Kiobel v. Royal Dutch Petroleum Co.: The Second Circuit Rejects Corporate Liability Under the Alien Tort Statute

I. OVERVIEW

The Shell Petroleum Development Company of Nigeria, Ltd. (SPDC) has been producing oil in the Ogoni region of Nigeria since 1958.[1] In response, indigenous Ogonis, concerned for their environment, organized the Movement for Survival of Ogoni People (MOSOP) to protest against SPDC's activities.[2] The noted case arises out of SPDC and its codefendants' alleged reaction to MOSOP, when in 1993, the defendants and the Nigerian government allegedly began suppressing the resistance movement.[3] The plaintiffs, members of MOSOP, claim that the Nigerian military, aided in various ways by the defendants, stormed Ogoni villages and killed Ogoni residents while plundering their property.[4] Specifically, the plaintiffs claim that the defendants "(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."[5]

In September 2002, the plaintiffs filed a putative class action in the United States District Court for the Southern District of New York under the Alien Tort Statute (ATS),[6] alleging that the defendants aided and abetted the Nigerian government in perpetrating numerous crimes in

1. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010).
2. *Id.*
3. *Id.* The codefendants include Royal Dutch Petroleum Company and Shell Transport and Trading Company, PLC, acting through their subsidiary, SPDC. *Id.*
4. *Id.*
5. *Id.*
6. For purposes of this Note, the Alien Tort Statute (ATS) and the Alien Tort Claims Act (ATCA) are referred to as one entity—the ATS—as both have been used over time by courts and scholars to refer to 28 U.S.C. § 1350 (2006).

violation of international law.[7] After the plaintiffs filed an amended complaint in May 2004, the defendants moved to dismiss all claims, relying on the landmark United States Supreme Court ATS decision, *Sosa v. Alvarez-Machain*.[8] The district court thereafter dismissed only some claims,[9] and certified its entire order for interlocutory appeal so that an appellate panel could examine the issue of corporate liability under the ATS.[10] The United States Court of Appeals for the Second Circuit *held*, as a matter of first impression, that the ATS does not extend subject matter jurisdiction to claims against corporations because corporate liability is not specifically recognized as a customary norm of international law. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010).

II. BACKGROUND

The Alien Tort Statute provides in full: "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."[11] According to Blackstone, there were three common offenses that violated international law at the time the ATS was written in 1789: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[12] Before the ATS, however, U.S. courts lacked jurisdiction to hear claims for violations of these common offenses, which worried Congress.[13] The Marbois incident of May 1784 was particularly provocative.[14] There, a Frenchman named De Longchamps assaulted the Secretary of the French Legion in Philadelphia, but the United States had

---

7. *Kiobel*, 621 F.3d at 123-24. The individual claims were for "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." *Id.* at 123.

8. *Id.* at 124 (citing Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)).

9. The court below granted the defendants' motion to dismiss claims for "aiding and abetting property destruction; forced exile; extrajudicial killing; and violations of the rights to life, liberty, security and association . . . reason[ing] that customary international law did not define those violations with the particularity required by *Sosa*." *Id.* (citing Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 464-65 (S.D.N.Y. 2006)). The court denied the defendants' motion to dismiss the claims for aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture or cruel, inhuman, and degrading treatment because in its opinion, these crimes are universally condemned. *Id.*

10. *Id.*

11. 28 U.S.C. § 1350 (2006).

12. *Sosa*, 542 U.S. at 715 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *68); *id.* at 712.

13. *Id.* at 715-16.

14. *Id.* at 716.

no jurisdiction to resolve the matter.[15] The Framers responded by delegating original jurisdiction to the Supreme Court for violations against ambassadors.[16] This induced the First Congress to enact the Judiciary Act of 1789,[17] which included the ATS, among other provisions.[18] Unfortunately, there is no modern consensus regarding Congress's intent behind the ATS, but recent case law interpreting the statute has given it some substance.[19]

The pioneering contemporary ATS decision came in 1980 when the United States Court of Appeals for the Second Circuit worked through an ATS case, with the guidance of little precedent.[20] In *Filartiga v. Pena-Irala*, the Second Circuit considered whether a state violated international law by torturing its own citizens.[21] To determine the scope of international law, the court cited the venerable *In re The Paquete Habana*, where the Supreme Court instructed that customary international law may evolve over time "by 'the general assent of civilized nations.'"[22] Considering this principle, the court concluded that it must interpret customary international law as it existed in 1980, as opposed to 1789.[23]

---

15. *Id.* at 716-17.

16. *Id.* at 717 (citing U.S. CONST. art. III, § 2).

17. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2006)).

18. *Sosa*, 542 U.S. at 717. Courts, including the Second Circuit in the noted case, frequently refer to the ATS, in the words of Judge Friendly, as a "legal Lohengrin . . . no one seems to know whence it came." 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). While many courts are quick to invoke the esteemed Judge Friendly, it is rather snide to refer to the ATS as a legal Lohengrin, because it was a product of our Founding Fathers.

19. *Sosa*, 542 U.S. at 718-19. In an amicus brief filed in support of the plaintiffs/petitioners on appeal requesting a rehearing by the full Second Circuit, Harvard Law Professors Susan Farbstein and Tyler Giannini argued:

> The purpose of the ATS is clear from its text and history [which] indicates that the First Congress thought it crucial to provide a federal forum to discharge the duty of the nation, to avoid potentially hostile state courts, and to promote uniform interpretation when dealing with violations of the law of nations.

Brief of Amici Curiae Professors of Federal Jurisdiction and Legal History in Support of Plaintiffs-Appellants Seeking Petition for Rehearing En Banc at 2, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2010) (Nos. 06-4800-CV, 06-4876-CV). They also point out, "Notably, the statute says nothing about the identity of the defendant and places no restriction on the type of international norm that can be violated, meaning the norm need not be criminal in nature." *Id.*

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

21. *Id.* at 878.

22. *Id.* at 881 (quoting *In re* The Paquete Habana, 175 U.S. 677, 694 (1900)). The *Habana* Court held that the traditional prohibition against seizure of an enemy's ship during wartime, which began as a standard of comity only, had ripened into "an established rule of international law." *Habana*, 175 U.S. at 708.

23. *Filartiga*, 630 F.2d at 881.

Accordingly, the Second Circuit held that international law is not a stagnant set of rules but rather an evolutionary body of law consisting of norms and customs agreed upon by the nations of the world.[24]

The court then consulted article 38 of the Statute of the International Court of Justice (ICJ), which lists the four sources that determine the norms of international law: (1) international conventions, (2) international custom, (3) general principles of law recognized by civilized nations, and (4) judicial decisions and teachings of the most highly qualified publicists of international law.[25] After looking at authoritative conventions such as the Universal Declaration of Human Rights[26] and the United Nations Charter,[27] the court concluded that the international community unequivocally renounces state-sponsored torture.[28] In so holding, the court approved the use of the ATS as a jurisdictional tool for alien plaintiffs suing in U.S. courts for violations of international law other than the three mentioned by Blackstone.[29]

Building on its *Filartiga* decision, the Second Circuit recognized in *Kadic v. Karadžić* that nonstate actors were also liable under the ATS for certain torts committed in violation of international law.[30] In *Kadic*, the plaintiffs were Bosnian refugees who claimed that Karadžić, leader of the Bosnian-Serb Republic,[31] commanded his military forces to commit genocide, rape, and torture against them.[32] The defendant, Karadžić, contended that the court lacked subject matter jurisdiction because the ATS cannot reach private, nonstate actors like him.[33] The court rejected this defense, and cited Attorney General William Bradford's 1795 opinion which endorsed the use of the ATS against a group of private American citizens who aided the French in plundering British property.[34]

---

24. *See id.*

25. *Id.* at 881 n.8 (citing The Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055 (1945)). However, the Supreme Court has indicated that scholarly works should only be used to determine what the law really is, not what the scholars think it should be. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) (citing *Habana*, 175 U.S. at 700); Hilton v. Guyot, 159 U.S. 113 (1895).

26. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (1948).

27. U.N. Charter.

28. *Filartiga*, 630 F.2d at 881-83. The court noted that "a U.N. Declaration is . . . a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated." *Id.* at 883 (internal quotation marks omitted).

29. *Id.* at 880; *see Sosa*, 542 U.S. at 715.

30. 70 F.3d 232, 239 (2d Cir. 1995).

31. Also known as Srpska. *Id.* at 237.

32. *Id.* at 236-37.

33. *Id.* at 239. The defendant relied on *Filartiga*, which held only that "official torture" is covered by the ATS. *Id.* at 240; *Filartiga*, 630 F.2d at 884.

34. *Kadic*, 70 F.3d at 239.

Similarly, the court in *Kadic* found that here, the executive branch reiterated its position that private parties do not escape ATS liability.[35] The court also cited the Restatement of Foreign Relations Law, which lists crimes of "universal concern" that reach all actors regardless of nationality or state identity.[36] Accordingly, the *Kadic* court certified that ATS liability extends to private actors.[37] As a result, plaintiffs increasingly listed corporations in complaints filed under the ATS post-*Kadic*, leading to a flurry of corporate ATS suits.[38]

In 2004, the ATS avoided total annihilation. In *Sosa v. Alvarez-Machain*, petitioner Jose Francisco Sosa appealed charges of arbitrary arrest and illegal detention, which the Ninth Circuit had found to be in violation of customary international law.[39] Sosa sought to render the ATS obsolete by arguing that the statute does not expressly authorize a cause of action, and even if it did, arbitrary arrest and illegal detention did not violate the norms of international law.[40] Sosa argued that Congress was required to list causes of action under the ATS for the statute to have any use, since the ATS is only jurisdictional in nature.[41] While agreeing that the ATS does not create a private cause of action, the Supreme Court held that the ATS was enacted with an understanding that future courts would reference the common law to determine which private causes of action violated international law.[42] The Court, however, warned lower courts to exercise "a restrained conception of [this] discretion."[43] The Court's position was that "a norm [must be] specific, universal, and obligatory" to qualify as customary international law.[44] The Court went on to find that arbitrary arrest and illegal detention were not sufficiently well-defined to warrant a judgment against Sosa,[45] but the ATS had already been saved; lower federal courts were now free to decide for themselves which actions were indeed customary and thus applicable under the ATS.[46]

---

35. *Id.* at 239-40.

36. *Id.* at 240. The court noted that the Restatement analogized hijacking an aircraft as a modern example of nonstate action which is of "universal concern." *Id.*

37. *Id.* at 239.

38. *See, e.g.*, Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510 (S.D.N.Y. 2002).

39. 542 U.S. 692, 698 (2004).

40. *Id.* at 712.

41. *Id.*

42. *Id.* at 724.

43. *Id.* at 725.

44. *Id.* at 732 (quoting *In re* Estate of Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

45. *Id.* at 738.

46. *Id.* at 724-25; *see* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 187 (2d Cir. 2009) (holding that nonconsensual medical experimentation on human subjects violated norms of international law); *see also* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007) (per

Justice Scalia filed a concurring opinion where he argued forcefully that federal courts do not have the authority to recognize new causes of action under the ATS because this would encroach on Congress's legislative powers.[47] He felt that the Court should have limited its opinion to finding that arbitrary arrest and illegal detention were not violations of customary international law, rather than vesting lower courts with the authority to "create" private causes of action.[48] He reasoned that such a grant to lower courts would spark judicial interference with Congress's law-making role, a role its members have been democratically elected to carry out.[49] Justice Scalia warned that future courts would undoubtedly use the authority given to them by *Sosa* to create causes of action, which would lead "directly into confrontation with the political branches."[50] He then cited *Kadic* as a relevant example.[51] Justice Scalia contended that in *Kadic*, the Second Circuit disregarded indications in Congress's Genocide Convention Implementation Act of 1987[52] that courts should refrain from creating a private right of action for genocide.[53] He argued that the Second Circuit's ultimate decision to grant a private cause of action for genocide under the ATS undercut Congress, and that such a precedent would lead future courts down the same slippery slope of clashing with the political branches.[54]

A post-*Sosa* example of the broad judicial discretion discouraged by Justice Scalia was evident in *Khulumani v. Barclay National Bank Ltd.*, where the Second Circuit held that corporate aiding and abetting is well defined under international law and thus actionable under the ATS.[55] Between *Sosa* and *Khulumani*, several district courts held that banks and corporations were liable for aiding and abetting governments that committed violations of international law.[56] In *Khulumani*, three groups of plaintiffs alleged that the defendant banks and corporations aided and

---

curiam) (finding that aiding and abetting violations of international law provides a basis for ATS jurisdiction).

47. *Sosa*, 542 U.S. at 747 (Scalia, J., concurring).

48. *Id.*

49. *Id.* ("In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives.").

50. *Id.* at 748.

51. *Id.*

52. 18 U.S.C. §§ 1091-1092 (2006).

53. *Sosa*, 542 U.S. at 749 (Scalia, J., concurring).

54. *Id.*

55. 504 F.3d 254, 260 (2d Cir. 2007) (per curiam).

56. *See* Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 293 (E.D.N.Y. 2007); Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006).

abetted South African officials in committing human rights violations and other atrocities related to apartheid.[57] The issue on appeal was whether aiding and abetting violations of customary international law was actionable under the ATS.[58] Judge Katzmann joined Judge Hall to hold that it was actionable.[59] Judge Katzmann reasoned in his concurrence that international tribunals such as the International Criminal Court (ICC) consistently recognized aiding and abetting.[60]

Disagreeing, Judge Korman argued that aiding and abetting liability "will generate tremendous uncertainty for private corporations, who will be reluctant to operate in countries with poor human rights records for fear of incurring legal liability for those regimes' bad acts."[61] Notably, his argument echoed that of the United States, which argued that the judiciary should not interfere with a delicate foreign policy issue.[62] Judge Korman also argued that corporations were not liable under the ATS because they cannot reason, think, or accept moral responsibility.[63] However, since the issue of corporate liability was not raised on appeal, it was not properly before the court, which declined to rule on it.[64] Judge Katzmann argued that corporate liability had always been assumed by the circuit, and was therefore not raised as an issue here.[65] Judge Korman rebutted that since it was never discussed or raised as an issue by any party, corporate liability under the ATS was "'merely lurk[ing] in the record [and] not to be considered as . . . constitut[ing] precedent[].'"[66] Furthermore, Judge Katzmann and Judge Korman agreed that causes of action under the ATS are based on international law[67] and a

57. *Khulumani*, 504 F.3d at 258.
58. *Id.* at 260.
59. *Id.*
60. *Id.* at 270 (Katzmann, J., concurring).
61. *Id.* at 330 (Korman, J., concurring in part and dissenting in part).
62. *Id.* at 296-97 ("[C]ontinued adjudication of the . . . matters risks potentially serious adverse consequences for significant interests of the United States." (internal quotation marks omitted)). This is an example of Justice Scalia's warning about potential clashes between the judiciary and the political branches. The Second Circuit went on to disregard the United States' position holding that aiding and abetting violations of international law was actionable under the ATS. *See id.* at 260 (per curiam).
63. *Id.* at 321 (Korman, J., concurring in part and dissenting in part).
64. *Id.* at 282-83 (Katzmann, J., concurring).
65. *Id.* at 282.
66. *Id.* at 321 (Korman, J., concurring in part and dissenting in part) (quoting Webster v. Fall, 266 U.S. 507, 511 (1925)).
67. *Id.* at 270-73 (Katzmann, J., concurring); *id.* at 337 (Korman, J., concurring in part and dissenting in part). Judge Katzmann looked at, among other sources, the London Charter, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Rome Statute, and the U.N. Convention Against Torture and

"purposefully" mens rea,[68] while Judge Hall countered that federal common law and a "knowingly" mens rea were determinative.[69] However, neither decision was binding as they both were part of concurring opinions.

With the standard for pleading aiding and abetting liability still a live issue, the Second Circuit had the opportunity to settle the law two years later in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*[70] There, Sudanese nationals alleged they were subject to human rights abuses by their government and sued Talisman Energy, Inc., for aiding and abetting under the ATS.[71] The panel of Chief Judge Dennis Jacobs, Judge Jose Cabranes, and Judge Pierre Leval, applying international law, held that the corporate defendant was not guilty for aiding and abetting under the ATS because it did not act purposefully.[72] The court, however, did not hold that Talisman was exempt from ATS liability because of its juridical status as a corporation.[73]

It should be noted that the United States Court of Appeals for the Eleventh Circuit currently holds that corporations are subject to jurisdiction under the ATS. For example, in *Romero v. Drummond Co.*, the plaintiffs alleged that executives of Drummond, Ltd., a Colombian subsidiary of a U.S. corporation, paid military operatives to torture and assassinate leaders of a Colombian trade union.[74] The court rejected the defendants' argument that corporations are exempt from ATS liability.[75] After looking at the text of the ATS, the court concluded that it provides no express exception to corporations.[76] The court further stated that corporate defendants are liable for violations of international law under the ATS based on circuit precedent.[77] Similarly, in *Sinaltrainal v. Coca-Cola Co.*, the Eleventh Circuit rejected the same argument by defendant Coca-Cola Company, pointing to circuit precedent.[78]

Other Cruel, Inhuman or Degrading Treatment or Punishment in making his decision. *Id.* at 270-73 (Katzmann, J., concurring).

68. *Id.* at 275, 277 (Katzmann, J., concurring); *id.* at 337 (Korman, J., concurring in part and dissenting in part).

69. *Id.* at 284, 289 (Hall, J., concurring).

70. 582 F.3d 244 (2d Cir. 2009).

71. *Id.* at 247. Specifically, the claims were for genocide, war crimes, and crimes against humanity (all recognized as violations of the norms of international law). *Id.* at 251.

72. *Id.* at 247, 260.

73. *See id.* at 261 n.12.

74. 552 F.3d 1303, 1309 (11th Cir. 2008).

75. *Id.* at 1315.

76. *Id.*

77. *Id.* (citing Aldana v. Del Monte Fresh Produce, Inc., 416 F.3d 1242, 1266-67 (11th Cir. 2005)).

78. 578 F.3d 1252, 1263 (11th Cir. 2009) (citing *Romero*, 552 F.3d at 1315).

III. THE COURT'S DECISION

In the noted case, the Second Circuit rejected corporate liability under the ATS by a two to one margin, holding that such liability is not a universal and obligatory norm of international law.[79] In its analysis, the majority concluded that customary international law, rather than domestic common law, dictates the scope of ATS liability.[80] Writing for the same three-judge panel that decided *Talisman*, Judge Cabranes reasoned that the Supreme Court and prior Second Circuit panels looked specifically to international law in determining the scope of ATS liability.[81] The majority then looked at international tribunals and conventions, as well as scholarly works, and deduced that the theory of corporate liability had not ripened into a doctrine of customary international law.[82] All three judges ultimately agreed, however, that this particular case had to be dismissed because the plaintiffs failed to plead that the defendants acted purposefully, the standard adopted by the Second Circuit in *Talisman*.[83]

A. The Majority Opinion

The majority began by evaluating whether domestic common law or international law governs the scope of ATS liability.[84] The majority first established that "[i]nternational law is not silent [regarding] the *subjects* of international law."[85] The court then cited a footnote in *Sosa* as an unambiguous order from the Supreme Court that lower courts should look to international law when determining specifically whether subjects, such as corporations, are liable under the ATS.[86] To bolster its argument,

---

79. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010).

80. *Id.* at 126.

81. *Id.* at 130 ("We have looked to international law to determine whether state officials, private individuals, and aiders and abettors, can be held liable under the ATS. There is no principled basis for treating . . . corporate liability differently." (citations omitted)).

82. *Id.* at 132-45. "[T]here would need to be not only a few, but so many sources of international law calling for corporate liability that the norm could be regarded as 'universal.'" *Id.* at 121.

83. *See id.* at 153-54 (Leval, J., concurring only in the judgment) (citing Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009)).

84. *Id.* at 125 (majority opinion).

85. *Id.* at 126 ("The concept of international person is . . . derived from international law." (internal quotation marks omitted)). The majority further noted that the International Military Tribunal at Nuremberg recognized individual liability in international law in addition to state liability, which implied that international law is concerned with its subjects as well as its causes of action. *Id.* at 127.

86. Specifically, footnote twenty in *Sosa* instructed lower "courts to consider '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.'" *Id.* at 127

the court observed that Justice Breyer, referencing the majority's footnote twenty in his concurrence, wrote that "[t]he norm [of international law] must extend liability to the *type of perpetrator* (e.g., a private actor) the plaintiff seeks to sue."[87] The court continued its survey by looking at a host of Second Circuit cases for direction, including *Filartiga* and *Kadic*, both quoted by *Sosa* with approval, and the two post-*Sosa* decisions, *Khulumani* and *Talisman*.[88]

After establishing that international law would provide the scope for its analysis, the court considered whether corporate liability was indeed a norm of customary international law such that the court could exercise jurisdiction over the defendants.[89] Following the Supreme Court's approach in *Sosa*, the court consulted article 38 of the ICJ Statute and determined that international conventions, customs, general principles of law recognized by civilized nations, and judicial decisions and teachings would provide the relevant guidance for their inquiry.[90] Beginning with tribunals, Judge Cabranes noted that the London Charter and Nuremberg Trials are "the single most important source of modern customary international law concerning liability for violations of fundamental human rights."[91]

In analyzing how the London Charter prosecuted the I.G. Farben chemical company (Farben) at Nuremberg, the court explained how Farben actively aided the Nazis to carry out their atrocities by providing Zyklon B for use in the gas chambers at Auschwitz.[92] Following the trial, the Nuremberg Tribunal did not find Farben liable as a corporate entity; only its executives were charged.[93] The Tribunal reasoned that "corporations act through individuals" and cannot be held to have approved the illegal actions.[94] Judge Cabranes thus noted that the Nuremberg Tribunal had defined international human rights liability based on individual human morality, effectively rejecting corporate

---

(quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)). In a footnote towards the end of his opinion, Judge Cabranes acknowledged that the *Sosa* Court was not addressing corporate liability, and therefore had no reason to distinguish natural persons from juridical persons. He maintained, however, that this "does not obscure footnote 20's fundamental point: courts must look to customary international law to determine the 'scope' of liability under the ATS." *Id.* at 129 n.31.

87. *Id.* at 127-28 (alterations in original) (quoting *Sosa*, 542 U.S. at 760 (Breyer, J., concurring) (citing *Sosa*, 542 U.S. at 732 n.20)).

88. *Id.* at 128-31.

89. *Id.* at 131.

90. *Id.* at 132.

91. *Id.* at 132-33.

92. *Id.* at 134-35.

93. *Id.* at 135.

94. *Id.* (internal quotation marks omitted)

liability as a norm of customary international law.[95] After considering select tribunals since Nuremberg, including the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the ICC's Rome Statute, the court concluded that corporate liability has not yet begun to ripen into a theory of customary international law.[96] The court also mentioned that a recent proposal to grant jurisdiction to the ICC over juridical entities was rejected, partially because corporate liability has not been accepted as a norm of customary international law.[97]

Next, in a somewhat defensive tone, the court explained that a treaty may be considered evidence of accepted norms of international law only if an overwhelming majority of states has ratified the treaty and abides by its principles.[98] The court cautioned, however, not to put substantial evidentiary weight on treaties that have been ratified by relatively noninfluential states, or treaties that focus specifically on subjects other than human rights.[99] The court argued that treaties with specialized subject matter, such as bribery of foreign officials or organized crime, could not be used to prove norms in other areas of international law such as human rights.[100] The court highlighted the Rome Statute as an example of a reliable treaty, since it is a "major multilateral treat[y]."[101] The court thus put more emphasis on the Rome Statute, which doubts the universality of corporate liability, than it did on the treaties with specialized subject matter.[102] The court concluded its analysis of sources by citing the works of prominent scholars in the field of international law.[103] Judge Cabranes quoted from Professor James Crawford's *Talisman* declaration, which read, "no national court [outside of the United States] and no international judicial tribunal has so far recognized corporate liability . . . *in a civil or criminal context* on the basis of a violation of the law of nations."[104] The court ended with a few paragraphs dedicated to a rebuttal of Judge Leval's concurring opinion, and

95. *Id.* at 135-36.
96. *Id.* at 136-37.
97. *Id.* at 137.
98. *Id.*
99. *Id.* at 138.
100. *Id.* at 138-39 ("Provisions on corporate liability in a handful of specialized treaties cannot be said to have a 'fundamentally norm-creating character.'").
101. *Id.* at 139.
102. *See id.*
103. *Id.* at 142-45. The court cautioned that these scholarly works are only referenced for evidence of what the authors think the law is, not what they think it should be. *Id.* at 142.
104. *Id.* at 143 (alterations in original) (internal quotation marks omitted).

reiterated its decision and reasoning for rejecting corporate liability under the ATS.[105]

B. Judge Leval's Concurring Opinion

Judge Pierre Leval concurred in the judgment but was highly critical of his colleagues' opinion, calling it "a substantial blow to international law."[106] He began with an appeal to common sense.[107] Judge Leval insisted that the majority decision to limit corporate liability under the ATS was incompatible with international law, which champions human rights, and he questioned the logic in giving corporations a "free pass" to flout the law by purposefully committing atrocities with impunity.[108] He drew various analogies, including modern-day commercial exploitation of sex-slavery and condemned the majority's rule, which would allow corporations to retain profits they earned from such intended abuse.[109]

Judge Leval agreed with the majority that it is proper to look at international law to determine whether certain actions violate international law.[110] He differed, however, by arguing that there is no consensus about whether corporate civil liability is an enforceable norm of international law.[111] Instead, he explained, while international law outlaws certain conduct such as genocide, it allows each state to determine whether to impose civil liability as a means of enforcing international law.[112] He argued that by adopting the ATS, the U.S. has explicitly approved the application of civil liability for violations of international law, and that other nations' stances on the issue are therefore irrelevant.[113] Moreover, he noted that the Supreme Court endorsed the theory of civil liability under the ATS in *Sosa*, where the majority spoke approvingly of *Filartiga* and its progeny for awarding civil damages.[114] Therefore, according to Judge Leval, the majority in the noted case was at odds with the Supreme Court in holding that there must be an international consensus before it could recognize civil liability, as there

105. *Id.* at 145-49.
106. *Id.* at 149 (Leval, J., concurring only in the judgment).
107. *See id.* at 154-55.
108. *Id.* at 155.
109. *Id.* at 155-59.
110. *Id.* at 174.
111. *Id.* at 175.
112. *Id.*
113. *Id.*
114. *Id.* at 176-77.

was no such consensus when the *Sosa* majority approved of its application.[115]

Additionally, he criticized the majority for taking the *Sosa* majority's use of the term "norm" out of context when they interpreted it as applying to types of violators.[116] He posited that the "norm[s]" the Supreme Court referred to were standards of conduct, including war crimes, slavery, and genocide, not the type of violator.[117] He noted that the *Sosa* majority cited to *Filartiga* with approval, which similarly used the term "norm" to refer "to *conduct* that renders one '*hostis humani generis*, an enemy of all mankind.'"[118]

Judge Leval also contended that the majority's rule barring corporate liability in ATS cases lacks precedent.[119] He listed numerous cases involving corporate defendants where courts have either assumed that corporations could be liable,[120] or have rejected the theory outright.[121] He invoked Judge Katzmann's *Khulumani* concurrence, which noted the Second Circuit's "repeated[] treat[ment]" of corporate "liab[ility] under the AT[S] as indistinguishable from the question of whether private individuals may be [liable]."[122]

He also cited two opinions of the U.S. Attorney General which stated that corporations do indeed have rights and obligations under the ATS, contrary to the majority's view.[123] Then, citing the Farben example used by the majority, Judge Leval claimed that Farben was indeed found guilty as a corporate entity; it was not criminally punished, however,

---

115. *Id.* at 176.

116. *Id.* at 177 (i.e., corporations, individuals, states, etc.).

117. *Id.*

118. *Id.* (emphasis added) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (quoting Filartiga v. Pena Irala, 630 F.2d 876, 890 (2d Cir. 1980))).

119. *Id.* at 160.

120. *Id.* at 161 n.12 (citing Abdullahi v. Pfizer, Inc., 562 F.3d 163, 187 (2d Cir. 2009) (holding that a claim was stated under the ATS for a violation of international law by a corporate defendant)).

121. *Id.* at 162 n.14 (citing Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009) (explaining law of the circuit which holds that corporate defendants may be liable for violations of international law under ATS)).

122. *Kiobel*, 621 F.3d at 161 n.13 (citing *Khulumani*, 504 F.3d at 282 (Katzmann, J., concurring)).

123. *Id.* at 162. One of those opinions, rendered in 1907, stated that an American corporation could have been liable to Mexican nationals if the corporation's "diversion of the water [of the Rio Grande] was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty." *Id.* (alterations in original) (internal quotation marks omitted). The other opinion held that a British corporation could sue American citizens who had plundered one of the settlements managed by the corporation in Africa, in violation of international law. *Id.* Judge Leval noted that the latter opinion was especially valuable because it was rendered just six years after the ATS was enacted and could give a potential glimpse into Congress's intent. *Id.*

because it is futile to criminally punish a corporation, which cannot think or feel remorse.[124] According to Judge Leval, the unwillingness to hold corporations liable for crimes under international law should not let corporations off the hook entirely.[125] He urged that tort liability serves different objectives than criminal liability, specifically, compensation to victims for harm and making victims whole.[126] Accordingly, he maintained that imposing "civil liability on the corporation[s] perfectly serves the objectives" of tort law, which is why it is a "worldwide practice."[127]

Additionally, he argued that the majority had misinterpreted footnote twenty from *Sosa*, and they therefore could not use it to support their assertion "that international law distinguishes between natural persons (who can be civilly liable) and corporations (who cannot)."[128] Judge Leval also argued that no international tribunal has ever been established to award civil damages against natural persons while limiting recovery from juridical entities.[129] He explained that the only tribunals that rejected corporate liability were tribunals organized to assess criminal liability.[130] Therefore, he argued that the Nuremberg tribunal, the ICTY, and the ICTR should not be used as examples by the majority to refute corporate civil liability as a norm of international law, because these tribunals only had jurisdiction to impose criminal punishment on individuals.[131] Judge Leval fiercely condemned the majority's use of two

---

124. *Id.* at 180. He discussed the goals of criminal law, and stated that corporate criminal liability makes little sense since only humans can "entertain guilt" and feel remorse after punishment. *Id.* at 166-69. Judge Korman, making essentially the same argument in his *Khulumani* dissent, argued that this is precisely why we should bar even corporate civil claims under the ATS (that is, because corporations cannot think before they act). *Khulumani*, 504 F.3d at 321 (Korman, J., dissenting).

125. *Kiobel*, 621 F.3d at 168.

126. *Id.* at 169.

127. *Id.* He insisted that when a corporate executive violates international law through his or her corporation, while the executive should be criminally liable for his or her moral wrongs, it is the corporation that profits and that should be required to compensate the victims. *Id.*

128. *Id.* at 163. Specifically, Judge Leval noted that footnote twenty from *Sosa* refers to discussions in other cases distinguishing between private and state action, not individual private and corporate private action. He explains that those cases held that certain violations are so egregious that they will be considered violations of international law regardless of whether there is state action or not. *Id.* at 165; *see* Kadic v. Karadžić, 70 F.3d 232, 239 (2d Cir. 1995) ("We do not agree that the law of nations . . . confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.").

129. *Kiobel*, 621 F.3d at 163.

130. *Id.*

131. *Id.* at 168. He noted that "the International Military Tribunal at Nuremberg declared, '[O]nly by punishing individuals who commit such crimes [and not by punishing abstract entities]

affidavits by law professors as evidence of scholarly support for the majority's rule.[132] He observed that, conversely, the Supreme Court has encouraged courts to use the most respected treatises of its time.[133] Judge Leval continued by addressing some specific criticism the majority levied on him, and concluded by explaining that the motion to dismiss must be granted nevertheless, because the plaintiffs failed to plead that the defendants acted purposefully.[134]

On February 4, 2011, the Second Circuit denied plaintiffs' petition for a rehearing en banc with a divided five-five vote. Judge Gerard Lynch's dissent, joined by Judges Pooler, Katzmann, and Chin, noted that "this case presents a significant issue and generates a circuit split" with the Eleventh Circuit.[135] With the judges of the Second Circuit so evenly and sharply divided, the Supreme Court may soon wish to shed its wisdom on ATS jurisprudence.

IV. ANALYSIS

After fifteen years of ATS expansion into the private sector, plaintiffs' lawyers and human rights advocates are reeling from the Second Circuit's landmark opinion in the noted case. Though the decision does not conflict with binding precedent, the court chose to discount recent rulings in favor of corporate liability by the Eleventh Circuit,[136] as well as its own assumptions of corporate liability in past decisions.[137] Furthermore, as Judge Leval notes, the majority seemingly quotes multiple sources of support out of context[138] and cites little scholarly support for its argument.[139] Moreover, the court glosses over the reality that international conventions have indeed recognized corporate liability in the contexts of foreign bribery and organized crime.[140] The court does not make a compelling argument for treating

---

can the provisions of international law be enforced.'" *Id.* (alterations in original) (quoting United States v. Goering (*The Nurnberg Trial*), 6 F.R.D. 69, 110 (1946)).

132. *Id.* at 182.

133. *Id.* at 181. See *In re* The Paquete Habana, 175 U.S. 677, 699-700 (1900), where the Supreme Court used Wharton's *Digest of the International Law of the United States* and Wheaton's international law treatise to discern the law.

134. *Kiobel*, 621 F.3d at 186-88.

135. Kiobel v. Royal Dutch Petroleum Co., Nos. 06-4800, 06-4876, 2011 WL 338151, at *1 (2d Cir. Feb. 4, 2011).

136. *See, e.g.*, Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009).

137. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009); *see also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009).

138. *Kiobel*, 621 F.3d at 163 (Leval, J., concurring only in the judgment).

139. *Id.* at 181-82.

140. *See id.* at 138-39 (majority opinion).

human rights differently.[141] One important policy effect the majority probably considered is the concern that corporations may hesitate to expand their operations in countries known for human rights abuses, in fear of aiding and abetting rogue governments.[142] Nonetheless, this concern is mitigated by the fact that corporations would be liable only for purposefully aiding and abetting violations of international law.[143] One of the majority's strongest arguments is that future congressional action is necessary to expand the scope of the ATS.[144] That school of thought undoubtedly pleases Justices Scalia and Thomas, both outspoken critics of "judicial law-making."[145] Considering the circuit split and passionate arguments by advocates on both sides of the issue, the future of corporate liability under the ATS will likely hinge on Supreme Court review.

The majority acknowledges that "at first blush," Americans would assume that corporations are liable under the ATS because corporations are liable under U.S. law.[146] However, Judge Cabranes's opinion is based on the following premise: because international law governs the scope of ATS liability, including its subjects, and nations have not customarily imposed liability on corporations in their dealings with each other, the Second Circuit does not have the authority to do so here.[147] The majority thus disregarded the Eleventh Circuit's recent decisions in favor of corporate liability, and based its reasoning on the fact that no international tribunal has ever held a corporation liable.[148] In his concurrence, Judge Leval convincingly argued that none of the majority's quoted sources even had jurisdiction to find civil liability, and that it would have been futile for those tribunals to hold corporations criminally liable.[149] In considering that counterargument, the majority misconstrued Judge Leval's point as an agreement that corporate liability is thus not a norm of international law.[150]

---

141. *See id.*

142. *See id.* at 158 (Leval, J., concurring only in the judgment).

143. *See id.*

144. *Id.* at 149 (majority opinion) ("[N]othing in this opinion limits or forecloses Congress from amending the ATS to bring corporate defendants within our jurisdiction.").

145. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 741-42 (2004) (Scalia, J., joined by Thomas, J., concurring in judgment only) ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." (internal quotation marks omitted)).

146. *Kiobel*, 621 F.3d at 117.

147. *Id.* at 145.

148. *See id.* at 143. To be fair, the Eleventh Circuit did not engage in an exhaustive review of the issues at bar as the Second Circuit panel did in the noted case. *See* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009).

149. *Kiobel*, 621 F.3d at 151-52 (Leval, J., concurring only in the judgment).

150. *Id.* at 145 (majority opinion).

Additionally, the majority cited scant scholarly sources, relying mostly on two affidavits from law professors who argued against corporate liability that same day in another case before the panel.[151] This does not comport with the spirit of the Supreme Court's instruction to consult works of publicists in *Habana*, where the Court used some of the most well-respected legal treatises on international law to assess the controlling legal doctrines.[152] The majority also overlooks the fact that before its decision, only Judge Korman in his *Khulumani* dissent was on record against corporate liability in the Second Circuit.[153] Further, Judge Katzmann and others have consistently assumed corporate liability in past Second Circuit decisions.[154] Nevertheless, the tide seems to be turning.

One federal district court followed the Second Circuit's lead in a slip opinion issued just thirteen days after the opinion of the noted case.[155] In *Viera v. Eli Lilly & Co.*, Chief Judge Richard L. Young of the United States District Court for the Southern District of Indiana found "the reasoning of the Second Circuit persuasive" on the issue of corporate liability under the ATS in favor of pharmaceutical giant Eli Lilly.[156] While the noted case will inhibit plaintiffs from recovering monetary judgments in court, defendant corporations will likely seek settlement nonetheless, to avoid the negative press that comes with claims of human rights violations.

Next, the majority in the noted case seems to backtrack when it acknowledges that certain recent international treaties that have been ratified by an overwhelming majority of states recognize corporate liability.[157] The court conceded that the Convention Against Transnational Organized Crime, adopted in 2000, and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted in 1997, both contain provisions specifically allowing corporate liability, yet the majority argued that this is irrelevant

---

151. *Id.* at 143.

152. *In re* The Paquete Habana, 175 U.S. 677, 699-700 (1900).

153. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 330 (2d Cir. 2007) (Korman, J., dissenting in part).

154. *See, e.g.*, *id.* at 282-83 (Katzmann, J., concurring).

155. Viera v. Eli Lilly & Co., No. 1:09-cv-0495-RLY-DML, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010).

156. *Id.* at *2. Other judges have also followed suit, albeit reluctantly. *See, e.g.*, *In re* Motors Liquidation Co., No. 09-50026(REG), 2011 Bankr. LEXIS 240, at *3 (Bankr. S.D.N.Y. Jan. 28, 2011) ("[U]nder controlling Second Circuit authority, binding on me and every other lower court in the Second Circuit, the underlying claims must now be disallowed.").

157. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 138-39 (2d Cir. 2010).

in the context of human rights violations.[158] The fatal flaw in the majority's argument is that it dismisses these treaties because of their subject matter, which undermines its attempt to prove that certain subjects, like corporations, are not within the bounds of customary international law.[159] Furthermore, while bribery of foreign officials is a serious global problem, is there any principled reason for recognizing corporate liability there, and not for victims of human rights abuses?

One policy consideration that may have biased the majority is the same fear Judge Korman raised in his *Khulumani* dissent: corporations may hesitate to expand their operations into countries with poor human rights records.[160] Proponents of this argument claim this would negatively impact U.S. corporations who rely on their economic ties to developing countries.[161] This concern is exacerbated by the increasing cooperation among the major world economies.[162] Nonetheless, the counterargument exposes the weakness in this point, as only corporations that purposefully facilitate or cause human rights violations would be liable under the ATS. This precludes corporations who even act knowingly. Thus, as Judge Leval delineates through his analogies, corporations that act with the purpose and intent of furthering evil should not be given a "free pass" to break well-defined, universally condemned violations of human rights.[163] Moreover, the profits corporations make from such action should be available to compensate victims of such abuses.

---

158. *Id.* at 138.

159. *See id.* at 126, 139.

160. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 297 (2d Cir. 2007) (Korman, J., dissenting in part).

161. *Id.*

162. Judge Korman cited the following excerpt from a letter of interest written by the Legal Advisor of the Department of State to the *Khulumani* district court:

> The United States relies, in significant part, on economic ties and investment to encourage and promote positive change in the domestic policies of developing countries on issues relevant to U.S. interests, such as respect for human rights and reduction of poverty. However, the prospect of costly litigation and potential liability in U.S. courts for operating in a country whose government implements oppressive policies will discourage the U.S. (and other foreign) corporations from investing in many areas of the developing world, where investment is most needed and can have the most forceful and positive impact on both economic and political conditions. To the extent that the apartheid litigation in U.S. courts deters such investment, it will compromise a valuable foreign policy tool and adversely affect U.S. economic interests as well as economic development in poor countries.

Id.

163. *Kiobel*, 621 F.3d at 155 (Leval, J., concurring only in the judgment).

One of the majority's strongest arguments, likely to be adopted by Justice Scalia if the noted case reaches the Supreme Court, is that Congress is free to legislate if it believes corporate liability is actionable under the ATS.[164] The Second Circuit has essentially punted to both the Supreme Court and Congress, and if Justice Scalia can convince his colleagues that they do not have the authority to recognize private causes of action such as corporate liability, the future of the ATS would then depend solely on congressional action.[165] Congress has acted in the past to increase the exposure of juridical entities in the context of international law, such as the 1996 amendment to the Foreign Sovereign Immunities Act to exclude juridical entities such as banks that promote terrorism through financing.[166] However, with the economy as Congress's chief current concern, one would think an express congressional amendment further extending liability to reach U.S. companies is unlikely anytime soon. If Congress does not act to extend corporate liability under the ATS, it would beg the question: is terrorism really more of an international concern than purposeful abuses of human rights, or is Congress just protecting its own without having the same concern for foreign banks that finance terrorism?

Judge Korman raised a related separation of powers issue in his *Khulumani* opinion, a position argued by the executive branch in a statement of interest in that case.[167] There, the United States asserted that judicial involvement in the aftermath of South Africa's apartheid was unwelcome and detrimental to U.S. foreign affairs.[168] The majority in the noted case may have had the same concern in mind when it limited its own involvement in this corporate ATS suit involving a foreign government. As Judge Korman pointed out in his *Khulumani* dissent, quoting *Sosa*, "'the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.'"[169] Furthermore, the court said, "'Since many attempts by federal courts to craft remedies for the

---

164. *Id.* at 149 (majority opinion).

165. While he failed to convince most of his colleagues in *Sosa*, with only Chief Justice Rehnquist and Justice Thomas joining his concurrence, the Court has four new members today and this issue may transcend traditional political allegiances. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 739 (2004) (Scalia, J., concurring in part and concurring in the judgment).

166. 28 U.S.C. § 1605(a)(7) (2006).

167. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d at 296 (Korman, J., dissenting in part).

168. *Id.* at 295.

169. *Id.* at 296 (quoting *Sosa*, 542 U.S. at 727).

violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.'"[170]

V. CONCLUSION

The majority in the noted case should be commended for attempting to strictly obey the orders of the only court with higher authority, the Supreme Court. When the *Sosa* majority instructed lower courts to engage in "vigilant doorkeeping," however, it left the door slightly ajar for future courts to recognize specific violations of the norms of international law.[171] The ultimate question is whether Justice Scalia's narrow view of vigilant doorkeeping, essentially closing the door until further congressional action, will prevail over Judge Leval's view, which encourages courts to intervene when corporations purposefully advance crimes against humanity. Despite Judge Cabranes's implication that his hands were tied by international law, federal appeals judges are certainly competent to base their decisions on compelling policy considerations. Allowing corporations a "free pass" to reap the profits of, but avoid the penalties for, their purposeful human rights abuses seems inherently unfair. Instead of precluding an entire class of defendants, the majority should have made it clear that purposefully facilitating human rights abuses is categorically unacceptable. As one of the world's strongest proponents of human rights and democracy, the United States has and should continue to take the lead on such issues.

The immediate effect of the noted case is that corporate executives are now more vulnerable to ATS suits, especially high-level executives with deeper pockets. This may increase personal accountability, and executives will probably still hesitate before taking risks in countries with poor human rights records. On the plaintiff side, victims of human rights crimes and their lawyers will likely engage in forum shopping as they look to avoid the corporate-friendly Second Circuit. The practical effect of the noted case is that it limits corporate exposure while providing potential compensation to victims through settlement negotiations, as no company wants to be named in a human rights complaint. Nonetheless, in failing to adequately address the potential effects of its rule on victims of global atrocities, the decision in the noted case may lead to a host of unintended consequences, which could have been avoided if the Second Circuit took a stand against immorality, regardless of a defendant's

170. *Id.* (quoting *Sosa*, 542 U.S. at 727-28).
171. *Sosa*, 542 U.S. at 729.

juridical status. While no defendant is above the law, the noted case permits corporations to purposefully disregard the law, even if its intentions include genocide and mass murder.

David R. Tawil*

* © 2011 David R. Tawil. J.D. candidate 2012, Tulane University Law School; B.A. 2007, New York University.