Article

Corporate liability for violations of international human rights: law, international custom or politics?

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Abstract

The full extent of the 1789 Alien Tort Claims Act (ATCA) which allows non-U.S. citizens to file suits in the U.S. for international human rights violations has been the subject of many debates in recent U.S. cases (Sosa v. Alvarez-Machain, Kiobel, Boimah Flomo I and II, Exxon). This comment looks at the key points relied upon in recent decisions to reject the existence of a corporate liability principle under customary international law. The concurring observations of Judge Leval, who argued that the Kiobel decision might have kept the door open to major corporate abuses and created a precedent of corporate impunity,¹ are especially relevant because they have been confirmed by more recent decisions.² This comment also considers the arguments presented in the Kiobel re-hearing rejection re-

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¹ See Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 151 (2d Cir. 2010) (Leval, J., concurring).
Regarding the policy impact of the decision and the policy-making role of U.S. tribunals. Finally, this comment questions whether U.S. courts should be expected to get involved in international justice, thereby risking being characterized as imperialist, self-appointed world judges.

Introduction

The full extent of the 1789 Alien Tort Claims Act (ATCA), which allows non-U.S. citizens to file suits in the U.S. for international human rights violations, has been the subject of many debates in recent U.S. cases. Referring to the Sosa v. Alvarez-Machain conclusions, the United States Court of Appeals for the Second Circuit rendered its decision in Kiobel v. Royal Dutch Petroleum on September 17, 2010 and ruled that the ATCA cannot be used to sue corporations for violations of international law because customary international law only admits the liability of ‘natural’ persons. The point was then eventually taken up by various cases (Boimah Flomo I and II, Exxon), which this comment considers. These judgements clarify the corporate liability debate by elaborating on the status of ‘juridical’ persons — as opposed to ‘natural’ persons — under international law, and on the ability of U.S. tribunals to admit jurisdiction over foreign entities under the ATCA. The reasoning

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3 Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268 (2d Cir. 2011).
4 See Alien’s Action for Tort, 28 U.S.C. § 1350 (2006) (also known as the Alien Tort Claims Act (ATCA) or Alien Tort Statute (ATS)).
5 The Movement for Survival of Ogoni People was created during the 1990s in Nigeria in reaction to the environmental impacts of oil extractive industries. The Nigerian government was accused of suppressing the Ogoni resistance to the benefit of the oil industries, while Royal Dutch Petroleum and Shell PLC — involved through a subsidiary named Shell Petroleum Development Company of Nigeria Ltd (SPDC) — were accused of aiding and abetting the Nigerian government by providing monetary and logistical support to the military regime. Three claims were eventually brought before the U.S. courts in Wiwa v. Royal Dutch Petroleum Co. under ATCA. See 226 F.3d 88 (2d Cir. 2000). In addition, a consolidating claim was filed by Esther Kiobel, alleging that Shell through SPDC’s activities, was an accomplice to torture and crimes against humanity. The Wiwa actions were settled for $15 million. See Settlement Order Wiwa v. Royal Dutch Shell, No. 96 CIV. 8386(KMW), 2002 WL 319887 (S.D.N.Y. 2002) available at http://www.haguejusticeportal.net/Docs/NLP/US/Wiwa_SettlementOrder_8-6-2009.pdf. The Kiobel suit was dismissed in June 2010. See Kiobel v. Royal Dutch Petroleum Co., 456 F.Supp.2d 457 (S.D.N.Y. 2010). On appeal, the action was dismissed again for lack of subject matter jurisdiction. See Kiobel, 621 F.3d 111.
and consequences of the various tribunals is questionable. The Boimah Flomo I decision, for instance, characterized Kiobel as a ‘compelling’ precedent,\(^6\) while Judge Leval provided a vigorous opinion qualifying the majority as a “blow to the efforts of international law to protect human rights.”\(^7\) Overall, the decision illustrates the conflicting relationship between domestic policymaking and corporate liability findings on an international level.

This comment considers two sets of arguments. First, it looks at the key points relied upon in recent decisions to reject or admit the existence of a corporate liability principle under customary international law.\(^8\) The observations of Judge Leval, who argued that the Kiobel decision might have kept the door open to major corporate abuses and created a precedent of corporate impunity,\(^9\) are especially relevant by virtue of their confirmation in more recent decisions.\(^10\) Second, this comment considers the arguments presented in the Kiobel re-hearing rejection regarding the policy impact of the decision and the policymaking role of U.S. courts.\(^11\) This policy impact questions whether U.S. courts should be expected to get involved in international justice, thereby risking being characterized as imperialist self-appointed world judges.

1. International corporate liability: the jurisdictional debate

The corporate liability debate deals with two distinct jurisdictional gaps. The first is that tribunals have had difficulty exercising extraterritorial jurisdiction, essentially admitting a lack of competency to adjudicate international disputes. The se-

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\(^7\) Kiobel, 621 F.3d 111 at 196 (Leval, J., concurring).
\(^9\) See Kiobel, 621 F.3d 111 (Leval, J., concurring).
\(^11\) See Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268 (2d Cir. 2011).
cond is the difficulty in demonstrating the existence of a corporation liability principle under customary international law.

### 1.1 The forum non conveniens deadlock

Tribunals tend to be constrained by territorial jurisdiction rules limiting their ability to look at corporations’ abuses abroad. While host-states courts have difficulties holding foreign parent entities liable, home-states’ judges similarly tend to dismiss claims brought against foreign plaintiffs for abuses committed abroad on the ground that the local tribunals should have jurisdiction over the cases. While tribunals are in practice in a difficult position, plaintiffs have major incentives to look for multiple forums before which to bring claims for compensations. The fact that most international firms’ headquarters are incorporated abroad rather than in the countries where abuses or accidents tend to take place indicates that greater compensation could be obtained before the tribunals having jurisdiction over the parent firms. Plaintiffs, as a result, are faced with a significant dilemma. On the one hand, bringing a claim before local tribunals may be less costly, but the local company may have fewer financial resources for compensation than its parent firm. On the other hand, bringing a dispute before a foreign court may generate greater compensation due to the resources available to the parent firm. The latter avenue is deemed longer, more complex, more expensive, and more uncertain.

This dilemma arises out of states’ failure to develop domestic regulations establishing extraterritorial jurisdiction over

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12 See J. McIntyre Machinery Ltd. v. Nicastro, 131 S.Ct. 2780 (2011) (noting that those who live or operate primarily outside a state have a due process right not to be subject to judgment in its courts as a general matter); Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1987) (finding California’s exertion of personal jurisdiction over Japanese manufacturer would exceed limits of due process, absent action by manufacturer to purposefully avail itself of California market).


14 See id. at 752–53.
foreign aliens and entities. One notable exception is the ATCA, which states: “The [American] 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.” The ATCA is only among a handful of statutes that provide domestic tribunals with an extraterritorial jurisdiction enabling them to decide on disputes originating abroad. As such, it has given foreign plaintiffs major incentives to consider U.S. courts as a potential forum for their claims, but it has also left those same courts with little possibility of avoiding involvement in large-scale foreign disputes.

The U.S. domestic court option has generated major confusion in the form of the forum non conveniens doctrine. This doctrine provides tribunals worldwide with justification not to consider foreign claims on their merits. For example, plaintiffs in Union Carbide brought claims under ATCA for damages after a gas leak killed more than 2,000 people (and injured more than 200,000) in Bhopal in the 1980s. Indian courts rejected their claims, reasoning that U.S. courts would have jurisdiction over parent firms and therefore would be the best jurisdiction to secure compensation for the victims. The U.S. Court of Appeals for the Second Circuit, however, upheld the lower court’s dismissal for lack of jurisdiction in finding that (1) witnesses were primarily to be found in India and (2) the interest of justice lay with Indian courts. The Court emphasized that Indian courts — being in a “superior position to construe and apply applicable Indian law and standards” — would constitute the most appropriate forum. The decision concluded that the “choice of the United States as a forum would not be given the deference to

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16 E.g., In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 197 (2d Cir. 1987).

17 Id. at 197.

18 Id.

19 Id. at 199.
which it would be entitle if this country were their home”, and dismissed the claim. While seven Indian nationals who formerly worked for the Indian branch of Union Carbide were found liable for death by negligence in June 2010 by an Indian tribunal, the responsibility of the parent corporation has not yet been considered.

The Union Carbide conclusions were acknowledged and reassessed in Spiliada Maritime Corporation v. Cansulex where the House of Lords noted that it could exercise extraterritorial jurisdiction for the sake of efficiency, expedition and economy. Judge Staugton observed that a dispute needs to be more real than apparent, and concluded that a case can be “a proper one for service out of jurisdiction” if the home-courts’ authority is “distinctly more suitable for the ends of justice.” A major difficulty, however, would be to demonstrate this particular level of suitability. Lord Justice Oliver emphasized the plaintiff’s responsibility “to assume the burden of proving some convincing explanation” that the case’s “centre of gravity” would indeed give jurisdiction to home-courts. The decision to accept or refuse an application furthermore remained at the judge’s discretion. The Second Circuit followed the Spiliada reasoning in Wiwa v. Royal Dutch Petroleum when it reversed a lower court dismissal on forum non conveniens grounds. Instead, the Court opted to recognize corporate liability in forced labor and torture circumstances under ACTA and the 1991 Torture Victim Protection Act (“TVPA”). This reasoning was extended in Doe v. Unocal Corp. when the federal district court

20 Id. at 202–03.
24 Id.
25 Id. at 116, 137–38 (Eng.).
26 Id. at 120.
for the Central District of California found a basis for jurisdiction in the managerial operations of Unocal.\(^\text{28}\) Unocal, the Court reasoned, was potentially liable for exercising control over acts of its subsidiary, as well as partners and joint-ventures.\(^\text{29}\) Overall, Special Representative John Ruggie’s 2008 Report suggests that “it is getting somewhat more difficult for defendant companies to have cases alleging harm abroad dismissed on the basis that there is a more appropriate forum”.\(^\text{30}\) Citing Voth v. Manildra Flour Mills Pty. Ltd., and Owusu v. Jackson, two decisions which characterized reliance on the forum non conveniens doctrine as “bad law”,\(^\text{31}\) Ruggie emphasizes that defendants will increasingly need to prove that a forum is “clearly inappropriate” for the doctrine to be apply.\(^\text{32}\) This is arguably more difficult to satisfy than showing that another forum is ‘more appropriate’ as was the case in Spiliada.\(^\text{33}\) In Owusu v. Jackson, the European Court of Justice held that respect for the principle of legal certainty would not be “fully guaranteed” if courts having jurisdiction were allowed to apply this doctrine which is “liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention”\(^\text{34}\). The Ruggie report notes that national courts in Australia and the EU might no longer dismiss actions against companies on such grounds.\(^\text{35}\) This suggests that corporations may no longer escape liability by playing the forum suitability card. The trend may also reflect an increasing recognition of the corporate liability principle.


\(^{32}\) Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, supra note 30, at 23 n.51.


\(^{34}\) Owusu, E.C.R. I–1238, ¶¶ 38, 41.

\(^{35}\) See Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, supra note 30, at 23 n.51.
1.2 Corporate liability as customary international law

In addition to the difficulty faced by domestic tribunals in accepting extraterritorial jurisdiction, establishing the existence of a principle of corporate liability for companies’ activities abroad under domestic regulations, public international law, or customary international law remains difficult. Rather than dealing with crimes defined under U.S. law, ACTA, for instance, stipulates that it is for U.S. courts to establish their jurisdiction over crimes violating rules of international law which customary international may not define. According to Article 38 of the International Court of Justice (“ICJ”) statute, demonstrating a corporate liability rule under public international law would require proving the existence of such a rule under (1) international conventions and treaties “establishing rules expressly recognized by the contesting states,”36 (2) international custom, “as evidence of a general practice accepted as law,”37 or (3) “the general principles of law recognized by civilized nations.”38 There are however no international conventions expressly elevating international corporate liability to the level of a principle of public international law. Additionally, its value as a general principle of law recognized by civilised nations, as well as its status under customary international law are hard to demonstrate because of the lack of general practice. In fact, while a principle’s opinio juris is typically a determinant in demonstrating its customary international law value,39 the courts in Sosa and Kiobel suggest that the recognition of international corporate liability is far from constituting a general practice comprising customary international law. As a result, suits have typically

37 Id.
38 Id. Article 38 also states that the court shall apply “the teachings of the most highly qualified publicists of the various nations”, as a “subsidiary” fourth source of international law. See id.
failed because of the difficulty in establishing an actionable violation of the so-called law of nations.\textsuperscript{40}

The difficulty in identifying corporate liability as a rule of customary international law is demonstrated in\textit{ Sosa v. Alvarez-Machain}\textsuperscript{41} where the Supreme Court failed to lay down guiding principles as to what ought to amount an actionable claim and explicitly refused to contemplate progressive interpretations of customary international law.\textsuperscript{41} The Supreme Court’s reasoning was straightforward: the ATCA did not encompass the concept of international corporate liability when it was drafted in 1789 and has not been amended “in any relevant way” by Congress since.\textsuperscript{42} The Court continued: “Congress intended the ATS to furnish jurisdiction for a \textit{relatively modest set of actions} alleging violations of the law of nations” including offenses against ambassadors, individual actions arising out of prize captures and piracy, and violations of safe conduct were also “probably” contemplated.\textsuperscript{43} Overall, the Court concluded that “the common law appears to have understood only those three of the hybrid variety as definite and actionable, or at any rate, to have assumed only a very limited set of claims,”\textsuperscript{44} and suggested that “any claim based on the present-day law of nations [should] 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.”\textsuperscript{45} In this way, the ATCA was made an instrument of extremely limited use. According to the dissent by Justice Scalia, most of today’s widely condemned crimes under international law — crimes of genocide to cite but one— would be clearly excluded from its scope.\textsuperscript{46} Similarly, cor-


\textsuperscript{42} Id. at 725.

\textsuperscript{43} Id. at 720 (emphasis added).

\textsuperscript{44} Id.

\textsuperscript{45} Id. at 725.

\textsuperscript{46} See id. at 729 (“[T]he jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority . . . subsequent developments should be
porate liability would also be without foundation. The decision actually makes it clear that the Supreme Court found having no congressional mandate to establish new and “debatable” violations of international law given that the Senate “expressly declined to give the federal courts the task of interpreting and applying international human rights law.”47 The Court, moreover emphasized that although the more recent TVPA establishes an “unambiguous and modern basis” for federal claims regarding torture and extrajudicial killing, this “affirmative authority is confined to specific subject matter” and therefore could not be used as a means to demonstrate the Court’s jurisdiction over corporate liability matters.48 In sum, the Sosa decision made several contradicting suggestions. On the one hand, it reasoned that U.S. courts should refuse to deal with any international norm lacking “specificity comparable to the features of the 18th-century paradigms” and either codified into U.S. law or crystallised as a norm of customary international law. On the other hand, it emphasized tribunals’ discretion in considering any “new cause of action” under ATCA, while failing to provide lower courts with guidelines for comparing current customary international law with the law of nations of the 18th century.49 Although the Sosa claims did not involve corporate liability, the decision nevertheless significantly limited the scope of violations which may trigger a cause of action under

understood to preclude federal courts from recognizing any further international norms as judicially enforceable today, absent further congressional action . . . we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction, that federal courts have no authority to derive “general” common law.” (summarizing a position taken in Justice Scalia’s dissent). But see id. (“Whereas Justice SCALIA sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”).

47 See id. at 728 (making reference to the ratification of the International Covenant on Civil and Political Rights in which substantive provisions declared it to be non self-executing). But see id. (“[Section] 1350 should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.”) (citing H.R. Rep. No. 102–367, at 4).

48 See id. (noting that Congress as a body has done nothing to promote recognition of “other norms” that “may ripen” into customary international law).

49 See also Christensen, supra note 40, at 1231 (discussing the impact of a lack of guidance for lower courts).
ATCA, including the possibility of recognizing corporate liability.\textsuperscript{50} In addition, it may have provided future tribunals with an opportunity to make clear that U.S. courts would not be willing to become a global forum for litigation brought against multinational corporations.\textsuperscript{51} The Sosa court, although involuntarily, made it clear that the law surrounding ATCA would have to be considered again.\textsuperscript{52}

The difficulty of identifying corporate liability as a rule of customary international law can also be seen in the Kiobel decision. Although the Kiobel tribunal acknowledged having jurisdiction under ATCA over claims involving a violation of the rules of international law,\textsuperscript{53} it encountered difficulties in determining whether corporate liability had standing under the rules of international law, either as a matter of customary or hard law.\textsuperscript{54} It justified its position on two major grounds. First, the court found that, corporations had not been recognized as ‘subjects of international law’ so as to form a “specific, universal, and obligatory” norm.\textsuperscript{55} Even though recent treaties, ratified by an overwhelming majority of states, have created a certain degree of corporate liability in circumstances of organized crime or bribery, the Kiobel tribunal suggested that these were only drafted in relation to specific subjects and could therefore not be applied to the case.\textsuperscript{56} In the absence of other historical evidence of “an existing or even nascent norm” establishing corporate li-

\textsuperscript{50} See Sosa, 542 U.S. 692 at 725.
\textsuperscript{51} Peter T. Muchlinski, Multinational Enterprises and the Law 156 (Oxford Univ. Press 2d ed. 2007).
\textsuperscript{52} See Sosa, 542 U.S. at 725 (making ATCA claims dependent upon definite and specific customary international norms, without defining the meaning of these terms).
\textsuperscript{53} See Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 125 (2d Cir. 2010) (“[W]e think courts should 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.”) (quoting Sosa, 542 U.S. at 725).
\textsuperscript{54} See Kiobel, 621 F.3d at 126 (“[International law] is not silent on the question of the subjects of international law.”).
\textsuperscript{55} See id. at 145.
ability for definite violations of human rights, the court found that those specific treaties could not be considered to codify an existing, general corporate liability rule on human rights, nor be viewed as crystallizing an emerging norm of customary international law. As a result, the Court concluded there was an absence of "a discernable, much less universal" principle establishing corporate liability under customary international law. Therefore the Court denied having jurisdiction to hear claims brought against corporations under ATS. Accordingly, Kiobel might be characterized as a step backwards. Or, in the words of Judge Leval, "a substantial blow to international law and its undertaking to protect fundamental human rights". The Boimah Flomo tribunal generated a similar set of arguments. Although the Court recognized having jurisdiction to hear the claim despite its extraterritorial nature, it nevertheless found that international law does not impose liability on corporations so that the plaintiffs had no cognizable cause of action under ATCA, and dismissed the case.

2. Reviewing the anti-corporate liability arguments

2.1 ATS v. customary international law

The reasoning of Kiobel, however, was rejected in decisions rendered shortly thereafter. For instance, in Boimah Flomo II the tribunal recognized that corporations were liable before U.S. courts under ATCA, though the allegations of wrongdoing

57 See Kiobel, 621 F.3d at 139.
58 See id. at 145.
59 Id. at 149 (Leval, J., concurring).
60 See Flomo v. Firestone Natural Rubber Co., 744 F.Supp.2d 810 (S.D. Ind. 2010).
61 See id.
62 Id. at 815 ("Plaintiffs have sued a corporation under the ATS for an alleged violation of international law. The Court has jurisdiction to hear Plaintiffs' claim and concludes that Plaintiffs have failed to establish a legally cognizable claim because no corporate liability exists under the ATS.")
63 See Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1019, 1024 (7th Cir. 2011).
were discredited on the merits. \textsuperscript{64} \textit{Doe v. Exxon Mobile} reached a similar conclusion when Circuit Judge Rogers agreed with the appellants’ that, contrary to the views of previous tribunals, “neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations.” \textsuperscript{65} The Exxon court emphasized that the claim did not suffer any “jurisdictional” weakness, \textsuperscript{66} and actually criticised the Kiobel decision for deliberately ignoring that a corporate liability rationale in all legal systems could constitute a source of customary international law providing for a practical recognition of ‘corporate personhood’ worldwide. \textsuperscript{67} Corporate personhood, it added, had been recognized in a similar way in \textit{Barcelona Traction}, where the ICJ emphasized the “wealth of practice already accumulated on the subject in municipal law.” \textsuperscript{68}

The argument formulated in \textit{Sosa} that a “restrained conception of the discretion a federal court judge should exercise in considering anew cause of action” under the ATCA is susceptible to criticism. \textsuperscript{69} In \textit{Boimah Flomoh II}, for instance, the tribunal clearly noted that although the 1789 violations of international law under ATCA only dealt with piracy, mistreatment of ambassadors, and violation of safe conducts, “in using the broad term ‘law of nations’ the Congress allowed the coverage of the statute to change with changes in customary international

\textsuperscript{64} See id.
\textsuperscript{65} \textit{Doe v. Exxon Mobil Corp.}, 654 F.3d 11, 15 (D.C. Cir. 2011). “[T]here is not basis for corporate immunity in either the text or the history of the ATS or international law...They observe, as the Eleventh Circuit held in Romero...that the text of the ATS places no limit on who can be a defendant, by contrasting with who can be a plaintiff, and the phrase “any civil action” undermine any implied limitations not contained in the text.” See id. at 40 (citing Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008)).
\textsuperscript{66} See \textit{Exxon Mobil Corp.}, 654 F.3d at 15.
\textsuperscript{67} See \textit{id. at 53} (“corporate liability is a universal feature of the world’s legal systems and that no domestic jurisdiction exempts legal persons from liability”).
\textsuperscript{68} Id. at 53 (quoting Barcelona Traction, Light & Power Co., 1970 I.C.J. 3, 38–39 (Feb. 20)).
\textsuperscript{69} See \textit{Sosa v. Alvarez-Machain}, 542 U.S. 692, 694, 732 (2004) (“Accepting a cause of action subject to jurisdiction under § 1350 . . . courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”).
In addition, the tribunal emphasized that ATCA rules had to be valid independently from Congressional activities, essentially because ATCA was in essence enacted with the objective of making customary international law and its evolutions enforceable before U.S. courts. The Exxon tribunal remarked that although Sosa addressed whether federal courts should recognize “new cause[s] of action” under federal common law, it failed to consider whether a corporation can be forced to pay damages for the conduct of its agents in violation of the current law of nations, and to demonstrate whether corporations are immune from liability under the ATCA.

2.2 The respondent’s personality under ATCA provisions

Another argument brought forward to reject the rationale favouring corporate liability deals with the legal personality of the defendant, often presented as incompatible with the jurisdiction granted to judges under ATCA. The Boimah Flomo I court, for instance, emphasized that the TVPA only provides a cause of action for victims of torture committed by an “individual” while the term “person” was rejected by the Congress, therefore precluding corporate liability. The decision in fact, cites a copy of the House committee markup of the TVPA which received unanimous consent to change “person” to “individual.” The report’s stated purpose was “to make it clear [Congress meant to apply the TVPA] to individuals and not to corporations.” However, the Kiobel majority’s decision to rely on the TVPA’s limitations to reject the possibility that corporations, as juridical entities, might be held liable for their actions under

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70 Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011).
71 See id. at 1022 (“The United States has enacted legislation making violations of customary international law actionable in U.S. courts: it is the Alien Tort Statute. And so the fact that Congress may not have enacted legislation implementing a particular treaty or convention (maybe because the treaty or convention hadn’t been ratified) does not make a principle of customary international law evidenced by the treaty or convention unenforceable in U.S. courts.”).
72 See Exxon Mobil Corp., 654 F.3d at 54–56.
74 Id.
ATCA is questionable because ATCA provides no express restriction as to the natural or juridical personality of the respondents. It rather confers on U.S. courts broad jurisdiction to hear cases involving a violation of the norms of the law of nations and to award compensatory damages. Judge Leval reasons that “no principle of domestic or international law supports the [Kiobel] majority’s conclusion that the norms enforceable through the ATS — such as the prohibition by international law of genocide, slavery, war crimes, piracy, etc. — apply only to natural persons and not to corporations, leaving corporations immune from suit and free to retain profits earned through such acts.” As a result, he adds, “according to the rule [the decision] created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims’ claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.” It is even more interesting to note that despite its overall conclusion that there is no corporate liability rationale under customary international law and its statement that Kiobel is ‘compelling’ precedent, the Boimah Flomo I tribunal actually rejected the argument that corporate liability under ATCA was “wholly insubstantial and frivolous.” The court, instead, found that the Kiobel majority’s rule conflicted with the “law that courts not only have jurisdiction to decide whether corporations may be civilly liable under the ATS, but that [because] corporations are, in fact, liable” since the ATCA text provides no express exception for corporations.

2.3 The Nuremberg and objectives of justice arguments

75 See 28 U.S.C. §1350 (2006) (“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.”).


77 Id. at 150–51.


79 Id. (citing Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008)).
Tribunals have also tried to constrain corporate liability findings by having recourse to the limits of international criminal law regarding the matter. A way for the Kiobel court to demonstrate the lack of corporate liability rationale under customary international law was, for instance, to suggest that international criminal tribunals have never recognised jurisdiction over ‘juridical’ persons. It held, under the London Charter, that the Nuremberg trials exclusively recognised ‘individual’ liability for the violation of norms of international human rights, thereby marking a clear distinction between corporations and ‘individual persons.’ Although the military courts eventually gained the ability to declare organizations as criminally liable (for example, the Nazis or the Gestapo), this only allowed for the prosecution of corporate executives for their role in violating customary international law during World War II. It did not allow the prosecution of the corporate entities themselves. The Exxon tribunal has however rejected the Nuremberg argument, holding that the Allies during the Nuremberg trials had actually determined that corporations had committed violations of the law of nations by “knowingly and prominently engag[ing] in building up and maintaining the German war potential.”

A more convincing argument of the Kiobel decision is perhaps found in the Report of the U.N. Secretary-General on the ICTY which recently rejected jurisdiction over corporations on the ground that “[T]he ordinary meaning of the term ‘persons responsible for serious violations of international humanitarian

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80 See Kiobel, 621 F.3d at 133–34.
81 Id. at 134.
82 See id.
83 See id.
84 Doe v. Exxon Mobil Corp., 654 F.3d 11, 52–53 (D.C. Cir. 2011) (quoting Control Council Law No. 9, Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Therof (Nov. 30, 1945), reprinted in 1 ENACTMENTS 225). As scholars have observed, the corporate death penalty enforced was based on customary international law. See Exxon Mobil Corp., 654 F.3d at 52 (citing Brief for Nuremberg Scholars as Amici Curiae Supporting Plaintiff-Respondents, Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268 (2d Cir. 2011) (No.06–4800–cv)). The court reached this decision despite finding the company had been seized by German authorities, making its conduct attributable to the German government.
law’ would be natural persons to the exclusion of juridical persons.” 85 Such a proposition is supported by the Rome Statute of the International Criminal Court, which solely considers ‘individual criminal responsibility’ and restricts jurisdiction to ‘natural persons.’ 86 Additionally, a French proposal to grant the ICC jurisdiction over corporations and other “juridical” persons was discarded on grounds that “criminal liability of corporations is still rejected in many national legal orders and thus would pose challenges for the ICC’s principle of “complementarity.” 87

The Nuremberg argument is not the only argument rejected by tribunals regarding the notion of corporate liability in relation to international criminal law. The Boimah Flomo I decision emphasized that international corporate liability finding would not fit within international criminal law’s goal of bringing individual perpetrators to justice. 88 The tribunal concluded that permitting corporate liability under ATCA would weaken the deterrent effect of litigation against individual actors (deemed less resourceful than international groups) and dissuade plaintiffs from suing an individual employee if the liability of “the deeper-pocketed corporate employer” could be found. 89 Ironically, the tribunal justified its position by emphasizing that the plaintiffs had made no attempt to sue the low-level managers whom “encouraged” the incriminating behavior. The decision, therefore, held that using ATCA to ‘punish’ corporations rather than to ‘compensate’ victims “runs counter to internationally accepted norms . . . because innocent third parties will be called upon to subsidize the malfeasance of any

87 See Kiobel, 621 F.3d at 137 (quoting Albin Eser, Individual Criminal Responsibility, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 767, 78 (Antonio Cassese et al. eds., 2002) (discussing how the history of international law, according to the Court, did not favour the prosecution of corporations).
88 See generally Flomo v. Firestone Natural Rubber Co., 744 F.Supp.2d 810, 817–18 (S.D. Ind. 2010) (discussing the reasons why international criminal law is best focused on the individual).
89 Id. at 817.
plantation employees who (allegedly) were responsible for Plaintiffs’ plight. Compensation for victims, nevertheless, might not have been achieved regardless because the courts focused exclusively on who was involved to the detriment of what happened. As one commentator noted, Kiobel (but also Boimah Flomo I) most likely “misconstrued” past decisions by holding that corporations cannot be held liable before U.S. courts. For Keitner, international law provides the ‘conduct-regulating’ rules applied under the ATCA, but U.S. courts are essentially in charge of the attribution of such prohibited conducts to specific facts. Similarly, it has been argued that “if there is conduct, then the status under international law of whoever is alleged to have done it is not relevant. The existence of ‘what’ is enough, and the ‘who’ is merely to show that this named defendant did it; further consideration of the juridical qualities of the defendant is irrelevant.” In the above decisions, however, the juridical personality of the respondent constituted the essential element of consideration, which led the courts to conclude that international law did not prohibit corporate criminal conducts because corporations were not subjects of international law.

2.4 Consequences regarding corporate immunity

Furthermore, the decisions could be criticised on the ground that failing to admit jurisdiction over claims involving international corporations and foreign plaintiffs would aggravate a polemical phenomenon of corporate impunity and immunity. On the one hand, impunity was generated by the courts’

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90 Id.
91 Id.
94 See Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010); Flomo, 744 F.Supp.2d at 818. In both instances, the courts ruled only on the issue of jurisdiction over corporate offenders.
refusal to recognize jurisdiction over catastrophes involving foreign corporations on the ground of *forum non conveniens*, as seen in the *Union Carbide* case. The results of such removed cases like *Union Carbide* have been largely limited by territorial jurisdiction issues. This has led some commentators to denounce the impunity of the parent firm and the related inability of the victims to obtain reparation or compensation. On the other hand, the *Kiobel* decision illustrates a corporate immunity debate launched in *Sosa v Alvarez-Machain*, where the tribunal did not reject corporate liability, but rather denied having jurisdiction over a claim founded upon violations of international law which it deemed nonexistent at the time of ATCA’s enactment. Although the *Kiobel* majority denied having created a corporate immunity precedent, it nevertheless ignored the alleged acts on the basis that corporate liability was not an avenue for liability under international law. Therefore, in both cases the respondents remained immune from liability, which suggests that international corporations might overall remain free to behave questionably as a result of the reluctance of the courts to admit either *forum conveniens* or the existence of a corporate liability principle under customary international law. In fact, such an argument was relied on by Firestone in *Boimah Flomo II*, where it claimed that “conduct by a corporation or any other

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95 See *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 205 (2d Cir. 1987).
96 See *Amnesty Int’l*, supra note 21 (arguing that the Indian prosecutions have dragged on for man years and have not been effective because companies and officers have refused to stand trial).
97 See id. (denouncing the convictions of Indian citizens for the Union Carbide disaster as inadequate justice for the victims); see also Justin Frewen, Op-Ed, *The Lessons of Bhopal and BP*, WORLDPRESS.ORG, Sept. 5, 2010, http://www.worldpress.org/Asia/3618.cfm#down (arguing that the *Union Carbide* settlement did not provide adequate compensation to its victims).
98 “We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity . . . . [T]he Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law . . . .” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). This argument is also discussed in Part B of the Court’s opinion. See generally id. at 703 (providing further detail on the Court’s reasoning).
99 See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010).
100 See id. Specifically, the Court ignored complaints of extrajudicial killing, crimes against humanity, torture, arbitrary arrest, violation of rights to life, liberty and security, forced exile, and property destruction. See id. at 123.
entity that doesn’t have a heart-beat can never be a violation of customary international law, no matter how heinous the conduct.” Such a result would mean that although a pirate could be sued under ATCA, a pirate corporation could not.

The Boimah Flomo II tribunal however agree with Firestone’s argument, and instead held contrary to the findings of previous decisions. It insisted that there must be a first time for anything — including corporate liability — and rejected the idea that international corporate liability is inconsistent with the objectives of international criminal law as suggested in Boimah Flomo I. Instead, the Court found that although traditional criminal penalties did not neatly comport with criminal punishment of corporations, the same could still be fined. This type of punishment would be especially appropriate if a crime furthered a corporation’s financial interest and/or was directed by company officers. Fining the corporation, in addition, would be a way of reaching and implicating the shareholders in giving the board incentives for greater control.

2.5 International law v. International policy

Having said this, it remains difficult to determine how far Congress originally intended to embed the ATCA into international law. In contrast with Sosa, the Filigarta case clearly

101 Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011).
102 “[S]uppose no corporation had ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be . . . . We have to consider why corporations have rarely been prosecuted criminally or civilly for violating customary international law; maybe there’s a compelling reason. But it seems not . . . .” Id. at 1019.
103 See id. at 1018 (referring to New York Center and Hudson R.R. v. United States, 212 U.S. 481, 492–94 (1909)). The Court added that “[i]f a corporation complicit in Nazi war crimes could be punished criminally for violating customary international law, as we believe it could be, then a fortiori if the board of directors of a corporation directs the corporation’s managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation can be civilly liable.” Id. at 1019.
104 See id.
105 The Sosa decision noted: “There is no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; there is no record even of debate on the section . . . despite considerable scholarly attention, it is fair to say that a consensus understanding of what congress intended has proven elusive.” Sosa v. Alvarez-Machain, 542 U.S. 692, 718–19 (2004); see also
held that the law of nations had to be interpreted as a living document by taking into account the evolutions of the international community and could not be left stagnating to what the drafters understood as international law when ATCA was enacted.\footnote{Christensen, supra, note 40 at 1225 (arguing that legal historians have failed to reach a conclusion on the intended scope of the ATCA); Logan Michael Breed, \textit{Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad}, 42 VA. J. INT’L L. 1005, 1014 (2001) (showing that historical and legislative sources reveal little about the original purpose of the ATCA).} Similarly, in \textit{Doe v Exxon Mobil}, the tribunal found that ATCA originally represented a policy move aiming at ensuring that the U.S. would respect their obligations towards the law of nations.\footnote{Compare Filigarta v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (arguing in favor of a broad application of the ATCA) \textit{with Sosa}, 542 U.S. 718–19 (holding ATCA was created with a limited scope).} While today’s crimes under public international law would be excluded from ATCA’s original scope of action under the \textit{Sosa} argument, David Christensen suggests that actionable norms should be extended to \textit{jus cogens} violations of human rights (genocide, war crimes, crimes against humanity, slavery, piracy, torture, and extrajudicial killing).\footnote{See Doe v. Exxon Mobil Corp., 654 F.3d 11, 52–53 (D.C. Cir. 2011). Breed argues that the practices of American firms are “often the most visible and pervasive representations of the United States to both the populations and the government of developing countries”, so that corporations, one way or another, have an impact on U.S. policy as “de facto ambassadors” spreading American economic and political values acting as “visible extensions of market norms and cultural preferences.” Breed, supra note 105 at 1012.} As he notes, by limiting violations to \textit{jus cogens} norms as a “minimum threshold”, the federal courts would greatly reduce the risk of incurring foreign policy concerns, since \textit{jus cogens} norms are by definition universal, obligatory, and non-derogable.\footnote{See id.} The proposition would, however, have a limited effect because it would make corporations liable only for those crimes, reducing considerably their liability for less heinous violations of human rights. For instance, corporate violations of civil and political rights codified in the ICCPR (such as protestors repression as in \textit{Wiwa} and \textit{Exxon}) and the economic social and cultural rights codified under ICESCR (say where corporations deny their employees the enjoyment of just and favourable conditions of work, fair wag-

es, or safe and healthy working conditions) would remain virtually unprotected. In addition, such a limitation would mean that the Bhopal accident and environmental abuses would most likely escape the scope of ATCA.

The political nature of the corporate liability debate is a significant obstacle to establishing the scope of ATCA under international law and therefore needs to be considered. Admitting jurisdiction over corporations for their worldwide acts would have significant policy impacts for which the courts have clearly tried to avoid. In Sosa for instance, the tribunal noted that overlooking new norms of international law “should be undertaken, if at all, with great caution” because it would “raise risks of adverse foreign policy consequences.” This point was confirmed in Boimah Flomo I, where the court similarly held that permitting corporate liability under customary international law would essentially constitute “a policy judgment better made by a legislature than a federal court — that facilitating victim compensation is more desirable than deterring individual misconduct.”

Refusing to render a law-making decision, the Court looked for congressional guidance on the topic of corporate liability. The only guidance that the Court found, however, was a pre-Sosa ruling which considered but rejected corporate liability for ATCA human rights violations anterior to the TVPA. While Judge Cabranes firmly claimed that “the grave policy considerations” which lie behind the Kiobel decision did not “drive” the tribunal’s conclusion, the arguments attached to the Kiobel Court of Appeal re-hearing denial rather suggest otherwise. Judge Jacobs, in reiterating the Court’s holding, clearly linked corporate liability under public international law

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110 See Breed, supra note 105 at 1009–13 (arguing that corporations frequently violate human rights codified in various treaties with no consequence).


112 Id. at 747.


114 See id.

115 See Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), re’g denied, 642 F.3d 268, 272 (2d Cir. 2011).
to their policy implications. Corporations, he noted, are economic assets and “creatures” which each state has an interest to protect. Therefore, he wrote, they cannot be part of the “enemies of all mankind” which the international community and international law traditionally fight. As a result, he emphasized the lack of “consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them . . . .” This argument is however more convenient than convincing, and demonstrates that the decision was — one way or another — driven by the fear that “such proceedings have the natural tendency to provoke international rivalry, divisive interests, competition, and grievance . . . .” Overall, Judge Jacobs’ opinion highlights how significant the policy nature of the decision is. He writes: “These policy considerations explain why no international consensus has arisen (or is likely to arise) supporting corporate liability.” Corporations may only be subject to corporate governance and government regulation at home. Policy-making will undermine international law until corporate abuses “proliferate” and achieve the level of organized crime. Suggesting that ignoring the corporate liability debate would be tantamount to “giving juridical entities carte blanche to violate fundamental human rights,” Judge Leval further questioned Judge Jacobs’ argument, indicating that the failure of the court to admit jurisdiction

116 See id. at 270–71 (Jacobs, J., concurring).
117 See id. at 270.
118 Id.
119 Id.
120 Id.
121 It should be noted, however, that Judge Cabranes’ opinion is more moderated than Judge Jacobs’. Cabranes finds that “[s]hould Congress, in the exercise of its legislative discretion, wish to alter the scope of jurisdiction under the ATS, the courts will be bound to follow its direction.” Id. at 272 (Cabranes, J., concurring).
122 See id. at 270 (Jacobs, J., concurring).
123 See id. at 271 (“Maybe one day, pirate corporations will proliferate; if so, however, an international consensus may come to consider the principle of corporate liability . . . . In short, this case has no great practical effect except for the considerable benefit of avoiding abuse of the courts to extort settlements.”).
124 Id. at 273 (Leval, J., dissenting).
over the case had the effect of policy-making. By refusing to render a decision, the Court created an arbitrary result insofar as “in seizing the initiative to make foreign and domestic policy by curtailing the law of nations, the majority [had] arrogated to itself a power that might appropriately be exercised by the Congress or by the Executive Branch, but does not properly belong to the courts.”  

The unwillingness of U.S. courts to involve themselves in international politics has been the subject of much discussion. Peter Muchlinski, for instance, argues that U.S. courts post-

*Union Carbide* have rejected the idea of serving as tribunals for claims against corporate abuses by U.S. groups, while the courts in *Sosa* and *Boimah Flomo I* have indicated that U.S. courts are not willing to become involved in international policy matters at all, much less serve as a global forum for litigation brought against multinational firms in general. In the absence of an international mandate endorsing such a function for U.S. courts, it seems plausible that the United States would end-up being accused of ‘judicial imperialism,’ and the actions of the courts might be seen as a self-proclaimed authority to interpret customary international law. As Judge Jacobs adroitly summarizes: “[I]s it clear that the nations of the earth would be complacent about having these matters decided in U.S. courts?”

A second argument suggesting that U.S. Courts should not be expected to take such a stand is that other states have clearly refused to do so, expressly declining to enact any regulatory

125 Id.

126 See Muchlinski, *supra* note 51, at 155.

127 See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 747 (2004) (holding that it is not the role of U.S. courts to play any role at all in foreign policy); *see also* *Flomo v. Firestone Natural Rubber Co.*, 744 F.Supp.2d 810, 818 (S.D. Ind. 2010) (“Recognizing corporate liability under the ATS would further exacerbate the disparate treatment between citizens and aliens in American courts and would promote forum shopping.”).

128 See *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 270 (2d Cir. 2011) (Jacobs, J., concurring).

129 Id.
framework allowing for the recognition of such jurisdiction. Indeed, some states have rejected the idea of holding their own corporations liable for wrongdoing committed abroad. For instance, in 2010 the Canadian House of Commons rejected a bill, which would have authorized the Department of Foreign Affairs to investigate allegations of human-rights abuses committed abroad by Canadian mining companies, the Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act. The Act would have penalized corporations found to be involved in illegal behaviour by limiting their Export Development funding and embassy promotion. In a press statement however, the Prospectors and Developers Association of Canada (PDAC) and the Mining Association of Canada (MAC) suggested that the industry’s commitment to CSR was already significant and largely sufficient, so that new Act would have had no effect and would have rendered Canadian miners uncompetitive. The House of Commons appears to have found the later argument persuasive, thereby obviating customary law as a justification for international corporate liability. Of course, simply because other states have rejected the idea of holding their corporations liable does not mean that U.S. courts cannot do otherwise, but it suggests that customary law cannot be the basis for such a move, and that the U.S. courts suffer no obligation to act as a forum for such disputes. Suggesting that U.S. courts should not be expected to overlook the issue of international corporate activities however does not mean that they should not do it if presented with an opportunity to do so.

130 See Laura Stone & Mike Barber, Bill to end abuses in overseas mines up for ‘tight’ final vote, CANWEST NEWS SERVICE (Oct. 26, 2010); see also Antoine Martin, Note on... the Canadian mining Bill on Corporate Accountability (the buried one), INT’L. L. NOTEPAD (Nov. 11, 2010), http://internationallawnotepad.wordpress.com/2010/11/11/canadian-mining-corporate-accountability/.


Congress, indeed, gave a clear mandate to courts to consider the claims of torture victims, which *Sosa* nevertheless refused to consider as an indication to move forward. It is unlikely, though, that the U.S. Congress will give U.S. courts such a clear and specific mandate with regard to corporate liability in the future.\(^{133}\)

A third argument suggesting that U.S. courts should not be expected to take such a stand is that the wording of ATCA does not indicate whether the jurisdiction of U.S. courts ought to be limited to American or foreign companies or on what ground the tribunals might have jurisdiction over foreign companies for actions (or omissions) committed abroad against foreign citizens.\(^{134}\) Although some commentators suggest that ATCA essentially focuses on holding U.S. entities liable for overseas human rights violations,\(^ {135}\) several claims have actually enlarged the scope of ATCA to worldwide corporations and rendered the perspective extremely restrictive. *Kiobel*, for instance, involved companies incorporated in the Netherlands (Royal Dutch) and the United Kingdom (Shell) which placed it outside the jurisdiction of the United States,\(^ {136}\) while the *Exxon* case made absolutely no distinction as to the nationality of the defendants. The only significant requirement concerned the foreign identity of the victim and the existence of a breach of international law. Ultimately, appellants have argued that the term “any civil action” contained in the provision is inclusive and unrestricted, and the Supreme Court has observed that the ATCA “by its terms does not distinguish among classes of defendants.”\(^ {137}\) As the *Exxon* court noted, the need to address and enforce the law of nations at the federal level was among the concerns motivating the Con-


\(^{135}\) See Breed, *supra* note 105, at 1013.

\(^{136}\) See *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268 (2d Cir. 2011).

stitutional Convention and was therefore “the direct precursor” of ATCA.\textsuperscript{138} That is, “the Judiciary Act of 1789 ensured that there would be no gap in federal subject matter jurisdiction with regard to torts in violation of treaties or the law of nations [and] provided federal jurisdiction for lawsuits brought by aliens for torts in violation of the law of nations without textual limitation.”\textsuperscript{139} The court, consequently, found that “historical context offers no reason to conclude that the First Congress sought to prevent drawing the United States into a dispute between Great Britain and France,” and concluded that it would have jurisdiction over cases in which foreign MNCs are involved.\textsuperscript{140}

Involving tribunals in political and diplomatic questions could however be detrimental to the very process of effecting justice, if only because American tribunals would engage in polemical policy debates by admitting or rejecting jurisdiction. Overall, justice would be subjected to international tensions, diplomacy and partisan interests; and it would lack the impartiality it deserves. Since the content of customary international law with regards to corporations remains undefined, U.S. courts would have to accept a broad and perilous interpretative burden in deciding the content of an international corporate liability doctrine; and it is unlikely that the international community would accept being bound by U.S. rules on the matter. Commenting on \textit{Kiobel}, Professor Kenneth Anderson questions how a liability determination by U.S. courts would be accepted by the international community: “What happens, that is, when plaintiffs in Africa decide to start using the ATS to sue Chinese multinationals engaged in very, very bad labor or environmental practices in some poor and far away place? Does anyone believe

\textsuperscript{138} See Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011).

\textsuperscript{139} \textit{Id.} at 45.

\textsuperscript{140} \textit{Id.} at 47 (“To remedy the problems identified in the preceding years, the ATS provided federal courts with jurisdiction over “all causes” in violation of the law of nations. The text demonstrates that the ATS was not limited to criminal conduct and did not exclude corporate defendants. Congress was focused not on whether the acts were criminal or the defendant’s identity but rather on the right that had been violated (a right under “the law of nations or a treaty of the United States”) and the plaintiff’s identity (“an alien”). Together, these two factors defined a class of cases sufficiently important for Congress to grant jurisdiction over “all causes where an alien suits for a tort only in violation of the law of nations or a treaty of the United States.”).
that China would not react — in ways that others in the world might like to, but can’t? Does anyone believe that the current State Department would not have concerns — or more precisely, the Treasury Department?"\textsuperscript{141} For instance, regarding agricultural development, it bears considering whether African states would even let their citizens bring claims against Chinese investors before U.S. courts.\textsuperscript{142}

**Conclusion**

The *Kiobel* decision illustrates a major but ongoing debate. Judge Leval’s arguments capture the widespread concern about the gap in accountability, which would leave victims of corporate accidents or crimes indefinitely uncompensated.\textsuperscript{143} Although the *Sosa* decision denied having jurisdiction over a claim founded upon violations of international law which it deemed nonexistent at the time of the enactment of ATCA, it did not reject the notion of corporate liability as such, unlike the court in *Kiobel*. The *Kiobel* court’s decision that corporations are not liable for their international wrongs because (1) customary law does not recognize corporate liability and (2) courts have no jurisdiction over juridical persons, has subsequently been criticized because it fails to compensate victims, and by the same token fails to contribute to the elaboration of international justice.\textsuperscript{144} The *Boimah Flomo* decision, by contrast, em-

\textsuperscript{141} Requejo, *supra* note 93.


\textsuperscript{144} *Flomo* v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011) (“The issue of corporate liability under the Alien Tort Statute seems to have been left open in an enigmatic footnote in *Sosa* (but since it’s a Supreme Court footnote, the parties haggle over its meaning, albeit to no avail). All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable.”) (international citations omitted).
phasized that corporations are liable for their actions under ATCA, and characterised Kiobel as a ‘compelling’ precedent.\textsuperscript{145}

At the same time, the compatibility of international corporate liability with the objectives of ‘international justice’ is unclear. The Kiobel court questioned the need to pursue corporations by emphasizing that the objectives of criminal punishment may ultimately prove incompatible with their application to corporations, which as ‘fictitious’ juridical entities “have no body, no soul, and no conscience, [and are] incapable of suffering, of remorse, or of pragmatic reassessment of its future behaviour” and cannot be incapacitated by imprisonment.\textsuperscript{146} The Boimah Flomo I decision, similarly, held that the TVPA provides a cause of action for victims of torture committed by “individuals” only, which unlike the term “person” precluded corporate liability.\textsuperscript{147} In other words, although the tribunal made it clear that corporations are in theory liable under ATCA, the role of international criminal law was to bring perpetrators to justice, so that permitting corporate liability under ATCA would have the consequence of weakening the deterrent effect of litigation for individual actors and dissuade plaintiffs from suing an individual employee if the liability of “the deeper-pocketed corporate employer” could be found.\textsuperscript{148} The Kiobel holding, in other words, would have been acceptable if the tribunal had (at least) looked into the existence of individual liability, but it did not.

Concerns about the lack of a corporate liability rationale and its compatibility with concepts of international justice are not unanimously shared. While it has been contended that states have not taken many steps to support the existence of a corporate liability rationale under customary international law, that Canadian Act indicates otherwise. Although there has been increasing pressure to place the burden on states to regulate mul-

\textsuperscript{145} Flomo v. Firestone Natural Rubber Co., 744 F.Supp.2d 810, 816 (S.D. Ind. 2010) (elaborating upon three reasons why the Kiobel decision should be regarded as “compelling.”).

\textsuperscript{146} Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 168 (2d Cir. 2010)

\textsuperscript{147} See Flomo, 744 F.Supp.2d at 817.

\textsuperscript{148} Id.; see also Martin, supra note Error! Bookmark not defined..
international corporations, international organizations such as the Human Rights Council have not helped either. John Ruggie’s 2010 report, for instance, provided a description of corporate obligations under international law which remains close to the approach followed in the court’s reasoning. The report states that “the term ‘responsibility’ to respect [human rights], rather than duty, is meant to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies,” since (as argued by the Kiobel majority) the existing corporate liability norms of international law remain limited to specific subject-matters.

The Kiobel decision, on the other hand, provides an opportunity to discuss whether U.S. courts should be expected to involve themselves in issues of international justice dominated by policy implications where other states have declined jurisdiction. Even granting that there exists a need for a tribunal having jurisdiction over such cases, placing that burden on U.S. courts raises a separate issue. What would happen if plaintiffs in Africa relied on ATCA to sue Chinese multinationals acting in violation of customary international law? It seems likely that China would assert the lack of jurisdiction of U.S. courts to rule on the legality of activities of foreign companies operating abroad, while the U.S. courts would end up being accused of hegemony, resulting in a net detriment to human rights protection. As the Boimah Flomo I decision concludes, a finding of corporate liability overall constitutes “a policy judgment better made by a legislature than a federal court, that facilitating victim compensation is more desirable than deterring individual


151 See Requejo, supra note 93. Question formulated by Professor Kenneth Anderson.
The issue of human rights protection, however, remains undermined by stability concerns and ultimately the balance remains unresolved, leaving international corporations in a state of immunity and impunity. As Judge Leval notes:

> If the Department of State advised us that it is in the interest of the nation’s foreign policy that corporations be exempted from liability in suits under the ATS, or that a particular suit be dismissed under *forum non conveniens* or in the interests of international comity, we courts should of course give great deference to such advice. And if Congress passed a statute exempting corporations from liability under ATS, that would establish binding law. But there is no such statute . . . . The law of nations, in its objective to protect basic human rights, and the Alien Tort Statute, in its objective to enforce the law of nations, have been substantially weakened – in the service of the foreign policy of two judges.¹⁵³

While Muchlinski interpreted the *Union Carbide* decision as indicating that U.S. courts were not willing to become a global forum for litigation brought against U.S. multinational firms,¹⁵⁴ more recent decisions suggest that U.S. courts are not willing to delve into any international policy-making at all, much less to become a global forum for litigations brought against multinational firms. Given the tension between the diplomatic, political, and ethical dimensions of the issue, it may be fairly asked: can you blame them?

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¹⁵² *Flomo*, 744 F.Supp.2d at 817.

¹⁵³ Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268, 277 (2d Cir. 2011) (Leval, J., dissenting).

¹⁵⁴ See MUCHLINSKI, supra note 51, at 155.
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