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# **Achieving Corporate Accountability for Egregious International Law Violations through the Alien Tort Statute:**

## **A Response to Professor Branson**

Katherine Gallagher\*

### **I. Introduction**

Professor Douglas Branson provides a rich discussion on the challenges of bringing claims for egregious human rights violations against transnational corporations under the Alien Tort Statute ("ATS").<sup>1</sup> Elaborating upon corporate law concepts such as piercing the corporate veil, enterprise liability, agency and joint venture liability using ATS case-studies, Branson demonstrates some of the issues that arise when applying these principles to fact patterns involving alleged violations of international law in faraway corners of the globe committed by direct perpetrators often bearing the names of unknown subsidiaries of multi-national corporations.<sup>2</sup> Examination of ATS litigation from this perspective is welcome.

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\* Senior Staff Attorney, Center for Constitutional Rights. I am currently involved in litigation under the Alien Tort Statute brought against corporations or corporate employees as counsel or amicus in support of plaintiffs. This paper is an expansion of comments made at the "Corporations and International Law" Symposium held in March 2010 in response to Professor Douglas Branson's presentation. I would like to thank the Santa Clara Journal of International Law for inviting me to participate in the symposium and to submit this comment.

1. The Alien Tort Statute ("ATS") is also known as Alien Tort Claims Act ("ATCA"). Since the Supreme Court's use of "Alien Tort Statute" for 28 U.S.C. § 1350 (2006) in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this has been the preferred term.
2. Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227 (2011).

Branson warns that “knowledge of the ins and outs of the ATS is only a starter” in such cases.<sup>3</sup> He is right that no litigator can commence a case against a transnational corporation under the ATS without considering many of the issues surfaced in his article.<sup>4</sup> However, in light of current developments related to the ATS, particularly in relation to corporate defendants, I must disregard his admonishment not to focus on the ATS in my remarks to some extent, and address in greater detail some of the threshold issues specific to ATS litigation touched upon by Professor Branson.

In necessarily brief remarks and from the perspective of a practitioner, I will address what violations are covered by the ATS, who falls within the statute’s jurisdiction or application, and under what theories of liability can defendants, including corporate entities, be held liable. I conclude that despite the challenges and recent setbacks in ATS case law, including the recent decision in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>5</sup> the ATS remains a vital and viable tool for holding corporations accountable for serious violations of international law.

## II. Scope of the Alien Tort Statute: Subject Matter and Personal Jurisdiction

Professor Branson refers to the “broad grant of subject matter jurisdiction” that the Alien Tort Statute provides to an alien who can obtain personal jurisdiction over a defendant.<sup>6</sup> Plaintiffs’ counsel who have brought claims—unsuccessfully—for environmental harms<sup>7</sup> or violations of fundamental rights such as the right to life and health<sup>8</sup> would likely

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3. *Id.* at 249.

4. Branson suggests that plaintiffs and their counsel are “quickly brought to earth, back to law school fundamentals” because of the myriad of challenges faced in the course of bringing a case against a multi-national. *Id.* at 228. It is recalled that there are numerous reasons why affected persons and communities seek to bring such a case including official acknowledgment of violations and reparations, deterrence, and contributing to transitional justice initiatives. See S. Coliver, J. Green and P. Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT’L L. REV. 169, 175–86 (2005). Plaintiffs also seek to engage in the legal process to have their claims adjudicated before an impartial and credible court and to hold violators accountable. *Id.* It cannot be said, however, that either plaintiffs or their counsel fail to appreciate the complexities and challenges of bringing a case under the ATS before embarking on such a course of action. Both are aware that such litigation, involving extensive motion practice, often requiring the assistance of experts in foreign law, history or political science, as well as the corporate structure, and the bridging of cultural, geographic, linguistic and legal differences can be costly, lengthy and time-intensive. Both are also aware of the very real risks involved, including to the safety of plaintiffs who publically expose serious human rights violations. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 336 (S.D.N.Y. 2003) (discussing plaintiff safety in the context of discussing whether an alternate forum exists); *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1267–68 (N.D. Ala. 2003) (discussing the same).

5. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. Sept. 17, 2010), *petition for reh’g denied*, 2011 U.S. App. LEXIS2200 (2d Cir. Feb. 4, 2011), *petition for cert. filed*, No. 10-1491 (U.S. June 6, 2011).

6. Branson, *supra* note 2, at 230.

7. See, e.g., *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003) (involving claims brought by Peruvian residents for damage to their lungs and for environmental damage caused by pollution emanating from a mining operation); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (dismissing claims brought under ATS by Indonesian citizen stating that there was no showing that

disagree with Branson's characterization of the jurisdictional grant as "massive." The bar for recognizing a violation under the ATS, meaning a tort "committed in violation of the law of nations," is high.<sup>9</sup>

In *Sosa v. Alvarez-Machain*, the Supreme Court found that the ATS grants jurisdiction over causes of action present in federal common law, which incorporates international law.<sup>10</sup> In assessing which norms are actionable, the Supreme Court instructed lower courts to "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."<sup>11</sup> The Court required that norms have "definite content" and widespread acceptance to be recognized under the ATS.<sup>12</sup> The Court found that the ATS was intended to be a jurisdictional statute for a "very limited set" of international law violations.<sup>13</sup> In cautioning against recognizing new norms without employing sufficient scrutiny, the Court said "judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping."<sup>14</sup>

The Supreme Court did, however, endorse the view that international law must be interpreted as an evolving body of law, and not a static one.<sup>15</sup> Accordingly, while "vigilant doorkeeping" is required, numerous violations have been recognized as falling within the scope of the ATS because they are recognized under international law, including genocide, war crimes, torture and forced labor,<sup>16</sup> as well as seemingly more "modern" violations such as failure of a pharmaceutical company to seek informed consent before including children in drug testing.<sup>17</sup> Thus, for example, as international law continues to develop, a sufficient international consensus could be found to have emerged to support the environmental claims that have so far proven unsuccessful.

Professor Branson is correct in his characterization of the subject matter jurisdiction as far-reaching insofar as the ATS opens the courthouse doors of U.S. federal courts to non-

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there is any customary international norm which could be identified with respect to environmental responsibility); *Viera v. Eli Lilly Co.*, No. 1:09-cv-0495-RLY-DML, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010).

8. See, e.g., *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1130-31 (C.D. Cal. 2002), *rev'd on other grounds*, 456 F.3d 1069 (9th Cir. 2006).
9. See, e.g., Beth Stephens, *Sosa v. Alvarez-Machain: "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533 (2004) (providing a detailed discussion on the recognition of violations under the ATS following the *Sosa* decision).
10. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).
11. *Id.* at 725. The historical paradigms cited in *Sosa* were offenses against ambassadors, violations of safe conduct, and piracy. *Id.* at 720.
12. *Id.* at 732. The ATS also provides jurisdiction over torts "committed in violation of . . . a treaty of the United States." *Id.* at 698-99.
13. *Id.* at 720.
14. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).
15. *Id.* at 733 (finding claims "must be gauged against the current state of international law").
16. For a discussion on the nature of the claims which have been brought under the ATS, see, e.g., Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 J. INT'L CRIM. JUST. 745 (2010).
17. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 207 (2d Cir. 2009) *cert denied* --- U.S. ---, 130 S. Ct. 3541 (U.S. June 29, 2010). Notably, the Second Circuit grounded its acceptance of this violation in Nuremberg precedents, among other sources of law. *Id.* at 172-91.

citizens, including persons who reside outside of the United States and suffered a harm outside of the United States.<sup>18</sup> But he overstates the ease with which plaintiffs attain personal jurisdiction over defendants or undervalues the connection that often exists between the defendants and the United States. Branson mischaracterizes the circumstances under which personal jurisdiction was obtained in the landmark ATS case *Filartiga v. Pena-Irala*<sup>19</sup> as involving an “unfortunate visit to New York” by Paraguayan police officer implicated in the torture and murder of Joelito Filártiga.<sup>20</sup> Indeed, the defendant, Americo Peña-Irala, had been living in Brooklyn, New York for nearly nine months at the time the ATS case against him was filed, having fled to the United States on a tourist visa when the Filártigas attempted to bring a case against him in Paraguay.<sup>21</sup>

In relation to corporate defendants, Branson states that the “agenda” of the plaintiffs and counsel “is to send a message as well as to obtain damages” and to do so, the “lawsuit must name and have a realistic prospect of obtaining a judgment against the household name.”<sup>22</sup> While it may be true that a case against a corporation that is well known attracts more public attention (and scrutiny), in order to obtain jurisdiction where that corporation is not domiciled, plaintiffs must establish that there are sufficient contacts between the corporation and the jurisdiction to satisfy due process requirements.

In one case that went against the parent company, Branson appears concerned that jurisdiction was obtained over Royal Dutch Shell because it maintained what he terms only a “small shareholder relations office in New York.”<sup>23</sup> But the Second Circuit, after concluding that the investor relations office was an “agent” of Royal Dutch Shell which provided needed access to capital markets, found that Royal Dutch Shell made the “determination [in opening this office] to invest substantial sums of money in cultivating their relationship with the New York capital markets.”<sup>24</sup> As such, the link was not small.<sup>25</sup>

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18. See, e.g., *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 717–20 (2010) (discussing the standing of aliens to bring claims in U.S. courts, including under the ATS).

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

20. Branson, *supra* note 2, at 227.

21. Paul Hoffman, *Courting Justice*, AMNESTY MAG., Fall 2004, [http://www.amnestyusa.org/amnestynow/courting\\_justice.html](http://www.amnestyusa.org/amnestynow/courting_justice.html); WILLIAM ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILARTIGA V. PENA-IRALA 28–30 (2007) (describing the Filártiga’s efforts to locate Peña-Irala in the United States and his arrest by the Immigration and Naturalization Services for overstaying his tourist visa). Affirming the principle set forth in *Filartiga* and through the ATS, Congress expressed its intention to ensure that the United States does not become a “safe haven” for torturers as a stated purpose for enactment of the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992). See S. REP. NO. 102-249, at 3 (1991).

22. Branson, *supra* note 2, at 229.

23. *Id.* at 227.

24. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 97 (2d Cir. 2000). The defendants also owned subsidiary companies in the United States, one of which owned all the shares of Shell Oil. *Id.* at 93.

25. On the other side of the corporate continuum, the Second Circuit allowed discovery for the purposes of determining whether it has personal jurisdiction over the Nigerian subsidiary, Shell Petroleum Development Company of Nigeria (SPDC). See *Wiwa v. Shell Petroleum Dev. Co. of Nigeria Ltd.*, 335 Fed. App’x 81 (2d Cir. 2009).

### III. Liability for Corporations: A Live Issue

Since the early 1990's, and particularly following the Second Circuit's finding in *Kadic v. Karadzic*<sup>26</sup> that a sufficient consensus existed for finding that certain violations, including genocide and war crimes, violate international law even when committed by private actors, cases have been brought under the ATS against corporations alleging violations of international law. To date, it is estimated that approximately eighty such cases have been filed against transnational corporations carrying out a range of activities from extractive industries to agricultural production to the provision of private military contractors.<sup>27</sup>

Professor Branson does not examine in detail the basis upon which plaintiffs have argued, and courts have accepted, jurisdiction over corporations. In light of the recent focus on the question of whether corporations can be held liable under the ATS, and the decision rendered by the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>28</sup> it is worth pausing to consider this question.

The Supreme Court has not opined on corporate liability under the ATS. The closest it came was a reference in a footnote in *Sosa* about private actor liability.<sup>29</sup> In footnote 20, the Supreme Court stated that a "related consideration" to the question of jurisdiction over a particular claim then before it (arbitrary detention) was "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."<sup>30</sup> The Supreme Court cited two cases which had arrived at different conclusions on the issue of private actor liability in relation to two particular norms—torture and genocide:<sup>31</sup> It had been concluded that some form of state action was necessary for torture, while for genocide, no such requirement had been found to exist. Notably, and plaintiffs argued significantly, the Supreme Court's focus was on the distinction between state actors and private actors generally—with individuals and corporations grouped together in the "private actor" category without any suggestion that a different analysis should apply to each.<sup>32</sup>

Space does not allow for a detailed discussion of what has transpired in the seven years since *Sosa*. To summarize the results of a fierce debate between the parties, some courts

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26. 70 F.3d 232, 239–41 (2d Cir. 1995).

27. See Gallagher, *supra* note 16, at 752–56.

28. 621 F.3d 111 (2d Cir. 2010). In their petition for certiorari, Plaintiffs' first question is whether the issue of corporate civil tort liability under the ATS is a merits question or an issue of subject matter jurisdiction. Plaintiffs argue it is the former. See Petition for Writ of Certiorari, June 6, 2011 (No. 10-1491) available at <http://ccrjustice.org/files/KiobelPetitionforwritFinal.pdf>.

29. See also *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 438 (1989) (observing that the ATS "by its terms does not distinguish among classes of defendants").

30. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.20 (2004).

31. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J., concurring) (noting insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic*, 70 F.3d at 239–41 (noting sufficient consensus in 1995 that genocide by private actors violates international law).

32. This interpretation has been explicitly accepted in some ATS cases. See, e.g., *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 743–44 (D. Md. 2010) (recognizing that the two cases cited both stand for the proposition that the analysis for determining whether state action is required is norm specific, and not applicable to all questions arising under the ATS); *in re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 584–89 & n.18 (E.D. Va. 2009) (same).

(including the Eleventh Circuit) have found, and many courts (including the Second Circuit) have assumed, that corporations can be held liable for violating those norms which have been recognized under international law.<sup>33</sup> In September 2010, the first two decisions to find that corporations could not be held liable under the ATS were handed down.<sup>34</sup> The Second Circuit's decision in *Kiobel* has already resulted in the dismissal of cases brought under the ATS against corporations.<sup>35</sup>

The basis for the starkly differing views on corporate liability under the ATS stems largely from the source of law consulted to answer the question of whether corporations can be found liable for egregious violations of international law. Some courts have found that they can look to federal common law.<sup>36</sup> Under federal common law, for the purposes of civil liability, there is generally no distinction between individual and corporate liability. While the ATS directs the courts to look to customary international law to determine whether particular conduct constitutes a norm in "violation of the law of nations," domestic law, and specifically federal common law, is identified as the appropriate source for

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33. Courts have held that corporations can be held liable directly for those violations that do not require state action, and through various theories of complicity for those violations which require a finding of state action. *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) (finding that non-state actors, including corporations, may be held liable for violations of the law of nations under the ATS); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (same); *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254, 282 (2d Cir. 2007) (Katzmann, J., concurring) ("We have repeatedly treated the issue of whether corporations may be held liable under the ATCA as indistinguishable from the question of whether private individuals may be."); *id.* at 289 (Hall, J., concurring) (explaining that corporations may be liable under the ATS in cases where "a defendant played a knowing and substantial role in the violation of a clearly recognized international law norm"); *Al-Quraishi*, 728 F. Supp. 2d at 753 ("There is no basis for differentiating between private individuals and corporations . . ."); *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 227-28 (D.D.C. 2007) (finding non-state actor can be held liable for harms caused by aerial fumigation when acting "under color of law" by willfully participating in joint activity with state actors); *In re Agent Orange Product Liab. Litig.*, 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005) ("Limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world."); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (finding that private individuals and corporations could be held liable for use of slave labor). The remand for mediation in the long-running corporate ATS case *Sarei v. Rio Tinto* by an *en banc* panel of the Ninth Circuit prior to deciding whether it has jurisdiction over the case could be read to suggest that a majority of that panel would conclude that the statute applies to corporations. Nos. 02-56256, 02-56390 & 09-56381, 2010 U.S. App. 22001 (9th Cir. Oct. 26, 2010).
34. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. Sept. 17, 2010), *petition for reh'g denied*, 2011 U.S. App. LEXIS2200 (2d Cir. Feb. 4, 2011), *petition for cert. filed*, No. 10-1491 (U.S. June 6, 2011); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1112-45 (C.D. Cal. 2010), *appeal docketed*, No. 10-56739 (9th Cir. Nov. 5, 2010).
35. *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810 (S.D. Ind. 2010). *See also Viera v. Eli Lilly Co.*, No. 1:09-cv-0495-RLY-DML, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010) (finding the reasoning of the Second Circuit "persuasive").
36. Support for looking to federal common law comes from *Sosa* itself. The Supreme Court held that the ATS is a jurisdictional statute recognizing causes of action under federal common law, which includes international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). Professor Branson appears to credit *Sosa* with providing jurisdiction over all aspects of international law, as evident in his discussion of the source of law in relation to secondary liability. Branson, *supra* note 2, at 234 ("Mindful of the Supreme Court's admonitions that any legal constructs to fill in the interstices of the ATS must come from an international law source . . ."). I can find no such admonishment in *Sosa*, reading *Sosa* instead to affirm the existence of federal common law.

secondary questions under international law.<sup>37</sup> Plaintiffs have argued that looking to international law for all questions under the ATS is inconsistent with fundamentals of international law, which leave the enforcement of international law to each state taking into account their domestic law, and that such an approach is wholly impractical and could render the ATS meaningless.

In *Kiobel*, the Second Circuit followed a path it had started down in an earlier decision, *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*,<sup>38</sup> in looking to international law for secondary questions, and then, only to the narrow area of international criminal law.<sup>39</sup> Focusing on the absence of an international treaty applicable to corporations and to the absence of an international criminal tribunal with jurisdiction over corporations, courts such as the one in *Kiobel* conclude that there is an insufficient basis in international law for holding corporations liable for violations of international law. It has been argued that this is a double error, with particular critique of the court's looking to *criminal* law for issues of liability in *civil* cases.<sup>40</sup> If a court is going to look to international law, it has also been argued that it should look to "general principles of law recognized by civilized nations";<sup>41</sup> under this analysis, a court could find that a sufficient consensus exists that corporations can be held liable under domestic or municipal law for the conduct alleged, as the underlying acts which constitute such crimes as torture and murder result in some form of liability for individuals and corporations alike.<sup>42</sup>

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37. In *Kiobel*, Judge Leval determined that the existence of a remedy is a question that turns on municipal law, and in the case of the United States, on federal common law. 621 F.3d at 152–53 (Leval, J., concurring only in judgment). See also *Kadic*, 70 F.3d at 246 ("The law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations."); William Castro, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 641–43 (2006).

38. 582 F.3d 244 (2d Cir. 2009).

39. Notably, the Second Circuit did not receive briefing on the question of corporate liability under the ATS in *Kiobel*. 621 F.3d at 143–44. In a separate case arising out of alleged international law violations by corporations in apartheid-era South Africa, the court had asked for supplemental briefing on the questions of (1) whether the customary law violations that fall within the jurisdiction of the ATS can include non-criminal conduct and construing the ATS to create a civil remedy for *criminal acts* committed in violation of the law of nations or a treaty, and (2) whether customary international law recognizes corporate criminal liability. *Balintulo v. Daimler A.G.*, no. 09-2778-CV, 2009 U.S. App. LEXIS 29244 (2d Cir. Dec. 4, 2009). Judge Cabranes, who authored the majority opinion in *Kiobel*, is the only judge from that panel who also sits on the *Balintulo* panel.

40. See, e.g., Brief for Earthrights International as Amicus Curiae Supporting Respondents, *Balintulo v. Daimler A.G.*, 2009 WL 5177981 (S.D.N.Y. Dec. 31, 2009) (No. 09-2778), available at <http://www.earthrights.org/sites/default/files/documents/apartheid-amicus-supplement-eri.pdf>. See also *Kiobel*, 621 F.3d at 149–97 (Leval, J., concurring only in judgment).

41. Statute of the International Court of Justice art. 38, ¶ 1(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

42. See, e.g., Brief for International Law Scholars as Amici Curiae Supporting Respondents at 14–19, *Balintulo v. Daimler A.G.*, 2009 WL 5177981 (S.D.N.Y. Dec. 31, 2009) (No. 09-2778), available at <http://www.khulumani.net/khulumani/documents/category/5-us-lawsuit.html>. A general principles analysis is a common method employed by international criminal tribunals to determine customary international law, and can draw on criminal, civil, or administrative remedies. For a similar analysis in relation to the question of whether a sufficient basis existed for holding commanders liable under the theory of command responsibility in non-international armed conflict, see *Prosecutor v. Hadžihasanović, Alagić, and Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, at 4 (Int'l Crim. Trib. for the Former



Unless and until the Supreme Court considers the ATS in the context of a corporate case,<sup>43</sup> or until a possible reversal by the Second Circuit should it hear another case brought against a corporation under the ATS *en banc*, this battle will continue to play out across the circuits.

#### IV. Modes of Liability: Aiding and Abetting

The source-of-law question has also had a profound impact on the determination of what modes of liability apply to violations under the ATS, and ultimately the ability to hold corporations liable under the statute. Many transnational corporations are alleged to be complicit in egregious human rights violations, rather than direct perpetrators of such acts.<sup>44</sup> Recent decisions have concluded that international (criminal) law provides the basis for determining liability, and then found that the standard under international law is higher than under federal common law, resulting in dismissal of some ATS cases or claims against multinational corporations.<sup>45</sup> As Professor Branson rightly states, the resulting standard for aiding and abetting when drawn from international criminal law—at least as currently understood in certain U.S. courts—is a much higher standard than exists at common law, such that it could be referred to as “aiding and abetting plus plus or aiding and abetting plus cubed.”<sup>46</sup>

The jurisprudential origin of this heightened standard is the Second Circuit’s decision in *Talisman*, which drew from a single concurring opinion in an earlier case in the circuit, *Khulumani v. Barclay National Bank, Ltd.*<sup>47</sup> In *Khulumani* Judge Katzmman read footnote 20

Yugoslavia [ICTY] July 16, 2003), reprinted in 14 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 2003, at 73, 74–85 (André Klip & Göran Sluiter eds., 2003); Prosecutor v. Hadžihasanović, Alagić, and Kubura, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, at 4 (ICTY Nov. 12, 2002), reprinted in 9 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 2002–2003, at 13, 14–66 (André Klip & Göran Sluiter eds., 2002).

43. It is worth noting that the Supreme Court had the opportunity to examine the question of corporate liability last term and appears to have given it a pass—at least for the moment. After the court in *Talisman* dismissed the case against a Canadian oil company alleged to have aided and abetted war crimes in Sudan, the plaintiffs filed a petition for certiorari. See Petition for Writ of Certiorari at 10, Presbyterian Church of Sudan v. Talisman Energy, Inc., 2010 WL 1602093 (U.S. Apr. 15, 2010) (No. 09-1262). Defendant Talisman filed a cross-petition in which it presented the Court with the question of whether corporations can be held liable under the ATS. See Cross-Petition of Defendant at 14, *Talisman*, 2010 U.S. S. Ct. Briefs LEXIS 1830 (No. 091418). The Court denied certiorari in both cases. *Talisman*, 582 F.3d 244, cert. denied, No. 09-1262, 131 S. Ct. 122 (U.S. Oct. 4, 2010). The Court did, however, ask for the views of the acting Solicitor General in another corporate ATS case. See Saleh v. Titan, No. 09-1313, 131 S. Ct. 379 (U.S. Oct. 4, 2010) (addressing whether non-state actors can be held liable for war crimes under the ATS).

44. Corporations have been alleged to be directly liable for serious violations of international law in a relatively small number of cases. See generally *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 753–56 (D. Md. 2010); *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 569–95 (E.D. Va. 2009).

45. See, e.g., *Aziz v. Republic of Iraq*, No. MJG-09-869, 2010 U.S. Dist. LEXIS 73697, at \*1–4 (D. Md. July 20, 2010); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1057 (C.D. Cal. 2010), appeal docketed, No. 10-56739 (9th Cir. Nov. 5, 2010). See also *In re Terrorist Attacks on Sept. 11, 2001*, 740 F. Supp. 2d 494, 514 (S.D.N.Y. 2010).

46. Branson, *supra* note 2, at 233.

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

in *Sosa* as an instruction to look to international law to answer questions of whether violations of international law applied to particular perpetrators.<sup>48</sup> In so doing, Judge Katzmann concluded that the categories of perpetrators addressed in *Sosa* itself—state actors versus private actors—could readily be substituted with direct perpetrators and indirect perpetrators, i.e., aiders and abettors.<sup>49</sup> The panel in *Talisman* came to the same conclusion. This substitution fails to recognize the significance of the issue of “state action” under international law. Certain violations, such as torture, have been found to include a requirement under international law that they be committed by state actors or include some form of state action before liability can attach.<sup>50</sup> No such specific requirements can be found in relation to the application of particular modes of liability to particular violations of international law.<sup>51</sup>

In looking to international law, and specifically international criminal law,<sup>52</sup> Judge Katzmann found guidance in the Rome Statute of the International Criminal Court.<sup>53</sup> In so doing, he found that “there is a discernable core definition” of aiding and abetting—a core that requires “purposefulness”—that could be applied to ATS cases.<sup>54</sup> While recognizing

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agreeing that it was required to apply the *Sosa* test to aiding and abetting, the court opined that “[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place.” *Id.* See generally *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254, 269–77 (2d Cir. 2007).

47. *Id.* at 269. Notably, and significantly for future cases examining the issue of corporate liability under the ATS, Judge Katzmann clarified in his dissenting opinion from the decision denying *en banc* review in *Kiobel v. Royal Dutch Petroleum* that his reasoning in *Talisman* should not lead to the conclusion that corporations cannot be held liable under the ATS and that he concurs with Judge Leval’s analysis in *Kiobel* that corporations (like natural persons) may be liable for violations of the law of nations under the ATS, 2010 U.S. App. LEXIS 27003 at \*2–4 (2d Cir. Sept. 17, 2010), thereby implying that courts should look to domestic law—rather than international law—to answer this question.

49. *Id.*

50. See, e.g., United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Punishment art.1, Dec. 10, 1984, 1465 U.N.T.S. 85.

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

*Id.* (emphasis added); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73 (1992) (attaching liability against an individual acting “under actual or apparent authority, or color of law”).

51. This is even the case in regards to genocide. Despite the Genocide Convention listing specific acts of genocide as punishable (Article 3 lists conspiracy, direct and public incitement, attempt and complicity), courts have found that other modes of liability, such as aiding and abetting and joint criminal enterprise, also can be applied to genocide. See, e.g., *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement (ICTY Apr. 19, 2004).

52. *Khulumani*, 504 F.3d at 270 n.5. Judge Katzmann rejected the argument that the imposition to criminal responsibility should not be used in the context of liability in the civil context:

This distinction finds no support in our case law, which has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the ATCA . . . international law does not maintain the kind of hermetic seal between criminal and civil law that the district court sought to impose.

*Id.*

53. See Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, UN Doc. A/CONF. 183/9, 37 ILM 1002 (1998).

54. *Id.* at 275–76, 277 n.12. Judge Katzmann looked to Article 25(3)(c) of the Rome Statute; he did not

that the definition “is not necessarily set in stone” and citing no ATS case or modern international law case that contained this definition, Judge Katzmann advanced a definition of aiding and abetting with a heightened *mens rea* requirement from that of the tribunals, namely, providing practical assistance that has a substantial affect on the perpetration of the crime “with the purpose of facilitating the commission of that crime.”<sup>55</sup> The Second Circuit in *Talisman* endorsed this standard, and as a result, dismissed all the claims against the Canadian corporation for the violations alleged to have occurred while it was engaged in oil operations in Sudan.<sup>56</sup>

Prior to the *Khulumani* and *Talisman* decisions, courts had generally found that corporations can be held liable for aiding and abetting under the international law standard set forth in the ICTY *Furundžija* Judgment, which provides a careful and detailed analysis of the state of customary international law in 1998 (notably, the same time that the Rome Statute was adopted):<sup>57</sup> knowingly providing practical assistance that has a substantial effect on the commission of the offense.<sup>58</sup>

The *Furundžija* Judgment is instructive and, arguably, should have been analysed and carefully distinguished by those panels of the Second Circuit which rejected it. There, the trial chamber included Article 25 of the Rome Statute in its discussion of the *actus reus*, and referenced Article 30 of the Rome Statute in its discussion of the *mens rea*,<sup>59</sup> suggesting that “for the purpose of facilitating the commission” in Article 25(3)(c) of the ICC Statute is related to the nature of the assistance and its link to the commission of an offence—the *actus reus*, rather than the mental state of the aider and abettor. The Appeals Chamber later described the *actus reus* and *mens rea* in the *Vasiljević* Appeal Judgment in a manner that reflects this understanding:

- (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a specific crime . . . and that this support has a substantial effect upon the perpetration of the crime. (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime by the principal.<sup>60</sup>

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include reference to Article 25(3)(d) which provides for liability for persons acting with a common purpose, nor did he look to Article 30 of the Statute, which addresses the “mental element.”

55. *Id.* at 277.

56. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (“[The] purpose standard has been largely upheld in the modern era, with only sporadic forays in the direction of a knowledge standard.”).

57. *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 249 (ICTY Dec. 10, 1998).

58. *See, e.g., Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 286–88 (E.D.N.Y. 2007); *In re Agent Orange Product Liab. Litig.*, 373 F. Supp. 2d 7, 54 (E.D.N.Y. 2005); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002).

59. *Furundžija*, *supra* note 55, ¶¶ 231, 244.

60. *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, ¶ 102 (ICTY Feb. 25, 2004). The Appeals Chamber has continued to uphold this interpretation. *See Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Judgment, ¶¶ 182–199 (ICTY May 9, 2007) (discussing “specifically directed” in the case-law of the ICTY as an aspect of the *actus reus* of aiding and abetting). For an elaboration on this element, see *id.* ¶ 189 (“to the extent specific direction forms an implicit part of the *actus reus* of aiding and abetting, where the accused knowingly participated in the commission of an offence and his or her participation substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her ‘routine duties’ will not exculpate the accused.”).

Like the issue of corporate liability itself, in the absence of further guidance from the Supreme Court this issue will be left to develop further in courts across the country, as district courts and circuits decide whether to adopt the *Talisman* standard.

## **V. Conclusion**

As Professor Branson explains, corporate law itself contains many challenges to holding corporations accountable for violations that occur outside the United States. The Alien Tort Statute has served as a tool to hold corporations accountable for some of the most serious violations of international law. As this response demonstrates, significant challenges exist also at the threshold level for establishing corporate liability under the ATS. Those challenges can, however, be overcome, whether by looking to federal common law or general principles of law. At a time when corporations are being granted what some consider unprecedented rights,<sup>61</sup> with globalization offering a seemingly endless supply of new opportunities, it is imperative that the current challenges faced by plaintiffs in ATS litigation are overcome so that transnational corporations are also held responsible for the most egregious conduct, and in so doing, deter future violations of international law.

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*See also* Prosecutor v. Šainović, Case No. IT-05-87-T. Judgment, ¶ 94 (ICTY Feb. 26, 2009).

Although the accused's lending of practical assistance, encouragement, or moral support must itself be intentional, intent to commit the crime or underlying offence is not required. Instead, the accused must have knowledge that his acts or omissions assist the principal perpetrator or intermediary perpetrator in the commission of the crime or underlying offence.

*Id.* The standard for aiding and abetting is a live issue in the appeal in *Šainović*. *See Šainović*, Case No. IT-05-87-A.

61. *See* Citizens United v. FEC, --- U.S. ---, 130 S. Ct. 876 (2010).

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