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**CORPORATE LIABILITY UNDER THE ALIEN TORT
STATUTE: THE SECOND CIRCUIT'S MISSTEP AROUND
GENERAL PRINCIPLES OF LAW IN *KIOBEL V. ROYAL
DUTCH PETROLEUM CO.***

INTRODUCTION

In Richard Wagner's opera *Lohengrin*,¹ a knight appears at the prayers of a maiden to defend her against accusations of murder.² The knight agrees to wed her on the condition that she never ask his name or from whence he came.³ As such, when Judge Friendly called the Alien Tort Statute ("ATS")⁴ a "legal Lohengrin,"⁵ he was referencing the peculiar origin and nature of this aged statute. Although we are well aware of the origins of the ATS, its inactivity for almost 200 years clouded it in an aura of mystery. Now, almost thirty years after its revival by the Second Circuit, that same court may have stripped the ATS of its ability to defend its maiden, the victims of tortious actions attributable to corporate entities.

The ATS has eluded much appellate review due to settlements and quick dismissals. The Supreme Court has seriously considered its jurisdictional grant in only one case.⁶ As such, there remains much mystery about its exact function and application. By requiring that courts look to the corpus of international law to determine jurisdiction, the ATS opens the door to judicial conjecture and confusion on the content of the "law of nations."⁷ Although the recognition of what constitutes substantive international law rules (such as standards for torture, extrajudicial killings, or forced exile) is a difficult enough task for the lower courts of the federal judiciary, the scope of those rules, such as their source, has equally led to conflict among the courts.

¹ RICHARD WAGNER, *LOHENGRIN* (Nicholas John ed., Amanda Holden trans., Riverrun Press 1993) (1850).

² *See id.* at 55–56.

³ *See id.* at 57–58.

⁴ Alien Tort Statute, 28 U.S.C. § 1350 (2006).

⁵ *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

⁶ *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004). The Court will review the ATS in the 2011 Term as they have granted certiorari in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011). *See discussion infra* Part V.D.

⁷ 28 U.S.C. § 1350.

It is this conflict of scope that gave rise to the Second Circuit's September 2010 holding in *Kiobel v. Royal Dutch Petroleum Co.*⁸ The Second Circuit, with no briefing of the issue from the parties, reversed an assumption underlying many ATS decisions against corporations up to that point: that the ATS provided subject matter jurisdiction over actions against corporate entities.⁹ The U.S. District Court for the Southern District of New York dismissed Nigerian plaintiffs' claims alleging human rights atrocities committed in connection with protests over the defendant corporation's oil extraction activities.¹⁰ On appeal, the Second Circuit affirmed this dismissal.¹¹

The Second Circuit held that subject matter jurisdiction under the ATS is not available for actions against corporations.¹² In doing so, the court almost exclusively looked to one source of international law—custom.¹³ Yet, the Statute for the International Court of Justice (“ICJ Statute”),¹⁴ recognized as the authority for the sources of international law,¹⁵ lists another important and especially pertinent source: “general principles of law recognized by civilized nations.”¹⁶ As this Comment shows, the Second Circuit's failure to implement this source of international law is a fatal blow to its holding.

This Comment, in Part I, first looks to the history of the ATS and the case law leading up to the holding in *Kiobel*. Next, in Part II, the facts of this case are discussed, followed by an analysis of both the majority and concurring opinions. Part III contains a discussion of the general principles of international law as stated in the ICJ Statute, leading to a survey of the world's legal systems in Part IV and their treatment of corporations and the imposition of tort liability. From this, Part V applies the general principles discovered from these legal systems through an analysis of the majority and concurring

⁸ *Kiobel*, 621 F.3d 111.

⁹ *Id.* at 145. The Supreme Court granted certiorari to determine whether the question dealing with corporate liability under the ATS is one that goes to the merits or is jurisdictional. See Petition for Writ of Certiorari, at i, *Kiobel*, 132 S. Ct. 472 (No. 10-1491). This issue will be discussed more thoroughly *infra* Part V.D.

¹⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 468 (S.D.N.Y. 2006), *aff'd in part, rev'd in part*, 621 F.3d 111, *cert. granted*, 132 S. Ct. 472.

¹¹ *Kiobel*, 621 F.3d at 149.

¹² *Id.*

¹³ *Id.* at 125–45.

¹⁴ U.N. Charter, Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031 [hereinafter ICJ Statute].

¹⁵ DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 13 (2d ed. 2006); see also ICJ Statute, *supra* note 14, art. 38(1).

¹⁶ ICJ Statute, *supra* note 14, art. 38(1)(c).

opinions, a look to the Second Circuit's denial of rehearing en banc, and a discussion of the dual issues certified by the Supreme Court when it granted certiorari in *Kiobel*. Finally, Part VI concludes the Comment with a discussion of alternatives to the Second Circuit's bright-line denial of ATS jurisdiction over corporations, the potential implications of the decision as it stands, and best alternatives to which the Second Circuit could have looked when deciding *Kiobel*.

I. THE ALIEN TORT STATUTE

Included in the Judiciary Act of 1789, the ATS states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹⁷ Thus, plaintiffs looking to overcome the ATS's jurisdictional barrier must be aliens suing in tort for a violation of the law of nations. Unlike other sources of original federal court jurisdiction, the ATS does not look to the relationship between the parties,¹⁸ nor to the source of the conflict in federal law,¹⁹ but asserts its power under the auspices of international law. This reference to international law, on its face, creates clear and unavoidable choice of law²⁰ and separation of powers issues,²¹ among others. Additionally, there is a general difficulty raised when municipal courts must construe and apply international law.

Despite the ATS's potential to raise these complex issues,²² it lay relatively dormant for almost 200 years.²³ It was awakened by the Second Circuit in

¹⁷ 28 U.S.C. § 1350 (2006); accord Judiciary Act of 1789 § 9(b), 1 Stat. 73, 77. Some courts have also referred to the ATS as the Alien Tort Claims Act or the ATCA. See *Doe I v. Unocal Corp.*, 395 F.3d 932, 943 (9th Cir. 2002); *Doe I v. Karadzic*, No. 93 Civ. 0878, 2001 U.S. Dist. LEXIS 12928, at *2-3 (S.D.N.Y. 2001). The Supreme Court has used ATS, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004), and, on this basis, this Comment references the statute in the same manner.

¹⁸ Compare 28 U.S.C. § 1350, with 28 U.S.C. § 1332(a) (2006).

¹⁹ Compare 28 U.S.C. § 1350, with 28 U.S.C. § 1331.

²⁰ See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J., concurring) ("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."); *Unocal*, 395 F.3d at 963 (Reinhardt, J., concurring) ("I do not agree that the question of Unocal's tort liability should be decided by applying any international law test at all. . . . [It] should be resolved by applying general federal common law tort principles."). But see *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 126 (2d Cir. 2010), cert. granted, 132 S. Ct. 472 (2011) (noting that the scope of international law is defined by international law itself).

²¹ *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-89 (2d Cir. 1980).

²² See INT'L COMM'N OF JURISTS, CIVIL REMEDIES 57 (2008) [hereinafter CIVIL REMEDIES].

²³ See *Taveras v. Taveraz*, 477 F.3d 767, 771 (6th Cir. 2007). Before its revival in 1980, the ATS established jurisdiction in two cases, *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), and *Bolchos v. Darrel*, 3

Filartiga v. Pena-Irala,²⁴ a decision which created a doctrine that has become “a touchstone for promoting effective remedies for serious human rights violations.”²⁵ In *Filartiga*, two citizens of Paraguay brought an action to recover for the death of a family member by torture at the hands of a former Inspector General of Police.²⁶ The trial court dismissed on jurisdictional grounds; the Second Circuit interpreted the trial court’s dismissal as reflecting that, although “official torture violates an emerging norm of customary international law,”²⁷ the trial court felt “constrained by dicta” to construe the ATS as excluding law governing the relations between a state and its citizens.²⁸ The Second Circuit disagreed. Reviving the little-used ATS, the majority looked to domestic court opinions,²⁹ the UN Charter,³⁰ the Universal Declaration of Human Rights,³¹ and even municipal constitutions³² to hold that “official” torture is “unambiguous[ly]” and “clear[ly]” prohibited by the law of nations.³³

Filartiga was a groundbreaking decision and victory for human rights.³⁴ Since that case was decided, the ATS has substantially protected victims and

F. Cas. 810 (D.S.C. 1795) (No. 1607). In *Adra*, the U.S. District Court for the District of Maryland resolved a custody dispute between divorced Iraqi and Lebanese nationals. *See* 195 F. Supp. at 859, 867. In *Bolchos*, the U.S. District Court for the District of South Carolina, having established jurisdiction under the ATS, resolved a dispute between two parties over the “rightful” ownership of slaves. *See* 3 F. Cas. at 810–11.

²⁴ *See Filartiga*, 630 F.2d 876.

²⁵ Brief of Amici Curiae International Jurists in Support of Affirmance at 13, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (No. 03-339).

²⁶ *Filartiga*, 630 F.2d at 878.

²⁷ *Id.* at 880.

²⁸ *Id.* This constraint came from the earlier Second Circuit cases of *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976), and *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975).

²⁹ *Filartiga*, 630 F.2d at 880–81; *see also* *The Paquete Habana*, 175 U.S. 677 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

³⁰ *Filartiga*, 630 F.2d at 881–82; *see also* U.N. Charter arts. 55–56.

³¹ *Filartiga*, 630 F.2d at 882; *see also* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

³² *Filartiga*, 630 F.2d at 884 (“[T]orture is prohibited, expressly or implicitly, by the constitutions of over fifty-five nations, including both the United States and Paraguay.” (footnotes omitted)).

³³ *Id.*

³⁴ David J. Bederman, *Dead Man’s Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT’L & COMP. L. 255, 256 (1995/1996) (“In a sense, all current human rights litigation owes its fortune to *Filartiga*. The rediscovery of the Alien Tort Statute was much like finding the Holy Grail.”). Writing the opinion, Judge Kaufman recognized the enormity and impact of the decision:

In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. . . . Our holding today . . . is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

provided civil judgments against those who violate “sufficiently and constitutionally defined”³⁵ human rights norms.³⁶ Yet, the ATS’s reach was subsequently judicially limited. In *Argentine Republic v. Amerada Hess Shipping Corp.*,³⁷ the Supreme Court held that jurisdiction over foreign sovereigns was not secured by the ATS, but instead that the sole basis for jurisdiction in these cases was to be controlled by the Foreign Sovereign Immunities Act.³⁸

Notwithstanding this limitation, the use of the ATS in actions against private individuals has been bolstered by the courts. In *Amerada Hess*, the Supreme Court stated: “The Alien Tort Statute by its terms does not distinguish among classes of defendants.”³⁹ Further, in *Kadic v. Karadžić*,⁴⁰ the Second Circuit held “that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”⁴¹ Yet, in the history of ATS litigation, the concept of liability for the private corporate person was not confronted in such a direct manner as it was in *Kiobel*.

The issue of corporate liability under the ATS has been pursued by plaintiffs under the theory of aiding and abetting liability.⁴² This approach has led to confusion and conflict in the courts over the specific standards for corporate aiding and abetting liability and acts as a prelude to the holding in *Kiobel*. In *Doe I v. Unocal Corp.*,⁴³ “one of the most learned discussions of

Filartiga, 630 F.2d at 890.

³⁵ *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820).

³⁶ Some judgments against ATS defendants have ranged from \$54 million, *Arce v. Garcia*, 434 F.3d 1254, 1256 (11th Cir. 2006), to \$4.5 billion, *Doe I v. Karadzic*, No. 93 Civ. 0878, 2001 U.S. Dist. LEXIS 12928, at *2 (S.D.N.Y. 2001).

³⁷ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

³⁸ *Id.* at 434. The Foreign Sovereign Immunities Act’s (“FSIA’s”) jurisdiction in these cases is substantially limited. FSIA has statutory exceptions under which sovereign defendants could escape liability where the ATS would have provided it. *Compare* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 4(a), 90 Stat. 2891, 2892–94 (codified as amended as 28 U.S.C. § 1605(a)–(d) (2006 & Supp. IV 2010)), *with* 28 U.S.C. § 1350 (2006).

³⁹ *Amerada Hess*, 488 U.S. at 438.

⁴⁰ *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

⁴¹ *Id.* at 239; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II, intro. note, at 71 (1987) (“Individuals may be held liable for offenses against international law, such as piracy, war crimes, or genocide.”).

⁴² *See, e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247 (2d Cir. 2009); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 259 (2d Cir. 2007) (*per curiam*); *Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002).

⁴³ *Unocal*, 395 F.3d 932.

aiding and abetting liability under the ATS,”⁴⁴ the Ninth Circuit judges were split on the definition and source of law for the aiding and abetting claims. Although holding that the case could continue against Unocal, the majority held that international law supplied the applicable legal standard,⁴⁵ while Judge Reinhardt found the cause of action in domestic law.⁴⁶ The Second Circuit perpetuated this conflict in *Khulumani v. Barclay National Bank Ltd.*⁴⁷ with Judge Katzmman’s concurrence engaging in an analysis of international law tribunals and agreements to find the relevant standard,⁴⁸ while Judge Hall argued for the application of domestic law.⁴⁹ *Khulumani*’s remaining concurring opinion could be considered the direct precursor to the majority reasoning in *Kiobel*. Concluding that the scope of the ATS, as defined by international law,⁵⁰ did not cover actions against corporate defendants,⁵¹ Judge Korman drew upon footnote language of the Supreme Court in *Sosa v. Alvarez-Machain*.⁵²

Sosa is one of a short line of cases in which the Supreme Court has given guidance to the lower courts handling ATS litigation. The plaintiff in *Sosa* was a Mexican physician accused of aiding in the torture of a Drug Enforcement Administration (“DEA”) agent.⁵³ After failed attempts to arrest Alvarez-Machain with the help of the Mexican government, the DEA hired a group of Mexican nationals to abduct and transport him to the United States to stand trial.⁵⁴ Following termination of the criminal case, Alvarez-Machain brought a civil action under the ATS for arbitrary arrest and detention as a violation of

⁴⁴ Anthony J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 BROOK. J. INT’L L. 871, 873 n.20 (2008).

⁴⁵ *Unocal*, 395 F.3d at 945 (“[A]ll torts alleged in the present case are *ius cogens* violations and, thereby, violations of the law of nations.”).

⁴⁶ *Id.* at 963 (Reinhardt, J., concurring) (“[T]he ancillary legal question of Unocal’s third-party tort liability should be resolved by applying general federal common law tort principles, such as agency, joint venture, or reckless disregard.”).

⁴⁷ *Khulumani*, 504 F.3d 254.

⁴⁸ *Id.* at 270–78 (Katzmann, J., concurring).

⁴⁹ *Id.* at 284 (Hall, J., concurring) (“To derive a standard of accessorial liability, however, a federal court should consult the federal common law.”).

⁵⁰ *Id.* at 312 (Korman, J., concurring in part and dissenting in part) (“[W]hether . . . there [is] a well established and universally recognized international norm providing for liability of private parties who aid and abet apartheid.”).

⁵¹ *Id.* at 321 (“The sources evidencing the relevant norms of international law at issue plainly do not recognize such liability.”).

⁵² *Id.* at 311; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004).

⁵³ *Sosa*, 542 U.S. at 697–98.

⁵⁴ *Id.* at 698.

the law of nations.⁵⁵ Reversing the Ninth Circuit's en banc decision, the Supreme Court sought to "clarify the scope of . . . the ATS."⁵⁶

In doing so, the Court made two key holdings. First, the Court held that the ATS was a jurisdictional statute that does not, of itself, create a cause of action.⁵⁷ Although seemingly a victory for the defendant (and the United States, which argued the same point), the Court refused to accept the notion that Congress intended the ATS "to be placed on the shelf" until they enacted subsequent legislation creating causes of action.⁵⁸ From this holding, important questions arise: Which causes of action for acts alleged to be violations of the law of nations are realized under the ATS, and thus, in the municipal law of the United States? How should the lower courts recognize new actions in the ever-evolving arena of international law, if at all?

The answers to these questions constitute the Court's second key holding in *Sosa*.⁵⁹ The Court held that to recognize a violation of the law of nations sufficient to trigger the ATS's jurisdictional grant, it must "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."⁶⁰ Clearly, this grant gives the lower courts substantial discretionary power, which Justice Scalia argued in concurrence was "illegitimate."⁶¹ The majority was not blind to the concern that district courts would be too loose in their recognition of international law norms. Justice Scalia argued that the "door" that leads to the creation of law under the auspices of a jurisdictional grant was closed by events after the enactment of

⁵⁵ *Id.* at 698–99.

⁵⁶ *Id.* at 699.

⁵⁷ *Id.* at 712.

⁵⁸ *Id.* at 719.

⁵⁹ Interestingly, the holding had been alluded to in prior case law. In *Filartiga*, the Second Circuit equated the torturer with the pirate, referencing one of the three previously and sufficiently defined violations of international law existing when the ATS was passed, vesting federal courts with universal jurisdiction. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). In 1789, when the ATS was passed, Blackstone had already identified three defined violations of the law of nations: violation of safe conducts, infringement of the rights of ambassadors, and piracy. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (William S. Hein & Co. 1992) (1769). Also, in *Amerada Hess*, the Second Circuit stated in dicta, "Where the attacker has refused to compensate the neutral, such action is analogous to piracy, one of the earliest recognized violations of international law," again referencing piracy as an established violation of the law of nations. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 424 (2d Cir. 1987), *rev'd*, 488 U.S. 428 (1989).

⁶⁰ *Sosa*, 542 U.S. at 725.

⁶¹ *Id.* at 750 (Scalia, J., concurring). Justice Scalia argues that the decision gives "the Federal Judiciary . . . a task it is neither authorized nor suited to perform." *Id.* at 739.

the ATS (most notably, *Erie Railroad Co. v. Tompkins*⁶²).⁶³ Responding to this, the majority employed some of the most cited language in ATS litigation post-*Sosa*: “[C]onsiderations persuade us that the judicial power [to recognize violations of the law of nations] should 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

Sosa thus gave the lower courts the much-needed guidance to establish jurisdiction under the ATS. Yet, the Court also injected uncertainty in another area of contention in a footnote: “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.”⁶⁵ With this, the Court created issues of whether international law itself defined the scope of the “law of nations”⁶⁶ and whether that scope would stretch to cover corporations allegedly violating international law. The Second Circuit provided a resolution to these issues in *Kiobel v. Royal Dutch Petroleum Co.*

II. *KIOBEL V. ROYAL DUTCH PETROLEUM CO.*

A. *Facts and Procedural History*

The facts of *Kiobel* arose from a conflict between the Ogoni people of Nigeria and the Shell Petroleum Development Company of Nigeria, Ltd. (“SPDC”).⁶⁷ This company is a subsidiary of and wholly owned by Royal Dutch Petroleum Company (“RDPC”) and Shell Transport and Trading Company.⁶⁸ The Ogoni region consists of approximately 400 square miles in

⁶² *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁶³ *Sosa*, 542 U.S. at 746 (Scalia, J., concurring) (“The general common law was the old door. We do not close that door today, for the deed was done in *Erie*.”); see also *Erie*, 304 U.S. at 78–80.

⁶⁴ *Sosa*, 542 U.S. at 729.

⁶⁵ *Id.* at 732 n.20 (emphasis added).

⁶⁶ 28 U.S.C. § 1350 (2006).

⁶⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010), cert. granted, 132 S. Ct. 472 (2011).

⁶⁸ *Id.*

southern Nigeria.⁶⁹ In 1956, oil was discovered in the Ogoni region and, in 1958, SPDC began oil production in this area.⁷⁰

Since the discovery, oil and gas have become vital sources of revenue for Nigeria. Ninety-seven percent of Nigeria's foreign exchange revenues and 79.5% of government revenues come from the oil and gas sectors.⁷¹ Moreover, the state-owned Nigerian National Petroleum Corporation is involved in the "joint venture" with SPDC, owning fifty-five percent of the venture.⁷² Because of the oil extraction, the Ogoni people have watched as the region has been decimated and ravaged by the extraction process, oil spills,⁷³ and gas flaring—the act of lighting excess gas from oil wells as waste, acknowledged as "extremely wasteful and environmentally damaging."⁷⁴

In 1990, the Movement for Survival of Ogoni People ("MOSOP") was formed to stage nonviolent protests against SPDC operations because of the environmental damage.⁷⁵ In 1992, MOSOP demanded compensation for the environmental damage and, by 1993, more than half of the Ogoni population participated in MOSOP protests.⁷⁶ According to the allegations, SPDC enlisted the help of Nigerian military officials to quell the protests, and the Nigerian military forces attacked and looted Ogoni villages and raped and killed the residents.⁷⁷ A month later, a Nigerian military commander wrote in a "restricted" memo that "Shell operations [are] still impossible unless ruthless military operations are undertaken for smooth economic activities to

⁶⁹ See Movement for the Survival of the Ogoni People, Ogoni Bill of Rights 3 (Dec. 1991) (proposed bill of rights), available at http://www.mosop.org/Ogoni_Bill_of_Rights_1990.pdf [hereinafter Ogoni Bill of Rights].

⁷⁰ AMNESTY INT'L, NIGERIA: PETROLEUM, POLLUTION AND POVERTY IN THE NIGER DELTA 11 (2009), available at <http://www.amnesty.org/en/library/asset/AFR44/017/2009/en/e2415061-da5c-44f8-a73c-a7a4766ee21d/afr440172009en.pdf>. But see Ogoni Bill of Rights, *supra* note 69, at 4–5 (claiming that oil was not discovered until 1958).

⁷¹ AMNESTY INT'L, *supra* note 70, at 11.

⁷² *Id.* at 12.

⁷³ *Id.* at 14–16.

⁷⁴ *Id.* at 18.

⁷⁵ See *About Us*, MOVEMENT FOR SURVIVAL Ogoni PEOPLE, http://www.mosop.org/about_us.html (last visited Apr. 15, 2011).

⁷⁶ See Ogoni Bill of Rights, *supra* note 69, at 3, 7 (noting that in 1991 there were approximately 500,000 Ogoni people; demanding restitution for "the flaring of gas, oil spillages, oil blow-outs, etc."); *Events*, MOVEMENT FOR SURVIVAL Ogoni PEOPLE, <http://www.mosop.org/events.html> (last visited Apr. 15, 2011) (noting that more than 300,000 Ogoni people attended Ogoni Day on January 4, 1993).

⁷⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).

commence,”⁷⁸ the Ogoni plaintiffs allege that the letter announced that “wasting operations” would be conducted during MOSOP protests.⁷⁹ The allegations also state that the military leader further instructed that “pressure” was to be exerted on Shell for “prompt regular inputs” to support military operations.⁸⁰

Throughout these happenings, it is alleged that Dr. Barinem Kiobel, a member of the Executive Council for the state encompassing Ogoni, opposed the use of violence in the region.⁸¹ In May 1994, he received a letter from the U.S. Congressional Human Rights Caucus outlining safety concerns for the Ogoni population and requested that Dr. Kiobel “do everything in [his] power” to prevent human rights violations.⁸² Plaintiffs allege that Kiobel forwarded the memo to military officials.⁸³ Further allegations state that two weeks later, Kiobel was invited to attend a meeting concerning an upcoming constitutional convention—necessitated by the seizure of Nigerian power by General Sani Abacha.⁸⁴ Plaintiffs allege that while Kiobel was elsewhere, taking care of other business, the meeting degenerated and four Ogoni elders were killed.⁸⁵ Allegations also state that Kiobel and eight other Ogoni activists, including MOSOP leader Ken Saro-Wiwa, were later arrested, detained, and subsequently tortured; these nine people came to be known as the “Ogoni Nine.”⁸⁶

Allegations regarding the detention state that the conditions for Dr. Kiobel and the rest of the Ogoni Nine were “brutal,” involving beatings and denial of basic medical care and food.⁸⁷ Plaintiffs allege that during this time, no charges were filed against Dr. Kiobel.⁸⁸ Allegedly, in November 1994, the Civil Disturbances Special Tribunal (“CDST”) was created to administer “extra-

⁷⁸ *Id.* at 189–90 (Leval, J., concurring).

⁷⁹ Amended Class Action Complaint ¶ 59, *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006) (Nos. 06-4800-cv, 06-4876-cv), *aff'd in part, rev'd in part*, 621 F.3d 111, *cert. granted*, 132 S. Ct. 472, *reprinted in* Joint Appendix at 67–68, *Kiobel*, 132 S. Ct. 472 (No. 10-1491).

⁸⁰ *Id.* (internal quotation marks omitted).

⁸¹ *Id.* ¶ 55.

⁸² *Id.* ¶ 60.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* ¶ 61.

⁸⁶ *See id.* ¶¶ 61, 63; Karen McGregor, *Ogoni Nine Hanged As Indifferent West Failed To Respond*, INDEPENDENT (Sept. 19, 2000), <http://www.independent.co.uk/news/world/africa/ogoni-nine-hanged-as-indifferent-west-failed-to-respond-699325.html>.

⁸⁷ Amended Class Action Complaint, *supra* note 79, ¶¶ 69–70.

⁸⁸ *See id.* ¶ 65.

judicial” sentences on those deemed to be “threats to public order.”⁸⁹ Plaintiffs allege that this tribunal convicted Dr. Kiobel of murder and he, along with the rest of the Ogoni Nine, was executed after a sham trial.⁹⁰

Twelve residents of Ogoni sued RDPC, *inter alia*, for their complicity in violations of international law, alleging extrajudicial killings, torture, arbitrary arrest and detention, and crimes against humanity in September 2002.⁹¹ Although concluding that aiding and abetting liability is permissible under *Sosa*, the district court held that extrajudicial killings, property destruction, forced exile, and violations of the rights to life, liberty, security, and association were not sufficiently well defined to constitute a violation of the law of nations, and thus, vest courts with subject matter jurisdiction under the ATS.⁹² Yet, the district court also denied the defendants’ motion to dismiss for aiding and abetting arbitrary arrest and detention; crimes against humanity; and torture or cruel, inhuman, and degrading treatment.⁹³ Recognizing that this case raises several controlling questions of law that provide “substantial ground for difference of opinion,”⁹⁴ Judge Wood certified the questions presented for interlocutory appeal to the Second Circuit.⁹⁵

B. Majority Opinion

Kiobel’s majority first recognized that, because appellate review of cases under the ATS has been uncommon,⁹⁶ many issues surrounding the jurisdiction granted by the statute have remained unresolved.⁹⁷ The issue presented here is one of those lacunae in ATS litigation, namely, “[d]oes the jurisdiction granted by the ATS extend to civil actions brought against corporations under the law

⁸⁹ *Id.* ¶ 3.

⁹⁰ *See id.* ¶¶ 3, 74. Petitioners allege multiple due process failures in the CDST trial, including detention without charges, interference with meetings between counsel and the accused, threats of physical violence against defense counsel, and provision of false testimony against the accused through bribes. *See id.* ¶¶ 3, 67–69.

⁹¹ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).

⁹² *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 463–64, 468 (S.D.N.Y. 2006), *aff’d in part, rev’d in part*, 621 F.3d 111, *cert. granted*, 132 S. Ct. 472.

⁹³ *Id.* at 468.

⁹⁴ *Id.* (internal quotation marks omitted).

⁹⁵ *Id.*; *see also* 28 U.S.C. § 1292(b) (2006).

⁹⁶ *Kiobel*, 621 F.3d at 116–17 (“Thus, our Court has published only nine significant decisions on the ATS since 1980 (seven of the nine coming in the last decade), and the Supreme Court in its entire history has decided only one ATS case.”); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

⁹⁷ *Kiobel*, 621 F.3d at 117.

of nations?”⁹⁸ The majority answered this question in two parts. First, the court considered the body of law that governs the scope of ATS litigation: international law or domestic law.⁹⁹ Concluding that international law governs the analysis and scope, the court then looked to the sources of international law to “reveal” whether corporations can be subject to liability under the statute.¹⁰⁰

To prove that international law governs the scope of ATS litigation, the majority quickly looked to the treatment of the subjects of international law.¹⁰¹ Relying for the first of many times on the International Military Tribunal at Nuremberg (“Nuremberg Trials”)—which was definitive in stating that individual liability can attach for private individuals’ international law violations—to prove that these subjects are defined by international law itself, the court held that the subjects of international law were defined by international law.¹⁰² To further vindicate the necessity of the foregoing analysis, the court took guidance from footnote 20 of *Sosa*, where the Supreme Court stated that a question to be answered by the lower courts was whether international law extends its scope over non-state juridical entities such as corporations.¹⁰³ The court stated that to answer this question, it has long followed the practice of scope-determination with reference to international law, beginning with the rejuvenation of ATS in *Filartiga*.¹⁰⁴ To support this, the majority looked to *Khulumani*,¹⁰⁵ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,¹⁰⁶ *Kadic v. Karadžić*,¹⁰⁷ and Judge Edward’s concurrence in *Tel-Oren v. Libyan Arab Republic*.¹⁰⁸ The majority claimed that this is not an unusual analysis, that “[t]here is no principled basis for treating

⁹⁸ *Id.* at 117.

⁹⁹ *Id.* at 125–31.

¹⁰⁰ *Id.* at 131–45.

¹⁰¹ Subjects of international law are “those that, to varying extents, have legal status, personality, rights, and duties under international law and whose acts and relationships are the principal concerns of international law.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II, intro. note, at 70 (1987) (emphasis added).

¹⁰² *Kiobel*, 621 F.3d at 126–27.

¹⁰³ *Id.* at 127–31; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004).

¹⁰⁴ *Kiobel*, 621 F.3d at 128 (“In *Filartiga*, we had looked to international law to determine our jurisdiction and to delineate the type of defendant who could be sued.”).

¹⁰⁵ *Id.*; see also *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 269 (2d Cir. 2007) (Katzmann, J., concurring).

¹⁰⁶ *Kiobel*, 621 F.3d at 128; see also *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009).

¹⁰⁷ *Kiobel*, 621 F.3d at 128; see also *Kadic v. Karadžić*, 70 F.3d 232, 239–41 (2d Cir. 1995).

¹⁰⁸ *Kiobel*, 621 F.3d at 128; see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J., concurring).

the question of corporate liability differently,” and thus, this holding should be unsurprising.¹⁰⁹

The majority then moved to the second, and more controversial, holding that corporate liability is not sufficiently well defined to be a norm of international law. The court recognized the primacy of the sources of international law as identified in Article 38 of the ICJ Statute and reproduced part of Article 38.¹¹⁰ Attempting to delineate the norm of corporate liability in international law, the court separated the analysis into an investigation of international tribunals, international treaties, and works of publicists.¹¹¹ Curiously missing from this analysis was an investigation into “general principles of law recognized by civilized nations” as a clearly stated source of international law in the ICJ Statute.¹¹²

Investigating international tribunals, the court again heavily relied on the Nuremberg Trials and the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (“London Charter”)¹¹³ establishing them as the “single most important source of modern customary international law concerning liability for violations of fundamental human rights.”¹¹⁴ The London Charter granted jurisdiction over “persons . . . whether as individuals or as members of organizations.”¹¹⁵ Yet, it also allowed the tribunal to classify organizations as criminal.¹¹⁶ This notion seemingly detracts from the court’s eventual conclusion, but the majority avoids this problem

¹⁰⁹ *Kiobel*, 621 F.3d at 130.

¹¹⁰ *Id.* at 132; see also ICJ Statute, *supra* note 14, art. 38.

¹¹¹ *Kiobel*, 621 F.3d at 132–45. The Second Circuit primarily focused on their investigation of custom. As for treaties, the court did indeed find treaties that would hold corporations civilly liable for international law violations. *Kiobel*, 621 F.3d at 138. The court rejected them as insufficient evidence of custom either because they have not been ratified by the states upon which the greatest impact would be had or because they are specially tuned to specific subject matter. *Id.* at 138 & n.40; see, e.g., Convention Against Transnational Organized Crime art. 10(1), *done* Nov. 15, 2000, T.I.A.S. 13127; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 2, S. TREATY DOC. NO. 105-43 (Dec. 17, 1997). As for publicists, the majority and the ICJ Statute relegate them to a “subsidiary means for the determination of rules of law.” ICJ Statute, *supra* note 14, art. 38(1)(d); accord *Kiobel*, 621 F.3d at 142. Relying on two professors who testified in front of the court, the majority concluded, “customary international law does not recognize liability for corporations that violate its norms.” *Kiobel*, 621 F.3d at 143.

¹¹² ICJ Statute, *supra* note 14, art. 38(1)(c). The court does speak to this in footnote 43. *Kiobel*, 621 F.3d at 141 n.43. A further discussion of this terse dismissal of the authority of general principles appears later in this Comment. See *infra* notes 135–43 and accompanying text.

¹¹³ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544 [hereinafter London Charter].

¹¹⁴ *Kiobel*, 621 F.3d at 132–33.

¹¹⁵ London Charter, *supra* note 113, art. 6.

¹¹⁶ *Id.* art. 9.

because the authority to determine the criminality of organizations was “merely to facilitate the prosecution of individuals who were members of the organization.”¹¹⁷ To illustrate this point, the court recounted the treatment of the I.G. Farben chemical company.¹¹⁸

For their complicity and active participation in the atrocities occurring at Auschwitz and their support of the Nazi regime, twenty-four executives of Farben were charged with various crimes including “planning, preparation, initiation and waging of wars of aggression and invasions of other countries” and “slavery and mass murder.”¹¹⁹ The corporation was not charged or named in the indictment. The Nuremberg Court explained in now-famous language: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹²⁰

The Second Circuit moves from the Nuremberg Trials to other international tribunals since Nuremberg.¹²¹ They examine the jurisdictional statutes for the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), and the International Criminal Court (“ICC”).¹²² Both ICTY and ICTR expressly limited jurisdiction to “natural persons.”¹²³ Moreover, the court relies on negotiations during the creation of the Rome Statute of the International Criminal Court (“Rome Statute”)¹²⁴—to which the United States is not a party—that rejected proposals to impose corporate criminal liability.¹²⁵ Thus, from their investigation of the

¹¹⁷ *Kiobel*, 621 F.3d at 134 (emphasis omitted).

¹¹⁸ *Id.* at 134–36.

¹¹⁹ 7 TRIALS OF WAR CRIMINALS BEFORE THE NURENBERG MILITARY TRIBUNALS 14, 50 (1953); *see also Kiobel*, 621 F.3d at 135.

¹²⁰ 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947); *see also Kiobel*, 621 F.3d at 135.

¹²¹ *Kiobel*, 621 F.3d at 136–37.

¹²² *Id.*; *see also* Rome Statute of the International Criminal Court art. 25(1), done July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]; Statute of the International Tribunal for Rwanda, Annex art. 5, S.C. Res. 955, U.N. SCOR, 49th Year, U.N. Doc. S/INF/50, at 15 (Nov. 8, 1994) [hereinafter ICTR Statute]; U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Annex art. 6, U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute].

¹²³ ICTR Statute, *supra* note 122, art. 5 (“The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present statute.”); ICTY Statute, *supra* note 122, art. 6 (“The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.”).

¹²⁴ Rome Statute, *supra* note 122.

¹²⁵ *Kiobel*, 621 F.3d at 137; *see also* Rome Statute, *supra* note 122, art. 25(1) (“The [International Criminal] Court shall have jurisdiction over natural persons pursuant to this Statute.”); Albin Eser, *Individual*

Nuremberg Trials and other modern international tribunals, the majority concluded that corporate liability has not yet been sufficiently well defined by these tribunals or by international law to have ripened into a norm of customary international law.¹²⁶ Thus, the court affirmed the district court's dismissal, dismissed the remaining claims, and held that "customary international law does not recognize liability for corporations that violate its norms."¹²⁷

Before moving on to the lengthy concurring opinion, two important points are notable. First, the majority spends part of its introductory statements and a whole section of reasoning discussing its points of disagreement with the concurrence. During the introduction, the majority mentions that it "do[es] not take lightly the passion with which Judge Leval disagrees with [its] holding" and then proceeds to cite to every page in the concurring opinion during which Judge Leval calls the majority reasoning "illogical," "strange," and "internally inconsistent."¹²⁸ Then, after their primary analysis of the case, the majority outlines four major points of disagreement with the concurrence, consuming approximately three pages of its twenty-four page opinion.¹²⁹

Briefly, the majority contends that Judge Leval inappropriately shifts the burden to the court to find a norm of custom that justifies their ruling.¹³⁰ Contrarily, the majority says that the burden to show a custom must be on those attempting to invoke it.¹³¹ Second, it disagrees that a significant distinction exists between the imposition of criminal and civil liability in international law.¹³² Third, the majority contends that Judge Leval distorts its holding by stating that corporations are never liable under international law for violations of the law of nations.¹³³ Finally, it disagrees that this case is

Criminal Responsibility, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 778–79 (Antonio Cassese et al. eds., 2002).

¹²⁶ *Kiobel*, 621 F.3d at 137.

¹²⁷ *Id.* at 143.

¹²⁸ *Id.* at 122.

¹²⁹ *Id.* at 145–48.

¹³⁰ *Id.* at 146.

¹³¹ *Id.*

¹³² *Id.* The court cites to Judge Katzmman's concurring opinion in *Khulumani*: "[I]nternational law does not maintain [a] kind of hermetic seal between criminal and civil law." *Id.* (alteration in original) (quoting *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 270 n.5 (2d Cir. 2007)) (internal quotation marks omitted).

¹³³ *Id.* at 147.

“merely a question of remedy to be determined independently by each state.”¹³⁴

The second notable point is the majority’s treatment of general principles of law as a source of international law.¹³⁵ In a footnote, the majority writes that general principles, as outlined in the ICJ Statute, are a subsidiary means of determining international law.¹³⁶ It supports this statement by citing to the Restatement (Third) of the Foreign Relations Law of the United States¹³⁷ and works of publicists.¹³⁸ Further, they cite Judge Friendly in *IIT v. Vencap, Ltd.*,¹³⁹ who wrote:

We cannot subscribe to plaintiffs’ view that the Eighth Commandment “Thou shalt not steal” is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been “a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*.”¹⁴⁰

This terse dismissal of general principles of law is especially curious considering that the majority reproduces the text of Article 38(1) of the ICJ Statute in full (including Subsection (c) which lists general principles as a source of international law),¹⁴¹ states that the Second Circuit has “long recognized” the ICJ sources as “authoritative . . . sources of international law,”¹⁴² and proceeds to structure their argument around custom, treaties, and works of publicists.¹⁴³

C. Concurring Opinion

Judge Leval wrote the concurring opinion. Because of the opinion’s length, this Comment proceeds by examining Judge Leval’s five major points: (1) the

¹³⁴ *Id.*

¹³⁵ See ICJ Statute, *supra* note 14, art. 38(1)(c).

¹³⁶ *Kiobel*, 621 F.3d at 141 n.43.

¹³⁷ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

¹³⁸ *Kiobel*, 621 F.3d at 141 n.43.

¹³⁹ *Id.*

¹⁴⁰ *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (quoting *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963)).

¹⁴¹ *Kiobel*, 621 F.3d at 132.

¹⁴² *Id.*

¹⁴³ See *id.* at 134–45.

creation of a rule versus the absence of a rule; (2) the question of remedy; (3) criminal versus civil liability in international law; (4) the potential for abuse told through hypothetical situations; and (5) the justification for dismissal.

First and most important is the difference in the characterization of the court's holding between the majority and the concurrence. The majority is explicit in saying that they looked to customary international law to "reveal" what it has to say about corporate liability and whether such a norm exists.¹⁴⁴ Conversely, the concurrence characterizes the majority holding as a new "rule" of international law.¹⁴⁵ Whereas the majority views its analysis as deciphering the custom of nations, the concurrence characterizes it as creating a new rule that exempts corporations from the strictures of international law.¹⁴⁶ This difference reveals a deeper conflict between the views of the majority and concurrence of how to apply customary international law.¹⁴⁷

The concurrence sees the absence of any norm imposing corporate liability as a grant of authority to the individual states to determine the remedy for violations of international norms, the second main point of the concurring opinion.¹⁴⁸ According to Judge Leval, civil liability for violations of international norms "is awarded in U.S. 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."¹⁴⁹

Continuing the concept that the issue of remedy is to be left to the states themselves, Judge Leval notes that no international tribunal exists with a

¹⁴⁴ *Id.* at 125 ("[W]e consider what the sources of international law reveal with respect to whether corporations can be subject to liability for violations of customary international law.").

¹⁴⁵ *Id.* at 149 (Leval, J., concurring). Throughout the opinion and in the point headings, Judge Leval refers to the "rule" of the majority.

¹⁴⁶ *Id.* at 151 ("The corporation, according to my colleagues, has not violated international law, and is indeed incapable of doing so because international law does not apply to the conduct of corporations.").

¹⁴⁷ The majority reasoned that the absence of any norm that supports corporate liability is the exact proof that no such norm exists and, thus, no subject matter jurisdiction can be maintained under the law of nations and the ATS. *Id.* at 147 (majority opinion) ("We hold that corporate liability is not a norm that we can recognize and apply in actions *under the ATS* because the customary international law of human rights does not impose *any* form of liability on corporations (civil, criminal, or otherwise).").

¹⁴⁸ *Id.* at 152 (Leval, J., concurring).

¹⁴⁹ *Id.* at 175. Moreover, if international law were to have a rule exempting corporations from liability (as the concurrence characterizes the majority holding), that rule would have to be found in customary international law and be sufficiently well defined. *See id.* at 164.

structure to carry the jurisdiction consistent with the majority's rule.¹⁵⁰ No international tribunal "has ever had jurisdiction to consider a private civil remedy of any kind—either against a natural person or a juridical entity."¹⁵¹ Moreover, if the remedy for violations of international law is not to be decided by the states, then it follows that international law does not recognize liability for natural persons either. The conclusion that no custom recognizes civil corporate liability merely follows from the idea that there is "no rule of international law making any private person civilly liable If the absence of widespread agreement in the world as to civil liability bars imposing liability on corporations, it bars imposing liability on natural persons as well."¹⁵²

The third major point of the concurring opinion is the distinction between criminal and civil liability in international law. Judge Leval points out that the majority mostly relied on the jurisdictional grants of international criminal tribunals to justify their conclusion that corporate liability is not a cognizable customary norm.¹⁵³ The majority is correct that the international tribunals to which they looked limited their jurisdiction to natural persons.¹⁵⁴ Yet, the concurrence sees this as a function of the differing purposes between civil and criminal liability and not as a function of the international community's denial of corporate civil liability for violations of international law.¹⁵⁵

This denial of criminal liability does not imply the denial of civil liability upon juridical entities.¹⁵⁶ Unlike the purposes of criminal liability, the purposes of civil liability can be effectuated by holding corporations financially responsible for their torts.¹⁵⁷ Civil liability's "principal objective" is to compensate victims and restore them to their previous condition before the

¹⁵⁰ *Id.* at 160 n.11; *see also* H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW § 126, at 266 (Archon Books 1970) (1927) [hereinafter LAUTERPACHT, PRIVATE LAW] ("International jurisprudence is rough when there is no forum . . . before which to fight out its problems.").

¹⁵¹ *Kiobel*, 621 F.3d at 163 (Leval, J., concurring). This argument is reminiscent of the views of Judge Reinhardt in *Unocal* and Judge Hall in *Khulumani* that the controlling law for violations of the law of nations is the common law. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 284 (2d Cir. 2007) (Hall, J., concurring); *Doe I v. Unocal Corp.*, 395 F.3d 932, 965 (9th Cir. 2002) (Reinhardt, J., concurring).

¹⁵² *Kiobel*, 621 F.3d at 176 (Leval, J., concurring).

¹⁵³ *Id.* at 166 ("The only fact of international law to which the majority can point as evidence of its view that international law does not apply to juridical persons is the fact that international *criminal* tribunals have not exercised authority to impose *criminal* punishments on them.").

¹⁵⁴ *See* Rome Statute, *supra* note 122, art. 25(1); ICTR Statute, *supra* note 122, art. 5; ICTY Statute, *supra* note 122, art. 6.

¹⁵⁵ *Kiobel*, 621 F.3d at 152 (Leval, J., concurring).

¹⁵⁶ *Id.* at 168 ("The refusal of international organizations to impose criminal liability of corporations . . . in no way implies that international law deems corporations exempt from international law.").

¹⁵⁷ *Id.* at 169.

tortious damage.¹⁵⁸ Additionally, this can be satisfactorily done only if the liability is on the corporation, instead of the executives, because the corporate entity earned the profit resulting from the illicit activities.¹⁵⁹

Fourth, Judge Leval, from the outset, looks to the slippery slope to exhibit the potential for abuse the majority holding could yield:

So long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy—all without civil liability to victims.¹⁶⁰

He continues this analysis by providing hypothetical situations in which corporations could perpetrate gross and heinous violations of human rights in the area of slave trading (with an emphasis on sex-slavery), piracy, genocide, and the aiding and abetting of these violations.¹⁶¹

Fifth and final, despite the lengthy reasoning of the concurring opinion mostly discussing its divergence from the views of the majority, Judge Leval agrees that the claims in this case should be dismissed. In doing so, he combined the purposeful standard for aiding and abetting liability as stated in *Talisman*¹⁶²—and also by Judge Katzmann in *Khulumani*¹⁶³—with the modern pleading standard handed down in *Ashcroft v. Iqbal*.¹⁶⁴ He then reviewed the sufficiency of the pleadings for both SPDC and RDPC's direct violations of human rights and its complicity in those violations under the aiding and abetting standard.¹⁶⁵

It is important to note the complete lack of mention in the concurring opinion of “general principles of law recognized by civilized nations.”¹⁶⁶

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* Judge Leval notes in the same paragraph, “[I]t is the worldwide practice to impose civil liability on corporations.” *Id.* Yet, nowhere in the concurring opinion are general principles as stated in the ICJ Statute discussed.

¹⁶⁰ *Id.* at 150.

¹⁶¹ *Id.* at 155–60. The majority dismisses these “hypothetical cases,” by merely reiterating their contention that although corporations cannot be held liable under the ATS, those individual perpetrators responsible for the corporate violation can. *Id.* at 147–48 (majority opinion).

¹⁶² *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009).

¹⁶³ *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring).

¹⁶⁴ *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *see also* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (originating the plausibility pleading standard under Rule 8 of the Federal Rules of Civil Procedure).

¹⁶⁵ *Kiobel*, 621 F.3d at 188–96 (Leval, J., concurring).

¹⁶⁶ ICJ Statute, *supra* note 14, art. 38(1)(c).

Whereas the majority simply dismisses them as a subsidiary source of international law and turns only to custom to resolve the issues in this case,¹⁶⁷ the concurrence ignores them altogether and relies on domestic law principles to rebut the majority holding that the ATS provides no subject matter jurisdiction over corporate defendants. This Comment proceeds by defining and discussing this recognized source of international law.

III. GENERAL PRINCIPLES OF INTERNATIONAL LAW

The present version of Article 38(1)(c) of the ICJ Statute recognizes “general principles of law recognized by civilized nations” as a source of international law along with custom, convention, and the works of scholars.¹⁶⁸ This clause has its origin in the Statute of the Permanent Court of International Justice (“PCIJ Statute”), Article 38(3).¹⁶⁹ It was first proposed by Baron Descamps, the Chairman of the Advisory Committee of Jurists.¹⁷⁰ Draft schemes from various countries phrased the intended source slightly differently: “general principles of law” (Denmark, Norway, and Sweden), “general principles of law and equity” (Germany and Brazil’s Clovis Bevilaqua), “general principles of justice and equity” (Switzerland), and “rules which, in the considered opinion of the Court, should be the rules of international law” (alternative draft for Norway, Denmark, and Sweden and the draft scheme of the Five Neutral Powers).¹⁷¹ The eventually adopted text was proposed by Elihu Root, a U.S. statesman, although it is more commonly attributed to his collaborator, Lord Phillimore.¹⁷²

Regardless of the exact phrasing, the inclusion of “general principles of law” was nothing new to the countries drafting the statute. The phrase was a common one and codified in many municipal law systems.¹⁷³ This rejection— inherent in the omission of international general principles from the statute—of

¹⁶⁷ *Kiobel*, 621 F.3d at 141 n.43.

¹⁶⁸ ICJ Statute, *supra* note 14, art. 38(1).

¹⁶⁹ Statute of the Permanent Court of International Justice art. 38(3), 1926 P.C.I.J. (ser. D) No. 1, at 7 [hereinafter PCIJ Statute]. The PCIJ Statute did not use the numbering system currently employed in the ICJ Statute, but instead the PCIJ Statute numbered subparagraphs with Arabic numerals, but did not number paragraphs. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 2 n.4 (Cambridge Univ. Press 2006) (1953).

¹⁷⁰ CHENG, *supra* note 169, at 7.

¹⁷¹ *Id.* at 7 & nn.24–27 (internal quotation marks omitted).

¹⁷² *Id.* at 14–15.

¹⁷³ *Id.* at 19. The nations of three of the ten members who drafted the PCIJ Statute contained the “general principles of law” in their municipal laws. *Id.*

traditional international law sources recognized that the international legal system is significantly less developed than most municipal legal systems; thus, there will be lacunae where custom and treaty have not developed.¹⁷⁴ The insertion of general principles in the PCIJ Statute “was intended to provide a solution in cases where treaties and custom provided no (clear) answers to the case at hand.”¹⁷⁵ By doing so, the ICJ could prevent a plea of *non liquet*—dismissal on the basis of no controlling law.¹⁷⁶ Moreover, general principles will continue to serve important functions in less developed areas of international law—such as human rights—to resolve issues “which neither conventional nor customary law is ready to meet.”¹⁷⁷

Yet, what exactly are “general principles of law recognized by civilized nations”?¹⁷⁸ Scholars have provided varying definitions such as “a core of legal ideas which are common to all civilized legal systems”;¹⁷⁹ “principles which are so fundamental to every well-ordered society that no reasonable form of co-existence is possible without their being generally recognized as valid”;¹⁸⁰ and “norms underlying national legal orders . . . the manifestation of the *universal legal conscience* certified by the law of civilized States.”¹⁸¹ The consensus that emerges from these definitions is a recognition of “the existence of a common core of objectively identifiable legal principles.”¹⁸² Some typical general principles that have been recognized in international tribunals are those such as estoppel,¹⁸³ unjust enrichment,¹⁸⁴ necessity,¹⁸⁵ and proximate cause.¹⁸⁶

¹⁷⁴ See BEDERMAN, *supra* note 15, at 14.

¹⁷⁵ Erika de Wet, *Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice*, 47 NETH. INT'L L. REV. 181, 185–86 (2000).

¹⁷⁶ H.C. Gutteridge, *The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice*, 38 TRANSACTIONS GROTIUS SOC'Y 125, 125 (1952).

¹⁷⁷ M. Cherif Bassiouni, *A Functional Approach to “General Principles of International Law,”* 11 MICH. J. INT'L L. 768, 769 (1990).

¹⁷⁸ ICJ Statute, *supra* note 14, art. 38(1)(c).

¹⁷⁹ Rudolf B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734, 739 (1957).

¹⁸⁰ I J.H. W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 59 (1968).

¹⁸¹ Johan G. Lammers, *General Principles of Law Recognized by Civilized Nations*, in ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER 53, 57 (Frits Kalshoven et al. eds., 1980) (quoting and translating A. FAVRE, PRINCIPES DU DROIT DES GENS [PRINCIPLES OF INTERNATIONAL LAW] 275 (1974)) (internal quotation mark omitted).

¹⁸² Bassiouni, *supra* note 177, at 771.

¹⁸³ *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

¹⁸⁴ *Lena Goldfields, Ltd., Arbitration* (Sept. 3, 1930), as reprinted in Arthur Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government*, 36 CORNELL L.Q. 31, 42–53.

¹⁸⁵ *S.S. Wimbledon* (U.K. v. Ger.), 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17).

¹⁸⁶ Administrative Decision No. II (U.S. v. Ger.), 7 R.I.A.A. 23, 29 (U.S.–Ger. Mixed Cl. Comm'n 1939).

These principles can be derived from both national and international sources.¹⁸⁷

Before proceeding to examine examples and applications of general principles as seen in international tribunals, there is another area of ambiguity that should be addressed, namely, the difference between custom and general principles. Neither is a superior source to the other according to both the plain text of the ICJ Statute and the drafting history.¹⁸⁸ The line of demarcation between the two is unclear because both include “all that is unwritten in international law.”¹⁸⁹

A rule of customary international law is shown by proving that (1) the rule has been followed as a “general practice” and (2) *opinio juris*.¹⁹⁰ The first is exhibited by actual practices of states *inter se* and is an objective inquiry, while the second, *opinio juris*, is a subjective element and looks to why international actors act according to the proposed custom.¹⁹¹ This second element is satisfied by showing that states act according to the custom out of a “sense of legal obligation or necessity.”¹⁹²

In contrast, showing a general principle requires “recognition,” but has no requirement of practice.¹⁹³ This requirement of recognition makes the search for and eventual use of a general principle more objective.¹⁹⁴ Moreover, general principles express a general truth that should guide action and be a

¹⁸⁷ Regardless of their source, the underlying theoretical basis of the use of general principles raises issues of natural law versus positivism. Although a thorough investigation of the theoretical and philosophical underpinnings of the use of general principles is outside the scope of this discussion, Professor Bassiouni provides a short summary:

[T]here is reason to believe that the framers of the PCIJ’s article 38 (I)(3) and the ICJ’s article 38 (I)(c) may have accepted the notion that natural law may be separate from the naturalists’ understanding of that term, and that it may arise from concrete applications and common practices existing in and among “civilized nations.” Such a composite conception may be viewed as a compromise between positivism and naturalism, if that is at all possible.

Bassiouni, *supra* note 177, at 774 (footnote omitted).

¹⁸⁸ CHENG, *supra* note 169, at 20 (“[D]uring the discussion in the Committees of the First Assembly, the words ‘in the order following’ (*en ordre successif*) in the introductory phrase of the draft article were deleted.”).

¹⁸⁹ *Id.* at 23.

¹⁹⁰ BEDERMAN, *supra* note 15, at 16.

¹⁹¹ *Id.* at 16–17.

¹⁹² *Id.* at 17.

¹⁹³ CHENG, *supra* note 169, at 24.

¹⁹⁴ De Wet, *supra* note 175, at 186. This objectivity emerges from the omission of an *opinio juris*-type element that looks to the subjective reasons why states adhere to a custom.

“theoretical basis” for solutions, while the rules of custom are practical and binding.¹⁹⁵ Additionally, as previously mentioned, custom is limited in its sources to international law and the practices of states among each other, while general principles can be derived from domestic and international law. The subtlety of these differences is a function of international tribunals’ failure to clearly demarcate the two sources and reluctance to decide cases on the basis of general principles.¹⁹⁶

An advocate attempting to use or rely upon general principles has a difficult task. Both the PCIJ and ICJ have failed to explain the method by which a general principle will be recognized by the court.¹⁹⁷ Adding to the lack of a methodology, the use of general principles suffers from a “paradox” relating to the generality of the principle.¹⁹⁸ Because the principle will be evidenced by widespread recognition in the international community’s various legal systems, the more abstract the principle is, the easier its mass recognition is to prove.¹⁹⁹ Yet, the more abstract the principle, the less useful it is in solving legal disputes in international tribunals.²⁰⁰ Nevertheless, Professor Lauterpacht has recognized that “international tribunals apply [municipal] law whenever they deem it advisable; that States which are parties before an international tribunal have, as a rule, recourse to analogies of private law,” at least in the context of international arbitral tribunals.²⁰¹

Despite these barriers, some guidelines have been espoused by the courts and can be found in the writings of academics. In *AM & S Europe Ltd. v. Commission of the European Communities* (“*AM & S Case*”),²⁰² the European Court of Justice looked to general principles of the European Community to

¹⁹⁵ CHENG, *supra* note 169, at 24 (quoting and translating *Gentini Case (It. v. Venez.)*, 10 R.I.A.A. 551, 556 (It.–Venez. Mixed Cl. Comm’n 1903)).

¹⁹⁶ Bassiouni, *supra* note 177, at 791; *see also* *Right of Passage over Indian Territory (Port. v. India)*, 1960 I.C.J. 6, 43 (Apr. 12); HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* § 51, at 166 (1958) [hereinafter LAUTERPACHT, *DEVELOPMENT*] (“Experience has shown that the main function of ‘general principles of law’ has been that of a safety-valve to be kept in reserve rather than a source of law of frequent application.”). In this case, the ICJ specifically refused to determine whether the issue could be resolved by general principles, but instead relied on a practice and local custom. *Right of Passage over Indian Territory*, 1960 I.C.J. at 43.

¹⁹⁷ Bassiouni, *supra* note 177, at 796.

¹⁹⁸ BEDERMAN, *supra* note 15, at 14–15.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ LAUTERPACHT, *PRIVATE LAW*, *supra* note 150, § 126, at 267.

²⁰² *Case 155/79, AM & S Eur. Ltd. v. Comm’n of the European Cmtys.*, 1982 E.C.R. 1575.

decipher a rule on legal confidentiality.²⁰³ The court surveyed the Member States' municipal law and presented each state's view on the confidentiality of documents between counsel and client.²⁰⁴ The court sought to derive a general principle of European Community law to cover these communications.²⁰⁵ Although finding that this privilege was not identically stated in all the Member States, it was sufficient that some states recognize the confidentiality "inasmuch as it contributes toward the maintenance of the rule of law" while others recognize that "the rights of the defence must be respected."²⁰⁶ This principle arises from "the purpose[] and in the interest[] of the client's rights of defence."²⁰⁷

In the *Delagoa Railway Arbitration*, the tribunal based an award from Portugal to the United States and Great Britain resulting from the Portuguese government's seizure of a railroad on "the general principles of the common law of modern nations."²⁰⁸ Doing so, the tribunal upheld the general principles of compensation for *damnum emergens* ("material damage") and *lucrum cessans* ("loss of profit").²⁰⁹ In the *Cayuga Indians Claims Case*,²¹⁰ the international arbitral tribunal looked to "considerations of justice, equity, and right dealing" and adopted a corporate veil-piercing analogy to hold that the Cayuga Indians were entitled to annuity shares under the Treaty of Ghent of 1814, *inter alia*.²¹¹

Yet, when investigating whether the international community of nations recognizes a general principle, instead of merely European Community parties as in the *AM & S Case*, the ease of identifying a unique principle is more difficult. Three primary issues arise. First is the question of how many nations must accept or evidence the general principle for it to be recognized. The ICJ has rejected the notion of universal acceptance—the idea that it must be evidenced by all nations.²¹² Thus, the principle should be evidenced by a

²⁰³ *Id.* at 1610–13.

²⁰⁴ *Id.* at 1605–06.

²⁰⁵ *See id.*

²⁰⁶ *Id.* at 1610–11.

²⁰⁷ *Id.* at 1611.

²⁰⁸ LAUTERPACHT, PRIVATE LAW, *supra* note 150, § 128, at 271 (internal quotation mark omitted).

²⁰⁹ *Id.* § 128, at 270–73.

²¹⁰ Great Britain *ex rel.* Cayuga Indians v. United States, 6 R.I.A.A. 173 (Am.–British Cl. Arb. Trib. 1926).

²¹¹ *Id.* at 180, 189.

²¹² BEDERMAN, *supra* note 15, at 18.

“representative majority” of nations, which includes the “principal” legal systems of the world.²¹³

Second is the question of how uniform the recognition of a general principle must be for its utilization. In the *AM & S Case*, the Advocate General argued that the principle does not have to be identically expressed or followed in the European Community countries to be a recognized principle.²¹⁴ Still, an advocate must remember the paradox discussed earlier: the more countries, the greater recognition, but also the less specific and useful the principle becomes. A good example is the *Gentini Case*²¹⁵ in which the Venezuelan Mixed Claims Commission unquestionably recognized a principle of prescription—statutes of limitations and repose—although it did not exactly set a numerical standard.²¹⁶

The third question arising in an investigation to prove a general principle arises from which countries must recognize the principle. The ICJ Statute says that the general principles are those recognized by “civilized” nations.²¹⁷ The idea of “civilized” nations has been criticized and generally rejected as a legitimate limitation on the use of general principles.²¹⁸ Instead, the reference to civilized nations refers to the major legal systems of the world, including the common law tradition, civil law tradition, significant religious legal systems, and other ideological legal systems (including socialist law).²¹⁹

It is this general outline of the world’s significant legal systems that guides the following discussion of corporate tort liability before returning to *Kiobel* and applying the general principle to those facts. Generally, the discussion looks to the laws of nations to prove that corporate tort liability is an established and recognized principle in the major legal systems of the world. Underlying this concept is the general principle of responsibility. In *Factory at Chorzów*, the PCIJ stated that “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an

²¹³ De Wet, *supra* note 175, at 187.

²¹⁴ Case 155/79, *AM & S Eur. Ltd. v. Comm’n of the European Cmtys.*, 1982 E.C.R. 1575, 1650 (opinion of Advocate General Sir Gordon Slynn).

²¹⁵ *Gentini Case (It. v. Venez.)*, 10 R.I.A.A. 551 (It.–Venez. Mixed Cl. Comm’n 1903).

²¹⁶ *Id.* at 556.

²¹⁷ ICJ Statute, *supra* note 14, art. 38(1)(c).

²¹⁸ Gutteridge, *supra* note 176, at 130–31.

²¹⁹ BEDERMAN, *supra* note 15, at 14. Because of the controversy surrounding whether socialist law actually constitutes a separate and independent legal system in contemporary legal practice, its norms concerning corporate liability are not examined. For a thorough discussion of this controversy, see John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMP. L. 781 (1989).

obligation to make reparation.”²²⁰ This principle was also evidenced in a Central American Court of Justice decision that provided “the complete analogy between public and private law” when turning to a principle of international responsibility on the basis of the private law conception of fault.²²¹ Thus, while looking to the text of municipal law systems to discover a general principle of corporate tort liability, underlying most of the rationales will be the general principle of responsibility.

IV. IMPOSITION OF CORPORATE TORT LIABILITY

A. *Civil Versus Criminal*

Before examining the world’s legal systems for principles of corporate civil tort liability, an initial decision between civil and criminal liability must be justified. This is not a trivial distinction. The majority’s reliance on international—and primarily customary—criminal law in *Kiobel* was a major dividing point between the majority and the stinging concurrence.²²²

The doctrine of corporate criminal liability was an accepted idea before the French Revolution when its acceptance declined with the rise of the ideal of individualism.²²³ The growing industrialization of the world’s economies began to see courts struggling against the conceptual barriers against corporate criminal liability. These arguments were similar in both the United States and the United Kingdom and had three general points of contention. First, because a corporation is a legal fiction, it is limited to actions for which it is legally empowered—also known as the *ultra vires* rule.²²⁴ Second, corporations were not contemplated to be able to have the requisite mens rea for perpetration of criminal acts.²²⁵ Third, sanctioning difficulties arose: corporations cannot be

²²⁰ *Factory at Chorzów (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13); see also *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 23 (finding that Albania was “responsible” for injury and had “a duty . . . to pay compensation”). For an excellent discussion of the general principle of responsibility, see CHENG, *supra* note 169, 163–70.

²²¹ LAUTERPACHT, *PRIVATE LAW*, *supra* note 150, § 135, at 287 (quoting Editorial, 3 AM. J. INT’L L. 423, 436 (1909)).

²²² See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120–23 (2d Cir. 2010), cert. granted, 132 S. Ct. 472 (2011).

²²³ Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 INT’L & COMP. L.Q. 493, 494 (1994).

²²⁴ *Id.* at 495.

²²⁵ *Id.*

imprisoned or—as was the typical punishment for felonies in English courts—executed or deported.²²⁶

Today, the *ultra vires* rule has eroded in the United States and the United Kingdom.²²⁷ Three cases in the United Kingdom and a landmark U.S. Supreme Court case have also overcome the hesitation of courts to impute mens rea to the corporation through doctrines of vicarious liability.²²⁸ Canada overcame this argument with strict and absolute liability regimes.²²⁹ The sanctioning difficulties were resolved by the imposition of fines and other sanctions such as loss of license, probation, or debarment—the loss of government contracts.²³⁰ The French Penal Code allows for corporations to be fined up to five times the maximum for individuals, while the Dutch Penal Code provides that any criminal sanction applicable to an individual can be applied to a corporation, except for those which cannot be (e.g., imprisonment).²³¹

The currently problematic issue arising from international prosecution of legal entities such as corporations is that no international tribunal has the jurisdiction to adjudicate legal entities; their jurisdiction only extends to natural persons.²³² Although there is no “theoretical obstacle” to holding corporations liable for violations of international law,²³³ negotiations to include legal entities as subjects of adjudication for the International Criminal Court failed in the formation of the Rome Statute.²³⁴ Thus, this form of liability is generally available only in national legal systems.

Comparatively, the use of civil remedies provides two primary advantages over the criminal system. First, the claims can be initiated by the victims against which the crimes were perpetrated or their survivors.²³⁵ The advantage

²²⁶ *Id.*

²²⁷ L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 MICH. L. REV. 1508, 1511 (1982).

²²⁸ *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909); *Dir. of Pub. Prosecutions v. Kent & Sussex Contractors, Ltd.*, [1944] K.B. 146 (U.K.); *Moore v. I. Bresler, Ltd.*, [1944] 2 All E.R. 515 (U.K.); *R v. I.C.R. Haulage, Ltd.*, [1944] K.B. 551 (Crim. App.) (U.K.).

²²⁹ Stessens, *supra* note 223, at 497.

²³⁰ V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1497 (1996).

²³¹ Stessens, *supra* note 223, at 516; *see also* CODE PÉNAL [C. PÉN.] art. 131-41 (Fr.); WETBOEK VAN STRAFRECHT [SR] [Criminal Code] art. 51 (Neth.).

²³² INT’L PEACE ACAD. & FAFO, BUSINESS AND INTERNATIONAL CRIMES: ASSESSING THE LIABILITY OF BUSINESS ENTITIES FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW 11 (2004).

²³³ *Id.*

²³⁴ INT’L COMM’N OF JURISTS, CRIMINAL LAW AND INTERNATIONAL CRIMES 56 (2008).

²³⁵ *See* CIVIL REMEDIES, *supra* note 22, at 4.

here bypasses the need to involve possibly reluctant municipal authorities to initiate the suit.²³⁶ Second, following from this and the general principle of responsibility,²³⁷ the victims of human rights abuses can be paid damages directly.²³⁸ Moreover, and particularly relevant here, civil tort liability to compensate victims for damages is a longstanding principle in most nations, while corporate criminal liability is still developing. Because of this long tradition of domestic corporate liability and its worldwide acceptance, it was erroneous for the Second Circuit to use vacuums in international criminal law to justify their rejection of the civil litigation mechanism and the principle revealed by an investigation into the general principles of law seen around the world.

B. Common Law Jurisdictions

The common law jurisdictions handle issues of civil liability through the law of torts.²³⁹ Tort law allows compensation to subjects of injury for protected “interests” such as life, liberty, and property.²⁴⁰ According to William L. Prosser, tort law serves five primary functions:

(1) to provide a peaceful means for adjusting the rights of parties who might otherwise “take the law into their own hands”; (2) to deter wrongful conduct; (3) to encourage socially responsible behavior; (4) to restore injured parties to their original condition . . . by compensating them for their injury; and (5) to vindicate individual rights of redress.²⁴¹

Without even looking to the domestic law of tort in the common law countries, holding corporations accountable for their torts furthers all five of these goals, specifically in the context of the *Kiobel* facts, by deterring vigilantism against the corporate entity while simultaneously deterring the use of illegitimate means to quell protesting parties and instead promoting

²³⁶ See *id.*

²³⁷ Eric Mongelard, *Corporate Civil Liability for Violations of International Humanitarian Law*, 88 INT’L REV. RED CROSS 665, 667 (2006).

²³⁸ CIVIL REMEDIES, *supra* note 22, at 5 (“[T]he law of civil remedies may often provide victims with their only legal avenue to remedy.”). The Rome Statute of the ICC does allow for victims to present views and seek reparations and also allows for fines to be paid into a Trust Fund for victims. See Rome Statute, *supra* note 122, art. 79. Yet, as previously mentioned, this court was not given jurisdiction over legal entities.

²³⁹ *Torts*, COLUM. L. SCH., http://www.law.columbia.edu/llm_jsd/grad_studies/courses/torts (last visited May 4, 2012).

²⁴⁰ *Id.*

²⁴¹ VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS 1–2 (12th ed. 2010).

responsible means to solutions to restore those suffering injury to the status quo and vindicating their rights of redress.

The corporation can incur tort liability in two ways: directly and vicariously.²⁴² Vicarious corporate liability is a form of strict liability regime wherein the principal is absolutely liable for the torts of an agent as if it were the tortious actor itself.²⁴³ Yet, this investigation merely seeks to decipher a general principle that corporations are held civilly liable for their torts. *Kiobel*'s holding is that international law has not sufficiently defined corporate liability to be a cognizable customary norm such that U.S. courts would have subject matter jurisdiction under the ATS.²⁴⁴ Thus, regardless of the doctrinal mechanism through which liability is imposed on the corporate entity, the mere fact that liability is imposed is sufficient for this investigation.

In the United Kingdom, the first real mention of vicarious liability in the sense of an employer's liability for harm caused by the employee while acting in the scope of his employment is *Hern v. Nichols*²⁴⁵ in 1709.²⁴⁶ In this case, an agent fraudulently represented the quality of silk he was selling.²⁴⁷ The purchaser brought an action for deceit and the court held that the employer should be liable civilly because he put "a trust and confidence" in the deceiving employee.²⁴⁸ Although deceit can be considered an intentional tort, vicarious liability traditionally did not cover intentional torts under interpretations of the United Kingdom's controlling Salmond test.²⁴⁹ This recently changed in the United Kingdom in *Lister v. Hesley Hall Limited*,²⁵⁰ which held an employer vicariously liable for torts arising out of the sexual

²⁴² PETER GILLIES, BUSINESS LAW § 40.6.2, at 949 (10th ed. 2001).

²⁴³ Reiner H. Kraakman, *Vicarious and Corporate Civil Liability*, in CIVIL LAW AND ECONOMICS 669, 674 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

²⁴⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).

²⁴⁵ *Hern v. Nichols*, (1709) 1 Salk. 289 (K.B.) (U.K.).

²⁴⁶ T. BATY, VICARIOUS LIABILITY: A SHORT HISTORY OF THE LIABILITY OF EMPLOYERS, PRINCIPALS, PARTNERS, ASSOCIATIONS AND TRADE-UNION MEMBERS WITH A CHAPTER ON THE LAWS OF SCOTLAND AND FOREIGN STATES 9 (1916).

²⁴⁷ *Hern*, 1 Salk. at 289.

²⁴⁸ *Id.*

²⁴⁹ *Lister v. Hesley Hall Ltd.*, (2001) 1 A.C. 215, 223–24 (H.L.) (U.K.) (opinion of Steyn, L.). The Salmond test refers to the position taken by John William Salmond, a famous English legal scholar. Salmond posited that only acts, whether authorized by the master or not, "so connected with acts which [the master] has authorised" could be the basis of vicarious liability. R. F. V. HEUSTON, SALMOND ON THE LAW OF TORTS § 32, at 105 (11th ed. 1953). Because an intentional injury against another is almost never in the vein of those authorized acts, an employer cannot be vicariously liable for the intentional torts of their employees.

²⁵⁰ *Lister*, 1 A.C. 215.

assault of emotionally and behaviorally problematic boys by the warden of their boarding annex.²⁵¹

In the *Lister* opinion, Lord Steyn commented favorably on two recent cases by the Canadian Supreme Court in this area of vicarious liability for intentional torts.²⁵² In one of these cases, the Canadian Supreme Court explicitly referenced the use of the Salmond test, as evidence of vicarious liability's similar growth and application in Canada, borrowing from U.K. common law.²⁵³ In this case, the court held a non-profit organization liable for torts arising from the sexual assault of children by a caretaker at a residential child-care facility.²⁵⁴ Moreover, both Canada and the United Kingdom have stated that to the extent that violations of international human rights laws give rise to injuries cognizable as torts (such as assault, battery, false imprisonment), civil remedies would be available.²⁵⁵ It seems to follow that if courts are comfortable holding corporations and non-profits liable for sexual abuse injuries inflicted by those under their control, then relief should be available for providing funding for atrociously violent human rights violations.

The idea of vicarious liability for intentional torts is also seen in U.S. jurisprudence. Respondeat superior is not limited to negligence, but also extends to "willful and malicious torts of an employee."²⁵⁶ Moreover, the United States stands at the forefront of civil protection for the rights of plaintiffs injured by breaches of international law because of the ATS itself. Before the holding in *Kiobel*, it was presumed that corporations could be held liable for these torts under the aiding and abetting theory, making the United States a leader in corporate tort liability.²⁵⁷

²⁵¹ *Id.* at 230 (opinion of Steyn, L.). It is interesting to note that the court here essentially overruled an earlier case. Lord Steyn wrote that the earlier case was "carefully considered and reasoned," but that the court's "allegiance must be to legal principle." *Id.* at 223.

²⁵² *Id.* at 230.

²⁵³ See *Bazley v. Curry*, [1999] 2 S.C.R. 534, 543 (Can.).

²⁵⁴ *Id.* at 567–68.

²⁵⁵ FAFO, A COMPARATIVE SURVEY OF PRIVATE SECTOR LIABILITY FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW IN NATIONAL JURISDICTIONS: CANADA 4–5 (2006), <http://www.fafono.liabilities/Canada.pdf>; STEPHEN POWLES ET AL., FAFO, A COMPARATIVE SURVEY OF PRIVATE SECTOR LIABILITY FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW IN NATIONAL JURISDICTIONS: UNITED KINGDOM 22 (2006), <http://www.fafono.liabilities/UK.pdf>.

²⁵⁶ *Bussard v. Minimed, Inc.*, 129 Cal. Rptr. 2d 675, 679–80 (Cal. Ct. App. 2003) (quoting *Farmers Ins. Grp. v. Cnty. of Santa Clara*, 906 P.2d 440, 448 (Cal. 1995)).

²⁵⁷ See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (per curiam).

Finally, in Australia, employers are vicariously liable for intentional torts committed in the course of employment.²⁵⁸ Again, citations to and use of the Salmond test appear in the High Court of Australia's opinion in *New South Wales v. Lepore*.²⁵⁹ In this case, Judge Kirby wrote that the fact that the torts were intentional was not a bar to vicarious liability and cited with approval the Canadian and English cases discussed above.²⁶⁰

Thus, as can be seen from the above analysis of major common law systems, the concept of liability for the corporate employer is not foreign in the less egregious realm of negligence or in the field of intentional torts. Therefore, the common law clearly recognizes a principle of law that holds corporations liable for tortious conduct committed in furtherance of their interests.

C. Civil Law Jurisdictions

The civil law tradition traces its existence from ancient Rome and is the most prominent legal system in the world.²⁶¹ Although controlled by a large body of statutory law, a de facto system of precedent deriving from interpretations of the statutes has begun to develop and has become especially important in the French law of delicts whose treatment in the *Code Civil* is quite general.²⁶² As well as the developing reliance on judicial rulings between the civil and common law systems, similarities in vicarious liability exist. The solutions given by the civil law jurisdictions and the common law jurisdictions are similar.²⁶³

Looking at many civil codes, their general treatment of corporations and liability for torts follow similar patterns: early provisions give the corporation some sense of legal personality such that it is given rights and incurs obligations, and later provisions provide for principles of reparation for tortious harm committed by those with legal personality.²⁶⁴ Although this pattern is not uniform, it is the general treatment pertinent to this discussion.

²⁵⁸ See *New South Wales v. Lepore* (2003) 212 CLR 511, 547 (H.C.) (Austl.) (opinion of Gleeson, C.J.).

²⁵⁹ *Id.* at 511.

²⁶⁰ *Id.* at 603–04, 623.

²⁶¹ JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM 3 (1995), available at [http://www.fjc.gov/public/pdf.nsf/lookup/civillaw.pdf/\\$file/civillaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/civillaw.pdf/$file/civillaw.pdf).

²⁶² *Id.* at 31.

²⁶³ Kwame Opoku, *Delictual Liability in German Law*, 21 INT'L & COMP. L.Q. 230, 230 (1972).

²⁶⁴ See, e.g., BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGL.] 195, as amended, §§ 21–22, 823, 831 (Ger.).

The French civil code, which Napoleon considered his greatest achievement and has influenced countless other civil codes worldwide,²⁶⁵ has a quite broad treatment of torts. Article 1382 states that any act that causes damage to the other creates an obligation to compensate the victim by the person at fault.²⁶⁶ Article 1384 codifies vicarious liability by stating that a person is also liable for damages caused by those for whom he is responsible.²⁶⁷ The French civil system is highly influential and has been adopted, either in part or in whole, in many countries including Belgium, the Netherlands, and Egypt.²⁶⁸

The German civil code has also been highly influential amongst the world's civil law systems.²⁶⁹ Sections 21 and 22 provide for the legal personality of associations.²⁷⁰ Section 823 imposes liability for intentional or negligent injury of life, body, health, freedom, property, or another right.²⁷¹ The liability for vicarious agents is outlined in Section 831 for those "who use another person to perform a task" when that person unlawfully inflicts damage while "carrying out the task."²⁷² The principal can be exculpated from this liability if reasonable care was taken in selecting the agent causing the tortious injury.²⁷³

Japan's civil code is more straightforward in its treatment of the liability for legal persons. Article 44 provides that a juridical person will be liable for damage to others caused either by its directors or other agents while performing their duties for the corporation.²⁷⁴

The civil code in Russia is written with extraordinary clarity. Like the German code, Articles 48 and 49 provide for the concept and legal capacity of the legal entity, which the Russian code defines as an organization that has its own "set-apart property and . . . is answerable by its obligations with this

²⁶⁵ APPLE & DEYLING, *supra* note 261, at 14 n.5.

²⁶⁶ CODE CIVIL [C. CIV.] art. 1382 (Fr.).

²⁶⁷ *Id.* art. 1384.

²⁶⁸ R. W. Lee, *The Civil Law and the Common Law—A World Survey*, 14 MICH. L. REV. 89, 92–94 (1915).

²⁶⁹ APPLE & DEYLING, *supra* note 261, at 1.

²⁷⁰ BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGL.] 195, as amended, §§ 21–22 (Ger.).

²⁷¹ *Id.* § 823, para. 1.

²⁷² *Id.* § 831, para. 1, English translation available at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

²⁷³ *Id.*

²⁷⁴ MINPŌ [MINPŌ] [CIV. C.] art. 44, para. 1 (Japan).

property.”²⁷⁵ Article 1068 provides that a “legal entity . . . shall redress the injury inflicted by the employee” as well as for the liability of “[e]conomic partnerships and procedure cooperatives” when injury is inflicted by its “participants (members).”²⁷⁶

In Norway, business entities domestically domiciled can have both civil and criminal actions brought against it for actions committed within and outside of the country.²⁷⁷ Compensation is available for “personal bodily injury, loss of future income and for the assumed future expenses that will be debited to the harmed person,” and if the victim is harmed in a “lastingly and considerable way,” they are entitled to compensation for that injury.²⁷⁸

The Spanish civil law was responsible for the spread of civil law in Central and South America.²⁷⁹ Article 35 of the *Código Civil*²⁸⁰ classifies corporations as juridical persons whose personality begins from the moment they are validly constituted and states that associations of private interest are granted individual personality independent from that of each of its members.²⁸¹ Article 1902 generally imposes liability for tortious injury while Article 1903 states that this recompense for damage is demandable from those of persons for whom others must respond, announcing a general vicarious liability principle.²⁸²

The Chilean civil code is significant because it greatly influenced many other Latin American legal systems and was either adopted entirely or used as a model in Colombia, Ecuador, Argentina, Paraguay, Venezuela, El Salvador, and Nicaragua.²⁸³ Article 54 states that people can be either legal or natural persons.²⁸⁴ Article 552 imputes the acts of agents as those of the corporation and Article 2314 states that people committing torts are liable to compensate

²⁷⁵ GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] arts. 48–49 (Russ.), English translation *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=247776.

²⁷⁶ *Id.* art. 1068, English translation *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=247777.

²⁷⁷ FAFO, A COMPARATIVE SURVEY OF PRIVATE SECTOR LIABILITY FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW IN NATIONAL JURISDICTIONS: NORWAY 20–21 (2006), <http://www.fafo.no/liabilities/Norway.pdf>.

²⁷⁸ *Id.* at 20.

²⁷⁹ APPLE & DEYLING, *supra* note 261, at 16.

²⁸⁰ CÓDIGO CIVIL [C.C.] (Spain).

²⁸¹ *Id.* art. 35.

²⁸² *Id.* arts. 1902–03.

²⁸³ APPLE & DEYLING, *supra* note 261, at 17.

²⁸⁴ CÓDIGO CIVIL [CÓD. Civ.] art. 54 (Chile).

the victim.²⁸⁵ Thus, reading Articles 552 and 2314 *in pari materia*, vicarious liability is established.

The Brazilian civil code has been called the “greatest monument to legal thought and codification in Latin America.”²⁸⁶ Article 45 gives corporations legal existence and personality when they register.²⁸⁷ Article 932 provides the liability for employers for torts committed by agents and employees.²⁸⁸

Although this is by no means a complete treatment of every national civil legal system, it stands as a proper representation of the treatment of corporations in the civil law tradition. To provide a final justification for the general principle, the European Group on Tort Law (“European Group”) sheds some light in its 2005 publication of the Principles of European Tort Law.²⁸⁹ Article 4:202 of these principles provides for what the European Group calls enterprise liability.²⁹⁰ This article imposes liability on those using “auxiliaries” (the European Group’s term for agents or employees) for the harm caused by those auxiliaries.²⁹¹ Moreover, Article 6:102 expressly provides for liability when damage is caused by an auxiliary acting “within the scope of their functions.”²⁹² Thus, as the European Group and the previous investigation of national civil codes reveals, the civil law tradition embraces the general principles of tort liability for corporations by giving them legal personality and holding them liable through the vehicle of vicarious liability.

D. Theological Legal Systems

1. Jewish Law

Jewish law, or *Halakha*, is sparse on its treatment of legal entities and corporations.²⁹³ Multiple perspectives for analyzing the modern corporate

²⁸⁵ *Id.* arts. 552, 2314.

²⁸⁶ APPLE & DEYLING, *supra* note 261, at 18 (internal quotation marks omitted).

²⁸⁷ CÓDIGO CIVIL [C.C.] art. 45 (Braz.).

²⁸⁸ *Id.* art. 932.

²⁸⁹ See Bernhard A. Koch, *The “European Group on Tort Law” and Its “Principles of European Tort Law,”* 53 AM. J. COMP. L. 189, 194 (2005).

²⁹⁰ EUR. GRP. ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW art. 4:202 (2005), available at <http://civil.udg.edu/php/biblioteca/items/283/PETL.pdf>.

²⁹¹ *Id.*

²⁹² *Id.* art. 6:102.

²⁹³ See Michael J. Broyde & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 1685, 1691 (1997).

entity have been developed by Jewish law scholars.²⁹⁴ The perspective most similar to the secular concept of corporations is called the *Halakhic* entity approach.²⁹⁵ Under this perspective, Jewish law recognizes the corporations as the owner of corporate assets, and thus a separate entity from the shareholders just as secular law does.²⁹⁶

In the area of tort law, *Halakha* generally does not recognize the principle of vicarious liability.²⁹⁷ Yet, two important points mitigate the potential evisceration of a general principle that would hold corporations liable for their torts. First, in an investigation to discover a general principle, it does not have to be recognized by all nations “so long as there is evidence that is applied by a representative majority which includes the principal legal systems of the world.”²⁹⁸ Thus, the absence of this norm in *Halakhic* tradition does not immediately deprive the world of a general principle of corporate tort liability. Second, Jewish law recognizes the doctrine of *dina de’malkhuta dina*, or “the law of the land is the law.”²⁹⁹ Thus, in the nations of the world that would hold a corporation liable, such as the common law or civil law traditions, Jewish law would allow this imposition, although not provided for in *Halakha*.

2. Islamic Law

Islamic, or Sharia, law designates rules and regulations governing the lives of the practitioners of Islam.³⁰⁰ Its influence spread far beyond its birthplace in the Arabian peninsula and Lower Mesopotamia.³⁰¹ As the Arab empire spread, Sharia law spread to Spain and Central Asia.³⁰² Before the Islamic Revolution in Iran in 1979, the only country with a completely Islamic legal system was Saudi Arabia.³⁰³ After 1979, Iran and Sudan replaced “Western style laws with an Islamic legal system” and, to a lesser degree, Libya and Pakistan as well.³⁰⁴

²⁹⁴ *Id.* at 1695–97.

²⁹⁵ *Id.* at 1738.

²⁹⁶ *Id.* at 1738–39.

²⁹⁷ *Id.* at 1779.

²⁹⁸ De Wet, *supra* note 175, at 187.

²⁹⁹ Broyde & Resnicoff, *supra* note 293, at 1696.

³⁰⁰ MAWIL IZZI DIEN, ISLAMIC LAW: FROM HISTORICAL FOUNDATIONS TO CONTEMPORARY PRACTICE 35 (Atl. Publishers & Distrib. first Indian reprint. 2005) (2004).

³⁰¹ Gamal Moursi Badr, *Islamic Law: Its Relation to Other Legal Systems*, 26 AM. J. COMP. L. 187, 187–88 (1978).

³⁰² *Id.*

³⁰³ JAMILA HUSSAIN, ISLAMIC LAW AND SOCIETY: AN INTRODUCTION 24 (1999).

³⁰⁴ *Id.*

Sharia law has primary sources in the Quran and *Sunnah* and also recognizes secondary sources in “the interpretations and opinions of the learned jurists.”³⁰⁵

In the commercial sphere, the goal of the law of Islam is not to inhibit fair trade and commerce, but “to allow people to earn their living in a fair and profitable way without exploitation of others.”³⁰⁶ Sharia originally did not recognize the existence of the juridical entity that is a corporation, and the concept that a partnership would exist as an entity separate from its partners developed only recently as a function of Western influence.³⁰⁷ Although assuming a type of legal “capability,” or *dhimma*, this capability does not endow Islamic corporations with a liability shield as seen in the West.³⁰⁸ Moreover, Sharia expounds the rule of strict liability as the “bedrock” of judicial actions under Islamic tort law such that only the tortfeasor is liable for a particular tort action.³⁰⁹

Today, the idea of juristic personality has been recognized by most of the Islamic countries in the Middle East, including those who base regulation on Sharia rather than Western law, such as Kuwait, Saudi Arabia, the United Arab Emirates, Oman, and Qatar.³¹⁰ Yet, in the field of vicarious tort liability, the scholars seem to be divided. Some suggest that respondeat superior has no place in Islamic law according to the principle of strict liability for responsible tortfeasors.³¹¹ Others use the term *fiqh* “*al-‘āqilah*” to apply to those people (“employers”) who can bear the responsibility of *diyah* (“blood-money”) on the employee’s behalf.³¹²

This latter concept of *fiqh* “*al-‘āqilah*” is similar to that seen in many common and civil law traditions, which impute the act of the employee “as if the employer caused the loss or damage himself.”³¹³ Thus, there is no theoretical obstacle to the imposition of tort liability on a corporate entity in Islamic law. Yet, this conclusion may not have fully solidified. The concept of

³⁰⁵ *Id.* at 26.

³⁰⁶ *Id.* at 160.

³⁰⁷ Nabil Saleh, *Arab International Corporations: The Impact of the Shari‘a*, 8 ARAB L.Q. 179, 180 (1993).

³⁰⁸ *Id.* at 180–81.

³⁰⁹ Abdul Basir bin Mohamad, *Vicarious Liability: A Study of the Liability of Employer and Employee in the Islamic Law of Tort*, 15 ARAB L.Q. 197, 197 (2000) [hereinafter Bin Mohamad, *Employer*].

³¹⁰ Mahdi Zahraa, *Legal Personality in Islamic Law*, 10 ARAB L.Q. 193, 206 (1995).

³¹¹ See F. M. Goadby, *The Moslem Law of Civil Delict As Illustrated by the Mejlle*, 21 J. COMP. LEGIS. & INT’L L., no. 2, 1939, at 62, 72–73.

³¹² Bin Mohamad, *Employer*, *supra* note 309, at 198.

³¹³ *Id.* at 202.

a juridical entity was not in the writings of classical Islamic scholars³¹⁴ and is developing as a result of Western influence.³¹⁵ Moreover, the idea of vicarious liability may have been previously rejected, but is now receiving scholarship and validity from Islamic theorists.³¹⁶ Thus, although the precise recognition of corporate tort liability is unclear in Islam, it appears there are no significant barriers to its development.

Of the systems and national legal structures analyzed, agency and vicarious liability are common themes. Returning to the United States, in the modern era of corporate tort liability under the ATS, the theory of aiding and abetting or complicity in human rights abuses was the primary cause of action against corporations.³¹⁷ Yet, this concept is unnecessary and its controversy moot if corporations cannot be held liable under the ATS as a matter of subject matter jurisdiction.³¹⁸ Yet, as this discussion concludes, corporate civil liability is a general principle of international law, and this doctrine, as applied to *Kiobel*, should not prevent the imposition of aiding and abetting liability for international law violations—assuming that aiding and abetting liability is a sufficiently specified or recognized norm of the law of nations.³¹⁹

V. APPLICATION OF GENERAL PRINCIPLES TO *KIOBEL*

In this Part, this Comment first looks to the panel majority's treatment of general principles and its misplaced reliance on the Restatement (Third) of the Foreign Relations Law of the United States. Next, it looks to the concurring opinion to show that, although Judge Leval followed a method similar to that

³¹⁴ Zahraa, *supra* note 310, at 202.

³¹⁵ Saleh, *supra* note 307, at 180.

³¹⁶ See Bin Mohamad, *Employer*, *supra* note 309, at 205; see also Abdul Basir bin Mohamad, *Vicarious Liability: A Study of the Liability of the Guardian and His Ward in the Islamic Law of Tort*, 17 ARAB L.Q. 39, 47 (2002).

³¹⁷ See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007); see also INT'L COMM'N OF JURISTS, *FACING THE FACTS AND CHARTING A LEGAL PATH* 8–16 (2008) (describing different methods in which a corporation may be held liable).

³¹⁸ Aiding and abetting liability for corporations due to their role in human rights abuses has been a widely covered area of legal scholarship. See, e.g., Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304, 322–24 (2008); Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 69–73 (2008); Jonathan Drimmer, *Jonathan Drimmer on the Aiding and Abetting Conundrum Under the Alien Tort Claims Act* (LexisNexis Emerging Issues Analysis, No. 2388, 2008), available at http://w3.lexis.com/research2/attachment/popUpAttachWindow.do?_m=bc584ba883eadc5f45a4aaefbd67939d&wchp=dGLzVzB-zSkAA&_md5=985c110a099dfbb3c9a4b0387bdd22da.

³¹⁹ See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009); *Khulumani*, 504 F.3d 254; *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

of application of general principles, he nevertheless ignored this important source. Third, this Comment analyzes the full bench of the Second Circuit's denial of rehearing en banc and deals primarily with Chief Judge Jacobs's arguments and how they could be remedied by the use of general principles. This Comment then applies the above-determined general principle and suggests how the Supreme Court may have alluded to and endorsed its use. Finally, this Comment will look at the Supreme Court's grant of certiorari in *Kiobel*.

A. *Majority Opinion Analysis*

The majority's classification of the use of "general principles" as being a matter of domestic law³²⁰ is a mischaracterization for two reasons. First, the majority cites to *Flores v. Southern Peru Copper Corp.*³²¹ for the concept that customary international law does not view "universally proscribed" conduct under domestic law as relevant for purposes of determining what customary international law truly is.³²² This is not an inaccurate statement of the law in that general principles are not a consideration in the custom inquiry. Yet, this phrasing in *Flores* confuses and conflates two separate sources of international law. Whereas custom looks to the norms and mores to which states have abided in their relations *inter se*,³²³ the formulation "general principles of law recognized by civilized nations" is an implicit rejection of the necessity to look to the relations among the states. If general principles were to somehow be derived from the actions of states in their interactions with each other, then it stands to reason that the general principles, as outlined in the ICJ Statute, would have referred to international law, as the statute expressly did when it established international custom as a source.³²⁴ Thus, although the court in *Flores* was correct in saying that the investigation into custom does not consider general principles relevant,³²⁵ this does not support the idea that general principles cannot act as their own source in providing independent rules of decision and scope of liability determinations. Adding to this, a

³²⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 141 n.43 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).

³²¹ *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

³²² *Kiobel*, 621 F.3d at 141 n.43 ("Even if [certain] conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law.") (quoting *Flores*, 414 F.3d at 249).

³²³ See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

³²⁴ See ICJ Statute, *supra* note 14, art. 38.

³²⁵ *Flores*, 414 F.3d at 252.

hierarchy between custom, treaty, and general principles was explicitly rejected in the drafting of Article 38.³²⁶

Second, the Second Circuit also relied upon the Restatement (Third) of Foreign Relations Law of the United States,³²⁷ which actually undermines their ultimate conclusion on the value of general principles to international law. Section 102(4) of the Restatement states: “General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law as appropriate.”³²⁸ Even the comment to which the majority cited and on which it relied in rejecting general principles admits that they can be “resorted to for developing international law interstitially in special circumstances.”³²⁹

Thus, it is appropriate to argue that corporate liability for international law violations is a special circumstance warranting the invocation of those general principles that the world’s major legal systems have recognized. To this point, comment (l) to § 102 of the Restatement lists specific rules that have been drawn from Article 38(c) of the ICJ Statute, namely, “rules relating to the administration of justice, such as the rule that no one may be judge in his own cause; *res judicata*; and rules of fair procedure generally.”³³⁰ It is logical that these would not be evidenced by customary international law. Disallowing a person “to be judge in his own cause” is not a principle of the type that would ordinarily be embodied in the sources of custom as evidenced by the practice of states *inter se*. It is one that follows from the basic concepts of law and its practical operation. These examples evidence the function of general principles as filling gaps or lacunae in international law.³³¹

Moreover, the same comment goes on to say that general principles can also provide “‘rules of reason’ of a general character, such as acquiescence and estoppel, the principle that rights must not be abused, and *the obligation to repair a wrong*.”³³² The Restatement’s inclusion of principles such as that

³²⁶ Bassiouni, *supra* note 177, at 782.

³²⁷ *Kiobel*, 621 F.3d at 141 n.43.

³²⁸ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(4), at 24–25 (1987).

³²⁹ *Id.* § 102, cmt. (l), at 28.

³³⁰ *Id.* § 102, cmt. (l), at 29.

³³¹ See MARK W. JANIS & JOHN E. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 136 (3d ed. 2006).

³³² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 102, cmt. (l), at 29 (emphasis added).

“rights must not be abused” and an “obligation to repair a wrong”³³³ is a direct parallel with the one of the purposes of tort liability—“to restore injured parties to their original condition . . . by compensating them for their injury; and . . . to vindicate individual rights of redress.”³³⁴ Thus, the Restatement seems to provide an argument for the use of general principles to derive corporate liability under the ATS, undermining the majority’s reliance on one sentence in the comment to Section 102.

B. Concurring Opinion Analysis

The key fault with the concurring opinion is its position on the role and power of domestic law in holding corporations liable for civil damages. Judge Leval repeatedly maintained a position evidenced by the argument that “[t]he position of international law on whether civil liability should be imposed for violations of its norms is that international law takes no position and leaves that question to each nation to resolve.”³³⁵ First, it stands to note that he provided no citation or support for this proposition. He merely moved from a lacuna in the scope of international law to the application of domestic law. In doing so, he skipped right over the very concept that would resolve his conflict and put him more in line with the correct statement of international law, namely the application of general principles of law recognized by civilized nations.

The position for which Judge Leval advocated is not dissimilar to the application of general principles. He used a concept that is well known in U.S. law to fill the gap in international law concerning the liability of corporations for their torts committed against aliens. This does not significantly differ from taking the general principle seen in the world’s major legal systems, including the United States, and applying it here to uphold corporate liability. The use of general principles recognizes the authority of the ICJ Statute and looks to municipal law to determine what the law is on the issue. Although his assertion is correct that generally international law is indifferent as to the enforcement of its rules, Judge Leval applied only the domestic principles of the United States, which “draws no distinction in its laws between violators who are natural persons and corporations.”³³⁶

³³³ *Id.*

³³⁴ SCHWARTZ ET AL., *supra* note 241, at 1–2.

³³⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 152 (2d Cir. 2010) (Leval, J., concurring), *cert. granted*, 132 S. Ct. 472 (2011).

³³⁶ *Id.*

C. Denial of Rehearing

In February 2011, the Second Circuit denied rehearing in *Kiobel*.³³⁷ Three separate opinions were filed: a dissent from Judge Leval and concurring opinions from Chief Judge Jacobs and Judge Cabranes (the author of the *Kiobel* panel majority opinion).³³⁸ Whereas Judge Cabranes filed just a paragraph, mostly supporting the *Kiobel* panel reasoning and rejecting claims that it was motivated by a policy agenda,³³⁹ Chief Judge Jacobs and Judge Leval filed heated opinions, directly addressing each other's arguments. Because the views posited in these arguments have erroneous propositions and this case presents an opportunity to use general principles, this Comment analyzes the denial opinions, primarily Jacobs's concurrence.

Unlike the opinion of the *Kiobel* panel, Chief Judge Jacobs's concurring opinion to the denial of a rehearing is full of foreign policy considerations.³⁴⁰ Generally, he posited that because "foreign companies are creatures of other states" and are "often engines of their national economies," then American courts are overreaching in ATS litigation by exerting the "power to bring to court transnational corporations of other counties . . . and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees," thus undermining comity.³⁴¹ He then referred to statements made by South African President Thabo Mbeki characterizing the *Khulumani* decision as "judicial imperialism."³⁴² He closed his policy considerations by arguing that there is no danger of other states protecting their corporations from judicial action in their home state because "no one would protect any enemy of all mankind."³⁴³

³³⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268 (2d Cir. 2011). A request for a rehearing en banc was also denied on the same day. *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379 (2d Cir. 2011).

³³⁸ *Kiobel*, 642 F.3d at 268.

³³⁹ *Id.* at 272 (Cabranes, J., concurring).

³⁴⁰ *Id.* at 270 (Jacobs, C.J., concurring). Judge Leval stingingly dismisses most of Jacobs's policy arguments:

I do not contend by any means that *all* of Judge Jacobs's policy concerns are frivolous. If it were the proper role of a panel of the U.S. courts to make and implement the foreign policy of the United States, some of his concerns would call for serious attention and evaluation.

Id. at 273 (Leval, J., dissenting).

³⁴¹ *Id.* at 270 (Jacobs, C.J., concurring).

³⁴² *Id.*

³⁴³ *Id.*

Chief Judge Jacobs's policy concerns are misguided and, even those that are not, can be remedied by means significantly less severe than the result in *Kiobel* provides. *Kiobel*'s bright-line prohibition on actions against corporations under the ATS itself is "seizing the initiative to make foreign and domestic policy"³⁴⁴ by restricting access to U.S. courts under an erroneous use of international law, namely the rejection of general principles. Moreover, many of his concerns about "judicial imperialism" are applicable to ATS actions against natural persons as well as corporations.³⁴⁵ Yet, he does not call for the repeal of the ATS to thwart this concern.

Especially striking is Chief Judge Jacobs's naïveté in suggesting that foreign states have no interest in protecting corporations that are perpetrating international law violations. This is striking because of Jacobs's recognition that actions may be against corporations that are the "engines of their national economies."³⁴⁶ If the engine of a state's economy is in danger because of suits arising from its complicity in human rights violations, that state has a substantial interest in not bringing them to justice. This is one of the main advantages of the ATS's use of the civil suit mechanism: the victims (or their survivors) can bring the claims themselves in the face of a potentially reluctant state prosecutor. Also not mentioned by Jacobs is an alternative to the bright-line prohibition found in the doctrine of *forum non conveniens*, which could easily deal with issues of American versus foreign adjudication.

Chief Judge Jacobs also argued contradictorily by stating both that *Kiobel* is "of no big consequence"³⁴⁷ and also that *Kiobel* "matters."³⁴⁸ He stated first that it is unimportant because the court's earlier holding in *Talisman*—wherein the court adopted the purposive standard for aiding and abetting liability—has foreclosed ATS suits against corporations to the "vanishing point."³⁴⁹ On the other hand, he argued that *Kiobel* is important because, without it, "plaintiffs would be able to plead around *Talisman* in a way that (notwithstanding *Bell Atl. Corp. v. Twombly* and *Ashcroft v. Iqbal*) would delay dismissal."³⁵⁰ Both of these contentions are vulnerable to criticism.

³⁴⁴ *Id.* at 273 (Leval, J., dissenting).

³⁴⁵ *See id.* at 276.

³⁴⁶ *Id.* at 270 (Jacobs, C.J., concurring).

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 271.

³⁴⁹ *Id.*

³⁵⁰ *Id.* (citations omitted).

Judge Leval rightly pointed out the “strange logic” of Jacobs’s use of *Talisman*.³⁵¹ If *Talisman*’s standard will dismiss all but the most heinous and factually supported ATS claims, then *Kiobel*’s only role is to exonerate all but the most heinous and factually supported ATS claims.³⁵² Responding to the contrary argument for *Kiobel*’s importance, his terse dismissal of the pleading barrier provided by *Iqbal* is inapposite. Undoubtedly, *Iqbal* made the motion to dismiss stage more difficult for plaintiffs to surpass by requiring a plausible claim for relief and even more so in litigation whose evidence and facts span multiple nations.³⁵³ Chief Judge Jacobs’s terse dismissal of the weight and difficulty in pleading provided by *Iqbal* and *Twombly* does not give enough credit to this initial barrier.

Chief Judge Jacobs also raised another issue that could be easily solved by the use and application of general principles of law recognized by civilized nations. He wrote: “The imposition of liability on corporations, moreover, raises vexed questions. What employee actions can be imputed to the corporation? What about piercing the corporate veil? . . . Punitive damages is a peculiar feature of American law; can they be exacted?”³⁵⁴ Questions such as these beg for the use of general principles because they are unlikely to be evidenced by custom. General principles fill the lacunae of international law where the domestic legal systems of the world have already come to a consensus. Questions about scope of actions, veil piercing, and punitive damages awards could be easily solved by looking to the legal systems of the world as evidence of an accepted treatment.

D. *Certiorari Granted*

On October 17, 2011, the Supreme Court granted certiorari in *Kiobel*.³⁵⁵ Because of the Second Circuit’s sua sponte decision to consider the corporate liability issue of as a matter of subject matter jurisdiction, the Supreme Court certified a second question in its grant, namely, “[w]hether the issue of corporate civil tort liability under the Alien Tort Statute (‘ATS’), 28 U.S.C.

³⁵¹ *Id.* at 276 (Leval, J., dissenting).

³⁵² *Id.* at 275–76 (“In other words, the defendants who secure exoneration by the operation of the majority’s rule are the ones who acted most heinously, such as slave traders, pirates, and mercenaries who contract to torture and carry out genocides.”).

³⁵³ Leslie A. Gordon, *Convoluting in Courts: For Federal Plaintiffs, Twombly and Iqbal Still Present a Catch-22*, A.B.A. J., Jan. 2011, at 16, 16.

³⁵⁴ *Id.* at 270 (Jacobs, C.J., concurring).

³⁵⁵ *See Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (2011).

§ 1350, is a merits question . . . or an issue of subject matter jurisdiction.”³⁵⁶ This Comment will briefly discuss the significance of this issue.

It is important to consider the consequences of the Court’s decision on this issue. If the question of whether a corporation can be liable under the ATS is a question of subject matter jurisdiction, then the Second Circuit committed no error by raising it sua sponte. Under Federal Rule of Civil Procedure 12(h)(3), a court must dismiss an action if it “at any time” determines that it lacks subject matter jurisdiction.³⁵⁷ If, however, the Court finds that the corporate liability issue is a merits question, then it was improper for the Second Circuit to raise the issue and dismiss on that basis.

Most recently, the Court looked at whether the extraterritorial application of § 10(b) of the Securities and Exchange Act was an issue of subject matter jurisdiction in *Morrison v. National Australia Bank Ltd.*³⁵⁸ Writing for the majority, Justice Scalia stated, “to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question.”³⁵⁹ Thus, the Court held that this issue was a merits question. In this case, the Court held that the jurisdictional statute (§ 78aa) supporting the substantive cause of action (§ 10(b)) allowed for jurisdiction.³⁶⁰

Similarly, in *Arbaugh v. Y & H Corp.*,³⁶¹ the Court looked at Title VII’s requirements to determine whether the fact that an employer did not meet the statutory definition of an “employer” was an issue of subject matter jurisdiction.³⁶² Yet, like in *Morrison*, the term “employee” does not appear in the actual jurisdiction-granting provision of Title VII, but in a substantive definitional provision.³⁶³ The Court expressed concern about “drive-by jurisdictional rulings”³⁶⁴ wherein “[j]udicial opinions . . . often obscure the

³⁵⁶ Petition for Writ of Certiorari, at i, *Kiobel*, 132 S. Ct. 472 (No. 10-1491); see also *Kiobel v. Royal Dutch Petroleum*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al> (last visited Apr. 23, 2012). For an excellent treatment of the jurisdictional question in *Kiobel*, see generally Kedar Bhatia, Comment, *Reconsidering the Purely Jurisdictional View of the Alien Tort Statute*, 27 EMORY INT’L L. REV. (forthcoming 2013).

³⁵⁷ FED. R. CIV. P. 12(h)(3).

³⁵⁸ *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

³⁵⁹ *Id.* at 2877.

³⁶⁰ *Id.*; see also 15 U.S.C. §§ 10(b), 78aa (Supp. IV 2010).

³⁶¹ *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006).

³⁶² *Id.* at 504–07.

³⁶³ See 42 U.S.C. § 2000e-5(f)(3) (“Each United States district court . . . shall have jurisdiction of actions brought under this subchapter.”).

³⁶⁴ *Arbaugh*, 546 U.S. at 511 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998)) (internal quotation marks omitted).

issue by stating that the court is dismissing for lack of jurisdiction when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim.”³⁶⁵

Considering *Morrison* and *Arbaugh*, *Kiobel* presents a similar situation. In *Kiobel*, the Second Circuit considered whether a corporate defendant could be subject to suit under the ATS’s jurisdictional support.³⁶⁶ The Second Circuit looked to a jurisdictional statute, but considered a subject and issue not mentioned within the statutory language, namely whether a particular defendant can be sued. In *Morrison*, the Court looked to where someone could be sued and held that it was a merits question.³⁶⁷ The issue of where someone could be sued was not mentioned in the jurisdiction-granting statute.³⁶⁸ In *Arbaugh*, the Court considered whether someone fit a substantive definitional provision and held that it was a merits question.³⁶⁹ The specific term whose definition was not met (“employer”) was not mentioned in the jurisdiction-granting statute.³⁷⁰ And here, in *Kiobel*, the Court will consider whether a particular entity is within the reach of the jurisdiction-granting statute.³⁷¹ And, like in the two cases above, the defendant (or the persons capable of being a defendant) is not mentioned in the jurisdiction-granting statute (the ATS). It seems that *Morrison* and *Arbaugh* are directly applicable and this issue is one of merits, not one of jurisdiction.

Yet, this should not be the kill switch on the Court’s analysis. Even though in *Morrison* the majority found that the extraterritorial reach of § 10(b) was a merits question, the Court stated that because none of the lower courts’ analyses relied on the mistake of whether the issue was jurisdictional or went to the merits, a remand on this issue was unnecessary.³⁷² The Court then continued to consider whether § 10(b) was indeed extraterritorial.³⁷³ Because a “remand would only require a new Rule 12(b)(6) label for the same Rule

³⁶⁵ *Id.* (quoting *Da Silva v. Kinsho Int’l Corp.*, 229 F.3d 358, 361 (2d Cir. 2000)) (internal quotation marks omitted).

³⁶⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 (2d Cir. 2010) (Leval, J., concurring), *cert. granted*, 132 S. Ct. 472 (2011).

³⁶⁷ *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

³⁶⁸ *See* 15 U.S.C. § 78aa (2006).

³⁶⁹ *Arbaugh*, 546 U.S. at 516.

³⁷⁰ *See* 42 U.S.C. § 2000e-5(f)(3) (2006).

³⁷¹ *See* Petition for Writ of Certiorari, at i, *Kiobel*, 132 S. Ct. 472 (No. 10-1491).

³⁷² *Morrison*, 130 S. Ct. at 2877.

³⁷³ *Id.*

12(b)(1) conclusion,”³⁷⁴ the Court should still consider whether corporations are shielded from ATS liability, regardless of the Court’s conclusion on the subject matter jurisdiction versus merits question.

E. Application of the General Principle

After investigating the world’s legal systems, looking to the *Kiobel* opinions, and recognizing their underlying error by ignoring general principles of law, the application of this general principle that corporations can be held liable for their perpetration and furtherance of tortious injury is simple. The ATS claims against RDPC should be allowed to go forward, at least to a factual inquiry of sufficiency of the pleadings under *Iqbal*. Judge Leval, while vehemently dissenting against the majority reasoning, found these pleadings to be insufficient under this test.³⁷⁵ The fact that there was sufficient ground to dismiss all of the Nigerian plaintiffs’ claims for insufficient pleadings increases the curiosity of the broad and unexpected majority holding on an unbriefed issue.

Dismissing this case on the jurisdictional ATS issue was against the weight of authority of both the Second Circuit and other courts. Although the majority is correct that unresolved issues “lurk[ing] in the record . . . are not to be considered as having been so decided as to constitute precedents,”³⁷⁶ the weight of authority which has either assumed that corporate ATS liability is available or allowed the suit to go forward without deciding is unquestionably persuasive.³⁷⁷ Moreover, *Kiobel* creates a direct circuit split with the Eleventh Circuit.³⁷⁸ In light of all this authority, the reasoning behind the majority’s

³⁷⁴ *Id.*

³⁷⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 188–96 (2d Cir. 2010) (Leval, J., concurring), *cert. granted*, 132 S. Ct. 472 (2011).

³⁷⁶ *Webster v. Fall*, 266 U.S. 507, 511 (1925).

³⁷⁷ *See, e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261 n.12 (2d Cir. 2009) (assuming without deciding corporate liability); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 282–83 (2d Cir. 2007) (Katzmann, J., concurring) (declining to decide the issue because it was not raised by the defendant); *Doe I v. Unocal Corp.*, 395 F.3d 932, 953–54 (9th Cir. 2002) (allowing claims for forced labor, murder, and rape without determining state action); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 105–08 (D.D.C. 2003) (dismissing claims for aiding and abetting terrorism due to lack of intent); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1355 (S.D. Fla. 2003) (finding that plaintiffs stated a “color of law” requirement sufficient to sustain claims under the ATS).

³⁷⁸ *See Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). Since *Kiobel*’s decision, the circuit split has deepened. *See Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011) (“[W]e join the Eleventh Circuit in holding that neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of

reluctance to utilize general principles to resolve this question in favor of the weight of assumptions, suppositions, and an opposite holding is baffling.

Adding to the force of this conclusion, the use of general principles should meet the strictures of the Supreme Court's test in *Sosa*. *Sosa*'s requirement that "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" allows for the acceptance of a general principle.³⁷⁹ General principles are "norm[s] of international character" to the extent that they are one of the three principal sources of international law, as outlined in the ICJ Statute.³⁸⁰ The objective search for recognition and precise definition of the general principle should meet the specificity requirement of the holding as well. Thus, the Supreme Court may have already hinted at and subtly endorsed the solution to the *Kiobel* problem, which the Second Circuit so casually rejected.³⁸¹

CONCLUSION

A. *Implications of Kiobel*

The immediate effect of the Second Circuit's decision is apparent: corporations will not be held liable for their torts in violation of the law of nations. Shortly after this decision was written, but before filing, the U.S. District Court for the Central District of California dismissed an ATS suit on the same grounds as *Kiobel*.³⁸² In this opinion, the district court undertook an extensive review of the justifications for previous impositions of corporate liability including logical extensions and stare decisis arguments.³⁸³ Just like the majority in *Kiobel*, the Central District of California dismissed the use of general principles in a footnote.³⁸⁴

nations."); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011) (Posner, J.) (holding that "corporate liability is possible under the Alien Tort Statute").

³⁷⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (emphasis added).

³⁸⁰ *Id.* at 725; see also ICJ Statute, *supra* note 14, art. 38(1).

³⁸¹ See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 141 n.43 (2d Cir. 2010) (Leval, J., concurring), *cert. granted*, 132 S. Ct. 472 (2011).

³⁸² *Doe I v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1143–44 (C.D. Cal. 2010).

³⁸³ *Id.* at 1130–33.

³⁸⁴ *Id.* at 1144 n.70.

Reading that opinion together with the Second Circuit's *Kiobel* decision, the two are strikingly similar. Yet, neither provides a sufficient basis to refute one of Judge Leval's arguments in his concurring opinion. Judge Leval argued that the remedy afforded by the ATS is not one that was handed down by international law, but was the judgment of Congress addressing a perceived need for a remedial measure for violations of international law cognizable at the time of its passage.³⁸⁵ As such, a judgment of Congress is susceptible to judicial interpretation in the face of conflict and ambiguity. Obviously, Congress did not speak to jurisdictional requirements concerning legal entities explicitly or implicitly in the statute. Thus, it is entirely consistent with U.S. jurisprudential practice to hold corporations liable.

The *Kiobel* majority extols their previous investigations of customary international law as proof that they have engaged in the same analysis to determine the scope of liability under international law.³⁸⁶ Yet, the majority's reliance on their decision in *Kadic* is slightly mischaracterized.³⁸⁷ Although they are correct that they looked to customary international law to determine whether non-state actors could be individually liable for international law violations, they did so exclusively in relation to the particular substantive norm attempting to be established.³⁸⁸ They did not make a blanket statement that individual actors could or could not be liable for international law violations as a bright-line rule. Thus, it is incorrect to state that their analysis in *Kiobel*—wherein they did wholly deny corporate liability with no relation to any particular substantive norm—follows necessarily from their analysis in *Kadic*.

Moreover, the majority overstates the clarity of the *Kadic* analysis and holding. In that case, they held that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”³⁸⁹ By limiting this holding to “certain forms of conduct,” this is a far cry from the establishment of an international norm holding individuals (natural persons) liable for their international law violations under the ATS. Thus, following another of Judge Leval's arguments,

³⁸⁵ *Kiobel*, 621 F.3d at 175 (Leval, J., concurring); see also *Sosa*, 504 U.S. at 725.

³⁸⁶ *Kiobel*, 621 F.3d at 128 (“Likewise, in *Kadic v. Karadžić*, . . . international law provided the rules by which the court decided whether certain conduct violated the law of nations *when committed by non-state actors*.”) (citation omitted).

³⁸⁷ In *Kadic*, the Second Circuit held that some specific violations of international law were cognizable and recognized under the court's ATS jurisdiction whether committed by states or individuals. See *supra* Part I.

³⁸⁸ *Kadic v. Karadžić*, 70 F.3d 232, 241–44 (2d Cir. 1995).

³⁸⁹ *Id.* at 239.

it seems that this limited holding that is far from clear or bright line cannot stand for the proposition that individual liability for those not acting under the auspices or color of state is a recognized norm of the community of nations. If the majority cannot justify this foundational premise of ATS liability, then it seems inapposite for them to extend it to juridical entities.

The decision also implicates procedural barriers. The Supreme Court rejected the complaint in *Ashcroft v. Iqbal* for failure to state a “plausible” claim for relief against the Attorney General for discrimination infringing on constitutional protections.³⁹⁰ This substantially limited complainants’ access to the tools of discovery to attempt to find evidence of a notoriously difficult-to-prove claim: discrimination. In the post-*Kiobel* world, the ability of an ATS litigant to get to discovery has been significantly curtailed. As in *Iqbal*—and its predecessor, *Bell Atlantic Corp. v. Twombly*—establishing a “plausible” claim, such as discrimination, anti-competitive practices, or purposeful provision of aid and resources in furtherance of human rights abuses, against the individuals in charge of entities that are as complicated as the U.S. government and most transnational corporations, has now become even more difficult.³⁹¹

Considering the implications of this decision, further questions arise: What effect would the opposite result have yielded? How could the Second Circuit have perhaps come to the same ultimate conclusion without completely abandoning any form of corporate liability under the ATS? The answers to these questions and their impact on the current state of ATS litigation will be discussed next.

B. *Alternative Solutions*

The decision in *Kiobel* is the most extreme of any solution that the Second Circuit could have contemplated. They decided the matter without any specific briefing from the parties on the matter of corporate liability and only a cursory mention of the issue occurring late and covering barely two pages of RDPC’s brief.³⁹² This Comment proceeds to consider the alternative means by which

³⁹⁰ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950–51 (2009). *Iqbal* stands as the current case law on the specificity required in complaints to survive a 12(b)(6) motion to dismiss for failure to state a claim. Gordon, *supra* note 353, at 16.

³⁹¹ See *Iqbal*, 129 S. Ct. at 1952–53; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

³⁹² See Brief for Appellees/Cross-Appellants at 30–31, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011) (Nos. 06-4800-cv, 06-4876-cv).

the court could have concluded this case with varying degrees of impact on the state of ATS litigation.

Most obviously, the court simply could have dismissed on insufficiency of the pleadings. This is the view adopted by the concurring opinion.³⁹³ Considering the fact that this was not part of the question certified for interlocutory appeal by Judge Wood from the Southern District of New York,³⁹⁴ it may seem inappropriate for the appellate court to engage in the factual inquiry. Yet, the concurrence also handles this argument. An order certifying questions for the appellate court focuses more on the order and not the question, as “it is the order that is appealable, and not the controlling question identified by the district court.”³⁹⁵

Another alternative is to follow the approach and conclusions of the district court in this case by analyzing the particular and allegedly violated norms to determine whether they have the sufficient specificity in international law to be cognizable under the ATS. The district court held that wanton destruction of real and personal property, forced exile, and extrajudicial killing were not sufficiently defined; while also holding that torture, arbitrary detention, and crimes against humanity were.³⁹⁶ Just as easily and in a significantly less extreme manner, the Second Circuit could have examined international law to determine whether the violations alleged in the multiple counts of the complaint were actually “defined with a specificity comparable to the features of the 18th-century paradigms” recognized at the time of the ATS’s enactment.³⁹⁷ Instead of slamming the door shut on all forms of corporate liability, the court could have followed prior practice and looked to the substantive norms being alleged to decide the case.

Alternatively, the court also could have cleared up the murky and contentious state of aiding and abetting corporate liability theories in the opinions of this circuit and others. Judge Leval contends that they should follow the purposeful standard as articulated in *Talisman*.³⁹⁸ This approach

³⁹³ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 188 (Leval, J., concurring).

³⁹⁴ *Id.* at 124 (majority opinion).

³⁹⁵ *Id.* at 191 n.52 (Leval, J., concurring) (quoting *Cal. Pub. Emps.’ Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 95 (2d Cir. 2004)).

³⁹⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 464–68 (S.D.N.Y. 2006), *aff’d in part, rev’d in part*, 621 F.3d 111, *cert. granted*, 132 S. Ct. 472.

³⁹⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

³⁹⁸ *Kiobel*, 621 F.3d at 192–93 (Leval, J., concurring).

would affect only the second major holding of the majority.³⁹⁹ In *Talisman*, the majority primarily looked to Judge Katzmman's concurrence in *Khulumani*⁴⁰⁰ to determine whether the source of the standard for aiding and abetting liability should derive from domestic law or international law.⁴⁰¹ With this approach, the *Kiobel* court's first holding would go unaffected.

This approach employed by Judge Katzmman and the *Talisman* majority, although not as detailed as the *Kiobel* discussion, is similar and pertinent to this case. Judge Katzmman wrote that the Second Circuit has repeatedly emphasized that "the scope of the [ATS's] jurisdictional grant should be determined by reference to international law."⁴⁰² The first part of the majority's reasoning does not deviate from this practice. The *Kiobel* majority cited to the exact quoted language above in coming to its first holding that international law itself governs the scope of international law as applied under the ATS's jurisdictional requirement that courts look to the law of nations.⁴⁰³

Thus, the court could then move to an analysis of the standard to be met in actions for aiding and abetting liability. Specifically, they could have more clearly defined whether the mens rea standard in these actions is knowledge that actions taken would further human rights violations or a purpose to do so.⁴⁰⁴ Although the knowledge standard has been evidenced in international tribunal proceedings,⁴⁰⁵ it is most likely that the court, like the concurring opinion, would follow the arguments of Judge Katzmman in *Khulumani* and *Talisman* and adopt the purposeful standard. This has an additional advantage to the critics of ATS litigation generally.

The use of a higher standard of mens rea in complicity liability could stem the fears of some in the business community that the ATS intrudes too much in a corporation's business activities and interactions with foreign entities. RDPC, arguing that private aiding and abetting liability should not be recognized in

³⁹⁹ This is the holding that ultimately provides the court's conclusion—that corporations are not liable under the ATS. *See supra* Part II.B.

⁴⁰⁰ Judge Katzmman reasoned in his *Khulumani* concurrence that the source of the aiding and abetting liability standard derived from international law. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 268 (2d Cir. 2007) (Katzmann, J., concurring).

⁴⁰¹ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258–59 (2d Cir. 2009).

⁴⁰² *Khulumani*, 504 F.3d at 269 (Katzmann, J., concurring).

⁴⁰³ *Kiobel*, 621 F.3d at 128.

⁴⁰⁴ *Compare Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring) (recommending purposeful standard), with *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, ¶ 117 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000) (adopting knowledge standard).

⁴⁰⁵ *See Furundžija*, Case No. IT-95-17/1-A, ¶ 117.

this case, implied this concern: “Blanket recognition of private liability for aiding and abetting or conspiracy would render all those who do business in foreign countries liable for the acts of those governments, so long as a plaintiff alleged some cooperation between the government and a private defendant.”⁴⁰⁶ One scholar has noted the impact and flood of litigation that widespread recognition of an aiding and abetting liability standard would have on enforcement of labor rights in foreign countries.⁴⁰⁷ Thus, the use of the higher purposeful standard would stem the fears of unwarranted intrusion in corporate affairs by a multitude of plaintiffs’ claims from around the world.

Yet another approach the Second Circuit could have employed in the *Kiobel* decision is similar to that of their decision in *Kadic v. Karadžić*. *Kadic*, although not as clear as the *Kiobel* majority made it seem, was an examination of whether private individuals not acting under color of state could be held liable for violations of international law under the ATS.⁴⁰⁸ The *Kadic* holding did not necessarily validate the bright-line use of the ATS in actions against private individuals, but instead held that “certain forms of conduct” violated international norms regardless of status as state or non-state actors.⁴⁰⁹ The *Kadic* court continued by looking to these “certain forms” such as genocide, war crimes, and other instances inflicting death, torture, and degrading treatment as relating to individual culpability for these actions.⁴¹⁰ This raises an alternative treatment in that the court could specify which claims against corporations are sustainable under the ATS. This alternative would also clear up the fears, raised in *Sosa*, inherent in requiring the district courts to interpret international law to find a cognizable norm. Moreover, this investigation would be substantially aided by looking to general principles to ascertain what conduct is abhorred in the domestic law spheres of the world. This would be a more appropriate and balanced approach to the issue of corporate liability than making an extraordinarily wide-reaching holding on an unbriefed issue while quelling some of the practical difficulties that the ATS jurisprudence presents to the lower courts.

The final and significantly broader ground upon which the Second Circuit could have ruled is that the court could have denied the availability of a cause

⁴⁰⁶ Brief for Appellees/Cross-Appellants, *supra* note 392, at 17.

⁴⁰⁷ Wesley V. Carrington, Note, *Corporate Liability for Violation of Labor Rights Under the Alien Tort Claims Act*, 94 IOWA L. REV. 1381, 1414–15 (2009).

⁴⁰⁸ *Kadic v. Karadžić*, 70 F.3d 239 (2d Cir. 1995).

⁴⁰⁹ *Id.* at 239.

⁴¹⁰ *Id.* at 241–44.

of action for aiding and abetting under the ATS entirely. Unquestionably this would require an overturning of precedent in the circuit.⁴¹¹ Yet, it would not conflict with mandatory authority from the Supreme Court, which has never reached the issue. Additionally, this solution is no more extreme than simply denying relief against a whole class of defendants as a matter of subject matter jurisdiction and was actually a conclusion of a Southern District of New York ruling post-*Sosa*: “[T]he [ATS] presently does not provide for aider and abettor liability, and this Court will not write it into the statute.”⁴¹²

Although the court could not have effectuated it, one more solution to this problem lurks in ATS litigation and is actually hinted at by the majority in *Kiobel*. The majority wrote, in conclusion, “[N]othing in this opinion limits or forecloses corporate liability other than the ATS—including the domestic statutes of other States—and nothing in this opinion limits or forecloses Congress from amending the ATS to bring corporate defendants within our jurisdiction.”⁴¹³ From this, it is clear that a congressional mandate could bring corporations back within the scope of the ATS. This is not as unlikely a scenario as it may seem. Congress has previously codified at least one violation of international norms beyond the three recognized paradigms, which served as the basis of the *Sosa* decision—the Torture Victim Protection Act.⁴¹⁴ Yet, it is also clear that pro-corporate interest lobbying efforts would not sit quietly while Congress attempted to provide a means of possible worldwide corporate liability in U.S. courts.

C. Best Alternative Solution and the Future of ATS Corporate Litigation

The final conclusion of this Comment is that the best alternative method by which the Second Circuit could have resolved *Kiobel*—instead of erecting an artificial jurisdictional barrier—is the application of general principles of law recognized by the world’s legal systems. In fact, in a post-*Kiobel* case, the D.C. Circuit endorsed the application of general principles in its well-researched and lengthy opinion in *Doe VIII v. Exxon Mobil Corp.*⁴¹⁵ This conclusion does not run counter to either the United States’ practice of holding

⁴¹¹ See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258–59 (2d Cir. 2009).

⁴¹² *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004).

⁴¹³ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).

⁴¹⁴ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as a note following 28 U.S.C. § 1350 (2006)).

⁴¹⁵ *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 53–55 (D.C. Cir. 2011).

corporations liable for their torts, or with the world's recognition that this liability exists and is in the best interest of protecting victims of tortious injury. Instead, the court has allowed for the possibilities presented by Judge Leval's slippery slope.⁴¹⁶ Although the results may not be as extreme as Leval posited, the potential for abuse of *Kiobel's* conclusion is most certainly possible. The majority attempts to mitigate this consequence by pointing back to their contention that individuals in the corporate structure responsible for human rights abuses could be held liable.⁴¹⁷

Yet, the deterrent effect of this holding is quite weak considering the massive amount of discovery and litigation involved in suits against transnational corporations and the difficulty in having enough information to allege which exact officer or manager was responsible for authorizing an action leading to an international law violation at the motion to dismiss stage, notwithstanding the increasing difficulty of proving it later in the case. Adding to this difficulty is the fact that officers and directors change with some frequency in the corporate arena. The responsible defendant may be far removed from the corporation and information may no longer be available to prove the claim. Thus, the potential for abuse is not as mitigated as the majority would like to argue.

The use of general principles to allow for corporate liability combined with the purposeful standard from *Talisman* leads to the best balancing of the forces at play in ATS litigation. The use of a higher mens rea standard stands as a substantial and fair barrier to curb the fears of the business community concerning unwarranted judicial interference in their foreign business dealings. Yet, for plaintiffs crossing the *Talisman* barrier with the most heinous of human rights and international law violations, the path to relief would remain open under this approach; whereas, under the *Kiobel* holding, these most terrible violations will go unpunished.

Future litigation of this issue and others in U.S. courts' determinations of international law must look to general principles as a source. As the worldwide trend in international law is toward increased protection of human rights, increasingly more secondary procedural and minor issues will arise.⁴¹⁸ General

⁴¹⁶ See *Kiobel*, 621 F.3d at 149–50, 155–58 (Leval, J., concurring).

⁴¹⁷ *Id.* at 149 (majority opinion).

⁴¹⁸ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. (I), at 28 (1987) (noting that general principles can be “resorted to for developing international law interstitially in special circumstances”).

principles of law can be the tool used by courts to accommodate the rise of these issues. Moreover, general principles were formulated to do just this,⁴¹⁹ and their importance will only increase in future suits under the United States' "legal Lohengrin"—the Alien Tort Statute. For the United States—where a revolution in human rights litigation was sparked by *Filartiga*—to deny compensation to plaintiffs injured by the most heinous of international law violations because of legal incapacity of juridical entities is entirely inconsistent with general principles of law and deals a significant blow to the vindication of human rights in U.S. courts.

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⁴¹⁹ Bassiouni, *supra* note 177, at 769.

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