A SHORT HISTORY OF CORPORATE ACCOUNTABILITY: A COMMENTARY ON INTERNATIONAL LEGAL PERSONALITY AND AN ANALYSIS OF HUMAN RIGHTS LITIGATION IN UNITED STATES COURTS UNDER THE ALIEN TORT STATUTE

By

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To those who believe that to accomplish great things,
we must not only act, but also dream; not only plan, but also believe

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TABLE OF CONTENTS

page

ACKNOWLEDGMENTS 4

ABSTRACT....8

CHAPTER

1 INTRODUCTION 10

2 EXEMPTING CORPORATIONS FROM THE LAW OF NATIONS....16

Limited Liability for Corporate Wrongdoing 16
Kiobel v. Royal Dutch Petroleum (2010)....18
Facts of the case 18
Procedural posture....19
Concluding no corporate liability....20
The Majority Opinion....20
The Majority's Two-Step Analysis 22
Step one: determining potential subjects of liability....23
Step two: determining corporate liability....23
The Concurring Opinion....26
An Introductory Assessment of the Majority's Opinion 27
Domestic Practice of Legal Liability under the ATS 28
Nature and Historical Development of International Law 30
Neglecting the Theoretical Question....34
Contemporary Outcomes of the Social Process....34
The Central Issue....35
The Present Challenge....35

3 THEORETICAL FRAMEWORK OF INTERNATIONAL LEGAL PERSONALITY....37

International Personality in Theory 37
Theoretical Conceptions of International Legal Personality 37
States only 39
Recognition 41
Individualistic....41
Formal 42
Actor....42
An Appraisal of the Five Theoretical Conceptions 43
Research Design and Framing the Social Process....44
Designing the System of Inquiry....46
The Community Process....47
Effective Power Process 48
Outcomes of the Power Process 49

4 MULTINATIONAL CITIZENSHIP INCORPORATED 51

Conceptualizing International Legal Personality in Practice 51
Globalization and the Juridical Person 51
Corporate Rights and Duties 53
Profit Over People 53
Voluntary Codes of Corporate Responsibility 55
Recognition of the Corporate Form 55
Domestic Corporate Personality 55
The corporate person in United States history 55
Recognition of domestic corporate personality 57
International Corporate Personality 58
Subjects of International Law 58
New Rules, Old Actor 58
A King's Crime Against Humanity 59
His Majesty's Pretend Court 60
Modern Subjects of International Law 62

5 CORPORATE ENTERPRISES IN AND UNDER A MODERN LAW OF NATIONS 68

Corporations In and Under International Law 68
Sources of International Law 69
Treaties or Conventions 70
Customary International Law 72
Objective element: state practice 73
Subjective element: opinion juris 73
General Principles of Law 75
Subsidiary Means to Determine International Law 75
Judicial Decisions 75
Teachings of Learned Scholars 76
Contemporary Sources of International Law 76
International Organizations 77
Soft-Law 78
Sources of Corporate Accountability in International Relations 81
Nuremburg Precedent 82
Looking Beyond Nuremburg 84
Dual identity of corporate nationals 85
Regulating corporations 88
Diplomatic protection of corporate persons 89
Jurisdiction in International Law 92
Jurisdiction Over Multinationals 93
Universal Jurisdiction 96

6 A SHORT HISTORY OF HUMAN RIGHTS LITIGATION IN UNITED STATES COURTS UNDER THE ALIEN TORT STATUTE 98

A Long Story in Brief: Kiobel v. Royal Dutch Petroleum Co. 98

The Alien Tort Statute 99
Origin and Development 100
The Statutory Elements 102
Conceptual Problems 103
Constitutionality and the Federal Common Law 103
International law as United States law 104
Application of the ATS in Human Rights Litigation 105
Filartiga v. Peña-Irala (1980) 106
Doe v. Unocal (2003) 108
Sosa v. Alvarez-Machain (2004) 109
Suing Corporations Under the ATS 113
A Nightmare Scenario 113
The "Amazonian Chernobyl" 115
Multinational Corporate Liability Under the ATS 118
Determining Who to Sue 119
Personal Jurisdiction 119
Forum Non Conveniens 120
The Aftermath of Kiobel v. Royal Dutch Shell Co. and Beyond 122
The Immediate Impact 122
Appropriateness of Defendants 124
Scope of Liability: An Open Question 125

7 CONCLUSION 127

Principal Conclusions 127
Rehearing Denied 130
Final Thoughts Regarding Corporate Liability 131

LIST OF REFERENCES 133

BIOGRAPHICAL SKETCH 147

Abstract of Thesis Presented to the Graduate School
of the University of Florida in Partial Fulfillment of the
Requirements for the Degree of Master of Arts

A SHORT HISTORY OF CORPORATE ACCOUNTABILITY: A COMMENTARY ON INTERNATIONAL LEGAL PERSONALITY AND AN ANALYSIS OF HUMAN RIGHTS LITIGATION IN UNITED STATES COURTS UNDER THE ALIEN TORT STATUTE

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With increasing frequency the modern corporation conducts business in all corners of the world. The power of the corporation is unparalleled in the international sphere, even when compared with the nation-state. Unlike the growth of the corporation, the rule of law lags behind; misguided interpretation and failure to recognize the evolving nature of non-state actors in international law limits its application to the changing paradigm of international relations.

The Alien Tort Statute (28 U.S.C. § 1350) provides a unique opportunity to examine corporate legal accountability in and under international law. Enacted in 1789, the Alien Tort Statute (ATS) permits enforcement of international law through United States tort law and permits aliens to sue for human rights violations in United States courts. Although the history and purpose of the ATS appears quite narrow, ATS jurisprudence broadened over time to hold all international actors accountable for violations of international law. However, a recent ruling by the United States Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), essentially exempts corporations from liability for transgressions of the law of nations. But surely this does not mean that corporations operate in a legal vacuum entirely beyond the reach of justice.

This thesis reflects the increasing presence of multinational corporate enterprises in the international sphere and increasing jurisdictional uncertainty in international law and under the ATS. It explores the complicated relationship between sovereign states and private enterprises and the increasing difficulty of subjecting private actors' conduct to the rule of law. Although the question of whether corporations are subjects rather than mere objects of international law arises in the context of human rights litigation in United States courts under the ATS, this issue concerns the global community at large.

CHAPTER 1
INTRODUCTION

Corporations and their multinational enterprises are often the engines of national economic growth and development. Unfortunately, there are numerous historical examples of corporate actors violating human rights. Even though these instances of human rights atrocities committed by multinational corporate enterprises are relatively few when compared with the number of multinational corporate enterprises operating throughout the world, this author is of the opinion that economic development and human rights ought to be considered together and not viewed as incompatible objectives.

This thesis explores the relationship between corporate liability for human rights violations under the Alien Torts Statute (ATS) and the development of corporate legal personality in domestic and international law as well as analyzes a recent ruling by the United States Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), that essentially exempts corporations from liability for transgressions of the law of nations under the ATS.[1] At present, multinational corporate entities operate in a theoretical and practical ungoverned space in the international sphere. This gap in international law is often exploited by private actors because their country of citizenship is either unable or unwilling to regulate its nationals' activities abroad and frequently the host country of multinational corporate activity is either unwilling or unable to govern their conduct within its borders. Consequently, multinational corporate activity, by capitalizing upon economic power, seemingly transcended the rule of law. Although the vast majority of multinational corporations adhere to human rights norms, there are notable examples where corporate activity, either directly or indirectly, breached human rights

[1] The ATS provides "[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."

norms in the pursuit of profit. However, in the later part of the twentieth century a new phenomena emerged in the struggle to enforce international human rights norms in United States courts: the Alien Torts Statute (28 U.S.C. § 1350) developed into a vehicle to provide a domestic remedy for torts committed by multinational corporations in violation of international law.

In fact, for over a quarter of a century United States courts played an important role in the protection and enforcement of international human rights norms. These human rights norms did not develop into being full-panoply, instead, global participants actively pursued these values through institutions, like United States courts, and liability for violations of human rights norms developed in the context of this international decision-making process. The decision-making process, simply stated, is a response to an actual or perceived problem: corporate accountability.

This author is also of the opinion that the rule of law provides the foundations for a democratic, free and just society and the ATS succeeds in filling a gap in international law. In fact, the evolution of ATS jurisprudence over the last three decades provides a unique opportunity to examine the legal standards governing private actor conduct and the development of corporate liability in an under a modern law of nations. Through this lens, the rule of law is merely a form of decision-making that emerged from societal demands, and the legal decisions holding private actors, such as corporations accountable for internationally wrongful conduct may be understood as an institutional response to these demands. Just like the ATS developed as a response to an actual and perceived problems of society, so too did the recent decision to foreclose that ATS as a viable method to hold corporations accountable. Some believe that the ATS is bad policy and that it is bad for business. In fact, there is voluminous debate among legal commentators about the ATS. This thesis does not purport to resolve every vignette surrounding

the ATS; rather, it examines corporate accountability in and under international law and argues that corporations may be held liable for internationally wrongful conduct under international law and the ATS.

In essence, this thesis provides a framework for understanding the legal status of corporate actors in and under international law and whether the jurisdictional grant under the ATS is sufficient to hold corporate entities accountable for violations of prevailing international norms governing private actor conduct. Recent judicial decisions in United States courts make this inquiry into corporate liability under international law particularly timely. On September 17, 2010, the United States Second Circuit Court of Appeals decided *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) and the majority ruled that corporations are exempt from suit under the ATS because international law does not extend liability to corporate entities.

Despite years of ATS jurisprudence holding private actor accountable for human rights violations, the United States Second Circuit Court of Appeals groundbreaking decision basically closed United States courts to alien plaintiffs seeking to hold corporations accountable for alleged human rights abuses outside of the United States. Although United States courts allowed lawsuits against corporate defendants under the Alien Tort Statute (ATS) for nearly two decades, the Second Circuit Court of Appeals has now exempted corporations from the law of nations and provided corporations with a new benefit of incorporation: limited liability.

The thesis is divided into seven chapters. Chapter One consists of this introduction. Chapter Two serves five preliminary purposes. First, the chapter provides an overview of the United States Second Circuit Court of Appeals decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). This first section of Chapter Two will highlight the facts of the

case, the procedural posture, and the court's conclusion. Second, Chapter Two examines the majority opinion in *Kiobel* and the two step analysis the court employed to reach its decision that corporations are not liable for violations of the law of nations. Third, Chapter Two introduces the concurring opinion of Judge Leval. Although the entire court found that this case ought to be dismissed, Judge Leval strongly disagreed with the majority's reasoning and vehemently opposes the rule, arguably, manufactured by the majority. Fourth, Chapter Two briefly analyzes the majority's opinion and presents an introductory assessment to the court's ruling. In *Kiobel*, the court's misguided approach to international law in theory and in practice lead to the court to incorrectly determine that corporations are not subjects of international law and as a result corporate entities are not liable under the ATS. Lastly, this section will introduce the reader to the initial arguments of this thesis which seeks to determine whether corporations are subjects of international law.

Chapter Three has two primary purposes. First, it examines international legal personality in theory vis-à-vis five theoretical conceptions of international legal personality. Throughout the history of international legal practice, these five main theoretical conceptions of legal personality inform the debate surrounding the issue of whether a corporation may be held liable for violations of international law. Second, Chapter Three lays out the system of inquiry employed throughout this thesis. This thesis borrows its theoretical approach from decision-making theory which at its most basic level posits that problems of law, such as determining corporate personality for the purposes of liability under the ATS, are problems derived from the social-process.

The theoretical model introduced in Chapter Three and adopted by this thesis frames the inquiry of corporate liability within the context of the social process. This theoretical model

recognizes that all actors have rights and duties determined by the international decision-making process and posits that all actors, including corporations, are effective actors within the international decision-making process. In this context, the particularized aspects of any given participant's international obligations and responsibilities are derived from its participation within this decision-making process. Moreover, an entities rights and duties depend upon its effective power within the legal system. Following this configurative analysis approach to examining corporate liability, this thesis will also examine the outcomes of the power process. Importantly, this theoretical model is employed because it accounts for the social reality of law and under this model all international actors are accounted for in and under the rule of law.

Chapter Four and Chapter Five examine corporations in and under international law. Chapter Four examines the historical development of legal personality. Chapter Five provides the reader an orientation to the sources and application of international law. These chapters explore the nature of international law as an evolving body of law within the context of the social process and trace the historical development of the corporation in and under the rule of law. Taken together, Chapter Four and Chapter Five provide a roadmap for determining whether corporations are accounted for in and under international law.

Chapter Six examines human rights litigation in United States courts and describes the development of corporate liability under the ATS. First, Chapter Six revisits the United States Second Circuit Court of Appeals decision in *Kiobel v. Royal Dutch Petroleum Co*. Second, Chapter Six reviews the complicated historical development of the ATS and reflects briefly on the waves of litigation under the ATS leading to corporate actor liability. For a more detailed and general description of the development in ATS jurisprudence there exists a plethora of literature; however, the focus of this study is whether corporations are subjects of international law and

whether corporate liability under the ATS is consistent with international law. Third, Chapter Six analyzes three specific cases that provide the framework to examine the legal standards of corporate liability under the ATS: *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000); 395 F.3d 932 (9th Cir. 2002); 395 F.3d 978 (9th Cir. 2003) and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). These cases provide the framework to examine the evolution of United States law governing tort liability for violations of international law. Central to the discourse pertaining to the viability of the ATS to hold private actors accountable is whether international law provides for corporate liability and whether domestic principles of corporate law provide the basis for corporate legal personality in international law. Here, these three cases provide illustrative examples of the development of law governing domestic remedies for torts committed in violations of the law of nations. Prior to concluding, this chapter weighs the outcome of the decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) and its influence on the future enforcement of human rights in United States courts and beyond.

Chapter Seven concludes this thesis and serves three purposes. First, it provides suggestions for further research. Second, I offer a few concluding words concerning the majority opinion in *Kiobel v. Royal Dutch Petroleum Co.* Third, Chapter Seven addresses the policy of the ATS. Lastly, Chapter Seven provides the reader with a conclusion of the inquiry into corporate liability under the ATS is that the jurisdictional grant is consistent with international law and the must be reviewed by the United States Supreme Court.

CHAPTER 2
EXEMPTING CORPORATIONS FROM THE LAW OF NATIONS

Limited Liability for Corporate Wrongdoing

"[A]doption of the corporate form has always offered important benefits and protections to business – foremost among them the limitation of liability to the assets of the business without recourse to the shareholders."[2] Yet, in *Kiobel v. Royal Dutch Petroleum Co.* the United States Second Circuit arguably announced a new set of corporate rights.[3] In a split decision, the court ruled that the Alien Tort Statute (ATS)[4] does not provide subject matter jurisdiction over claims alleging violations of international law against corporations.[5] "[T]he new rule," according to Judge Leval, agreeing only in the judgment to dismiss the plaintiffs' claims, "offers to unscrupulous businesses advantages of incorporation never before dreamed of."[6] Moreover, "[s]o long as they incorporate . . . businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy – all without civil liability to victims."[7]

In response to the aforementioned concerns, majority opinion author Judge Cabranes wrote,

> [w]e do not take lightly the passion with which Judge Leval disagrees with our holding. We are keenly aware that he calls our reasoning '*illogical*' on nine

[2] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 150 (2d Cir. 2010) (Leval, J., concurring) [herein *Kiobel*].

[3] *Id.* at 114.

[4] The Alien Tort Statute, 28 U.S.C.S. § 1350, provides jurisdiction over (1) tort actions, (2) brought by aliens only, (3) for violations of the law of nations. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010); *see also*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25, 732, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) (Souter, J.) (quoting *Filartiga* with approval and identifying it as the "birth of the modern line of [ATS] cases").

[5] *Kiobel at* 114-115.

[6] *Kiobel at* 150 (Leval, J., concurring).

[7] *Id.*

> separate occasions . . . Nor is it lost on us that he calls our conclusions '*strange*,' . . . or that he repeatedly criticizes our analysis as '*internally inconsistent*,' We must, however, leave it to the reader to decide whether any of Judge Leval's charges, individually or in combination, are a fair reading of our opinion. In so doing *we are confident that if our effort is misguided, higher judicial authority is available to tell us so*."[8]

This tension between judges evidences that United States courts are clearly struggling to determine standards of corporate legal personality in international matters. Moreover, I accept the invitation to decide whether Judge Leval's charges in his eighty-eight page separate opinion are a fair reading of Judge Cabranes's fifty-page opinion in *Kiobel* that concluded that corporations are not subject to liability under the ATS. Indeed, this thesis will show that Judge Cabranes's decision is incorrect in theory and practice and concludes that Judge Leval's opinion is an accurate critique of the majority opinion.

The majority opinion is incorrect in theory. First, the majority relies on outdated and outmoded legal theory which purports to confer legal personality exclusively to state actors; second, the majority exhibits an insufficient understanding of the international legal process and ignores the essence of international legal practice; third, the result is that the majority lacks any bases under a modern law of nations to support its holding and based its decision upon its incorrect theoretical approach that led the majority to manufacture rules to support its holding; fourth, the majority misstates the historical development of international norms; and fifth, the majority ignores well-settled relationships between the rights and duties of international actors.

Additionally, the majority opinion is incorrect in practice. First, the majority incorrectly approaches the modern law of nations. The majority based its assessment of international law upon an incomplete appraisal of its sources. Second, the majority departs from well-settled principles of law, both international and domestic. Third, the majority lacks legal precedent for

[8] *Id.* at 123 (emphasis added).

its holding. The majority misconstrues existing ATS jurisprudence, misunderstands the Supreme Court's decision in *Sosa*, and frustrates the object and purpose of the jurisdictional grant of the ATS.

Kiobel v. Royal Dutch Petroleum (2010)

In *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit found that corporate defendants have never been held liable, either criminally or civilly, for violations of international law, and held that in the absence of an international rule of corporate liability, plaintiff's claims against corporate entities must be dismissed for lack of subject matter jurisdiction.[9] The United States Supreme Court has never addressed the issue of corporate liability under the ATS. Although the Second Circuit's decision in *Kiobel* represents a significant departure from ATS precedent, the decision was issued at a point in ATS jurisprudence where many parties were looking for a judicial split among appellate courts to prompt a ruling from a higher judicial authority. The Supreme Court has decided only one case under the ATS and provided little guidance to lower courts.[10] *Kiobel* is ripe for review.

Facts of the case

In *Kiobel*, Nigerian citizens, residents of the Ogoni Region of Nigeria, alleged that corporate defendants Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC, through a subsidiary, Shell Petroleum Development Company of Nigeria, Ltd., aided and abetted the Nigerian government in committing human rights abuses.[11] In *Kiobel*, all

[9] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 114-115 (2d Cir. 2010) (In *Kiobel*, the majority reasoned that "the absence of a universal practice among nations of imposing civil damages on corporations for violations of international law means that under international law corporations are not liable for violations of the law of nations").

[10] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

[11] Notably, for the purpose of determining personal jurisdiction, the corporate defendants are holding companies, Royal Dutch Petroleum Company, incorporated in the Netherlands, and Shell Transport and Trading Company PLC and incorporated in the United Kingdom respectively; Shell Petroleum Development Company of Nigeria, Ltd. is incorporated in Nigeria. *Id.* at 123.

defendants were corporations; each of the entities sued under the ATS for aiding and abetting the Nigerian government in violation of the laws of nations were "'juridical' persons, rather than 'natural' persons."[12] Nigerian military forces, throughout 1993 and 1994, were accused of "beating, raping, and arresting residents and destroying or looting property" of the Nigerians, all with the assistance of defendants.[13] The Nigerians alleged that Shell (1) provided transportation to Nigerian forces, (2) allowed their property to be utilized as a staging ground for attacks, (3) provided food for soldiers involved in the attacks, and (4) provided compensation to those soldiers.[14] Based upon these allegations, the citizens of Nigeria "brought claims of aiding and abetting (1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction."[15]

Procedural posture

In September 2002, the Nigerian plaintiffs in *Kiobel* filed their class action under the ATS alleging the aforementioned violations of the law of nations. Shortly after filing the case, the Supreme Court decided *Sosa v. Alvarez-Machain* and the corporate defendants moved for dismissal relying on the *Sosa* decision.[16] In 2006, the District Court for Southern New York dismissed the bulk of the case, including the "claims for aiding and abetting property destruction; forced exile; extrajudicial killing; and violations of the rights to life, liberty, security, and

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 123.

[16] *Id.* at 124; *see also*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004).

association reasoning that customary international law did not define those violations with the particularity required by *Sosa.*"[17]

Concluding no corporate liability

In *Kiobel*, the Second Circuit Court found that corporations are not subjects of international law and as a result are not subject to liability under the ATS.[18] Judge Cabranes, joined by Judge Jacobs, in a fifty-page opinion, concluded "that insofar as plaintiffs bring claims under the ATS against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs' claims fall outside the limited jurisdiction provided by the ATS."[19] Notably, in a separate eighty-eight page opinion, Judge Leval agreed with the judgment but vehemently protested the majority's analysis, reasoning, and conclusions.[20] Importantly, Judge Leval noted that "[t]he majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights."[21]

The Majority Opinion

According to the majority, "for now, and for the foreseeable future, the Alien Tort Statute does not provide subject matter jurisdiction over claims against corporations."[22] The *Kiobel* majority held as follows:

> (1) Since *Filartiga*, which in 1980 marked the advent of the modern era of litigation for violations of human rights under the Alien Tort Statute, all of our precedents--and the Supreme Court's decision in Sosa require us to look to international law to determine whether a particular class of defendant, such as

[17] *Kiobel v. Royal Dutch Petroleum Co*., 456 F. Supp. 2d 457, 464-65, 467 (S.D.N.Y. 2006).

[18] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 114-115 (2d Cir. 2010).

[19] *Id.*

[20] *Id.* at 149-50 (Leval, concurring).

[21] *Id.* at 149 (Leval, concurring).

[22] *Id*. at 114-115.

> corporations, can be liable under the Alien Tort Statute for alleged violations of the law of nations.
>
> (2) The 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. Inasmuch as plaintiffs assert claims against corporations only, their complaint must be dismissed for lack of subject matter jurisdiction.[23]

At first glance, the majority's holding appeared akin to Swift's modest proposal.[24] But upon a closer inspection, the issue of whether corporations have international legal personality is much more complex. A determination of whether corporate liability is permissible under the ATS is dependent upon how one approaches international law. In *Kiobel*, the majority approached international law somewhat straightforward, yet employed an antiquated "states-only" approach and ignored general principles of law that essentially serve as gap fillers in international law.[25] As a result, the majority misconstrued international law and arrived at a conclusion to exempt corporations from liability that is incompatible with the development legal norms addressing the of human rights obligations.

Furthermore, the majority in *Kiobel* undermine the purpose of the ATS. First, the plain language of the text clearly indicates that the purpose of the ATS is to provide aliens a civil remedy in federal courts for violations of international law. Additionally, the history of the ATS further supports the notion that the ATS provides federal courts jurisdiction for "all causes" brought by an alien alleging injuries arising from a violation of international law. Second, the ATS does not designate the appropriate defendants and to not allow ATS actions against

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[23] *Id.* at 125 (internal citations omitted).

[24] *See generally* JONATHAN SWIFT, A MODEST PROPOSAL FOR PREVENTING THE CHILDREN OF POOR PEOPLE IN IRELAND FROM BEING A BURDEN TO THEIR PARENTS OR COUNTRY, AND FOR MAKING THEM BENEFICIAL TO THE PUBLIC (1729) (suggesting that the impoverished Irish might ease their financial situation by selling children to the wealthy for consumption).

[25] *Kiobel* at 141 n.43.

corporate defendants is contrary to historical and jurisprudential evidence that suggests otherwise.

Lastly, the majority in Kiobel misconstrues the Supreme Court's language in *Sosa* and reaches a conclusion that threatens to undermine United States business interests. In fact, to deny corporate liability under international law is tantamount to denying the rights of our corporate nationals doing business abroad. Importantly, United States corporate nationals are increasingly subjected to exterritorial governance and in the absence of universal compliance with human rights norms, United States economic interests are placed at a significant disadvantage when compared with a corporate national of a state that does not enforce human rights law. Still, the majority overlook this policy argument which would ensure the competitiveness of United States economic interests abroad. In short, the majority opinion reached the conclusion that corporations are not subject to liability under the ATS based upon his understanding of international law, albeit misguided, because Judge Cabranes framed the issue within the "states-only" perspective of international legal personality.

The Majority's Two-Step Analysis

To reach the conclusion that corporations are not subject to liability, the majority employed a two-step analysis.[26] First, the court considered whether international law or domestic law determines whether the jurisdictional grant under the ATS extends to civil actions against corporations.[27] Second, the court turned its inquiry to international law to discover "what the sources of international law reveal with respect to whether corporations can be subject to liability for violations of customary international law.[28]

[26] *Id.* at 125

[27] *Id.*

[28] *Id.* at 125

Step one: determining potential subjects of liability

The first issue before the court, according to the majority, was to determine whether international law or domestic law determines ATS liability of a particular actor, corporate or individual.[29] The majority read the Supreme Court's decision in *Sosa* as requiring "that [it] look to *international law* to determine [its] jurisdiction over ATS claims against a particular class of defendant, such as corporations."[30] The majority reinforced its interpretation of *Sosa* by noting that its conclusion is consistent with Justice Breyer's reformulation of the issue in his concurring opinion: "The norm [of international law] must extend liability to the *type of perpetrator* (*e.g.*, a private actor) the plaintiff seeks to sue."[31] Next, to determine whether international or domestic law governs whether an actor is a subject of international legal obligations *(i.e.*, international legal personality) the court looked to jurisprudence of international and domestic courts, scholarly works of international commentators and briefly turned to its own ATS jurisprudence to find that international law rather than domestic law determines the subjects of international law.[32]

Step two: determining corporate liability

"Having concluded that international law controls our inquiry, we next consider what the sources of international law reveal with respect to the existence of a norm of corporate liability under customary international law."[33] The court approaches the issue of whether corporate

[29] *Id.*

[30] *Id.*

[31] Id. at 128 (citation omitted) (emphasis included in text).

[32] *Id.*

[33] *Id.* at 131.

liability, in the context of the *Sosa* test, is "specific, universal, and obligatory."[34] The court constrained its inquiry to the jurisdictional grants of International Tribunals, including but not limited to Nuremburg, the ICTY, the ICTR, and the Rome Statute of the ICC. Although this limited scope inquiry correctly weighs in favor of the majority finding no customary rule of corporate civil liability for violations of international criminal law, the survey was an incomplete assessment of international law based upon a limited inquiry into criminal liability norms that were just developing at Nuremburg. The majority noted, because "international tribunals are established for the specific purpose of imposing liability on those who violate the law of nations, the history and conduct of those tribunals is instructive."[35] The majority also found "it particularly significant, therefore, that no international tribunal of which we are aware has *ever* held a corporation liable for a violation of the law of nations."[36] In contrast, Judge Leval aptly points out that, international law generally looks to domestic law for notions of civil liability, but he also neglects to inquire about developments in corporate personality in international law outside of the criminal context.[37]

Following its reliance on International Criminal Tribunals to find notions of civil liability, the majority briefly considered a few particularized treaties.[38] From its review of the treaties upon which the district court relied, the majority stated the following:

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[34] *Id.* at 131 (quoting *Sosa*, 542 U.S. at 732).

[35] *Id.* at 132.

[36] *Id.* at 132 (emphasis in original).

[37] *Id.* at 149-50 (Leval, concurring).

[38] *Id.* at 138 n 40. "The district court relied on the following treaties: (1) Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, *adopted* July 1, 1949, 96 U.N.T.S. 257 (not ratified by the United States); (2) Convention on Third Party Liability in the Field of Nuclear [**75] Energy, *done* July 29, 1960, amended Jan. 28, 1964, 956 U.N.T.S. 263 (not ratified by the United States, China, the Soviet Union, or Germany); (3) International Convention on Civil Liability for Oil Pollution Damage, *done* Nov. 29, 1969, 973 U.N.T.S. 3 (not ratified by the United States, China, or the Soviet Union)); (4) Vienna Convention on Civil Liability

> [T]here is no historical evidence of an existing or even nascent norm of customary international law imposing liability on corporations for violations of human rights. It cannot be said, therefore, that those treaties on specialized questions codify an existing, general rule of customary international law. Nor can those recent treaties, in light of their limited number and specialized subject matter, be viewed as crystallizing an emerging norm of customary international law.[39]

Here, the court incorrectly characterizes the evolution and development of customary international law because, in fact, the practice of a small number of states in a particular region creates regional customary international law.[40] Again, incorrectly the majority states that "[p]rovisions on corporate liability in a handful of specialized treaties cannot be said to have a 'fundamentally norm-creating character.'"[41] Additionally, the practice of particularly affected states (*e.g.* space law), can create custom that binds other states and the ICJ has signaled such a possibility may exist.[42] Nonetheless, the majority found that these treaties "in light of their limited number and specialized subject matter, be viewed as crystallizing an emerging norm of customary international law."[43]

The majority also misconstrues the purpose of the ATS when the courts noted that "the statute was rooted in the ancient concept of comity among nations and was intended to provide a remedy for violations of customary international law that 'threaten serious consequences in

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for Nuclear Damage, *done* May 21, 1963, 1063 U.N.T.S. 265 (not ratified by the United States, China, France, Germany, or the United Kingdom); (5) Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, *done* Dec. 17, 1971, 974 U.N.T.S. 255 (not ratified by the United States, China, the Soviet Union, or the United Kingdom); and (6) Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, *done* Dec. 17, 1976, *reprinted at* 16 I.L.M. 1450 (signed by six States but ratified by none)" *Id*. 138 n 40 (citing *Presbyterian Church*, 244 F. Supp. 2d at 317).

[39] *Kiobel* at 138.

[40] *Id*.

[41] *Id*. at 139.

[42] The ICJ, in the *Asylum* case, accepted that there could be a Latin American customary rule regarding the right of a state to issues a unilateral and definitive grant of political asylum. *See generally*, Asylum (Colom. V. Peru), 1950 I.C.J. 266 (Nov. 20.).

[43] *Id*. at 139.

international affairs.'"[44] Unless, of course, ensuring the payment of private debt owed by American debtors to British creditors rises to the majority's understanding of what constitutes a serious threat to United States interests.[45]

The Concurring Opinion

Judge Leval's eighty-eight page separate opinion harshly criticizes the majority.[46] Even though Judge Leval agrees with the majority that the case against Royal Dutch Shell for aiding and abetting the Nigerian government must be dismissed, Judge Leval, "cannot, however, join the majority's creation of an unprecedented concept of international law that exempts juridical persons from compliance with its rules. The majority's rule conflicts with two centuries of federal precedent on the ATS, and deals a blow to the efforts of international law to protect human rights."[47]

Judge Leval fully agreed with the majority "that *this* Complaint must be dismissed" because it failed to state a proper legal claim upon which the defendants were entitled to relief under the ATS.[48] However, Judge Leval refused to join the majority opinion because he found that the majority' manufactured an unprecedented concept of international law that exempts juridical persons from compliance with its rules."[49] Judge Leval objects to the majority's opinion for several reasons. First, Judge Leval finds the majority have no basis for its contention in

[44] *Id*. at 139 (quoting *Sosa* at 715 (noting that this concern "was probably on the minds of the men who drafted the ATS").

[45] *See infra* note 325.

[46] *Kiobel* at 149-196 (Leval, concurring).

[47] *Id.* at 196 (Leval, concurring).

[48] *Id.* at 151 (Leval, concurring) (emphasis in original).

[49] *Id.* at 196(Leval, concurring)

international law.[50] Second, Judge Leval finds the majority's rule is "internally inconsistent and incompatible" with Supreme Court jurisprudence and the court's own case law.[51] In particular, Judge Leval notes that "no principle of domestic or international law supports the majority's conclusion that norms enforcement through the ATS . . . apply only to natural persons and not to corporations . . ."[52] This thesis argues that Judge Leval's opinion is indeed a fair reading of the majority's opinion and the following section of this study will briefly examine whether corporations are subjects rather than merely objects of international law.

An Introductory Assessment of the Majority's Opinion

First, let me say that jurisdictional uncertainty and the issue of corporate liability for an internationally wrongful act generate significant concern. This uncertainty and concern about subjecting private non-state actors to liability for an internationally wrongful act is underscored by a misguided approach to international law which purports to confer legal personality, the ability to sue and be sued, exclusively to state actors.[53] However, the so-called "legal person" is a legal fiction and the creation of such legal persons has evolved, developed, and continues to coexist among the various subjects of international law. In reality, international law places all legal persons on the same conceptual plane, irrespective of entity or enterprise.

The sovereign state is the first legal personality of international law, and in this context, the corporate legal person should exist on the same conceptual plane as other subjects of international law. Yet, the historical reality of international law is that any exercise by the

[50] *Id.* at 153 (Leval, concurring).

[51] *Id.* at 152 (Leval, concurring).

[52] *Id.* at 153 (Leval, concurring).

[53] *See generally*, ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW (2010) (this monograph provides the only comprehensive analysis of legal personality in international law); *see also* Jan Klabbers, *Legal Personality: The Concept of Legal Personality*, 11 IUS GENTIUM 35, 37 (2005).

corporate legal person of the right to sue, just like that of an individual, must be filtered through the sovereign. In contrast, liability for wrongful acts freely flows to the individual or a non-traditional legal person, such as a corporation or supranational entity. Such varied conceptual notions of international legal personality led to the current uncertainty regarding corporations in and under international law.

Second, direct responsibility of corporate actors for human rights violations is even more problematic in United States courts. Recently, federal courts have begun to grapple with subjecting corporate actors to subject matter jurisdiction for extraterritorial human rights violations. These contemporary problems of corporate liability for human rights violations committed beyond the traditional territorial reach of courts emerged in the context of a "legal Lohengrin," the Alien Tort Statute (ATS), which in its modern form provides United States courts with jurisdiction to adjudicate torts committed in violation of the law of nations.[54]

Domestic Practice of Legal Liability under the ATS

As modernity ushered in new societal demands and notions of responsibility, ATS case law evolved and broadened.[55] Early case law under the ATS subjected individuals to liability for

[54] Enacted in 1789 to provide judicial remedy in United States courts for "violations of the law of nations", the Alien Tort Statute (28 U.S.C. §1350) has developed over time into a legal mechanism to hold private actors accountable for human rights violations beyond the conventional territorial reach of domestic courts. Judge Friendly first referred to the ATS as a "legal Lohengrin" because "no one seems to know whence it came." *See IIT v. Vencap, Ltd*., 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd*., 130 S. Ct. 2869 (2010); *compare with* BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN, & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 3 (2008) (noting that Judge Friendly's description of the ATS as a "legal Lohengrin" is no longer accurate because historians have uncovered its history).

[55] *See generally* JEFFERY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS (2008) (studying the struggle to enforce international human rights law in United States courts); PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE (2009) (addressing the legal interpretations and practical implications of the ATS); MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH US TORTS LAW (2009) (studying the struggle to enforce international human rights law in United States courts) (examining and analyzing corporate liability under the ATS) [herein KOEBELE]; BETH STEPHENS, *et al*., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2008) (providing an in-depth guide to human rights litigation under the ATS).

torts committed in violation of the law of nations and shortly thereafter, courts began to assert subject matter jurisdiction over corporations accused of committing human rights violations.[56] An individual, possessing *locus standi juridical*, is logically an appropriate defendant in lawsuits under the ATS; however, courts now hesitate about the ascription of responsibility to corporations extraterritorially.[57] In such cases, business enterprises have dual-identity.[58] These courts resurrected concerns about non-state actors and notions of legal personality in international law. Courts have created new rules for the multinational enterprise and provide new

[56] For nearly two decades, U.S. courts have allowed lawsuits against corporate defendants under the ATS. *See, e.g., Doe v. Unocal Corp*., 395 F.3d 932 (9th Cir. 2002) (concluding that a private party, a corporation is subject to suit under the ATS without any showing of state action for aiding and abetting violations of customary international law), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005) (ultimately settled); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (dismissing ATS case against corporate defendant on forum non conveniens grounds, because courts of Ecuador provided adequate alternative forum); *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 374 F. Supp. 2d 331, 335 (S.D.N.Y. 2005) (Cote, J.) (finding corporate defendants argument that corporate liability under international law is not sufficiently accepted in international law to support an ATS claim is misguided); *Talisman*, 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003) (Schwartz, J.) (ruling that a private corporation is a juridical person and has no per se immunity under domestic or international law and finding where plaintiffs allege *jus cogens* violations, corporate liability may follow); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal. 2005); 564 F.3d 1190 (9th Cir. 2009); *Sinaltrainal v. Coca-Cola Co.*, 572 F.3d 1252 (11th Cir. 2009); *Abdullahi v. Pfizer, Inc*., 562 F.3d 163 (2d Cir. 2009) (holding corporate defendant liable for engaging in non-consensual medical experimentation on human subjects in violation of law of nations), *cert. denied*, 78 U.S.L.W. 3049. However, recent decisions essentially closed U.S. courts to alien plaintiffs seeking to hold corporations accountable for alleged human rights abuses outside of the U.S. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 114-115 (2d Cir. 2010) ; *Flomo v. Firestone Natural Rubber Co.*, No. 1:06-cv-00627, 2010 U.S. Dist. LEXIS 108068, at 7 (S.D. Ind. Oct. 5, 2010) (relying on *Kiobel's* holding to dismiss corporate ATS case); *Viera v. Eli Lilly & Co*., No. 1:09-CV-0495, 2010 U.S. Dist. LEXIS 103761 (S.D. Ind. Sep 30, 2010) (relying on *Kiobel's* holding to dismiss corporate ATS case); *Doe v. Nestle*, No. CV 05-5133, 2010 U.S. Dist. LEXIS 98991 (C.D. Cal. Sept. 8, 2010) (holding independently of *Kiobel* that the ATS does not provide subject matter jurisdiction over corporations).

[57] States generally assert extraterritorial jurisdiction over legal and natural persons and conduct occurring outside their borders under the following six bases: (1) the "objective territorial principle," where an act occurred abroad but its effect was felt within the prosecuting state's territory (*e.g.*, narcotics and human trafficking, antitrust laws, and corrupt practices); (2) the "nationality principle," where the perpetrator is a national of the prosecuting state; (3) the "passive personality principle," where the victim is a national of the prosecuting state; (4) under the "protective principle," where an act affects the essential security interests of the prosecuting state (*e.g.*, espionage, visa fraud, terrorism); and (5) under the "universal principle," where an act is universally condemned (*e.g.*, crimes against humanity, genocide, war crimes, piracy, slavery). *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

[58] *See, e.g., Barcelona Traction, Light and Power Company, Limited (Belg. v. Sp.)*, Second Phase, Judgment, 1970 I.C.J. Rep. 32 (1970); *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. Rep. 3 (1989).

benefits of incorporation by permitting the corporate form to be used as a means of insulating corporations from liability for human rights violations committed beyond our borders.[59]

Nature and Historical Development of International Law

In the United States, the ATS developed into a viable legal mechanism to hold international actors, both natural and legal persons, accountable for violations of human rights norms outside of the United States.[60] Although the origins and purpose of the ATS are unclear, ATS jurisprudence has been used to hold individuals and corporations accountable for human rights violations.[61] Recent decisions, however, have questioned whether a corporation is subject to liability under the ATS.[62] This reflects the conventional description of the international legal system as a community of states. Thus, states and only sovereign states are vested with legal personality.[63]

Through this lens, non-state actors like corporations are mere objects of international law. This perspective prevailed prior to World War II (WW II), yet international law practice dramatically changed since then.[64] In fact, international law practice since 1945 expanded the

[59] *Kiobel at* 114-115.

[60] BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN, & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2008).

[61] *See, e.g.*, MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH US TORTS LAW (2009) [herein KOEBELE].

[62] *See, e.g.*, *Kiobel*; *Flomo v. Firestone Natural Rubber Co.*, No. 1:06-cv-00627, 2010 U.S. Dist. LEXIS 108068 (S.D. Ind. Oct. 5, 2010); *Viera v. Eli Lilly & Co.*, No. 1:09-CV-0495, 2010 U.S. Dist. LEXIS 103761 (S.D. Ind. Sep 30, 2010); *Doe v. Nestle*, No. CV 05-5133, 2010 U.S. Dist. LEXIS 98991 (C.D. Cal. Sept. 8, 2010).

[63] J.L. BRIERLY, THE LAW OF NATIONS (6th ed. 1963); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (6th ed. 2003); PHILIP C. JESSUP, A MODERN LAW OF NATIONS (1956).

[64] *See generally Developments in the Law – International Criminal Law: V. Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025 (May, 2001); Frank Christian Olah, *MNC Liability for International Human Rights Violations under the Alien Tort Claims Act: A Review & Analysis of the Fundamental Jurisprudence and a Look at Aiding & Abetting Liability under the Act*. 25 QUINNIPIAC L. REV. 751 (2007).

scope and volume of international law.[65] In one famous International Court of Justice (ICJ) decision, the *Reparations for Injuries* case, the question before the court was whether the United Nations had legal personality.[66] The ICJ held that the United Nations (UN) had legal personality appropriate to its structure and functions.[67] The *Reparations for Injuries* case provides the only articulation of a definition on international legal personality: "an international person . . . is . . . capable of possessing international rights and duties, and . . . has capacity to maintain its rights by bringing international claims."[68] The ICJ reasoned that such status results either from an explicit statement in the organization's organic documents or from the functions and powers granted to the organization.[69] Since the ICJ's authoritative statement in the *Reparations for Injuries* case, both scholars and the ICJ itself have developed several indicia for determining international legal personality, which include but are not limited to, the existence of an independent decision-making and ministerial organ, financial independence, and notably, the capacity to enter into international agreements.[70]

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[65] *See, e.g.*, Richard B. Bilder, *An Overview of International Human Rights Law*, in Guide To International Human Rights Practice 3, 4-6 (Hurst Hannum ed., 4th ed. 2004); *see also* Jeffery M. Blum & Ralph G. Stienhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 64-75 (1981).

[66] *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 179 (Adv. Op., Apr. 11).

[67] *Id.*

[68] *Id.*

[69] *Id.* at 182.

[70] *See, e.g.*, C.F. AMERASINGHE, PRINCIPLES OF INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 83 (2005); JAN KLABBERS, INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 45 (2002); *see also Western Sahara*, 1975 I.C.J. 12 (Adv. Op., Oct. 16).

Additionally, the Allied powers created Tribunals to try Nazi war criminals in Germany and Japanese war criminals in Japan.[71] These Tribunals, in particular Nuremberg, sought direct application of international criminal law to subjects of states.[72] The core assumption of these Tribunals was that collective punishment of states was secondary to individual accountability and that behind the state were the active decision-makers.[73] Tribunals applied this reasoning to pierce the veil of the sovereign state to hold individuals directly accountable.[74] What was not fully appreciated is that if individuals were to be held legally accountable they must be afforded legal safeguards under the rule of international law.[75] Thus, in addition to holding individuals

[71] The Charter of the International Military Tribunal commonly called the "London Charter," authorized punishment of war criminals following the WWII. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the "London Charter"), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

[72] *See generally*, Robert H. Jackson, *Final Report to the President Concerning the Nurnberg War Crimes Trial* (1946), *reprinted in* 20 TEMP. L.Q. 338, 342 (1946); *see also* Brigadier General Telford Taylor, U.S.A., Chief of Counsel for War Crimes, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10*, at 109 (1949).

[73] *See* Albin Eser, *Individual Criminal Responsibility, in The Rome Statute of the International Criminal Court* 767, 774-75 (Antonio Cassese et al. eds., 2002) (emphasis added) (footnote omitted); and Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L. J. 439, 440 (2010) (describing Nuremburg's recognition of a particular mode of international criminal responsibility known as Joint Enterprise liability).

[74] According to Judge Cabranes, "The singular greatest achievement of international law since the WWII has come in the area of human rights, where the subjects of customary international law – *i.e*., those with international rights, duties, and liabilities--now include not merely states, but also individuals." *Kiobel* at 119; *see also* Robert H. Jackson, *Final Report to the President Concerning the Nurnberg War Crimes Trial* (1946), *reprinted in* 20 TEMP. L.Q. 338, 342 (1946). Brigadier General Telford Taylor, U.S.A., Chief of Counsel for War Crimes, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10*, at 109 (1949) ("[T]he major legal significance of the [Nuremberg] judgments lies, in my opinion, in those portions of the judgments dealing with the *are a of personal responsibility* for international law crimes." (emphasis in original)); *Cf.* Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 76 (2002); and Jonathan Bush, *The Prehistory of Corporations and Conspiracy in International Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1098 (2009) (noting that international commentators and legal authorities misunderstand the post-WWII war crimes tribunals judgments).

[75] The Nuremberg Charter and Rules of procedure explicitly provide for the right to cross-examine hostile witnesses and to be represented by a defense counsel chosen from a predetermined list of defense attorneys. However, affidavits and depositions were employed extensively to prove guilt, thereby neutralizing any significant defense "right" to cross-examine. The Tribunal at Nuremberg was authorized to impose "death or such other punishment as shall be determined by it to be just" upon an individual convicted of crimes against humanity. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 27, 82 U.N.T.S. 279, 300. Specifically, in the trial of the major war criminals, seven of the accused were sentenced to extended

liable for international criminal violations, the unappreciated consequence of Nuremburg and other international Tribunals is the extension of individual rights to defendants under international criminal law.[76]

The cumulative effect of these developments clearly challenges the orthodox position that only states are under the domain over international law.[77] International law in the post-war period had to reach beyond the jurisdiction of states and, if necessary, reach individual actors. Following World War II, the international system witnessed a profusion of international and regional organizations having legal personality and identities distinct from the sovereign state which coexist within the international legal order.[78] Similarly, at present, corporations in and under the modern law of nations raise various concerns because private institutions and non-state actors are subordinate to the sovereign state and their rights and obligations are limited

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prison terms, eleven were sentenced to death by hanging, and three were acquitted. *See* JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 397-405 (1994).

[76] International commentators and courts generally look to the rules and procedures of international criminal tribunals (*i.e.*, Nuremberg Tribunals, International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC)) and domestic courts for the content of international due process norms. *See e.g.*, Statute of the International Criminal Tribunal for the former Yugoslavia, contained in the Report of the Secretary-General pursuant to Paragraph 2 of S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159, 1170 (1993); U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute on the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF/183/9, reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

[77] A State may be characterized as "an autonomous territorial and political unit having a central government with coercive power over men and wealth." Henry T. Wright, *Toward an Explanation of the Origin of the State, in Explanation Of Prehistoric Change* 215, 217 (James N. Hill ed., 1977) (citing Robert L. Carneiro, *A Theory of the Origin of the State*, 169 SCI. 733 (1970)). Oppenheim asserts that the phrase "sovereign nation" entails two kinds of sovereignty possessed by each State: dominum, or territorial sovereignty, which is supreme authority over all persons, items, and acts within that state's territory, and imperium, or personal sovereignty, which is supreme authority over all citizens of that State, be they at home or abroad. *See* Oppenheim's International Law § 123 (H. Lauterpacht ed., 8th ed. 1955) *See also* Restatement (Third) Of The Foreign Relations Law Of The United States §201 (1987) [hereinafter Restatement] (defining a state as "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities").

[78] *See, e.g.*, Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, as amended by protocols of 1993 [hereinafter OAS Charter].

accordingly. It remains an open question whether the notion that corporations are not traditional subjects of international law precludes liability for internationally wrongful conduct.[79]

Neglecting the Theoretical Question

This is, in part, a theoretical question of who among the various participants of a global community is an appropriate subject of international law and who the law may hold accountable for transgressions of prevailing norms. This theoretical inquiry must consider contemporary developments of the international legal process and the extent to which international law and notions of universal jurisdiction are exercised in domestic courts.

Contemporary Outcomes of the Social Process

Conditions in the international system have changed since early formulation and conceptualization of who may be considered subject to and a subject of international law.[80] Today, corporate activity lends support to recognizing the significance of the corporate actor among the various subjects of international law.[81] For instance, corporations are among the world's largest economic entities and often wield greater economic power than the countries in which they operate. According to the World Bank, of the world's largest 150 economic entities, ninety-five are corporations; thus, corporations make up the majority of world's largest global

[79] *See generally*. Phillip I. Blumberg, *Asserting Human Rights Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493 (2002). *See also* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (June, 1991); *How Is International Human Rights Law Enforced*, 74 IND. L.J. 1397,1414 (1999); *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263 (2004).

[80] *See* SUSAN STRANGE, THE RETREAT OF THE STATE--THE DIFFUSION OF POWER IN THE WORLD ECONOMY 46 (1996) (arguing that "the world economy . . . has shifted the balance of power away from states and toward [competitive] world markets"); *see also* WILLIAM GREIDER, ONE WORLD, READY OR NOT 11-26 (1997) (discussing the emphasis on competitive global capitalism); Winston P. Nagan & Craig Hammer, *The Changing Nature of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 161 (2004).

[81] *See e.g.* Lucien J. Dhooge, *Human Rights for Transnational Corporations*, 16 J. TRANSNAT'L L. POL'Y 197 (2007).

economic enterprises.[82] From a business prospective, this indicates the success of the global trading system, yet from a legal perspective this observation lends itself to the recognition of the corporation as a dominant institution of modernity within the international community.

The Central Issue

The central problem in the international legal community regarding corporate and enterprise activity is that violations of modern customary norms may fall outside of the legal framework. This gap in the rule of law occurs because courts continually frame questions of international law within eighteenth century paradigms. In this context, international law is inadequate to address the systemic demands confronting international decision-makers. Such activity influences world order and generates uncertainty about which rules apply to corporate activity. In short, the states-only conceptualization of international law is insufficient to regulate the conduct of these entities across state borders.

The Present Challenge

Modern conflicts, such as the rise of terrorism, citizen insecurity, human trafficking, counternarcotics and globalization, and even the resurgence of old conflicts, such as piracy have encouraged the development of private sector corporate activity that benefits from contractual undertakings historically dominated and relegated to the modern nation state. In particular, the privatization of military and security operations illuminate an emerging area of legal uncertainty. Here, private sector actors, undertaking traditional state functions, are not subject to the same rules as states under international law. In effect, the distribution of such activity may be viewed as an allocation of essential public sector functions. This raises the complex judicial question of whether allocation of such functions ought to erode the veil of private sector insulation from

[82] *See* FORTUNE MAGAZINE, 26 July 2010 *available at* http://money.cnn.com/magazines/fortune/global500/2010/full_list/.

public international law accountability. These private-public undertakings blur traditional distinctions between public and private international law.[83] This complex allocation of power could be altered by incorporating notions of state responsibility by contract to non-state actors who perform public functions for state actors. Although an apparently simple solution to a complex issue, the reality is that often the purpose of privatizing these functions and activities may be precisely to avoid state responsibility. In the absence of a private agreement or universally recognized rules regulating the conduct of legal persons, such as the ATS, corporations operate in a legal no-man's land of voluntary corporate responsibility; global corporate enterprise activity seemingly occurs within an ungoverned legal space.

[83] International law may no longer be conveniently divided into public and private separate spheres. *See* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 19 (2008). Among the most vocal legal scholars espousing this view, Ryngaert points out that "conflicts of laws rules may come to reflect public international law rules, and as a result the fields of public and private international law may ultimately be (re-)united." *See also* H.L. BUXBAUM, *The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation*, 26 YALE J INT'L 262 (2001) (noting that the public and private distinction in intentional law is unproductive).

CHAPTER 3
THEORETICAL FRAMEWORK OF INTERNATIONAL LEGAL PERSONALITY

International Personality in Theory

The concept of legal personality is "a condition sine qua non for the possibility of acting within a given legal situation."[84] Recognition of legal personhood confers not only the very life of the corporation, but also adds a dimension of legitimacy because the corporation is accounted for under the law.[85] Similar to domestic law, the notion of legal personality is used to distinguish between entities being account for in international law and those actors excluded from it. Consequently, there are various theories and positions on how to determine precisely which actors are recognized, by what criteria the actor acquired its personality and the results of the acquired personality, such as corresponding rights and duties. This uncertainty and lack of predictability in the international legal system is troubling; it is disconcerting that this uncertainty influences legal outcomes.

Theoretical Conceptions of International Legal Personality

There are several conceptions of legal personality in international law.[86] According to Roland Portmann, there are five main perspectives are (1) states only, international legal personality as exclusive to states; (2) recognition, views states as organizations or the primary person with other entities acquiring personality; (3) individualistic, conception of legal personality recognizes individuals as international persons in the field of fundamental norms; (4) formal, emphasizes that international is an open system and carries no presumptions: every entity that is an addressee of norms has international personality; and (5) actor, considers the

[84] Jan Klabbers, *"Legal Personality: The Concept of Legal Personality,"* 11 IUS GENTIUM 35, 37 (2005).

[85] *Id.*

[86] ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW 13 (2010).

specific rights and duties of all effective actors of international relations and these determine international personality decision-making.[87] These idealized categories span the main positions invoked in international legal practice and to a certain extent reflect the historical origin and development of modern international law.[88] Each of these five perspectives form the framework applied within the legal arguments surrounding whether corporations are subjects of international law. With five perspectives, each with different substantive positions on international personality, the concept of international personality provides merely a framework for each position's conception. Indeed, there is a distinction between concept and conception.[89]

In *A Theory of Justice*, John Rawls noted that even though there are varied conceptions of the concept of international personality, there is an overarching formulation of the concept itself.[90] Here, Rawls implicitly notes the importance of distinguishing between a concept and various conceptions thereof.[91] Rawls, among other legal philosophers, put forth the notion that certain concepts have agreed upon purposes with unclear details.[92] For example, justice as a concept has a basic purpose that may be agreed upon, yet there is no clear consensus on what exactly justice entails.[93] Practically speaking, people may agree that the concepts of justice and

[87] *Id*. at 13-4; *compare with* Hans Aufricht, *Personality In International Law*, in INTERNATIONAL LEGAL PERSONALITY 47, (Fleur Johns ed., 2010) (noting that in the context of the legal personality of the individual, four perspectives are present: (1) the private individual has no legal personality; this attribute is reserved for the states. (2) The private individual is the object, not the subject of, international law. (3) The legal personality of the State is fictitious; only individuals are the "real" subjects of international law. (4) States are the "normal" subjects of international law, but the validity of rules concerning individuals is not excluded.).

[88] *Id.*

[89] The distinction between concept and conception was first argued by WB Gallie. PORTMANN at 13.

[90] PORTMANN at 13.

[91] *Id*.

[92] PORTMANN at 14; *see also* JOHN RAWLS, A THEORY OF JUSTICE, 5-6 (1999); *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, 103-5 and 134-5 (1977).

[93] PORTMANN at 15.

fairness are relevant to the discourse of whether corporations should be held liable for human rights abuses.[94] However, each may conceptualize justice or fairness differently leading to varied opinions of what precisely would represent a fair or just outcome.[95] This tension is notably present in the instant scenario of corporate legal personality. In large, the denial of legal personality to corporations in international law is only compatible with the states-only perspective and it has been argued that nobody adheres to this restrictive and antiquated position.[96]

States only

First, the "states-only" position "reserves international personality exclusively to the states."[97] There are no conditions for international personality of than having acquired statehood." This conception is best evidenced by Oppenheim's formulation, among others, that the international system is a community of states.[98]

> The conception of International Persons is derived from the conception of the Law of Nations. As this Law is the body of rules which the civilized States consider legally binding in their intercourse, every State which belongs to the civilized states, and it is, therefore, a member of the Family of Nations, is an International Person. Sovereign states exclusively are International Persons -- i.e. subjects of international law.[99]

This perspective is based not upon natural law; rather it is the common will of states that creates international law.[100] From this conception, the source of national law is the will of a

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[94] PORTMANN at 14-15.

[95] *Id*.

[96] PORTMANN at 13 ("This position [states-only] is today very rarely, if at all, explicitly advocated. But it is important in historical context and is at times still relevant for legal issues today.").

[97] PORTMANN at 13.

[98] Others include Heinrich Triepel and Dionisio Anzilotti. *See* PORTMANN at 43.

[99] PORTMANN at 43 (quoting LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATIES, 99 (1st ed.) (1905).

[100] *Id*. at 44.

single state-actor.[101] By contrast international law is the aggregate will of a number of states.[102]

Portmann encapsulate this perspective in two basic assertions:

> (1) The international community consists only of states. No other entities form part of the international realm. Individuals do not exist as independent entities outside the boarders of their state of nationality.
>
> (2) International law slowly emanates from common state will. International law is created by states and applies alone to those states having consented to it. It cannot apply to an entity not having consented to the rule in question. Thus, only states can be bound by international law, since only they can consent to it. This represents the link between source and personal application of international law, that is, of sources and legal personality.[103]

Portmann identifies several important manifestations of the states-only view that it is the sole legal person.[104] The first significant manifestation of the states-only perspective is the Mavrommatis-formula, which espouses the notion of diplomatic protection – a state must invoke its own rights to protect its citizen's interests.[105] If an individual has no international rights then what is envisioned is that a state must invoke its rights on behalf of an injury to its national[106]. The Mavrommatis-formula is found in an ICJ case arising out of a concession agreement for public infrastructure improvements in Palestine.[107] The court stated the classic Mavrommatis-formula when it argued:

> In the case of the Mavrommatis Concessions it is true that the dispute was at first between a private person and a State – i.e., between M. Mavrommatis and Great Britain. Subsequently, the Greek Government took up the case. The dispute then entered a new phase; it entered the domain of international law, and became a

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[101] *Id*.

[102] *Id*.

[103] *Id*. at 47.

[104] *Id*. at 64.

[105] *The Mavrommatis Palestine Concessions* (Greece v. U.K.), Jurisdiction, 1924 PCIJ Series A No. 2, at 12.

[106] Diplomatic Protection

[107] PORTMANN at 13.

> dispute between two states . . . By taking up the case of one of its subjects and by resorting to diplomatic action or international juridical proceedings on his behalf, a State is in reality asserting its own rights. . . . The question, therefore, whether the present dispute originates in an injury to a private interest, which in a point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is the sole claimant.[108]

As we will see, this perspective has been espoused by the ICJ in *Barcelona Traction* and the Draft Articles of Diplomatic Protection.[109] Moreover, the corporation emerged as a national for the purposes of standing.[110]

Recognition

Second, the "recognition" position "conceives of states as the original or primary persons of international law."[111] Even though other entities may acquire international personality, the mechanism is exclusively via the explicit or implicit recognition by states.[112] Often this method of acquiring legal personality is "derivative of" or "secondary to" the State's legal personality. Once the State recognizes an entity, this new entity has fundamental rights, duties, and capacities relevant to its legal personality which are analogous to those of the State itself.[113]

Individualistic

Third, the "individualistic" position presumes the individual is an international person for the purposes of fundamental norms."[114] Additionally, any entity, from this perspective, can

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[108] *Id*. at 66 (quoting *The Mavrommatis Palestine Concessions* at 12).

[109] *See generally Barcelona Traction, Light and Power Company, Limited (Belg. v. Sp.),* Second Phase, Judgment, 1970 I.C.J. Rep. 32 (1970); draft Articles on Diplomatic Protection, ILC Report, doc. A/61/10 (2006).

[110] *See e.g.*, *Barcelona Traction* and its progeny.

[111] PORTMANN at 13.

[112] *Id.*

[113] *Id.*

[114] *Id.*

possess international legal personality, so long as they are addressees of a particular international norm.[115] The underlying presumption is that the "consequence of personality is international responsibility."[116] Thus, any entity, individual or corporation, is "responsible for a violation of an existing fundamental norms irrespective of whether they act in a public or private function."[117]

Formal

Fourth, the "formal" position "declares international law to be an open system, without any preexisting presumptions as to whom is an entity with legal personality under international law.[118] Through this lens, international personality is "an a posteriori concept: every entity is an international person that according to general principles of interpretation is the addressee of the norms of international law," and without "consequences being attached to being an international person."[119]

Actor

Lastly, the fifth position, the "actor" perspective rejects the traditional notions of legal personality and "stipulates a presumption that all effective actors of international relations are relevant for the international legal system."[120] The international decision-making process determines the rights and duties held by each and every entity, and each entity participates in the

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] PORTMANN at 13.

[119] PORTMANN at 13-14.

[120] PORTMANN at 14. The "actor" conception of international legal personality is often associated Rosalyn Higgins, a former President of the ICJ; however, her approach to international legal personality is attributed to Myers S. McDougal and Harold D. Lasswell's formulation of the actor conception of international personality following WW II as part of their policy-oriented approach to international law. *See* PORTMANN at 208 (noting that Higgins studied under Myers S. McDougal while studying law at Yale and he supervised her doctorate at Yale Law School).

decision-making process depending on the entities effective power.[121] The "actor" conception dissolves the dichotomy of subjects and objects and considers only participants. Under this model, all entities exercise "effective power" within international decision-making process.[122] All participants within the international legal system are labeled international persons.[123]

An Appraisal of the Five Theoretical Conceptions

Conceptions resting on assumptions clearly at odds with contemporary conceptions cannot claim any legal value within contemporary international legal argument.[124] According to Portmann, "the concept of personality must conform with how statehood, the relationship between state power and individual freedom, the sources on international law, and the role of the actual in determining the normative are conceived in present international law."[125] Portmann notes that the underlying assumptions of the "states-only" and the "recognition" conceptions of international legal personality have been discarded in international law.[126] Portmann concludes that

> [t]he assumptions informing the individualistic and the formal conceptions are to a considerable degree in line with the premises of contemporary international law: the state is a legal status, the individual has to be protected from the state power rather than being entirely subjected to it, and there are general norms of international law transcending state consent, including overriding legal principles of peremptory character which cannot be derogated from as a result of policy considerations. In all these aspects, the two conceptions [individualistic and formal] and their assumptions conform to the position of international law today.[127]

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[121] *Id.*

[122] *Id.*

[123] *Id.* at 210.

[124] This is the main argument of Ronald Portmann's book. *See* PORTMANN at 269.

[125] *Id.*

[126] *Id.*

[127] *Id.* at 269-70.

Thus, Portmann's findings contemporary international legal personality regarding corporations ought to be framed by combining the principles of the individualistic and formal conceptions of international legal personality and notes that the combination leads to international law representing an open system.[128] Under Portmann's framework corporations would possesses international personality which supports corporate liability for violations of international law and the viability of the ATS to hold corporations accountable. Even though Portmann emphasized the conceptualization of international legal personality as an open-system, the actor conceptualization of international legal personality provides the most appropriate framework supporting corporate liability on the basis of its international legal personality, the actor conception provides the most coherent approach to understanding the development of legal standards governing domestic remedies for tort remedies under the ATS for holding corporate actors accountable for violations of international law. Here, this particular theoretical inquiry will not only address the specific question of whether corporations should be held accountable for human rights violations, but will also address the trends and practice of legal personality. In addition to trends, I also examine the dominant trends in theory of international legal personality. On the basis of international scholarship, these have a clear and legitimate status as a source of international law.

Research Design and Framing the Social Process

This thesis adopts the "actor" conception of international legal personality and will approach the question of corporate legal personality for the purposes of determining liability for violations of human rights in United States Courts under the ATS. This approach to international

[128] *Id*. at 271 quoting James R. Crawford, *International Law as an Open System* 27-8 (2002).

legal personality is policy-oriented approach to international law.[129] Developed by W. Michael Reisman, Myers S. McDougal and Harold D. Lasswell, this approach to international law is often referred to as the New Haven School perspective. [130] Together these individuals founded the New Haven School perspective of international law.[131] From the perspective of the New Haven School, international lawmaking, or prescription, is seen as a process of communication involving a communicator and a target audience.[132] The substance of this communication functions as signs or symbols of policy content, symbols of authority, and symbols of controlling intention.[133] These three signs or symbols are: (1) the "policy content," which is the prescription, (2) the "authority signal," which is the legitimate basis from which to prescribe, and (3) the "control intention," which is the enforcement power.[134] In other words, a core philosophy of the School is that in order to count as law, international law must have a prescriptive policy content, it must be accompanied by symbols or signs indicative of widespread community acceptance

[129] McDougal and Lasswell offer a configurative conception of jurisprudence that is the end result of an authoritative decision-making process. *See* HAROLD LASSWELL & MYRES MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY 24-5 (1992). They argue that a scientifically grounded answer to any policy-oriented problem can be reached that might promote the common interest to achieve a world order based on fundamental principles of human dignity. *Id*. at 34-36. Scholars and policymakers regard their approach to decision-making as a rigorous one embedded in a social context. *Id*. *See also* Rosalyn Higgins, *Conceptual Thinking about the Individual in International Law*, BRITISH J. INT'L STUDIES, 4 (1978).

[130] The founding members of Yale's New Haven School examined how governing hegemons manipulate social development and world public order. *See generally* HAROLD LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY (1935).

[131]Consisting initially of Harold Lasswell, Myres McDougal, and their colleagues, the New Haven School seeks to illumine the world political process by ascertaining and examining meaningful cultural, financial, psychological, and emblematic factors that lay beneath social behaviors. To follow this process, the New Haven School created a comprehensive contextual mapping system of human social structures. *See generally* HAROLD LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW (Meridian ed. 1958).

[132] *See generally,* HAROLD LASSWELL, WORLD POLITICS FACES ECONOMICS (1945); HAROLD LASSWELL & ABRAHAM KAPLAN, POWER AND SOCIETY: A FRAMEWORK OF POLITICAL INQUIRY (1950); HAROLD LASSWELL & MYRES MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY (1992).

[133] *Id*.

[134] *Id*.

(because the community is the notional basis for authority in international law), and it must be accompanied by a conception that some institutionalized control exists to ensure that the prescribed law is real.[135]

Designing the System of Inquiry

To provide some orientation to the problem of corporate legal personality, this thesis borrows from decision-making theory and the scholarship basically suggest that law at any level presents problems of give and take within the social-process.[136] The strength of this theory compels consideration of the social reality from which law is constructed and in particular in the context of the corporation. In this sense, I'm confronting the dominant theory employed by Judge Cabranes.

The approach to international law, formulated by New Haven School, is the most direct international legal theory to address the social context and reality of law. This thesis posits that the creditability of law is its ability to respond to problems within the social context and that the social process brings an element of reality to this type of problem and provides value to address the critique of both the active-decision maker and to identify the scope of the problems that emerge. The model provided by this perspective, simply stated is that law is applicable only in the social process.[137] In short, human-beings or associations seek to purposefully realize value via legal claims or demands through social institutions. In the next section, this study will

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[135] *See* Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1966-67). *See also* W. Michael Reisman, *International Lawmaking: A Process of Communication*, AM. SOC. INT'L L. PROC. 108-10 (1981) (discussing three aspects of prescriptive communication that essentially convey legal norms because they designate policy that both emanates from a source of authority and creates an expectation in the target audience that the policy content of the communication is intended to control.).

[136] *See generally* W. Michael Reisman, *International Lawmaking: A Process of Communication*, AM. SOC. INT'L L. PROC. (1981).

[137] *See* HAROLD LASSWELL & MYRES MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY 34-36 (1992) (arguing a scientifically grounded answer to any policy-oriented problem can be reached that might promote the common interest to achieve a world order based on fundamental principles of human dignity).

identify certain markers to guide the inquiry into corporate liability for human rights violations under the ATS.

The Community Process

First, it is necessary to identify the participants by looking at the law to determine the active participants in the international legal decision-making process. Today, we can all agree that governments are central to the international participants in the decision-making process. Additionally, there are members of the international community, such as corporations, NGOs, political parties, lobby groups, and even global crime cartels. Importantly, this study emphasizes the emergence of multinational corporate legal personality in and under international law.

From the New Haven perspective, once the participants are identified then the question turns to determining the identity of these participants and to examine whether they have an innate or ascribed identity. In the context of the corporation, for instance, we create and ascribe its identity. Next following the New Haven perspective's model, the inquiry turns to an assessment of the scope of the corporate identity. The corporation has an identity that is different from individuals because its identity is ascribed. In fact, all human associations have an identity appropriately different from the individuals that comprise it. Consequently, this inquiry into identity is more complex with individuals – I'm born here, thus I'm X. In the description of the social process claims of identity must be explicit. Importantly this model recognizes that lawfully, the corporation will be able to express its identity everywhere, so long as it's lawfully incorporated under domestic law. This is an implicit recognition that identity only has meaning because of the participants' activity. Accordingly, international rights and duties derive from an actor's identity.

Effective Power Process

Following this study's policy-oriented approach to international law, the inquiry turns toward an examination of particular actors systemic demands. From this perspective of demand, the corporation's goal is the freedom to engage the global community with the least restrictive environment. This activity can be viewed as an aggregation of market power. The main point is that the primary demand of the corporate actor is to maximize wealth and this demand can only be tempered by the rule of law.

Next, in the description of the social process, from the perspective of the corporate actors' expectation of the law creating the least restrictive wealth maximizing system, this demand also generates the expectation of legal compliance. Notably, the corporation is dependent upon law to protect its expectations therefore the very need of legal protection generates the expectation that the corporation must also comply with the law. So, the corporations can't say that it is without a demand because of its activities there is some sort of law that provides protection for its expectation it is parallel that the corporation expects to be subject to law. If there is no corporate identity in international law then there no expectation of protection of its activity within the rule of law.

What basis of power does the corporation have at its disposal to advance its global wealth maximizing activity? The corporation's basis of power in international law flows from its identity, meaning that it can call upon the state of incorporation to protect its interests. The authority of the state is the corporation's basis of power within the international sphere. Additionally, wealth is another basis of corporate power, and may be leveraged to reproduce even more wealth. If the corporate actor goes abroad its wealth can leverage its power towards its interests. There must be limitations on the methods by which an actor may leverage its wealth toward garnering greater power in order to protect against an abuse of power. Also, the wealth

generating power can leverage all other values – respect, skill affection, enlightenment, well-being, and rectitude. Clearly, the corporation as a wealth producing entity derives its bases of power implicitly from its existing wealth and is characterized by its ability to produce more wealth and therefore generate more power.

With wealth as a basis of power, certain strategies are employed to support the wealth generating power of the corporation. The corporation employs many strategies either coercive or permissive as its basis of power. What this study seeks to determine is whether justice is served for an actor, here the corporate actor, which has the right to engage in coercive strategies, either direct or indirect that may violate international legal norms and rules and whether it can also be liable for its violations. In this context, the corporation effectuates numerous strategies and often resorts to economic coercion via its political power; it can deploy ideological coercion and even military coercion. In the context of the private corporations' military coercion, it can seek its home state to intervene on its behalf or it may even hire military or quasi-military entities such as private military contractors, mercenaries or even governments where it is asserting its activity. Also, the corporate actor can resort to propaganda as a strategy to ensure its basis of power. For instance, the corporations can demonize its opponents via advertising and public relations campaigns. Propaganda strategies can also garner support for its activity by a corporation's espousal and adherence to voluntary corporate responsibility schemes. Additionally, law can be a basis of power for the corporation. The arenas where the corporation functions may be geographic or institutional.

Outcomes of the Power Process

Lastly, two further theoretical issues remain in the context of the outcomes of corporate basis of power or the strategies employed. Wherever the corporation may operate they may violate international law, thus the outcomes must be identified and the effects of corporate

activity examined. That is social realism – the outcomes of the social process will be the generation of legal claims and counterclaims. The question then turns on determining how far the actor, here the corporation, ought to be permitted to go. To complete the model, the outcome of the social context is the power process. Indeed, the corporate connection to the power process is that they can use wealth to gain power in the domestic and international sphere. Through this lens, the corporation maximizes its demands toward a favorable outcome by using it wealth as power to buy more power to maximize greater wealth which in turn generates more power and so on. Following the New Haven School's perspective of international law and policy-oriented approach to solving problems in the social context, this paper will argue that the corporation is a direct participant in international sphere; the corporation is not a power entity itself, by contrast its wealth is a critical basis of power, thus the corporation has a heightened responsibility to use its wealth wisely. This posit implicates theoretical problems and legal practice, and this paper will examine the corporate actor and deploy trends in practice of corporate liability and trends in legal theory to determine corporate legal personality in international law.

CHAPTER 4
MULTINATIONAL CITIZENSHIP INCORPORATED

Conceptualizing International Legal Personality in Practice

From a legal perspective, any addressee of a rule of law is a "person."[138] Through this lens, corporations must enjoy legal personality in and under international law if there is a showing that international rules address the corporation. Some of these rules may be directed to states and practically still affect corporations. Here, corporate legal personality depends upon whether such rules are found in international law. Everyone can agree that corporations possess legal personality in domestic law, but the inquiry becomes more complex when a domestic court must determine what international law is and then how to apply it locally. In a globalized world where economic and political "might makes right" it is increasingly important to determine corporate liability for harm done by internationally wrongful conduct.

Globalization and the Juridical Person

Modernity and globalization, in particular, brought about a number of changes in the nature of global citizenship. One pair of authors noted, "the power that individuals derived from citizenship to define the political, social, and cultural landscape has been shifted to corporate entities whose loyalties lie in the economic well-being as defined by the bottom line."[139] In much of the existing scholarship, the research in this area tends to focus on determining whether corporations are subject to human rights obligations.[140] Here, the central question is whether corporations are subject to and subjects of international law. Although, as already mentioned,

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[138] *See* Hans Aufricht, *Personality In International Law*, in INTERNATIONAL LEGAL PERSONALITY 53, (Fleur Johns ed., 2010).

[139] BERTA ESPERANZA HERNÁNDEZ-TRUYOL AND STEPHEN J. POWELL, JUST TRADE, 79 (N.Y.: N.Y. Univ. Press, 2009).

[140] *See* Saskia Sassen, "Economic Globalization and the Redrawing of Citizenship," in Hernández-Truyol (ed.), MORAL IMPERIALISM, 135, 137, 141, 164 (engaging in an in-depth analysis of corporate power on the institution of citizenship).

nation-states typically are the bearer of human rights obligations in international law, society now recognizes that corporations bear human rights responsibilities. As one author commented:

> At a moral level it would appear that there exists a widening consensus that MNEs should observe fundamental human rights standards. This can be supported by reference to the fundamental need to protect humans from the assaults against dignity regardless of whether their perpetrators are state or non-state actors.[141]

However, despite the strong theoretical and moral case for extending human rights beyond the nation-state to the corporation, the legal responsibility of the modern transnational corporation for human rights violations remains uncertain.[142] But, it has been noted that:

> Under customary international law, emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labor, torture and some crimes against humanity.[143]

Nevertheless, to see where transnational corporate citizenship is trending, one must understand the origin and historical development of today's transnational corporation.

In nearly all legal systems within the international community of sovereign states, legal entities possess legally enforceable rights and duties. Although a circular argument, to deny an entity of its duty is to deny and deprive it of rights. Just like the evolution of corporate personality under United States law developed alongside the corporate person, adjusting to fit the corporate person into the domestic legal order, international law transformed toward greater recognition of legal personalities.

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[141] P.T. Muchlinski, "Corporate Social Responsibility" in P.T. Muchlinski, F. Ortino, and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) *Id.* at 655 (footnote omitted).

[142] P.T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW, 517 (2007).

[143] J. Ruggie, "Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises" (2006) *Id.* at para. 60.

Corporate Rights and Duties

"The social responsibility of business," according to Milton Friedman, "is to increase its profits."[144] In the context of "corporate citizenship" much scholarship is concerned with the relationship between today's modern corporation and society in general which is often referred to as "corporate social responsibility" (CSR). One key distinction between the "natural" and "legal" person is that corporate law imposes a "fiduciary duty" upon the corporate officers to act in "the best interest of the corporation." This "best interests of the corporation" standard is well-rooted in American jurisprudence and remains the dominant justification of the corporate decision-making process.[145] This tension between corporate duties and societal notions of corporate social accountability led to the development of modern notions of corporate social responsibility; however, as mentioned, the corporation, has the legal duty to act within the best interest of the bottom line and does not necessarily take into account social well-being is not easily commoditized.

Profit Over People

American jurisprudence, over ninety years ago, first grappled with these concepts and the tension between CSR and the profit-motive inherent in the corporation questions.[146] The "best interests of the corporation" standard issue dates back to *Dodge v. Ford*, a case that came before the Michigan Supreme Court in 1919.[147] Henry Ford, the majority shareholder and president of Ford Motor Company, attempted to end the company's special dividend program and reinvest

[144]Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, The New York Times Magazine, September 13, 1970.

[145] *Dodge v. Ford Motor Company*, 204 Mich. 459, 170 N.W. 668. (Mich. 1919) (held that Henry Ford owed a duty to the shareholders of the Ford Motor Co. to operate his business for profitable purposes rather than charitable).

[146] Dodge v. Ford.

[147] *Id*. at 15.

the money back into the business based on his belief that this strategy would produce a long term benefit for the company.[148] "'My ambition,' declared Mr. Ford, 'is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.'"[149] The minority of the shareholders objected to this strategy and brought suit.

In *Dodge v. Ford*, the court held that a for-profit business corporation is organized to create wealth and profit for the stockholders, as opposed to the community or its employees.[150] The court found that the discretion of the directors must be exercised in the choice of means to attain that end.[151] The court reasoned that because this company was in business for profit, Ford could not turn it into a charity.[152] This rationale was compared to spoliation of the company's assets in the form of shareholder value.[153] The court therefore upheld the decision of the trial court that ordered the directors declare an extra dividend of $19 million to be paid to the shareholders.[154] Yet, much has changed in society and it is now accepted that corporate social responsibility may be framed within the context of the shareholders' interests. Still, it remains an open legal question whether the best interests of the corporation extends beyond the shareholders' interest or whether the interests of other participant interest may also be considered

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

in the decision-making process.[155] Arguably, Ford's mistake was to inform the shareholders that his plan didn't place their stock value first above all other interests and to relate this program back to the long-term interests of the shareholders.

Voluntary Codes of Corporate Responsibility

Largely in response to the influence of the court of public opinion, many multinational corporations have adopted formal policies and practices of corporate responsibility. The corporate-initiated code of conduct is a form of "self-regulation."[156] Indeed, this form of self-regulation is premised upon the acceptance of legal duties.[157]

Recognition of the Corporate Form

Domestic Corporate Personality

Looking back one hundred fifty years ago in United States history, the corporate form was an unheard-of business entity and a fairly insignificant institution.[158] Today, the modern corporation has penetrated nearly every aspect of society, and is arguably modernity's dominate institution. This section of the paper examines the evolution of the corporation from a relatively insignificant business organization to a dominant institution.

The corporate person in United States history

The rise of the modern corporation in American and other Western societies is a product

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[155] *See generally* Ian B. Lee, *Citizenship and the Corporation*, 34 LAW & SOC. INQUIRY 129 (Winter, 2009) (examines the concept of corporate citizenship through the lens of political theory to illustrate the constituent relationships of participation within the corporate structure).

[156] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 531 (2001) (providing commentary on corporate ATS cases).

[157] *Id.*

[158] Until the mid nineteenth century, a specific legislative act was required to form a corporation in the U.S. and at the same time, the U.K. had similar rules which required a charter from the Crown or an act of Parliament. *See* PHILIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW, 22 (1993); *See also* Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 Am. U. L. Rev. 81, 84 (1999).

of the past century. These business entities emerged as a consequence of the modern industrial era. Initially, corporations were given a narrow legal mandate and were associations of person joined to perform a particular function, and the legislature, upon petition, would issue a specific charter that "authoritatively fixed the scope and content of corporate organization," including "the internal structure of the corporation."[159] Back then the corporation was essentially a quasi-public entity that was created and supervised by the legislature and "designed to serve a social function for the state."[160] At this time in American history, it was widely understood that corporations "were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare."[161] In short, there were very few corporations in early American history and those that did exist at that time were formed for a public purpose and the corporation, in both law and society, was considered a gift from the people and mandated to serve the public good.[162]

Following the civil war and the industrial revolution there was significant growth in American commerce and the corporate form, at the time, was considered too restrictive for the changing business environment.[163] In response the bundle of rights we now associate with corporations took root to meet the changing business environment.

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[159] J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970, 15-6 (1970) (reprint 2004).

[160] HANDLIN & HANDLIN, ORIGIN OF THE AMERICAN BUSINESS CORPORATION, 5 J. Econ. Hist. 1, 22 (1945).

[161] R. SEAVOY, ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784-1855, 5 (1982).

[162] At the beginning of the nineteenth century, there were only 317 corporations in the U.S. and Professor Hurst reported that, "of the 317 separate-enterprise special charter from 1780 to 1801 in the states, nearly two-thirds were for enterprises concerned with transport (island navigation, turnpikes, toll bridges); another 20 percent were for banks or insurance companies; 10 percent were for the provision of local public services (mostly water companies); and less than 4 percent were for the general business corporations." HURST, *supra note* 311 at 17.

[163] Although general incorporation was introduced during the Jacksonian era, it did not fully take root until after the Civil War. Blumberg, *supra note* 310, at 22, 31. *See also* Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1444 (1987) (discussing the business preference for sole proprietorships and partnerships in early American history).

Recognition of domestic corporate personality

Since the nineteenth century, American Courts have increasingly recognized the corporate "legal" person. Although it is so well settled in American law today that the corporation is a legal person, the Courts have not always recognized the legal personality of the corporation as a true "citizens" for the purposes of determining whether corporations where "persons" under the law. For example, in 1809 the court in *Bank of U.S. v. Deveaux* concluded that for the purpose of diversity jurisdiction corporations are not citizens, but in 1822, the Court in *Charleston R.R. Co. v Leston* held that for the purposes of diversity jurisdiction the corporation is a citizen of the state they are incorporated.[164] By the end of the nineteenth century it was settled law that the Equal Protection Clause of the Fourteenth Amendment applied to the "legal" personhood of corporations.[165] With the Court's recent decision in *Citizens United*, the American legal systems continues toward wider acceptance that the freedoms and protections of Bill of Rights apply to both "natural" and "legal" persons alike.[166] In brief, corporations in the U.S. domestic courts have not been immune from criminal nor civil liability; however, the same is not true under international law and corporations have legal support for claiming a lack of subject matter jurisdiction for the purpose of criminal and civil liability under international law.

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[164] *See Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844); *but see Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 88, 91 (1809).

[165] *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394, 396 (1886) (the court said that it would not hear an argument on whether the Fourteenth Amendment to the Constitution, which forbids a state to deny any person equal protection, applies to corporations because "we are of the opinion that it does"). "Very soon after the Fourteenth Amendment became law, the Supreme Court began to demolish it as a protection for blacks, and to develop it as a protection for corporations." *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES, 260-61 (2001).

[166] *Citizens United v. Federal Election Commission*, 175 L. Ed. 2d 753 (U.S. 2010) (held that under the First Amendment corporate funding of independent political broadcasts in candidate elections cannot be limited); *compare with Federal Communications Commission v. AT&T*, 562 U.S. ___ (2011) (held that corporations do not have a right of personal privacy that would protect them from the disclosure of public records that have been handed over to federal agencies).

International Corporate Personality

The concept of international legal personality is "a condition sine qua non for the possibility of acting within a given legal situation."[167] Recognition of legal personhood confers not only the very life of the corporation, but also adds a dimension of legitimacy because the corporation is accounted for under the law.[168] In at a time "when accountability is the watchword and immunity is derided as impunity" corporate defendants are arguing that courts lack subject matter jurisdiction over corporations under the ATS because (1) unlike individuals and states, they cannot be guilty of international law; and (2) international law does not recognize conspiracy and related forms of inchoate liability.[169] Corporations have limited legal support for claiming a lack of subject matter jurisdiction under international law for the purpose of civil liability under the ATS, notably not under the domestic law of the United States.

Subjects of International Law

New Rules, Old Actor

Political, economic and social power have shaped notions of jurisdiction throughout the development of the rule of law. In 1649, Charles I, King of England, was tried, convicted, and ultimately sentenced to death by a so-called kangaroo court which he argued lacked the legal authority to try the tyrannical absolute monarch for waging war against his subjects.[170] The idea

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[167] Jan Klabbers, *"Legal Personality: The Concept of Legal Personality,"* 11 IUS GENTIUM 35, 37 (2005).

[168] *Id*.

[169] *See e.g.*, Jonathan Bush, *The Prehistory of Corporations and Conspiracy in International Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1098 (2009). According to the U.S. Supreme Court in *Hamdan*, conspiracy is not traditionally considered a crime in violation of the law of war, thus the crime of conspiracy would not normally be tried by before a military tribunal. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 598-612 (2006).

[170] *See generally* GEOFFREY ROBERTSON, THE TYRANNICIDE BRIEF (2005). Additionally, much of the story of the trial of King Charles that follows has been adapted from a law school lecture given by Prof. Joe Little at the Levin College of Law, University of Florida. I'm forever grateful to Prof. Little; I'm particularly grateful for his telling of this story, but also for his contribution to my legal education generally and the quality of professionalism he instills in his students.

of trying the King, in 1649 was a novel approach. Although previous monarchs had been deposed by their subjects or even their successors, the notion of putting the King on trial was novel. In fact the Act of Parliament, that created the court, to try the King, illustrates common separation of power issues and the trial of Charles I, King of England is often pointed out as an early manifestation of judicial review. Charles's crimes of treason were based upon the notion that the King had used his power to pursue his own personal interests, rather than the common good. Just like King Charles boldly asserted lack of jurisdiction, corporations now are arguing lack of subject matter jurisdiction in international law and under the Alien Tort Statute (ATS). Moreover, Charles's ultimate conviction for "high treason and other high crimes" represents a defining moment in the power of courts to assert jurisdiction over actors not traditionally believed subject to or a subject of the rule of law.

A King's Crime Against Humanity

Following Charles's defeat in the first period of the English Civil War (1642-45), Parliament had fully expected Charles to accept a new legal order and give into demands for the establishment of a constitutional monarchy.[171] Even though defeated, Charles managed to provoke a second period of the English Civil War (1648).[172] Following the first Civil War, members of Parliament accepted the premise that although wrong, Charles was justified in his fight. Consequently, under a new constitutional settlement parliamentarians provided the King with limited powers. But by continuing to wage war, Charles unjustifiably caused significant

[171] During his reign, Charles I, King of England became embroiled in a power and economic struggle with the Parliament which sought to curtail the King's divinely ordained "royal prerogative." The King's subjects opposed his levying taxes without the consent of parliament and increasingly, questioned the King's "royal prerogative." Yet Charles continued to challenge Parliamentary authority by asserting his divine right to overrule and negate acts of Parliament. Civil war broke out in England in 1642.

[172]Even though Charles surrendered to the Scots at Newark, Charles's managed to broker a series of deals to avoid being returned to Parliament; in the meantime, Charles continued to wage war against his subjects by enlisting the Scots and later the Royalist. Finally, at the end of 1648, Charles was delivered into Parliamentary custody.

bloodshed and thousands of deaths.[173] Parliament was now determined that the King should be punished for waging war against the people.[174]

His Majesty's Pretend Court

The trial of Charles I, King of England began with what I can only imagine must still be today one of the greatest moments in courtroom drama. At the opening of proceedings, then Solicitor General John Cooke stood beside the King to announce the indictment; no sooner than Cooke began to speak when Charles I took his cane, tapped Cooke sharply on the shoulder, and order Cooke to stop. But Cooke continued to speak. Charles then poked Cooke more forcefully and stood to speak. Despite Charles's increasing hostility, Cooke ignored him and continued reading the indictment. Charles became so incensed at Cooke's defiance, that he struck Cooke on the shoulder with such force that the lavishly decorated top of the King's cane broke and came to rest between them. Charles then demanded Cooke retrieve the top of his cane, but Cooke still ignored the King's orders and stood there defiantly silent. Finally, Charles bent down toward the ground to fetch the broken pieces and the historic proceedings against him continued.

Following the reading of the indictment, although Charles was provided an opportunity to speak he refused on the grounds that there can be no court with jurisdiction over the King because his authority was derived from God. [175] Here, King Charles argued that the High Court

[173] It is estimated that the fist and second civil wars in England resulted in the loss of approximately 200,000 people. It is reported that 84,830 killed directly participating in hostilities and an equivalent number of death from war-related diseases. Notably, the population of England in 1650 was reported at just over 5 million and considering that nearly 200,000 were estimated killed as a result of the wars, England lost approximately 3.5 percent of its population under the rule of Charles I. To put the number deaths in perspective, when compared with United States civil war these estimates are nearly proportionally double. *See* MICHAEL CLODFELTER, WARFARE AND ARMED CONFLICT: A STATISTICAL REFERENCE TO CASUALTY AND OTHER FIGURES, 1618-1991 (1992).

[174] Samuel Rawson Gardiner (ed.) (1906). "The Charge against the King," The Constitutional Documents of the Puritan Revolution 1625-1660. *available at* http://oll.libertyfund.org/.

[175] In light of Charles's refusal to speak, the court followed the standard legal practices and entered a guilty plea (*pro confesso*) on the King's behalf just like in all cases where defendants refused to enter plea. *Id.* Gardiner (ed.) (1906).

of Justice lacked jurisdiction because the King could not be subject to any existing law. Moreover, if such a law existed then surely the King could change that law because the King was the law. Charles questioned not only the legality of what he called a "this pretend court" but also noted that under his divine right "no earthly power can justly call me (who am your King) in question as a delinquent."[176] Essentially the King stood before the Court and stated its lack of jurisdiction over the King based upon the fact that the King's powers were derived from God.[177] Following the maxim the "King can do no wrong," Charles argued that under the laws of England there can be no impeachment against the King." Despite the absence of legal authority to bring a monarch to justice for human rights violations, the court found Charles "guilty of all the treasons, murders, rapines, burnings, spoils, desolations, damages and mischiefs to this

[176] Saddam Hussein reportedly paraphrased King Charles in his opening statement to Iraqi Special Tribunal in the Hague and said "by what power am I called hither . . . by what authority." *Compare with* King Charles defiantly responding to allegations by stating, "Having already made my protestations, not only against the illegality of this pretended Court, but also, that no earthly power can justly call me (who am your King) in question as a delinquent, I would not any more open my mouth upon this occasion, more than to refer myself to what I have spoken, were I in this case alone concerned: but the duty I owe to God in the preservation of the true liberty of my people will not suffer me at this time to be silent: for, how can any free-born subject of England call life or anything he possesseth his own, if power without right daily make new, and abrogate the old fundamental laws of the land which I now take to be the present case? *See* Samuel Rawson Gardiner (ed.) (1906). "The King's reasons for declining the jurisdiction of the High Court of Justice," The Constitutional Documents of the Puritan Revolution 1625-1660. *available at* http://oll.libertyfund.org/.

[177] "Then for the law of this land, I am no less confident, that no learned lawyer will affirm that an impeachment can lie against the King, they all going in his name: and one of their maxims is, that the King can do no wrong. Besides, the law upon which you ground your proceedings, must either be old or new: if old, show it; if new, tell what authority, warranted by the fundamental laws of the land, hath made it, and when. But how the House of Commons can erect a Court of Judicature, which was never one itself (as is well known to all lawyers) I leave to God and the world to judge. And it were full as strange, that they should pretend to make laws without King or Lords' House, to any that have heard speak of the laws of England." Samuel Rawson Gardiner (ed.) (1906). "The King's reasons for declining the jurisdiction of the High Court of Justice," The Constitutional Documents of the Puritan Revolution 1625-1660. *available at* http://oll.libertyfund.org/.

nation, acted and committed in the said wars, or occasioned thereby."[178] Three days later Charles was beheaded.[179]

Modern Subjects of International Law

Today the international community and United States courts in particular are confronted with recognizing another actor – the corporation – but before turning attention to determining whether the corporate actor is accounted for in and under international law, certain parallels can be drawn from other non-state actors functioning in and among the international community. In principle, corporations, formed under municipal law lack international legal personality, but just like there is no general rule in international law that the individual cannot be a 'subject of international law' there is no rule that the corporation cannot be a 'subject of international law,' and in many contexts, the corporation and the individual appear as a 'legal' person on the same international plane.[180] However, to merely classify either an individual or a corporation as a 'subject' of the law is problematic because it would imply the existence of capabilities and qualities which it may not possesses.[181]

According to the International Court of Justice (ICJ), a subject of law is an entity capable of possessing international rights and duties and the capacity to maintain its rights by bringing

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[178] Samuel Rawson Gardiner (ed.) (1906). "The Charge against the King," The Constitutional Documents of the Puritan Revolution 1625-1660. *available at* http://oll.libertyfund.org/.

[179] Following the "restoration" of the monarch, former Solicitor General John Cooke, prosecutor of King Charles was himself tried and convicted of treason for his involvement in the trial. But before John Cooke was drawn and quartered, he reportedly wrote a letter in which he said, "[w]e fought for the public good and would have enfranchised the people and secured the welfare of the whole groaning creation, if the nation had not more delighted in servitude than in freedom." GEOFFREY ROBERTSON, THE TYRANNICIDE BRIEF, 418 (2005). From a practical standpoint, legal practice can be quite hazardous when seeking to hold powerful actors accountable under the rule of law. How that relates to asserting jurisdiction over corporations is for the reader to infer.

[180] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 67 (4th ed. 1990) (dedicating an entire section to personality and recognition).

[181] *Id.*

claims.[182] As Ian Brownlie points out, this conventional definition is circular since the indicia depend on the existence of a legal person.[183] Despite this caveat on whether a particular actor is a subject of international law, it is agreed that dominant actors on the international scene today include nation-states, supranational international organizations, individuals, and associations of individuals, such as trade unions, non-governmental organizations (NGOs) and corporations.[184] Each of these actors possesses rights and duties in and under international law with legal personality for their particular purpose.[185] Increasingly, these actors impact the international sphere. Even though the nation-state dominated the international sphere, the supranational international organization ascended into the international system, and today, the corporation is impacting international relationships.[186]

The modern nation-state is the dominant actor in international law. In fact, modern states have been characterized as corporations.[187] The personality of the nation-state is "conceived as a complexity of members" that create a group personality for the first time; it should be noted that for centuries international commentators have demonstrated "the close connection between the

[182] *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 179 (Adv. Op., Apr. 11).

[183] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 59 (4th ed. 1990) (dedicating an entire section to personality and recognition).

[184] Scholars disagree about the extent to which recognition is required to establish legal personality, or if legal personality can indeed exist independently of recognition. If legal personality can exist without recognition, recognition is transformed into a legal duty possessed by the state. *See* PETER H.F. BEKKER, THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS 74 (1994).

[185] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 59 (6th ed. 2003) (dedicating an entire section to personality and recognition).

[186] Although corporations are formed under domestic law, they often conduct activity beyond the reach of domestic law. One notable advent of the modern legal system is that corporations have attained greater rights without corresponding duties. For instance, it is now possible for a corporation to have standing to assert its rights under certain investment treaties (i.e. NAFTA) and enter into contractual relationships with nation-states (*i.e.*, voluntary corporate codes of conduct).

[187] *See* Hans Aufricht, *Personality In International Law*, in INTERNATIONAL LEGAL PERSONALITY 35, (Fleur Johns ed., 2010) (noting the corporate idea in its relationship to the state-concept).

theory of the state (*Staatsslehre*) and the theory of the corporation (*Genossenschaftslehre*)" and the interrelationship between the theories still presents conceptual problems.[188] Traditionally, states, via their governments, create, apply, and enforce international law.[189] Over time, certain basic rules emerged in international law to determine whether an entity is in fact a state, and to determine who the government of that state is.[190] Once a state is recognized it is enjoys certain rights and duties under United States domestic laws; however, United States law also has given effect to unrecognized quasi-state actor for the purpose of determining "state" action.[191] Here, issues of state recognition generally dominate questions of international law pertaining to who is

[188] *Id*. at 39.

[189] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 58-70 (4th ed. 1990). *See* H.L.A. HART, THE CONCEPT OF LAW 97-114 (1961) (explaining that some laws are backed by threats of the sovereign and other laws are based on a system of primary rules of obligation). *See also* HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 4-6 (1946) (distinguishing the viewpoint that an entity that satisfies the criteria of statehood is bound to legal rights and duties under international law whether or not other states recognize it from the viewpoint that only the act of recognition by already recognized states can transform unrecognized entities into sovereign states subject to international law). *See generally* Michael Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29 (1995).

[190] Under traditional elements of international law, an entity seeking recognition as a state must have: (1) a defined territory; (2) a permanent population; (3) and effective government; and (4) the capacity to enter into relations with other states. *See* Inter-American Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (Montevideo Convention); *See also*, H.L.A. HART, THE CONCEPT OF LAW 97-114 (1961) (suggesting that the "rule of recognition" is the primary rule that establishes the certain parties or organizations, such as a monarchy, as rulemaking institutions). The foundation of the German constitutional state is its Grundgesetz (Basic Law), which is an intricately structured framework of rules and values. Each constitutional provision manifests a binding legal norm that obliges complete, unequivocal implementation. The Constitution represents the Grundnorm, or basic norm, which governs and validates the legal order. Accordingly, any law or practice that is not reconcilable with the Basic Law is by definition unconstitutional. *See generally* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115 (1961).

[191] In United States law recognized "states" enjoy certain privileges and immunities relevant to judicial proceedings, *see, e.g., Pfizer Inc. v. India*, 434 U.S. 308, 318-20, 98 S.Ct. 584, 590-91, 54 L.Ed.2d 563 (1978) (for the diversity jurisdiction); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-12, 84 S.Ct. 923, 929-32, 11 L.Ed.2d 804 (1964) (granting access to U.S. courts).. Even if an international actor is "unrecognized" and without legal personality, United States courts have regularly given legal effect to the "state" action of unrecognized states. *See, e.g., United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101-03, 22 L.Ed. 816 (1875) (seceding states in Civil War); *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 9-12, 19 L.Ed. 361 (1868) (same); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir.1970), cert. denied, *245 403 U.S. 905, 91 S.Ct. 2205, 29 L.Ed.2d 680 (1971) (post-World War II East Germany). *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (discussing the rights of non-state actors and considering a dismissal for lack of subject matter jurisdiction over an "unrecognized entity").

the legitimate government and even whether to acknowledge new state actors.[192] Previously, state recognition issues confronted the international community in the context of de-colonialism, yet today, as democratic uprising occur throughout the Middle East, in Egypt, Bahrain, Libya, and beyond the question of either implicit or explicit recognition of these new entities will confront the international community.[193]

Importantly, once an international actor materializes in the international spheres, the specific attributes of the actor help determine its international personality. In the context of the corporate actor, we must ask ourselves whether corporations have the power to enter into international agreements; whether corporations may bring claims on its own behalf; and whether the corporation may be sued by other actors. Often, the constitutive instrument of the organization provides for its legal status and character; constituent instruments often contain express provisions regarding the entities legal status, yet in its absence legal personality might be implied given the entities object and purpose.[194] In short, once an international actor is recognized international law provides corresponding rights and duties.

In the first place, the question of the subjects of international law is most often discussed as whether not only states but also individuals are subjects of international law.[195] The question presented here is whether a theory of legal personality supports corporate liability for violations

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[192] The criteria for statehood are widely accepted by the international legal community, the declaration of such status remains contested. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 85-106 (4th ed. 1990) (noting that an entity is *ipso facto* a state once the criteria for statehood are meet, even in the absence of a "declaratory theory of recognition" by other states); *compare with* the Charter of the Organization of American States which provides that the "political existence of the state is independent or recognition." April 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, as amended by protocols of 1993 [hereinafter OAS Charter].

[193] *Briefing: After Mubarak*, THE ECONOMIST, Feb. 19, 2011, at 47-53.

[194] *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 179 (Adv. Op., Apr. 11).

[195] *See* Hersch Lauterpacht, *The Subjects of the Law of Nations*, in INTERNATIONAL LEGAL PERSONALITY 174, (Fleur Johns ed., 2010).

of the law of nations. In the second place, Brownlie notes that a corporation formed under domestic law, whether public or private, may engage in activity beyond the territory other than under which they incorporated and "in principle, corporations of municipal law do not have international legal personality."[196] However, renowned commentator Philip Jessup noted that corporations or partnerships may also be properly considered subjects of international law.[197] Often corporations can and do make agreements, for instance concession agreements for oil or mineral rights, but these international agreements are not necessarily treaties in a formal sense, rather they are more akin to contracts.[198] Corporations in the last few decades have gained greater recognition within a multinational trading regime; for instance, corporations have standing to challenge governmental action under certain free trade agreements.[199] Arguendo, corporate codes of conduct are inherently more in the nature of an international agreement and provide a stronger basis of support toward corporate actor recognition.

In international law the concept of recognition affects the natural and legal persons to a greater degree than international organizations. Yet the corporation is intrinsically involved in international creation, interpretation, and obligation/compliance. Increasingly, corporations are

[196] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 67 (4th ed. 1990).

[197] Philip C. Jessup, The Subjects of a Modern law of Nations, 45 Mich. L. Rev. 383, 387 (1947).

[198] *See generally*, *The Mavrommatis Palestine Concessions* (Greece v. U.K.), Jurisdiction, 1924 PCIJ Series A No. 2.

[199] Many international law scholars point to the successful interplay between state autonomy and international governance functions manifested by multilateral treaty regimes. Specifically, Hersh Lauterpacht identifies the "subjection of the totality of international relations to the rule of law" as the primary feature of the Grotian conception of international society. Hersh Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 19 (1946); *see also* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602 (1997) (noting the complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems). Other commentators have identified a new type of sovereignty, which is created by the interpenetration of multilateral treaty regimes across sovereign borders. Specifically, they argue that "to be a player, the state must submit to the pressures that international regulations impose... [because] sovereignty... is status--the vindication of a state's existence as a member of the international system." ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 27 (1995).

involved in the law making function previously reserved to the state. In the United States, corporate political spending will likely help corporations buy future government official and corporate friendly laws.[200]

[200] *See generally, Citizens United v. Federal Election Commission*, 175 L. Ed. 2d 753 (U.S. 2010) (held that corporate political speech cannot be limited because corporations are people and entitled to protections under the First Amendment of the United States Constitution); *see also Kiobel* at 118 n. 11 (noting that in and under U.S. law corporations are "persons" with duties, liabilities, and rights).

CHAPTER 5
CORPORATE ENTERPRISES IN AND UNDER A MODERN LAW OF NATIONS

Corporations In and Under International Law

"[T]here is more agreement today," according to Philip C. Jessup, distinguished international jurist, "than at any earlier period . . . that there is as this time both the need and the opportunity for the development of a modern law of nations."[201] That statement was made over 50 years ago and still holds true today. As it was then, today it remains that "the greatest excitement of international law lies not in its past, but in its future growth and development as a means for maintaining world peace, prosperity, and human dignity."[202] This section will provide the reader with an introduction to the sources of international law as applied by courts and permit the reader to determine whether the majority opinion in *Kiobel* properly applied international law.

International law, in its most pure form, principally pertains to the legal norms that operate among states.[203] International law is primarily concerned with the legal norms that regulate conduct between a state and the individuals within the states' territory and even beyond its borders.[204] International law, unlike most domestic law such as in the United States, is largely decentralized and consequently the international legal system consists of a conglomerate of legal systems.[205]

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[201] PHILIP C. JESSUP, A MODERN LAW OF NATIONS 1 (1956).

[202] GERALD J. MANGONE, THE ELEMENTS OF INTERNATIONAL LAW 470 (1967).

[203] States are also generally referred to as nations and countries. For the purposes of this thesis, these terms are used interchangeably.

[204] *See e.g.* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (6th ed. 2003); PHILIP C. JESSUP, A MODERN LAW OF NATIONS (1956).

[205] *Id.*

Every legal system requires a body of law, but no single international code exists.[206] Of the numerous distinctions between international law and domestic legal systems, the absence of a single compilation of rules complicates determining what precisely one means by international law. Just like any body of law, international law did not jump into being full-panoply; all legal systems have their origin in the societies in which they govern.[207]

Sources of International Law

In the absence of a global or world legislature, international law is not created by statute as other legal systems are; by contrast, international law is found in a variety of sources. Some of the sources of international law are codified by the Statute of the International Court of Justice.[208] Thus, international and domestic courts, seeking to identify and apply international law, commonly consult the following: (1) international conventions (treaties); (2) customary international law evidenced by state practice and *opinion juris*; (3) general principles of law recognized by civilized nations; and (4) judicial decisions and the teachings of the most qualified publicists.[209]

Notably, there are disagreements among international legal commentators as to whether these sources are listed in order of importance (*i.e.*, whether there is a hierarchy) and whether these sources are exclusive.[210] Individuals familiar with the common-law legal tradition often

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[206] PHILIP C. JESSUP, A MODERN LAW OF NATIONS 4 (1956).

[207] JESSUP at 1.

[208] Statute of the International Court of Justice, art. 38 (1), June 26, 1945, 59 Stat. 1055 [hereinafter, ICJ statute].

[209] Art. 38(1)(a)-(d), ICJ Statute; *compare with* HAZEL FOX, *Time, History, and Sources of Law, Peremptory Norms: Is There A Need For New Sources of International Law*, in TIME, HISTORY AND INTERNATIONAL LAW, (Matthew Craven, Kalgosi Fitzmaurice &Maria Vogiatzi eds., 2007). It is also worth noting that judicial decisions and teachings are considered subsidiary means. Art. 38(1)(d), ICJ Statute.

[210] HAZEL FOX, *Time, History, and Sources of Law, Peremptory Norms: Is There A Need For New Sources of International Law*, in TIME, HISTORY AND INTERNATIONAL LAW, (Matthew Craven, Kalgosi Fitzmaurice &Maria Vogiatzi eds., 2007). BRIERLY, THE LAW OF NATIONS at 66.

overlook the status of precedent in international law; the concept of *stare decisis*, the doctrine of precedent, is technically non-existent in international law.[211] Decisions of the International Court of Justice (ICJ) are binding only on the parties to the case and without formal effect as precedent.[212] However, in practice, the ICJ often cites its prior decisions as persuasive authority, pursuant to Article 38(1)(d), and the ICJ will frequently evaluate rules of customary international law in their opinions and often will subsequently rely upon those evaluations in later decisions.[213]

Even though courts typically begin their analysis of international law with the four enumerated sources of international law contained in the 1945 ICJ statute, these four sources are not exhaustive. It should be noted that both opinions in *Kiobel* to attempt to frame the issues appropriately, yet Judge Cabranes omits several sources of international law and fails to look beyond the Nuremburg precedent to determine whether international law recognizes the corporate actor. This section will provide the reader with a coherent understanding of the modern sources of international law. Following a source by source analysis of international law, this Chapter then examines developments in international and domestic law pertaining to the determination of corporate legal personality under international law.

Treaties or Conventions

Treaties are agreements between and among States, by which parties obligate themselves to act, or refrain from acting, according to the terms of the treaty.[214] Similar to when two

[211] Under *stare decisis* [Latin "to stand by things decided"], the doctrine of precedent, a court must follow earlier judicial decisions when the same points arise again. *See* BLACKS LAW DICTIONARY.

[212] Article 59, ICJ Statute; *see also* BRIERLY, THE LAW OF NATIONS 56-66 (1963).

[213] *See e.g. Kiobel*

[214] The Vienna Convention of the Law of Treaties(VCLT) defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Art. 2, VLCT.

individuals seek to enter into a contract and evidence their obligations by writing, two or more countries can contract through treaties.[215] Like contracts between individuals, treaties cover a number of substantive issues and can be lengthy or limited. Rules regarding treaty procedure and interpretation are defined in the Vienna Convention on the Law of Treaties (VCLT).[216] Since international law lacks any procedural body of rules, the VCLT of Treaties was adopted to codify the background rules of state treaty practice. Often, the VCLT is called "the treaty of treaties" because just like other agreements among states, each party must consent to be bound by the instrument.

Although there is no official hierarchy to the sources of law the sources do vacillate in their significance. Notably, treaties, just like contracts, encapsulate the notion of mutual assent and provide strong evidence of states' "mutual promises." This analogy between treaty and contract leads to one of the most basic fundamental principles relating to treaties, *pacta sunt servanda*, which provides that, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[217] One significant distinction between the treaty and the contract should be made prior to proceeding, "the treaty has a law-applying and simultaneous law-creating character.

Once a State becomes a party to a treaty, it is bound by that treaty; however, a treaty does not create rights or obligations for States that are not parties to the treaty.[218] Even if a State is not party to a treaty, the treaty may serve as evidence of customary international law, and thus

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[215] BRIERLY at 56-66.

[216] *See* Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. [herein VCLT].

[217] VCLT at Article 26.

[218] VCLT at Article 34.

operate as a "back-door" method by which a treaty may become binding on non-parties.[219] States are likely to be bound by the VCLT through customary international law. This is because many courts regard the VCLT as reflecting state practice.[220] Consequently, the VCLT is nearly always considered relevant when courts seek to determine how a party should act in light of its treaty obligations. Importantly, situations often arise where some provisions of a treaty may reflect or codify customary international law, while other parts do not.[221]

Customary International Law

The second source of international law is customary international law.[222] A rule of customary international law is one that, whether or not it has been codified in a treaty, has binding force of law because the community of States treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a State whether or not it has affirmatively assented to that rule.

In order to prove that a particular rule has become a rule of customary international law, two elements must be proved: widespread state practice (*i.e.*, uniform and consistent) and *opinion juris* - the mutual conviction that the recurrence (of state practice) is the result of a compulsory rule. There is a certain tautology to the second requirement, such as state practices is not law unless states regard it as law."[223]

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[219] Article 38, VCLT. *See also, F.R.G. v. Denmark North Sea Continental Shelf Cases* (1969) (recognizing this "back-door" means by which a treaty may become binding on non-parties).

[220] *Id.*

[221] For instance, some provisions of the International Covenant on Civil and Political Rights (ICCPR) may reflect and essentially codify customary international law, while other provisions may not.

[222] Art. 38(1)(b), ICJ Statute.

[223] *See e.g.* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-10 (4th ed. 1990); BRIERLY at 59-61.

Objective element: state practice

"State practice" is an objective element, and simply stated means that a sufficient number of states behave in a regular and repeated manner consistent with the customary norm. Evidence of State practice may include a codifying treaty, if a sufficient number of States sign, ratify, and accede. There are two important issues in the objective "state practice" element of customary international law. First, whether the practice of a small number of states in a particular region creates "regional customary international law."[224] Second, whether the practice of particularly affected states (*e.g.* space law), can create custom that binds other states. The ICJ has signaled such a possibility may exist.[225]

Subjective element: opinion juris

Opinio juris is the subjective element of customary international law. It requires that the State action in question be taken out of a sense of legal obligation, as opposed to mere expediency. As one commentator put it, *opinion juris*, is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it."[226]

Customary international law is shown by reference to treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal

[224] Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L. J. 439, 440 (2010).

[225] The ICJ, in the *Asylum* case, accepted that there could be a Latin American customary rule regarding the right of a state to issues a unilateral and definitive grant of political asylum. See generally, Asylum (Colom. V. Peru), 1950 I.C.J. 266 (Nov. 20).

[226] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

advisers, and the practice of international organizations.[227] Each of these items might be employed as evidence of State practice, *opinion juris*, or both.

Corporations are subjects of customary international law and using the notion of a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance (*i.e.*, Grotian Moment) I argue that a consequence of globalization and the significant political and economic strength of the corporation, customary international law developed rapidly to incorporate these new corporate actors. This is true even if international law has never found corporation criminally or civilly liable. Just like customary international law developed at Nuremberg in a Grotian Moment to hold individuals accountable, domestic courts in the U.S. and other industrialized countries recognized the transformative development of corporate and political power in a Grotian Moment to hold corporate accountable for violations of the law of nations. It may be argued that the limited practice of the few industrialized states seeking to hold corporations accountable for violations of international law is insufficient to create customary international law, but as the ICJ has noted customary international law can develop regionally or from particularly affected states, thus the customary international law of corporate liability emerged in domestic rules, like the ATS, and years of United States jurisprudence under the ATS holding corporations liable are an important source of international law evidencing a customary practice to be considered by courts.

[227] The party asserting a rule of customary international law bears the burden of proving it meets both requirements. *See e.g.*, *North Sea Continental Shelf Cases*.

General Principles of Law

The third source of international law consists of "general principles of law."[228] Such principles are gap-filler provisions, utilized by the ICJ in reference to rules typically found in domestic courts and domestic legal systems in order to address procedural and other issues. The bulk of recognized general principles are procedural in nature (*e.g.*, burden of proof and admissibility of evidence). Many others, such as waiver, estoppel, unclean hands, necessity, and force majeure, may sound familiar to a common-law practitioner as equitable doctrines. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited general principles of international law.[229]

Subsidiary Means to Determine International Law

The final source of international law is judicial decisions and teachings of scholars.[230] This category is described as "a subsidiary means of finding the law."[231] Judicial decisions and scholarly writings are, in essence, aids for the Court, used to support or refute the existence of a customary norm, to clarify the bounds of a general principle or customary rule, or to demonstrate state practice under a treaty.[232]

Judicial Decisions

Judicial decisions, whether from international tribunals or from domestic courts, are useful to the extent they address international law directly or demonstrate a general principle.

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[228] Art. 38(1)(c), ICJ Statute.

[229] It is important to note that "equity" is a source of international law under Article 38(1)(c) of the ICJ Statute. It is an *inter legem* (within the case) application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono* (that is, to simply decide the case based upon a balancing of the equities), which is a separate matter and provided for under Article 38(2) of the ICJ Statute.

[230] Art. 38(1)(d), ICJ Statute.

[231] *Id.*

[232] *Id.*

Here, past decisions by international and domestic courts provide a rule-making function. Additionally, the treatment of corporations in and under international law by courts evidences that general principles of the state of incorporation govern the determination of personality for the purpose of corporate liability. This issue will be discussed further in the next section. Also, United States jurisprudence under the ATS holding corporations liable for human rights violations has a rule creating character under international law and helps fill the gaps on whether corporations are subject to international law and whether corporations may be held civilly liable under the ATS.

Teachings of Learned Scholars

"Teachings" refer to the writings of learned scholars. Many make the mistake of believing that every single published article constitutes a "teaching" under Article 38(1)(d); however, teachings are expressly limited to of "the most highly qualified publicists."[233] Moreover, there is a very short list of "the most highly qualified publicists," which generally include international legal scholars like Grotius and Brownlie, there are additional scholars who would be regarded as "highly qualified publicists" in the context of a specific field.

Contemporary Sources of International Law

Much in the international community has changed since 1945 when the ICJ Statute first codified the sources of international law. Even though courts typically begin their analysis with these four sources, modern international law has evolved to include additional "sources" of international law. First, international organizations have created another source of international

[233] *Id.*

law. Second, an area of so-called soft-law emerged to create new international norms. Lastly, there is a place of 'reason' in the sources of international law.[234]

International Organizations

International organizations, such as the United Nations or the Organization of American States, are conferred with the authority to create rules that may ultimately bind their members.[235] Importantly, these quasi-legislative bodies operate in a more narrow sense than their state equivalents. Additionally, it must be noted that United Nations General Assembly Resolutions are not, in and of themselves, binding; even though these Resolutions may evidence customary international law, the General Assembly is not analogous to a domestic legislature, such as Congress.[236] Additionally, non-binding international instruments increasingly affect international actors' behaviors and as a result have helped crystallized customary international law on a variety of issues.[237] Often new situations are discovered in international law and just like every

[234] BRIERLY at 66.

[235] Many international law scholars point to the successful interplay between state autonomy and international governance functions manifested by multilateral treaty regimes. Specifically, Hersh Lauterpacht identifies the "subjection of the totality of international relations to the rule of law" as the primary feature of the Grotian conception of international society. Hersh Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 19 (1946); *see also* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602 (1997) (noting the complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems). Other commentators have identified a new type of sovereignty, which is created by the interpenetration of multilateral treaty regimes across sovereign borders. Specifically, they argue that "to be a player, the state must submit to the pressures that international regulations impose... [because] sovereignty... is status--the vindication of a state's existence as a member of the international system." ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 27 (1995).

[236] The International Court of Justice (ICJ) has advanced the notion that each UN General Assembly Resolution is a form of soft law that in itself gradually becomes a binding form of law. The ICJ asserted in the Nuclear Weapons Advisory Opinion that "General Assembly resolutions...provide evidence important for establishing the existence of a rule or the emergence of *opinio juris*.... [A] series of [General Assembly] resolutions may show the gradual evolution of *opinio juris* required for the establishment of a new rule." *See* Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 254-55 (July 8).

[237] Oscar Schachter contends that a unanimous assertion in good faith by all--or at least nearly all--states manifests *opinio juris communis* (instant custom) and as a result, "[I]f nearly all States agreed on what is the law, was there a sufficient reason to deny effect to that determination?" *See* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE, IN INTERNATIONAL LAW 114, 116 (Barry E. Carter & Phillip R. Trimble eds., 1991); *See* Panel Discussion, *A Hard Look at Soft Law*, 82 AM. SOC. INT'L L. PROC. 371 (1988).

other body of law, international law will never sufficiently develop to cover every situation or actor that emerges upon the international sphere. In these situations, the judicial entity confronted with a gap in international law must apply reasoning to cover the new situation.[238]

Soft-Law

Increasing recognition of corporate legal personality has significantly increased as nations turn attention toward third generation human rights such as democracy. One perceived threat to consolidation of democratic global governance is corruption and consequently the international legal community has developed. In the context of corruption, there are a variety of multilateral, regional and bilateral conventions or treaties that attempt to deal with corporate social responsibility. Generally, these international instruments focus on the individual wrongdoer such as a bribe giver or recipient.[239] Unlike human rights conventions, the conventions dealing with corruption, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, do obligate states to promise not to engage in corrupt practices or to combat corruption globally; rather, these instruments merely encourage nations to enact domestic legislation and by implication, they require states to enforce these domestic measures.[240] Consequently, even customary law derived from conventions combating corruption would be limited to an obligation to enact and enforce domestic laws.

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[238] This type of reasoning is not the reasoning of any 'intelligent' man, but a 'judicial' reasoning, which according to Brierly, means that a principle to cover the new situation is discovered by applying methods of reasoning which lawyers everywhere accept as valid. Examples include the consideration of judicial precedent, reasoning by analogy, and "disengagement from accidental circumstances of the principles underlying the rules of law already established." BRIERLY at 66.

[239] *See, e.g.*, Foreign Corrupt Practices Act (FCPA), 15 U.S.C.A. §§ 78dd-1 (1998).

[240] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD, 21 Nov. 1997 [herein OECD Convention]; OECD Guidelines for Multinational Enterprises, OECD, 27 June 2000; Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises, OECD, June 2000.

The concept of the corporate personality in international law is well-settled in modern treaty law. As far back as the 1970s, international law recognized the emerging concept of the multinational enterprise.[241] For example, the International Labor Organization (ILO) promulgated the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy which states, in relevant part, that

> [T]he advances made by multinational enterprises in organizing their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives and with the interest of the workers. In addition, the complexity of multinational enterprises and the difficulty of clearly perceiving their diverse structures, operations and policies sometimes give rise to concern either in the home or in the host countries, or in both.[242]

Additionally, the Organization for Economic Co-operation and Development (OECD) promulgated the OECD Guidelines for Multinational Enterprises which states, in relevant part, that "Governments adhering to the Guidelines encourage the enterprises operating in their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country. However, both the Tripartite Declaration and the OECD Guidelines skirt the issue of defining the legal personality of a "multinational enterprise" in international law. But the Tripartite Declaration does explain that

> [T]o serve its purpose this Declaration does not require a precise legal definition of multinational enterprises; this paragraph is designed to facilitate the understanding of the Declaration and not to provide such a definition. Multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based. The degree of autonomy of entities within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their fields of activity and having regard to the great diversity in the form of

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[241] International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 17 I.L.M. 422, 424-28 (Nov. 16, 1977) [hereinafter "Tripartite Declaration"]; Organization for Economic Co-operation & Development, Guidelines for Multinational Enterprises available at http://www.oecd.org/dataoecd/56/36/1922428.pdf (Revision 2008) [hereinafter "OECD Guidelines"].

[242] *Tripartite Declaration* at para. 1.

> ownership, in the size, in the nature and location of the operations of the enterprises concerned. Unless otherwise specified, the term "multinational enterprise" is used in this Declaration to designate the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilities among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration.[243]

Similarly, the OECD Guidelines offer no precise definition of the international legal personality of a multinational enterprise; rather, the OECD Guidelines state that

> A precise definition is not required for the purposes of these Guidelines. [Multinational Enterprises] usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.[244]

Although neither of these international instruments are indented to bind its members, they merely provide a framework to regulate corporate activity and clearly signal the concept of the international legal personality of the multinational corporate enterprise in and under international law. The General Policies of the OECD Guidelines illustrate international obligations for multinational enterprises and aim for the respect of human rights and sustainable development in conjunction with good corporate governance. Moreover, this development in international law ought to effect U.S. courts interpretation of corporate liability under the ATS.

This section provided the reader with an adequate appraisal of the sources of a modern law of nations. International practitioners and their domestic counterparts seeking to determine questions of international law must consider a wide variety of sources; however, international

[243] *Tripartite Declaration*, para. 6.

[244] *OECD Guidelines*, section I(3).

law generally leaves questions of civil liability to domestic states. The next section will examine the development of corporate liability in practice under the domestic law of the United States and then under international law since Nuremburg.

Sources of Corporate Accountability in International Relations

Today, there is significant debate to whether corporations have been held liable, either civilly or criminally, in an under international law.[245] In domestic law, we value corporate liability and hold its personhood as sacrosanct; however, international law is undeveloped in the area of the law of persons.[246] An examination of corporate criminal liability in international law, following WWII, far from settles the issues of corporate liability.[247] Importantly, it is clear that no international criminal court has been granted jurisdiction to prosecute corporations for violations of international law, and it follows that no corporation has even been found liable for violations of international criminal law. During war crimes proceedings against the defeated Axis enemy, only individuals were charged in the initial phase of the Nuremburg Tribunal and the Tokyo Tribunal.[248] Subsequent Nuremburg trials did eventually tackle corporate activity; however, the trials against giant German enterprises focused on the managers, directors, and owners, not the corporate entity.[249] One explanation for these Tribunals' failure to adjudicate the guilt or innocence of corporate complicity in war crime is rooted in The Nuremberg Charter,

[245] Bush at 1098.

[246] *Id*.

[247] *See* Case No. 57, The I.G. Farben Trial, U.S. Military Tribunal, Nuremberg, 14 Aug. 1947-July 29, 1948, 10 Law Reports of Trials of War Criminals 1; *see also* Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 76 (2002) (noting that the Tribunal found that the I.G. Farben Corporation had violated international law.).

[248] *Id*.

[249] The trials against German corporations focused primarily on Krupp, Flick, I.G. Farben, and some attentions to Hermann Goering Works (HGW) and Dresdner Bank. These cases alleging war crimes against corporate actors where brought under the authority of Control Council Law No. 10.

which authorized the criminal prosecution of individuals only, rather than legal persons such as corporations.[250]

Nuremburg Precedent

The Nuremburg Tribunal, following World War II, decisively rejected the prevailing majority view that only state actors and not individuals could be held accountable for violations of international law. The Nuremburg Tribunal ruled that "crimes against international law, are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[251] Although there is some case law relating to, it appears that these proceeding are where corporations may draw significant historical support for corporate immunity to criminal liability.[252]

One problem is that United States courts have a tendency to rely on the Nuremberg precedents to determine whether corporations can be held liability under international law.[253] Courts construe these precedents as the Holy Grail and seek to apply them as some sort of precedent binding today's international law to standards that emerged a life-time ago. Even though these Tribunals were situations of "first instance" in the international legal community the legal arguments were fairly unrefined and were early actions seeking attempts to expand accountability beyond the state to the individual, United States courts and even international

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[250] Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L. J. 439, 440 (2010) (arguing the Nuremburg precedent was paradigm-shifting coupled with endorsement of the Nuremburg Principles by the U.N. General Assembly resulted in the accelerated formation of customary international law).

[251] Trial of Major War Criminals before the International Military Tribunal 223 (Nuremburg 1947); The Nuremburg Trial, 6 F.R.D. 69, 110 (1946).

[252] *Id*.

[253] *See e.g. Kiobel*; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 308-20 (S.D.N.Y. 2003); and *Khulumani v. Barclay Nat'l Bank Ltd*., 504 F.3d 254 (2d Cir. 2007) (the court issued three separate opinions, each relied on the Nuremberg precedents, each reach a separate conclusion.).

legal commentators heavy reliance of these embryonic notions of liability frustrate a determination of corporate liability in international law today. Take for instance *Khulumani v. Barclay Nat'l Bank Ltd*., 504 F.3d 254 (2d Cir. 2007) the court issued three different outcomes of corporate liability based upon the Nuremburg so-called precedent.[254] On commentator noted that even the legal scholars get the Nuremburg precedent incorrect.[255]

These Tribunals of "first instance" bumped and bothered the margins of prevailing norms and rules on international liability existing at that time in history. At the time of Nuremburg, international liability beyond the state was an undeveloped area of law. Nevertheless, international law continues to develop and the Nuremberg tribunals were instances of first impressions for international law and merely signal the development of new norms requiring further elaboration. At the present time in history, the corporation is in a much different position

[254] In *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), the opinions relied heavily on Nuremberg precedents, albeit each drawing different conclusions by the three separate opinions in. Two judges found, for different reasons, that aiding and abetting violations of international law is itself a violation of international law that is accepted by the international community, and one judge dissented.

[255] In the most comprehensive work on corporations and criminal liability Jonathan Bush suggests that no corporations has even been held liable for war crimes and that there are suggestions to the contrary by human rights scholars are mistaken. Jonathan Bush, *The Prehistory of Corporations and Conspiracy in International Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1098 (2009) [herein Bush]. *See, e.g.*, Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 266 (2004) (confusing Nuremberg tribunals that tried Flick, Krupp, and I.G. Farben officials with Nuremberg tribunal that was permitted by "the Nuremberg Charter" to designate groups or organizations as criminal, but that did not adjudge any corporations or firms); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights,* 20 BERKELEY J. INT'L L. 45, 76 (2002) (confusing court's finding of Farben's offenses, for which evidence was abundant, with legal finding of corporate guilt as an entity). *Id.* at 1098, n.9. According to Bush, the I.G. Farben case attracts the bulk of the misunderstanding, and he notes that even legal authorities "who see that only individuals and not the firm were charged often go on to claim that individual defendants were convicted on charges relating to Zyklon B at Auschwitz." *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 98 (E.D.N.Y. 2005) ("Kugler, an official in the Farben enterprises, was found guilty of supplying the gas."); George P. Fletcher, *Tort Liability for Human Rights Abuses* 164 (2008) ("The approach in Nuremberg was to pierce the corporate veil and hold the individual directors liable, say, for selling large quantities of Zyklon B to the administrators of the death camps."). Bush continues in the footnote to point out that "while a handful of defendants were convicted for other involvement with slave labor at Farben factories at Auschwitz, every Farben defendant involved with Zyklon B was acquitted." *Bush* at 1098, n.9.

than in the "prehistory of Nuremburg."[256] Since Nuremburg, the corporate entity developed, and so too has the law. Courts must now include in their examination of corporate liability modern precedents of corporations in international law. The approach to international law by United States Courts today is insufficient to determine notions of corporate liability because they continually frame questions of corporate liability under international law within an antiquated conceptualization of the contemporary sources of law and fail to consider developments in both law and society. The time has come for United States courts and those beyond our borders to exercise jurisdiction over corporations, rejecting notions to the contrary in favor of the progressive nature of international law. Just like their Nuremburg predecessors, the time has come for U.S. legal practitioners to find a coherent approach to international law. Importantly, the judicial decisions of these courts form the contemporary corpus on judicial works as a source of law. Indeed, the legacy of ATS judicial decisions will help develop notions of legal personality and liability for years ahead. It is unlikely these issues will be resolved anytime soon, yet the approach to international law under the ATS requires incorporation of domestic conceptions of legal personality.

Looking Beyond Nuremburg

Determining corporate nationality is increasingly problematic. Globalization, neo-liberalism, free-trade, and economic integration challenge the general rule that a corporation is a national of the place of incorporation. This widely cited holding from *Barcelona Traction* (Spain v. Belgium) must now be reexamined within the context of a global trading environment because multinational enterprises operate via a variety of corporate entities.[257] In the past, the legal status

[256] *See e.g.*, Jonathan Bush, *The Prehistory of Corporations and Conspiracy in International Law: What Nuremberg Really Said,* 109 COLUM. L. REV. 1094, 1098 (2009).

[257] Belgium v. Spain, *I.C.J. Reports 1970.*

of foreign corporations and their cross-border maneuverability belonged exclusively to private law, and attempts to define "foreign" corporations and the rights conferred upon them culminated in two recognition theories of corporate personality, in common legal parlance referred to as the 'incorporation' theory and the 'real seat' theory.[258] To speak of 'recognition' of in the context of the corporation under the law is to consider the foreign company as a legal subject (*i.e*. a bearer of rights and duties).[259]

Dual identity of corporate nationals

"The very essence of the notion of corporation is respect for the existence of the corporate veil, separating the corporations from its members and endowing it with rights and duties of its own."[260] Generally, international courts respect the corporate veil in cases where a state asserts diplomatic protection for injuries suffered by its corporate national.[261] In fact, The reasoning for courts respecting the integrity of the corporate veil is clear, corporation have rights and duties of their own, and it follows from this legal truth that the corporation itself and not its members are in need of protection.

In brief, this section will describe the distinctions between the corporate "legal" person in internationals law and the attempts to protect the dual personalities of the modern corporate form. Here, the personality of the corporation has dual identities, the corporate legal entity itself and the identity of the shareholders; each identity of the corporate legal personality possesses certain rights and duties distinct from the other. To understand the dual-identity of the modern corporation we can frame the inquiry in the context of claim to diplomatic protection to examine

[258] STEPHAN RAMMELLO, CORPORATIONS IN PRIVATE INTERNATIONAL LAW, 9 (2001).

[259] *Id*. at 10.

[260] IGNAZ SEIDL-HOHENVELDRERN, CORPORATIONS IN AND UNDER INTERNATIONAL LAW 3 (1987).

[261] *See, e.g., Barcelona Traction.*

whose interests states have commonly asserted. Importantly, both the individual and the corporation lack status and standing under the ICJ Statute and this has led to domestic courts now concluding that corporations are not subjects of international law. However, because litigation under the ATS includes the individual, the corporation and the quest for an international law of corporations can be formulated within espousals of diplomatic protection.

Since the corporation is a legal fiction, the issue arises as to which state is entitled to protect its interests. In the case of an individual or citizen this would be the state of the individual's nationality.[262] The nationality of a corporation is determined no differently.[263] Moreover, the corporation has a legal personality independent of its members.[264] Governments confer upon legal personhood which creates a corporate personality independent of its shareholders. This act implies granting it rights over its own property, rights which it alone is capable of protecting. Finally, in the international context, the determination of corporate nationality only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State.[265] What is envisioned

[262] *Id. Compare with,* the *Nottenbohm Case* (Liechtenstein v. Guatemala), Second Phase Judgment, 6 April 1955. In the 1955 *Nottenbohm Case* the ICJ denied Liechtenstein's attempt to espouse the claim of a German national who was a naturalized citizen of Liechtenstein because there was no genuine connection of existence" or "bond of attachment" between Nottenbohm and Liechtenstein. The court noted that the naturalized citizen of Liechtenstein, Nottenbohm, did not live in Liechtenstein nor did he intend to live there, he had no business activities or interests there, and he didn't pay taxes there. Unlike, *Barcelona Traction* which involved a corporation (*i.e.* natural person), the *Nottenbohm Case* involved the nationality of an individual (*i.e.* natural person), in the *Nottenbohm Case* the ICJ held that the standard for determining nationality is the "Genuine Link" test. Commentators have endorsed the *Nottenbohm Case* "Genuine Link" test as a superior standard for determining the nationality of a corporation, rather than the incorporation test pronounced in *Barcelona Traction*. *See e.g.*, Lawrence Jahoon Lee, *Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later*, 42 STANFORD JOURNAL OF INT'L LAW 237 (2006).

[263] *Id.*

[264] Belgium v. Spain, *I.C.J. Reports 1970*, p. 34, para. 40; *see also*, Lawrence Jahoon Lee, *Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later*, 42 STANFORD JOURNAL OF INT'L LAW 237 (2006).

[265] Belgium v. Spain, *I.C.J. Reports 1970*, p. 34, para. 40.

here is that if the "legal" person is afforded fundamental rights then what state is entitled to protect a violation of its rights.

Courts will not likely pierce the corporate veil to hold the shareholders liable for violations of international law. In *Barcelona Traction*, the ICJ held that Belgium lacked standing or *jus standi*, to claim reparation for Barcelona Traction's collapse because the corporation is a distinct legal entity and Barcelona Traction was not a Belgian national.[266] In *Barcelona Traction*, the court ruled that a corporation is a national of the country in which it is incorporated, not where the majority of its shareholders are nationals; in fact, the majority expressly rejected the argument for nationality based upon the location of the majority of the shareholders as an alternative to the place of incorporation test to determine corporate nationality.[267] Even though the incorporation rule provided the basis of the court's conclusion, the court suggested, in obiter dictum several hypothetical exceptions to the rule of incorporation.[268] The first exception suggests the court would permit an exercise of diplomatic protection on behalf of the nationals whose direct rights as shareholders, as opposed to rights owed to the company itself were violated.[269] In fact, the ICJ cited to municipal law as the source of the shareholders rights they expressed.[270] The second exception suggests the court would permit an exercise of diplomatic protection on behalf of the nationals for harm to the company as a matter of equity.[271] This

[266] *Id*. at 43-45.

[267] *Id.*

[268] *Id.*

[269] *Barcelona Traction* at para. 46-47.

[270] *Id.*

[271] *Id.*

exception would apply if the company ceased to exist. It would also apply if the state of incorporation is the same state alleged to have caused the harm.[272]

Although the ICJ refused to confer standing upon Belgium, the Court articulated a theoretical exception that might allow the national state of the shareholders to bring a claim; the Court stated, "[A] theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company."[273] The Court in *Barcelona Traction* noted that only on the "legal demise" of the corporation would the shareholders have no possibility redress through the company and under the domestic law in which it incorporated, and only then would the shareholders' government (*i.e.*, Belgium) have an independent right of action for them (the shareholders) arise.[274]

Regulating corporations

Even if the corporate enterprise is a multinational corporation international law affords no different status. International law precludes states from asserting a corporation's interests, unless it is asserted by the state under whose law the legal entity is organized.[275] A state may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses.[276] In *Barcelona Traction*, the court in its analysis characterized corporations under national law, and emphasized that a corporation has a separate legal existence.[277] Importantly,

[272] Id. at para. 92. Note that in separate opinions; only three judges supported this exception. *Id.* at 72-75, 134, 191-93; by contrast four judges vigorously opposed this exception, Id. at 240-241, 257-259, 318.

[273] *Id.* at para. 92.

[274] *Id.* at p. 34, para. 40.

[275] *Id.*

[276] Art. 4, Hague Convention (1930).

[277] Belgium v. Spain, *I.C.J. Reports 1970*, p. 37.

the law of state responsibility does not attempt to regulate conduct between a state and its own nationals.[278] Although Corporations are a legal entity under domestic legal systems, they lack status and standing under international law.[279] Here, the ICJ, given the lack of international turns its inquiry to domestic rules; general principles of domestic law fill the so-called void in international law.[280] In light of this holding, the corporate person is the only possibly identity that could be sued under international law it is clear that for recognition purposes, the corporation has legal personality in international law.

Diplomatic protection of corporate persons

Notably, over a quarter of a century has lapsed since the *Barcelona Traction* was decided and international law continually develops new rules. Although the ICJ refused to confer standing upon Belgium in *Barcelona Traction*, subsequent courts vacillated in their decisions – although resolute in recognition of the juridical person and a general respect for the corporate veil. The ICJ, in contrast to its holding in *Barcelona Traction*, allowed the United States to bring a case against Italy to redress the harm suffered by and Italian company, wholly owned by United States shareholders.[281] Notably, the ICJ did not provide an explanation for allowing a claim for diplomatic protection to protect the direct rights of shareholder in *ELSI*; however, separate opinions by two other judges indicates the United States was permitted to exercise diplomatic protection to protect the shareholders direct rights granted under a treaty between the United States and Italy. A subsequent judgment by the ICJ in *Ahmandou Sadio Diallo* indicated that the ICJ in *ELSI*, allowed the United States to exercise diplomatic protection to protect the

[278] Art. 1, draft Articles on Diplomatic Protection (2006), ILC Report, doc. A/61/10, p. 24.

[279] *See e.g.*, ICJ Statute.

[280] Often the ICJ imports significant bodies of general principles including, but not limited to enterprise law, agency theory, principles of equity, estoppel, etc.

[281] *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. Rep. 3 (1989) [herein *ELSI*].

direct rights of shareholders granted by a Treaty of Friendship, Commerce and Navigation concluded between the United States and Italy.[282] Additionally international rules of diplomatic protection were established in 2004 and 2006, when the International Law Commission (ILC) issued its draft articles on diplomatic protection; these draft articles reflect the ILC's understanding and interpretation of the ICJ's decisions in the aforementioned case, as well as other sources of customary international law.[283] In fact, these draft articles, arguably rise to the level of customary international law and at the very least are a source of law under 38(1)(d) as the work of particularized learned scholarship.[284]

Most recently, in 2007, the ICJ confirmed in the case of *Ahmandou Sadio Diallo* that diplomatic protection can be exercised on behalf of a national whose direct rights as a shareholder in a foreign corporation or other business entity have been violated.[285] Unlike the *ELSI* case, where the ICJ derived the shareholder's direct rights from a treaty between the parties to the dispute, the court in *Diallo* stated that the direct rights of the shareholders should be derived from the municipal law of the Respondent State. In *Diallo*, the ICJ also held that diplomatic protection by substitution is not a customary norm of international law and the ICJ "having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of associés and shareholders, is of the opinion that these do not reveal at least at the present time an exception in customary international law allowing for protection by substitution . . ."[286] The ICJ noted,

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[282] *Ahmandou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) – Judgment of 24 May 2007* [herein Diallo]*; see also ELSI.*

[283] *See, e.g.,* draft Articles on Diplomatic Protection (2006), ILC Report, doc. A/61/10.

[284] Art. 38(1)(d), ICJ Statute.

[285] *Diallo* at para. 89.

[286] *Diallo* at para. 89.

> [t]he fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary…[287]

In its statement, the ICJ notes that with respect to corporations, the exercise of diplomatic protection has become less important in a globalized trading system comprised of bilateral investment treaties and other investor protection regimes. The take away from these statements is that the court seemingly reaffirms the general treatment of corporations under customary international law and is recognizing the international legal personality of the corporation.

Importantly, the ICJ in *Barcelona Traction* alluded to the fact that a State would be entitled to espouse claims of non-nationals if the allegations amounted to an egregious violation of human rights.[288] In dicta in *Barcelona Traction,* the ICJ stated, "[b]y their very nature [obligations *erga omnes*] are the concern of all States.[289] In view of the importance of the rights involved, all States can be held to have a legal interest in their protection."[290]Among the

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[287] *Diallo* at para. 90.

[288] *See Barcelona Traction, Light and Power Company, Limited (Belg. v. Sp.),* Second Phase, Judgment, 1970 I.C.J. Rep. 32 (1970).

[289] In international law, the concept of an obligation *erga omnes* is a powerful tool for showing standing. Taken at face value, if a State breaches an obligation *erga omnes,* then any State in the world would have standing to seek a judicial determination prohibiting the breach. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Sp.),* Second Phase, Judgment, 1970 I.C.J. Rep. 32 (1970); *compare Nottebohm*. The ICJ, in *Barcelona Traction,* noted the source of obligations *erga omnes* are rooted in the prohibitions against genocide and acts of aggression, and "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[289] In fact, the list of *erga omnes* obligations enumerated in 1970 by the ICJ in *Barcelona Traction* is limited to acts of aggression, genocide, slavery and racial discrimination.

[290] *East Timor Case* (Port. v. Aust.), 1995 ICJ Rep. 4. In 1995 the ICJ recognized the right of a people to self-determination as *erga omnes. See East Timor Case* (Port. v. Aust.), 1995 ICJ Rep. 4. In 1997 the ICJ recognized the theoretical existence of such a right in the context of large-scale environmental injury. *See Gabcikovo-Nagymaros Case* (Hung. v. Slov.), 1997 ICJ Rep. 4.

violations listed by the ICJ that would trigger universal standing are crimes against peace, war crimes, and crimes against humanity, piracy and slavery. But international law is constantly developing customary law and has recognized self-determination and theoretically large-scale environmental injury to the list of *erga omnes*.[291] Drawing upon the paramount importance attributed to obligations *erga omnes* by the Court in *Barcelona Traction*, many commentators have drawn a link between the obligations *erga omnes* and the notion of *jus cogens* norms of international law.[292] Thus the question of corporate liability turns on whether the human rights claims are sufficient to assert universal jurisdiction.[293]

Jurisdiction in International Law

Under international law, states generally assert extraterritorial jurisdiction over legal and natural persons and conduct occurring outside their borders under the following six bases: (1) the "objective territorial principle," where an act occurred abroad but its effect was felt within the prosecuting state's territory (*e.g.*, narcotics and human trafficking, antitrust laws, and corrupt practices); (2) the "nationality principle," where the perpetrator is a national of the prosecuting state; (3) the "passive personality principle," where the victim is a national of the prosecuting

[291] In 1995 the ICJ recognized the right of a people to self-determination as *erga omnes. See East Timor Case* (Port. v. Aust.), 1995 ICJ Rep. 4. In 1997 the ICJ recognized the theoretical existence of such a right in the context of large-scale environmental injury. *See Gabcikovo-Nagymaros Case* (Hung. v. Slov.), 1997 ICJ Rep. 4.

[292] *Barcelona Traction, Light and Power Company, Limited (Belg. v. Sp.),* Second Phase, Judgment, 1970 I.C.J. Rep. 32 (1970). According to the VCLT "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law [*jus cogen*]." VCLT at Art. 53. Note, the proceedings of the negotiations of Article 53 indicate that the drafters had a very short list in mind, and include aggressive war, slavery, slave trade, piracy and genocide.

[293] *South West Africa cases.* The *South West Africa cases* provide some guidance on whether a violation is sufficient to trigger universal standing and what rights rise to the level of *erga omnes* In the *South West Africa cases,* the ICJ held that Liberia and Ethiopia lacked standing to bring claims against South Africa for its practice of apartheid in present day Namibia. In 1966, Namibia was know as South West Africa and administered by South Africa under a League of Nations mandate. Even though in 1966 the ICJ denied an of *erga omnes* basis for standing for South Africa's practice of apartheid, this line of cases were essentially overruled by a series of subsequent resolutions adopted by the U.N. General Assembly which equate apartheid with crimes against humanity. As a result of this development in international law apartheid practices would rise to the level of *erga omnes* thus, subject to universal standing under the *Barcelona Traction* dicta.

state; (4) under the "protective principle," where an act affects the essential security interests of the prosecuting state (*e.g.*, espionage, visa fraud, terrorism); and (5) under the "universal principle," where an act is universally condemned (*e.g.*, crimes against humanity, genocide, war crimes, piracy, slavery).[294]

Jurisdiction Over Multinationals

The United States is entitled to exercise universal jurisdiction over multinational corporations. Today, universal jurisdiction is gaining greater acceptance in United States courts and beyond.[295] The resurgence of piracy, a classic crime, presents modern challenges to the international legal community. Pirates are the classic archetype for exercise of universal jurisdiction and piracy is the classic crime from both the modern and historical perspective which states have supported a legal basis for extraterritorial jurisdiction. The history of universal jurisdiction is well-rooted in international law. [296] In fact, the ATS represents a United States

[294] *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

[295] *See* JEFFERY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS, 239 (2008). The notion of universal jurisdiction exercised by an individual state or sovereign is deeply rooted in British practice of the Nineteenth Century. Acts of piracy violated the law of nations. *See* OPPENHEIM, *supra note* 77 at 505. The rules relating to the prohibition of slavery and piracy were considered to be rules of universal prescriptive force. In other words, every nation had the right to punish the perpetrators, regardless of where and against whom the acts were committed. *See* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 176 (3d ed. 1846). It should be noted that even at this point in history, judges and jurists carefully drew a distinction between universally prohibited acts of piracy on the high seas and acts prohibited by domestic municipal laws of any given State. *See* OPPENHEIM, *supra note* 77, at 506. James Brierly, the British publicist, justified this early version of universal jurisdiction when he wrote that in cases of piracy, offending ships were regarded as stateless entities. By virtue of the offenders' commission of acts of piracy, they effectively forfeited any protection afforded by their national flags. *See* J. L. BRIERLY, THE LAW OF NATIONS 306-07 (Sir Humphrey Waldock ed., 6th ed. 1963). The enforcement of these rules was left to the institutions and practices of individual states. *See id*. Great Britain outlawed slavery in all of its territories in 1833 and used its political, diplomatic, and military competence to enforce these international law rules of universal import. The importance of British historical practice seems to escape the attention of the *Kiobel* court.

[296] In the sixth century, *Codex Justiniani*, an embryonic form of universal jurisdiction, granted the Empires' Tribunals jurisdiction over the place of the violation's occurrence and wherever that perpetrator was found. Additionally, Roman law permitted plaintiffs the ability to bring an action against vagrants (persons without domicile and citizenship) wherever they might be found. *See* RYNGARET, JURISDICTION IN INTERNATIONAL LAW at 108.

manifestation of the theory of universal jurisdiction.[297] Although conflicts of jurisdiction in international law are frequent, the international law of jurisdiction does not prioritize the bases of jurisdiction.[298] United States courts may exercise universal jurisdiction over corporations even though there may be a more appropriate forum.[299]

One commentator notes that the "next frontier of jurisdictional conflicts" may likely arise in the context of "enhanced transnational corporate social responsibility."[300] Often the home states of multinational corporations are under social pressure to regulate the activity of its nationals' overseas activities. The societal demands to regulate corporate activity are a product of the recognition that many of the largest multinational corporations operate in hosts states that are either unwilling or unable to enforce minimum human rights standards. This power asymmetry, relating to the expectations of human rights standards presents a regulatory vacuum in international law that may be filled by either the state of nationality or under a theory of universal jurisdiction.[301]

Undoubtedly, the extraterritorial imposition of regulatory standards is susceptible to criticism by proponents of free trade. It may very well be that the host state set its standards to

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[297] In one empirical studies employing multivariate logistics analysis of cases decided under the ATS, the data show that federal courts are edging toward greater acceptance of universal jurisdiction; and, increasing federal courts are abandoning traditional notions of sovereignty and territorial jurisdiction. JEFFERY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS, 239 (2008).

[298] *See Laker Airways Ltd v Sabena*, 731 F. 2d 909, 935 (DC Cir 1984) (finding "no rule of international law or national law precludes an exercise of jurisdiction solely because another state has jurisdiction" citing Restatement (Third) § 402 comment b).

[299] *See Laker Airways Ltd v Sabena*, 731 F. 2d 909, 935 (DC Cir 1984) (finding no principle of international law which abolishes concurrent jurisdiction and ruling that '[t]here is . . . no rule of international law holding that a "more reasonable" assertion of jurisdiction mandatorily displaces a "less reasonable" assertion of jurisdiction as long as both are in fact, consistent with the limitations on jurisdiction imposed by international law').

[300] *See* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 132 (2008).

[301] *See* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 132 (2008). *See also* M Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN LJ 399, 409 (2002); *see e.g.* D Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, 5 MELBOURNE J INT'L L 1, 35 (2004).

attract foreign direct investment in order to achieve domestic development goals. These states would likely argue that the extraterritorial imposition of the home states standards is a continuation of Western imperialism or even a form of protectionism.[302] Consequently, for such situations, where a state may impose universal jurisdiction or even extraterritorial jurisdiction based on strong policy interests, "a second-level rule of jurisdictional reasonableness" is an acceptable solution to resolve these issues.[303] Moreover, human rights litigation in United States courts has already implicitly recognized this possibility in dismissing ATS actions against corporate defendants under theory such as FNC.

It is now universally held, in both international law and domestic jurisprudence, that individuals have the right to be free from torture.[304] However, one United States, court held that even a campaign of widespread and systematic rape does not rise to the level of an international crime.[305] For example, in *Doe v. Karadzic,* the United States district court found that it had no jurisdiction to hear a civil suit based upon an alleged campaign of rape and torture by Bosnian Serbs under the United States Alien Tort Statute.[306] The court ruled that the ATS only covered international crimes, and equated these to crimes carried out under State authority; in contrast, "[a]cts committed by non-state actors do not violate the law of nations."[307] Since the campaign was carried out by militiamen who did not act on behalf of a recognized State (no Bosnian/Serb

[302] *See* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 133 (2008).

[303] *Id*.

[304] U.S. courts recognized the right to be free from torture as universal in *Filartiga v. Pena-Irala*, 77 I.L.R. 185 (1984) and British courts recognized the right in *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening)* (No.3), 2 All ER 97 (1999) 1 L 482 269. *See generally* Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement,* 14 HARV. HUM. RTS. J. 87 (2001).

[305] Doe v. Karadzic, 866 F.Supp. 734 (U.S. S.D.N.Y., 1994).

[306] *Id.*

[307] *Id.*

State existed), the crime did not fall under the ambit of the ATS. The decision was overturned on appeal; the appellate court specifically rejected an overly formalist approach which requires a recognized and extant "State" as a prerequisite for an international crime.[308]

Universal Jurisdiction

"The system of jurisdiction, in both criminal and economic matters, is, one of concurrent jurisdiction," and is often problematic for courts to understand.[309] However, a regional custom crystallized corporate liability under international law among the Western legal community when, years ago, the state practice emerged to criminally prosecute and allow civil suit against violators of international human rights law in domestic legal systems under a theory of universal jurisdiction. In the United States this practice is evidenced by human rights litigation under the ATS. Additionally, there is an established state practice within the domestic legal systems of a growing number of European Community members to hold individuals and corporations liable for human rights violations.

Conceptually, universal jurisdiction is well settled in international law and emerged early in the modern law of nations. The concept of universal jurisdiction is present in the four Geneva Conventions of 1949 and additional treaties.[310] Importantly, the concept of a "mandatory universal jurisdiction" likely crystallized under international law earlier than 1949, but was codified by the Geneva Conventions whereby States parties are required to find and legal

[308] *Kadic v. Karadzic*, 74 F.3d 377 (2d Cir. 1996).

[309] *See* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 127 (2008); see e.g. Cedric Ryngaert, *Universal Tort Jurisdiction over gross Human Rights Violations*, NYIL 3 (2007).

[310] *See, e.g.*, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, U.N. T S. No. 970, vol, pp. 31-83 (1950), signed at Geneva, 12 August 1949, at Art. 49, para. 2. ("Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, arid shall bring such persons, regardless of their nationality, before its own courts."); Single Convention on Narcotics and Drugs (1961), at art. 36(2)(a)(iv); International Convention against the Taking of Hostages of 17 December 1979, at art. 8 (State parties shall try to extradite accused hostage-takers "without exception whatsoever and whether or not the offence was committed in its territory").

prosecute "grave breaches" of the Geneva Conventions, regardless of entity, nationality or location. In addition to the concept of mandatory universal jurisdiction introduced by the Geneva Conventions of 1949, the concept of "permissive universal jurisdiction" is embodied by several other treaties that permit the exercise of criminal jurisdiction over a violator of international humanitarian law.[311] Today, many nations throughout the world have implemented legislation to enable the exercise of universal jurisdiction which is generally based upon the jurisdictional grants of treaties.[312] Even though there is often some debate over which violations of international law are subject to universal jurisdiction, slavery is frequently cited as one crime that justifies the exercise of universal jurisdiction. Also, the violation of any *jus cogens* generally justifies the exercise of universal jurisdiction.[313]

[311] *See, e.g.,* TVPA, *supra* note 362.

[312] *See, e.g.* Belgian Law of 16 June 1993, as modified 1999 (permitting the prosecution of genocide and grave violations of international humanitarian law). In fact, the aforementioned Belgian Law was at issue in the 2000 *Arrest Warrant Case* between the Democratic Republic of the Congo and Belgium and in particular the exercise of universal jurisdiction thereunder even though the ICJ declined the opportunity to discuss the legality of the exercise of universal jurisdiction. *See* STEVEN R. RATNER AND JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY, 141. *See also* United Kingdom War Crimes Act of 1991 (permitting prosecution of war crimes committed in Germany during WWII); Australian War Crimes Act of 1991 (permitting domestic prosecution of WWII-era violations); Criminal Code of Canada 1985, art. 7 (conferring a broad jurisdictional grant to domestic courts). However, some domestic courts have refused to prosecute defendants without either a territorial or personality nexus in the absence of an explicit treaty grant of universal jurisdiction. *See, e.g., In re Javor*, 1996 Bull.crim., no. 132, at 379, French Cour de Cassation, Criminal Chamber, March 26, 1996 (noting that because the Genocide Convention does not explicitly provide for universal jurisdiction the French courts are powerless to prosecute violations unless there is a nexus between France and the violator). But following this decision, the French Criminal Code was amended on two separate occasions to allow for the prosecution of crimes within the Cognizance of the international criminal tribunals for Rwanda and Yugoslavia. *See* Brigette Stern, International Decisions, 93 AM. J. INT'L L. 525, 528 at notes 20 & 21 (1999). *See also* Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 341 (1999), citing a Danish case, *Director of Public Prosecutions v. T.* (discussing the trial of a Croatian national accused of war crimes in the former Yugoslavia).

[313] *See, e.g.,* VCLT, *infra* note 292.

CHAPTER 6
A SHORT HISTORY OF HUMAN RIGHTS LITIGATION IN UNITED STATES COURTS UNDER THE ALIEN TORT STATUTE

A Long Story in Brief: Kiobel v. Royal Dutch Petroleum Co.

In *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit became the first United States appellate court to hold that corporations are not subject to liability under the ATS. The majority found that corporate defendants have never been held liable, either criminally or civilly, for violations of international law, and held that in the absence of an international rule of corporate liability, plaintiff's claims against corporate entities must be dismissed for lack of subject matter jurisdiction.[314] The Second Circuit's decision in *Kiobel* represents a significant departure from ATS precedent. To date, the Supreme Court has decided only one case under the ATS and provided little guidance to lower courts.[315]

The case in *Kiobel* was brought by Nigerian plaintiffs brought their class action claims for aiding and abetting property destruction; forced exile; extrajudicial killing; and violations of the rights to life, liberty, security, and association under the ATS. All of the three judge panel agreed that this particular case should be dismissed; however, Judge Leval refused to join the majority opinion because he found that the majority' manufactured an unprecedented concept of international law that exempts juridical persons from compliance with its rules.[316]

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[314] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 114-115 (2d Cir. 2010) (In *Kiobel*, the majority reasoned that "the absence of a universal practice among nations of imposing civil damages on corporations for violations of international law means that under international law corporations are not liable for violations of the law of nations").

[315] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

[316] *Kiobel* at 155.

The Alien Tort Statute

"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[317] This law, the Alien Tort Statute (ATS), is merely thirty-three words long and consists of a single sentence, yet has generated significant jurisprudence and academic scholarship.[318] Arguably, no single piece of United States legislation has the potential to affect international trade and human rights as does the ATS.

Following enactment in 1789, the ATS sat undisturbed and for that matter largely unnoticed until 1980 when the Second Court of Appeals decided *Filartiga v. Pena-Irala*.[319] Despite nearly two hundred years of dormancy, the ATS emerged as a viable tool to advance human rights norms outside of the United States.[320] There are only a few hundred cases involving the ATS and the vast majority of the cases were decided after 2000.[321] Nevertheless,

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[317] 28 U.S.C. §1350. When the ATS was originally enacted in 1789, the ATS conferred jurisdiction to the federal district courts and said the district courts of the United States shall "have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, §9, 1 Stat. 73, 77 (1789).

[318] *See supra* note 55.

[319] *Filartiga v. Pena-Irala*, 630 F.2d 876, 879 (2d Cir. 1980). In the 1790s only two cases referred to the ATS. *Moxon v. The Fanny*, 17 F. Cas. 942, 948 (D. Pa. 1793) (denying ATS jurisdiction for ship-owner's claim for restitution rather than "tort only"); *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795) (finding jurisdiction over a suit for restitution of illegally seized property in violation of the law of nations); *see also* BETH STEPHENS, *et al*., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 6 (2008) (noting that three slaves were the "property" at issue in *Bolchos*; thereby illustrating the evolution of international law because the court made no mention of an wrongdoing in connection with slavery). *See also* PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE, 437 (2009) (noting that a group of creative lawyers rediscovered the ATS and now 'virtually' defines human rights litigation in United States courts).

[320] Between 1795 and 1976, very few cases or controversies invoked the ATS. *see* BETH STEPHENS, *et al*., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 7 (2008) (noting fewer than two dozens cases) quoting Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquires into the Alien Tort Statute*, 18 J. INT'L L. & POL. 1, 4-5 n. 15-17 (1985) (counting twenty-one cases claiming ATS jurisdiction prior to *Filartiga*). There is a plethora of academic literature about *Filartiga* and its progeny. *See generally*, Pamela J. Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002).

[321] *See* PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE 5 (2009).

the ATS has been invoked by a growing number of global actors, both within and from far beyond the territorial boarders of the United States. Moreover, legal practitioners have used the ATS to hold multinational enterprises accountable for their involvement with alleged human rights violations in Latin America and beyond [322]

Origin and Development

The ATS was enacted following ratification of the United States Constitution as part of the first legislative act of the new United States Congress.[323] The ATS is believed to have been included in the Judiciary Act of 1789 to show that the newly formed American government would adhere to and espouse the "law of nations."[324] However, no written record of the legislative history of the ATS withstood the tests of time.[325] Despite a lack of legislative history, this first act of the United States is believed to evidence the desire of the founders to enforce, in United States federal courts, existing international standards that conform to international obligations of state responsibility.[326] In fact, enactment has been traced to a necessity to provide

[322] PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE, 24 (2009) (noting that litigation under the ATS will continue to expand into other areas unless the parameters of actionable claims in and under international law are defined by U.S. courts).

[323] The ATS is also referred to as the Alien Tort Claims Act (ATCA).

[324] A provision of the peace treaty concluded between the United States and England following the American Revolution required the new United States government to honor British creditors' claims against American debtors. "Article IV of the Definitive Treaty of Peace and Independence States: 'Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted.'" *See* PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE, 28 (2009) (quoting Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquires into the Alien Tort Statute*, 18 J. INT'L L. & POL. 1, 28-29 (1985)); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004) ("When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.") (quoting *Ware* v. *Hylton*, 3 Dall. 199, 281, 3 U.S. 199, 3 Dallas 199, 1 L. Ed. 568 (1796) (Wilson, J.)).

[325] *See* BETH STEPHENS, *et al*. INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 3 (2008).

[326] *See* PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE, 28 (2009) (noting that because several states violated United States treaty obligations by enacting legislation hostile to British commercial interests, a political decision was made to allow British creditors to pursue claims in a less bias federal court system).

a venue for aliens to prosecute claims fulfilled United States treaty obligations.[327] Early references to the purpose of the ATS in the context of private actors and commercial interests indicate that today's corporation would be considered a proper defendant under the ATS.

The First Congress provided a framework, by enacting the ATS, to hold private actors accountable for their commercial interests. Even though there were relatively few corporations in existence at the statute's enactment, the corporation is a proper defendant under the ATS and this does not frustrate the drafters' intent.[328] In one historic reference to the ATS, when asked whether an American citizen alleged to have participated in the plunder and pillage of a British colony could face criminal prosecution, Attorney General William Bradford was uncertain but made it clear that the injured aliens could bring a civil action against the American citizen:

> But there can be no doubt that the *company or individuals* who have been injured by these acts of hostility have a remedy by civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violations of the law of nations, or a treaty of the United States.[329]

In fact, the Supreme Court in *Sosa v. Alvarez-Machain* analyzed this early historical reference to support its holding that the ATS provides federal jurisdiction and that the Congress by enacting the ATS fully intended for common law claims arising out of a violation of the law of nations to be recognized by the federal courts.[330] In *Sosa,* when the Supreme Court made reference to the statement of Attorney General William Bradford it found that "[t]he Continental Congress was

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[327] *Id.* For additional discussion of the influence of the British debts controversy on the scope of the First Judiciary Act, *see* Wythe Holt, *To Establish Justice: Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, DUKE L.J. 1421 (1989).

[328] At the beginning of the nineteenth century (1780 - 1801), there were only 317 corporations in the U.S. including banks and insurance companies, entities for the provision of public services, and general business corporations." *See* HURST, *infra note* 308 at 17.

[329] 1 Op. Att'y. Gen. 57, 57 (1795) (emphasis added); *see also Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1174 (C.D. Cal. 2005) (relying on Attorney General Bradford's opinion).

[330] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004).

hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished' and 'in 1781 the Congress implored the States to vindicate rights under the law of nations.'"[331] Noting the lack of corporations in existence at the time the ATS was drafted, the drafters' intent to include corporations as possible defendants is uncertain. What is self-evident, however, is that the development of the juridical person in American law and corresponding jurisprudence provides the general principles of international law which ought to guide a determination of whether corporations are permissible entities under the ATS for the purposes of liability for human rights violations.

The Statutory Elements

Under the plain meaning of the ATS, there must be either a violation of the law of nations or a violation of a treaty of the United States.[332] These are redundant because a treaty is one of the sources of the law of nations.[333] Additionally, under the ATS, three basic requirements must be met: (1) the claimant must be an alien (2) the claim must be for a tort, and (3) the claim must allege a breach of the law of nations.[334] Generally, in litigation under ATS, the first element and

[331] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004) (quoting J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893) (internal citation omitted)).

[332] *See* BETH STEPHENS, *et al*., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 215-227 (2008) (discussing a violation of a treaty of the United States and noting that ATS jurisprudence relies almost exclusively on the law of nations prong).

[333] *See* SARAH JOSEPH, CORPORATIONS AND HUMAN RIGHTS LITIGATION 53-54 (2004) (noting that the alternative to a violation of the law of nations, a violation of a treaty of the United States, has remained redundant since enactment); *see also* Art. 38(1)(a), ICJ Statute.

[334] 28 U.S.C. §1350. The meaning of the "law of nations" is limited to a few international norms. Under the ATS courts often apply the "law of nations" as it existed at the enactment of the ATS in 1789; s*ee Tel-Oren v. Libyan Arab Republic* (urging courts to limit their interpretation of "law of nations" as it existed in 1789 when the ATS was enacted); s*ee also Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In 1789, the "law of nations" was limited to a few universally agreed principles such as rights of a countries ambassador, rules of safe conduct, war prize law, and piracy. However, at the time the ATS was enacted, "the law of nations" did not prohibit slavery. Prohibitions on slavery likely crystallized as part of the "law of nations" late in the nineteenth century. Even though international law has developed since the eighteenth century, courts still examine the law of nations within this paradigm and frequently quote Blackstone's *Commentaries*. *Compare Sosa* at 716 quoting Blackstone; *and Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (discussing the rights of non-state actors and considering a dismissal for lack of subject matter jurisdiction over an "unrecognized entity").

second element are easily met, and not subject to much controversy under the ordinary meaning of the statute's purpose; however, the third element "a breach of the law of nations" generates significant difficulties in application by United States courts.[335]

Conceptual Problems

The primary conceptual problem presented by the ATS, is that the traditional states-only conception of international law believed that international law exclusively regulates so-called public law. In contrast, private law or the law of torts is aimed at regulating private actor conduct. Notably, the ATS combines both public and private law. This mix results in tension for judicial application of tort law, generally governing private actor conduct, and public international law. The dual nature of the ATS provides courts with the ability to regulate private conduct with the rules of the public order. Consequently, the ATS regulates private conduct under public international legal norms. The ATS, by requiring not only a violation of the law of nations, but also a tort, combines both the public and private sphere because it not only incorporates public international law by reference, but equally forms a part of federal tort law.[336]

Constitutionality and the Federal Common Law

Academics and jurists alike have gone as far as questioning the constitutionality of the ATS.[337] Since the Supreme Court in *Sosa* held that the ATS is merely jurisdictional, it is reasonable to infer that Art. III of the United States Constitution provides a basis for the ATS.[338]

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[335] KOEBELE at 4. *See, e.g.*, 1 Op. Att'y Gen. 26, 27 (1792) (opinion by Edmund Randolph) ("The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land.").

[336] KOEBELE at 322.

[337] *See generally* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on the Text and Content*, 42 VA. J. INT'L L. 687 (2002); *see also* U.S. Const. art. I, § 8 cl. 10, which vest the legislative power to congress and explicitly enumerates Congress' power "to *define and punish* Piracies and Felonies committed on the high Seas, and *Offenses against the Law of Nations*" (emphasis added).

[338] *See* PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE, 26 (2009). *But see* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 597 (2002) (concluding that the drafters of the United

Additionally, in early ATS litigation prior to *Sosa*, commentators believed that the ATS created a federal tort action for violations of international law. In *Sosa*, the Court explained that the ATS was enacted "on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability."[339] This is complicated by the hybrid nature of the ATS. Since the ATS requires the application of both international law and the federal common law of torts, courts must examine and arguably "discover" the federal common law.[340]

International law as United States law

Legal practitioners in the United States have a tendency to view the domestic legal system as an isolated system, free from outside interference and influence. In reality, the interplay of international law and foreign law are often at issue in United States Courts.[341] According to the Supreme Court, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[342] Although it is generally accepted that customary international law is the law of the land, there is an increasing vocal minority that argue federal courts are prohibited from applying customary international law

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State's Constitution, by omission of the term "law of nations" in Art. III implicitly deprived federal courts jurisdiction over claims arising under the law of nations).

[339] 542 U.S. at 724.

[340] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998).

[341] *Compare* Bradley & Goldsmith, *Customary International Law as Federal Common Law*, at 853-54 (rejecting such a possibility that federal courts could treat the law of nations today as part of "general law," as opposed to federal or state law as precluded by *Erie*), *with* Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002) (arguing for this possibility that federal courts could treat the law of nations today as part of "general law," as opposed to federal or state law as precluded by *Erie*).

[342] *The Paquete Habana*, 175 U.S. 677, 700 (1900).

because these norms are part of the so-called federal common law which courts may no longer discover.[343] This further complicates jurisdictional matters in the United States.

Application of the ATS in Human Rights Litigation

Since *Filartiga v. Peña-Irala*, courts have allowed ATS suits against government officials, both past and present members of armed forces, heads of state and corporations. Twenty years after the Second Court of Appeals decided *Filartiga*, however, it recently held federal courts lack subject matter jurisdiction to hold corporations accountable for violations of international law under the ATS.[344] Related to *Filartiga*, the significance of the United States Second Circuit decision in *Kiobel v. Royal Dutch Petroleum Co.* cannot be overlooked or understated.[345] First, twenty years prior to *Kiobel*, the Second Circuit ushered in the modern era of ATS litigation with *Filartiga.* Second, between the fifty-page opinion of Judge Cabranes, who was joined by Judge Jacobs, and the eighty-eight page separate opinion of Judge Leval, the opinion in *Kiobel* has already and will continue to influence human rights litigation in United States courts under the ATS.[346] Third, the Second Circuit decision in *Kiobel* presents a clearly articulated perspective of international law divided among ideological lines that will likely

[343] *See The Paquete Habana*, 175 U.S. 677, 700 (1900) (noting international law is part of the federal common law). *But see Erie v Tompkins* 304 U.S. 64 (1938) (held that there is no general federal common law).

[344] *See, e.g., Abdullahi v. Pfizer, Inc*., 562 F.3d 163 (2d Cir. 2009) (holding corporate defendant liable for engaging in non-consensual medical experimentation on human subjects in violation of law of nations), *cert. denied*, 78 U.S.L.W. 3049; *Sinaltrainal v. Coca-Cola* Co., 578 F.3d 1252, 1263 (11th Cir. 2009) (holding corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations); *Romero v. Drummond Co., Inc*., 552 F.3d 1303, 1315 (11th Cir. 2008) (finding that the ATS provides no express exception for corporations); *but see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 114-115 (2d Cir. 2010) (holding that corporate defendants are not liable under the ATS).

[345] 621 F.3d 111 (2d Cir. 2010).

[346] *See United States v. Hasan*, 2010 U.S. Dist. LEXIS 115746, 2010 A.M.C. 2705 (E.D. Va. 2010) (following *Kiobel*); *Flomo v. Firestone Natural Rubber Co.*, 2010 U.S. Dist. LEXIS 108068 (S.D. Ind. Oct. 5, 2010) (citing, following, and explaining *Kiobel*); *Viera v. Eli Lilly & Co.*, 2010 U.S. Dist. LEXIS 103761 (S.D. Ind. Sept. 30, 2010) (following *Kiobel*).

influence other judges and provide support for either perspective.[347] Lastly, the legal divide in United States courts will likely prompt "a higher judicial authority" to chime in on the debate and provide further guidance about the ATS.[348]

Filartiga v. Peña-Irala (1980)

Although human rights litigation under the ATS is not a subject exclusive to Latin American Studies, modern human rights litigation in United States courts under the ATS began from a dispute arising in Paraguay.[349] Dr. Joel Filartiga and his daughter Dolly, both citizens of Paraguay, brought an action relying on ATS jurisdiction against Mr. Peña-Irala, for torturing and killing Dr. Filartiga's son while Mr. Peña -Irala was inspector general of the Asunción police department.[350] By the time the case was filed in the late 1970's, the atmosphere was favorable to an extension of human rights protections and such an act of brutality committed by an individual illegally living in the United States presented the issues in a clear and dramatic manner.[351] Nevertheless, the district court dismissed the complaint for lack of subject matter jurisdiction.[352]

In 1980, in *Filartiga v. Peña-Irala*, the United States Second Court of Appeals, the same court which also recently decided *Kiobel*, reversed and held that:

> deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction.

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[347] 621 F.3d 111 (2d Cir. 2010).

[348] *Id.* at 123.

[349] *Filartiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

[350] *Id.*

[351] STEPHENS, *et. al* at 8.

[352] *Filartiga* at 879.

> Accordingly, we reverse the judgment of the district court dismissing the complaint for want of federal jurisdiction.[353]

Importantly, to reach this conclusion, the court resolved many issues arising under the ATS: the Second Circuit noted the evolving nature of international law and threshold jurisdictional issues which in its decision placed no limitation to the ultimate reach of the ATS. Such lack of limitation is of particular importance to the issue of whether courts today have subject matter jurisdiction over corporations under the ATS.

In *Filartiga*, the Second Court of Appeals refused to draw a distinction between a foreign national (alien) and a citizen for application of customary international law.[354] Thus, the court recognized that the individual via the individual's government possesses certain fundamental human rights that universally exist. Here, the court underscored an approach to interpreting customary international law as it exists today rather than at the time of the enactment of the ATS. The court stated "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[355] It characterized customary international law as a fluid concept, thereby alluding to an expanded use going forward. Despite the Second Circuits' recent decision in *Kiobel* holding that corporations are not appropriate defendants under the ATS, the *Filartiga* legacy will continue because the ATS remains an effective mechanism to hold private individuals accountable for violations of international law.[356]

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[353] *Id.* at 878.

[354] *Id*.

[355] *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 1 L. Ed. 568 (1796) (distinguishing between "ancient" and "modern" law of nations).

[356] *See generally Filartiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980); *compare with Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 114-115 (2d Cir. 2010). *But see Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (dismissing for lack of subject matter jurisdiction over an "unrecognized entity").

Doe v. Unocal (2003)

Following the court's decision in *Filartiga* to hold individuals liable for human rights violations, the ATS expanded to hold corporate actors liable for human rights violations.[357] *Doe v. Unocal Corp.* provided the initial legal basis to hold corporate defendants liable for violations of international law under the ATS.[358] In *Unocal*, Burmese citizens alleged in a class action that Unocal was liable for human rights violations committed by the Burmese military in conjunction with an enterprise venture to build a pipeline in Burma.[359] The ruling regime of Burma committed numerous human rights violations.[360] In *Unocal*, the Burmese military was alleged to have forcefully relocated civilians and used forced labor in furtherance of the defendants' project to construct a gas pipeline.[361] The Burmese citizens ("aliens") argued that Unocal by knowingly engaging in business relations with a government entity with a long and documented history of human rights abuses was liable for the violations of international law committed in furtherance of the pipeline project which could be imputed to the defendants on various theories of liability.[362] In addition to the ATS, the plaintiffs in the class action based their case on Torture

[357] *See* PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE, 437 (2009) (noting three wave of human rights litigation in United States courts under the ATS).

[358] *Doe v. Unocal Corp*., 963 F. Supp. 880 (C.D. Cal. 1997) (concluding that a private party, a corporation, may be subject to suit under the ATS without any showing of state action), *aff'd*, 395 F.3d 932 (9th Cir. 2002), *vacated* 395 F.3d 978 (9th Cir. 2003); *compare with Presbyterian Church* and *In re Agent Orange Prod. Liab. Litig*., 373 F. Supp. 2d 7, 56 (E.D.N.Y. 2005).

[359] Burma is officially called Myanmar.

[360] *Id*.

[361] *Id*.

[362] To establish liability the plaintiffs relied upon various theories including but not limited to joint venture, vicarious liability in their efforts to hold Unocal jointly and severally liable for the actions of the Burmese military in conjunction with the project. *Unocal* at 947 n.20.

Victim Protection Act (TVPA).[363] At the close of the saga, the parties settled out of court for an undisclosed sum and the case against Unocal was vacated.[364] One commentator noted that this case implicates problems of attribution of jurisdiction in cases involving multinational corporations and simultaneously illustrates the effectiveness of entity law shielding overseas multinational corporate group affiliates from jurisdiction.[365]

Sosa v. Alvarez-Machain (2004)

At a time of judicial uncertainty, many lower courts where looking for guidance by a higher judicial authority. Finally, in 2004, the Supreme Court in the only case, so far, where the Court has enunciated interpretations of the ATS, the Court explicitly labeled both the "individual" and the "corporation" as "private actors," therefore, the Supreme Court has recognized the possibility of corporate liability under the ATS.[366] The Supreme Court apparently assumes that the ATS, although incorporating international law, is still governed by and forms part of the domestic law of torts which applies equally to natural and legal persons, unless of course the statute provides otherwise.[367]

The Supreme Court in *Sosa v. Alvarez-Machain* resolved several lingering issues under the ATS providing some guidance to the open question of whether corporations can be held liable for overseas human rights violations.[368] Unfortunately, the standard under which

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[363] Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note) (unlike the ATS, the TVPA explicitly exempts corporations, contains a ten year statute of limitations, and an exhaustion of remedies requirement) [herein TVPA].

[364] The precise terms of the settlement are undisclosed, but some estimate that the *Unocal* case settled for $30 million. *See A Milestone for Human Rights*, BUSINESS WEEK, Jan. 24, 2005.

[365] Phillip I. Blumberg, *Asserting Human Rights Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 500 (2002).

[366] *Sosa*, 542 U.S. at 733 n.20 (citation omitted).

[367] KIOBELE at 208.

[368] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) [herein *Sosa*].

corporations could be held liable was not at issue in Sosa.[369] Yet, in one footnote the Supreme Court signaled its acceptance of the ATS jurisdictional grant over corporate actors: "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."[370] According to the Second Circuit in Kiobel, "footnote 20 of *Sosa*, while nominally concerned with the liability of non-state actors, supports the broader principle that the scope of liability for ATS violations should be derived from international law."[371] In *Kiobel*, the court noted that it followed Sosa, and looked "to customary international law to determine both whether certain conduct leads to ATS liability and whether the scope of liability under the ATS extends to the defendant being sued."[372]

Finally in 2004, the Supreme Court, agreeing with the Second Court of Appeals reasoning in *Filartiga*, emphasized that according to the plain language of the ATS, the statute is only jurisdictional.[373] Prior to *Sosa*, United States courts were uncertain whether an independent cause of action was required for actionable claims or whether an independent cause of action was required to proceed under the ATS.[374] The Supreme Court's decision in *Sosa* provided some

[369] Nevertheless, the Supreme Court's holding in *Sosa* clearly preserved the private right of action for tortuous violations of international law in United States Courts. *See generally* Brad R. Roth, *Sosa v. Alvarez-Machain; United States v. Alvarez-Machain,* 98 A.S.I.L. 798 (2004).

[370] *Sosa*, 542 U.S. at 733 n.20 (citation omitted).

[371] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009).

[372] *Kiobel* at 128.

[373] *Sosa* at 712. Justice Breyer, concurring in part and concurring in the judgment, expressed the view that an additional consideration for recognizing, under the ATS, a norm of international law ought to be to ask whether the exercise of jurisdiction would be consistent with those notions of comity that led each nation to respect the sovereign rights of other nations by limiting the reach of the nation's own laws and their enforcement. *Sosa* at 720.

[374] *Sosa* at 712.

guidance by articulating a two-step analytical inquiry to determine whether there is an actionable claim under the ATS.[375]

Under the *Sosa* test, the first step of this analytical inquiry is whether federal courts have subject matter jurisdiction.[376] Federal subject matter jurisdiction is only satisfied if all three of the following statutory conditions are met: first, an alien must sue; second, it must be for a tort; and third, the complaint must allege an actionable violation of the law of nations.[377] If these three conditions are met, courts then turn their inquiry to the second step to determine whether a common law cause of action should be created. The Supreme Court in *Sosa* explicitly limited the types of actionable offenses to those that they believe the drafters intended to fall under the term "law of nations" when the ATS was originally enacted.[378] Accordingly, actionable claims under the ATS are limited to a "narrow class" of international norms recognized and "accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms" existing at the time of the statutes enactment.[379]As an initial observation, the 18th-century framework is inconsistent with the plain-meaning of the statute because the jurisdictional grant is for a "civil action" which has undoubtedly developed and change significantly and could not be read and applied within the 18th-century paradigm, neither should a "violation of the law of nations."

Lastly, actionable ATS claims generally fall within two categories: those claims that may be brought only if state action is found and claims that may be brought without a showing of

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[375] *Id.*

[376] *Id.*

[377] *Id.*

[378] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004).

[379] *Id.*

state action.[380] The subject of what precisely is actionable under the ATS is still a matter of great controversy, yet, the most troubling issue is still whether corporations are appropriate defendants under the ATS.[381] The Supreme Court in *Sosa* left the issue of corporate liability nearly unexamined.[382] Following *Sosa*, the take away ought to have been a more narrow approach to the ATS by lower courts.[383] Yet, lower courts still proceeded with claims and allowed plaintiffs the opportunity to establish claims by permitting large scale discovery which some have criticized as a burden on "corporate engines" of the economy.[384] Lower courts have, in fact, heightened the pleading requirements in ATS cases.[385] Notably, since *Sosa* was decided, the composition of the Supreme Court has changed.[386]

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[380] *Id*.

[381] *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc*., 582 F.3d 244, 261 n. 12 (2d Cir. 2009).

[382] The Court found that, "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa* at 732 n. 20.

[383] The Supreme Court sought to limit actionable violations when it found "the jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Sosa* at 724.

[384] *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111 (2d Cir. 2010), *petition for rehearing denied*, 2011 U.S. App. LEXIS 2200 (2d Cir. Feb. 4, 2011); *see also* Curtis A Bradley and Jack Goldsmith, *Rights Cases Gone Wrong: A Ruling Imperils Firms and U.S. Diplomacy*, THE WASHINGTON POST, Apr. 19, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/04/17/AR2009041702859.html.

[385] *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007) (concluding that non-frivolous claims against a corporation for vicarious liability for violations of *jus cogens* norms were sufficient to warrant exercise of federal jurisdiction under the ATS), *vacated in part on other grounds*, 550 F.3d 822 (9th Cir. 2008); *Sinaltrainal v. Coca-Cola* Co., 578 F.3d 1252, 1263 (11th Cir. 2009) (applying a heightened pleading standard); *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 582 F.3d 244, 259 (2d Cir. 2009) (holding that liability under the ATS for aiding and abetting violations of international human rights and ruling that corporate liability lies only where the aider and abettor acts with a purpose to bring about the abuse of human rights).

[386] Since the 2004 decision in *Sosa*, the composition of the United States Supreme Court has changed significantly. In 2005, Chief Justice Rehnquist was replaced by Chief Justice John Roberts. In 2006, Justice O'Connor was replaced by Justice Alito. In 2009, Justice Souter was replaced by Justice Sotomayor. Lastly, in 2010, Justice Stevens was replaced by Justice Kagan. These changes will undoubtedly affect any attempt to revisit unresolved issues.

Suing Corporations Under the ATS

The ATS does not identify nor limit who is a proper defendant under the plain text of the statute, but international and domestic practice shows that individuals and other entities beyond nation-states are subject to international rights and duties. Following *Unocal's* broadening of the ATS to include corporate actors as permissible defendants; legal practitioners and human rights organizations developed a tool to hold large multinational corporations accountable for human rights violations.[387]

A Nightmare Scenario

Following the broadening of the ATS to include corporate actors as permissible defendants, some authors predicted that the use of the ATS would have profound consequences for the world economy and in particular curtail international trade and investment in the United States.[388] For instance, it was predicted that by 2013, hundreds of thousands of Chinese plaintiffs would sue multinational corporations such as General Electric, Ford, General Motors, Toyota, Motorola, or Nokia in United States Courts under the ATS.[389] Undoubtedly, this nightmare scenario failed to materialize. By contrast, courts have heightened the pleading standards and recently narrowed the application of the ATS to excluded corporate liability. In the end, the "nightmare scenario" failed to materialize. Moreover, the standard for imposing accessorial corporate liability that developed following *Unocal* required that "a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the

[387] *See*, *e.g.*, *Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88 (2d Cir. 2000)*; Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

[388] GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, 1 (2003) (predicting that the expansion of ATS jurisprudence to hold multinational corporations liable for collusion with unsavory states practices outside of the United States would bring trade and international investment in the United States to a halt).

[389] *Id.*

alleged offenses."[390] In short, judicial restraint in accordance with the jurisdictional grant of the ATS kept this the "nightmare scenario" from materializing and the courts themselves tempered further application of the ATS beyond direct or purposeful participation with governmental human rights abuses.

From *Unocal* through *Presbyterian Church v. Sudan*, the defense of lack of legal personality for corporate liability under the ATS had never been raised by corporations.[391] Not until *Presbyterian Church*, did courts even consider the issue of whether subjecting corporate actors to civil liability for a violation of international law under the ATS was proper.[392] In *Presbyterian Church*, an international commentator noted that prior to the current wave of human rights litigation in American courts, no corporation has ever been charged with or convicted of a crime under international law.[393] Despite the fact that corporate defendants have often raised lack of personal jurisdiction as a defense in ATS cases none had raised lack of subject matter jurisdiction over corporations under international law.[394] In fact, in *Presbyterian Church*, the court specifically noted that the question of corporate liability remains an open question in the Second Circuit.[395] In *Presbyterian Church*, the court assumed without deciding that "corporations may be held liable for the violations of customary international law that

[390] *Presbyterian Church*, 582 F.3d 244, 248 (2d Cir. 2009).

[391] KIOBELE at 197 (indicating that because no decision in the current wave of ATS litigation against corporate defendants prior to *Presbyterian Church*, 582 F.3d 244 (2d Cir. 2009) raised the issue of legal personality it was clearly understood that courts implicitly recognized corporate liability under the ATS).

[392] *Presbyterian Church*, 582 F.3d 244 (2d Cir. 2009).

[393] In *Presbyterian Church*, the court noted that "We will also assume, without deciding, that corporations may be held liable for the violations of customary international law that plaintiffs allege." *Id*. at 263 n. 12.

[394] BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN, & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 249-51 (2008).

[395] *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 582 F.3d 244, 261 n. 12 (2d Cir. 2009).

plaintiffs allege."[396] "Others have also acknowledged, either explicitly or implicitly, that the question remains unanswered."[397] But the Second Circuit seemingly answered the question in its groundbreaking decision in *Kiobel*.

The "Amazonian Chernobyl"

Often cases against multinational corporations under the ATS arise in the context of mineral and gas operations.[398] In one continuing saga still percolating in United States and Foreign courts, Texaco is alleged to have polluted the rain forests and rivers of Ecuador and Peru during their oil exploration activities in the Andean region of South America.[399] In *Aguinda v. Texaco, Inc.*, citizens of Ecuador and Peru brought an ATS action against a multinational oil and gas company alleging that between 1964 and 1992 Texaco improperly disposed of large

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[396] *Id.*

[397] *See Kiobel* at 117 n 10; citing *Khulumani*, 504 F.3d at 282-83 (Katzmann, J., concurring) (noting that, because defendants did not raise the issue, the Court need not reach the question of corporate liability); *id*. at 321-25 (Korman, J., concurring in part and dissenting in part) (expressing the view that corporations cannot be held liable under the ATS); Brief of the United States as *Amicus Curiae* in Opposition to the Petition for a Writ of Certiorari 9 n.2, *Pfizer Inc. v. Abdullahi*, No. 09-34 (May 28, 2010) (urging the Supreme Court not to "grant certiorari in this case to consider whether suits under the ATS can be brought against private corporations" because "[t]hat question was not addressed by the court below" and was not "fairly included in the scope of . . . the questions presented" (internal quotation marks omitted)). And at least one district court in another circuit has recently held that there is no corporate liability under the ATS. *Doe v. Nestle,* No. CV 05-5133, 2010 U.S. Dist. LEXIS 98991 at 191-203 (C.D. Cal. Sept. 8, 2010)."

[398] *See, e.g., Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010) (oil and gas multinational; largest energy company, and second largest company in the world measured by revenue); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal. 2005); 564 F.3d 1190 (9th Cir. 2009) (Texas-based American oil and gas exploration and production company, a/k/a "Oxy, with operations in the U.S., Middle East, North Africa, and South America); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); 582 F.3d 244 (2d Cir. 2009) (Canadian multinational petroleum company with operations around the world); *Romero v. Drummond Co., Inc*., 552 F.3d 1303, 1315 (11th Cir. 2008) (Alabama-based American mining company); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007), *vacated in part*, 550 F.3d 822 (9th Cir. 2008) (en banc) (British-American multinational mining group); *Bowoto v. Chevron Corp*., 557 F. Supp. 2d 1080 (N.D. Cal. 2008) (California-based American multinational energy company); *Flores v. S. Peru Copper Corp.*, 406 F.3d 65 (2d Cir. 2003) (multinational mining company with operations in Mexico and Peru, subsidiary of Mexican mining conglomerate Grupo Mexico); *Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88 (2d Cir. 2000) (global oil and gas company).

[399] *See Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (action for environmental harm dismissed on *forum non conveniens* grounds); *see also Jota v. Texaco*, Inc., 157 F.3d 153 (2d Cir. 1998).

quantities of toxic byproducts of the drilling process into the local eco-system.[400] The citizens alleged that despite the prevailing industry standards of pumping these byproducts back into the well, Texaco dumped these hazardous products into the environment which caused the citizens of Ecuador and Peru various physical injuries, including precancerous growths.[401] These Ecuadorian and Peruvian citizens sought monetary damages under theories of negligence, public and private nuisance, strict liability, and various other actionable violations under the ATS.[402]

Although it is still an open question whether environmental harm is actionable under the ATS, *Aguinda v. Texaco* permitted discovery to proceed because the circumstances involved, "a massive industrial undertaking extending over a substantial period of time and with major consequences."[403] Ultimately the court dismissed the claim against Texaco on the grounds of a more adequate and available forum and the case to proceeded in Ecuadorian Courts.[404]

On February 14, 2011, an Ecuadorian court ruled that Chevron (since merged with Texaco) was responsible for widespread environmental harm in the Ecuadorian rainforest, and fined Chevron eight billion dollars. No sooner had the judge ruled, than Chevron noted it would

[400] *Aguinda v. Texaco, Inc.*, plaintiffs brief at 4.

[401] *Id.*

[402] *Id.*

[403] *Aguinda v. Texaco, Inc*., 303 F.3d 470 (2d Cir. 2002) (dismissing ATS case against corporate defendant on forum non conveniens grounds, because courts of Ecuador provided adequate alternative forum); *see also Jota v. Texaco*, Inc., 157 F.3d 153 (2d Cir. 1998) (vacating district court's dismissal of ATS case against corporation on forum non conveniens grounds and remanding for further proceedings); *compare with Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 160 (2d Cir. 2003) (noting that "the asserted right to life and right to health are insufficiently definite to constitute rules of customary international law"); and *Beanal v. Freeport McMoran, Inc*. 197 F.3d 161, 166-67 (5th Cir. 1999) (rejected ATS claim based upon environmental damage because "the sources of international law merely refer to a general sense of environmental responsibility"); *but see Gabcikovo-Nagymaros Case* (Hung. v. Slov.), 1997 (ICJ recognized the theoretical existence of such an environmental right of action based upon international law in the context of large-scale environmental injury).

[404] *Aguinda v. Texaco, Inc*., 303 F.3d 470 (2d Cir. 2002); *see also Jota v. Texaco*, Inc., 157 F.3d 153 (2d Cir. 1998).

appeal the decision which it characterized as "illegitimate and unenforceable."[405] Prior to the Ecuadorian ruling, Chevron sought and received a temporary order halting enforcement of an anticipated judgment in favor of 30,000 people affected by the pollution, including farmers and indigenous groups.[406] Even though United States District Judge Lewis Kaplan issued a temporary order halting enforcement of any award, he refused to extend it beyond March 8 when the order was set to expire, requiring attorneys in the long-standing saga to do more research into Ecuadorian law prior to him ruling whether the judgment is enforceable.[407] This case represents an eighteen year struggle to resolve this dispute. Arguably the dismissal of the ATS action on the FNC grounds coupled with a refusal by United States courts to enforce a foreign judgment may rise to a denial of justice under international law.

Often, multinational corporate activity occurs in developing nations like Ecuador, where corporate economic and political power exceed that of the host nation.[408] Today, Chevron is one of the largest economic entities in the world. When Texaco was operating in Ecuador, its annual global earnings were roughly four times Ecuador's Gross National Product (GNP) and while in Ecuador, Texaco operated with the active support of the United States government.[409] This dispute, the "Amazonian Chernobyl," illustrates contemporary challenges to regulating multinational corporations within a states-only conception of international legal personality.

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[405] NPR, *Attorney: Ecuador Court Fines Chevron $8 Billion*, (Mon., Feb. 14th, 2011) *available at* http://www.npr.org/2011/02/14/133754813/attorney-ecuador-court-fines-chevron-8-billion; *see generally*, Martin Kaste, *Chevron Texaco Sued in Ecuador*, All Things Considered, NPR (Oct. 24, 2003). There is an American documentary film, *Crude* (2009) that follows the progress of the case against Chevron between 2006 and 2007. *See* CRUDE (Entendre Films 2009).

[406] Grant McCool and Basil Katz, U.S. judge delays decision in Chevron-Ecuador case, Reuters (Fri. Feb. 18, 2011), *available at* http://www.reuters.com/article/2011/02/18/us-chevron-ecuador-idUSTRE71H4R520110218.

[407] *Id.*

[408] Chris Jochnick, *Confronting the Impunity of Non-State Actors: New Field for the Promotion of Human Rights*, 21 HUM. RTS. Q. 56, 65 (1999).

[409] *Id.* at 58.

Unfortunately though, most of the existing scholarship in international human rights is framed within the international legal personality of the state and individual (*i.e.*, natural persons) rather than the corporation (*i.e.*, juridical persons) and its enterprise activity. In particular, scholars and United States courts fixate upon international corporate criminal liability without recognizing the nuances of civil liability in international law.[410] In this chapter, I will examine prevailing jurisdictional notions of corporate personality and the rights and duties that flow from legal personhood.

Multinational Corporate Liability Under the ATS

Particularized issues arise under the ATS when alleged human rights violations are against large MNEs. The complexity of the modern structures of corporate entities and enterprises – constitute corporations consolidating efforts into a single entity enterprise – have woven a complex web of parent-subsidiary relationships spanning the entire globe.[411] In U.S. law and under entity law generally, the rules are directed at each constituent entity and treat each as a separate "legal" person. The law of "civilized" nations generally recognizes entity liability of corporations and subsidiaries as each possessing distinct and severable "legal" persons, with each entity possessing its own legal rights and duties. The dual-identity of the corporate actor will likely remain separate and the corporate identity will remain distinct from the shareholders' identity. [412]

[410] Leval noting no concept of international civil liability even, in the context of criminal conduct. *Kiobel*.

[411] Kiobel

[412] Even though the parent and its subsidiaries are treated alike, each is typically liable for conduct attributable to their particularized officers, directors, and employees. Often, though, courts will employ doctrines of equity to impute liability throughout the complex corporate structure of MNEs.

Determining Who to Sue

Nationality is an essential condition of jurisdiction.[413] As the corporate entity rose to dominance through a process of globalization, determining corporate nationality has become increasingly complex. The structure of MNEs further complicates the filing of a suit under the ATS. Plaintiffs seeking redress under the ATS are confronted and often frustrated by threshold issues, such as determining precisely which corporate entity to sue. As already noted, MNEs operate in a complex network of parent, subsidiary, and affiliate relationships among a variety of individual corporate "legal" persons. Usually MNEs set up a subsidiary or affiliate to directly undertake a specific project. That entity, under normal circumstances would be the obvious defendant; however, plaintiffs often implead the parent company.[414] As a result, nearly all ATS cases filed against a corporation name parent companies or other group entities.[415] In light of the MNE's multiplicity of identities, obtaining personal jurisdiction in United States courts under the ATS is growing increasingly complex.

Personal Jurisdiction

Several notable cases arising under the ATS raised lack of personal jurisdiction.[416] To complicate an already complicated endeavor, United States courts must distinguish between specific and general jurisdiction.[417] In *Unocal*, the court applied a three part test to determine

[413] *See* Hersch Lauterpacht, *The Subjects of the Law of Nations*, in INTERNATIONAL LEGAL PERSONALITY 175, (Fleur Johns ed., 2010).

[414] KOEBELE, at 305 (2009).

[415] *Id*.

[416] *See, e.g.*; *Doe v. Unocal Corp*., 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd*, 395 F.3d 932 (9th Cir. 2002), *vacated* 395 F.3d 978 (9th Cir. 2003).For a detailed examination of personal jurisdiction under the ATS see KOEBELE, at 305-22 (2009). *See also* STEPHENS *et al.*, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS at 249-51 (2008).

[417] *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 (1984).

personal jurisdiction of Total SA.[418] The court concluded there was no specific personal jurisdiction over the MNE.[419] In fact, more often than not, actions against foreign corporations brought under the ATS fail for lack of personal jurisdiction.[420] In order to establish jurisdiction over foreign parent corporations and hold them liable for extraterritorial violations under the ATS courts must find sufficient minimum contacts to the forum state.[421] The three part test requires: (1) purposeful availment, which requires that the defendant must have performed "some type of affirmative action within the forum which allow or promotes its business;" (2) a relation between claims and contacts, where the court must apply a "but for" test to determine whether claims arise out of the forum related actions; and (3) reasonableness of the courts exercise of jurisdiction.[422] Alternatively, some courts have more lenient standards for establishing jurisdiction over foreign parent companies under a theory of agency.[423]

Forum Non Conveniens

One problem arising under ATS litigation is that government defendants are often privilege to numerous defenses to liability, thus the only potential defendant remaining are often corporations. However, corporations have available defenses to liability under the ATS. For instance, even if United States courts have personal jurisdiction over a corporate defendant in an ATS proceeding, the court may still exercise its discretionary power to dismiss the claim for a

[418] *Unocal* at 922.

[419] *Unocal* at 925.

[420] *Id.*

[421] KOEBELE at 322.

[422] KOEBELE at 309-11.

[423] *See, e.g.,Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

more appropriate forum under the doctrine of Forum Non Conveniens (FNC).[424] The discretionary doctrine of FNC is well-rooted in United States common law legal tradition; however, the doctrine is without a parallel in the civil law tradition.[425] FNC has been invoked under the ATS with mixed results.[426] Confronted with a FNC motion, courts must conduct several different analyses because cases arising under the ATS can raise non-justicability grounds such as comity issues, the political question doctrine, and acts of state doctrine.[427] Generally, courts will not dismiss a claim on FNC grounds unless there is an available alternative forum.[428] Of course the moving party bears the burden of proof to show the availability of alternative fora. [429] To determine the alternate fora availability, courts consider several factors such as the statute of limitations, the integrity of the foreign court and operational efficiency.[430]

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[424] FNC is a discretionary ground for declining jurisdictional and in the United States FNC governed by a specific statutory provision. *See* 28 U.S.C.A sec. 1404(a). In layman's terms FNC means that there is a more appropriate place to hear the matter. FNC is distinct from an exhaustion of remedies requirement generally required under international law. *See, e.g., Interhandel Case* (Switzerland v. U.S.), I.C.J. Rep. 1959.

[425] Alejandro M. Garro, *Title*, 35 U. MIAMI INTER-AM. L. REV. 65 (2003-04) (noting that in civil law systems courts either have or do not have jurisdiction and as a result judges lack discretionary power in the exercise of the court's jurisdiction).

[426] *See Aguinda v. Texaco, Inc*., 303 F.3d 470 (2d Cir. 2002) (dismissing ATS case against corporate defendant on FNC grounds, because courts of Ecuador provided adequate alternative forum); *Jota v. Texaco*, Inc., 157 F.3d 153 (2d Cir. 1998) (vacating district court's dismissal of ATS case against corporation on forum non conveniens grounds and remanding for further proceedings); *compare with Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88 (2d Cir. 2000) (failed to successfully invoke FNC).

[427]*See, e.g., Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007), *vacated in part,* 550 F.3d 822 (9th Cir. 2008) (en banc).

[428] John F. Carella, *Of Foreign Plaintiffs and Proper Fora: Forum Non Conveniens and ATCA Class Actions,* U. CHI. LEGAL F. 717 (2003).

[429] *See* Kathryn L. Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in US Human Rights Litigation*, 39 VA. J. INT'L L. 41 (1998); *compare with* Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001 (2001).

[430] One particularly common example is *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, (S.D.N.Y. 1986) where the district court rejected the notion that the India court system was incapable of handling the case arising from the catastrophic leakage at the company's plant in Bhopal, India; *compare with Bhatnagar v. Surrendra Overseas, Ltd.* (3d Cir. 1995) (noting that common delays in India's courts of "up to a quarter of a century" rendered the courts inadequate to support a dismissal on FNC grounds).

Even though there may be an alternative, adequate and available forum supporting a dismissal on FNC grounds, courts must consider whether convenience factors weigh in favor of the foreign forum. Courts have imported these convenience factors from domestic notions and transposed them into the analysis under international litigation.

The Aftermath of Kiobel v. Royal Dutch Shell Co. and Beyond

The Second Circuit's unprecedented decision in *Kiobel* regarding whether corporations may be sued under the ATS arguably signaled the final chapter in the short history of human rights litigation in United States courts under the ATS against corporate entities. The court ruled that corporations cannot be sued under the ATS for violations of international law because "the concept of corporate liability has not achieved status as customary international law."[431] It is premature, however, to declare an end of history to human rights litigation under the ATS.

The Immediate Impact

First, it is undisputable that the court's legal analysis in *Kiobel* will likely influence the future of ATS litigation in United States' courts; already the case has been cited and followed by courts in and beyond the United States Second Circuit.[432] Dozens of courts cite to *Kiobel* as good law and dozens more following the Second Circuit's decision in *Kiobel* and numerous cases in the District Courts of the Second Circuit have cited and followed *Kiobel*.[433] Even though only

[431] *Kiobel* at 149.

[432] Although there was an initial wave of cases that cited and followed *Kiobel's* new rule that the ATS does not provide subject matter jurisdiction to hold corporations accountable, these case halted when an appeal was filed in Kiobel. Just as this thesis was nearing completion, the United States Court of Appeals for the Second Circuit denied a petition for rehearing in the same dramatic form in which it decided the case.

[433] Kiobel has been cited by the following Second Circuit District Courts: *Webb-Payne v. Smith*, 2011 U.S. Dist. LEXIS 6404 (E.D.N.Y. Jan. 21, 2011); *Norton-Griffiths v. Wells Fargo Home Mortg.*, 2011 U.S. Dist. LEXIS 2348 (D. Vt. Jan. 7, 2011); *Maynes v. Unkechaug Tribal Council*, 2011 U.S. Dist. LEXIS 1481 (E.D.N.Y. Jan. 5, 2011); *Vallen v. Miraglia*, 2010 U.S. Dist. LEXIS 137977 (E.D.N.Y. Dec. 30, 2010); *Velez v. Sanchez*, 2010 U.S. Dist. LEXIS 126586 (E.D.N.Y. Nov. 30, 2010). Kiobel has been followed by the following Second Circuit District Courts: *Saadya Mastafa v. Chevron Corp.*, 2010 U.S. Dist. LEXIS 128509 (S.D.N.Y. Nov. 29, 2010); *Mastafa v.*

binding in the Second Circuit, many other courts beyond the Second Circuit are following and applying the new rule that corporate defendants are not subject to jurisdiction for violations of internationals law under the ATS.[434] The impact of the historic decision of *Kiobel* is felt in all layers of the United States judicial system. The effect is felt in state, federal and administrative proceedings. For example, a jointly administered U.S. Bankruptcy panel applied and followed *Kiobel* in January 2011 and found a lack of subject matter jurisdiction over corporate defendants.[435] In *In re Motors Liquidation Co*., decided in 2011, Apartheid Claimants, residents of South Africa, filed a motion for class certification in their prepetition actions against the debtors, formerly General Motors Corporation, presently in chapter 11 proceedings, alleging that they were victims of the infamous system of apartheid in South Africa and that the debtor aided and abetted the perpetrators of the apartheid system.[436] The debtors sought to disallow the claims. The court denied the Apartheid Claimants motion for class certification and disallowed the claims for lack of subject matter jurisdiction. The panel, on the question of corporate liability, found that "the claims of the Apartheid Claimants are based on the premise that Old GM, a corporation charged with aiding and abetting the violations of international law, may be found to be liable in the United States courts under the Alien Tort Statute." However, following the

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Chevron Corp., 2010 U.S. Dist. LEXIS 140289 (S.D.N.Y. Nov. 22, 2010); *Abreu v. Nassau County Corr. Dep't,* 2010 U.S. Dist. LEXIS 120388 (E.D.N.Y. Nov. 3, 2010).

[434] *United States v. Hasan*, 2010 U.S. Dist. LEXIS 115746, 2010 A.M.C. 2705 (E.D. Va. 2010) (4th Circuit – U.S. District Court following Kiobel); *Flomo v. Firestone Natural Rubber Co*., 2010 U.S. Dist. LEXIS 108068 (S.D. Ind. Oct. 5, 2010) (7th Circuit – U.S. District Court citing, following, and explaining *Kiobel*); *Viera v. Eli Lilly & Co.*, 2010 U.S. Dist. LEXIS 103761 (S.D. Ind. Sept. 30, 2010) (7th Circuit – U.S. District Court following *Kiobel*).

[435] *See In re Motors Liquidation Co.*, 2011 Bankr. LEXIS 240 (Bankr. S.D.N.Y. Jan. 28, 2011) (at 48.

[436] The lawsuits were brought by under the Alien Tort Statute, 28 U.S.C.S. § 1350. *In re Motors Liquidation Co., 2011 Bankr*. LEXIS 240 (Bankr. S.D.N.Y. Jan. 28, 2011) at 48.

doctrine of *stare decisis*, the court concluded "*Kiobel*, binding authority from the Circuit, holds otherwise."[437]

Even though the claimants' raised several persuasive arguments for the panel not to be bound to the decision in *Kiobel*, the panel disallowed the claims for lack of subject matter jurisdiction.[438] First, the Apartheid Claimants directed the courts attention Judge Leval's vigorous dissent in *Kiobel* on the issue of amenability of a corporation to suit; second they noted that the issue had been raised *sua sponte* in *Kiobel*, not having been briefed by any party; third, they pointed out that a petition for rehearing *en banc* in *Kiobel* had been filed, and is pending; and that another panel had failed to issue the very quick similar decision.[439] "Nevertheless," wrote Judge Gerber, "those are points for the Circuit to consider, not me; I'm bound as a lower court in the Second Circuit to abide by any Second Circuit holding."[440]

Appropriateness of Defendants

Even though the number of ATS cases involving corporate defendants had significantly increased following *Unocal*, other ATS cases involving individual defendants (*i.e.* natural persons) are not affected by the decision. Although illogical considering that the treatment of individuals and corporations under international law is nearly identical ATS action may only proceed against individuals. Despite the court's ruling in *Kiobel*, the *Filartiga*-type case will continue against individual human rights violators under both the ATS and TVPA. It should not be forgotten that the Supreme Court explicitly approved the *Filartiga*-type case.[441] Second, it is

[437] *Id.*

[438] *Id.*

[439] *Id.*

[440] *In re Motors Liquidation Co.*, 2011 Bankr. LEXIS 240 (Bankr. S.D.N.Y. Jan. 28, 2011) at 48.

[441] *Sosa.*

not entirely clear whether international law or the federal common law informs the jurisdictional grant of the ATS with respect to determining who may be an appropriate defendant. Possibly, as one author suggested, "the most coherent approach would look to U.S. law on the question of personal jurisdiction, including the type of entity against which a claim can be asserted, [while] international law would provide the substantive, conduct relating rules that apply to private actors."[442]

Scope of Liability: An Open Question

One peculiarity contained in the majority's opinion still lingers. Toward the end of the majority opinion, Judge Cabranes dedicates an entire section to address Judge Leval's concerns about the majority's opinion and going forward leaves the reader to percolate on the following key question:

> Finally, and most importantly, Judge Leval incorrectly categorizes the scope of liability under customary international law--that is, who can be liable for violations of international law--as merely a question of remedy to be determined independently by each state. As we explained above, the subjects of international law have always been defined by reference to international law itself. Judge Leval is therefore wrong to suggest that "international law takes no position" on the question of who can be liable for violations of international law. Although international law does (as Judge Leval explains) leave remedial questions to States, the liability of corporations for the actions of their employees or agents is not a question of remedy. Corporate liability imposes responsibility for the actions of a culpable individual on a wholly new defendant--the corporation. In the United States, corporate liability is determined by a body of rules determining which actions of an employee or agent are to be imputed to the corporation. In this important respect corporate liability is akin to accessorial liability, which is a subject of international law not left to individual States.[443]

After all is said and done, one can only hope that a higher judicial authority weighs in on the debate and provides lower courts with flexibility and guidance to apply a modern law of nations. The fact of the matter is that international law provides for minimum standards that are generally

[442] Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 72 (2008).

[443] *Kiobel* at 147-8 (citations omitted).

applicable to the States only.[444] International law does not prevent States from raising its legal standards by holding corporations liable for their involvement in international wrongdoing, so long as the cause of action is served. Just like Judge Leval's aforementioned statement explicitly notes, international law leaves individual liability largely to domestic law.[445]

[444] KOEBELE at 208 n.75.

[445] *Id*.; *see also Kiobel* at 147-8. In 2003, it was noted that it can not be excluded that early human rights litigation against corporations, as an embryonic emergence of a universal norm thereby constituting an emerging rule of international law beyond U.S. courts which will ultimately lead to recognition, at least partially, of international legal personality of the corporation. Andre Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility*, 52 ICLQ 615, 617 (2003). The aforementioned statement also reflects the reasoning of the court in *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 57 (E.D.N.Y. 2005).

CHAPTER 7
CONCLUSION

This conclusion will undertake two complementary objectives. First, the principal conclusions of the study will be highlighted on a chapter-by-chapter basis. Second, additional final thoughts concerning corporate liability in and under international law will be addressed. This section will highlight the issue of corporate liability under the Alien Tort Statute (ATS) and then briefly conclude with final remarks regarding the United States Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum Co*. Lastly, alternative avenues of corporate liability will be addressed.

Principal Conclusions

The statements that follow will synthesize the most significant conclusions of this study by highlighting the findings of each of the previous chapters. Chapter Two served five preliminary purposes. First, the chapter provided an overview of the United States Second Circuit Court of Appeals decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). The first section of Chapter Two highlighted the facts of the case, the procedural posture, and the courts conclusion and recognized that this particular case did not meet the requirements to proceed under the ATS. Second, Chapter Two examined the majority opinion in *Kiobel* and the two step analysis employed by the court to reach its decision that corporations are not liable for violations of the law of nations. Third, Chapter Two introduced the concurring opinion of Judge Leval. Fourth, Chapter Two briefly analyzed the majority's opinion and presented an introductory assessment of court's ruling. Ultimately, this study found that the majority opinion in *Kiobel* employed a misguided approach to international law, both in theory and in practice, that lead the majority to incorrectly determine that corporations are not subjects of international law and as a result corporate entities are not liable under the ATS.

Chapter Three provided the theoretical framework to this thesis. First, it introduced five theoretical conceptions of international legal personality that inform the debate surrounding the issue of whether a corporation may be held liable for violations of international law. Second, Chapter Three borrowed its theoretical approach from decision-making theory which at its most basic level posits that problems of law, such as determining corporate personality for the purposes of liability under the ATS, are problems derived from the social-process. Following the approach created by the New Haven School, this theoretical model recognized that all actors have rights and duties determined by the international decision-making process. Chapter Three emphasized that all actors, including corporations, are effective actors within the international decision-making process. Through this configurative analysis approach to examining corporate liability, this chapter examined the outcomes of the power process. This theoretical model was employed because it accounts for the social reality of law and under this model all international actors are accounted for in and under the rule of law.

Chapter Four and Chapter Five examined corporations in and under international law. Chapter Four examined the development of legal personality. Chapter Five examined the traditional and contemporary sources of international law and this chapter provided the reader with an orientation to international law. Taken together, Chapter Four and Chapter Five provided a coherent assessment of the development of corporate legal personality for the purposes of corporate liability under the ATS.

Lastly, Chapter Six examined human rights litigation in United States courts and described the development of corporate liability under the ATS. Chapter Six reviewed the complicated historical development of the ATS and briefly reflected on the waves of litigation under the ATS. This chapter found that the decision in *Kiobel* is inconsistent with the plain

meaning of the ATS. Additionally, this study found that the decision in *Kiobel* conflicts with the history and purpose of the ATS. Next, Chapter Six analyzed three specific cases. First, Chapter Six analyzed *Filartiga v. Peña-Irala.*[446] This chapter found that the decision in *Kiobel* is inconsistent with the court's own jurisprudence that ushered in the modern-era of human rights litigation in United States courts under the ATS. Second, Chapter Six analyzed *Doe v. Unocal Corp*.[447] Even though this case settled out of court, *Doe v. Unocal Corp*. provided a characterization of corporate liability which served as the legal basis for future decisions holding corporations liable for violations of the law of nations under the ATS. Finally, Chapter Six analyzed *Sosa v. Alvarez-Machain,* the only ruling from the United States Supreme Court pertaining to the ATS.[448] Chapter Six found that the decision in *Kiobel* is inconsistent with the Supreme Court's decision in *Sosa*.

In short, *Kiobel* significantly conflicts with ATS jurisprudence generally, the decision misconstrued international law, and the majority manufactured a rule of limited liability for corporate violations of human rights norms. Additionally, this chapter found that the majority opinion in *Kiobel* misunderstood the Supreme Court's ruling and language in *Sosa*. Finally, this chapter concluded that Judge Leval's concurring opinion provided a fair assessment of the majority opinion in *Kiobel*.

[446] 630 F.2d 876 (2d Cir. 1980).

[447] 110 F. Supp. 2d 1294 (C.D. Cal. 2000); 395 F.3d 932 (9th Cir. 2002); 395 F.3d 978 (9th Cir. 2003).

[448] 542 U.S. 692 (2004).

Rehearing Denied

On February 4, 2011, The United States Court of Appeals for the Second Circuit denied a petition for rehearing in *Kiobel v. Royal Dutch Petroleum Co*.[449] The opinion denying rehearing in *Kiobel* further illustrates the divide among the three judges sitting on the court. Although Judge Cabranes authored the court's opinion in *Kiobel* with Judge Jacobs signing on, Judge Jacobs chimed in and authored the court's opinion denying rehearing.[450] Still, Judge Leval's opposition to "the new rule" remained resolute and Judge Leval dissented from the denial of rehearing.[451] Before moving on to the obvious question of whether the case will be heard by "a higher judicial authority," such as the United States Supreme Court, the discourse among judges warrants further examination.

Judge Jacobs, writing for the Second Circuit denying rehearing, noted that he previously signed on and "subscribed to Judge Cabranes's sound and elegant opinion" in *Kiobel*, and he found no grounds to revisit the court's judgment.[452] At the same time, Judge Jacobs, by concurring in the opinion to deny rehearing, felt compelled to "subject Judge Leval's conclusion to some tests of reality and pointed out that Judge Level's opinion in *Kiobel* was crafted with "a certain scholarly force and has an academic constituency."[453] Ultimately, this study concluded that Judge Level's opinion is a fair reading of the majority opinion and should likely influence a higher authority's review of the *Kiobel* decision.

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[449] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *petition for rehearing denied*, 2011 U.S. App. LEXIS 2200 (2d Cir. Feb. 4, 2011).

[450] *Id*.

[451] *Id*. at 12 (Leval dissenting in the denial of rehearing).

[452] *Id*.

[453] *Id.* at 2.

Final Thoughts Regarding Corporate Liability

In the absence of ATS liability for corporate actor violations of human rights skilled legal practitioners will likely find alternative avenues to hold international actors accountable for human rights violations. One author argues that governments of industrialized nations may aid and abet corporate violations of human rights other directly or indirectly.[454] One key foreign relations priority of industrialized states is to assist and promote the interests of its nationals.[455] Often governments negotiate trade agreements and lobby against trade barriers on behalf of their corporate nationals.[456] One commentator points out a state does not intend to allow corporations to act and other state in a way that violates human rights; nevertheless a state by its actions or omissions may facilitate or otherwise contribute to a situation in which such violations by corporations occur.[457] The growth of multinational enterprises operating across national borders has raised questions about how international law regulates these entities. The complexity of nationality and legal uncertainty over corporate legal personality under international law has created a new form of limited liability for corporate actors.[458]

Despite numerous sources of international law that indicate corporations should have direct liability for violations of international law there is currently no specific international human rights or humanitarian law that explicitly holds corporations directly liable internationally

[454] Robert McCorqueodale and Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, in NON-STATE ACTORS AND INTERNATIONAL LAW 505-32, (Andrea Bianchi ed., 2009).

[455] *Id.*

[456] *Id.*

[457] *Id.* at 505-06.

[458] *Kiobel*, (Leval, concurring).

for such violations.[459] Many have argued that there is no human rights law regulating corporations because human rights law developed to protect individuals from the state and that corporations do not need protection from an oppressive state.[460] However, I argue that the same rationale applied to the individual does indeed apply to the corporation. Take for instance cases of expropriations, often oppressive governments seize corporate property and deprive them of their investment. In this situation, corporations need protection. Clearly, states can oppress the rights of a fictional person. One international commentator argues that if corporations cannot be held accountable for human rights violations under international law, victims may seek to impute responsibility to the home state of the perpetrators nationality.[461] The main point is that states have an international obligation to ensure that its corporate nationals behave responsibly abroad. Arguably, the United States may even have an obligation *erga omnes* to provide a forum to redress violations of human rights committed abroad because of the numerous multinational corporations originating from its territory and in conjunction with the universality of human rights norm. This thesis sought to develop an international framework of corporate accountability to ensure that no state avoids its duty to protect the international rights of the juridical person (*i.e.*, the corporation) and that states may enforce its international obligations owed to all members of the international community.

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[459] Many international commentators have suggested corporate liability for violations of international law. *See e.g.*, Norms of the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, (2003) UN Doc E/CN.4/Sub.2.

[460] *Id.*

[461] Robert McCorqueodale and Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, in NON-STATE ACTORS AND INTERNATIONAL LAW 507, (Andrea Bianchi ed., 2009).

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As an undergraduate, Mr. Taylor participated in the College of Charleston's study abroad program in Havana, Cuba and studied Cuban government and society. Additionally, as a graduate student, Mr. Taylor studied judicial reform in Santiago, Chile and also received a field research grant to study corruption and judicial reform in Ecuador.