

CORPORATE LIABILITY AND HUMAN RIGHTS ABUSES ABROAD

By

MARIELA CABRERA

---

A Thesis Submitted to The Honors College

In Partial Fulfillment of the Bachelors degree  
With Honors in

Law

THE UNIVERSITY OF ARIZONA

M A Y 2 0 1 6

Approved by:

---

Najwa Nabti  
James E. Rogers College of Law

**Abstract:**

This legal note analyzes the legal issues raised when suing corporations in the United States federal courts under the Alien Tort Statute (ATS). Part I discusses the elements needed to bring a claim under ATS and the history behind the statute. Part II describes the U.S. Supreme Court's 2013 decision in *Kiobel* and what it represents. This section also covers why holding corporations accountable is important, focusing on globalization, the corporation's power, and their role; and discusses the importance of seeking remedies for human rights victims. Part III examines whether ATS is still viable for suing corporations for human rights abuses after *Kiobel* and the possible alternatives available for holding corporations accountable including: regional human rights courts, naming and shaming, or suing in domestic courts where the violations occur.

## Table of Contents

### Introduction

#### I. Background

- A. Alien Tort Statute and Elements for a Claim
  - i. History
  - ii. Elements for an ATS Claim.
- B. ATS and Human Rights Abuses
- C. Claims under Alien Tort Statute Against Corporations
  - i. *Pre-Kiobel*
  - ii. *Kiobel*

#### II. Issue with Corporate Liability and Alien Tort Statute

- A. Why is Corporate Liability important?
  - i. Remedies for Human Rights Victims
  - ii. Globalization, Corporations, and their increasing power.
- B. Obstacles faced When Suing a Company under ATS

#### III. Resolution

- A. ATS still viable for Human rights abuses after *Kiobel*
- B. Alternative Means for Holding Corporations Accountable for Human Rights Abuses
  - i. Alternative Means within the ATS
  - ii. International Alternative for Human Rights Violations
    - a) Regional Human Rights Courts
    - b) International Criminal Court
  - iii. Naming and Shaming
  - iv. Suing in Domestic Courts

### Conclusion

## Introduction

Globalization has encouraged corporations to move across borders. Corporations can now have their headquarters in one state and their operations in another. These corporations might sometimes engage in activities that violate laws, specifically human rights under international law.

Corporations may become involved in human rights abuses through different scenarios. For example, companies, managers, shareholders, or employees may be directly responsible for committing human rights violations. Less directly, companies may provide items used to commit human rights abuses to governments and authorities.<sup>1</sup> In both occasions, corporations should be liable for such practices. Corporate liability refers to the legal responsibility businesses have to when an employee (an “agent”) or the company violate the law.

When corporations take their companies and activities abroad, they are capable of causing acts that damage the citizens of another country. Those acts can include “environmental degradation, forced relocation, violation of basic human rights, and violation of civil and political rights.” Basic human rights violations are commonly associated with arbitrary detention, torture, disappearance, and summary execution<sup>2</sup>. Corporate involvement in such violations – through the use of corporate employees or government forces working closely with the

---

<sup>1</sup> "Human Rights Council Discusses The Right To Health And Human Rights And Transnational Corporations."(n.d.):Web.1May2015.

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14686&LangID=E>

<sup>2</sup> Gregory G.A. Tzeuschler, “Corporate Violator: The Alien Tort Liability of Transnational Corporations For Human Rights Abuses Abroad” *Colombia Human Rights Law Review*, Vol. 30, Issue 2 (Spring 1999), pp. 359-420.

corporations – is the key subject of this note.

Even though some of these cases might have happened abroad, the people who suffered human rights violations have sued the offenders in U.S. federal courts under the Alien Tort Statute (ATS), especially in cases where the defendants have been based in the United States. The ATS is a federal law that gives U.S. federal courts jurisdiction to hear lawsuits filed from a foreign person for torts committed in violation of international law and human rights abuses.<sup>3</sup>

The ATS states that: "The district courts shall have original jurisdiction in 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."<sup>4</sup> ATS was first adopted as part of the Judiciary Act of 1789.<sup>5</sup> In order for the court to hear the case, the plaintiff must be an alien, the defendant must have committed a tort, and the tort must violate either a treaty or the law of nations. Since the first lawsuit under ATS for human rights violations in 1980, *Filártiga v. Peña-Irala*, courts have disagreed with the extent of the Statute's reach. Most recently, in *Kiobel v. Royal Dutch Petroleum Co.*, the U.S. Supreme Court restricted the ability of plaintiffs to file suit against corporations.

This note seeks to analyze the legal issues raised when suing corporations in U.S. federal

---

<sup>3</sup> "Alien Tort Statute" *The Center for Justice and Accountability: bringing human rights abusers to justice* The Center for Justice and Accountability. n.d. Web. 10 Aug 2015

[www.cja.org/article.php?id=435](http://www.cja.org/article.php?id=435)

<sup>4</sup> 28 U.S.C.A. § 1350

<sup>5</sup> The Judiciary Act of 1789 established the structure and jurisdiction of the federal court system. Although the act has been amended throughout the years, "the basic outline of the federal court system established by the First Congress remains largely intact today." See more:

<http://www.loc.gov/rr/program/bib/ourdocs/judiciary.html>

court under the ATS and the implications this may have for corporations. In order to understand how the Statute functions and its importance to human rights victims, Part I will discuss the statute, its enactment, and the elements needed to bring a claim as well as the statute's history of being used in courts to sue individuals and then corporations for human rights violations.

Part II will describe the issues that arise from suing corporations under the ATS after the Supreme Court's 2013 decision in *Kiobel*. Furthermore, this section will also cover why holding a corporation accountable is important focusing on globalization, the power corporations hold, and the role they play. Lastly, this section will discuss the importance of seeking remedies for human rights victims.

Part III will focus on describing whether ATS is still viable for suing corporations for human rights abuses after *Kiobel*. This section will also describe possible alternatives available for holding corporations accountable including: regional human rights courts, naming and shaming, or suing in domestic courts where the violations occur.

## **I. History of the Alien Tort Statute**

Alien Tort Statute was first adopted in 1789. It is a federal law that allows filing lawsuits in a United States court by a foreign citizen when in violation of the law of nations. When first adopted, not many cases applied ATS to enforce international human rights law.

### **A. Alien Tort Statute and Elements for a Claim**

#### **i. History**

Alien Tort Statute gives the federal courts jurisdiction to hear lawsuits filed by an "alien"

for torts committed in violation of international law and human rights abuses.<sup>6</sup> The ATS states "The district courts shall have original jurisdiction in 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."<sup>7</sup>

**ii. Elements for an ATS Claim**

An ATS claim must meet the following elements: the plaintiff must be an alien (non U.S. citizens), the defendant must have committed a tort, and tort must violate either a treaty or a law of nations.<sup>8</sup> The elements for a claim in ATS are ambiguous. Such ambiguity is found in the scope of the law of nations, whether ATS grants jurisdiction to U.S. federal courts concerning violations committed outside the United States (extraterritoriality), and whether a corporation can be held liable under the statute.<sup>9</sup>

First, courts have disagreed regarding the interpretation of the "law of nations" as intended at the time of the ATS's enactment. The law of nations is defined as: "a system of rules . . . established by universal consent among the civilized inhabitants of the world; in order to decide all disputes which . . . must frequently occur between two or more independent nations,

---

<sup>6</sup> "Alien Tort Statute" *The Center for Justice and Accountability: bringing human rights abusers to justice* The Center for Justice and Accountability .n.d. Web. 10 Aug 2015  
[www.cja.org/article.php?id=435](http://www.cja.org/article.php?id=435)

<sup>7</sup> 28 U.S.C.A. § 1350

<sup>8</sup> Yang, Yihe. "Corporate Liability Under the Alien Tort Statute: The Practical Implications From Kiobel" *Western State University Law Review* (Spring 2013) pg. 195-211

<sup>9</sup> Id.

and the individuals belonging to each.”<sup>10</sup> The question is whether an individual or a corporation has committed a tort that violates the law of nations. Some offenses that violate the law of nations include: violation of safe conduct, interference with ambassadors, and piracy on the high seas. However, courts can interpret the law of nations based on current legal issues.<sup>11</sup>

The second key ambiguity – whether corporations, or only individuals, can be held liable under ATS – has also been subject to litigation. While early ATS cases pursued claims against government officials and foreign individuals, in the *Unocal* case in 2002, a corporation was sued for aiding and abetting human rights abuses caused by military and governmental actors.<sup>12</sup> In the following sections, cases brought against individuals and corporations will be discussed.

A third ambiguity in the text of the ATS – extraterritoriality – was the subject of the most recent U.S. Supreme Court case on the Statute in the 2013 *Kiobel* case, also discussed below.

### **B. Alien Tort Statute and Human Rights Abuses Cases Against Individuals**

In 1980, for the first time, the Second Circuit held in *Filártiga v. Peña-Irala*, that the Alien Tort Statute provides jurisdiction over claims for violations of international human rights law. In 1979, the family of Joleito Filártiga, all Paraguayans, filed a lawsuit against Peña in a federal court in Brooklyn, New York under the ATS section 1350. Peña, when he was the Inspector General of Police in Asuncion, Paraguay, kidnapped and tortured their son, Joelito.

The Filártiga family had applied for permanent political asylum in the United States. The

---

<sup>10</sup> Danforth, Matthew. “Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations” *Cornell International Law Review* (Fall 2011) p. 660-690.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*



claim prevailed because Peña, also a Paraguayan, was living in New York with a visitor's visa at the moment of filing the claim. The court held "whenever an alleged torturer is found and served with process by an alien within our borders, section 1350 provides federal jurisdiction."<sup>13</sup>

After the decision in *Filártaga*, many lawsuits have been filed under the ATS against human rights violators. The lawsuits have prevailed in court and have not been dismissed under the ATS. The results have been very successful for the plaintiffs even though plaintiffs have not been able to collect full damages, because the defendants usually flee the country before a decision was made.<sup>14</sup> Plaintiffs are extremely happy to be able to tell their story in court and receive favorable decisions.<sup>15</sup> Plaintiffs also seek to use their legal declarations as a tool to deter future human rights violations.<sup>16</sup>

Twenty-four years after *Filártaga*, the U.S. Supreme Court decided its first major case under the ATS in 2004. In *Sosa v. Alvarez-Machain*, the Supreme Court upheld the application of the ATS to widely accepted international human rights violations and largely agreed with the reasoning in *Filártiga*.<sup>17</sup> In this case, a DEA agent was killed by a cartel in Mexico. The DEA

---

<sup>13</sup> *Filártiga v. Peña-Irala* 630 F.2d 876 (1980)

<sup>14</sup> *Id.*

<sup>15</sup> For more information refer to Section II: Why Corporate Liability is important? in this note

<sup>16</sup> Gregory G.A. Tzeuschler, "Corporate Violator: The Alien Tort Liability of Transnational Corporations For Human Rights Abuses Abroad" *Colombia Human Rights Law Review*, Vol. 30, Issue 2 (Spring 1999), pp. 359-420.

<sup>17</sup> Hackett, Kate and Gerard Morales. "Human Rights Litigation Under the Alien Tort Statute: Beware of Business Arrangements with foreign actors that have poor human records." *Practical Litigator* (May 2010) n.pag.

found that Alvarez was responsible for DEA agent's death. However, the Mexican government would not extradite Alvarez to the United States. Therefore, Mexican nationals, including Sosa, were hired to bring Alvarez by force. Alvarez sued Sosa and the other Mexican nationals who kidnapped and brought him to the United States.

The Supreme Court held that an individual could bring suit under the ATS. However, the case emphasized that the Court would recognize "narrow" claims of international law against human rights abuses. Such claims, it held, "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 we have recognized."<sup>18</sup> The court compared Alvarez's claim to the traditional categories of the law of nations (safe conduct, piracy, etc), and found that his claim did not fall into those traditional categories.

### **C. Claims under Alien Tort Statute Against Corporations**

ATS has been used to file lawsuits against individuals for human rights violations, and now corporations. In order to understand why a corporation can be sued under ATS, it is important to examine what constitutes a corporation.

A corporation is defined as an "entity having authority under law to act as a single person distinct from the shareholders who own it..."<sup>19</sup> In order to be considered a corporation in the United States, a business first applies in the state where it will be stationed. States might also

---

<sup>18</sup> *Doe v. Unocal Corp* 124 S.Ct. 2739 (2004)

<sup>19</sup> Martin, Emily M. "Torture, INC: Corporate Liability Under the Torture Victim Protection Act." *Northern Illinois University Law Review* (Fall 2010) 175-208 citing the Black Law

Dictionary reference

require out of state corporations to register in their state before conducting business there.<sup>20</sup>

Thus, the law treats corporations as a legal person, who can be sued and pursue a lawsuit.<sup>21</sup>

Corporations implicated in ATS lawsuits involving human rights violations are usually multinational or transnational corporations.

**i. Pre-*Kiobel v. Royal Dutch Petroleum Co.***

For almost twenty years judges interpreted ATS as a mean to redress human rights abuses. But it was not until 2002 that a corporation was first held liable for such violations. Even though the case was settled out of court, *Doe v. Unocal Corp.* marked the first instance a corporation was successfully held accountable for human rights violations under the ATS.<sup>22</sup>

In *Doe v. Unocal Corp.*, Unocal Corporation utilized Myanmar military forces to build an oil pipeline in Burma. The Myanmar military murdered, raped and tortured local villagers. The Ninth Circuit Court of Appeals recognized Unocal's role in the atrocities committed by members of the Myanmar military and held Unocal liable for aiding and abetting liability these crimes. Significant evidence pointed that Unocal officials were aware of such atrocities.<sup>23</sup>

After *Doe v. Unocal Corp.*, the Second Circuit expanded on aiding and abetting liability under ATS in *Khulumani v. Barclay Nat'l Bank Ltd.* It held that:

---

<sup>20</sup> Martin, Emily M. "Torture, INC: Corporate Liability Under the Torture Victim Protection Act." *Northern Illinois University Law Review* (Fall 2010) 175-208 citing the Black Law Dictionary reference

<sup>21</sup> Id.

<sup>22</sup> Garvey, Michael. "Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Legislative Perogative" *Boston College Third World Law Journal* (Spring 2009) n.pag.

<sup>23</sup> Id.

“A defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.”<sup>24</sup>

After the *Unocal* case, ATS claims against corporations increased substantially.<sup>25</sup> However, “the Second Circuit only flirted with ATS corporate civil liability in cases like *Khulumani* until *Kiobel*.”<sup>26</sup>

**ii. *Kiobel***

In 2010 the Supreme Court of the United States ruled in *Kiobel v. Royal Dutch Petroleum Co.* that the ATS does allow claims against corporations as long as the conduct “touch and concern” the United States. The court then dismissed claims by Nigerian nationals alleging various corporations aided and abetted human rights violations.<sup>27</sup> The Supreme Court issued its opinion in *Kiobel* in April 2013, holding that “all the relevant conduct took place outside of the

---

<sup>24</sup> Danforth, Matthew. “Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations” *Cornell International Law Review* (Fall 2011) p. 660-690

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Neil A.F. Popović “Corporate Liability for Human Rights Violations after *Kiobel*: Judge Scheindlin Opens the Door” *Travaux: The Berkeley Journal of International Law Blog* (25 April 2015) n. pag.

United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”<sup>28</sup> However, it did not determine whether corporations could be held accountable for violations abroad where the claims had more of a connection that touched and concerned the United States.<sup>29</sup>

## **II. Issue with Corporate Liability and Alien Tort Statute**

Corporations shall be hold accountable for actions that violate fundamental human rights. After *Kiobel*, the Alien Tort Statute might not be viable anymore.

### **A. Why is Corporate Liability important?**

It is important for corporations to be held accountable for human rights abuses for several reasons. First, human rights victims should have judicial remedies. Second, with globalization, corporations are gaining more power. Corporations now have their headquarters in one state, their shareholders in another, and their operations in others. Besides the corporation’s power, the international economy is becoming more integrated.

#### **i. Judicial Remedies (ATS) for Human Rights Victims**

Many victims of human rights abuses have brought suit against corporations in a federal court. Many of these cases have not been successful. Most have settled out of court and others such as *Kiobel*, where they find that the allegations did not touch and concern the U.S

---

<sup>28</sup> *Moncrieff v. Holder* 133 S. Ct. at 1699 (2013)

<sup>29</sup> “Alien Tort Statute” *The Center for Justice and Accountability: bringing human rights abusers to justice* The Center for Justice and Accountability .n.d. Web. 10 Aug 2015

[www.cja.org/article.php?id=435](http://www.cja.org/article.php?id=435)

As a result, victims of human rights abuses have not been able to receive remedies.<sup>30</sup> Even though the results of the cases might not have been very successful, it is important to consider what it means to the plaintiffs to file a lawsuit against human rights abusers.

In many countries, when an individual brings a suit against a corporation, the court will decide not to hear their case such as in Burma, Indonesia and Nigeria.<sup>31</sup> In other countries, there are no protections for the plaintiffs. In these cases, the U.S. courts allowing the hearing of a claim from a non-citizen is the only forum available.<sup>32</sup>

Courts allow victims to tell their story. Having this space can be of high importance for the victims. Many victims and their families who have “brought suit under section 1350 have expressed satisfaction in part for the opportunity to air their grievances publicly, complete their understanding of past events through fact-finding, and recover from the violence they have suffered.”<sup>33</sup> Other victims expressed satisfaction in knowing that they are acting for justice. Besides, they are also creating a public record for those who violate their human rights.<sup>34</sup>

If corporations are held accountable, this might provide human rights victims with a sense of justice and a possibility to put this in the past. This might also help set an example

---

<sup>30</sup> Smith, Erin Foley “Right to Remedies and The Inconvenience of Forum Non Conveniens: Opening the U.S. Courts to Victims of Corporate Human Rights Abuses. *Columbia Journal of Law and Social Problems* (Winter 2010)

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

for other corporations to not commit or facilitate human rights violations. This can send a powerful message of moral disapproval. This also helps a society that has been traumatized by human rights violations to identify the offenders, allowing national unity.<sup>35</sup>

In *Filártiga v. Peña*, the court gave the following opinion:

“In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture...Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”<sup>36</sup>

The importance of filing a claim under the ATS is high. It gives opportunities of relief for the victims and helps with future abuses. According to the Center for Justice and Accountability,

---

<sup>35</sup> Ratner, Steven R. “Corporations and Human Rights: A Theory of Legal Responsibility” *Yale Law Journal* (December 2011)

<sup>36</sup> *Filartiga v. Pena-Irala* 630 F.2d 876 (1980)

the goals for using ATS to bring suit for human rights violations are ending impunity, letting survivors speak, exposing human rights abusers, deterring future abuses and denying safe haven, and building human rights law and jurisprudence.<sup>37</sup>

Seeking justice can help put an end to impunity that may prevail in the plaintiffs' home country.<sup>38</sup> ATS empowers plaintiffs to tell their story, but also exposes the human rights abusers. Exposing them can serve as a measure of punishment. This can also play an important role in "naming and shaming" advocacy.<sup>39</sup> Finally, for human rights laws to be even more effective they must be implemented in domestic courts. Domestic courts play a central role in protecting human rights. According to the Center for Justice and Accountability, "ATS litigation has proven to be an effective way of developing a human rights framework in the U.S. legal system."<sup>40</sup>

## **ii. Globalization, Corporations, and their Increasing Power**

There has been a growing concern for human rights abuses, because transnational corporations are growing rapidly. As corporations continue to grow so does their power and therefore declining the power of the states. Mary Robinson, United Nations Commissioner for Human Rights from 1997 to 2002, has called for more corporations' accountability. She stated, "more than half of the top economies in the world are corporations not states."<sup>41</sup>

Multinational corporations tend to have more power than some states, especially those with

---

<sup>37</sup> "Part III: The Goals of our ATS Work." *Center for Justice and Accountability* available at <http://www.cja.org/article.php?id=435>

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.



low GDP. With this power, also comes their capacity to commit human rights violations with impunity.

Holding states and individuals accountable for violations of human rights is important, but if corporations are responsible for human rights violations, then they should be held accountable as well. Some of the less developed states see foreign corporations as means of income. “They desire for them to establish their business in their states, which means governments will neither have an interest nor the resources to enforce human rights laws.”<sup>42</sup> A government’s interests and desire for the company’s investments may even lead the government to help the company in violations.<sup>43</sup>

Governments may also use corporate resources to perpetrate human rights abuses.<sup>44</sup> Repressive governments or state forces may rely on corporations to supply them with tools or other items to continue with their own activities.<sup>45</sup> As we have seen in the case *In re South African Apartheid Litigation*, the companies Ford and IBM provided assistance and support by providing specialized vehicles to security forces for the South African apartheid government to commit human rights violations.

Corporations continue to grow, and so they become more independent from government control. Many of the largest corporations have their headquarters in one country,

---

<sup>42</sup> Ratner, Steven R. “Corporations and Human Rights: A Theory of Legal Responsibility” *Yale Law Journal* (December 2011)

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Id.

shareholders in several others, and operations worldwide.<sup>46</sup> If the host state does not regulate the corporation's acts against human rights, the corporation's home country might choose to abstain from regulating the corporation because of extraterritorial issues that may arise. Corporations therefore, might choose to take their activities to states that have fewer regulations including human rights protections.<sup>47</sup>

Therefore, corporations should be held accountable for their actions. Over the last decade, some corporations have been held accountable under the ATS for their complicity in human rights violations. After the decision in *Kiobel*, however, more limitations might be present.

### **B. Obstacles faced When Suing a Company under ATS**

The existence of ATS does not guarantee that filing a lawsuit against a corporation for human rights violations will be successful. Two potential obstacles are extraterritoriality and forum non-conveniens. First, *Kiobel*'s decision that holds that the presumption against extraterritorially does apply in ATS claims. However, the court might not dismiss the claim if the plaintiff can demonstrate that the claim touches and concerns the United States with sufficient force.

Besides the touch and concern element as established in *Kiobel*, in *Bauman*, the court held that in order for an ATS claim to prevail, the corporation's headquarters needed to be in

---

<sup>46</sup> Ratner, Steven R. "Corporations and Human Rights: A Theory of Legal Responsibility" *Yale Law Journal* (December 2011)

<sup>47</sup> *Id.*

United States territory as well<sup>48</sup> This case happened in Argentina during the Dirty War, Mercedes-Benz USA, subsidiary of German DaimlerChrysler company, contributed to torture, murder, and kidnapping workers that were with the military.<sup>49</sup>

Claims filed under ATS face several obstacles, but claims continue to be made after *Kiobel*.<sup>50</sup> Given the limited reach of the ATS, however, plaintiffs might need to look for alternative means of bringing a case against corporations for human rights abuses.

### **III. Resolution**

It may be difficult to stop corporations from continuing harmful activities in countries, but efforts have increased to hold corporations accountable through legal norms and structures. Furthermore, the threat of an award of damages for past judgments may serve as an incentive for the corporations to enter in to a settlement agreement providing for remediation or changes in practices.

#### **A. ATS still viable for Human rights abuses after *Kiobel***

After the court's decision in *Kiobel*, a suit can still be brought against corporations that violate human rights. The issue is that the decision in *Kiobel* significantly limited the application of ATS. In order to use ATS, the corporations have to "touch and concern" the United States. It is not nearly enough that the corporations' headquarters or that their assets are in the United States.

---

<sup>48</sup> Skinner, Gwynne L. "Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post Kiobel) World." *Columbia Human Rights Law Review* (Fall 2014)

<sup>49</sup> *Daimler AG v. Bauman* (2014) 134 S.Ct. 746

<sup>50</sup> See Section III in this note.

*Al Shimari v. CACI* is the first case where an appellate court has ruled that a case “touched and concerned” the United States with sufficient force.<sup>51</sup> Judge Barbara Keenan discussed and summarized various facts and considerations examined by the court:

*We conclude that the plaintiffs’ ATS claims ‘touch and concern’ the territory of the United States with sufficient force to displace the presumption against extraterritorial application based on: (1) CACI’s status as a United States corporation; (2) the United States citizenship of CACI’s employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI’s contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI’s employees to obtain security clearances from the United States Department of Defense; (4) the allegations that CACI’s managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to “cover up” the misconduct, and “implicitly, if not expressly, encouraged” it; and (5) the expressed intent of Congress, through enactment of the TVPA and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad. Accordingly, we hold that the district court erred in concluding that it lacked subject matter jurisdiction under the ATS, and we vacate the district court’s judgment dismissing*

---

<sup>51</sup> Giannini, Tyler and Susan Farbstien “Fourth Circuit’s Post-Kiobel Ruling Revives ATS claims against U.S. Corporations for Violations Committed Abroad.” *Human Rights @Harvard Law* (2 July 2014) available at <http://hrp.law.harvard.edu/alien-tort-statute/fourth-circuits-post-kiobel-ruling-revives-ats-claims-against-u-s-corporation-for-violations-committed-abroad/>

*the plaintiffs' ATS claims on that basis.*<sup>52</sup>

The case however was dismissed on the basis that ATS cannot be extraterritorially applied and the law of Iraq applies to the claims. An amicus brief was submitted.

Recently, in *In re South African Apartheid Litigation*, the Second Circuit handed down its opinion denying the opportunity for plaintiffs to continue with their claims against IBM and Ford.<sup>53</sup> This was because the plaintiffs had no new facts to move forward.<sup>54</sup> The allegations against Ford were that the corporation aided and abetted the South African state to commit international law violations when they designed and approved the sale of specialized vehicles to security forces.<sup>55</sup> In the claim against IBM, the court held the actions of the corporations did touch and concern the United States as established in *Kiobel*, but such actions were not purposefully as established in *Doe v. Nestle*.<sup>56</sup> The corporations did not act with the purpose of committing human rights violations. They might have known about it, but they did not do it with

---

<sup>52</sup> Giannini, Tyler and Susan Farbstain "Fourth Circuit's Post-Kiobel Ruling Revives ATS claims against U.S. Corporations for Violations Committed Abroad." *Human Rights @Harvard Law* (2 July 2014) available at <http://hrp.law.harvard.edu/alien-tort-statute/fourth-circuits-post-kiobel-ruling-revives-ats-claims-against-u-s-corporation-for-violations-committed-abroad/>

<sup>53</sup> Giannini, Tyler and Susan Farbstain "Second Circuit Decision in Apartheid Appeal Denies Plaintiffs the Opportunity to Proceed with Their Claims" *Human Rights @Harvard Law*. (30 July 2015) available at <http://hrp.law.harvard.edu/alien-tort-statute/second-circuit-decision-in-apartheid-appeal-denies-plaintiffs-the-opportunity-to-proceed-with-their-claims/>

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

that purpose.<sup>57</sup>

## **B. Alternative Means for Holding Corporations Accountable for Human Rights**

### **Abuses**

There are several limitations under the ATS for plaintiffs to be able to sue a corporation for human rights violations. Alternative means for holding corporations accountable should be considered. An alternative option within the ATS might be considered.

#### **i. Alternative Means within the ATS**

Within the ATS, an option to sue corporations will be to sue the corporation's officers and directors. In *Kiobel*, the majority states, "nothing in this opinion limits or forecloses suits against a corporation's employees, managers, officers, directors, or any other person who commits, or purposefully aids and abets violations of international law."<sup>58</sup> Corporate decisions are actually taken by individuals. So, holding individuals accountable instead of corporations who make those decisions may be the best approach to ATS.<sup>59</sup> A corporation is a legal entity that is all the legal norms and rules. Officers and directors make the decisions of the corporation. They should be held responsible for the decisions leading to human rights abuses.

#### **ii. International alternative for human rights abuses**

At the international level, States have the duty to protect against human rights abuses.

---

<sup>57</sup> Giannini, Tyler and Susan Farbstein. "Apartheid Plaintiffs Ask Second Circuit to Reconsider Claims Against IBM and Ford" Human Rights @Harvard Law (19 Aug 2015) web <http://hrp.law.harvard.edu/category/alien-tort-statute/>

<sup>58</sup> *Kiobel v. Royal Dutch Petroleum* 621 F.3d 111 (2010)

<sup>59</sup> Haider, Ziad. "Corporate Liability For Human Rights Abuses: Analyzing *Kiobel* and Alternatives to the Alien Tort Statute" *Georgetown Journal of International Law* (Summer 2002)

The International Human Rights Framework contains different courts and monitoring bodies in the world that help in advocate for human rights. The United Nations includes the UN Human Rights Council, which serves as a forum for dialogue about human rights concerns. The council may issue resolutions to urge States to uphold certain human rights principles.<sup>60</sup> However, states can only push for corporations in their territory to uphold human rights principles. The council is made of forty-seven states responsible for promoting and protecting human rights.

#### **a) Regional Human Rights Courts**

There are regional human rights courts that aid in human rights violations by the abusers responsible. For example, Africa has the African Court on Human Peoples' Rights, a regional human rights tribunal to ensure the protection of human rights. The tribunal has jurisdiction over those States that have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.<sup>61</sup>

The Inter-American Court of Human Rights is responsible for monitoring and ensuring implementation of human rights. The Court may only “decide cases brought against the Organization of American States Member States that have specifically accepted the Court’s contentious jurisdiction and those cases must first be processed by the Commission.”<sup>62</sup>

---

<sup>60</sup> Zerk, Jennifer “Corporate Liability for gross human rights abuses.” A report prepared for the Office of the UN High Commissioner for Human Rights Abuses available at <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>

<sup>61</sup> For more information please visit:

<http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>

<sup>62</sup> Id.

Europe has the European Court of Human Rights that can decide complaints by individuals and states. The ECHR is one of the most effective courts. The court has jurisdiction over states belonging to the European Union. The Middle East has the Arab Human Rights Committee and Southeast Asia has the ASEAN Intergovernmental Commission of Human Rights.<sup>63</sup>

#### **b) International Criminal Court**

The International Criminal Court (ICC), was created by a treaty ratified by countries that agree to be bound by it and is not mandated by the United Nations.<sup>64</sup> The ICC was established through the Rome Statute, an international treaty. The ICC acts as an independent court.<sup>65</sup> Three states from Africa have referred to this court to solve several situations occurring in their territories.<sup>66</sup> Such cases include crimes against humanity, including mass murder, rape and forced conscription. There are 105 states of 207 in the treaty.<sup>67</sup> It is important to take into consideration that the court is powerless to apprehend a suspect. The court only has jurisdiction over crimes committed by people who are from states that are part of the treaty.<sup>68</sup>

This list of the bodies implemented by the United Nations to help monitor and decide cases related to human rights violations can only decide those cases brought by an individual or a

---

<sup>63</sup> “Overview of the Human Rights Framework” *International Justice Resource Center* available at <http://www.ijrcenter.org/ihr-reading-room/overview-of-the-human-rights-framework/>

<sup>64</sup> Gottsfield, R.L. “International Courts to Know” *Arizona Attorney* (March 2010)

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Id.



State, not corporations, because “Although the U.N. Norms provide an excellent framework for transnational corporations to implement internal codes of conduct, there are no concrete enforcement measures, nor are there fully developed monitoring and verification mechanisms.”<sup>69</sup>

### **iii. Naming and Shaming or Corporate Shaming**

An alternative option to enforce corporate accountability for human rights violations or to not participate in any abuses can be “naming and shaming.” Media and others have successfully used naming and shaming to advocate and enforce international human rights law and norms.<sup>70</sup>

Results of using “naming and shaming” as a strategy to uphold international human rights laws and norms are favorable in certain instances. Emilie M. Hafner in “Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem” analyzes the relationship between naming and shaming efforts and government’s practices for 145 countries from 1975 to 2000. Results show that governments that are named and shamed for human rights violations often improve human rights protections.<sup>71</sup>

It is important to take into consideration that “naming and shaming” can sometimes be considered “cheap talk,” and therefore have no effect.<sup>72</sup> For example, Israel is among the most

---

<sup>69</sup> 40 Dellinger, Lauren A. “Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building A Better Business Reputation” *California Western International Law Journal* (Fall 2009) p. 56-98

<sup>70</sup> Hafner-Burton, Emilie M. "Sticks And Stones: Naming And Shaming The Human Rights Enforcement Problem." *International Organization* 62.4 (2008): 689-716. *Political Science Complete*. Web. 10 Oct. 2015.

<sup>71</sup> Id.

<sup>72</sup> Id.

named and shamed countries. In 2000, more twenty-four news releases named and shamed Israel for human rights violations, and yet the violations have not stopped.<sup>73</sup> This strategy may be considered not effective, because in reality, it has no actual authority over governments.

“Naming and shaming” have shown both negative and positive effects regarding human rights protections in governments. The question is what effect this strategy may have on corporations. Most corporations work in an environment where reputation does matter. It is important to first define what shaming represents in legal terms. Shaming is the “process in which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions.”<sup>74</sup> Instead of punishing offenders by sanctioning them to pay damages or sending them to prison, shaming focuses on targeting their reputation.<sup>75</sup> In *Doe v. Unocal Corp*, the court said, “The most controversial and potentially damaging to a company's reputation is its complicity with human rights violations.”<sup>76</sup>

---

<sup>73</sup> Hafner-Burton, Emilie M. "Sticks And Stones: Naming And Shaming The Human Rights Enforcement Problem." *International Organization* 62.4 (2008): 689-716. *Political Science Complete*. Web. 10 Oct. 2015.

<sup>74</sup> Kahan & Posner, supra note 6, at 368 cited in journal Skeel, David A. “Shaming In Corporate Law” *University of Pennsylvania Law Review* (June 2001)

<sup>75</sup> Skeel, David A. “Shaming In Corporate Law” *University of Pennsylvania Law Review* (June 2001)

<sup>76</sup> *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) discussed in 40 Dellinger, Lauren A. “Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act

#### iv. Suing in Domestic Courts

Domestic efforts to regulate corporate behavior, including human rights violations must first address the issue of who governs, the country where the human rights violations happened or the country where the corporations are based.<sup>77</sup> At first sight, it seems that the country where the human rights violations took place should have jurisdiction to decide what happens.<sup>78</sup>

Other issue to take into consideration is that some corporations and their structures, sometimes prevents or insulates them from being liable in the country where the violations happened. Corporations move their assets to countries where they are less likely to be held liable.<sup>79</sup> Governments of third world countries resent western corporations for trying to impose higher labor standards arguing this will cost them jobs. Activists in such countries disagree, arguing that their leaders care more about international business than their own citizens. *Id.*

When thinking about domestic courts and corporate liability, it is important to distinguish who does recognize corporate liability and who does not. Therefore, it is possible to divide domestic legal systems into two groups. The first group includes those who do not recognize corporate liability and those who do. This group can be divided into sub-groups: those who recognize corporate liability as a general concept, those who recognize corporate liability but list some exceptions, and last, those who recognize corporate liability in relation to specific offenses.

---

Litigation While Simultaneously Building A Better Business Reputation” *California Western International Law Journal* (Fall 2009) p. 56-98

<sup>77</sup> Stephens, Beth “Corporate Liability: Enforcing Human Rights Through Domestic Litigation” *Hastings International and Comparative Law Review*. (Spring 2001) n. pag.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

Domestic law on corporate liability is not working efficiently. Host countries often have ineffective remedial laws.<sup>80</sup> Therefore, pursuing remedies in host countries can be very challenging and sometimes impossible. Suing a corporation in domestic countries represent various challenges. Second, litigants face persecution in domestic countries for filing suit. The persecution comes from government officials, corporations and in some cases, community members. Third, many countries do not offer “pro bono” services. The difficulty to pay for lawyers can prevent human rights victims to pursue litigation.<sup>81</sup>

In the *Filartiga* case, the plaintiffs first brought suit in the Paraguayan court before filing a lawsuit in the United States. The case was still pending in the Paraguayan court after for four years. As a result of filing the claim in the Paraguayan court, Filartiga's attorney was arrested. He was brought to the Paraguayan's police headquarters where, thrown to a wall, and threatened to death by Pen. This attorney, it is alleged, has since been disbarred without just cause. During the course of the four years, another man, Hugo Duarte, confessed to the murder of Filartiga's son. Duarte worked in Peña's household, and he declared that Joelito and his wife where having an affair. He caught them and declared this a crime of passion. A picture of Joelito's corpse was submitted to the courts, showing that the cause of death was a result of professional torture methods. Furthermore, although Duarte confessed, he was never arrested.<sup>82</sup> It is difficult for victims to seek justice in their home jurisdiction.

---

<sup>80</sup> Skinner, Gwynne L. “Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post Kiobel) World. *Columbia Human Rights Law Review* (Fall 2014)

<sup>81</sup> Id.

<sup>82</sup> *Filartaga v. Pena-Irala* 630 F.2d 876 (1980)

In the case of *Wiwa v. Royal Dutch Petroleum*, the court provides the following opinion:

“One of the difficulties that confront victims of torture under color of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, merely returning to that place would endanger the victim. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought. Finally, because characteristically neither the plaintiffs nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as “not our business.”<sup>83</sup>

The cases show some of the hardships human rights victims endure when using domestic courts to file a lawsuit for human rights violations.

### **Conclusion**

With globalization, corporations are able to hold operations worldwide. Corporations are growing in power, with headquarters in one place and operations in another. They more than often participate or enhance human rights violations.<sup>84</sup> Corporations should be held accountable for human rights violations, because it provides the victims with a forum and judicial remedies.

---

<sup>83</sup> *Wiwa v. Royal Dutch Petroleum Co.* 226 F.3d 88 (2000)

<sup>84</sup> Ratner, Steven R. “Corporations and Human Rights: A Theory of Legal Responsibility” *Yale Law Journal* (December 2011)

ATS was used to bring claims against corporations in the United States. It first began bringing claims against individuals, and then it was used to file lawsuits against corporations. Some of the first cases and others have been successful. After the *Kiobel* decision, ATS is still a viable mean to file a lawsuit against corporations but it is restrictive. Regional human rights courts, shaming and naming advocacy as well as domestic courts can be used to deter corporations from continuing violating human rights abuses.