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## *Kiobel* and Corporate Immunity Under the Alien Tort Statute: The Struggle for Clarity Post-*Sosa*

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### I. INTRODUCTION

In September 2010, a two-judge Second Circuit majority ruled that corporations are immune from liability under the Alien Tort Statute (“ATS”).<sup>1</sup> This statute, which grants aliens access to federal district courts, has emerged as a controversial tool for international norm enforcement in the last thirty years. The unexpected decision to foreclose corporate liability has generated a wave of criticism from human rights activists and international law scholars who claim that the decision is grounded in a fundamental misunderstanding of international law.

This commentary examines the *Kiobel* decision against other recent interpretations of the ATS, especially those following the Supreme Court’s decision in *Sosa v. Alvarez-*

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<sup>1</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *reh’g en banc denied*, No. 06-4800-cv, 2011 WL 338048 (2d Cir. Feb. 4, 2011).

*Machain*. Although corporate immunity makes little sense doctrinally, this commentary attempts to provide a rationale for the Second Circuit's decision. The *Kiobel* decision was largely the product of policy concerns about expanded use of the ATS. And it stems from the Supreme Court's mandate to lower federal courts to exercise "vigilant doorkeeping": narrowing ATS claims to those that arise under "customary international norms."<sup>2</sup> Confusion over what body of law determines enforcement standards has resulted in varying interpretations of ATS jurisdictional boundaries, and has contributed to the vigorous Second Circuit decision in *Kiobel*.

Following further consideration among the circuits, the Supreme Court should address whether the ATS allows corporate liability, aiding and abetting liability, and liability for purely extraterritorial suits. Eliminating liability under any of these theories would have resulted in dismissal in *Kiobel*. However, sweeping rules may screen out meritorious cases. The question then becomes what set of rules would achieve the optimal result, minimizing over-screening while adhering to the Supreme Court's requirement of caution.

Critics (including the U.S. government) warn that a lack of principled limits will have negative systemic effects, including dire consequences for U.S. foreign policy. However, human rights activists discount these predictions as unfounded and exaggerated. They focus on the ATS's important role in the development of principles of international accountability, and the importance of granting victims of atrocities access to the U.S. judicial system. As the international enforcement system stands, "[a]dherence to internationally recognized human rights norms remains largely voluntary, and current mechanisms for international enforcement have had little impact on abusive behavior."<sup>3</sup> ATS litigation provides a unique opportunity for redress for victims of crimes against humanity. However, it remains to be seen whether the benefits of ATS litigation outweigh potential harms to U.S. foreign policy. In articulating the boundaries of ATS jurisdiction, the federal courts must continue to balance the United States' current international obligations with principles of international comity. The Supreme Court has categorically rejected the imposition of liability that threatens diplomatic relations, and would likely continue to do so in this context. It is unlikely that the Supreme Court would support an ATS claim on a theory of aiding and abetting liability in a purely extraterritorial case when the systemic effects pose great risk to U.S. interests.

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<sup>2</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 729 (2004).

<sup>3</sup> See Terry Collinsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 183 (2002).

*A. History of the ATS*

Congress enacted the ATS in 1789 to provide a federal forum for suits against violators of “the law of the nations.”<sup>4</sup> The Continental Congress had previously issued a broad resolution for the states to “provide expeditious, exemplary, and adequate punishment” for international law infractions.<sup>5</sup> Critics of this policy found the idea of state intrusion into entirely foreign matters dangerous for foreign policy—James Madison wrote that “these articles [of confederation] contain no provision for the case of offences against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations.”<sup>6</sup> To protect against unfettered state discretion, Congress enacted the ATS as part of the First Judiciary Act, providing that “[t]he 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.”<sup>7</sup> Under the ATS, Congress created no new causes of action, but confirmed the availability of a federal forum for foreigners to bring cases against violators of the law of nations.<sup>8</sup>

The ATS lay largely dormant until 1980, when the Second Circuit interpreted the statute to allow suits by aliens against defendants in the United States who allegedly committed human rights violations overseas.<sup>9</sup> The Supreme Court affirmed this interpretation in *Sosa*. The Supreme Court concluded that Congress had extended federal court jurisdiction to encompass claims based on “the present-day law of nations,” provided that such claims “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of 18<sup>th</sup>-century paradigms we have recognized.”<sup>10</sup> But the Supreme Court noted that international liability can be imposed only when the norms are “specific,

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<sup>4</sup> 28 U.S.C. § 1350 (2010).

<sup>5</sup> 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136 (Gaillard Hunt ed., Washington Gov’t Printing Office, 1912). The journals specifically referred to “the violation of safe conducts or passports . . . the commission of acts of hostility against [U.S. allies] . . . [and] infractions of the immunities of ambassadors and other public ministers.” *Id.*

<sup>6</sup> THE FEDERALIST No. 42 at 233 (James Madison).

<sup>7</sup> 28 U.S.C. § 1350 (2010).

<sup>8</sup> *Sosa*, 542 U.S. at 711.

<sup>9</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), dubbed the human rights movement’s *Brown v. Board of Education*, 349 U.S. 294 (1955), by Harold Koh. See Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991).

<sup>10</sup> *Sosa*, 542 U.S. at 725. Lower courts have understood these analogues to include prohibitions on genocide, war crimes, crimes against humanity, torture, summary execution, and forced labor. See *Kadić v. Karadžić*, 70 F.3d 232, 241 (2d Cir. 1995) (concerning genocide and war crimes); *Sosa*, 542 U.S. at 729 (concerning crimes against humanity), *Abebe-Jira v. Negewo*, 72 F.3d 844, 847–48 (11th Cir. 1996) (concerning torture); *Hilao v. In re Estate of Marcos*, 25 F.3d 1467, 1474–75 (9th Cir. 1994) (concerning summary execution), *Doe v. Unocal*, 395 F.3d 932, 945 (2002) (concerning forced labor).

universal and obligatory.”<sup>11</sup> Additionally, the Court cautioned that “the determination whether a norm is sufficiently definite to support a cause of action should (and . . . inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”<sup>12</sup> In doing so, the Court made clear that the scope of liability must go no further than the *jus cogens* law of nations (universally recognized “compelling law”) while preserving judicial discretion in the application of the ATS.

*B. Corporate Liability—Who Can Be Held Responsible under the ATS?*

As the Supreme Court has recognized, “the [ATS] by its terms does not distinguish among classes of defendants . . . .”<sup>13</sup> Although *Sosa* confirmed that ATS cases could be brought against private actors as well as government officials, it left the question of corporate liability open for interpretation. A definitive response to this question proved elusive until the Second Circuit’s decision in *Kiobel*.

Most ATS suits against corporations arise under a theory of indirect liability, asserting corporate complicity in the actions of third parties.<sup>14</sup> In the federal courts, civil aiding and abetting liability is narrowly circumscribed.<sup>15</sup> However, in *Presbyterian Church v. Talisman Energy Inc.*, a case also brought under the ATS, Judge Cote found that aiding and abetting liability would lie only for *purposeful* facilitation.<sup>16</sup> This marked an important development in the interpretation of *Sosa*: in order to bring a suit under the

<sup>11</sup> *Sosa*, 542 U.S. at 748.

<sup>12</sup> *Sosa*, 542 U.S. at 732–33.

<sup>13</sup> *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).

<sup>14</sup> BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 24 (2d ed. 2008)

(“[M]ost corporate lawsuits allege corporate complicity in abuses committed by government security forces or private paramilitary groups.”).

<sup>15</sup> In *Central Bank v. First Interstate Bank of Denver*, 511 U.S. 164, 188–91 (1994), the Supreme Court held that the doctrine of civil aiding and abetting could not be applied to a judicially crafted private right of action without legislative authorization. See also *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162–63 (2008) (refusing to authorize liability in suits beyond those brought by the limited parties indicated in the statute).

<sup>16</sup> *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 453 F. Supp. 2d 663, 668 (S.D.N.Y. 2006). This holding was echoed in *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 270 (2d Cir. 2007) (Katzmann, J., concurring) (“[T]he individual responsibility of a defendant who aids and abets a violation of international law . . . has been frequently invoked in international law instruments as an accepted mode of liability [and] has been repeatedly recognized in numerous international treaties . . .”), and was applied most recently in *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005). The Ninth Circuit has proposed a more relaxed mens rea standard, allowing liability for knowing facilitation. See *Doe v. Unocal*, 395 F.3d 932, 949 (9th Cir. 2002).

ATS, not only must the complaint allege the violation of an international norm, but this norm must also guide domestic enforcement.

### C. *Kiobel and Corporate Liability*

Against this backdrop came the *Kiobel* case, in which a class of Nigerian citizens sought to hold Royal Dutch Petroleum liable on the theory that its subsidiary corporation had been complicit in human rights violations committed by the Nigerian military. Judge Cabranes, writing for the Second Circuit, declined to order dismissal of the litigation for lack of purposeful aiding and abetting. Instead, Judge Cabranes held that the ATS does not provide subject matter jurisdiction over claims against corporations for two reasons: (1) *Sosa* requires that the courts “look to international law to determine whether a particular class of defendant, such as corporations, can be liable under the Alien Tort Statute for alleged violations of the law of nations,” and (2) “[t]he concept of corporate liability for violations of customary international law has not achieved universal recognition or acceptance as a norm in the relations of States with each other.”<sup>17</sup> Judge Cabranes further reasoned that the absence of corporate liability under international law embodies a recognition by the international community that “moral and legal responsibility for heinous crimes should rest on the individual whose conduct makes him or her ‘*hostis humani generis*, an enemy of all mankind.’”<sup>18</sup> Judge Cabranes acknowledged that certain nations and treaties recognize corporate liability, but concluded that this does not mean that the rule has achieved “universal recognition and acceptance as a norm in the relations of States *inter se*.”<sup>19</sup>

While Judge Leval concurred and concluded that the claim should be dismissed for pleading inadequacies under Federal Rule of Civil Procedure 12(b)(6), he vigorously disagreed with Judge Cabranes’ core holding, finding ample support for civil corporate liability in international law. Judge Leval explained that the lack of a widespread agreement on the issue of corporate liability is consistent with the structure of the international justice system. International law, according to Judge Leval, “prescribes norms of conduct. It identifies acts (genocide, slavery, war crimes, piracy, etc.) that it prohibits.”<sup>20</sup> The question of civil liability and the manner of remedy are to be determined by each state—and the United States “has chosen through the ATS to impose civil liability.”<sup>21</sup>

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<sup>17</sup> *Kiobel*, 621 F.3d at 149.

<sup>18</sup> *Id.* at 149 (quoting *Sosa*, 542 U.S. at 732).

<sup>19</sup> *Id.* at 149.

<sup>20</sup> *Kiobel*, 621 F.3d at 175 (Leval, J., concurring).

<sup>21</sup> *Id.*

## II. WHY THE *KIOBEL* COMPLAINT SHOULD HAVE BEEN DISMISSED ON OTHER GROUNDS

### A. *Sosa* and the Customary International Norm of Corporate Liability

Judge Cabranes required dismissal in *Kiobel* by holding that “international law . . . has never extended the scope of liability [for a violation of a given norm] to a corporation.”<sup>22</sup> However, this position is difficult to square with Judge Leval’s analysis, as well as an outpouring of amicus curiae briefs summarizing modern international law scholarship supportive of corporate liability for human rights violations. The corporate immunity theory was largely unanticipated by the parties—the defendants barely briefed this argument.<sup>23</sup> And while Judge Cabranes’ reasoning focuses on customary international law practices as central to his rationale for corporate immunity, international bodies have recognized corporate liability along with individual responsibility for the past century.<sup>24</sup>

Although *Sosa* limited application of the ATS by requiring a violation of “customary international law,” it is unclear how strictly the Court intended the customary international norm standard to be applied.<sup>25</sup> And while the decision undoubtedly set a “high bar to new private causes of action for violating international law,” it remains unclear whether both the violation and cause of action must have a basis in customary

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<sup>22</sup> *Kiobel*, 621 F.3d at 119.

<sup>23</sup> The majority of the defendant’s brief focused on aiding and abetting liability. The theory of corporate immunity was first briefed before the Second Circuit (and rejected) in *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d. See, e.g., Brief of Joint Defendant-Appellees at 413–14, *Khulumani v. Barclay Nat’l Bank Ltd.*, No. 05-2131 (Oct. 4, 2005). But Judge Korman’s partial dissent accepted this theory. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d at 321 (Korman, J., concurring in part and dissenting in part).

<sup>24</sup> For examples, see *infra* note 35.

<sup>25</sup> *Sosa* directs the courts to impose liability only when defendants violate definite norms accepted among civilized nations. See *Sosa*, 542 U.S. at 732. *Sosa*’s general standard has been understood in different ways by different courts. For example, critics of the *Talisman* decision find fault with Judge Cote’s broad reading of customary international law. In the early stages of the *Kiobel* litigation, the district court conceded that “[i]t is a close question whether, following *Sosa*, private individuals can be held liable under the ATS for aiding and abetting violations of international law.” *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 463 (S.D.N.Y. 2006) [hereinafter “District Court Order”]. This recognizes that aiding and abetting liability under international law may not meet the “high bar” required by *Sosa*. Arguments for foreclosing aiding and abetting liability completely were briefed by the defendants in *Kiobel*. And amicus curiae briefs submitted by the United States urged the Second Circuit to reject all claims for civil secondary liability under the ATS for violations of the law of nations in *Ntsebeza* and *Khulumani*. See e.g., Brief for the United States as Amicus Curiae Supporting Petitioners, *American Isuzu Motors, Inc., v. Ntsebeza*, No. 07-919 (Feb. 11, 2008); Brief for the United States as Amicus Curiae Supporting Petitioners, *Khulumani v. Barclay Nat’l Bank Ltd.*, No. 05-2141-cv (Oct. 14, 2005).

international law.<sup>26</sup> Justice Souter's majority opinion suggested an interpretation recognizing enforcement of international legal norms under "federal common law." He wrote that "[w]hatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under *federal common law* for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."<sup>27</sup> This language implies that causes of action can be fleshed out under federal common law principles,<sup>28</sup> which squares with previous decisions in the lower courts, both before and after *Sosa*, that have applied federal common law rules in ATS cases.<sup>29</sup>

This standard became muddled in Justice Breyer's concurrence, which noted that, "[t]he norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue."<sup>30</sup> By this logic, it appears that international law is determinative of the enforcement mechanism. The *Sosa* decision seemingly invites federal courts to limit the reach of federal common law according to international customs establishing *who* can be sued.<sup>31</sup>

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<sup>26</sup> *Sosa*, 542 U.S. at 727.

<sup>27</sup> *Sosa*, 542 U.S. at 732 (emphasis added).

<sup>28</sup> See also Thomas H. Lee, *The Safe Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006) ("[C]ommon law . . . supplied the right to sue and defined the elements of the cause of action; the international law reference was necessary only to identify when aliens were entitled to sue.").

<sup>29</sup> See, *e.g.*, *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005); *Doe I v. The Gap, Inc.*, No. cv-01-0031, 2001 WL 1842389 (D. N. Mariana Islands Nov. 26, 2001); *Kadić v. Karadžić*, 518 U.S. 1005 (1996).

<sup>30</sup> *Sosa*, 542 U.S. at 760 (Breyer, J., concurring in part and concurring in the judgment).

<sup>31</sup> This principle was echoed in the Second Circuit's decision in *Kadić*:

In order to determine whether the offenses alleged by the appellants in the litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a particularized examination of these offenses, mindful of the important precept that "evolving standards of international law govern who is within the [ATS's] jurisdictional grant."

70 F.3d at 241 (quoting *Amerada Hess Shipping Corp. v. Argentine Rep.*, 830 F.2d 421, 425 (2d Cir. 1987)). The analysis is further complicated by footnote 20 in Justice Souter's *Sosa* opinion, which reads: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20. Judge Cabranes read this footnote to reveal the Court's intent to distinguish corporations from individual actors. *Kiobel*, 621 F.3d at 126. However, Judge Leval reasoned that the intended meaning was that the two categories were to be treated identically. *Kiobel*, 621 F.3d at 164 (Leval, J., concurring). Katzmann's *Kbulumani* concurrence supports this reading: "It is perhaps not

Undoubtedly, practical problems result from requiring a court to turn to customary international law in order to determine whether a given perpetrator may be brought into court. It is clear that in order to bring a case under the ATS, *Sosa* requires that a tort be committed in violation of a specific, universal, and obligatory norm of international law. However, international law does not determine who can be sued and how.<sup>32</sup> The logical outgrowth of requiring international law to govern enforcement would render the ATS stillborn in all cases of civil liability,<sup>33</sup> an idea explicitly rejected by the Supreme Court in *Sosa*.<sup>34</sup> In fact, *Filartiga*, the seminal ATS

surprising that neither the defendants nor the United States raised [corporate immunity] as a bar to liability: We have repeatedly treated the issue of whether corporations may be held liable under the AT[S] as indistinguishable from the question of whether private individuals may be.” 504 F.3d at 282 (Katzmann, J., concurring). Legal scholars have agreed with this reading of footnote 20: “[In this footnote,] [t]he Court implicitly rejected the propositions that corporations are *in principle* immune from liability under international law or that the prospect of abusive lawsuits required a narrow interpretation of the ATS.” Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2284 (2004).

<sup>32</sup> Susan Farbstein and Tyler Giannini support this proposition:

The *Kiobel* majority’s logic conflates normative prohibitions with enforcement regimes by requiring both elements to establish a violation of customary international law. This is simply not how the international legal system works. The international legal system plays two critical roles in the arena of human rights: first, it establishes acceptable norms of conduct, such as prohibitions on torture, extrajudicial killing, and war crimes; and second, it provides, when possible and desirable, enforcement mechanisms that supplement and support domestic enforcement of the established norms. The structure of the international legal system is thus especially important in conflict zones, where the domestic legal system is often absent or fails to function effectively. In situations where the state is embroiled in abuses and unable to pursue perpetrators, the international system must protect international human rights norms by filling enforcement gaps.

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, 124 (2010), available at [http://www.harvardilj.org/2010/11/online\\_52\\_giannini\\_farbstein/](http://www.harvardilj.org/2010/11/online_52_giannini_farbstein/).

<sup>33</sup> As stated by the court in *Doe v. Nestle, S.A.*, No. cv-05-5133 svw, 2010 WL 3969615 (C.D. Cal. Sept. 8, 2010):

In short, even in the absence of a universally recognized civil cause of action that exists under international law, the Alien Tort Statute provides a domestic civil cause of action which incorporates the universally recognized norms of international law, regardless of whether they are criminal or civil. To hold otherwise would render *Sosa*’s references to Blackstone superfluous and, indeed, would cause the entire foundation of the Alien Tort Statute to crumble, given that there is no universally recognized norm of private civil liability for international law violations.

*Id.* at \*9.

<sup>34</sup> *Sosa*, 542 U.S. at 694.



case affirmed by the *Sosa* Court, would have been wrongly decided under *Kiobel's* logic.<sup>35</sup>

However, even under the exacting “international norm test” recognized by Judge Cabranes, imposition of corporate civil liability should be possible in certain cases. In *Flores v. Southern Peru Copper Corp.*, Judge Cabranes himself outlined the relevant sources of international law for purposes of the ATS:

the proper primary evidence consists only of those ‘conventions’ (that is treaties) that set forth ‘rules expressly recognized by the contesting states,’ . . . ‘international custom’ insofar as it provides ‘evidence of a general practice accepted as law,’ . . . and ‘the general principles of law recognized by civilized nations’ . . .”<sup>36</sup>

It is difficult to square a complete preclusion of corporate liability with this set of criteria. A survey of international treaties provides ample evidence that corporations can be liable for violations of international law.<sup>37</sup> And while the *Kiobel* majority

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<sup>35</sup> See Brief for International Law Scholars as Amici Curiae Supporting Plaintiffs-Appellants-Cross-Appellees at 5–6, *Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4800-cv (Oct. 14, 2010), urging rehearing in *Kiobel*.

The *Kiobel* panel would apparently have required the *Filartiga* plaintiffs to demonstrate that torturers were universally held civilly liable in courts of third countries. Of course, no such demonstration could have been made at the time, because state-sponsored torture—though common—had never grounded an award of civil damages from the torturer to the victim in the domestic courts of that State, let alone some other country.

*Id.* at 5–6.

<sup>36</sup> 414 F.3d 233, 251 (2d Cir. 2003) (citing Art. 38 of the Charter of the Int’l Court of Justice).

<sup>37</sup> For example, the European Convention on the Prevention of Terrorism, May 16, 2005, art. 10(1), C.E.T.S. No. 196 (2005) states that “Each Party shall adopt such measures as may be necessary, in accordance with its legal principles, to establish the *liability of legal entities* for participation in the offenses set forth in Articles 5 to 7 and 9 of this Convention”(emphasis added). The commentary makes clear that the Convention intends to provide for “the liability of legal entities in addition to that of individuals.” Explanatory Report on the European Convention on the Prevention of Terrorism, May 16, 2005, § 26, C.E.T.S. No. 196 (2005). The Convention against Transnational Organized Crime, Nov. 15, 2000, art. 10(1), 2225 U.N.T.S. 209, signed by the United States, provides that:

Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the *liability of legal persons* for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8, and 23 of this Convention.

(emphasis added). The Convention against Transnational Organized Crime distinguishes legal persons from natural persons in art. 10(3). Article 2 of the Convention on Combating Bribery

considered individual civil liability to be sufficiently established in international law, it overlooked the fact that the legal regimes governing these wrongs do not distinguish between natural and juridical persons.<sup>38</sup>

Even if treaties and other sources of customary international law did not clearly provide for corporate civil liability, the court would still be entitled to look more broadly to the acceptance of corporate liability within the world's legal systems in order to determine whether corporate liability is a "general principle of law common to legal systems around the world."<sup>39</sup> Foreign legal systems recognize corporate personhood.<sup>40</sup> Further, some form of corporate liability for serious harms is a universal feature of legal systems across the globe.<sup>41</sup>

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of Foreign Public Officials in International Business Transactions states that "Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the *liability of legal persons* for the bribery of foreign public official." Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, art. 2, S. Treaty Doc. No. 105-43, 37 I.L.M. 1 (1998). And the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, defines "person" to mean "any natural or legal person," Mar. 22, 1989, 1673 U.N.T.S. 57, art. 2(14). The International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 3, 1973 art. I(2), 1015 U.N.T.S. 243, ratified by 107 states, provides that "The States Parties to the present Convention declare criminal those *organizations, institutions, and individuals* committing the crime of apartheid." The International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S., defines "person" to be "any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions." *See also* Brief for International Law Scholars as Amici Curiae Supporting Plaintiffs-Appellants-Cross-Appellees at 8-10, *Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4800-cv (Oct. 14, 2010).

<sup>38</sup> For examples, see *supra* note 35.

<sup>39</sup> *Flores*, 414 F.3d at 251.

<sup>40</sup> *See* *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-29 & n.20, (citing *Barcelona Traction, Light and Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3, at 38-39 (Feb. 5)).

<sup>41</sup> In his dissent, Judge Leval quoted the Chairman of the Rome Statute's Drafting Committee as saying, "all positions now accept in some form or another the principle that a legal entity, private or public, can, through its policies or actions, transgress a norm for which the law, whether national or international, provides, at the very least damages." *Kiobel*, 621 F.3d at 168-69 (quoting M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 379 (2d rev. ed. 1999)). *See also* 3 INT'L COMMISSION OF JURISTS, *CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: CIVIL REMEDIES* 5 (2006) ("[W]hen the legal accountability of a company entity is sought, the law of civil remedies may often provide victims with their only legal avenue to remedy. *This is because the law of civil remedies will always have the ability to deal with the conduct of companies, individuals and state authorities.*") (emphasis added), quoted in *Kiobel*, 621 F.3d at 169.

Beyond this, corporate liability for certain *jus cogens* crimes fits a key purpose of modern international law: to provide meaningful remedies for crimes against humanity. Under international law, the obligation to redress crimes against humanity is required of all sovereign nations.<sup>42</sup> Removing liability for corporations that commit crimes against humanity could allow governments to privatize around this obligation.<sup>43</sup>

#### B. Possible Policy Reasons for the *Kiobel* Decision

In his concurring opinion, Judge Leval urged dismissal of the *Kiobel* case under *Ashcroft v. Iqbal* and *Talisman* on the ground that the plaintiffs did not state a plausible claim of purposeful aiding and abetting.<sup>44</sup> The Second Circuit majority might have

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<sup>42</sup> See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (“where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”); *The Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 87, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (“As part of their duty to protect, States are required to take appropriate steps to investigate, punish, and redress corporate-related abuse of the rights of individuals within their territory and or/jurisdiction—in short, to provide access to a remedy.”); *General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant* [International Covenant on Civil and Political Rights], U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8 (“[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities.”), cited and quoted in Brief for International Law Scholars as Amici Curiae Supporting Plaintiffs-Appellants-Cross-Appellees at 13–14, *Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4800-cv (Oct. 14, 2010). See also Brief for Human Rights and Labor Organizations as Amici Curiae Supporting Plaintiffs-Appellants’ Petition for Rehearing and for Rehearing En Banc at 12, No. 06-4800-cv (Oct. 14, 2010).

<sup>43</sup> See Giannini & Farbstain, *supra* note 32, at 132 (“In essence, the majority’s rule would have permitted the German state to privatize the gas chambers with the result that a company like I.G. Farben would then have been able to exterminate millions of people for profit with impunity. This stark example illustrates how the *Kiobel* court’s rule might incentivize states to abdicate power to corporate actors, which would then use the corporate form as a shield from civil liability and a means of protecting illicit profits.”); Steinhardt, *supra* note 31, at 2288 (“There is certainly no rule that corporations, regardless of their relationship with a government, enjoy immunity for their state-like or state-related activities, as when they interrogate detainees, provide public security, work weapons systems in armed conflict, or run prisons . . .”).

<sup>44</sup> Judge Leval explained that the claim should be dismissed for failure to state a claim on which relief can be granted:

ordered dismissal of the case for this reason instead of eliminating corporate civil liability under the ATS. The strained doctrinal analysis (which is in tension with Judge Cabranes' earlier articulation of standards under the ATS after *Sosa*<sup>45</sup>) suggests that broader policy concerns motivated this decision. These same policy concerns were central to Chief Judge Jacobs' opinion supporting denial of re-hearing in the *Kiobel* case.<sup>46</sup>

Several concerns stand out. Beyond the practical difficulty of adjudicating disputes between aliens in the United States, broadening the ATS could seriously impact U.S. foreign relations.<sup>47</sup> This concern is especially relevant to the imposition of liability for

[I]t fails to state a proper legal claim of entitlement to relief. The Complaint alleges that the Appellants—the parent holding companies at the apex of the huge Royal Dutch Shell international, integrated oil enterprise—are liable under the ATS on the theory that their actions aided the government of Nigeria in inflicting human rights abuses on the Ogoni peoples in the jungles of Nigeria. The allegations fall short of mandatory pleading standards. We recently held in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, that liability under the ATS for *aiding and abetting* in a violation of international human rights lies only where the aider and abettor acts *with a purpose* to bring about the abuse of human rights. Furthermore, the Supreme Court ruled in *Asbroft v. Iqbal*, 129 S. Ct. 1937 (2009), that a complaint is insufficient as a matter of law unless it pleads specific facts supporting a plausible inference that the defendant violated the plaintiff's legal rights. Putting together these two rules, the complaint in this action would need to plead specific facts that support a plausible inference that the Appellants aided the government of Nigeria *with a purpose* to bring about the Nigerian government's alleged violations of the human rights of the plaintiffs.

*Kiobel*, 621 F.3d at 153–54 (Leval J., concurring) (citations omitted).

<sup>45</sup> See *Flores*, 414 F.3d at 248.

<sup>46</sup> See Opinion Concurring in the Denial of Panel Rehearing, *Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4800-cv, 2011 WL 338048 (2d Cir. Feb. 4, 2011) (Jacobs J., concurring) [hereinafter “Opinion Concurring in the Denial of Panel Rehearing”], which sought to subject “Judge Leval’s conclusion to some tests of reality.”

<sup>47</sup> In *American Isuzu Motors, Inc. v. Ntsebeza*, plaintiffs contended that by conducting business in South Africa, defendants aided and abetted violations of international law committed by the apartheid-era South African government, and for that reason, were liable under the ATS. Brief for the United States as Amicus Curiae Supporting Petitioners at I, *American Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (2008). This litigation was condemned by South Africa’s democratically elected government as a “completely unacceptable” infringement of that nation’s sovereignty and inconsistent with its domestic policy of reconciliation. *Id.* at 19. The United States also objected that such litigation would create tension with South Africa. *Id.* Further, the litigation was inconsistent with the United States’ strong support for South Africa’s reconciliation policy. *Id.* at 2. Citing the concerns expressed later by South Africa and the United States in *American Isuzu Motors Inc. v. Ntsebeza*, *Sosa* identified these types of cases as ones where “a policy of case-specific deference to the political branches” could well preclude “relief in the federal courts for violations of customary international law.” *Sosa*, 542 U.S. at 733

aiding and abetting foreign sovereigns, which could effectively put foreign governments on trial.<sup>48</sup> Aiding and abetting litigation involving foreign governments comes closest to violation of the constitutional mandate that the Executive Branch conduct foreign policy.<sup>49</sup> In *Sosa*, the Court addressed these very points and strongly warned against extending the ATS due to the adverse impact on U.S. interests.<sup>50</sup>

Judge Cabranes' high "customary norm" requirement speaks to these concerns. Without requiring courts to follow norms established as clear customs of international law, foreign nations might oppose the imposition of U.S. domestic standards on their

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<sup>48</sup> Chief Judge Jacobs points out statements by South African President Thabo Mbeki prior to the Second Circuit's decision in *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007): "We consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which have no responsibility for the well-being of our country." *See* Opinion Concurring in the Denial of Panel Rehearing, 2011 WL 338048.

<sup>49</sup> For arguments supporting complete deference to executive interpretation of treaties, see Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 649 (2000) (2002); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1202 (2007).

<sup>50</sup> Justice Breyer has written that:

[s]ince enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement. In applying those principles, courts help ensure that 'the potentially conflicting laws of different nations' will 'work together in harmony,' a matter of increasing importance in an ever more interdependent world. . . . Such consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote.

*Sosa*, 542 U.S. at 761 (citations omitted). Justice Souter, writing for the majority, also discussed the foreign policy implications of cases under the ATS:

It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits . . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.

*Sosa*, 542 U.S. at 727–28.

citizens.<sup>51</sup> Judge Cabranes refused to recognize liability without the clearest indication that it would be acceptable to the majority of foreign nations.

Judge Cabranes' decision to foreclose corporate liability was also apparently motivated by a concern about use of the statute to coerce unwarranted settlements from corporate defendants.<sup>52</sup> Although no ATS suit has resulted in a monetary judgment against a major corporation, the pressure on corporate defendants to settle ATS cases is great (even when the underlying claims of complicity are weak).<sup>53</sup> These perverse incentives have the greatest potential for foreign policy conflicts—expansive ATS litigation will bring more defendants into United States courts for conduct that may have been approved by foreign officials.

Judge Leval himself provides policy reasons cutting against broad corporate liability. He writes that:

[t]he only form of punishment readily imposed on a corporation is a fine, and this form of punishment, because its burden falls on the corporation's owners or creditors (or even possibly its customers if it can succeed in passing on its costs in increased prices), may well fail to hurt the persons responsible for the corporation's misdeeds. Furthermore, when the time comes to impose punishment for past misdeeds, the corporation's owners, directors, and employees may be completely different persons from those who held the positions at the time of the misconduct. What is more, criminal prosecution of the corporation can undermine the objectives of criminal law by

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<sup>51</sup> See Opinion Concurring in the Denial of Panel Rehearing, 2011 WL 338048 (“I cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them—and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees. Such proceedings have the natural tendency to provoke international rivalry, divisive interests, competition, and grievance—the very opposite of the universal consensus that sustains customary international law.”)

<sup>52</sup> More than half of the companies included in the Dow Jones Industrial Average have been named as defendants in ATS actions. See Brief for Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner at 19–20, *Pfizer, Inc. v. Abdullahi*, No. 09-34 (2d Cir. Aug. 10, 2009).

<sup>53</sup> See *Kiobel*, 621 F.3d at 116 n.7. See also Opinion Concurring in the Denial of Panel Rehearing, 2011 WL 338048 (“Courts should take care that they do not become instruments of abuse and extortion. If there is a threshold ground for dismissal . . . it should be considered and used . . . . In short, this case has no practical effect except for the considerable benefit of avoiding abuse of the courts to extort settlements.”)

misdirecting prosecution away from those deserving of punishment.<sup>54</sup>

This problem is most acute when a corporate parent is made to pay for the transgressions of its subsidiary. The wealth transfer does not affect those at fault, impacting only innocent shareholders and customers. There is no international norm rendering a parent company liable for misdeeds of a separate corporate subsidiary.<sup>55</sup> Even in the United States, a parent company is typically not responsible civilly for actions of a subsidiary unless the subsidiary is only a branch or division and thus not a separate legal entity.<sup>56</sup>

Under an economic theory of deterrence, a corporation should be made to pay for all profits accumulated as a result of its bad behavior.<sup>57</sup> But that rationale does not justify ignoring separate corporate identity, a basic feature of modern corporate law. On balance, imposing liability on a parent company for a subsidiary's misconduct—as sought by the *Kiobel* plaintiffs—could have the harmful effect of chilling growth and multinational development, with a potential backlash for U.S. investment.<sup>58</sup>

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<sup>54</sup> *Kiobel*, 621 F.3d at 168 (Leval, J., concurring).

<sup>55</sup> See *Adams v. Cape Industries plc* [1990] Ch. 433 (Eng.) (stating separate entity rule under English law).

<sup>56</sup> “It is a general principle of corporate law deeply ‘ingrained in our . . . legal systems that a parent corporation . . . is not liable for the acts of subsidiaries.” *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). See also HENRY W. BALLANTINE, *BALLANTINE ON CORPORATIONS* § 138 (1946) (as a “general rule” ownership does not warrant imposition of liability “for torts of subsidiary.”).

<sup>57</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 142–43 (8th ed. 2008) (compensation serves to deter negligent behavior); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970).

<sup>58</sup> The alleged “assistance” on which plaintiffs in many ATS cases rest their claims of aiding and abetting may be the corporation's ordinary business activity conducted in a developing country where human rights abuses take place. This business activity may be a reflection of “constructive commercial engagement,” and a result of foreign policy intended to improve economic and social conditions in the developing country. See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioners at 21, *American Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (2008). The U.S. Government has warned that aiding-and-abetting liability would “have a deterrent effect on the free flow of trade and investment, because it would create uncertainty for those operating in countries where abuses might occur.” *Id.* at 20; see also *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1025 (W.D. Wash. 2005) (civil aiding and abetting under the ATS “could have significant, if not disastrous effects on international commerce”), *aff'd on other grounds*, 503 F.3d 974 (9th Cir. 2007). See also Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. INT'L L. 1, 34 (2007).

A system that imposes the risk of liability will incentivize corporations to take greater care when conducting business in conflict zones. However, the further the separation between the corporate defendant and the individual actors, the less likely it is that any liability imposed on the corporation will influence conduct. This concern should be given considerable weight in cases like *Kiobel*, but it does not explain the blanket elimination of corporate liability.

C. *Alternative Grounds for the Decision: The Future of the ATS*

Critics and supporters of the ATS have been unable to find much common ground regarding its limits or its broader purpose. While some celebrate the ATS as a victory for human rights advancement, critics caution that overuse would have serious foreign policy consequences. And while ATS litigation has yet to have substantial negative effects on U.S. foreign policy or the international economy, it must be acknowledged that the strategic interests of the United States and the normative interests of human rights advocates often differ.<sup>59</sup> Thus, an optimal judicial interpretation would maximize positive effects from ATS litigation while minimizing damage to U.S. interests. However, there is little consensus on how to strike that balance.<sup>60</sup> While the values embodied in international human rights law are universal,

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<sup>59</sup> See Abebe, *supra* note 58, at 29–33 (“The strategic interests of the United States and the normative interests of human rights advocates will not always converge. When they converge, the pursuit of normative goals through international human rights litigation complements the pursuit of strategic interests. For example, the United States’ attempts to contain the Soviet Union through the development of military and economic resources (security interests) and its opposition to the lack of democracy and basic human rights under communism (normative interests) satisfied both goals. In other cases, however, the normative preferences of the litigants and their advocates, while laudable, may conflict with the United States’ strategic interests and the foreign policy necessary to achieve them . . . . The filing of international human rights litigation directly implicates the executive branch’s foreign affairs prerogatives. First, the majority of ATS cases are dismissed on various procedural grounds. Despite this fact, the mere filing of litigation engages American foreign policy without producing any tangible benefit for the victims of human rights abuses. Second, even if international human rights litigation were more successful, there is little evidence that such litigation, by itself, results in an improvement of human rights practices in the targeted States.”).

<sup>60</sup> See, e.g., Jamie O’Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT’L. L.J. 295, 340 (2005) (recommending that “policymakers, activists, and survivors themselves should hesitate to pursue judicial action against human rights violators as a means for helping victims psychologically, until and unless further research shows that judicial actions have a net therapeutic effect on most survivors.”); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 154–55 (2004) (concluding that a functional analysis of the ATS reveals that its costs outweigh its benefits); GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 14 (2003) (predicting that expanding ATS litigation against corporations will cause severe disruption to the United States and global economies); Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2



the question remains whether the federal court system is the best mechanism to advance normative human rights practices overseas.<sup>61</sup>

Both Judges Leval and Cabranes agreed that the *Kiobel* litigation had to be dismissed. Yet their strong disagreement over the limits of liability reveals the difficulties inherent in interpretation of the ATS. The Supreme Court has required that federal courts vigilantly guard their doors without offering specific guidance. As a result, various categorical “doorkeeping” standards have emerged in federal court litigation.

Dismissing *Kiobel* due to a lack of purposeful aiding and abetting is an alternative ground for this decision,<sup>62</sup> which can be resolved at the pleading stage according to Judge Leval.<sup>63</sup> Elimination of aiding and abetting liability would certainly be consistent

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CHI. J. INT'L L. 457, 459–70 (discussing foreign policy and sovereignty costs for the United States and the global community from ATS litigation). The other side of the debate points to an important function of ATS litigation: enhancing the legitimacy of international law, see Harold Koh, *Transnational Process*, 75 NEB. L. REV. 181, 194–201 (1996); the importance of ATS litigation in enforcing human rights norms, see Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 981 (2004); and that corporate complicity furthers constructive engagement, see Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207 (2008).

<sup>61</sup> See Abebe, *supra* note 58, at 46 (“As others have noted, the federal judiciary is not best suited to determine amorphous, indeterminate new CIL norms on a case-by-case basis. First, the new CIL’s methodological incoherence and rapidly changing content are so contested that seasoned scholars of international law strongly disagree about how to identify or even determine the existence of many purportedly universal new CIL norms. Second, federal judges ‘have, at most, a superficial familiarity with the theory of law creation in the international legal system and only the vaguest notion of how the system functions.’ Third, federal judges also lack appropriate guidance as ‘neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure make reference to methods or requirements for pleading or proving customary international law in United States courts.’ This is not a criticism of the capacity of U.S. federal judges; rather, it is a description of the new CIL’s unclear methodology and the difficulties that federal judges face in adjudicating international human rights claims.”).

<sup>62</sup> In *In re South African Apartheid Litigation*, Judge Sprizzo held that Congress did not intend to include aiding and abetting liability under the ATS, drawing support from *Sosa*: “To allow for expanded liability, without congressional mandate, in an area that is so ripe for non-meritorious and blunderbuss suits, would be an abdication of this Court’s duty to engage in ‘vigilant doorkeeping.’” 346 F. Supp. 2d 538, 550–51 (S.D.N.Y. 2004). Other courts have allowed aiding and abetting claims against individuals under the ATS. See *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289, 320–24 (S.D.N.Y. 2003); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (“[B]y their terms, the ATCA and the TVPA are not limited to claims of direct liability.”); *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355–56 (N.D. Ga. 2002).

<sup>63</sup> *Kiobel*, 621 F.3d at 153–54 (Leval, J., concurring).

with the general trend in Supreme Court decisions.<sup>64</sup> This restriction also makes sense if the customary international law requirement does not control the cause of action. If the cause of action must be fleshed out under federal common law principles, it would be less likely to result in civil aiding and abetting liability, which is generally not accepted in the federal courts.<sup>65</sup> Accordingly, the Second Circuit might have rejected aiding and abetting claims involving sovereign nations entirely, as the State Department and Justice Department have advocated.<sup>66</sup>

In addition, it remains unclear whether the Supreme Court will allow purely extraterritorial controversies (involving no direct and substantial effect in the United States) to be litigated in U.S. courts if the risks to U.S. foreign policy are high and if an alternative remedy exists elsewhere.<sup>67</sup> The Justice and State Departments have opposed such applications of the statute, and have advocated dismissing claims brought by foreign persons against foreign defendants where the injuries took place solely on foreign soil, and where there was no direct and substantial impact within the United States.<sup>68</sup> The Supreme Court's latest decisions apply a presumption against

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<sup>64</sup> See *supra* note 15.

<sup>65</sup> See *supra* note 15.

<sup>66</sup> See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioners at 8, *American Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (2008) (“As this Court has explained, the creation of civil aiding and abetting liability is a legislative act separate and apart from the recognition of a cause of action against the primary actor, and one that the courts should not undertake without congressional direction. *Central Bank*, 511 U.S. at 182. Such ‘a vast expansion of federal law,’ *id.* at 183, is all the more inappropriate where, as here, it raises significant ‘risks of adverse foreign policy consequences,’ *Sosa*, 542 U.S. at 728.”); Brief of the United States of America as Amicus Curiae at 9, *Khulumani v. Barclay National Bank, Ltd.*, No. 05-2141-cv (Oct. 14, 2005) (“As the Supreme Court has held, the creation of civil aiding and abetting liability is a legislative act that the courts should not undertake without Congressional direction, and there is no indication in either the language or history of the ATS that Congress intended such a vast expansion of suits in this sensitive foreign policy area.”).

<sup>67</sup> For a discussion of purely extraterritorial suits, see Statement of Interest of the United States of America at 11–12, *Doe I v. Al Maktoum*, No. cv-07-293-ksf, 2008 WL 4965169 (E.D. Ky. Sept. 5, 2008) (“Plaintiffs have asked this Court to create a cause of action for violations of international norms alleged to have been committed entirely outside of the United States’ territorial jurisdiction by citizens of foreign nations against citizens of other foreign nations. In addition, plaintiffs ask the Court to refuse to defer to the UAE program, the foreign remedy created by those countries with the most significant interests in this matter, and expressly intended by those countries to be the exclusive remedy.”).

<sup>68</sup> See *id.* at 12–14 (“When construing a federal statute, there is a strong presumption that Congress does not intend to extend U.S. law over conduct that occurs in foreign countries . . . . This presumption was well-established at the time the ATS was adopted . . . the 1795 opinion of Attorney General Bradford, to which the Supreme Court referred in *Sosa* . . . states that insofar as ‘the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States.’ . . . . The presumption against extraterritoriality

interpreting federal statutes in such a broad extraterritorial fashion, noting the danger of conflict with the policy of other sovereign nations.<sup>69</sup> While the founders contemplated extraterritorial suits under the ATS for conduct such as piracy on the high seas, such misconduct has a direct and harmful impact on the United States and its internal economy.<sup>70</sup> Purely extraterritorial cases may be rare.<sup>71</sup> But the greater the distance between the allegedly harmful activities, the actors, and the United States, the greater the suspicion that ATS litigation is tantamount to “judicial imperialism.”<sup>72</sup>

Federal courts are courts of limited jurisdiction. Because federal judges are not elected officials, they are insulated from political pressure and are capable of ruling on the basis of legal principles. This premise is articulated by Bickel: “Judges have . . . the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of the government.”<sup>73</sup> But this important aspect of separated powers can result in decisions that conflict with the will of political officials, including the

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‘serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.’ . . . For the same reasons, there should be a compelling presumption against recognizing a power in the courts to project U.S. law into foreign countries through the fashioning of federal common law. In this case, none of the underlying events alleged to form the basis for plaintiffs’ claims occurred within the territorial jurisdiction of the United States or involved United States citizens. Claims arising from wholly extraterritorial conduct should not be recognized as actionable under the ATS. To hold otherwise and ignore the significant potential for serious adverse foreign policy consequences that would accompany extraterritorial application of U.S. law would be directly contrary to the purposes of the ATS and the Supreme Court’s admonition that courts must use ‘great caution’ in exercising their authority under that statute . . .”).

<sup>69</sup> However, the Supreme Court has declined to limit ATS suits against individuals engaged in illegal activities affecting this country. In *Samantar v. Yousuf*, the Supreme Court held that foreign government officials are not immune from ATS suits under the Foreign Sovereign Immunities Act. 130 S. Ct. 2278, 2282 (2010). Relying on *Sosa*, the Court explained that foreign government officials may still enjoy immunity when provided by customary international law. *Samantar*, 130 S. Ct. at 2292 (2010).

<sup>70</sup> But *F. Hoffman La-Roche Ltd. v. Empagran S.A.* makes clear that even a statute with potential extraterritorial reach for events harming U.S. commerce should not extend to purely extraterritorial disputes. 542 U.S. 155, 169 (2004). The *Sosa* litigation is not in conflict with this proposition, as it directly involved the U.S. government. The killing of a U.S. government official is a matter of strong U.S. concern.

<sup>71</sup> The United States has an interest in seeing perpetrators of genocide, slavery, and other crimes against humanity brought to justice as a member of the international community who must abide by its rules.

<sup>72</sup> President Mbeki claimed that the *Khulumani* decision was a form of “judicial imperialism.” See President Thabo Mbeki, Response to 15 National Assembly Question Paper (Nov. 8, 2007). See also *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 295 (2d Cir. 2007) (Korman, J., dissenting).

<sup>73</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 25–26 (1962).

President and his Secretary of State. The counter-majoritarian feature of judicial power becomes particularly worrisome in the context of international litigation, where legal standards are general and often imprecise. Conflicting policy coming from different branches of the government frustrates the State Department's ability to influence international affairs. It is the State Department's job to promote balanced resolutions of global policy issues.<sup>74</sup> As such, principled restrictions to ATS litigation make sense in protecting this important function within the Constitutional balance of powers. Larger issues of global importance are not for local juries to decide.<sup>75</sup>

It is true that bright line limits may potentially screen out meritorious cases. However, the Supreme Court has categorically rejected the imposition of liability that threatens diplomatic relations, and would likely continue to do in this context. While it is already difficult to bring a case under the ATS,<sup>76</sup> current screening mechanisms may not be adequate to contain expansive ATS litigation. It is unlikely that the Supreme Court would support an ATS claim on a theory of aiding and abetting liability in a purely extraterritorial case when the systemic effects pose great risk to U.S. interests.

In *Kiobel*, the Second Circuit has recently denied the petition for rehearing, by a five to four decision. Due to this divide within the court, and allegations of a circuit split, the plaintiffs will likely seek Supreme Court review. However, absent a genuine conflict among the circuits, the Supreme Court will probably deny *certiorari*.<sup>77</sup> Although other courts have approved corporate liability in dicta, no ruling has squarely opposed the *Kiobel* decision.<sup>78</sup> In addition, this is a poor vehicle for review at this early stage

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<sup>74</sup> See *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, No. 09-20084, 2011 WL 386871 (5th Cir. Feb. 8, 2011) (applying political question doctrine to preclude civil claims asserting collusion among private corporations and foreign government officials where private litigation of the matter would upset U.S. international relations).

<sup>75</sup> Further, collective state action through international agreement will have a greater effect than ad hoc judicial decisions coming from the federal courts. See Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses*, 26 NW. J. INT'L L. & BUS. 43 (2005).

<sup>76</sup> Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), it has become harder for weak cases to make it past the pleading stage. See Amanda Sue Nichols, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 FORDHAM L. REV. 2177 (2008).

<sup>77</sup> A conflict only exists when it can be said with confidence that another circuit would decide the same issue in the opposite way, based on a square ruling in a closely similar dispute. See EUGENE GRESSMAN ET. AL., SUPREME COURT PRACTICE 242 (2007).

<sup>78</sup> In *Sinaltrainal v. CocaCola*, the majority explained that:

[i]n addition to private individual liability, we have also recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations . . . (“[T]he law of this Circuit is that [ATS] grants jurisdiction from complaints of torture against corporate

because all judges agree that the *Kiobel* complaint should be dismissed. The Supreme Court will likely review standards for ATS litigation at a later date, as these issues continue to develop (and conflicts emerge) within the circuits. It may be prudent for the Court to wait for relevant empirical evidence to emerge that will help develop meaningful limits for this evolving mechanism of transnational justice. Congress, of course, can lay down new standards for ATS litigation at any time. Given the passage of two hundred years since this law's enactment and the interpretive debates that have emerged in recent litigation summarized here, Congressional review would serve a valuable public purpose.

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defendants.”); . . . . We rejected defendants’ argument that corporate defendants were excluded from either the ATS or the TVPA. 538 F.3d 1252, 1263 (11th Cir. 2009). The plaintiffs allege that that this decision is indicative of circuit split in their petition for rehearing. However, the defendants deny that this is a true circuit split: “Neither *Sinaltrainal v. Coca-Cola Co.* . . . , nor *Romero v. Drummond Co.*, 552 F. 3d 1303, 1315 (11th Cir. 2008) . . . considered whether corporate liability lies under the law of nations. Both cases relied solely on *Aldana* [416 F.3d 1242 (11th Cir. 2010)] which contains no discussion of corporate liability whatsoever.” Brief of Appellees/Cross-Appellants in Opposition to Petition for Rehearing and Rehearing *En Banc*, *Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4800, 06-4876 (Oct. 22, 2010). It is likely that the Supreme Court will allow more time for the issues to “percolate” in the circuits before it steps in to resolve this undeveloped difference in viewpoint.