffer and Caroline Kaeb, ‘The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the *Alien Tort Statute* and the Case for a Counterattack Strategy in Compliance Theory’ (2010) 29 *Berkeley Journal of International Law* 101, 111–24 (arguing primarily that aiding and abetting liability should be determined by federal common law, but if the Second Circuit in *Talisman* was correct to rely on international law, then it misread the *Rome Statute* in doing so). See also David J Scheffer, ‘Brief of David J Scheffer, Director of the Center for International Human Rights, as Amicus Curiae in Support of the Issuance of a Writ of Certiorari’, Submission in *Talisman*, No 09-1262, 19 May 2010.

¹⁰⁰ See Scheffer and Kaeb, above n 99; see also Judge Scheindlin in *Apartheid Litigation*, 617 F Supp 2d 228 (SD NY, 2009) and accompanying text, above n 88.

¹⁰¹ *Khulumani*, 504 F 3d 254, 286 n 4 (2nd Cir, 2007).

common law (although it can be queried whether previous US administrations argued this simply to assist pushing its erstwhile primary objection to ATS suits as non-justiciable on political question grounds).¹⁰²

But more fundamentally, the question of secondary liability is not one of 'exclusive sources'. The better view, in our opinion, is that courts should adopt (and in the past, have adopted)¹⁰³ a hybrid approach. The starting point must be that for two centuries the Supreme Court has affirmed that 'the domestic law of the United States recognizes the law of nations'.¹⁰⁴ In exercising their federal common law discretion to develop and recognise new causes of action under the ATS — as recognised in *Sosa* — courts can rely on principles and standards developed in international law not merely because they are part of international law, but because they form part of the common law. Further, as a practical matter federal courts will invariably need to draw on both international and federal common law, because some causes of action under the ATS will be based on violations that amount to 'crimes' under international law, such as genocide or war crimes, while other suits will be based on certain human rights violations for which there is no individual criminal liability in international law. For the former, international criminal law may have developed rules on liability, or indeed special standards (such as the *dolus specialis* requirement for the crime of genocide), but for the latter, short of drawing analogies with state responsibility (being the closest thing international law has to 'civil' liability),¹⁰⁵ federal courts will need to rely on the rules of civil liability found in US law in order to define causes of action under the ATS.

¹⁰² Both in *Khulumani* and *Talisman*, the US government's amicus briefs put forward a position that the inquiry as to the 'scope of liability' is one to be conducted under federal common law. See Michael J Garcia et al, 'Brief for the United States as Amicus Curiae', Submission in *Talisman*, No 07-0016, 15 May 2007, 15: 'The question, moreover, is whether courts may now fashion a rule of federal common law imposing damages liability on an aiding and abetting theory.' Also: 'A court deciding whether to announce a federal common law rule imposing aiding and abetting liability or conspiracy liability under the ATS must consider the practical consequences, including the foreign policy effects of such a ruling': at 18; and that 'serious foreign policy and other consequences relating to US national interests reinforce the conclusion that courts may not properly impose civil aiding and abetting or conspiracy liability as a matter of federal common law under the ATS': at 23 (emphasis added). See also the opinion of Judge Hall in *Khulumani*, 504 F 3d 254, 286 (2nd Cir, 2007): 'although the substantive norm to be applied is drawn from international law or treaty, any cause of action recognized by a federal court is one devised as a matter of federal common law', quoting Michael J Garcia et al, 'Brief for the United States of America, as Amicus Curiae', Submission in *Khulumani*, No 05-2141-cv and No 05-2326-cv, 5. Note, however, that the Obama administration is somewhat less hostile to ATS suits than its predecessor: see EarthRights International, *Submission to the Office of the High Commissioner for Human Rights, Universal Periodic Review — United States of America* (April 2010) <http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/ERI_EarthRightsInternational.pdf>.

¹⁰³ See, eg, *Apartheid Litigation*, 617 F Supp 2d 228, 270–6 (SD NY, 2009). While applying international law on the question of aiding and abetting liability, the court relied on domestic federal common law when it came to doctrines of corporate liability such as agency and piercing the corporate veil.

¹⁰⁴ *Sosa*, 542 US 692, 729–30 (2004), citing *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 423 (1964), *The Paquete Habana*, 175 US 677, 700 (1900), and *The Nereide* 9 Cranch 388, 423 (1815).

¹⁰⁵ For a suggestion that federal courts should draw on the law of state responsibility when crafting a standard for complicity in international delicts as opposed to complicity in international crimes, see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 264–5.

IV THE CHOICE OF LAW DEBATE FOR CORPORATE LIABILITY: *KIOBEL*

The majority judgment in *Kiobel* is deceptively simple. Drawing on *Sosa* and Second Circuit precedent from *Filártiga* to *Khulumani*, the majority proceeds in two stages. First, a determination is made that the question of whether a corporation can be liable for a violation of the law of nations — in this case, allegations that Shell was complicit in the Nigerian Government's extra-judicial killing, rape, arbitrary detention, torture and displacement of the local Ogoni people opposed to Shell's oil and gas exploration — is a question that must be answered by reference to international law itself.¹⁰⁶ In the same way as *Sosa* apparently exhorts federal courts to look to international law to determine the 'scope of liability', and the same way that the Second Circuit has looked to international law to determine questions such as whether state action is required for certain violations of international law,¹⁰⁷ or whether international law recognises aiding and abetting liability,¹⁰⁸ then so too must the question of whether corporations can be held liable for violations of international law be determined by international law. This is supported, the majority reasons, by the fact that international law defines its own 'subjects' — that is, those entities that possess legal personality in international law and enjoy 'rights, duties or powers established in international law, and, generally, the capacity to act on the international plane'.¹⁰⁹ Thus, in the majority's view, international law is the correct place to look for guidance on the scope of liability of corporations under the ATS.

Secondly, having determined that the governing law is that of international law, the majority next consider whether corporations can be liable under customary international law and determine that there is no 'norm of corporate liability' in customary international law.¹¹⁰ The majority draw extensively on the statutes and practices of various international criminal tribunals, from the Nuremberg tribunals to the ICTY to the International Criminal Court ('ICC'), to determine that international law does not bind corporations. This is because, in the majority's terms, international law has 'rejected' corporate liability for violation of its norms.¹¹¹ The majority draw this conclusion from the fact that: (1) the *Charter of the International Military Tribunal at Nuremberg*¹¹² granted the Tribunal jurisdiction over natural persons only; (2) the US military tribunals

¹⁰⁶ *Kiobel*, 621 F 3d 111, 127–31 (2nd Cir, 2010).

¹⁰⁷ *Kadic*, 70 F 3d 232 (2nd Cir, 1995).

¹⁰⁸ *Talisman*, 582 F 3d 244 (2nd Cir, 2009).

¹⁰⁹ *Kiobel*, 621 F 3d 111, 126 (2nd Cir, 2010), quoting Robert Y Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Oxford University Press, 9th ed, 1996) vol 1, 119.

¹¹⁰ *Kiobel*, 621 F 3d 111, 127–31 (2nd Cir, 2010).

¹¹¹ *Ibid* 120: 'Customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for the law of nations.'

¹¹² *Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 279 (signed and entered into force 8 August 1945) annex ('*Charter of the International Military Tribunal at Nuremberg*').

established under *Control Council Law No 10*¹¹³ prosecuted corporate executives but never the corporations themselves (drawing extensively on the *IG Farben* case); (3) the statutes of the ICTY, ICTR and ICC give those tribunals jurisdiction over natural persons only; (4) the proposal to extend the ICC's jurisdiction to include corporations was rejected; and (5) the few treaties that do provide for corporate liability are either not widely ratified or have a limited subject matter, and therefore do not codify or crystallise a general rule of customary international law on corporate liability.¹¹⁴ The majority further rely on the declarations of James Crawford and Christopher Greenwood filed in support of Talisman Energy in *Talisman*,¹¹⁵ whose appeal was heard the same day as the appeal in *Kiobel*. In those declarations, Crawford and Greenwood state, respectively, that 'no international tribunal has so far recognised 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' and that 'there is not, and never has been, any assertion of the criminal liability of corporations in international law'.¹¹⁶

The majority's opinion on this point is met by a fierce dissent from Judge Leval. While concurring in the dismissal of the complaint, Judge Leval dissents from the majority's holding that corporations cannot be sued under the *ATS*. Claiming that the majority have fashioned a rule that has no basis in international law or precedent, Judge Leval's opinion sets out various bases for why the majority's reasoning is flawed: the improbability that international law would have adopted a rule exempting corporations from liability; the absence of any precedent for the majority's rule in either US law or international law; and the misinterpretation of judgments of international criminal tribunals, as well as the drawing of incorrect conclusions from the terms of their statutes.¹¹⁷ Judge Leval also points to the majority's misconstrual of footnote 20 of the *Sosa* judgment, the misuse of *Sosa*'s reference to 'norms' of international law which must command universal acceptance, the mistaken claim that corporations are not 'subjects' of international law, and the absence of scholarly support for the majority's rule.¹¹⁸ Some of these criticisms are more effective than others (and will be addressed in the course of framing our own criticisms of the majority opinion in the following discussion) but taken as a whole, Judge Leval's judgment amounts to a powerful if only partial refutation of the majority's proposition that corporations cannot be liable under the *ATS*.

For our own part, as foreshadowed, we emphasise three key deficiencies in the majority's reasoning: first, federal common law, and not international law, governs the question of corporate liability under the *ATS*; secondly, the majority's reasoning erroneously limits *ATS* causes of action to those violations which constitute crimes under international law, contrary to *Sosa* and the Second

¹¹³ *Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity* (Germany) 20 December 1945, *Official Gazette Control Council for Germany* (1946) 50, art II(b).

¹¹⁴ *Kiobel*, 621 F 3d 111, 133–8 (2nd Cir, 2010).

¹¹⁵ *Talisman*, 582 F 3d 244 (2nd Cir, 2009).

¹¹⁶ Quoted in *Kiobel*, 621 F 3d 111, 143 (2nd Cir, 2010).

¹¹⁷ *Ibid* 159–60.

¹¹⁸ *Ibid* 163–86.

Circuit's own precedents; and thirdly, regardless of whether corporations are still strictly excluded from being 'subjects' of international law (according to an increasingly challenged formalism), practice and policy confirm that the law of nations has historically contemplated, and currently contemplates, that corporations can violate its norms. We conclude by considering the latent policy rationales underlying the Second Circuit's restrictive approach to the *ATS* — policy rationales subsequently made explicit in the judgment on the denial of rehearing — and posit some contrary considerations.

For a considerable period in the history of *ATS* suits against corporate defendants, corporate liability was assumed, and no court had explicitly ruled on the question¹¹⁹ until the first instance judgment of Judge Schwartz in the Southern District Court of New York in *Talisman*, in 2003.¹²⁰ Even more curiously, in the two circuit court cases where the argument against corporate liability gained traction — Judge Korman's dissent in *Khulumani* and the majority's opinion in *Kiobel* — the defendants did not raise it, the issue had not been briefed (so the courts were not able to have the benefit of adversarial argument) and, of course, the proposition was inconsistent with the Second Circuit's own precedents in the area (which had consistently presumed that corporations could be liable under the *ATS*) as well as the overwhelming precedents from the lower courts and other circuit courts. In *Khulumani*, it was Judge Korman in dissent who raised the argument about corporate liability and found in favour of defendants, even though the issue was not briefed by the parties.¹²¹ Then in *Kiobel*, again without the defendants raising it in the district court and without briefing from the parties on appeal,¹²² the majority disposed of the entire case by deciding, of their own volition, to address one of the supposedly 'lurking questions'¹²³ in *ATS* jurisprudence. Yet in the only

¹¹⁹ *Presbyterian Church of Sudan v Talisman Energy*, 244 F Supp 2d 289, 313 (Schwartz J (SD NY, 2003): 'While the Second Circuit has not explicitly held that corporations are potentially liable for violations of the law of nations, it has considered numerous cases ... where a plaintiff sued a corporation under the *ATS* for alleged breaches of international law.' See also *Apartheid Litigation* 617 F Supp 2d, 254–5 (SD NY, 2009): 'On at least nine separate occasions, the Second Circuit has addressed *ATS* cases against corporations without ever hinting — much less holding — that such cases are barred'; and *Nestle*, 748 F Supp 2d 1057, 1124 (CD Cal, 2010): 'Defendants argue that international law does not extend liability to corporations. With a single exception, this argument has been uniformly rejected or ignored by other courts.' That exception, prior to the decisions in *Nestle* and *Kiobel*, was Judge Korman's dissenting opinion in *Khulumani*.

¹²⁰ *Presbyterian Church of Sudan v Talisman Energy*, 244 F Supp 2d 289 (SD NY, 2003).

¹²¹ *Khulumani*, 504 F 3d 254, 282 (Katzmann J) (2nd Cir, 2007) (citations omitted):

Judge Korman further argues that the defendants cannot be held liable as aiders and abettors because the sources that establish accessory liability do not extend that liability to corporations. This argument was not raised by the defendants on appeal and therefore the issue was not briefed by the parties. It is perhaps not surprising that neither the defendants nor the United States raised this issue as a bar to liability: we have 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.

¹²² Esther Kiobel et al, 'Plaintiff's Petition for Rehearing and Rehearing *En Banc*', Submission in *Kiobel*, No 06-4800-cv and No 06-4876-cv, 15 Oct 2010, 2 (corporate liability not briefed); *Kiobel Panel Rehearing*, (2nd Cir, No 06-4800-cv, 4 February 2011) slip op 1 (Leval J) (corporate liability not raised by defendants before the district court).

¹²³ *Kiobel*, 621 F 3d 111, 115 n 10 (2nd Cir, 2010).

case where the issue of corporate liability had been raised at the appellate level — *Talisman* — the Second Circuit did not decide the question.¹²⁴

V WHERE THE KIOBEL MAJORITY WENT WRONG

A Federal Common Law, Not International Law, Governs ATS Corporate Liability

The *Kiobel* majority frame the question they propose to answer as: ‘[d]oes the jurisdiction granted by the ATS extend to civil actions brought against corporations under the law of nations?’¹²⁵ The majority’s desired answer to this question is already exposed in its framing: the jurisdiction granted by the ATS is not to entertain civil actions against corporations *under the law of nations*. What the majority seek to do by framing the question in this manner is to conflate the jurisdictional and cause of action aspects of an ATS suit. That is, while a civil action under the ATS is pursuant to jurisdiction granted by a statute and informed by substantive norms derived from the law of nations (or treaty law), it is a federal common law cause of action.¹²⁶ ATS actions brought against corporations are thus actions brought under *federal common law*. Therefore, while federal courts have jurisdiction under the ATS over torts that amount to violations of the law of nations — when the norm of international law relied on has the same definite content and general acceptance among states as the historical paradigms familiar when the ATS was enacted¹²⁷ — the cause of action which follows from that jurisdiction is a cause of action for damages in tort under federal common law. The majority thus confuse the two step inquiry ordinarily required under the ATS: first, has the plaintiff pled a violation of a norm of international law? Secondly, is there already, or should the federal courts recognise, a common law cause of action for that violation of international law?¹²⁸ By contrast, applying the majority’s reasoning, all one would need to ask (as a jurisdictional question) is: has the plaintiff pled a universally accepted norm of corporate liability for violations of international law? The answer to that question is likely to be no, since the norms of international law typically leave causes of action against perpetrators — including corporations — to domestic law.

¹²⁴ *Talisman*, 582 F 3d 244, 261 n 12 (2nd Cir, 2009), quoting *Sosa*, 542 US 692, 732 n 20 (2004):

We will also assume, without deciding, that corporations such as *Talisman* may be held liable for the violations of customary international law that plaintiffs allege. Because we hold that plaintiffs’ claims fail on other grounds, we need not reach, in this action, the question of ‘whether international law extends the scope of liability’ to corporations.

¹²⁵ *Kiobel*, 621 F 3d 111, 117 (2nd Cir, 2010).

¹²⁶ *Sosa*, 542 US 692, 724–5 (2004).

¹²⁷ *Sosa*, 542 US 692, 732 (2004).

¹²⁸ As explained by Judge Katzmann in *Khulumani*, 504 F 3d 254, 266 (2nd Cir, 2007):

a federal court faced with a suit alleging a tort in violation of international law must undertake two distinct analytical inquiries. One is whether jurisdiction lies under the [ATS]. The other is whether to recognize a common-law cause of action to provide a remedy for the alleged violation of international law.

International law permits (and often urges or mandates) states to enforce the norms of international law, as a matter of domestic law, against any and all legal persons within their jurisdiction. Thus, states can (or, for example, if a party to the *Torture Convention*,¹²⁹ must) criminalise acts of torture committed by individuals,¹³⁰ they can criminalise acts of torture if committed by corporations,¹³¹ and they can impose civil liability on individuals who commit torture¹³² or corporations who commit torture — as modern courts have done using the *ATS*. It is important to note, for example, that as a technical matter, no international criminal tribunal presently has jurisdiction over a crime of torture, as defined in the *Torture Convention* (in contrast to situations where acts of torture constitute war crimes or crimes against humanity under the statutes of the ICTY or ICC). This did not, and does not, prevent individuals being civilly liable for committing torture, as that norm is recognised under international law pursuant to the *ATS*.¹³³ Had the *Filártiga* Court asked itself whether any international tribunal had ever held an individual liable — whether civilly or criminally — for committing torture, it would have found no such examples at that time. Indeed, in 1980, there was not even an obligation on states to criminalise torture under their own domestic law — such obligation only arose for states parties with the entry into force of the *Torture Convention* in 1987. And yet, the majority in *Kiobel*, noting that strictly speaking ‘no international tribunal has ever held a corporation liable for a violation of the law of nations’¹³⁴ and that ‘no corporation has ever been subject to *any* form of liability under the customary international law of human rights’,¹³⁵ conclude from this that there can be no *ATS* suits against corporations.

The fundamental problem with this analysis is that it seeks to return to the old terrain of Judge Bork in *Tel-Oren* — it seeks to find within international law itself, in the absence of more explicit statements from Congress or a treaty on

¹²⁹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘*Torture Convention*’).

¹³⁰ *Ibid* art 4. See, eg, *Criminal Code* (Canada), s 269.1.

¹³¹ See, eg, *Code Pénal* [Penal Code] (France), art 222–1 et seq regarding torture and acts of barbarity, for which corporations can be criminally liable, per art 222–6–1.

¹³² *Torture Victim Protection Act of 1991*, Pub L No 102-256, 106 Stat 73.

¹³³ *Filártiga*, 630 F 2d 876 (2nd Cir, 1980).

¹³⁴ *Kiobel*, 621 F 3d 111, 120 (2nd Cir, 2010). That is despite the fact that the Nuremburg tribunals could declare corporations to be ‘criminal enterprises’. For further discussion of the ways in which WWII era tribunals could, and did, sanction corporations, see Tyler Giannini and Susan Farbstein, ‘Corporate Accountability in Conflict Zones: How *Kiobel* Undermines the Nuremburg Legacy and Modern Human Rights’ (2010) 52 *Harvard International Law Journal Online* 119. Also consider the antislavery courts of mixed commission sitting throughout most of the 19th century (early ‘international human rights courts’) in various countries that, pursuant to treaty and applying international law, freed nearly 80 000 slaves in over 600 cases. Those subject to the courts included not only individual merchants and slave trading ships but at least some bodies corporate. See Jenny Martinez, ‘Antislavery Courts and the Dawn of International Human Rights Law’ (2008) 117 *Yale Law Journal* 550, 553. This would appear to be an important and long-standing precedent of which the *Kiobel* majority was not aware.

¹³⁵ *Kiobel*, 621 F 3d 111, 121 (2nd Cir, 2010) (emphasis in original).

point, all aspects of the cause of action.¹³⁶ Recall Judge Bork's view that unless international law defined a private right of suit in respect of the breach of one of its norms, there could be no cause of action under the *ATS*.¹³⁷ That is, failing more explicit grants under statutory or treaty law, plaintiffs would have to show that international law gave them a right to sue. But as we have seen, later courts did not follow Judge Bork's view of the *ATS*, and the Supreme Court has since closed the debate — the right to sue is found in federal common law.¹³⁸ Although the *ATS* itself is essentially a jurisdictional statute that the Supreme Court has said does not in itself create new statutory causes of action, it was intended to have 'practical effect' from its enactment and thus contemplated existing causes of action from its inception. It also serves as the vehicle, as discussed above, for certain new causes of action recognised under evolving federal common law. Nor must the cause of action, as such, be found in international law, even though the actionable substantive norms must spring from the law of nations or a treaty. The point is that US federal common law provides the cause of action, the right to sue. It is indisputable, therefore, that just as the plaintiffs' right to sue under the *ATS* is a matter of US domestic law, so too is the defendant's ability to be sued a matter of US domestic law. And US law, as even the *Kiobel* majority remind us, has long recognised the liability of corporations.¹³⁹

The most significant aspect of the dispute between Judge Leval and the majority concerns the interpretation of the *ATS*, rather than the interpretation of international law. Where the majority would ignore domestic legal concepts of corporate liability and look to the position of corporations in customary international law, Judge Leval correctly counsels that:

Civil liability *under the ATS* for violation of the law of nations is not awarded because of a perception that international law commands civil liability throughout the world. It is awarded in US courts because the law of nations has outlawed certain conduct, leaving it to each state to resolve questions of civil liability, and the United States has chosen through the *ATS* to impose civil liability.¹⁴⁰

¹³⁶ See also *Kiobel* et al, 'Plaintiff's Petition for Rehearing and Rehearing *En Banc*', above n 122, 8 (citations omitted):

The *Sosa* Court explicitly rejected Judge Bork's view in *Tel-Oren* that international law must supply the contours of an *ATS* cause of action. ... The majority's requirement that customary international law norms explicitly specify sub-categories of private actor defendants subject to suit is simply another way of restating Judge Bork's discredited attempt to relegate the *ATS* to the dustbin of history.

¹³⁷ See text accompanying above nn 44, 51 and 52.

¹³⁸ *Sosa*, 542 US 692, 724–5 (2004).

¹³⁹ *Kiobel*, 621 F 3d 111, 117 (2nd Cir, 2010):

A legal culture long accustomed to imposing liability on corporations may, at first blush, assume that corporations must be subject to tort liability under the *ATS*, just as corporations are generally liable in tort under our domestic law (what international law calls 'municipal law').

Also, '[t]he idea that corporations are "persons" with duties, liabilities, and rights has a long history in American domestic law': at 117–18 n 11. See also *Agent Orange*, 373 F Supp 2d 7, 59 (ED NY, 2005): 'the Supreme Court made clear that an *ATS* claim is a federal common law claim and it is a bedrock tenet of American law that corporations can be held liable for their torts'.

¹⁴⁰ *Kiobel*, 621 F 3d 111, 175 (2nd Cir, 2010) (emphasis in original).

The majority's insistence that the 'scope of corporate liability' is to be determined by international law is chiefly drawn from the infamous footnote 20 of the Supreme Court's judgment in *Sosa*. As others have demonstrated,¹⁴¹ the important distinction being made in footnote 20 is between state and private actors, and under what circumstances the norms of international law will extend to the latter.¹⁴² If private entities can violate a norm of international law, then for the purposes of the *ATS*, it is irrelevant whether that private actor is an individual, a corporation, an association, the PLO, or some other legal entity recognised under domestic law. Whosoever can commit a tort under US law falls within the scope of the *ATS*.¹⁴³ If particular conduct requires state action before it is a violation of international law, then whether state action is alleged will be relevant to the plaintiff's ability to withstand a motion for dismissal. But whether the *norm* of international law includes a state action requirement is a different question to whether international law itself holds persons liable for a breach of that norm. The first question, about norms, must be answered by reference to international law; the second question, regarding liability, will be resolved by federal courts applying federal common law.

Thus, it is the *norm* of international law which is relevant to establishing whether *conduct* amounts to a violation of international law. This may include whether conduct such as aiding and abetting a primary perpetrator also constitutes a violation of international law. Identifying such norms under international law is essential for enlivening the subject-matter jurisdiction of federal courts pursuant to the *ATS*. However, international law is only relevant up to the point that the inquiry into 'conduct-regulating' norms ceases.¹⁴⁴ Once a norm has been identified, the court moves into 'ancillary questions'¹⁴⁵ related to the cause of action — all those rules of domestic legal systems such as burdens

¹⁴¹ Scheffer and Kaeb, above n 99, 130–2; Mamolea, above n 78, 142–3; *Kiobel*, 621 F 3d 111, 163–5 (Leval J) (2nd Cir, 2010).

¹⁴² See *Bowoto v Chevron Corp* (ND Cal, No C 99-02506 SI, 22 August 2006) slip op 9.

¹⁴³ See *Nestle*, 748 F Supp 2d 1057, 1128–9 (CD Cal, 2010) and the cases cited therein.

¹⁴⁴ We do not attempt to draw a definitive line between 'conduct-regulating' and other rules. Suffice it to say that for some commentators, the distinction is important since the classification determines which source of law to apply: international law in the case of conduct-regulating rules, and federal common law for ancillary questions. However, as noted above, on our view the better approach to sources of law is a hybrid one, which recognises that the line between conduct-regulating and ancillary questions will not always be clear cut. But importantly, the guiding principle for *ATS* courts should be that the substance of the norm is distinct from the procedural avenue for its enforcement: the former is drawn from international law while the latter is from domestic law. In this way, when framing causes of action under the *ATS*, courts will draw on federal common law, while recognising that international law forms part of US law. See text accompanying above nn 103–5. For an analysis of the distinction between 'conduct-regulating rules' and 'other rules of decision' (or 'ancillary questions') see William Casto, 'Regulating the New Privateers of the Twenty-First Century' (2006) 37 *Rutgers Law Journal* 671, 695–9 (on the distinction generally and in relation to *respondeat superior* in particular); William Casto, 'The New Federal Common Law of Tort Remedies for Violations of International Law' (2006) 37 *Rutgers Law Journal* 635, 642–4, 650–1 (outlining the interplay between international law and federal common law in *ATS* cases); Keitner, above n 78 (applying the 'conduct-regulating' rules and 'ancillary questions' distinction to aiding and abetting liability); and Hoffman and Zaheer, above n 39 (treating complicity and aiding and abetting liability as 'ancillary' questions, to be determined predominantly by federal common law but drawing on relevant international law).

¹⁴⁵ As Judge Reinhardt called them in *Unocal*, 395 F 3d 932, 966 (9th Cir, 2002).

and standards of proof, rules of evidence, theories of vicarious liability and doctrines of veil piercing, agency, *respondeat superior*, proof of causation and calculation of damages — and the court will then draw on federal common law to define the contours of the cause of action. It would be naive to expect international law to have a universally accepted rule on the computation of damages, or the imputation of specific intent to a corporation. When it comes to crafting civil causes of action and their remedies, international law leaves that task to each state.¹⁴⁶

B *The Kiobel Majority Erroneously Limits ATS Causes of Action*

Based on the apparent absence of direct criminal liability of corporations under international law and the perception that corporations have never been subject to the jurisdiction of an international tribunal,¹⁴⁷ the majority conclude that ‘corporate liability has not attained a discernable, much less universal, acceptance [as a norm of customary international law] … and it cannot, as a result, form the basis of a suit under the *ATS*.¹⁴⁸ That the majority speak of

¹⁴⁶ While international law generally permits states to enact laws as they see fit, subject of course to the substantive international law norms binding the state, it does limit the ability of states to enact laws with extraterritorial reach, such as laws which apply to conduct of nationals abroad or of foreign nationals. The limits on extraterritorial jurisdiction are themselves evolving to take into account global realities, demands, and social expectations. There is no scope here to delve into the myriad questions regarding the extraterritorial application of the *ATS*. For commentary, see generally: William Dodge, ‘Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy’ (2010) 51 *Harvard International Law Journal Online* 35; Michael Ramsey, ‘International Law Limits on Investor Liability in Human Rights Litigation’ (2009) 50 *Harvard International Law Journal* 271; see also the Guiding Principles of the UN Special Representative of the Secretary-General on Business and Human Rights: John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights — Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, UN Doc A/HRC/17/31 (21 March 2011), as endorsed by the UN Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/L.17/Rev.1 (15 June 2011). Further note that in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 77 [48] (commenting on the broad extraterritorial jurisdiction of the *ATS*) the Judges noted that ‘[w]hile this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally’. The exceptionality of the *ATS* may be waning in light of the European Union’s renewed interest in the prospects of imposing human rights responsibilities on European corporations operating outside the EU; see Daniel Augenstein, ‘Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union’ (Report, European Commission, October 2010) <http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf>

¹⁴⁷ *Kiobel*, 621 F 3d 111, 120 (2nd Cir, 2010): ‘customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations’. This analysis fails to take account, however, of the Nuremberg context, in which the liability of certain individuals depended upon their connection with enterprises that had been declared ‘criminal’, and the fact that, in a number of cases, the tribunal spoke in terms of the corporation’s violations of the laws of war, even if it was convicting the corporate officers: see Leval J at 180, quoting from the judgment in the *Farben* case; see also above n 134 and accompanying text, discussing the 19th century antislavery courts. On the broader interaction between international law, corporations and international tribunals, see below Part V(C).

¹⁴⁸ *Ibid* 148–9.

corporate *liability* as a ‘norm’ of customary international law suggests the fundamental error in their reasoning. The *Kiobel* majority essentially require that, for a defendant to be liable in tort under the *ATS*, international law must specifically address the liability of that defendant for the conduct alleged.¹⁴⁹ Given that, beyond state responsibility,¹⁵⁰ direct responsibility under international law arises primarily in the context of individual criminal responsibility for international crimes, the *Kiobel* majority extrapolate a limiting principle: that the tort liability of persons under the *ATS* would only pertain to cases of crimes under international law. This analysis is flawed for at least three reasons: it misunderstands the nature of the *ATS*; it misunderstands the nature of crimes under international law; and it conflicts with the Supreme Court’s judgment in *Sosa* and the Second Circuit’s own precedents.

As the *ATS* is above all a tort statute, restricting its scope to only international crimes would undermine its purpose, as reflected in the statute’s literal language as well as its historical application. Regarding the nature of international crimes, the majority in *Kiobel* once again overstate how much of *Sosa*’s footnote 20 is directive rather than dicta:

the question before us, as the Supreme Court has explained, ‘is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual.’ Looking to international law, we find a jurisprudence, first set forth in Nuremberg and repeated by every international tribunal of which we are aware, that offenses against the law of nations (ie customary international law) for violations of human rights can be charged against States and against individual men and women but not against juridical persons such as corporations.¹⁵¹

It is true that the primary, if not exclusive thrust of international criminal law has been to impose individual criminal responsibility on natural rather than juridical persons. But the narrow field of international criminal law is not the ‘law of nations’. Within the field of international criminal law itself, it is important to distinguish between ‘crimes’ under international law, for which persons incur individual criminal responsibility as a matter of international law (for example, the core international crimes of genocide, crimes against humanity and war crimes), as opposed to conduct which is criminalised under domestic

¹⁴⁹ The clearest statement of this proposition in the majority opinion can be found at *ibid* 122 (emphasis in original):

whether a defendant is liable under the *ATS* depends entirely upon whether that defendant is subject to liability under customary international law. ... It is inconceivable that a defendant who is *not liable* under customary international law could be *liable* under the *ATS*.

¹⁵⁰ For completeness we note that other international legal persons, such as international organisations, also bear responsibility under international law: see the current work of the International Law Commission (‘ILC’) on this topic, including International Law Commission, *Titles and Texts of the Draft Articles on the Responsibility of International Organizations Adopted by the Drafting Committee on Second Reading in 2011*, UN Doc A/CN.4/L.778 (30 May 2011), which draw substantially on the ILC’s earlier *Articles on State Responsibility* in International Law Commission, *Report of the International Law Commission*, UN GAOR, 56th sess, UN Doc A/56/10 (23 April – 1 June and 2 July – 10 August 2001) 29.

¹⁵¹ *Kiobel*, 621 F 3d 111, 120 (2nd Cir, 2010), quoting *Sosa*, 542 US 692, 732 n 20 (2004). See also the point made above n 132.

law but which international law, under the principle of universal jurisdiction, permits all states to punish regardless of the nationality of the offender or the location of the offence (for example piracy, and on some views, torture).¹⁵²

Ian Brownlie, for example, does not classify piracy as a crime under international law. In the case of an international crime, ‘what is punished is the breach of international law’.¹⁵³ This is in contrast to ‘the punishment, under national law, of acts in respect of which international law gives a liberty to all states to punish, but does not itself declare criminal’,¹⁵⁴ such as, he contends, piracy. Thus, while Brownlie accepts that states can exercise universal jurisdiction over acts of piracy, since the repression of piracy is a matter of international public policy, in his view it is not an international crime for which individual criminal responsibility would inhere as a matter of international law.¹⁵⁵ Antonio Cassese similarly shares this view, noting that piracy ‘does not meet the requirements of international crimes proper’.¹⁵⁶

There is also an ongoing dispute about whether torture in times of peace, as defined in the *Torture Convention* — as opposed to torture as a war crime or as a crime against humanity — is a discrete crime under international law. Robert Cryer et al are of the view that ‘[s]tates have not taken the step of classifying torture as an international crime *stricto sensu*’.¹⁵⁷ They argue that torture is not punishable as such by any international court or tribunal, but rather that states have adopted a convention for its suppression (including obligations to prosecute

¹⁵² In respect of torture, Lord Millett, dissenting in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* [2000] 1 AC 61, was of the view that the UK could exercise universal jurisdiction over torture. See also Katherine Gallagher, ‘Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture’ (2009) 7 *Journal of International Criminal Justice* 1087 (discussing torture cases filed in France, Germany and Spain under universal jurisdiction laws). For a summary of developments in the Spanish cases against US officials for torture committed at Guantánamo Bay and other overseas US detention facilities, see Center for Constitutional Rights, *The Spanish Investigation into US Torture* <<http://ccrjustice.org/spain-us-torture-case>>.

¹⁵³ Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) 303.

¹⁵⁴ Ibid.

¹⁵⁵ See also Judge Edwards in *Tel-Oren*, 726 F 2d 774, 794 (DC Cir, 1984), who recognises the doctrinal disputes about the status of piracy in international law: ‘In one view [acts of piracy] are private violations of the law of nations, eg, *United States v Smith*, 18 US (5 Wheat) 153, 161–2 (1820). In another view, international law merely authorises states to apply sanctions of their municipal law, whatever the nationality of the offender’, citing Marek St Korowicz, ‘The Problem of the International Personality of Individuals’ (1956) 50 *American Journal of International Law* 533, 545; Harvard Research in International Law, ‘Draft Convention on Piracy with Comments’ (1932) 26 *American Journal of International Law Supplement* 739, 754, 759–60; Edwin D Dickinson, ‘Is the Crime of Piracy Obsolete?’ (1925) 38 *Harvard Law Review* 334.

¹⁵⁶ Antonio Cassese, ‘International Criminal Law’ in Malcolm Evans (ed), *International Law* (Oxford University Press, 2nd ed, 2006) 720 n 3. While Cassese notes that ‘some international crimes such as piracy and slavery’ were regulated in the 19th century and that regulation has formed part of customary international law, he nevertheless argues that the first treaty to provide for the enforcement of individual criminal responsibility at an international level was the *Treaty of Versailles* (1919): at 732. Thus, on this view the criminalisation of piracy in the 19th century was a matter for domestic law, as demonstrated by the fact that, for Blackstone, piracy was a violation of the law of nations but an offence against the common law of England: see Blackstone, above n 54.

¹⁵⁷ Robert Cryer et al (eds), *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 294–5.

or extradite offenders) and that there is a generally recognised basis under customary international law for universal jurisdiction in respect of acts of torture.¹⁵⁸ Thus, there is a principled basis on which to argue that torture is not a discrete crime under customary international law giving rise to individual criminal liability, but rather, more akin to piracy, is an act ‘in respect of which international law gives a liberty to all states to punish’.¹⁵⁹ Taking a contrary view, Cassese considers that state torture in time of peace is a discrete international crime, but notes that, at present, it does not fall under the jurisdiction of any international tribunal.¹⁶⁰ Brownlie registers Cassese’s approach, noting that ‘[i]t is reasonable to categorise torture in time of peace as an international crime’,¹⁶¹ but does not take a clear position on the question himself. Thus, to reiterate, at the time of the Second Circuit decision in *Filártiga* in 1980, while state torture was a violation of international law, it was not necessarily clear that it was also an international crime.

Had the Second Circuit in *Filártiga* applied the indicia adopted by the *Kiobel* majority to determine whether it had jurisdiction, it would have likely concluded that the torture and death of Joelito Filártiga at the hands of Paraguayan police officials would not have been actionable under the *ATS*. Just as corporations are generally not directly liable for crimes under international law and international tribunals have not tended to exercise jurisdiction over corporations, so too, in 1980 individuals generally did not bear direct criminal liability for torture under international law, and international tribunals did not exercise jurisdiction over individuals charged with a discrete crime of torture (that is, where unconnected with war crimes or crimes against humanity). Despite the Supreme Court’s endorsement of *Filártiga* and its progeny, the majority in *Kiobel* effectively seek to overturn 30 years of settled jurisprudence.¹⁶² Added to that, both the Supreme Court’s analysis in *Sosa* and the Second Circuit’s own analysis in *Abdullahi v Pfizer* (‘*Pfizer*’),¹⁶³ decided less than two years before *Kiobel*, highlight the error in the majority’s reasoning that equates a violation of international law with a crime under international law.

¹⁵⁸ Ibid. Cryer et al also note that certain conduct which has been suggested to be subject to direct liability in international criminal law, such as piracy and slavery, a general offence of terrorism, and individual acts of torture, continue to be disputed as international crimes: at 5–6.

¹⁵⁹ Brownlie, above n 153, 303.

¹⁶⁰ Cassese, above n 156, 741. The ICTY, ICTR and ICC statutes include torture as a war crime or as a crime against humanity, but not as a discrete offence.

¹⁶¹ Brownlie, above n 153, 564.

¹⁶² Even Judge Edwards in *Tel-Oren*, 726 F 2d 774, 781 (DC Cir, 1984) appears to have been alive to the point that tort liability under the *ATS* is not limited to cases of international crimes:

Judge Kaufman [in *Filártiga*] did not argue that the torturer is like a pirate for criminal prosecution purposes, but only for civil actions. The inference is that persons may be susceptible to civil liability if they commit either a crime traditionally warranting universal jurisdiction or an offence that comparably violates current norms of international law.

¹⁶³ 562 F 3d 163, 180 (2nd Cir, 2009).

If the majority in *Kiobel* are correct, and the only violations of international law actionable under the ATS are international crimes, then the Supreme Court could have been much more succinct in its dismissal of Alvarez-Machain's claim in *Sosa*: there is no *crime* of arbitrary detention or deprivation of liberty in international law (except perhaps in the context of war). But to the contrary, the Supreme Court entertained the idea that 'some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race',¹⁶⁴ and that the prohibition in customary international human rights law against a state practicing, encouraging or condoning 'prolonged' arbitrary detention could in theory meet the requisite standard of specificity comparable to Blackstone's common law offences.¹⁶⁵ Alvarez's claim failed, not because there was no crime of arbitrary detention in international law, but because

a single illegal detention of less than a day, followed by the transfer to custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.¹⁶⁶

The Supreme Court's approach emphasises that the inquiry is about *conduct* and *norms* — namely, does the conduct alleged violate a norm of customary international law, where that norm also meets the specificity standard set down in *Sosa*? Federal courts are not applying international criminal law under the ATS; they are hearing or creating federal causes of action.

Indeed, a panel majority of the Second Circuit itself, in *Pfizer*¹⁶⁷ permitted an ATS suit to proceed against a corporate defendant for involuntary medical experimentation conducted on Nigerian children, such conduct constituting a violation of international human rights law, but not amounting to an international crime.¹⁶⁸ The majority in that case expressly noted that the prohibition on involuntary medical experimentation, as framed in the *International Covenant on Civil and Political Rights* ('ICCPR'),¹⁶⁹ was not limited to state actors, and the purpose of the ICCPR was to ensure the rights therein to all persons,¹⁷⁰ thereby implicitly recognising that corporations could violate the norm in the ICCPR, even if the ICCPR did not explicitly address the fact that corporations would be liable at international law for that violation. Importantly, provided that the conduct alleged amounted to a violation of an international legal norm, and that norm met *Sosa*'s acceptance and specificity standard, then the claimant had established subject-matter jurisdiction.¹⁷¹ Jurisdiction having been established,

¹⁶⁴ *Sosa*, 542 US 692, 737 (2004).

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid* 738.

¹⁶⁷ *Pfizer*, 562 F 3d 163 (2nd Cir, 2009).

¹⁶⁸ Involuntary medical experimentation could amount to an international crime in the context of war, but no armed conflict was alleged in this case.

¹⁶⁹ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7 ('ICCPR').

¹⁷⁰ *Pfizer*, 562 F 3d 163, 180 (2nd Cir, 2009).

¹⁷¹ *Ibid* 177–83.

the majority could then proceed to adapt the international legal norm to private rights within its common law discretion.¹⁷² This reasoning confirms that the ‘law of nations’ goes beyond the limited category of conduct that constitutes crimes under international law. Moreover, the *Pfizer* judgment supports the view that international human rights law can be violated by corporate entities, even if international law as such does not impose direct liability on them for that violation under international law.

Nothing in the terms of either the *ATS* or *Sosa* limits ‘violations of the law of nations’ to ‘crimes under international law’. In 1789, depending on which commentator you agree with, there were very few international crimes (piracy being a commonly recognised candidate), in the sense of offences which were punishable under international law as such and over which an international tribunal would have jurisdiction. Therefore, if only international crimes can be ‘violations of the law of nations’, then the *ATS* would, beyond piracy, have had little work to do in 1789, until such time as, following the Nuremberg tribunals, international law imposed direct liability on individuals.¹⁷³ Such a construction is contrary to the intentions of Congress, the language of the *ATS* (which references ‘tort’ but not crime), the history of *ATS* litigation, and the Supreme Court’s characterisation of the *ATS* in *Sosa*.¹⁷⁴

C *The Law of Nations Contemplates That a Corporation Can Violate Norms of International Law*

Closely related to the majority’s argument that corporations are not liable under international law is the argument that corporations are not ‘subjects’ of international law. It is beyond the scope of this paper to engage in the debate regarding the criteria for ‘subjectivity’, or the utility of maintaining the language of ‘subjects of international law’, in preference to the notion, for example, of

¹⁷² The dissenting Judge in *Pfizer* maintained that the prohibition on conduct as prescribed by international law has to apply to private actors before it is actionable under the *ATS*. The dissent erroneously presumed, however, that the feature of private liability in international law turned on universal criminal jurisdiction. However, as discussed above in Part V(B), some ‘crimes’ that are subject to universal jurisdiction do not involve criminal responsibility on the international plane but rather criminal responsibility under domestic law — it is just that international law permits every state to criminalise the conduct, beyond usual jurisdictional limits, either pursuant to a treaty obligation or under customary international law, as is the case for torture.

¹⁷³ As indeed was borne out in practice, with the *ATS* lying almost completely dormant until *Filártiga* in 1980.

¹⁷⁴ The decision of the District Court for the Central District of California in *Nestle*, 748 F Supp 2d 1057, 1131 (CD Cal, 2010), handed down less than 10 days before *Kiobel*, similarly seeks to limit the scope of *ATS* claims to just those violations which entail individual criminal responsibility under international law, citing piracy as the ‘18th century paradigm’ to be emulated. As discussed above, however, in the text accompanying above nn 153–6 and in *Nestle*, 748 F Supp 2d 1057, 1131 (CD Cal, 2010), it is controversial whether in the 18th and 19th century piracy *jure gentium* was an offence under international law, as opposed to an offence under municipal law in respect of which international law permitted states to exercise universal jurisdiction.

'participants'.¹⁷⁵ Suffice it to say that, prior to WWII, the individual was not widely considered a 'subject' of the international legal order.¹⁷⁶ But following various developments since then — in particular in the area of human rights, including mechanisms for individuals to bring claims before UN human rights bodies and certain regional courts to protect their rights, and the post-Nuremberg legacy of individual criminal responsibility for the commission of certain international crimes — it is now recognised that individuals have rights and duties under international law. In a similar vein, international instruments have been creating quite extensive rights for corporations too — such as the protection of the right to property under *Protocol 1 to the European Convention on Human Rights*,¹⁷⁷ and dispute resolution rights under regional and bilateral trade and investment treaties, such as before the International Centre for Settlement of Investment Disputes ('ICSID'),¹⁷⁸ which allows direct suit by corporations. The customary international law rules on expropriation, while traditionally enforced through the espousal of diplomatic protection claims by the state of nationality of the corporation, are nevertheless rules designed to protect the legitimate interests of companies. Increasingly, treaties are requiring states to criminalise or otherwise sanction the conduct of corporations within their jurisdiction, especially in areas such as transnational organised crime, bribery, and terrorist financing, and to impose civil sanctions in respect of certain environmental torts.¹⁷⁹ States are, of course, free to extend legislation governing the domestic prosecution of war crimes, crimes against humanity, genocide, torture, slavery, and so forth to the conduct of corporations incorporated in their territory.¹⁸⁰ And the increasingly extraterritorial reach of corporate criminal liability in certain areas (for example, anticorruption, money laundering, securities, antitrust, organised crime, terrorist financing) is also relevant, even if not always pursuant to treaty obligations or customary international law, as such practice goes some way to developing a general principle of corporate criminal liability.

¹⁷⁵ See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994); see also Clapham, above n 105.

¹⁷⁶ See the discussion of the historical evolution of the role of the individual in international law in the judgment of Judge Edwards in *Tel-Oren*, 726 F 2d 774, 794 (DC Cir, 1984) (citing early 20th century recognition of individuals as subjects of international law, but noting a lack of scholarly consensus) and also consider the 19th century antislavery courts, above n 134.

¹⁷⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) ('European Convention on Human Rights').

¹⁷⁸ Established by the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

¹⁷⁹ See Clapham, above n 105, 247–51. Clapham observes at 267 that the various treaties that address the behaviour of legal persons with regard to financing terrorism, corruption, environmental crimes, and trafficking, demonstrate that states can be bound in international law to ensure that corporations respect particular obligations defined in international instruments.

¹⁸⁰ See, eg, *Code Pénal* [Penal Code] (France), discussed above n 131.

In light of these and other developments,¹⁸¹ corporations have increasing capacities, rights and duties on the international plane, created through international or hybrid legal mechanisms. Just as states agreed to create a right of access for individuals to the European Court of Human Rights, so too did states agree to create a right of access of corporate persons to ICSID. Just as the *Torture Convention* requires states to criminalise certain conduct within their jurisdiction, so too do conventions regarding bribery, or terrorist financing, call on states to criminalise or sanction corporate conduct within their jurisdiction. And while the direct responsibilities of corporations under international law for the still-nascent phenomenon of international crimes remain less appreciated and well-defined than those of individuals, this is not to say that, in domestic laws implementing their international obligations, states do not extend the scope of their legislation, such as that prohibiting torture, to the conduct of both natural and juridical persons.¹⁸² If a corporation operated a detention facility and, through its practices and procedures, encouraged, condoned, or was reckless as to the perpetration of torture by its employees, the corporation's conduct is no less a violation of the prohibition on torture than if the detention facility was a state-run prison operated by government officials. That the corporation may not be held directly accountable for its conduct before any international tribunal does not change the simple fact that there is a substantive violation, even if international law is inadequate as to the punishment of that violation.¹⁸³

¹⁸¹ For more comprehensive analyses of the changing position of corporations in the international legal order, see generally, Michael Kerr, Richard Janda and Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (LexisNexis, 2009); Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443; David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931; John Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1.

¹⁸² *Kiobel*, 621 F 3d 111, 183 (Leval J) (2nd Cir, 2010), quoting James Crawford (emphasis in original):

When the terms of an international treaty become part of the law of given state — whether (as in most common law jurisdictions) by being enacted by Parliament or (as in many civil law jurisdictions) by virtue of constitutional approval and promulgation which give a self-executing treaty the force of law — *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 recognised as unlawful by that legal system.

¹⁸³ See Clapham, above n 105, 267: 'there are clearly violations of international criminal law that exist in the absence of any international jurisdiction to try them. The absence of an international jurisdiction to try corporations does not mean that transnational corporations cannot break international law'. See also Volker Nerlich, 'Core Crimes and Transnational Business Corporations' (2010) 8 *Journal of International Criminal Justice* 895, 898–9. Nerlich accepts that it is difficult to maintain the position that customary international law provides for the criminal punishment of transnational businesses for core international crimes. However, he posits that one must conceive of crimes as made up of two elements: first, a prohibition of certain conduct, and secondly, criminal punishment for its breach. Nerlich argues that the prohibition of conduct applies to corporations, even if they cannot be punished under current customary international law. Thus, the failure by a corporation to comply with the prohibition may result in sanctions short of criminal punishment.

International law inevitably depends to a large extent on municipal systems of law to enforce its rules. States criminalised piracy in their domestic jurisdictions as a means of addressing a problem of common concern and transnational reach. That there was no international tribunal before which pirates could be tried did not change the fact that their conduct offended international legal norms — those standards of conduct agreed between states as a matter of international law, but more often than not enforced domestically.

The *ATS* is a domestic statute enforcing, through civil liability, the standards of conduct recognised at international law. To consistently recall that it is a jurisdictional statute permitting federal common law suits for violations of the law of nations is essential in order to resist the *Kiobel* majority's insistence, armed with footnote 20 of *Sosa*, that all questions about the 'scope of liability' under the *ATS* must be answered by international law itself.

In the final analysis, whether or not corporations are 'subjects' of international law is irrelevant to the question of whether corporations can be liable under the *ATS*. As Judge Leval observes:

Because the law of nations leaves each nation free to determine for itself whether to impose civil liability for such violations of the norms of the law of nations, and because the United States by enacting the *ATS* has opted for civil tort liability, *US courts*, as a matter of *US law*, entertain suits for compensatory damages *under the ATS* for violations of the law of nations. The *ATS* confers jurisdiction by virtue of the defendant's violation of the law of nations. Damages are properly awarded under the *ATS* not because any rule of international law imposes damages, but because the United States has exercised the option left to it by international law to allow civil suits.¹⁸⁴

VI THE NEED FOR CLARITY

In 1984, Judge Edwards opened his concurring judgment in *Tel-Oren* with the following plea:

This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the 'law of nations'. As is obvious from the laborious efforts of opinion writing, the questions posed defy easy answers.¹⁸⁵

Twenty-five years later, courts are still struggling to answer the questions posed by *ATS* suits. Presuming that reports of the death of the *ATS* are exaggerated, future suits against corporate defendants will continue to raise as yet unresolved issues: piercing the corporate veil, joint venture liability, agency, *respondeat*

¹⁸⁴ *Kiobel*, 621 F 3d 111, 183–4 (Leval J) (2nd Cir, 2010) (emphasis added).

¹⁸⁵ *Tel-Oren*, 726 F 2d 774, 775 (DC Cir, 1984).

superior, and so on.¹⁸⁶ But before courts chart new territory, they are yet to settle on their existing boundaries — what is the standard for aiding and abetting liability, and can corporations be subject to suit? *Kiobel* has now created a circuit split: the Eleventh Circuit held in 2008 that corporations are liable under the *ATS*.¹⁸⁷

Meanwhile, footnote 20 of the *Sosa* judgment continues to wreak havoc in lower courts. Where Judge Hall in *Khulumani* could discern nothing more than ‘Delphian’ guidance from footnote 20,¹⁸⁸ and the district court in *Kiobel* was wary of giving a mere footnote too much weight,¹⁸⁹ a Seventh Circuit district court in 2010 held in *Flomo v Firestone Natural Rubber Co* (‘*Flomo*’)¹⁹⁰ that ‘*Sosa* has already rejected [the] Plaintiffs’ argument’ that ‘either federal common law always governs the issue [of corporate liability] or, alternatively as Judge Leval’s concurrence concludes, that federal common law can fill in the gaps of international law in *ATS* actions’.¹⁹¹ With the characteristic Pavlovian response,

¹⁸⁶ Though at least one court has already espoused the view that even these issues can be determined by reference to international law. See *Nestle*, 748 F Supp 2d 1057, 1127 (CD Cal, 2010) (citing *Sosa*, 542 US 692, 732 n 20 (2004)):

After *Sosa*, it is appropriate to look to international law rather than domestic law to provide standards governing corporate liability, agency attribution, joint venture theories, piercing the corporate veil, and the like. Some might argue that corporate liability can be provided by operation of ‘federal common law’ (See, eg *Agent Orange*, 373 F Supp 2d 7, 59 (ED NY, 2005)) ... however, such an approach improperly superimposes American legal rules on top of international law norms, which directly contravenes *Sosa*’s insistence 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 ...’.

However, international law is unlikely to have sufficiently clear rules on any of these doctrines, given that they are all doctrines applicable to the liability of corporations, and corporations are legal constructs known above all to municipal systems of law. So much was recognised by the ICJ in *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 34–5 [38]:

international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.

¹⁸⁷ *Romero*, 552 F 3d 1303, 1315 (11th Cir, 2008): ‘The text of the *Alien Tort Statute* provides no express exception for corporations, see 28 USC § 1330, and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants.’ See also *Flomo v Firestone Natural Rubber Co*, 744 F Supp 2d 810, 813 (SD Ind, 2010): ‘the [*Kiobel*] majority’s rule conflicts with the law in the Eleventh Circuit that courts not only have jurisdiction to decide whether corporations may be civilly liable under the *ATS*, but that corporations are, in fact, liable’.

¹⁸⁸ See quote at above n 86.

¹⁸⁹ *Kiobel v Royal Dutch Petroleum*, 456 F Supp 2d 457, 464 n 9 (SD NY, 2006) (citations omitted):

Dictum in *Sosa* potentially implies that courts should consider secondary liability on a case by case basis, taking into account the specific primary violation at issue rather than secondary liability more generally. However, given that: (1) the Supreme Court’s directive is unclear; (2) secondary liability is mentioned in *Sosa* only in a footnote; and (3) dictum in *Presbyterian Church* implies that aiding and abetting claims pursuant to the *ATS* are viable generally, this court declines to take that approach.

¹⁹⁰ 744 F Supp 2d 810 (SD Ind, 2010).

¹⁹¹ Ibid 815.

the *Flomo* court recited *Sosa*'s dictum that '[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual' and concluded that the 'Plaintiffs' argument that federal common law provides the scope of [corporate] liability in *ATS* claims — no matter what international law may say on the matter — impermissibly conflicts with the plain language of *Sosa*'.¹⁹² Thus, *Kiobel* has already netted its first out-of-circuit catch. It remains to be seen how other circuits will respond. But this much is clear: the *ATS* continues to cry out for clarification by the Supreme Court. Having denied certiorari in both *Khulumani* and *Talisman*, one hopes that, if petitioned, the Supreme Court will see the wisdom of providing guidance to the lower courts on the 'broad and novel' questions that continue to arise in the context of the *ATS*.

VII THE POLICIES BEHIND THE JUDICIAL PRACTICE

The modern incarnation of the *ATS* was never going to be a universally popular statute. Making US courts available to aliens to sue for international law violations perpetrated in foreign lands at the hands of foreign defendants has raised considerable disquiet among some judges as well as in some US administrations.¹⁹³ Indeed, defendants frequently raise doctrines of judicial restraint or non-justiciability in motions to dismiss lawsuits. These include the act of state doctrine, the political question doctrine, and *forum non conveniens* grounds.¹⁹⁴ Some judges who do not approve of the scope or reach of the *ATS* would limit its application by reference to these prudential doctrines. For example, Judge Robb in *Tel-Oren* would have dismissed that case for raising political questions best left to the Executive or to Congress, and had his cause-of-action ground not been sufficient, Judge Bork would have agreed.

In our view, however, judges are also adopting a different, less explicit, approach to dismissing *ATS* suits they deem inappropriate: namely, interpreting the statute to create standards or rules that, by their application, foreclose certain suits. That judges, in the exercise of judicial reasoning, might seek to 'reason away' the *ATS* is not a new phenomenon. As Judge Edwards noted in 1984 in *Tel-Oren*:

Judge Bork virtually concedes that he is interposing a requirement that the law of nations provide a right to sue simply to void a statute of which he does not approve — and to avoid having to extend and distort existing doctrine on nonjusticiability to reach the same result.¹⁹⁵

One might well say something similar about the *Kiobel* majority's interposition of a requirement that the law of nations provide for the direct liability of corporate entities. Indeed, the theory that deeper policy rationales and

¹⁹² Ibid. The district court decision is, at the time of writing, on appeal to the Seventh Circuit, see *Flomo v Firestone Natural Rubber Co* (7th Cir, No 10-3675, 2 June 2011).

¹⁹³ This was particularly the case with the Bush administration. See Ku, above n 33, 360.

¹⁹⁴ These doctrines are not wholly unsuccessful, either — while the political question doctrine has had limited success, courts are occasionally amenable to staying proceedings on *forum non conveniens* grounds — most recently, see *Aldana v Del Monte Fresh Produce*, 578 F 3d 1283 (11th Cir, 2009) and *Aguinda v Texaco Inc*, 303 F 3d 470 (2nd Cir, 2002).

¹⁹⁵ *Tel-Oren*, 726 F 2d 774, 790 (DC Cir, 1984).

general opposition to the *ATS* informed the majority opinion in *Kiobel* received resounding confirmation with the issue of the judgment denying the plaintiffs petition for panel rehearing on 4 February 2011.¹⁹⁶

A *The ATS as an Unjustifiable Hindrance on Foreign Commerce*

The judgment denying panel rehearing, like the original appellate decision, splits 2–1. Interestingly, Chief Judge Jacobs, who had joined in the majority opinion authored by Judge Cabranes in *Kiobel*, takes the opportunity on rehearing to author his own opinion in response to the criticisms of Judge Leval. Chief Judge Jacobs' opinion, however, exposes, in Judge Leval's words, the 'intense, multi-faceted policy agenda that underlies the majority's undertaking to exempt corporations from the law of nations'.¹⁹⁷ Among the most startling revelations in Chief Judge Jacobs' opinion is his considerable faith in the general propriety of corporations and a strong deference to non-interference in the economic affairs of foreign states:

All the cases of the class affected by this case involve transnational corporations, many of them foreign. Such foreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies, sustaining employees, pensioners and creditors — and paying taxes. I cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them — and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees.¹⁹⁸

...

By definition, no one would protect any enemy of all mankind, so it is telling that each and every country *does* protect and foster the companies that fuel its national economy and that project its economic power and interests under such regulation as each country deems sufficient. These policy considerations explain why no international consensus has arisen (or is likely to arise) supporting corporate liability. Is it plausible that customary international law supports proceedings that would harm other civilized nations and be opposed by them — or be tantamount to 'judicial imperialism'?¹⁹⁹

In the context of *ATS* suits, it should not be 'telling' that countries protect and foster the companies that fuel their economy, but rather, it should be 'telling' that countries are capable of protecting companies whose conduct amounts to a serious violation of human rights when commercial interests are put above the human rights of their citizens, above the rights of indigenous groups to their land, and above the right of their peoples to be free of forced labour and intimidation. The fact that the investment of foreign corporations is so vital to the prosperity of many nations is as much a cause for concern as for comfort, when it comes to the ability and the incentive for developing country host states to regulate foreign multinational corporations.

¹⁹⁶ *Kiobel Panel Rehearing* (2nd Cir, No 06-4800-cv, 4 February 2011).

¹⁹⁷ *Ibid* slip op 1 (Leval J).

¹⁹⁸ *Ibid* slip op 3–4 (Jacobs J).

¹⁹⁹ *Ibid* slip op 5–6 (emphasis in original).

B The ATS as an Unjustifiable Hindrance on Foreign Policy

There was already a suggestion of Chief Judge Jacobs' opposition to the *ATS* in the opinion he authored for the court in *Talisman*:

There is evidence that southern Sudanese were subjected to attacks by the Government, that those attacks facilitated the oil enterprise, and that the government's stream of oil revenue enhanced the military capabilities used to persecute its enemies. But if *ATS* liability could be established by knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts. Such measures are not the province of private parties but are, instead, properly reserved to governments and multinational organisations.²⁰⁰

Essentially, the point of imposing the higher (non-customary international law) 'purpose' standard for aiding and abetting in *Talisman* was to foreclose suits such as the one before the court, not so much for failure of pleadings or evidence, but because the court considered that it would amount to impermissible interference with the government's power over foreign affairs and amount to a form of judicial imperialism and, perhaps most importantly, would be a seemingly unjustifiable restraint on legitimate commerce. Perhaps it is not surprising therefore that these are very similar to the arguments raised by the Bush administration in its amicus brief in *Talisman*, that courts should leave these questions to Congress and should not extend aiding and abetting liability under the *ATS* due to the impermissible interference in a domain reserved to the executive branch of government.²⁰¹

That the higher 'purpose' standard was adopted in *Talisman* to achieve these policy goals receives further confirmation in Chief Judge Jacobs' opinion on the petition for rehearing in *Kiobel*. In Chief Judge Jacobs' view, the decision in *Kiobel* is one of 'no big consequence'²⁰² because the earlier decision of the same Second Circuit panel in *Talisman* set such a high bar for aiding and abetting liability that only those corporations who have 'purposefully engaged in the business of genocide, slavery, [or] piracy'²⁰³ would be liable. This forecloses, in Chief Judge Jacobs' view, all but a handful of cases. Indeed, as his Honour observes, given the restrictive effect of *Talisman*, the 'incremental number of cases actually foreclosed by the majority opinion in *Kiobel* approaches the vanishing point'.²⁰⁴ And yet the fundamental point appears to have escaped his Honour: if *Talisman* does limit corporate *ATS* suits to only those cases where a corporation has intentionally and purposefully engaged in the most egregious violations of international law, then the majority opinion in *Kiobel* does not foreclose a handful of frivolous or vexations claims, but in fact forecloses the very claims where corporations would bear the greatest legal and moral culpability for their actions. In Judge Leval's terms: 'To justify a rule that

²⁰⁰ *Talisman*, 582 F 3d 244, 264 (2nd Cir, 2009).

²⁰¹ See Michael J Garcia et al, 'Brief for the United States as Amicus Curiae', Submission in *Talisman*, No 07-0016, 15 May 2007.

²⁰² *Kiobel Panel Rehearing* (2nd Cir, No 06-4800-cv, 4 February 2011) slip op 6 (Jacobs J).

²⁰³ Ibid.

²⁰⁴ Ibid.

exempts certain defendants from liability on the ground that the rule protects only the very worst offenders is strange logic.²⁰⁵

C *The ATS as an Abuse of US Courts*

The majority opinion in *Kiobel*, authored by Judge José Cabranes, opens perhaps rather ominously: ‘Once again we consider a case brought under the *Alien Tort Statute*, a jurisdictional provision unlike any other in American law and of a kind apparently unknown to any other legal system in the world.’²⁰⁶ There is a hint of exasperation and embarrassment at having to hear, once again, such a suit. ‘Since [Filártiga]’, Judge Cabranes continues, ‘the ATS has given rise to an abundance of litigation in US district courts’.²⁰⁷ Indeed, the complexity and uncertainty of such suits, ‘combined with the fact that juries hearing ATS claims are capable of awarding multibillion-dollar verdicts’, has, in the majority’s view, ‘led many defendants to settle ATS claims prior to trial’.²⁰⁸ The majority opinion raises this fact as an explanation for why the Second Circuit has only published nine significant judgments on the *ATS* since 1980, and the Supreme Court has only decided one *ATS* case. And yet, this gives a false impression. By US litigation standards, *ATS* suits are by no means the most ‘abundant’ type of claim filed in US district courts. And while juries are always capable of awarding substantial verdicts, for all the purported profusion of *ATS* suits, only a handful have ever made it to trial, and juries are just as capable of acquitting defendants as they are of awarding damages.²⁰⁹ However, in setting the scene of an ‘abundance’ of *ATS* litigation, resulting in multibillion-dollar jury verdicts and leading to early (and presumably considered unjustified) settlements, this sketch is in fact a harbinger of the stated policy rationale for denying *ATS* suits against corporations that eventually rears its head in Chief Judge Jacobs’ opinion in the denial for rehearing.

In Chief Judge Jacobs’ view, the majority opinion in *Kiobel* barring *ATS* suits against corporations in the Second Circuit matters because

without it, plaintiffs would be able to plead around *Talisman* in a way that ... would delay dismissal of *ATS* suits against corporations; and the invasive discovery that ensues could coerce settlements that have no relation to the prospect of success on the ultimate merits. American discovery in such cases uncovers corporate strategy and planning, diverts resources and executive time, provokes bad public relations or boycotts, threatens exposure of dubious trade practices, and risks trade secrets. ... These coercive pressures, combined with pressure to remove contingent reserves from the corporate balance sheet, can easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff’s likelihood of success on the merits is zero. Courts should take care that they do not become instruments of abuse and extortion. If there is a threshold ground for dismissal — and *Kiobel* is it — it should be considered and used.²¹⁰

²⁰⁵ *Ibid* slip op 7 (Leval J).

²⁰⁶ *Kiobel*, 621 F 3d 111, 115 (2nd Cir, 2010).

²⁰⁷ *Ibid* 116.

²⁰⁸ *Ibid*.

²⁰⁹ *Romero*, 552 F 3d 1303 (11th Cir, 2008).

²¹⁰ *Kiobel Panel Rehearing* (2nd Cir, No 06-4800-cv, 4 February 2011) slip op 7–8 (Jacobs J).

These are criticisms of American litigation generally; they are not concerns unique to *ATS* suits.²¹¹ For example, the burden of discovery and the pressure to settle, even where the likelihood of success is marginal, can be just as great in antitrust class actions — if not more so, given the right of plaintiffs to treble damages under the *Clayton Act*.²¹² That the supposed vices of American litigation are being used to justify a rule barring an entire category of defendant from suit under the *ATS* should give the Supreme Court pause if it comes to review the majority decision in *Kiobel*. As Judge Leval observes:

Chief Judge Jacobs justifies the rule on the basis of his 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. Regardless whether his concerns have validity, the proposition that juridical entities are exempt from the rules of international law became a rule of international law only by virtue of the majority’s decision to make it so. Neither the law of nations nor the Alien Tort Statute furnishes any basis for leaving corporate and other juridical entities free to violate fundamental human rights without liability to victims.²¹³

VIII CONCLUSION

Concerns about comity and interfering with the political branches of government are all legitimate concerns, but they can be addressed within the scope of judicial discretion to hear a common law cause of action under the *ATS*,²¹⁴ or considered within the scope of recognised doctrines such as the political question doctrine or *forum non conveniens*.²¹⁵ But to take such political policy considerations such as the burden of *ATS* suits on foreign corporations

²¹¹ This point is not lost on Judge Leval, *ibid* slip op 3 (Leval J): ‘most of Judge Jacob’s grievances are against the exercise of *ATS* jurisdiction generally and against the burdens our legal system places on defendants generally and have no bearing on whether tort liability falls on corporations as well as individuals’. And at 4:

the problem of the risk of excessive jury verdicts putting unreasonable pressure on defendants to settle non-meritorious claims applies no more to *ATS* suits against corporations than to *ATS* suits against natural persons, as well as to nearly every branch of domestic tort litigation ...

²¹² 15 USC 12–27, 15.

²¹³ *Kiobel Panel Rehearing* (2nd Cir, No 06-4800-cv, 4 February 2011) slip op 11 (Leval J).

²¹⁴ Per the insistence in *Sosa*, 542 US 692, 732–3 (2004) that ‘the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts’.

²¹⁵ Again, Judge Leval’s critique is apt:

If the Department of State advised us that it is in the interest of the nation’s foreign policy that corporations be exempted from liability in suits under the *ATS*, or that a particular suit be dismissed under *forum non conveniens* or in the interests of international comity, we courts should of course give great deference to such advice. And if Congress passed a statute exempting corporations from liability under *ATS*, that would establish binding law. But there is no such statute, and my colleagues did not seek guidance from the Department of State, as courts conventionally do when concerned that a judgment might interfere with the executive branch’s conduct of foreign policy. Whether the policy put into effect by this ruling serves the foreign policy of the United States is pure conjecture.

Kiobel Panel Rehearing (2nd Cir, No 06-4800-cv, 4 February 2011) slip op 8–9 (Leval J).

and the risk of ‘judicial imperialism’, and cloak them in an analysis of whether there is a norm of corporate liability at customary international law, is to engage in the kind of political decision making that Chief Judge Jacobs himself counsels should be left to the political branches of government.

So, with Frankensteinian flourish, the Court that gave new life to the *ATS* in *Filártiga* has since grown to regret its progeny and appears determined to destroy the monster it thinks it has created. Yet the rationale behind the apparent popularity of the *ATS* with plaintiffs remains. In disputes with corporations over alleged human rights abuses perpetrated overseas, victims are often without any effective courses of remedial action. The singular opportunity offered by the *ATS*, though limited, therefore holds great appeal. Its capacity to provide redress for particular and egregious wrongs is already significantly constrained through the original language in which it was framed and its subsequent interpretation. To eviscerate even this extent of jurisdictional reach on the policy grounds that it is an encumbrance on corporations, courts and government alike, and by way of legal argument that is fundamentally flawed, is not a path the Supreme Court should countenance.