

## THE RULE OF LAW AT A CROSSROAD: ENFORCING CORPORATE RESPONSIBILITY IN INTERNATIONAL INVESTMENT THROUGH THE ALIEN TORT STATUTE

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### 1. INTRODUCTION

Rape and forced labor as part of the construction of a natural gas pipeline project. Medical experimentation on children without their parents' consent. Children subjected to both forced labor and dangerous working conditions. Labor organizers killed for their attempts to unionize in a mining company. Over the past decade, questions about the role of multinational corporations in human rights violations such as these have finally received the world's attention.

With the globalization of the world economy, the movement to hold corporations responsible when they abuse human rights has also globalized. The worldwide communications revolution now enables many local activists to publicize human rights abuses worldwide and to enlist the support of advocates in the corporations' home states. International bodies, regional organizations, domestic legal systems and corporations themselves have made significant progress in developing human rights standards to govern corporate conduct.<sup>1</sup>

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<sup>1</sup> See, e.g., GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Jan. 10,

The growth of corporate human rights norms was the result of increasing pressure for corporations to prevent human rights abuses as well as to provide redress for the victims of human rights violations they committed. One factor in the development of the norms was pressure from non-governmental organizations around the world, including those who brought cases to court to seek the enforcement of universally accepted human rights standards.

Yet even with all of the development of international norms on how corporations should behave in the global economy, one of the biggest challenges continues to be the enforcement of human rights standards—what penalties corporations pay when they violate the most fundamental human rights including the prohibitions against forced labor, torture, genocide, crimes against humanity and war crimes, and whether the victims of these abuses can receive any compensation. Effective accountability is critical for an international legal system that rewards law-abiding corporations, which then contributes to the deterrence of future violations. The outlier corporations committing the violations such as those mentioned above have often reacted to human rights lawsuits with more than just denial of the charges, but have attempted to undermine the very system of accountability.

My focus here will be one small piece of the attempt to enforce human rights standards against corporate violators—the claims brought under a U.S. law, the Alien Tort Statute (“ATS”), and the recent challenges presented by a Supreme Court case, *Kiobel v. Royal Dutch Shell*. One of the central questions the courts have begun to address in the wake of the *Kiobel* decision is to what extent the human rights practices of U.S. corporations, or foreign corporations doing significant business in this country, “touch and concern” the United States.<sup>2</sup>

The development of this area of jurisprudence is at an important crossroad, and the next steps by U.S. courts will be

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2014); Voluntary Principles on Security and Human Rights, <http://www.voluntaryprinciples.org/> (last visited Jan. 10, 2014); Organisation for Economic Co-operation and Development (OECD), GUIDELINES FOR MULTINATIONAL ENTERPRISES, <http://mneguidelines.oecd.org/> (last visited Jan. 10, 2014); BUSINESS & HUMAN RIGHTS RESOURCE CENTER, <http://www.business-humanrights.org/> (last visited Jan. 10, 2014); Human Rights Council, *Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles*].

<sup>2</sup> See *infra* Sections 4 and 5 (discussing the *Kiobel* decision and post-*Kiobel* cases).

critical steps—either forward, towards an improved system of accountability for those who suffer the most egregious human rights abuses at the hands of corporate violators, or backward, leaving victims without a remedy, rewarding those companies who flout the rule of law and penalizing their competitors who follow the law, and weakening the system of law itself. I will also discuss how the ATS litigation fits into the global movement to hold corporations accountable when they violate international standards on human rights, the need for consistent human rights standards for companies doing business in the United States and the importance of a commitment to the rule of law for companies operating overseas.

## 2. THE DEVELOPMENT OF CORPORATE LIABILITY CASES UNDER THE ALIEN TORT STATUTE

The Alien Tort Statute is a provision of the First Judiciary Act of 1789, which provided jurisdiction over claims by aliens for violations of the “law of nations,”<sup>3</sup> today referred to as customary international law. From the early days of the ATS, the statute authorized claims against private parties, or “non-state actors,” such as pirates, for acts occurring on U.S. and foreign territory.<sup>4</sup>

After a few cases in the 1790s, historical accounts note that the statute lay dormant for almost 150 years.<sup>5</sup> Human rights cases under the ATS began in the late 1970s, with a case brought on behalf of the family of Joelito Filartiga, a 17-year-old killed by a police official because of his father’s political activities.<sup>6</sup> In a groundbreaking decision, sometimes described as the *Brown v. Board of Education* of international human rights,<sup>7</sup> the U.S. Court of

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<sup>3</sup> 28 U.S.C. § 1350 (2012).

<sup>4</sup> See generally *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (noting that the ATS did not specify types of defendants); William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists”*, 19 HASTINGS INT’L & COMP. L. REV. 221 (1996).

<sup>5</sup> See Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Claims Statute*, 18 N.Y.U. J. INT’L L. & POL. 1, 4-5 nn.15-17 (counting 21 cases between 1789 and 1980). Two early cases were *Moxon v. The Brigantine Fanny*, 17 F. Cas. 942 (D. Pa. 1793) and *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795).

<sup>6</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>7</sup> Harold Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991).

Appeals for the Second Circuit held that the Paraguayan police official who had fled to New York could be sued in the state because of the universal prohibition against torture and the U.S. doctrine of transitory torts, which states that a person cannot escape liability by fleeing a particular jurisdiction and can be held liable for a tort wherever that person can be found.<sup>8</sup>

The *Filartiga* decision set forth the underlying principle of the ATS decisions: the cases are part of the attempt to enforce fundamental human rights: “a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”<sup>9</sup> More than just a rhetorical admonition, however, the Second Circuit conducted a careful, scholarly analysis of the role of international law in U.S. courts.<sup>10</sup>

While the *Filartiga* family sued the police official who physically tortured Joelito Filartiga, cases in the 1980s and 1990s held accountable former foreign officials who had command responsibility for human rights violations, including both military and civilian leaders. Defendants in these cases include a former Argentinian general who presided over a campaign of disappearances and extrajudicial executions of political opponents during the “dirty war” in 1970s Argentina, former Philippine dictator Ferdinand Marcos and former Haitian dictator Prosper Avril in two cases alleging human rights violations against political opponents, and an Indonesian general who ordered an attack on peaceful protestors in East Timor.<sup>11</sup>

In 1995, the Second Circuit took an important step in the post-*Filartiga* line of cases when it held that a leader of the 1990s Bosnian genocide, Radovan Karadzic, could be sued for violations of international law, even though Karadzic was a non-state actor (as

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<sup>8</sup> *Filartiga*, 630 F.2d at 885.

<sup>9</sup> *Id.* at 890.

<sup>10</sup> *Id.* at 885; see also *McKenna v. Fisk*, 42 U.S. 241, 248-49 (1843) (discussing the longstanding nature of transitory tort doctrine and the reparations obligation for civil wrongful acts transcending national boundaries); *Stoddard v. Bird*, 1 Kirby 65, 68 (Conn. Super. Ct. 1786) (applying transitory tort doctrine by ATS author Oliver Ellsworth while a state court judge).

<sup>11</sup> *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988) (former military general responsible for campaign of extrajudicial killings and disappearances during Argentina’s dirty war); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994) (former Philippines military dictator); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993) (former Haitian dictator); *Todd v. Panjaitan*, 1994 WL 827111 (D. Mass., Oct. 26, 1994) (former military leader in East Timor).

the self-proclaimed head of territory not recognized as a state by the international community). The Second Circuit's holding was based on a two-pronged analysis. First, for wrongs such as torture, for which international law requires state action, the state action requirement can be satisfied if the defendants are complicit with a state actor. And second, the Court held, there are some international law violations whose definition simply does not require state action, such as genocide, war crimes and crimes against humanity.<sup>12</sup>

This analysis was applied to multinational corporations in *Doe v. Unocal*, in which plaintiffs sued California-based Unocal and its president and chief executive officer for human rights violations committed in connection with a natural gas pipeline project in Burma. In 1997, the Central District of California adopted the *Kadic* two-pronged analysis, allowing the plaintiffs to proceed with their claims of forced labor, rape and other human rights abuses.<sup>13</sup> The court held that the forced labor claims, as a form of slavery, were claims for which the international law definition did not require any state action, and that, for claims such as rape as form of torture, the state action element was met by the plaintiffs' allegation of Unocal's complicity with the military government of Burma.<sup>14</sup> The case was resolved in a confidential settlement in 2004.<sup>15</sup>

Cases against corporations were highly contested. To survive motions to dismiss, litigants had to survive numerous hurdles, such as showing that the case was brought in the most convenient forum and should not be transferred to a foreign court (forum non conveniens doctrine),<sup>16</sup> the case did not present questions that were

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<sup>12</sup> *Kadic v. Karadzic*, 70 F.3d 232, 245-46 (2d Cir. 1995).

<sup>13</sup> *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *see also* *John Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *on reh'g en banc sub nom.*

<sup>14</sup> *Id.* The court followed the careful analysis of *Kadic* in analyzing what norms could constitute customary international law, citing *U.S. v. Smith* and *Paquete Habana*.

<sup>15</sup> *See Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers*, CTR. FOR CONST. RTS., <http://www.ccrjustice.org/newsroom/press-releases/historic-advance-universal-human-rights%3A-unocal-compensate-burmese-villagers> (last visited Mar. 4, 2014) (announcing the settlement in which Unocal agreed to compensate Burmese plaintiffs who sued the firm for complicity in human rights abuses).

<sup>16</sup> *See, e.g., Turedi v. Coca-Cola Co.*, 460 F.Supp.2d 507 (S.D.N.Y. 2006) (holding that the Court had jurisdiction to dismiss the suit on the basis of forum

more appropriately decided by the executive or legislative branches of government (political question doctrine),<sup>17</sup> or that the case did not challenge the legitimate act of a foreign government (act of state doctrine).<sup>18</sup>

Most importantly, the cases that survived motions to dismiss were those in which the plaintiffs could show a strong link between the defendants and the alleged human rights violations. It was never sufficient, in any court, for a plaintiff to argue that a corporation was merely doing business in a country in which human rights violations were occurring: the standard required that the company must be complicit in those violations. This complicity took the form of either direct participation or the well-recognized forms of secondary liability such as conspiracy, agency, alter-ego, and aiding and abetting liability, with the most commonly accepted (and historically substantiated) standard for aiding and abetting liability being that the defendant knowingly provided substantial assistance for the commission of the alleged human rights violations.<sup>19</sup>

Plaintiffs alleged direct participation in human rights violations in *Abdullahi v. Pfizer*,<sup>20</sup> in which family members of Nigerian children alleged that the Pfizer company had direct liability for the company's medical experimentation on the children without their parents' consent, and that as a result, eleven children died and many others were left blind, deaf, paralyzed or brain-damaged. The initial ATS litigation raised awareness about the issue, and the Nigerian government then took action, leading to a settlement for

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non conveniens).

<sup>17</sup> See, e.g., *Kadic*, 70 F.3d 232, *supra* note 12 (finding that adjudication of this case was not precluded by the political question doctrine).

<sup>18</sup> See, e.g., *Unocal*, 963 F. Supp. at 893, 899 (holding that the act of state doctrine did not preclude consideration of claims based on alleged human rights abuses by the Burmese government but that the doctrine did preclude claims based on expropriation of property in Myanmar by the Burmese government).

<sup>19</sup> *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) *vacated sub nom.*; *Doe I v. Nestle USA, Inc.*, 10-56739, 2013 WL 6670945 (9th Cir. Dec. 19, 2013); *cf.* *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) *judgment entered sub nom.*; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 01 CIV.9882(DLC), 2006 WL 3469542 (S.D.N.Y. Dec. 1, 2006) and *aff'd*, 582 F.3d 244 (2d Cir. 2009) (discussing different standards for aiding and abetting liability—*mens rea* of purpose rather than knowledge).

<sup>20</sup> *Abdullahi v. Pfizer*, 562 F.3d 163, 169–70 (2d Cir. 2009) (holding that medical experimentation without consent violated customary international law, including standards established at Nuremberg war crimes tribunals).

the children and family members affected.<sup>21</sup> The case also exemplifies another benefit of ATS litigation, in which the cases contribute to the development of norms that will help prevent violations, in this case, the norm against medical experimentation without consent.<sup>22</sup>

A number of cases against U.S. military contractors for abuses in Iraq that include extrajudicial killing and torture have survived defendants' motions to dismiss and have settled. For example, a series of cases were brought against Blackwater for beatings and shootings, including launching a grenade into a girls' school and a massacre which left seventeen Iraqi civilians dead and more than twenty injured; the case settled in 2010.<sup>23</sup> The cases against U.S. contractors have highlighted these abuses and helped develop norms both in the United States and led to international action.<sup>24</sup>

In some cases, plaintiffs alleged both direct and secondary

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<sup>21</sup> In 2009, Pfizer reached a \$75 million settlement with the state of Kano in Nigeria. Nicole Perloth, *Pfizer Finalizing Settlement in Nigerian Drug Suit*, FORBES, Apr. 3, 2009, <http://www.forbes.com/2009/04/03/pfizer-kano-trovan-business-healthcare-settlement.html>. The civil case resulted in a confidential settlement in February 2011. Donald G. McNeil Jr., *Nigerians Receive First Payments for Children Who Died in 1996 Meningitis Drug Trial*, N.Y. TIMES, Aug. 11, 2011, <http://www.nytimes.com/2011/08/12/world/africa/12nigeria.html>.

<sup>22</sup> According to one scholar, the *Abdullahi* ruling "should help persuade international corporations and researchers alike to take informed consent . . . much more seriously." George J. Annas, *Globalized Clinical Trials and Informed Consent*, 360 NEW ENG. J. MED. 2050, 2053 (2009). See also Danielle Cendrowski, *International Health Law Violations Under the Alien Tort Statute: Federal Appeals Court Reinstated Lawsuit Under the Alien Tort Statute Against United States Pharmaceutical Company Pfizer Brought by Nigerian Children and Their Guardians-Abdullahi v. Pfizer, Inc.*, 35 AM. J. L. & MED. 233, 236 (2009) (concluding that as a result of *Abdullahi*, "pharmaceutical and health care companies must be more cognizant of their actions in foreign countries that may give rise to potential claims under ATS for violations of other norms of customary international health law").

<sup>23</sup> See *In re XE Serv. Alien Tort Litig.*, 665 F.Supp.2d 569 (E.D. Va. 2009) (denying motion to dismiss); *In re XE Serv. Alien Tort Litig.*, Nos. 09-615, 09-616, 09-617, 09-618, 09-645, 09-1017, and 09-1048 (E.D. Va. Jan. 6, 2010) (order of stipulated dismissal); see also *Jarallah v. Xe*, No. 09-631, 2009 WL 1350958 (S.D. Cal. filed Mar. 27, 2009) (discussing a schoolteacher killed by Xe-Blackwater shooters in Iraq; this case was transferred and consolidated with *In re XE Serv.*).

<sup>24</sup> See U.S. DEP'T. OF DEFENSE INSTRUCTION 3020.50 CHANGE 1, Aug. 1, 2011, [http://www.acq.osd.mil/log/PS/p\\_vault/DODI\\_302050\\_01Aug2011.pdf](http://www.acq.osd.mil/log/PS/p_vault/DODI_302050_01Aug2011.pdf), for U.S. security contractor norms; see the International Code of Conduct for Private Security Service Providers (ICoC) organization, <http://www.icoc-psp.org/>, for international efforts; see generally Daniel Warner, *Establishing Norms for Private Military and Security Companies*, 40 DENV. J. INT'L L. & POL'Y 106 (2012); *Private Security Companies (PSCs) - Program Support*, U.S. DEP'T. OF DEFENSE, <http://www.acq.osd.mil/log/PS/psc.html>.

liability. One such case was *Wiwa v. Royal Dutch Petroleum Co.*, in which plaintiffs alleged that the parent and subsidiary corporations and the head of the Shell Nigeria subsidiary were directly liable because corporate employees bribed witnesses to give false testimony against Ken Saro-Wiwa, a leader of the movement against Shell's exploitation of the environment, and repressed activists in the Ogoni region of Nigeria.<sup>25</sup> The plaintiffs also brought indirect liability claims that Shell aided and abetted abuses against plaintiffs. The complaint alleged that plaintiffs and their family members were "repeatedly arrested, detained and tortured," executed after a trial based on "fabricated evidence," and that, although "these abuses were carried out by the Nigerian government and military, they were instigated, orchestrated, planned, and facilitated by Shell Nigeria under the direction of the defendants."<sup>26</sup> The court rejected defendants' motion to dismiss and found sufficient allegations of defendants' direct participation in the human rights violations.<sup>27</sup> The case settled in 2009.<sup>28</sup>

In *Doe v. Exxon*, Indonesian villagers alleged that the Exxon Mobil Corporation, as part of a natural gas extraction and processing facility in the Aceh province of Indonesia, directed security forces who committed abuses, including killings and torture, which were actionable under the ATS.<sup>29</sup> Both the Court of Appeals and the District Court for the District of Columbia rejected defendants' claims that plaintiffs had not made sufficient allegations of corporate complicity in the violations, instead accepting claims that Exxon paid, supported, equipped, trained the soldiers and provided intelligence to the military,<sup>30</sup> and that the U.S. parent was involved as well as the subsidiary.<sup>31</sup>

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<sup>25</sup> *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-8386, 2002 WL 319887, at \*2, 9, 25 (S.D.N.Y. Feb. 28, 2002).

<sup>26</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000).

<sup>27</sup> *Wiwa*, 2002 WL 319887 at \*12-13.

<sup>28</sup> Jad Mouawad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 8, 2009, <http://www.nytimes.com/2009/06/09/business/global/09shell.html>.

<sup>29</sup> *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013).

<sup>30</sup> *Id.* at 16.

<sup>31</sup> *Doe v. Exxon Mobil Corp.*, 573 F. Supp. 2d 16, 19-20 (D.D.C. 2008) (Exxon Mobil Indonesia (EMOI) "alone was not 'equipped to handle all the issues that were cropping up' with security and therefore 'went up the chain and request[ed] additional corporate kinds of support' from Exxon Mobil Corporation – which enforced 'uncompromising controls' over EMOI's security.").

In March 2007, Chiquita Brands International pled guilty to the felony of knowingly providing material support to the *Autodefensas Unidas de Colombia* (AUC), a paramilitary organization that it knew to be responsible for killings and other crimes against Colombian civilians and designated a “Foreign Terrorist Organization” and a “Specially Designated Global Terrorist” by the U.S. Government.<sup>32</sup> The U.S. described Chiquita’s support for seven years of over 100 payments to the AUC as “prolonged, steady, and substantial” in the Sentencing Memorandum submitted to the District Court and found, after a full investigation, that “Chiquita’s money helped buy weapons and ammunition used to kill innocent victims.”<sup>33</sup> After pleading guilty, Chiquita was fined \$25 million for violating U.S. antiterrorism laws.<sup>34</sup> In the related civil ATS case, *In re Chiquita Brands*, each plaintiff alleged that the Chiquita-supported AUC terrorist organization attacked his or her relative in Colombia.<sup>35</sup> One decedent was reported to have been kidnapped when he was asleep at home, and then beaten, shot twice, and left for dead.<sup>36</sup> The Court found that the facts alleged by plaintiffs in this case were sufficient to make plausible ATS claims for torture, extrajudicial killing, war crimes, and crimes against humanity.<sup>37</sup>

In the midst of this developing case law, the Supreme Court weighed in for the first time in 2004 in *Sosa v. Alvarez-Machain*.<sup>38</sup> In the *Sosa* decision, the Court upheld the *Filartiga* line of cases and held that plaintiffs could bring claims for torts that were also violations of widely accepted, clearly defined customary international law norms.<sup>39</sup> The Executive Branch submitted an amicus curiae brief arguing that the ATS should not apply to

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<sup>32</sup> U.S. DEP’T OF JUSTICE, *Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay \$25 Million Fine* (Mar. 19, 2007), [http://www.justice.gov/opa/pr/2007/March/07\\_nsd\\_161.html](http://www.justice.gov/opa/pr/2007/March/07_nsd_161.html).

<sup>33</sup> Sentencing Memorandum by the United States, *United States v. Chiquita Brands Int’l, Inc.*, No. 07-055 (D.D.C. 2007) (filed Sept. 17, 2007) [hereinafter Sentencing Memorandum].

<sup>34</sup> *Colombians Sue Chiquita over Paramilitary Payments*, CNN, June 1, 2011, <http://edition.cnn.com/2011/WORLD/americas/05/31/colombia.chiquita.lawsuits/>.

<sup>35</sup> *In re Chiquita Brands Int’l, Inc. Alien Tort Statute & S’holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1307–08 (S.D. Fla. 2011).

<sup>36</sup> *Id.* at 1308.

<sup>37</sup> *Id.* at 1359.

<sup>38</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

<sup>39</sup> *Id.* at 724–25 (noting standard generally consistent with *Filartiga* and *Marcos*).

conduct that occurs on foreign soil, but the Court did not address that issue.<sup>40</sup> Although the case was against an individual foreign citizen and did not concern corporate liability, various amici representing trade organizations filed briefs which sought to eliminate corporate ATS liability, arguing that the cases disrupted U.S. trade and foreign policy.<sup>41</sup> This effort failed, as the Court chose not to address the question of corporate liability.<sup>42</sup>

### 3. THE ATS AS PART OF THE GLOBAL MOVEMENT FOR CORPORATE ACCOUNTABILITY

As the ATS litigation against corporate defendants developed, so also did the global movement for corporate social responsibility, which included providing remedies for human rights victims. Opponents have sometimes complained that ATS cases were a form of “legal imperialism” or that U.S. corporations would be singled out and lose business to foreign, less ethical, competitors.<sup>43</sup> However, the ATS is just one part of the developing interdependent system for corporate accountability for human rights abuses.

Many of the cases discussed above came from and were connected to social movements against human rights abuses, such as the torture and extrajudicial killing of people because of their political beliefs and advocacy on issues such as fair labor standards or a healthy environment. The ATS cases reflected developments in other countries and in international and regional systems. International standards, in turn, recognizing the importance of judicial enforcement mechanisms, incorporated civil litigation against corporations as an important tool in the implementation of the developing norms. For example, the most recent international set of standards, the 2011 UN Guiding Principles on human rights and transnational businesses, outlined a framework to protect and respect human rights and provide access to a remedy for violations. These principles stated that: “Effective judicial

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<sup>40</sup> Brief of the United States for Respondent Supporting Petitioner at 46-50, *Sosa*, 542 U.S. 692 (No. 03-339, 2004 WL 425376); *see also* *Doe I, et al., Plaintiffs, v. Exxon Mobil Corp., et al., Defendant.*, 2003 WL 25625348 (D.D.C.).

<sup>41</sup> *See, e.g.*, Brief of the Nat'l Ass'n of Mfrs. as Amicus Curiae in Support of Reversal, *Sosa*, 542 U.S. 692 (2004) (No. 03-339, 2004 WL 199236).

<sup>42</sup> *See generally Sosa*, 542 U.S. 692.

<sup>43</sup> *See, e.g.*, Joseph G. Finnerty III and John Merrigan, *Legal Imperialism*, *WALL ST. J.*, Feb. 28, 2007, <http://online.wsj.com/news/articles/SB117263453724421692>.

mechanisms are at the core of ensuring access to remedy.”<sup>44</sup> This of course builds on the international law norms for the right to a remedy.<sup>45</sup>

The Guiding Principles also noted that “States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable.”<sup>46</sup> The increasing availability of remedies for survivors of human rights violations is an important step toward giving meaning to these guidelines.

Important standards have also developed at the international regional level. One recent example of critical regional action leading to greater corporate accountability is the 2001 Brussels regulation on jurisdiction, which requires courts in European nations to assert jurisdiction over corporations domiciled in European Union countries.<sup>47</sup>

In addition, other national governments have implemented standards and put corporations on trial for human rights abuses. As noted by Judge Richard Posner in his opinion in *Flomo v. Firestone*, corporate tort liability is common around the world.<sup>48</sup>

Just a few recent examples of national laws and court cases span the globe. In England, a recent legislative change allowed foreign direct liability: if the parent company is directly involved in the subsidiary’s operation or exercises de facto control over those operations, it owes a duty of care to employees and anyone affected by the operations.<sup>49</sup> Cases in England have resulted in

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<sup>44</sup> *Guiding Principles*, *supra* note 1, at Annex ¶ 26.

<sup>45</sup> *Factory at Chrozow (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13) (holding “[i]t is a principle of international law, and even a general conception of law, that the breach of an engagement involves an obligation to make reparation in an adequate form.”); Rep. of the Int’l Law Comm’n, 53d Sess. Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR 56th Sess., Supp. No. 10 (2010); *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 33 (Feb. 5) (noting “[r]esponsibility is the necessary corollary of a right.”).

<sup>46</sup> *Guiding Principles*, *supra* note 1, ¶ 26.

<sup>47</sup> Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, *available at* [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33054\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm).

<sup>48</sup> *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1019 (7th Cir. 2011) (citing Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective*, 31 LEGAL STUD. 684 (2011)).

<sup>49</sup> Companies Act, 2006, c. 46, § 1159 (U.K.), *available at*

numerous successful verdicts and settlements for the plaintiffs,<sup>50</sup> as have cases in Australia,<sup>51</sup> Argentina,<sup>52</sup> Colombia,<sup>53</sup> and Ghana.<sup>54</sup> Some countries have laws providing for a forum of necessity – plaintiffs may bring the claims in their domestic courts if there is no other forum where plaintiffs could reasonably seek relief. A growing number of countries also allow for the possibility of corporate criminal liability.<sup>55</sup>

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[http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga\\_20060046\\_en.pdf](http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf).

<sup>50</sup> See, e.g., *Chandler v. Cape PLC*, No. [2012] EWCA Civ 525, England and Wales App. (concerning a worker exposed to asbestos in an extinct subsidiary company who was able to recover from the parent company); *Guerrero v. Monterrico*, EWHC 3228 (Q.B.) (2010) (concerning 33 Peruvians protesting copper mine; the plaintiffs charged corporate complicity in torture and the case ended in confidential settlement); *Landmark Settlement of Miners' Claims Boosts Fight for Silicosis Compensation*, LEIGH DAY, Sept. 25, 2013, <http://www.leighday.co.uk/News/2013/September-2013/Landmark-settlement-of-miners%E2%80%99-claims-boosts-fight> (discussing a settlement by a mining company to pay South African workers who contracted silicosis).

<sup>51</sup> BUSINESS AND HUMAN RIGHTS CENTER, CASE PROFILE: BHP LAWSUIT (RE PAPUA NEW GUINEA), <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/BHPlawsuitrePapuaNewGuinea> (last visited Jan. 12, 2014). Sued in Australia, the mining company BHP was required to pay AUS\$40 million and remove mine tailings from a polluted river in Papua New Guinea.

<sup>52</sup> *Argentina: Court Halts Open-Pit Uranium Mine*, NUCLEAR MONITOR (WISE), May 12, 2010, <http://www.nirs.org/mononline/nm709.pdf>; *Court Halts Open-Pit Mining in Northern Argentina*, LATIN AMERICAN HERALD TRIB., Feb. 2011, <http://www.laht.com/article.asp?ArticleId=355944&CategoryId=14093>. The Argentinean Supreme Court halted open pit uranium mining until a transnational company could show that work would not cause contamination or environmental damage.

<sup>53</sup> Claudia Müller-Hoff, *Making Corporations Respond to the Damage They Cause: Strategic Approaches to Compensation and Corporate Accountability*, EUROPEAN CTR. FOR CONST. & HUM. RTS. (ECCHR) 5, available at [http://www.ecchr.de/?file=tl\\_files/Dokumente/Publikationen/Making%20respond%202012-11.pdf](http://www.ecchr.de/?file=tl_files/Dokumente/Publikationen/Making%20respond%202012-11.pdf). The Colombian Constitutional Court stopped Muriel Mining Corporation's project in areas owned by indigenous and Afro-Colombian communities.

<sup>54</sup> Müller-Hoff, *supra* note 53, at 5. The High Court of Ghana granted compensation to victims of forced displacement by Anglogold Ashanti at the Iduapriem Mine in Ghana.

<sup>55</sup> Examples include Australia, Austria, Belgium, Canada, Denmark, Finland, France, India, Japan, Netherlands, Norway, South Africa, United Kingdom, and the United States. See Anita Ramasastry and Robert C. Thompson, *COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW* (2006); Sara Sun Beale, *A Response to the Critics of*

The Alien Tort Statute has been an important tool for victims of corporate human rights abuses to obtain some redress, particularly when there is a U.S. corporation involved, and it is an important part of a growing system of consistent, enforceable corporate human rights standards to provide victims redress, punish violators and prevent continued abuses. International standards such as the Guiding Principles suggest that courts or other segments of the U.S. governments shall not “erect barriers to prevent legitimate cases from being brought to court.”<sup>56</sup> In 2011, however, a new challenge arose for victims seeking to sue corporations under the ATS.

#### 4. *KIOBEL V. ROYAL DUTCH: A CORPORATE ATS CASE AT THE SUPREME COURT*

In 2011, the ATS again reached the U.S. Supreme Court, this time in a case against a corporate defendant.

*Kiobel v. Royal Dutch Petroleum* was filed in 2002 by twelve Nigerians who sued Royal Dutch Petroleum and Shell Transport and Trading (Shell) for torture, prolonged arbitrary detention, and crimes against humanity during the mid-1990s, charging Shell with complicity with the military dictatorship in Nigeria.<sup>57</sup> Because of this treatment, they had sought and been granted political asylum in the United States.<sup>58</sup> In 2010, the U.S. Court of Appeals for the Second Circuit, without prior briefing or argument on the issue, ruled that corporations could not be sued under the ATS.<sup>59</sup>

Three subsequent courts of appeals—the Seventh Circuit, the D.C. Circuit, and the Ninth Circuit—ruled that the ATS permits suits against corporations for universally condemned human rights violations (and rulings by the U.S. Court of Appeals for the Fourth Circuit have been interpreted to stand for the principle of corporate accountability under the ATS).<sup>60</sup>

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*Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1493-1500; see also *Flomo*, 643 F.3d at 1018-20.

<sup>56</sup> *Guiding Principles*, *supra* note 1, at Annex ¶ 26.

<sup>57</sup> The *Kiobel* case was originally a companion case to *Wiwa*, discussed earlier, but the two cases were separated after dismissal of one of the claims in *Kiobel* led to an interlocutory appeal. While the *Kiobel* appeal was pending, *Wiwa* settled. See Mouawad, *supra* note 28.

<sup>58</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013).

<sup>59</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

<sup>60</sup> *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012); *Aziz v. Alcolac*,

The Supreme Court granted the *Kiobel* plaintiffs' petition for certiorari on the question of corporate liability under the ATS. The case was highly contested: 19 amicus briefs were submitted in support of the *Kiobel* plaintiffs (Petitioners) and 16 amicus briefs were submitted in support of the Shell defendants (Respondents). A broad range of briefs submitted in support of Petitioners included briefs by survivors of human rights violations, scholars, a former U.S. senator, former military officials, former U.S. counterterrorism officials, former U.S. diplomats, United Nations officials, a Nobel-prize winning economist, and German Members of Parliament. Respondents' amici included a number of corporations and corporate trade organizations, selected governments, as well as scholars.<sup>61</sup>

In their briefs, Respondents and many of their supporting amici aimed to eliminate corporate ATS liability altogether.<sup>62</sup> In commenting on this strategy, the United Nations Special Representative on Human Rights and Business, Harvard Professor John Ruggie, asked, "Should the litigation strategy aim to destroy an entire juridical edifice for redressing gross violations of human rights, particularly where other legal grounds exist to protect the company's interests?"<sup>63</sup>

Another question was how the Court would rule so soon after its ruling in *Citizens United* granting corporations first amendment rights<sup>64</sup>—if corporations had these types of rights, did they also have responsibilities to comply with human rights standards?<sup>65</sup>

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Inc., 658 F.3d 388 (4th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo*, 643 F.3d at 1013; *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007), *on reh'g en banc*, 550 F.3d 822 (9th Cir. 2008).

<sup>61</sup> *Kiobel*, 133 S. Ct. at 1659. For a compilation of all briefs filed in the case, see *Kiobel v. Royal Dutch Petroleum: SCOTUSblog Coverage*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/> (last visited Feb. 28, 2014) [hereinafter *SCOTUSblog*].

<sup>62</sup> See *SCOTUSblog*, *supra* note 61 (including Brief for Respondents *Kiobel*, 133 S. Ct. (No. 10-1491)); Brief for BP America et al., as Amici Curiae Supporting Respondents, *Kiobel*, 133 S. Ct. (No. 10-1491); Brief for Chevron Corp. et al., as Amici Curiae Supporting Respondents, *Kiobel*, 133 S. Ct. (No. 10-1491); Brief for KBR, Inc. et al., as Amici Curiae Supporting Respondents, *Kiobel*, 133 S. Ct. (No. 10-1491); Brief for Rio Tinto Grp. & Occidental Petroleum Corp., as Amici Curiae Supporting Respondents, *Kiobel*, 133 S. Ct. (No. 10-1491).

<sup>63</sup> John G. Ruggie, Issues Brief, *Kiobel and Corporate Social Responsibility*, HARVARD KENNEDY SCH., Sept. 4, 2012, at 6.

<sup>64</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>65</sup> See Beth Stephens, *Are Corporations People? Corporate Personhood Under the*

After argument, the Court took the unusual step of ordering briefing on a separate issue: “whether and under what circumstances the [Alien Tort Statute] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”<sup>66</sup>

That question was briefed; again, multiple amici weighed in. In April 2013, the Court issued its decision. The attempt to eliminate corporate liability under the ATS failed. Instead, the Court introduced a new standard for ATS cases, based on the “principles underlying the canon of interpretation” of a presumption against the extraterritorial application of “an Act of Congress regulating conduct.”<sup>67</sup>

Chief Justice Roberts rejected the application of the transitory tort doctrine to ATS cases and devoted much of the majority opinion to a discussion of concerns about the foreign policy implications that arise when courts decide cases involving acts which occurred on foreign soil (to explain why it invoked the “principles underlying the canon” on extraterritoriality, since the canon on extraterritoriality itself had not been applied to statutes such as the ATS, which the Court’s earlier decision in *Sosa v. Alvarez Machain*, had ruled to be jurisdictional).<sup>68</sup> Notably, the majority did not overrule *Sosa*, which allowed a foreign plaintiff to sue for acts on foreign soil.<sup>69</sup>

The majority opinion and the three separate concurring opinions raised a number of questions which continue to be litigated. In Part IV of its decision, the majority applied its

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*Constitution and International Law*, 44 RUTGERS L.J. 1 (2013) (comparing the reasoning of the *Citizens United* and *Kiobel* courts); see also Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT’L ECON. L. 263, 265 (2004) (“If corporations have rights under international law, by parity of reasoning, they must have duties as well.”).

<sup>66</sup> *Kiobel*, 133 S. Ct. at 1663. For the text of the grant of certiorari, see *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (2011).

<sup>67</sup> *Kiobel*, 133 S. Ct. at 1664. The court referred to the “canon of interpretation” because, as it specified, the presumption itself was limited such that the extraterritorial application was not a question of jurisdiction but rather was a “merits question.” *Id.* (citing *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2876–77 (2010)).

<sup>68</sup> *Id.* at 1663–69.

<sup>69</sup> *Id.* at 1663 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714, 724 (2004)) (“[T]he First Congress did not intend the provision to be ‘stillborn.’ The grant of jurisdiction is instead ‘best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations.’”).

extraterritoriality test to the *Kiobel* plaintiffs' allegations and issued its narrow conclusion: "On these facts, all the relevant conduct took place outside the United States."<sup>70</sup> The Court then broadened its analysis with the following: "And even where the claims touch and concern the territory of the United States they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."<sup>71</sup>

This short paragraph has prompted many questions from courts, plaintiffs, defendants, and scholars, including what conduct is sufficient to "touch and concern" the United States "with sufficient force" to allow claims, and what "mere corporate presence" is insufficient to allow a claim to proceed.<sup>72</sup>

Contributing to the debate, Justice Kennedy joined the majority opinion but also wrote a separate opinion noting that the Court was "careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."<sup>73</sup> Justice Kennedy indicated that some (unspecified) claims may proceed under the ATS:

[C]ases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the [Torture Victim Protection Act] nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.<sup>74</sup>

A concurrence by Justice Alito, joined by Justice Thomas, offered further indication that the *Kiobel* decision did not eliminate the ATS as an avenue for plaintiffs to seek redress for claims where conduct occurred overseas.<sup>75</sup> Justice Alito stated that he wrote

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<sup>70</sup> *Id.* at 1669.

<sup>71</sup> *Id.* (citation omitted).

<sup>72</sup> See, e.g., An Hertogen, *Kiobel Insta-Symposium Insta-Roundup*, OPINIO JURIS (Apr. 18, 2013, 5:36 PM), <http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-insta-roundup/> (aggregating all of the site's posts by academics regarding the *Kiobel* decision); SCOTUSblog, *supra* note 61 (providing links to several commentaries on the *Kiobel* decision).

<sup>73</sup> *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1669-70 (Alito, J., concurring).

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separately to “set out the *broader standard* . . . that this case falls within the scope of the presumption.”<sup>76</sup> That “broader standard,” which he and Justice Thomas preferred, would have required that an ATS claim be barred “unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa’s* requirements of definiteness and acceptance among civilized nations.”<sup>77</sup>

Justice Breyer wrote yet another concurring opinion which also noted that the majority opinion left many issues unresolved. Joined by Justices Ginsburg, Sotomayor, and Kagan, this opinion noted that the ATS basic purpose is to provide compensation for victims of “today’s pirates” (meaning both those committing acts of piracy as well as other universally condemned human rights abuses) and that other countries permitted plaintiffs to sue for human rights violations.<sup>78</sup> This concurrence suggested that these justices would displace the *Kiobel* majority’s “presumption” where “the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”<sup>79</sup>

The question of which claims may proceed under the *Kiobel* standard is still being sorted out by the lower courts, and litigation on these questions is expected for the next several years.

##### 5. THE INITIAL ROUND OF POST-KIOBEL CASES

An initial series of cases, almost all by district courts, quickly dismissed plaintiffs’ claims based on the doctrine of extraterritoriality. Some provided little or no analysis of the Supreme Court’s opinion; in others, the analysis misstated the facts or treated Justice Alito’s “broader” test on extraterritoriality as if it were the majority opinion. In a more recent series of decisions, the courts have expanded their analysis of the *Kiobel* opinion and begun to analyze the majority’s “touch and concern” test. These latter cases have led to decisions which have emphasized the importance of accountability for human rights violations.

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<sup>76</sup> *Id.* at 1670 (Alito, J., concurring) (emphasis added).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1671–72 (Breyer, J., concurring in the judgment).

<sup>79</sup> *Id.* at 1671 (Breyer, J., concurring in the judgment).

For example, in June 2013, the U.S. District Court for the Eastern District of Virginia dismissed plaintiffs' claims in *Al Shimari v. CACI International*. The case was brought by four Iraqi civilians against a U.S. contractor for torture, war crimes, and inhuman treatment in the notorious Abu Ghraib prison under U.S. control.<sup>80</sup> The plaintiffs alleged that CACI employees directed soldiers in torture and mistreatment including the use of unmuzzled dogs and beatings<sup>81</sup> and that the corporation ignored reports of abuse, praised or promoted employees implicated in the abuse, and attempted to cover up the misconduct in order to continue its contract.<sup>82</sup> The court stated that it dismissed the claims because the "tort claims occurred exclusively in Iraq, a foreign sovereign."<sup>83</sup>

The *Al Shimari* opinion mistakenly read *Kiobel* as a blanket prohibition and erred in its broad statement that "*Kiobel* rejected the extraterritorial application of the ATS."<sup>84</sup> As explained above, such a categorical bar was the position of the self-described "broader" test proposed by Justice Alito in his concurring opinion (joined only by Justice Thomas), rather than the *Kiobel* majority.<sup>85</sup> The *Al Shimari* court failed to apply the "touch and concern" analysis of the majority opinion, which requires an assessment of the U.S. interests at stake: in *Al Shimari*, a U.S. corporation (making decisions in the United States) violated a norm that the U.S. has espoused (the prohibition against torture) in a facility controlled by the United States. The *Al Shimari* opinion even acknowledged that the *Kiobel* decision "may be interpreted by some as leaving the proverbial door ajar for courts to eventually measure its width."<sup>86</sup> However, among other errors, the District Court interpreted the *Kiobel* "presumption" as "only rebuttable by legislative act," a standard which the Supreme Court itself did not articulate.<sup>87</sup> Plaintiffs have appealed that case to the Fourth Circuit, supported

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<sup>80</sup> Complaint, *Al Shimari v. CACI, Int'l. Inc.*, 679 F.3d 205 (4th Cir. 2012) (No. 2:08-cv-637), available at <http://ccrjustice.org/Al-Shimari-v-CACI>.

<sup>81</sup> *Id.* ¶¶ 18, 81–83, 87–88, 103, 116, 119–25.

<sup>82</sup> *Id.* ¶¶ 146, 148, 149, 152, 157.

<sup>83</sup> *Al Shimari v. CACI Int'l Inc.*, 951 F. Supp. 2d 857, 858 (E.D. Va. 2013).

<sup>84</sup> *Id.* at 864.

<sup>85</sup> For a discussion of Alito's concurrence in *Kiobel*, see *supra* notes 75–77 and accompanying text.

<sup>86</sup> *Al Shimari*, 951 F. Supp. 2d at 867.

<sup>87</sup> *Id.* at 866.

by a number of amici curiae.<sup>88</sup>

In July 2013, a district court in Alabama dismissed a case against Drummond, a mining company based in Alabama.<sup>89</sup> There, the plaintiffs had alleged that the head of Drummond took actions in Alabama that involved funding terrorists in Colombia who murdered union activists.<sup>90</sup> In its ruling on defendants' motion for summary judgment of the case, the court ruled that there was no admissible evidence that the U.S.-based Drummond corporation made decisions in the United States.<sup>91</sup> Plaintiffs have challenged the court's analysis including the exclusion of evidence and appealed to the Eleventh Circuit; as of this writing, both argument and a decision are pending.<sup>92</sup>

In a case against three U.S. corporations for aiding and abetting South Africa's apartheid regime, plaintiffs alleged that IBM, Ford, and Daimler supplied computers for the main mechanisms supporting apartheid—for the pass system, to track dissidents, and to target particular individuals for repressive acts—and supplied vehicles for the police and military used to commit human rights

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<sup>88</sup> See *Al-Shimari v. CACI et al.*, CTR. FOR CONST. RTS., <http://ccrjustice.org/Al-Shimari-v-CACI> (last visited Feb. 28, 2014) (providing links to all amicus briefs supporting the plaintiffs). As this article was going to press, the U.S. Court of Appeals for the Fourth Circuit unanimously reversed the lower court's dismissal. The Circuit held that the lower court had misread the *Kiobel* decision, and should have considered CACI's substantial U.S. connections. *Al-Shimari v. CACI Premier Technology, Inc.*, No. 13-1937 (4th Cir. June 30, 2014).

<sup>89</sup> *Giraldo v. Drummond Co.*, No. 2:09-CV-1041-RDP, 2013 WL 3873960, at \*9-\*10 (N.D. Ala. July 25, 2013).

<sup>90</sup> *Id.* at \*2-\*3.

<sup>91</sup> *Id.* at \*8.

<sup>92</sup> There are other cases which dismiss plaintiffs' claims based on Justice Alito's concurrence rather than the majority opinion. For one example, see *Tymoshenko v. Firtash*, No. 11-CV-2794 (KMW), 2013 WL 4564646, at \*2 n.4 (S.D.N.Y. Aug. 28, 2013) ("Although the majority failed to adopt a particular test regarding the 'touch and concern' standard, the Court notes that Plaintiffs' claim would fail under either formulation proposed by the concurring opinions."). The *Tymoshenko* court fails to note that both the Alito and Breyer concurrences state that they are advocating different standards than the majority, and Justice Alito notes that his standard is "broader." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (2013) (Alito, J., concurring). A second case invoking the blanket standard advocated by Justice Alito's concurrence is *Muntslag v. D'Ieteren, SA.*, No. 12-cv-07038 (TPG), 2013 WL 2150686, \*2 (S.D.N.Y. May 17, 2013) (misstating the holding of the court and instead asserting a standard more along the lines of Justice Alito's opinion: "The court held that the ATS does not provide the federal courts of the United States with subject matter jurisdiction over torts that occur outside of the United States.").

violations.<sup>93</sup> The case was before the Second Circuit on a writ of mandamus and the collateral order doctrine, but the court sidestepped the limited procedural posture and instead wrote a substantive opinion about *Kiobel*.<sup>94</sup> The August 2013 opinion did not consider the actions that plaintiffs alleged had occurred on U.S. territory, including defendants' affirmative steps in the United States to circumvent the domestic and international sanctions regime which barred all sales of commodities to apartheid security forces and the provision of technical data for use by apartheid security forces.<sup>95</sup> Instead, once again, the court applied the standard set forth in the concurrence by Justice Alito.<sup>96</sup> After the Second Circuit's remand, the District Court ordered briefing on whether corporations are liable under the Alien Tort Statute.<sup>97</sup>

More recently, however, there have been a number of significant post-*Kiobel* rulings that have allowed plaintiffs to proceed with their claims. An April 17, 2014 decision in the *Apartheid* case held that corporations can be liable under the ATS, and allowed plaintiffs to make a preliminary showing to satisfy the *Kiobel* test on extraterritoriality.<sup>98</sup>

In another case with a corporate defendant, *Doe v. Nestle*, brought on behalf of child labor victims in the Ivory Coast, a December 2013 Ninth Circuit decision reversed the district court's pre-*Kiobel* dismissal of the plaintiffs' claims.<sup>99</sup> The Circuit held that the question of whether the alleged acts "touch and concern" the United States was a question of fact and remanded the case to allow plaintiffs to amend the complaint to deal with this question.<sup>100</sup> On the question of corporate liability, the court cited *Kiobel* as "suggesting in dicta that corporations may be held liable under the ATS," and further cited the analyses in three cases, including a prior Ninth Circuit ruling, which provided lengthy and scholarly analyses of corporate liability under the ATS: *Sarei v. Rio*

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<sup>93</sup> *Balintulo v. Daimler AG*, 727 F.3d 174, 182-83 (2d Cir. 2013).

<sup>94</sup> *Id.* at 188-91.

<sup>95</sup> *Id.* at 193-94.

<sup>96</sup> *Id.* at 191 n.26, 191-93.

<sup>97</sup> Order, *In re South African Apartheid Litigation*, No. 1:02-md-01499-SAS (S.D.N.Y. Dec. 26, 2013).

<sup>98</sup> *In Re: Apartheid Litigation*, No. 1:02-md-01499 -SAS (S.D.N.Y. Apr. 17, 2014).

<sup>99</sup> *Doe I v. Nestle USA, Inc.*, 738 F.3d 1048, 1049 (9th Cir. 2013).

<sup>100</sup> *Id.*

*Tinto, Doe v. Exxon* and *Flomo v. Firestone*.<sup>101</sup> The *Nestle* court reversed the lower court's requirement that the plaintiffs allege specific intent for the applicable mens rea standard, and instead held that the test was whether defendants had provided assistance that had a substantial effect on the commission of the human rights violations.<sup>102</sup>

In a case with an organization as a defendant, *Mwani v. Bin Laden and Al Qaeda*, plaintiffs alleged harm resulting from defendants' 1998 bombing of the U.S. Embassy in Kenya.<sup>103</sup> The judge noted that he requested briefing from both parties because the "case is between foreign nationals and a foreign group for events that occurred in Nairobi, Kenya."<sup>104</sup> The District Court for the District of Columbia rejected defendants' motion to dismiss the case based on the *Kiobel* ruling on extraterritoriality.<sup>105</sup> The court noted that the *Kiobel* decision had left open a "narrow[] avenue for jurisdiction over acts that occurred outside the United States."<sup>106</sup> It focused on the majority's analysis of the *Kiobel* plaintiffs' allegations, interpreting the opinion as "suggesting that in some limited instances, an act occurring outside the United States could so obviously touch and concern the territory of the United States that the presumption against extraterritorial application of the ATS is displaced."<sup>107</sup> The *Mwani* court highlighted plaintiffs' allegations that the foreign defendant took overt acts in furtherance of conspiracy in the United States, and that U.S. national interests were involved because the acts "were directed at the United States government, with the intention of harming this country and its

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<sup>101</sup> *Id.* (citing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011) (same), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *Flomo v. Firestone Nat'l Rubber Co.*, 643 F.3d 1013, 1020-21 (7th Cir. 2011) (same); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 761 (9th Cir. 2011) (en banc) (holding that corporations may be liable under ATS), *vacated on other grounds*, 133 S. Ct. 1995.

<sup>102</sup> *Nestle*, 738 F.3d at 1049 (rejecting *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) and endorsing the standards set forth in *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-01-A, Judgment, ¶ 475 (Special Court of Sierra Leone Sept. 26, 2013) and *Prosecutor v. Perisic*, Case No. IT-04-81-A, Judgment, ¶ 36, n.97, (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013)).

<sup>103</sup> *Mwani v. Bin Laden*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013).

<sup>104</sup> *Id.* at 3.

<sup>105</sup> *Id.* at 5-6.

<sup>106</sup> *Id.* at 4.

<sup>107</sup> *Id.*

citizens.”<sup>108</sup> The *Mwani* decision is now on appeal.

One detailed analysis of the question of extraterritoriality occurred in a case against a man living in Massachusetts, *Sexual Minorities of Uganda v. Scott Lively*.<sup>109</sup> The defendant in this case was alleged to have planned and managed a decade-long campaign to cause physical harm to the LGBT community in Uganda. The judge found that the level of persecution amounted to a crime against humanity.<sup>110</sup> In analyzing the *Kiobel* extraterritoriality “principles,” the judge highlighted that Lively was a U.S. citizen, that his campaign against the Ugandan LGBT community was conducted “to a substantial degree within the United States”;<sup>111</sup> and the court highlighted the defendant’s nationality and location in concluding that “[a]n exercise of jurisdiction under the ATS over claims against an American citizen who has allegedly violated the law of nations in large part through actions committed within this country fits comfortably within the limits described in *Kiobel*.”<sup>112</sup>

The analysis of the defendant’s ties to the United States is also appropriate for cases against U.S. corporations: U.S. corporations are citizens of the United States and conduct “substantial” portions of their activity in the United States.

The *Sexual Minorities Uganda* decision also concluded that to hold the defendant accountable would produce no negative foreign policy implication; to the contrary, there might in fact be negative foreign policy concerns if the defendant were to face no consequences for his actions:

Indeed, the failure of the United States to make its courts available for claims against its citizens for actions taken within this country that injure persons abroad would itself create the potential for just the sort of foreign policy complications that the limitations on federal common law are aimed at avoiding. Under the law of nations, states are obligated to make civil courts of justice accessible for claims of foreign subjects against individuals within the state’s

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<sup>108</sup> *Id.* at 5.

<sup>109</sup> *Sexual Minorities Uganda v. Lively*, No. 12-CV-30051-MAP, 2013 WL 4130756 (D. Mass. Aug. 14, 2013).

<sup>110</sup> *Id.* at \*7.

<sup>111</sup> *Id.* at \*13 (“[T]ortious acts committed by Defendant took place to a substantial degree within the United States.”).

<sup>112</sup> *Id.* at \*14.

territory.<sup>113</sup>

The court cited to an earlier opinion by a U.S. Court of Appeals for the District of Columbia judge in emphasizing that “[i]f the court’s decision constitutes a denial of justice, or if it appears to condone the original wrongful act, under the law of nations the United States would become responsible for the failure of its courts and be answerable not to the injured alien but to his home state.”<sup>114</sup> The court also cited an event in the early history of the ATS, in which U.S. citizens who joined a French privateer fleet to aid the French in their war against Great Britain—despite an official American policy of neutrality—could be held civilly liable under ATS. Since the issue could be resolved by way of a civil suit, this may have avoided an international conflict and diffused tensions between the United States and Great Britain.<sup>115</sup>

The analysis of the *Sexual Minorities Uganda* decision can be applied to U.S. corporations: to further U.S. foreign policy interests such as the rule of law and the enforcement of human rights standards, U.S. corporate citizens should be held accountable when they violate U.S. and international law, in order to prevent negative foreign policy implications.<sup>116</sup>

A number of other cases are pending, including *Doe v. Exxon*<sup>117</sup> and the above-mentioned *Chiquita* and *Drummond* appeals.<sup>118</sup> Another case in which there is a pending appeal is *Mujica v. Occidental*,<sup>119</sup> in which plaintiff alleged that a bomb dropped by the

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (quoting *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 783 (D.C. Cir. 1984) (Edwards, J., concurring), *cert denied*, 470 U.S. 1003 (1985)).

<sup>115</sup> *Id.* (citing *Breach of Neutrality*, 1 Op. Atty. Gen. 57 (1795)).

<sup>116</sup> The court specifically dismissed the reasoning in the *Al Shimari* case as “unpersuasive.” *See id.* at \*15 n.8 (“Arguably a different rationale may apply to a natural U.S. citizen than an American corporation. If not, this court finds the reasoning in *Al Shimari* unpersuasive.”). *See also* *Ahmed v. Magan*, 2:10-cv-00342, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013), *report and recommendation adopted*, 2:10-cv-00342, 2013 WL 5493032 (S.D. Ohio Oct. 2, 2013) (holding there was no issue of extraterritoriality where defendant was a permanent resident of the United States).

<sup>117</sup> *Doe v. Exxon Mobil Corp.*, 527 F. App’x 7 (D.C. Cir. 2013), *reh’g en banc dismissed* (July 26, 2013) (affirming claims for wrongful death, assault and battery and negligent supervision and remanding ATS claims for further consideration).

<sup>118</sup> For more on these cases, see *supra* notes 33–37 (*Chiquita*), 89–91 (*Drummond*), and accompanying text.

<sup>119</sup> *Mujica v. Occidental*, Nos. 10-55515, 1055516 & 10-55587 (pending in 9th Cir.). Ninth Circuit oral argument was held on March 5, 2014. *See* Oral Argument, *Mujica v. Occidental* (Nos. 10-55515, 1055516 & 10-55587), *available at*

military of Colombia killed his mother, sister, and cousin; he also alleges that the Colombian armed forces in question were funded by Occidental Petroleum Corporation, that the intelligence for the bombing was provided by Occidental, and that the bombing was planned in Occidental's complex.<sup>120</sup>

Several of these cases also raise questions beyond the issue of "extraterritoriality," including debates over the standard of corporate complicity required to hold the defendants liable in U.S. courts. The first post-*Kiobel* case to rule on this issue, *Doe v. Nestle*, found the correct standard to be that a company must have knowledge of the human rights abuse and continue to aid and abet the violation.<sup>121</sup> In the Second Circuit, the courts are re-examining the circuit's *Kiobel* ruling which held that corporations are not responsible under international law and therefore cannot be defendants in ATS cases. As mentioned above, the Southern District of New York held that, *inter alia*, in light of the Supreme Court's decision in *Kiobel*, corporations may in fact be sued under the ATS, but the Circuit itself has not yet addressed the issue.<sup>122</sup>

As the above analysis indicates, there are still many unresolved questions and opportunities for plaintiffs to proceed with claims after the *Kiobel* ruling. And, within the United States, there are other statutes which offer human rights victims possible remedies for plaintiffs besides the ATS.

One additional federal statute which allows plaintiffs to raise

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[http://www.ca9.uscourts.gov/media/view.php?pk\\_id=0000012431](http://www.ca9.uscourts.gov/media/view.php?pk_id=0000012431). One issue in the *Occidental* case is the Supreme Court's ruling in *Daimler AG v. Bauman*, No. 11-965 (Jan. 14, 2014), which held that a defendant was subject to general jurisdiction for ATS cases only if the defendant was "at home" within the state.

<sup>120</sup> *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1168 (C.D. Cal. 2005).

<sup>121</sup> *Doe I v. Nestle USA, Inc.*, 738 F.3d 1048 (9th Cir. 2013); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1082 (C.D. Cal. 2010), *vacated sub nom.* I was counsel for amicus curiae Nuremberg Scholars in support of plaintiffs, who concluded that the decisions of the Nuremberg Tribunals after the Second World War used a knowledge standard for aiding and abetting liability. Brief of Amici Curiae Nuremberg Scholars et al. in Support of Plaintiffs-Appellants Seeking Reversal, at 19-32, *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (No. 10-56739).

<sup>122</sup> *In re South African Apartheid Litigation*, *supra* note 98. See also *Jesner v. Arab Bank, PLC*, No. 06-CV-3869(NG)(VVP), 2009 WL 4663865 (E.D.N.Y. May 1, 2009) (granting defendant's motion to dismiss plaintiffs' claims under the ATS, and, instead of addressing the extraterritoriality question, stating that the law of the Second Circuit was that plaintiffs could not bring claims against corporations under the ATS; the case is now on appeal to the Second Circuit, *Jesner v. Arab Bank*, No. 13-3605-cv (L)).

human rights claims against multinational corporations is the Trafficking Victims Protection Act.<sup>123</sup> Under this statute, survivors of human trafficking may bring claims for the trafficking and other human rights abuses which are part of the trafficking, such as sexual violence or arbitrary detention, but the law is limited to provide remedies only to victims of trafficking.<sup>124</sup> A statute providing opportunities for redress for acts of terrorism is the Anti-Terrorism Act.<sup>125</sup>

Another possible avenue for plaintiffs is to bring claims in state courts for torts such as wrongful death, assault and battery, and negligent supervision. A number of plaintiffs in ATS cases have also brought state tort claims; one example where state claims are pending is *Doe v. Exxon*.<sup>126</sup>

ATS cases, as well as the other U.S. federal and state laws which offer human rights victims the opportunity to bring claims for redress continue to contribute to the growing system of corporate human rights accountability.

## 6. CONCLUSION

In a time of increasing globalization of corporate activity, cases in the United States, as well as those in other national systems, have been important steps forward in a growing system of accountability for outlier corporations which violate human rights. Holding these violators accountable contributes to what has been called the “double bottom line”: the bottom line of compliance with human rights standards as well as the traditional bottom line of maximizing financial profits.<sup>127</sup>

The United States has a long tradition of passing and implementing laws designed to control corporate excess. Parallel developments in the United States over the past century include the antitrust laws in the late nineteenth and early twentieth centuries<sup>128</sup> and the Foreign Corrupt Practice Act in the 1970s.<sup>129</sup>

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<sup>123</sup> Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-12 (2012).

<sup>124</sup> *Id.*

<sup>125</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

<sup>126</sup> Paul Hoffman and Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 16 (2013).

<sup>127</sup> Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 LOY. L.A. L. REV. 765, 767 (2009).

<sup>128</sup> Clayton Act of 1914, 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (2012); Federal

These laws were passed to both punish and prevent violations and to create a fair system for law-abiding businesses. Similarly, ATS suits seek to promote corporate social responsibility based on international human rights norms and reaffirm prohibitions such as those against forced labor, genocide, war crimes, torture, extrajudicial killing, and crimes against humanity, which are well-established violations of international law.

The burden on law-abiding businesses to avoid involvement in gross human rights abuses is similar to the burden of avoiding criminal or fraudulent conduct. For example, the well-accepted U.S. Sentencing Guidelines for Organizational Defendants requires that, in order to avoid harsh sentences, companies must have rigorous due diligence programs to avoid involvement in criminal misconduct.<sup>130</sup> Similarly, UN Guiding Principle 23(c) provides that companies should “[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.”<sup>131</sup>

In the Seventh Circuit decision in *Flomo v. Firestone*, Judge Posner noted that the ATS might level the playing field for ethical companies:

One of the amicus curiae briefs argues, seemingly not tongue in cheek, that corporations shouldn't be liable under the Alien Tort Statute because that would be bad for business. That may seem both irrelevant and obvious; it is irrelevant, but not obvious. Businesses in countries that have and enforce laws against child labor are hurt by competition from businesses that employ child labor in countries in which employing children is condoned.<sup>132</sup>

Nobel-Prize winning economist Joseph Stiglitz has stressed that the ATS is an important means to improve business standards because it gives corporations an incentive to police their own conduct and to promote development and foreign direct investment.<sup>133</sup> World

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Trade Commission Act 1914, 15 U.S.C §§ 41-58 (2012); Sherman Act of 1890, 15 U.S.C. §§ 1-7 (2012).

<sup>129</sup> Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. § 78dd-1 (2012).

<sup>130</sup> U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2013), available at [http://www.ussc.gov/Guidelines/2013\\_Guidelines/Manual\\_HTML/8b2\\_1.htm](http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_HTML/8b2_1.htm).

<sup>131</sup> Guiding Principles, *supra* note 1, ¶ 23(c).

<sup>132</sup> *Flomo v. Firestone Nat'l Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011).

<sup>133</sup> Brief of Joseph E. Stiglitz as *Amicus Curiae* in Support of Petitioners at 6, *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012) (No. 11-88).

2014]

## THE RULE OF LAW

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Bank studies have shown that respect for human rights is associated with an economy's performance.<sup>134</sup>

The ATS is a limited statute, allowing plaintiffs to bring claims for the most egregious human rights violations. Where corporations are complicit in those violations, liability rules provide carefully drawn standards for when plaintiffs can hold liable corporations and/or their officers. The cases brought under the statute have drawn upon and contributed to the international standards intended to prevent and provide remedies for corporate human rights abuses.

The ramifications of the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum* are still unknown and the courts and parties in ATS cases face an important challenge: will the nation's pronouncements on the importance of human rights and the rule of law be applied to corporations who violate the most fundamental of human rights? Will the courts contribute to a system of law which reins in the most egregious violations committed by corporate actors? Or, will they contribute to a system of loopholes which allow corporations to argue that a corporation headquartered in the United States, doing business in the United States, benefitting from U.S. laws, or all of the above, should not have to comply with laws seeking to prevent and punish human rights violations?

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<sup>134</sup> *Id.* at 13 (citing Jonathan Isham, et al., *Civil Liberties, Democracy, and the Performance of Government Projects*, 11 WORLD BANK ECON. REV. 219 (1997)).