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Essay

Corporate Liability in
Alien Tort Litigation

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JOEL SLAWOTSKY*

INTRODUCTION

The complex world of Alien Tort Claims Act (ATCA or ATS)¹ litigation bridges the worlds of corporate governance, tort liability, international law, and human rights. Together with the presence of large, sophisticated global defendants, the context of severe violations of international law, and the ensuing high financial stakes, ATS litigation has been the subject of vigorous debate and scholarly treatment in both the academic and judicial spheres.²

The statute has been invoked by human rights advocates³ as a means to enforce customary international law.⁴ In recent years, corporations have become “tier-one” target defendants and the economic focus of ATS litigation. Examples of claims brought against corporations include child

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1. 28 U.S.C. § 1350 (2006) (“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.”).

2. See, e.g., M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT’L L. 316 (2009); Lucien Dhooze, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT’L L. 3 (2003); Julian Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT’L L. 353 (2011); Eric Posner, *Climate Change and International Human Rights Litigation, A Critical Appraisal*, 155 U. PA. L. REV. 1925 (2009); Joel Slawotsky, *The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable Under the Alien Tort Claims Act*, 17 DUKE J. COMP. & INT’L L. 131 (2006).

3. While often relied upon in the human rights context, the statute is valid in commercial disputes. See Matt Vega, *Balancing Judicial Cognizance with Caution: Whether Transnational Corporations Are Liable for Bribery Under the Alien Tort Statute*, 31 MICH. J. INT’L L. 385, 393–95 (2010).

4. See David H. Moore, Medellín, *the Alien Tort Statute, and the Domestic Status of International Law*, 50 VA. J. INT’L L. 485, 486–87 (2010) (explaining that “[t]he statute has provided the practical context in which the debate over the [customary international law’s] domestic status has occurred”).

labor abuses on cocoa plantations;⁵ pharmaceutical testing on children without informed consent in Nigeria;⁶ disclosure of a political dissident's e-mail records in China;⁷ and the provision of vehicles and spare parts to apartheid South Africa.⁸ Not all violations of international law are cognizable under the ATS; only misconduct that exhibits a particularly identifiable and strong transnational dimension and which are sufficiently egregious are actionable.⁹

For more than two decades, U.S. courts have held that private corporations have duties under customary international law and can be subject to lawsuits under the ATS.¹⁰ A recent opinion from the U.S. Court of Appeals for the Second Circuit, however, has created a circuit split on the issue. In *Kiobel v. Royal Dutch Petroleum Co.*,¹¹ the Second Circuit held that, pursuant to the Supreme Court of the United States' opinion in *Sosa v. Alvarez-Machain*,¹² customary international law controls the question of whether a corporation may be liable under the ATS.¹³ According to a footnote in *Sosa*, federal courts are to examine international law to decide the question of whether that law "extends the scope of liability for a violation of a given norm to the perpetrator being sued."¹⁴ Relying upon that footnote, the court in *Kiobel* examined international law and determined that it did not encompass corporate liability.¹⁵

In a concurrence, Judge Leval vigorously disagreed with the majority's view on this point.¹⁶ Judge Leval opined that while international law controls the type of conduct within the ambit of the statute's reach, domestic law controlled the question of whether a specific actor, such as a

5. *Doe v. Nestlé, S.A.*, No. 05-5133, 2010 WL 3969615 (C.D. Cal. Sept. 8, 2010).

6. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

7. Catherine Rampell, *Yahoo Settles with Chinese Families: Firm Gave Officials Dissidents' E-Mails*, WASH. POST, Nov. 14, 2007, at D04.

8. *Khulumani v. Barclay Nat'l Bank Ltd.*, 509 F.3d 148 (2d Cir. 2007).

9. See Slawotsky, *supra* note 2, at 131–32 (2006) (explaining that only claims that implicate the "mutual concern of the nations of the world" are permitted under the statute).

10. Corporations have either settled cases or gone to trial based, presumably, on the premise that a corporate defendant may be potentially liable under the statute. See, e.g., *Jad Mouawad, Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 8, 2009, at B1; Rampell, *supra* note 7.

11. 621 F.3d 111 (2d Cir. 2010).

12. 542 U.S. 692 (2004).

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

14. *Sosa*, 542 U.S. at 732 n.20.

15. *Kiobel*, 621 F.3d at 126 (citing *Sosa*, 542 U.S. at 732 n.20).

16. *Id.* at 150–96 (Leval, J., concurring). Judge Leval concurred because he believed there was insufficient evidence of purposeful conduct on the part of the defendant to satisfy the Second Circuit requirement that, in ATS litigation, a plaintiff must establish that the defendant acted with purpose to impose secondary liability. *Id.* at 154 (Leval, J., concurring).

corporation, could be liable.¹⁷ He further contended that international law did not ban corporate civil liability.¹⁸

The majority's holding in *Kiobel* is in direct conflict with a 2009 Eleventh Circuit decision specifically holding that corporations may be liable under the statute.¹⁹ Although several district courts prior to *Kiobel* held corporations could not be liable under the ATS,²⁰ virtually all appellate and trial courts have either presumed that corporations may face liability or, alternatively, have held corporations may face liability if treated as state actors.²¹

The Second Circuit itself acknowledged the general presumption that a corporation should be treated as any other private actor in 2007. In *Khulumani v. Barclay International Bank*,²² the majority, in commenting on dissenting Judge Korman's claim that a corporation could not face liability under the statute, explained: "We have repeatedly treated the issue of whether corporations may be held liable under the ATCA as indistinguishable from the question of whether private individuals may be."²³

17. *Id.* at 175, 175 n.33 (Leval, J., concurring) ("As explained throughout this opinion, international law outlaws certain forms of abhorrent conduct and in general leaves to individual nations how to enforce the proscription.").

18. *Id.* at 175 (Leval, J., concurring).

19. *See Sinaltrinal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) ("[W]e have . . . recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations.").

20. *Doe v. Nestlé, S.A.*, No. 05-5133, 2010 WL 3969615, at *62 (C.D. Cal. Sept. 8, 2010) (holding that because "existing cases have not adequately identified any international law norms governing corporations . . . corporations cannot be held directly liable under the Alien Tort Statute for violating international law"); *see also Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 26 (D.D.C. 2005) ("[A] few courts have held individuals liable for Alien Tort Statute violations when they acted under color of law[, but the r]easoning in these cases is unpersuasive").

21. Ironically, several rulings arose from the Second Circuit. *See Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (holding that a pharmaceutical company's failure to obtain medical consent violated international law, but not directly addressing the question of whether corporations were proper defendants under the statute); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 282 (2d Cir. 2007) (Katzmann, J., concurring) (noting that while the corporate liability issue was not raised on appeal, the court has "repeatedly treated the issue of whether corporations may be held liable . . . as indistinguishable from the question of whether private individuals may be"); *see also Sarei v. Rio Tinto, Plc.*, 487 F.3d 1193 (9th Cir. 2007) (affirming claims against a corporate defendant could proceed without discussing the question of corporate liability); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 403 F.3d 708 (9th Cir. 2005) (en banc) (holding that a "private party," such as a corporation, may be subject to liability for aiding and abetting specific international law violations without proof of state action); *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988) (presuming the ATCA "does confer subject matter jurisdiction over private parties who conspire in, or aid and abet, official acts of torture by one nation against the citizens of another nation"); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999) ("[N]o logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law.").

22. 504 F.3d 254 (2d Cir. 2007).

23. *Id.* at 282.

Given prior precedent,²⁴ *Kiobel*'s holding is startling. But even more troublesome is that, taken to its logical conclusion, *Kiobel* arguably holds that corporations can conduct business any way they deem proper without concern of liability under the statute. In light of this, there are several compelling reasons for finding that corporations should be liable under the statute.

First, there is nothing to indicate that corporations were excluded by the statute. All available evidence indicates that, to the contrary, corporations were always envisioned as part of the class of potential ATS defendants.

Second, the zealous reliance by *Kiobel* on the *Sosa* footnote is misplaced. The footnote does not stand for the proposition that federal courts should examine international law to find whether a class of defendants, such as corporations, can be sued under the statute. Rather, the Supreme Court simply articulated that international law should be examined to determine whether the type of misconduct at issue can be allocable to various actors, such as public or private entities.

Third, international law does not mandate the manner of its enforcement; such mechanisms are reserved for the individual states to implement.

Fourth, the *Kiobel* court's reliance on international criminal rulings to prove corporations are not liable under international law is misplaced, as criminal law is fundamentally different from civil tort law.

Fifth, international law unquestionably protects corporate rights and, therefore, corporations should be subject to obligations.

Sixth, the view that international law is applicable only to "states" is not an accurate reflection of our globalized world. As states increasingly outsource their functions to businesses, corporations are beginning to fulfill traditional "state" roles. This change has led to a blurring of the once sharp public/private distinction.

I. THE *KIOBEL* DECISION

A. *The Second Circuit's Opinion*

Plaintiffs, residents of the Ogoni region of Nigeria, filed suit under the ATS accusing defendant international oil corporations of aiding and abetting the Nigerian government in committing international law violations.²⁵ Allegedly, the conduct occurred during the suppression of resident protests in the 1990s against the environmental degradation of the

24. See, e.g., *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 254 (S.D.N.Y. 2009) ("On at least nine separate occasions, the Second Circuit has addressed ATCA cases against corporations without ever hinting — much less holding — that such cases are barred.")

25. *Kiobel*, 621 F.2d at 123.

area.²⁶ Defendants were accused of aiding and abetting the conduct by providing payment, food, and transportation to the Nigerian military.²⁷ The government soldiers allegedly beat, raped, and murdered civilians.²⁸

The Second Circuit rejected the claims against the corporate defendants. The court referenced and adopted a footnote in the Supreme Court's 2004 *Sosa* ruling wherein the Court stated that federal courts must examine international law to decide the question of whether that law "extends the scope of liability for a violation of a given norm to the perpetrator being sued."²⁹ *Kiobel* thus held that the question of whether corporations could be liable in a U.S. court must be determined by international law.

The court evaluated international law by reviewing the decisions of international tribunals,³⁰ treaties,³¹ and scholarship.³² The *Kiobel* ruling found that corporate liability is not part of international law.³³ The court referenced the fact that the London Charter, which established the International Military Tribunal at Nuremberg (NMT), permitted jurisdiction to the tribunal only over natural persons,³⁴ relying heavily upon the fact that the NMT declined to impose liability on corporations, instead focusing on individual liability.³⁵ Moreover, the court referenced the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court, which all limit their jurisdiction solely to natural persons.³⁶

Kiobel also relied on the NMT's decision to refuse the imposition of corporate liability on the corporation, I.G. Farben. The Farben entity was referenced by *Kiobel* as the most "nefarious corporate enterprise known to the civilized world."³⁷ The majority cited a passage from *United States v. Krauch* (I.G. Farben Case),³⁸ which explained that

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 126 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004)).

30. *Id.* at 132–37.

31. *Id.* at 137–41.

32. *Id.* at 142–45.

33. See Andrei Mamolea, *The Future of Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 SANTA CLARA L. REV. 79, 100–12 (2011), for an excellent review of the Second Circuit's potential misunderstandings and incorrect claims in *Kiobel* regarding the holdings of the international tribunals.

34. See *Kiobel*, 621 F.3d at 133–34 (relying significantly on the London Charter in holding that international law is applicable only to individuals and not to corporations).

35. For a discussion of why the NMT decision to pursue individuals is not persuasive, see Tyler Giannini & Susan Farbstein, *Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights*, 52 HARV. INT'L L.J. ONLINE 119 (2010).

36. *Kiobel*, 621 F.3d at 136.

37. *Id.* at 135.

38. *Id.*

corporations act through individuals and, under the conception of *personal individual guilt* . . . the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that *an individual defendant* was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.³⁹

Lastly, in coming to its conclusion, the *Kiobel* court examined international treaties, finding that despite “provisions imposing corporate liability in some recent specialized treaties,” these treaties fail to demonstrate that corporate liability is a norm of international law.⁴⁰ The court also explored the opinions of two international law experts, finding their opinions persuasive.⁴¹

B. Judge Leval’s Concurrence

Judge Leval joined in dismissing the suit because the defendants were not alleged to have actively or directly participated in the wrongdoing, but rather were accused of aiding and abetting the conduct.⁴² However, Judge Leval disagreed with the ruling that corporations cannot face liability under the statute, arguing that the broad scope of the holding could allow corporations to evade liability for outrageous misconduct simply by acting in a corporate form.⁴³

Judge Leval criticized the majority’s reliance on the various international tribunals because those bodies were looking to impose criminal responsibility as opposed to civil compensation.⁴⁴ According to the concurrence, a crucial distinction exists between criminal and civil jurisdiction because corporations are not the customary focus of criminal punishment.⁴⁵

In addition, Judge Leval stated that while international law establishes norms, it does not mandate methods of implementation, and that the specifics of international law enforcement are left to the states.⁴⁶ Thus,

39. *United States v. Krauch* (I.G. Farben Case), in 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1153 (1952).

40. *Kiobel*, 621 F.3d at 138–39.

41. *Id.* at 143 (referencing expert opinions by Professor James Crawford and Professor [now Judge] Christopher Greenwood, which were submitted in an unrelated ATS case, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010), and 131 S. Ct. 122 (2010)).

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

43. *Id.* at 149–50 (Leval, J., concurring) (“According to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims’ claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.”).

44. *Id.* at 163 (Leval, J., concurring).

45. *Id.* at 166–67 (Leval, J., concurring).

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

while international law determines whether the conduct constitutes a violation, each state determines pursuant to that sovereign's domestic law which actors can be a defendant and what rules of enforcement are permitted.⁴⁷ Since American tort law controls, and corporations may face liability under United States law, it follows that corporations could face liability under the statute.

C. *The Ramifications of Kiobel*

The *Kiobel* court's decision that corporations and other juridical entities are not subject to international law will lead to grave consequences. As explained by Judge Leval in his concurrence,

[s]o 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.⁴⁸

Illustrative of the end result of the “no corporate liability” view is the recent ruling in *Flomo v. Firestone Natural Rubber Co.*⁴⁹ Heeding *Sosa's* cautionary approach to finding conduct to be cognizable violations,⁵⁰ the *Flomo* court held that subjecting children to harsh labor conditions was sufficiently egregious to be a violation of international law and was therefore within the reach of the ATS. However, in light of *Kiobel*, the court concluded that a corporation cannot face liability under the statute and granted summary judgment.⁵¹

Thus, the result of *Kiobel's* sweeping rejection of corporate accountability is that, regardless of whether the corporation is a direct tortfeasor or is secondarily liable, and regardless of the severity of the violation, a corporation simply cannot be held liable under the ATS.

As evidenced by *Flomo* and warned against in Judge Leval's concurrence, the *Kiobel* ruling is an invitation for corporations to violate international law. While *Kiobel* attempted to dilute its conclusion by stating that nothing prevents corporate officers from being held individually liable, such liability is not a viable solution. Plaintiffs may not be able to obtain adequate compensation from corporate officials, and jurisdictional issues may be involved. Without corporate defendants, the pool of potential defendants will be extremely modest.

47. *Id.* (Leval, J., concurring) (“[International law] leaves the manner of enforcement, including the question of whether there should be private civil remedies for violations of international law, almost entirely to individual nations.”).

48. *Id.* at 150 (Leval, J., concurring).

49. No. 06-00627, 2010 WL 393812 (S.D. Ind. Oct. 5, 2010).

50. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 725–29 (2004).

51. *Flomo*, 2010 WL 3938312 at *7.

The *Kiobel* ruling is clearly a significant one with far-reaching consequences. The question is whether the decision was the correct one.

II. DO CORPORATIONS HAVE LIABILITY UNDER THE ATS?

Before *Kiobel*, courts and parties have long presumed that the ATS is applicable to corporations.⁵² Clearly presuming corporations may face liability under the ATS, both Yahoo! and Shell Oil have settled ATS suits filed against them,⁵³ while Chevron⁵⁴ and Drummond Corporation⁵⁵ proceeded to trials and obtained defense verdicts.

A. *Nothing in the ATS or Early Case Law Indicates That Corporations Are Not Potential Defendants*

There is nothing in the ATS itself, in any congressional amendments, or in the historical record to indicate such a restrictive view of the statute. Corporations were in existence at the time the ATS was enacted—presumably, the drafters could have excluded corporations had their intent been to do so.⁵⁶ The Supreme Court has acknowledged that “[t]he Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA [Foreign Sovereign Immunities Act of 1976] as before with respect to defendants other than foreign states.”⁵⁷

Based on Supreme Court discussion, the failure of Congress to amend the statute, and the failure of the statute to exclude corporations, there is a complete absence of any indication that the intent of the drafters was to exclude corporate liability.

The purpose of the statute is to provide redress in the federal courts for aliens who have suffered a violation of their rights under international law.

52. *See, e.g.,* *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 282–83 (2d Cir. 2007) (noting that the Second Circuit has consistently failed to distinguish between “individual” and “corporate” private actors).

53. *See* Mouawad, *supra* note 10.

54. *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1121 (9th Cir. 2010) (“These plaintiffs brought claims under the Alien Tort Statute (‘ATS’), Nigerian law, and California law. The jury rendered a verdict in favor of Chevron on all claims, and Plaintiffs now appeal. . . . We . . . affirm the district court’s judgment.”).

55. *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1309 (11th Cir. 2008) (“[O]ne claim for relief that Drummond aided and abetted the killings, which were war crimes, remained. At a trial of that claim, the jury returned a verdict for Drummond. . . . We affirm.”).

56. *See* *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 926–27 (2010) (Scalia, J., concurring) (“The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak. To the contrary, colleges, towns and cities, religious institutions, and guilds had long been organized as corporations at common law and under the King’s charter The dissent offers no evidence—none whatever—that the First Amendment’s unqualified text was originally understood to exclude such associational speech from its protection.”).

57. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).

Conferring immunity on corporations conflicts with the purpose of the statute. To distinguish between private individuals and a corporation engaged in the same misconduct is not reasonable.

The Supreme Court has also concluded that corporations have a right to sue under the statute.⁵⁸ If a company can be a plaintiff in an ATS suit, a company should also be a potential defendant. It would be astonishing if corporations could wield the advantage of being a plaintiff while simultaneously enjoying immunity from suit.

B. *Does Sosa Require Courts to Examine International Law to Determine Whether a Corporation Can Be a Defendant?*

Kiobel used the *Sosa* footnote as a lynchpin in its decision. However, the footnote did not explicitly state nor imply that an issue existed regarding whether a corporation may be subject to liability under international law. The Court held that international law controls the question of whether the specific conduct alleged gives rise to liability if the defendant is a private non-state actor. The context of the footnote and the reference to Judge Edwards' concurrence in the D.C. Circuit's *Tel-Oren v. Libyan Arab Republic*⁵⁹ opinion and to the Second Circuit's *Kadic v. Karadzic*⁶⁰ opinion make it manifestly clear the Court was not questioning the viability of suing corporations.

The Court's footnote explains that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."⁶¹

The context of the footnote demonstrates that *Kiobel*'s reliance on it is misplaced. The footnote cites to Judge Edwards' concurrence in the *Tel-Oren* ruling,⁶² in which the D.C. Court of Appeals grappled with the issue of whether torture conducted by a non-state actor (here, Palestine Liberation Organization (PLO) members killed thirty-four mostly Israeli citizens they had taken hostage on a major Israel highway) was cognizable under the statute. After consulting sources of international law, the court found that a private terrorist organization could not be sued under the statute for torture since torture was not a *jus cogens* (a widely accepted international legal norm) offense and therefore only a state actor (and not a private organization such as the PLO or an individual human being not

58. *Barrow Steamship Co. v. Kane*, 170 U.S. 100, 106 (1898) (holding that the term "aliens" in the Judiciary Act has "always been held by this [C]ourt to include corporations").

59. 726 F.2d 774 (D.C. Cir. 1984).

60. 70 F.3d 232 (2d Cir. 1995).

61. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004).

62. *Id.*; *Tel-Oren*, 726 F.2d at 775–98.

acting under color of state law) could be liable for such conduct.⁶³ The *Tel-Oren* concurrence did not distinguish between a juridical person, such as a terrorist organization or a corporation, and a private individual. The only issue at play in the *Tel-Oren* concurrence was whether the actor is public or private. *Sosa*'s footnote indicated that courts should examine international law to determine whether for the specific misconduct alleged, non-state actors — *such as corporations* — may also have liability. This is made even more manifestly clear with the Court's citation, also in the *Sosa* footnote, to the Second Circuit's *Kadic* opinion, in which the Second Circuit held that a private, non-state actor could be found liable for genocide under the ATS.⁶⁴ For these reasons, the footnote supports the view that corporations may have liability, since corporations are included as a type of private actor defined within the scope of the statute.

C. *Under International Law, States Implement and Enforce Standards of International Law According to Their Own Domestic Legal System*

As Judge Leval stated in his *Kiobel* concurrence, international law does not provide the particular domestic implementation of liability for violations of international law.⁶⁵ Under international law, enforcement responsibilities lie with the individual nations.

An example is the United Nations Convention Against Corruption.⁶⁶ This international convention authorized a domestic remedy for acts of corruption. According to Article 38, “[e]ach State Party shall take such measures as may be necessary to encourage, *in accordance with its domestic law*, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences.”⁶⁷

These provisions corroborate Judge Leval's view that international law provides for nations to enforce international law according to their particular domestic principles.

Judge Edwards' concurrence in *Tel-Oren* also argues this position. Addressing Judge Bork's claim that the *Tel-Oren* plaintiffs could not sue absent a “right” to sue granted by international law, Judge Edwards noted that Judge Bork had no authority for this position:

The law of nations thus permits countries to meet their international duties as they will In some cases, states have undertaken to carry out their obligations in agreed-upon ways, as in

63. *Tel-Oren*, 726 F.2d at 792–94.

64. *Kadic*, 70 F.3d at 239–41.

65. *Kiobel*, 621 F.3d at 172–73.

66. United Nations Convention Against Corruption, *opened for signature* Dec. 9, 2003, S. TREATY DOC. NO. 109-6 (2005), 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

67. *Id.* art. 38 (emphasis added).

a United Nations Genocide Convention, which commits states to make genocide a crime . . . or in bilateral or multilateral treaties. Otherwise, *states may make available their municipal laws in the manner they consider appropriate As a result, the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations*; by consensus, the states leave that determination to their respective municipal laws.⁶⁸

Since international law does not articulate, let alone obligate, the manner of its domestic enforcement, to read *Sosa's* footnote as preventing the ATS from enforcing international law vis-à-vis corporations seems counterintuitive at best. If a corporation cannot be held liable for violations of international law under the ATS, the goals of international law are thwarted.

D. Does International Law Encompass Liability for Corporations?

1. Criminal Liability

The *Kiobel* majority, relying principally on various international tribunals,⁶⁹ found that corporate criminal liability for international law violations has not been well-established. Professor Ku also supports the *Kiobel* majority by pointing to the prior and current failure of international tribunals to prosecute corporations.⁷⁰ However, the ATS is a civil tort statute, not a law providing for criminal penalties. The wording of the statute refers to “a tort” — there is no reference to criminal conduct. Reliance on criminal law is therefore not persuasive.

In addition, the issue of corporate liability for criminal conduct may not be a foregone conclusion. To the contrary, corporate criminal law is becoming the norm, not the exception.⁷¹ While various European nations’ legal regimes traditionally excluded corporations from criminal liability,⁷² this view is already antiquated. As stated by Professor Lederman:

[t]imes however have changed This socio-economic reality has dictated, to a large extent, the change in the law’s approach to the imposition of penal liability on corporations. *Policy setters in various legislative and law enforcement bodies sensed that attaining effective, and mainly*

68. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (emphasis added) (citations omitted).

69. See *Kiobel*, 621 F.3d at 132–37.

70. Ku, *supra* note 2, at 380–84.

71. Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1493 (2009) (“[S]everal European jurisdictions that previously made no provision for corporate criminal liability have created such liability, and others have expanded existing bases of corporate liability for crimes.”).

72. See Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 643 (2000).

*trouble-free, control of the economy through criminal law depends on a sweeping subordination of the legal bodies themselves, as far as possible, to criminal proceedings. All this without restricting the scope of the personal criminal liability incumbent on management ranks or on those actually involved in breaking the law.*⁷³

In June 2010, defendant corporation Trafigura was fined and held *criminally* responsible by a Dutch court for the impermissible dumping of toxic waste.⁷⁴ The case arose from a 2006 illegal dumping of toxic waste in the Ivory Coast and the resulting injuries to thousands. In September 2009, U.N. Special Rapporteur Okechukwu Ibeanu delivered a report to the U.N. Human Rights Council detailing the dumping of the waste and the resulting injuries, concluding that the corporation failed to satisfy its responsibility to protect human rights by allowing the dumping to occur.⁷⁵

2. *Civil Liability*

With respect to civil liability, corporations have obligations under and are subject to international law. Private individuals, or public and private corporations, may become the subjects of this law in regard to rights growing out of their international relations with foreign sovereigns and states, or their subjects and citizens.⁷⁶

The vast majority of jurisdictions permit civil suits against corporations. Given the fact that the ATS suits against corporations are civil rather than criminal, an examination of whether corporate civil liability is an accepted norm of international law is most relevant. Unlike criminal liability, there is no doubt about a juridical organization's liability for causing damage.

Civil liability therefore gives more latitude than criminal liability in four main fields: It applies indiscriminately to natural and legal persons, whereas criminal law often restricts the liability of legal persons; the characterization of a negligent or intentional conduct is not subject to the principle of legality; it operates on a lower standard of proof than criminal

73. *Id.* at 644 (emphasis added).

74. *Trafigura Found Guilty of Exporting Toxic Waste*, BBC, July 23, 2010, <http://www.bbc.co.uk/news/world-africa-10735255> (“A Dutch court has found multinational Trafigura guilty of illegally exporting toxic waste from Amsterdam and concealing the nature of the cargo. In 2006, Trafigura transported waste alleged to have been involved in the injury of thousands of people in Ivory Coast. Trafigura denied any wrongdoing.”).

75. See Special Rapporteur on the Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Report of the Special Rapporteur on the Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, ¶¶ 72–83, Human Rights Council, U.N. Doc. A/HRC/12/26/Add.2 (Sept. 3, 2009) (by Okechukwu Ibeanu).

76. See HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 28 (Richard Henry Dana ed., 6th ed. 1866).

liability; and it offers an independent source of financial redress for victims.⁷⁷

E. Corporations Enjoy Rights Under International Law: They Must Also Have Obligations

Corporations enjoy rights under international law, including those arising out of international treaties. One illustration is the rights conferred by the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁷⁸ Indeed, corporations have filed claims in the European Court of Human Rights for infringements on the corporation's rights.⁷⁹

One of the most important treaties utilized by both international corporations and states is the bilateral investment treaty (BIT). BITs and similar cross-national instruments, such as Chapter 11 of the North American Free Trade Agreement (NAFTA), have rapidly proliferated over the past few decades.⁸⁰

Corporations file claims under treaties such as NAFTA.⁸¹ In 1999, Methanex Corporation filed claims under NAFTA against the United States alleging that California's MTBE reduction plan constituted unequal and unfair treatment and would result in an illegal taking of its "property rights."⁸² While the claim was ultimately denied, Methanex's claim was brought under international law.⁸³ The Methanex claim represents a clear example of a corporation invoking international law as a claimant. If a corporation has the right to invoke rights under international law, a corporation should also be subject to civil liability under international law.

BIT disagreements are also brought before international tribunals. As Professor Lehari mentions, "most prominent is the World Bank's International Center for Settlement of Investment Disputes (ICSID). Many of these tribunals adopt a relatively progressive approach in interpreting BIT clauses, intervening in numerous instances in local

77. Regis Bismuth, *Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing Between International and Domestic Legal Orders*, 38 DENV. J. INT'L L. & POL'Y 203, 221 (2010).

78. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

79. See, e.g., *Agrotexim v. Greece*, 330 Eur. Ct. H.R. 3 (ser. A) (1996) (holding that the company, and not its shareholders, is the proper rights holder).

80. See Amnon Lehari, *The Global Law of the Land*, 81 U. COLO. L. REV. 425, 428 (2010) (citations omitted).

81. See North American Free Trade Agreement, U.S.-Can.-Mex., arts. 1115-38, Dec. 17, 1992, 107 Stat. 2057.

82. *Methanex Corp. v. United States*, 44 I.L.M. 1345, pt. IV, ch. D, ¶ 3 (NAFTA Ch. 11 Arb. Trib. 2005).

83. *Id.* pt. II, ch. B, ¶ 1.

regulatory or legislative acts that are viewed as conflicting with such cross-national legal norms.”⁸⁴

Corporations bring claims alleging a breach of the host state of treaty obligations which are subject to international law and which are decided under international law. Thus, corporations are invoking international law to their benefit.

Predictably, along with rights come obligations. To vest corporations with rights, such as filing claims, yet simultaneously exonerate them for tort damage created by violating international law makes little sense and may potentially encourage violations of international law.

F. *The Sharp Line of Demarcation Between States and Corporations No Longer Exists*

The conceptual underpinning for opposing corporate liability relies on the perception that the ATS is only for state actors, since it is these actors who are the subjects of “international law.” As pointed out by Professor Ku, legal rights and duties flowed between sovereigns alone under traditional international law.⁸⁵

However, this position ignores the reality of the changing roles of private and state actors. Although a line of demarcation once existed, that line is now blurred. For example, states are operating in the business world as private actors through vehicles such as sovereign wealth funds (SWFs).⁸⁶ Simultaneously, corporations are becoming active private actors in the public arena, taking a role in traditional state functions. Indeed, large multinational corporations have been referred to as virtual “states.”⁸⁷

1. *Corporations Acting in the Public Sphere*

In addition to wielding enormous economic power, corporations increasingly engage in state-like activity as a result of the privatization of traditional state functions, such as the management of prisons, public welfare programs, public utilities, and wars. Thus, corporations have often chosen to operate in environments where state power is weak or non-existent.⁸⁸

Given the fact that corporations are acting as public actors, the traditional role of the “state” is no longer well defined. Substantial

84. See Lehari, *supra* note 80, at 448.

85. See Ku, *supra* note 2, at 377.

86. See Joel Slawotsky, *Sovereign Wealth Funds as Emerging Financial Superpowers: How U.S. Regulators Should Respond*, 40 GEO. J. INT’L L. 1239, 1245 (2009).

87. See Douglas J. Wood, *Say Hello to the World’s New Sovereign Nations: Facebook, Google and RIM*, CORPORATE COUNSEL, Nov. 24, 2010, available at <http://tinyurl.com/6xqnfse>.

88. See Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT’L L. 955, 961 (2005).

incentive for misconduct exists if the public actor knows there is an exemption of civil liability by virtue of corporate conduct.⁸⁹

2. *States Acting in the Private Sphere*

A similar disconnect between traditional roles has occurred between states and the private sector. For example, states have taken on a private actor role in the emergence of SWFs as financial superstars. SWFs, and their state owners, are increasingly acquiring ownership stakes in corporations all over the globe. Whether a SWF controls, dominates, or outright buys a corporation, there can be no doubt that such activity represents involvement in a traditionally “non-state” activity, resulting in a type of hybrid capitalism whereby sovereigns are conducting business as private actors.⁹⁰

As states are engaging in private-actor functions, the distinction between states and corporations are eviscerating. Accordingly, the theoretical underpinning for holding only states as bearing international legal obligations has similarly been eliminated.

CONCLUSION

The twenty-first century is witnessing a dramatic rise in the willingness of states to project economic power both at home and in host states through the same economic vehicles that threatened the states’ power in the twentieth century. The facilitating cause of this change in approach is the creation of the very system that frees economic actors from the constraints of territory and more closely binds public actors thereto. Just as private economic entities may now cross borders to affect transactions that maximize their wealth, so states are now discovering that they may do the same.

Thus, the roles of corporations as purely private actors and that of states as purely public actors is no longer in effect. Each distinct role has been replaced with a mixed role.

In today’s world, both states and corporations have similar or even identical interests. This coalition of interests underscores the blurring of the distinction between states and corporations. Given the reality of corporations being wealthier than states and the blurring distinction between states and corporations, the failure to impose obligations upon corporations because corporations are distinct from states is no longer valid.

89. See *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494–95 (1909) (“[N]o good reason why corporations may not be held responsible for and charged with the knowledge and purpose of their agents. . . . If it were not so, many offenses might go unpunished . . .”).

90. Wood, *supra* note 87.

Similar to state interests, corporations also have no enduring values other than goals of power and wealth. There is an absence of any reason, let alone a compelling one, militating toward treating a corporation differently so as to exempt them from liability.

The Second Circuit's holding in *Kiobel* is wrong. There is an absence of support for opining that *Sosa* mandates an examination of international law to determine whether corporations may have liability. However, even assuming *arguendo* that *Sosa* mandates that international law controls, all of the evidence establishes that, in the civil context, international law recognizes corporate liability. In sum, there is an absence of reasons supporting non-liability and an abundance of reasons in support of corporate liability.