

# Corporate liability for violating international law under The Alien Tort Statute: The corporation through the lens of globalization and privatization

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## ABSTRACT

The article addresses the question of whether the changing roles of “public actor” states and “private actor” corporations should impact the legal liability of corporations in international law. The classical paradigm viewed international law as the interactions between sovereign nations and thus was viewed as encompassing the rights and duties of states who were the exclusive subjects of international law. However, does this historical distinction remain relevant in our world today? The context of Alien Tort Statute (“ATS”) litigation provides an excellent vehicle to examine the issue. The objection to corporate liability under the ATS stems from the dichotomy between public state and private actors. Corporate liability opponents argue that international law involves the relationships between states, or between states and individuals, as opposed to the relationship between juridical entities such as corporations and individuals. Prior academic commentary (as well as some judicial rulings) attempted to bridge the “liability gap” by arguing that since private individuals may have liability for certain jus cogens violations, corporations as exemplars of “individuals”, should also have liability. Rather than comparing corporations to private individuals, this Article argues that global corporations can and should be compared to public actor states. Several developments militate strongly in favor of corporate liability. One, the financial power and influence global corporations wield over an individual rivals that of states. Large global corporations now have the ability to cause widespread damage, a power traditionally held only by states, thus eviscerating the distinction between global corporations and states. Two, the line of demarcation between states and corporations has been greatly reduced in recent years as the role and functions of states and private actors have become interchangeable. In recent years private actors have increasingly assumed public roles as states have outsourced public functions and services to private parties. Moreover, the line is further blurred because in a parallel development, state actors are now engaged as private actors through the operation of sovereign wealth funds and state-owned enterprises. The Article discusses these developments and argues that any objection to corporate liability based upon the distinction between states and corporations should be updated to reflect the blurring of the distinction between “public” and “private” actors. If large global corporations can be treated as actors similar to sovereigns, corporations should have similar duties and responsibilities towards the public as a state government.

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## INTRODUCTION

Do corporations have liability for violating international law? This vexing question is the subject of vigorous academic and practical debate in the United States in the context of Alien Tort Statute (“ATS”) litigation.<sup>1</sup> The ramifications are substantial. If corporations do not have ATS liability then such entities are effectively immunized from paying damages for violating international law.<sup>2</sup> Defendant corporations have argued that pursuant to international law, juridical entities such as corporations cannot be liable for international law violations. For example, at oral argument in *Kiobel v. Royal Dutch Petroleum* defense counsel argued in response to a question from Justice Breyer that indeed, a fictitious corporation, “Pirates Inc.” would have no liability for violating international law by engaging in piracy.<sup>3</sup>

The question of corporate liability in ATS litigation bridges the worlds of corporate governance, tort liability, international law and human rights. With the presence of large, sophisticated global defendants, and in the context of severe violations of international law and the ensuing high financial stakes, the question of corporate liability has been the subject of vigorous disagreement and scholarly treatment in both the academic and judicial spheres.<sup>4</sup>

The ATS enables aliens to file civil claims for violations of “the law of nations” or a “treaty of the United States,”<sup>5</sup> and is illustrative of the global trend of claims against multi-national defendants over “allegations of corporate misconduct overseas.”<sup>6</sup> In recent years, ATS defendants accused of violating international law overseas<sup>7</sup> include global corporations spanning a diverse array of industries: Pfizer<sup>8</sup>;

<sup>1</sup>28 U.S.C. § 1350 (2006). The statute states in its entirety: “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.”

<sup>2</sup>*Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 150 (2d Cir. 2010), *aff’d*, 81 U.S.L.W. 4241 (2013) (Leval, J., concurring only in judgment) (“The new rule offers to unscrupulous businesses advantages of incorporation never before dreamed of. So long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot’s political opponents, or engage in piracy—all without civil liability to victims.”).

<sup>3</sup>Hrg. Transcr. 25:14–26:5 (Feb. 28, 2012) (available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1491.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf)). Justice Breyer: Do you think in the 18th century if they brought Pirates, Incorporated, and we get all their gold, and Blackbeard gets up and he says, oh, it isn’t me; it’s the corporation—do you think that they would have then said: Oh, I see, it’s a corporation. Good-bye. Go home.

Kathleen Sullivan: Justice Breyer, yes, the corporation would not be liable.

*Id.* 25:18–26:5. Interestingly, while the appeal to the Supreme Court was based upon the corporate liability issue, the Court’s opinion did not rule on the question and the issue remains unresolved. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

<sup>4</sup>*See e.g.*, Jordan J. Paust, *Corporate Liability, and the Extraterritorial Reach of the ATS*, 53 Va. J. Intl. L. Dig. 18 (2012); Eric Engle, *Kiobel v. Royal Dutch Petroleum Co.: Corporate Liability Under the Alien Torts Statute*, 34 Hous. J. Intl. L. 499 (2012); Alan O. Sykes, *Corporate Liability For Extraterritorial Torts Under The Alien Tort Statute And Beyond: An Economic Analysis*, 100 Geo. L. J. 2161 (2012); Julian G. Ku, *The Limits Of Corporate Rights Under International Law*, 12 Chi. J. Intl. L. 729 (2012).

<sup>5</sup>28 U.S.C. § 1350. Not all violations of international law are cognizable under the ATS; only misconduct that exhibits a particularly identifiable and strong transnational dimension and which are sufficiently egregious, are actionable pursuant to the ATS. *See* Joel Slawotsky, *The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable Under the Alien Tort Claims Act*, 17 Duke J. Comp. & Intl. L. 131, 131–32 (2006) (explaining that only claims which implicate the “mutual concern of the nations of the world” are permitted under the statute).

<sup>6</sup>Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Intl. Law 456, 457–58 (2011); *See also* Peter Muchlinski, *The Changing Face of Transnational Business Governance*, 18 Ind. J. Global Leg. Stud., 665, 687–88 (2011) (discussing recent cases in continental Europe where corporations have been defendants in suits claiming the corporations are liable for environmental damage, human rights abuses and war crimes).

<sup>7</sup>The Supreme Court ruled in *Kiobel* that the presumption against extraterritoriality as outlined in *Morrison v. Natl. Austrl. Bank Ltd.*, 130 S. Ct. 2869 (2010) is applicable to the ATS. 133 S.Ct. at 1669 (“We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. “[T]here is no clear indication of extraterritoriality here.”)(citation omitted) (brackets in original). However, the Court left many questions unresolved and the parameters of the presumption with respect to the ATS is unknown. “The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute . . . . Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today’s case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.” *Id.* at 1669 (Kennedy, J., concurring). Justice Breyer in his concurrence joined by three other justices concurred in the affirmance but rejected the presumption against extraterritoriality. “Unlike the Court, I would not invoke the presumption against extraterritoriality.” *Id.* at 1671 (Breyer, J., concurring).

<sup>8</sup>*Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (performing pharmaceutical experiments on children without their parents’ informed consent).

Exxon-Mobil<sup>9</sup>; Yahoo!<sup>10</sup>; Cisco<sup>11</sup> and Rio Tinto.<sup>12</sup> Development of transnational tort litigation is not surprising since large multinationals have become significant players wielding immense power in determining the social, economic and legal fate of nations.<sup>13</sup> Indeed, “[s]ome transnational corporations have more economic, social, political, and legal clout than many developing countries.”<sup>14</sup>

In rejecting corporate liability under the ATS, the Second Circuit in *Kiobel*,<sup>15</sup> embraced the statist approach to international law. According to the court, “customary international law includes only ‘those standards, rules or customs (a) *affecting the relationship between states or between an individual and a foreign state*, and (b) *used by those states for their common good and/or in dealings inter se*.”<sup>16</sup> The foundational premise relied upon by *Kiobel* is that the actors in international law are almost exclusively states,<sup>17</sup> therefore private corporations do not have obligations under international law and thus cannot have liability under the ATS. Pursuant to *Kiobel*, if the international law violator defendant Royal Dutch Petroleum had been a state or public actor there may have been potential liability. However, since the defendant was a corporation – and a corporation cannot violate international law – there can be no liability for the defendant’s conduct. *Kiobel*’s rejection of corporate liability in the ATS context has engendered vigorous scholarship<sup>18</sup> and a split of circuit authority in the United States.<sup>19</sup>

What is the theoretical foundation of *Kiobel*’s ruling? Citing treatises<sup>20</sup> and other authoritative sources,<sup>21</sup> liability opponents argue that international law involves the relationships between states as opposed to the relationship between juridical entities such as corporations and individuals. Corporate liability opponents believe “sovereign States exclusively are International Persons – i.e., subjects of International Law and neither ‘monarchs, diplomatic envoys, private individuals . . . churches . . . chartered companies, nor . . . organized wandering tribes’ enjoyed the status of ‘International Persons’ who are “subject[s] of the Law of Nations.”<sup>22</sup>

<sup>9</sup>*Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (helping governments commit crimes against their own citizens in order to continue the exploration for crude oil and natural gas).

<sup>10</sup>Catherine Rampell, *Yahoo Settles With Chinese Families: Firm Gave Officials Dissidents’ E-Mails*, Wash. Post Do4 (Nov. 14, 2007) (disclosure of a political dissident’s e-mail records in China).

<sup>11</sup>See John Markoff, *Suit Says Cisco Helped China Pursue Falun Gong*, N.Y. Times B7 (May 22, 2011) (available at <http://www.nytimes.com/2011/05/23/technology/23cisco.html>) (“Cisco, the maker of internet routing gear, customized its technology to help China track members of the Falun Gong spiritual movement, according to a federal lawsuit filed last week by members of the movement.”).

<sup>12</sup>*Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (plaintiff alleged war crimes, crimes against humanity, racial discrimination, and environmental torts against mining company).

<sup>13</sup>Daniel Chow, *Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries*, 51 Va. J. Intl. L., 785, 817 (2011).

<sup>14</sup>Rachel J. Anderson, *Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law*, 18 Mich. St. J. Intl. L. 1 (2009).

<sup>15</sup>621 F.3d 111. In an unusual twist, several days after argument the Court ordered additional briefing on the issue of extraterritoriality. While the appeal to the Supreme Court was based upon the corporate liability question, the Court’s affirmance of the Second Circuit opinion in *Kiobel* was based upon extraterritoriality. See *supra* n. 7 (explaining the Court’s reasoning).

<sup>16</sup>*Kiobel*, 621 F.3d at 118 (citing *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (emphasis added)).

<sup>17</sup>The Second Circuit’s opinion acknowledged that under certain circumstances individuals may have liability but juridical entities such as corporations cannot be. *Id.* at 122 (“nothing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law—including the employees, managers, officers, and directors of a corporation—as well as anyone who purposefully aids and abets a violation of customary international law.”).

<sup>18</sup>See e.g., Julian G. Ku, *The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 Va. J. Intl. L. 353 (2011) (arguing against corporate liability); Frank Cruz-Alvarez & Laura E. Wade, *Second Circuit Correctly Interprets the Alien Tort Statute: Kiobel v. Royal Dutch*, 65 U. Miami L. Rev. 1109 (2011) (arguing *Kiobel* was correctly decided); Tyler Giannini & Susan Farbstein, *Corporate Accountability in Conflict Zones: How Kiobel Undermines The Nuremberg Legacy and Modern Human Rights*, 52 Harv. Intl. L. J. Online 119 (2012) (available at [http://www.harvardilj.org/2010/11/online\\_52\\_giannini\\_farbstein/](http://www.harvardilj.org/2010/11/online_52_giannini_farbstein/)) (arguing in favor of liability).

<sup>19</sup>*Compare Kiobel*, 621 F.3d 111 (holding private corporations cannot have liability) with *Doe v. Exxon*, 654 F.3d 11 (holding corporations can have liability).

<sup>20</sup>See J. L. Briery, *The Law Of Nations: An Introduction To The International Law Of Peace* 1 (6th ed. 1963), which defines international law as “the body of rules and principles of action which are binding upon civilized states in their relations with one another . . . . [A]s a definite branch of jurisprudence the system which we now know as international law is modern, . . . for its special character has been determined by that of the modern European state system, . . .”.

<sup>21</sup>See *Restatement (Third) Of The Foreign Relations Law Of The United States* § 102(1) (1987), which characterizes rules of international law as those “that [have] been accepted as such by the international community of states . . .”.

<sup>22</sup>L. Oppenheim, *International Law: A Treatise* vol. 1, 125 (Ronald F. Roxburgh, ed., 3d ed. Longmans, Green and Co.1920). See also Ku, *supra* n. 18, at 389 (“There is little or no support from international practice for the imposition of customary international law duties on corporate entities.”).

This opposition to corporate liability under international law has its roots in classical public international law.<sup>23</sup> The “United States currently interprets the law of nations, *jus gentium*, as indicating public international law . . . States, as a general rule, are the presumed addressees of duties and bearers of rights under public international law.”<sup>24</sup> Corporate liability opponents have focused solely on “public international law” and its traditional finding that only states can be actors within international law.<sup>25</sup>

Both court decisions and academic commentary have previously addressed the question of ATS corporate liability. Prior attempts to tackle the question have discussed: refuting *Kiobel*'s reliance on international criminal tribunals;<sup>26</sup> claiming that corporations can be treated as another form of private actor;<sup>27</sup> noting neither the statute itself nor its history excludes corporations;<sup>28</sup> and holding that international law need not be consulted at all since enforcement of international law is left to the domestic remedies of states.<sup>29</sup> However, little analysis exists as to whether the historical dichotomy between formal “states” and private “corporations” remains relevant today as a justification for opposition to corporate liability.

Intriguing questions are raised with respect to whether the changing roles of governments and private corporations should impact the legal liability of corporations. Demarcations between public states and private corporations are no longer sharp. Commenting on the changing roles of public and private actors as exemplified by the Norwegian Sovereign Wealth Fund (NSWF), Larry Backer notes “the distinction between law and norm, between public and private spheres . . . collapses within the operational universe of the NSWF.”<sup>30</sup>

In recent years, private actors have increasingly assumed public roles as states have outsourced public functions and services to private entities such as corporations. Private actors play an increasingly critical role in traditionally governmental functions. For example, large corporations in the food industry have replaced the U.S. Food and Drug Administration’s responsibility in guaranteeing the food its citizens eat is safe.<sup>31</sup> In a parallel development, state actors have increasingly assumed the role of private actor by becoming active participants in private markets. Governments are engaged as private actors through the operation of sovereign wealth funds that buy shares on global stock exchanges, invest in malls, and enter into joint ventures with private corporations.

This Article will discuss the foundational question and argues that the formalistic distinctions between “public actor states” and “private actor corporations” are no longer pertinent because globalization has “de-emphasis[ed] . . . the integrity of the territorial borders of states” and the changing roles of states and private actors are “questioning the organizational frameworks on which the conventional global order has been based.”<sup>32</sup>

Both large global corporations and states have the resources that can and do affect people’s lives in an unprecedented fashion and degree. Large global corporations are at the epicenter of astonishing

<sup>23</sup>See *Engle*, *supra* n. 4, at 501 (explaining how international law is dividable into public and private international law).

<sup>24</sup>*Id.* at 502.

<sup>25</sup>Courts have used these terms interchangeably. *E.g.*, *Kiobel*, 621 F.3d at 116 n. 3 (“In this opinion we use the terms ‘law of nations’ and ‘customary international law’ interchangeably.”).

<sup>26</sup>See *Doe v. Exxon*, 654 F.3d at 53 (rejecting the notion that the Nuremberg Military Tribunal rejected corporate liability); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1017–19 (7th Cir. 2011) (holding *Kiobel*'s reliance on the failure of international criminal tribunals to prosecute corporations is misplaced); See also Giannini & Farbstein, *supra* n. 18, at 129 (noting that Judge Cabranes reliance on the Nuremberg Military Tribunal’s failure to prosecute the I.G. Farben company was misplaced because the Allies punished the IG Farben, dissolving the corporation and destroying some of its facilities, demonstrating corporations do indeed have obligations).

<sup>27</sup>See Joel Slawotsky, *Corporate Liability in Alien Tort Litigation*, 1 Va. J. Intl. L. Online 27, 37–40 (2011) (available at <http://www.vjil.org/articles/corporate-liability-in-alien-tort-litigation>) (private actor corporations should be treated as private actors and have liability for committing violations of international law).

<sup>28</sup>See *Sarei*, 671 F.3d at 748 (“The ATS contains no such language and has no such legislative history to suggest that corporate liability was excluded and that only liability of natural persons was intended. We therefore find no basis for holding that there is any such statutory limitation.”).

<sup>29</sup>See *Flomo*, 643 F.3d at 1020 (“International law imposes substantive obligations and the individual nations decide how to enforce them.”).

<sup>30</sup>See Larry Catá Backer, *Sovereign Investing and Markets Based Transnational Legislative Power: The Norwegian Sovereign Wealth Fund in Global Markets*, 10 (Working Paper, November 18, 2012, Consortium for Peace & Ethics, No. 2012–11/11) (available at SSRN [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2177778](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2177778)).

<sup>31</sup>Stephanie Armour et al., *Food Sickens Millions as Company-Paid Checks Find It Safe*, Bloomberg.com (Oct. 11, 2012) (available at <http://www.bloomberg.com/news/2012-10-11/food-sickens-millions-as-industry-paid-inspectors-find-it-safe.html>).

<sup>32</sup>See Larry Catá Backer, *Private Actors and Public Governance*, 18 Ind. J. Global Leg. Stud. 751, 754–55 (2011).

and multifaceted governance systems “developing outside the state and international public organizations, and beyond the conventionally legitimating framework of the forms of domestic or international hard law.”<sup>33</sup> Indeed, a consequence of globalization is the decline of the state’s exclusive power over the lives of citizens and the rise of the state-like role of the large corporation. “Globalization has led to a shift in power away from states and towards the private sector, which has resulted in multinational corporations taking a place among the most powerful international actors.”<sup>34</sup>

Moreover, role reversal has eviscerated the historic differences between states and corporations. “In effect, the state here is using private power to effect public governance objectives. By inverting its role, it can regulate more effectively as a private shareholder than as a state.”<sup>35</sup>

Furthermore, responsibilities once relegated to states are now devolving to private actors as well. Sovereign wealth funds exemplify this new role. Norway, via its sovereign wealth fund (SWF) “has begun to import into private investment markets the obligations of international law once limited to states.”<sup>36</sup>

Similar to state actors, corporations are capable of inflicting enormous damage, either directly or by or aiding and abetting.<sup>37</sup> If large global corporations can be treated as actors similar to sovereigns, corporations should “have the same duties and responsibilities towards its constituents as a state government”<sup>38</sup> and the academic underpinning relied upon by *Kiobel* is eliminated. Accordingly, the holding of *Kiobel* excluding private corporations as actors with obligations under international law, is incongruous with a globalized world wherein such actors are capable of causing severe harm similar to sovereigns. In Part One, this Article describes the ATS and provides a background to the corporate liability question including a summary of the current appellate case law. In Part Two, the arguments used by liability opponents are explored. In Part Three, arguments are presented demonstrating that the arguments of the liability opponents are no longer relevant and should be discarded.

## I. THE ALIEN TORT STATUTE AND THE CORPORATE LIABILITY QUESTION

### A. Preliminary considerations

Before discussing the corporate liability question, it is worthwhile to note some unique facets of ATS litigation. Notwithstanding the exceptional aspects of the statute, the ATS provides an excellent structure from which to explore the issue of corporate responsibility for international law violations.

#### 1. Unique aspects of the ATS

The ATS is an unconventional statute for several reasons. First, it is a 200-year-old statute with very limited existing legislative history.<sup>39</sup> The lack of knowledge regarding the legislative intent also bears on the dearth of information regarding the statute’s purpose(s) and goal(s). Second, for nearly 200 years the ATS remained in relative anonymity with only a handful of cases brought under the statute.<sup>40</sup> Thus, despite being in existence for 200 years, many essential questions (such as the corporate liability issue) have only recently been grappled with. Third, until relatively recently, a question remained as to whether the statute conferred a statutory cause of action. Nearly 200 years after Congress enacted the ATS, the Second Circuit in *Filartiga v. Pena-Irala*<sup>41</sup> “paved the way for a new conceptualization of the ATS.”<sup>42</sup> The Second Circuit read “the law of nations” as a malleable grant of jurisdiction that can expand as

<sup>33</sup>*Id.* at 751.

<sup>34</sup>Jonathan Bellish, *Towards A More Realistic Vision Of Corporate Social Responsibility Through The Lens of the Lex Mercatoria*, 40 Denv. J. Intl. L. & Policy, 548 (2012).

<sup>35</sup>See Backer, *supra* n. 30, at 39.

<sup>36</sup>*Id.* at 75 (noting that the Norwegian SWF’s Ethics Council is requiring corporations to uphold international law or risk divestment).

<sup>37</sup>Unquestionably, “colossal harms” may arise when corporations engage in misconduct. See José Alvarez, *Are Corporations “Subjects” of International Law*, 9 Santa Clara J. Intl. L. 1, 5 (2011).

<sup>38</sup>See Katharine v. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 Hastings Bus. L. J. 309, 331 (2011).

<sup>39</sup>See also *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d. Cir. 1975), *abrogated on other grounds, Morrison v. Natl. Austrl. Bank Ltd.*, 130 S. Ct. 2869 (2010) (“This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came.”) (citation omitted).

<sup>40</sup>See Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 U. St. Thomas L. Rev. 607, 609 (2004).

<sup>41</sup>*Filartiga v. Pena-Irala* 630 F.2d 876 (2d. Cir. 1980).

<sup>42</sup>Hufbauer & Mitrokostas, *supra* n. 40, at 609.

international proscription of an allegedly violative act becomes more uniform.<sup>43</sup> Until the Supreme Court endorsed *Filartiga's* understanding that the ATS granted jurisdiction, the opinions were divided on whether the ATS conferred a statutory cause of action.<sup>44</sup> Fourth, the statute explicitly recognizes and incorporates international law. Fifth, while the ATS ostensibly wields extraterritorial reach, the Supreme Court has upheld the presumption against extraterritoriality with respect to the ATS.<sup>45</sup>

Finally, the ATS is unique in that it has served as a method to punish (with civil damages) corporate defendants for international crimes. There is a strong policy argument in favor of allowing corporate liability. While criminal liability would tend to deter such conduct and likely lead to a reduction of same, no international court, including the International Criminal Court (ICC), can even prosecute businesses. As currently standing, the ICC does not have such jurisdiction.<sup>46</sup>

## 2. ATS limitations

The ATS does not constitute a tonic to remedy corporate misconduct. Challenges exist for plaintiffs seeking compensation for the conduct of transnational corporations pursuant to the ATS. For example, only defendants subject to personal jurisdiction in the United States can be held accountable. In addition, there is a presumption against extraterritoriality. And courts are under admonition from the U.S. Supreme Court to only allow certain universally-acknowledged violations as predicate offenses. This serves to limit the types of violations that can constitute actionable claims under the ATS.<sup>47</sup> There are also numerous doctrines available to defendants to have cases dismissed such as international comity, forum non conveniens and political question. Numerous suits are dismissed based upon forum non conveniens by courts finding that an alternative forum would be more appropriate.<sup>48</sup>

## 3. Domestic and international contexts

In recent years, there has been a sharp increase in public awareness of both possible human rights abuses conducted by multi-national corporations (“MNCs”) and the lack of safeguards ensuring good corporate governance. A substantial factor militating in favor of corporate change has been the internet, which provides an inexpensive and convenient method of instant communication and information swapping, thus empowering individuals who possess negative information regarding MNCs and who wish to disseminate the same to shareholders and consumers. Shareholders and institutional investors have commenced pressuring MNCs to adopt and adhere to codes of good corporate conduct. Both individual and institutional stakeholders have begun to exercise their influence in a meaningful way. For example, the California Public Employees’ Retirement System (CalPERS) will only invest in corporations that adhere to the Global Sullivan Principles. These principles are designed to prompt and guide a corporation into sound corporate governance. CalPERS has divested from nations based on the nations’ human rights violations.

In the United States, the business community has been a key opponent of ATS suits and of corporate liability in particular. Business interests argue against holding corporations liable, alleging American businesses lose out to competitors who are not subject to ATS suits. These opponents view the ATS mechanism as detrimental to American business interests providing defendants not subject to suit with economic advantages. In addition, policy opponents believe that the ATS is a form of “judicial imperialism” endangering America’s relations with other nations who will view ATS suits as a form of interference in their own affairs. Of course, political considerations come into play as some

<sup>43</sup>The court held “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.” *Filartiga*, 630 F.2d at 881.

<sup>44</sup>See e.g., Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Intl. L. 587, 592–594 (2002) (arguing that, because the ATS was a part of the Judiciary Act, it merely granted jurisdiction to federal courts); William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 478–80 (1986) (asserting that the ATS “clearly does not create a statutory cause of action,” but may have created a common law cause of action).

<sup>45</sup>See *supra* n. 7, at 1669.

<sup>46</sup>See Rome Statute of the ICC [http://untreaty.un.org/cod/icc/statute/99\\_corr/cstatute.htm](http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm) Article 25 (jurisdiction only over natural persons).

<sup>47</sup>See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (“A series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute.”). See e.g., Anderson, *supra* n. 14 at 4 (citing *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (“Plaintiffs alleging harms by transnational corporations face substantive and procedural hurdles. . . . [M]any claims do not rise to the level of violating the law of nations, as required under the Alien Tort Statute.”).

<sup>48</sup>*Aguinda v. Texaco, Inc. (Aguinda III)*, 303 F.3d 470, 480 (2d Cir. 2002).

U.S. administrations are more “ATS friendly” than others. Sometimes courts ask for the view of the U.S. State Department which, depending upon the political winds, may or may not find the suit an interference with U.S. government policy.<sup>49</sup>

A global movement towards imposing obligations gained momentum in the 1990s with the United Nations issuing findings and recommendations on the corporate responsibilities under international law. One significant report was released by the UN Commission on Human Rights: *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*.<sup>50</sup> Another major report was the *Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* released by the UN Secretary General.<sup>51</sup> The reports endorse international norms and mechanisms to impose legal duties and regulations on corporations under international law.

The Norwegian SWF represents a major step in the process of imposing international legal obligations on corporations. Through its Ethics Council, the Norwegian SWF reviews companies and will exclude and divest from companies that it believes violate international law and/or engage in unethical corrupt behavior. International politics again plays a role as some nations will object to having its companies divested or placed on an observation status. Norway’s SWF decided that its investment portfolio would not include cluster bomb manufacturers and nuclear weapons producers. As a result, certain American companies were banned from the fund. Affected companies included iconic American businesses such as General Dynamics, Northrop Grumman, Boeing and Lockheed Martin. Norway’s SWF also blacklisted Walmart based upon child labor practices and anti-union activities. The United States Ambassador to Norway stated in response to the divestment of Walmart, that “[a]n accusation of bad ethics is not an abstract thing. They’re alleging serious misconduct. It is essentially a national judgment of the ethics of these companies.”<sup>52</sup>

## B. The Statute and litigation

The Alien Tort Statute provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>53</sup>

The statute allows non-U.S. citizens to sue American or foreign<sup>54</sup> defendants in federal court for tortious conduct constituting a violation of the law of nations (i.e., international law)<sup>55</sup> or a treaty. To be cognizable under the ATS, the conduct violates the “law of nations” if it contravenes well-established recognized norms of international law that involve the mutual interests of nations and have the specter of global relationship impact.<sup>56</sup> Torts that do not meet these requirements cannot form the basis of an ATS suit.<sup>57</sup> Claims are generally framed in the context of egregious violations of human rights such as slavery,<sup>58</sup> war crimes, and<sup>59</sup> crimes against humanity.<sup>60</sup> However, the statute contains no restrictive

<sup>49</sup>See Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, Policy Analyses in Intl. Econ. (2003). (available at <http://bookstore.piie.com/book-store/367.html>).

<sup>50</sup>See refworld, reprinting UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) (available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=category&category=REFERENCE&publisher=UNSUBCOM&type=SESSIONALREPORT&coi=&docid=403f46ec4&skip=>) (last accessed May 20, 2013).

<sup>51</sup>See UN Human Rights Council, *Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc A/HRC/11/13 (2009) (available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>) (last accessed May 20, 2013).

<sup>52</sup>Mark Landler, *Norway Keeps Nest Egg From Some U.S. Companies*, N.Y. Times (May 4, 2007) (available at [http://www.nytimes.com/2007/05/04/business/worldbusiness/04norway.html?\\_r=3&oref=slogin&](http://www.nytimes.com/2007/05/04/business/worldbusiness/04norway.html?_r=3&oref=slogin&)) (last accessed May 20, 2013).

<sup>53</sup>28 U.S.C. § 1350 (2006).

<sup>54</sup>Suit is of course subject to the court’s ability to exercise personal jurisdiction. In addition, the Supreme Court has ruled that the presumption against extraterritoriality is applicable to ATS cases although questions regarding the contours remain. See *supra* n. 7, and accompanying text.

<sup>55</sup>See *Kiobel*, 621 F.3d at 116 n. 3 (“In this opinion we use the terms ‘law of nations’ and ‘customary international law’ interchangeably.”).

<sup>56</sup>See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003) (“[C]ustomary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.”).

<sup>57</sup>See Slawotsky, *supra* n. 5, at 150 (“Many torts have been rejected as predicate offenses permitted under the ATCA.”).

<sup>58</sup>*Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 445 (D.N.J. 1999).

<sup>59</sup>*Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

<sup>60</sup>*Doe v. Exxon*, 654 F.3d 11 (D.C. Cir. 2011).

language, and while international law is often framed in a criminal context, suits may be based upon violations of international law in other contexts.<sup>61</sup> Some have argued that commercial bribery and egregious corporate fraud may also be subject to ATS suits.<sup>62</sup> Given that transnational corporations are responsible for misconduct outside the strict limit of human rights violations, such as environmental catastrophes and corruption, it may be a matter of time before such conduct might trigger ATS litigation.<sup>63</sup>

For nearly 200 years, relatively few cases were filed pursuant to the Alien Tort Statute.<sup>64</sup> This relative dormancy ended when in *Filartiga v. Pena-Irala*, the Second Circuit issued a landmark ruling whereby the statute was relied upon to find that state-sponsored torture was actionable.<sup>65</sup> The issue in *Filartiga* was whether torture constituted a “violation of the law of nations” and thus cognizable under the ATS.<sup>66</sup> To be actionable, plaintiffs needed to establish there was an international consensus with respect to torture being a violation of international law.<sup>67</sup> According to the Second Circuit, “[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS].”<sup>68</sup>

*Filartiga* held that in determining whether specific conduct constituted a violation of international law, a court was to examine judicial opinions, scholarly works and custom.<sup>69</sup> Significantly, the court stated that international law had to be applied as it is used “today” and not from 200 hundred years prior<sup>70</sup> noting that international law evolves over time.<sup>71</sup> The Second Circuit found that torture was a “well-established, universally recognized norm [] of international law” that was cognizable under the statute.<sup>72</sup>

After *Filartiga*, plaintiffs commenced vigorously filing ATS cases. Such cases included ones against government officials alleging various human rights abuses.<sup>73</sup> Plaintiffs also commenced suing corporations, usually alleging these defendants aided and abetted the governments or officials in violating international law.<sup>74</sup>

In *Sosa v. Alvarez*, the Supreme Court addressed the ATS and held the statute is jurisdictional,<sup>75</sup> thus permitting federal courts to adjudicate cases brought by aliens for violations of international law noting such law was part of federal common law.<sup>76</sup> The Court held the statute was initially intended to encompass the three primary violations of international law at the time of its enactment: piracy, offenses against ambassadors, and violations of safe passage.<sup>77</sup> However, the Court endorsed the *Filartiga* view that international law develops over time and held that courts were available to entertain claims for violations of the “present-day law of nations.”<sup>78</sup> *Sosa* cited approvingly to *Filartiga* stating,

<sup>61</sup>See e.g., *Abdullahi*, 562 F.3d 163 (informed medical consent).

<sup>62</sup>See Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 Mich. J. Intl. L. 385, 393–95 (2010); Slawotsky, *supra* n. 5, at 131.

<sup>63</sup>One case so alleging was recently filed by a Turkish company against a South African company for allegedly bribing Iranian officials to procure lucrative contracts. See Tom Schoenberg & Indira A.R. Lakshmanan, *MTN Promised Iran Money, UN Votes for Phone Deal: Rival*, Bloomberg.com (Mar. 29, 2012), <http://www.bloomberg.com/news/2012-03-28/mtn-promised-money-weapons-un-votes-in-iran-rival-says.html>

(“MTN Group Ltd. (MTN), Africa’s largest wireless operator, bribed officials, arranged meetings between Iranian and South African leaders, and promised Iran weapons and United Nations votes in exchange for a license to provide mobile-phone service in the Islamic Republic, Turkcell Iletisim Hizmetleri AS (TCELL) alleged in a lawsuit.

Turkcell, which initially was awarded the Iranian mobile-phone license, sued its Johannesburg-based rival yesterday in federal court in Washington for \$4.2 billion in damages. The suit includes numerous alleged internal MTN memos that detail the company’s efforts to win the Iranian business after losing the bid to Turkcell in February 2004.”)

<sup>64</sup>See *ITT*, 519 F.2d at 1015 (noting the dearth of cases).

<sup>65</sup>*Filartiga*, 630 F.2d 876.

<sup>66</sup>*Id.* at 878.

<sup>67</sup>*Id.* at 888–889.

<sup>68</sup>*Id.*

<sup>69</sup>*Id.* at 880–881.

<sup>70</sup>*Id.* at 887.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* at 888.

<sup>73</sup>See e.g., *In re Est Marcos, Hum. Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994).

<sup>74</sup>See e.g., *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), 395 F.3d 932 (9th Cir. 2002).

<sup>75</sup>542 U.S. at 714.

<sup>76</sup>*Id.* at 720.

<sup>77</sup>*Id.* at 724.

<sup>78</sup>*Id.* at 725.

“[t]he position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga*.”<sup>79</sup> Simultaneously, the Court urged caution with respect to embracing the types of international law violations that should be cognizable. The Court provided some guidance, namely, to come within the ambit of the ATS, a violation 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.”<sup>80</sup>

Thus, subject to diligent gate keeping, the federal courts were empowered to adjudicate cases brought by aliens for violations of international law other than the three original paradigm examples. In the years subsequent to *Sosa*, a variety of such claims were filed and the courts continue to grapple with many of the vigorously debated issues.<sup>81</sup> Regarding corporate liability, the only reference in *Sosa* was in a footnote wherein the Court stated that “[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”<sup>82</sup>

The footnote was relied upon by *Kiobel* in holding the question of corporate liability is determined by reference to international law.<sup>83</sup> However, the footnote did not explicitly state or imply there was an issue of corporate liability but addressed whether liability for the type of conduct at issue can be extended to a private actor—such as a corporation.<sup>84</sup> The private actor might be an individual or a corporation and no distinction was articulated. If anything, the Court seemed to be confirming that corporate liability exists under the ATS.

### C. Summary of case law on the corporate liability issue

For more than two decades, U.S. courts held that private actors, including individuals<sup>85</sup> and private corporations,<sup>86</sup> owe duties under customary international law and may have liability under the statute. Clearly presuming corporations may face liability under the ATS, corporations such as Yahoo!<sup>87</sup> and Shell Oil<sup>88</sup> have either settled or proceeded to trial like Chevron<sup>89</sup> and Drummond Corporation.<sup>90</sup>

Overturing its own precedent,<sup>91</sup> the Second Circuit’s majority opinion in *Kiobel* held that corporations do not have obligations under international law and thus cannot have liability under

<sup>79</sup>*Id.* at 731.

<sup>80</sup>*Id.* at 725.

<sup>81</sup>For example, the issue of what standard is sufficient to find a defendant liable for secondary liability. Compare *Aziz v. Alcolac, Inc.* 658 F.3d 388, 398 (4th Cir. 2011) (purposeful conduct); *The Presbyterian Church of Sudan v. Talisman*, 582 F.3d 244, 258–59 (2d Cir. 2009) (purposeful conduct) with *Doe v. Exxon*, 654 F.3d at 38 (mere knowledge is sufficient).

<sup>82</sup>*Sosa*, 542 U.S. at 732 n. 20.

<sup>83</sup>*Kiobel* relied on the footnote in rejecting corporate liability. The court referenced and adopted a footnote in the Supreme Court’s 2004 *Sosa* ruling wherein the Court stated that federal courts must examine international law to decide the question of whether that law “extends the scope of liability for a violation of a given norm to the perpetrator being sued.” See *Kiobel*, 621 F.3d at 126 (citing *Sosa*, 542 U.S. at 732 n. 20). Compare *Kiobel* (invoking footnote 20 to reason that the question of corporate liability must be resolved by reference to international law) with *Doe v. Exxon*, 654 F.3d 11 (positing that *Kiobel*’s reliance on footnote 20 was misplaced).

<sup>84</sup>See Slawotsky, *supra* n. 27, at 35 (“The Court held that international law controls the question of whether the specific conduct alleged gives rise to liability if the defendant is a private non-state actor. The context of the footnote and the reference to Judge Edwards’ concurrence in the D.C. Circuit’s *Tel-Oren v. Libyan Arab Republic* opinion and to the Second Circuit’s *Kadic v. Karadžić* opinion make it manifestly clear the Court was not questioning the viability of suing corporations.”).

<sup>85</sup>See e.g., *Kadic*, 70 F.3d 232; *Marcos Est.*, 25 F.3d 1467.

<sup>86</sup>See e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103–104 (2d Cir. 2000); *Iwanowa*, 67 F. Supp. 2d at 445; *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 254 (S.D.N.Y. 2009) (“On at least nine separate occasions, the Second Circuit has addressed ATCA cases against corporations without ever hinting—much less holding—that such cases are barred.”).

<sup>87</sup>Rampell, *supra* n. 10, at Do4.

<sup>88</sup>Jad Mouawad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. Times, B1 (June 8, 2009) (available at [http://www.nytimes.com/2009/06/09/business/global/09shell.html?\\_r=0](http://www.nytimes.com/2009/06/09/business/global/09shell.html?_r=0)).

<sup>89</sup>*Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1121 (9th Cir. 2010) (“These plaintiffs brought claims under the Alien Tort Statute (‘ATS’), Nigerian law, and California law. The jury rendered a verdict in favor of Chevron on all claims, and Plaintiffs now appeal . . . We . . . affirm the district court’s judgment.”).

<sup>90</sup>*Romero v. Drummond Co.*, 552 F.3d 1303, 1309 (11th Cir. 2008) (“[O]ne claim for relief that Drummond aided and abetted the killings, which were war crimes, remained. At a trial of that claim, the jury returned a verdict for Drummond . . . We affirm.”).

<sup>91</sup>See e.g., *S. African Apartheid*, 617 F. Supp. 2d at 254 (“On at least nine separate occasions, the Second Circuit has addressed ATCA cases against corporations without ever hinting—much less holding—that such cases are barred.”).

the ATS.<sup>92</sup> *Kiobel* relied upon the *Sosa* footnote reference to corporations to hold that the question of corporate liability turns on whether international law provides for same.<sup>93</sup> The majority held that pursuant to Supreme Court-ordered guidance in the *Sosa* opinion, federal courts are to examine international law to decide the question of whether that law “extends the scope of liability for a violation of a given norm to the perpetrator being sued.”<sup>94</sup> Relying upon that footnote, *Kiobel*, examined international law and citing to international criminal tribunals,<sup>95</sup> treaties<sup>96</sup> and scholarship,<sup>97</sup> found such law did not encompass corporate liability.<sup>98</sup> The court based its decision on its conclusion that international law did not involve actors other than states. According to the court, “customary international law includes only “those standards, rules or customs (a) *affecting the relationship between states or between an individual and a foreign state*, and (b) *used by those states for their common good and/or in dealings inter se.*”<sup>99</sup>

*Kiobel* ruled that the only actors in international law are states.<sup>100</sup> According to the Second Circuit, it is now up to Congress to decide whether the statute can impose corporate liability but “[f]or now, and for the foreseeable future, the Alien Tort Statute does not provide subject matter jurisdiction over claims against corporations.”<sup>101</sup>

The first post-*Kiobel* appellate ruling was the District of Columbia Court of Appeals opinion in *Doe v. Exxon*.<sup>102</sup> In *Exxon*, the court held corporations may indeed have liability in ATS suits and called the Second Circuit opinion internally inconsistent and illogical. The court found *Kiobel*'s:

analysis conflates the norms of conduct at issue in and the rules for any remedy to be found in federal common law at issue here; even on its own terms, its analysis misinterprets the import of footnote 20 in *Sosa* and is unduly circumscribed in examining the sources of customary international law.<sup>103</sup>

Citing both Louis Henkin and Judge Edwards' *Tel-Oren* opinion, the *Exxon* court ruled that international law itself provides no remedies for its violations, rather individual nations determine whether and how such violations should be addressed. The court stated:

The ATS provides federal jurisdiction where the conduct at issue fits a norm qualifying under *Sosa* implies that for purposes of affording a remedy, if any, the law of the United States and not the law of nations must provide the rule of decision in an ATS lawsuit. Consequently, the fact that the law of nations provides no private right of action to sue corporations addresses the wrong question and does not demonstrate that corporations are immune from liability under the ATS.<sup>104</sup>

The court held the domestic remedy for violations of international law is left for the individual nations. Therefore, the ATS may be used to enforce international law norms.

The *Exxon* court also relied upon the argument that a corporation is merely a variant of an individual. According to the court, *Kiobel* is inherently contradictory inasmuch as the *Kiobel* majority concedes that “individuals” from a corporation may have liability. If, as *Kiobel* admits, individuals have liability, a juridical entity may also have liability.

Because international law generally leaves all aspects of the issue of civil liability to individual nations, there is no rule or custom of international law to award civil damages in any form or context, either as to natural persons or as to juridical ones. If the absence of a

<sup>92</sup>*Kiobel*, 621 F.3d at 149. While Judge Leval concurred in the judgment based upon other grounds, he vigorously disagreed on the corporate liability issue. See *id.* at 151 (Leval, J., concurring only in the judgment).

<sup>93</sup>*Sosa*, 542 U.S. at 732 n. 20.

<sup>94</sup>*Kiobel*, 621 F.3d at 127 (“In *Sosa* the Supreme Court instructed the lower federal courts to consider ‘whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.’”).

<sup>95</sup>*Id.* at 132–37.

<sup>96</sup>*Id.* at 137–41.

<sup>97</sup>*Id.* at 142–45.

<sup>98</sup>*Id.* at 148–49.

<sup>99</sup>*Id.* at 118 (emphasis added) (citation omitted).

<sup>100</sup>*Kiobel* acknowledged that under certain circumstances individuals may have liability but juridical entities such as corporations cannot be held liable under the ATS. See *id.* at 122 (“[N]othing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law—including the employees, managers, officers, and directors of a corporation—as well as anyone who purposefully aids and abets a violation of customary international law.”).

<sup>101</sup>*Id.* at 149.

<sup>102</sup>654 F.3d 11.

<sup>103</sup>*Id.* at 41.

<sup>104</sup>*Id.* at 42.

universally accepted rule for the award of civil damages against corporations means that U.S. courts may not award damages against a corporation, then the same absence of a universally accepted rule for the award of civil damages against natural persons must mean that U.S. courts may not award damages against a natural person. But the majority opinion concedes (as it must) that U.S. courts may award damages against the corporation's employees when a corporation violates the rule of nations. Furthermore, our circuit and others have for decades awarded damages, and the Supreme Court in *Sosa* made clear that a damage remedy does lie under the ATS. The majority opinion [in *Kiobel*] is thus internally inconsistent and is logically incompatible with both Second Circuit and Supreme Court authority.<sup>105</sup>

The decision is also noteworthy in that in broad terms, it embraces the ATS plaintiffs' bar arguments that corporations may have liability under international law citing to the Allied dismemberment of corporate violators of international law after WWII.<sup>106</sup>

Several days after the *Exxon* ruling, the Seventh Circuit, in *Flomo v. Firestone*,<sup>107</sup> similarly held corporations may indeed have liability in ATS suits. Describing *Kiobel* as a rebel opinion, the court did not mince words. It called the *Kiobel* ruling wrong.

All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable . . . The outlier is the split decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), which indeed held that because corporations have never been prosecuted, whether criminally or civilly, for violating customary international law, there can't be said to be a principle of customary international law that binds a corporation. The factual premise of the majority opinion in the *Kiobel* case is incorrect.<sup>108</sup>

As to the substantive corporate liability argument, *Flomo* disagreed with the Second Circuit and found that international law had in fact been used by the Nuremberg Military Tribunals to punish corporations.<sup>109</sup> The court also held that international law does not control the question of liability which is a matter of domestic enforcement. The court used the following analogy:

If 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.

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If a corporation has used slave labor at the direction of its board of directors, then whether the board members should be prosecuted as criminal violators of customary international law-or also or instead be forced to pay damages, compensatory and perhaps punitive as well, to the slave laborers-or, again also or instead, whether the corporation should be prosecuted criminally and/or subjected to tort liability-all these would be remedial questions for the tribunal, in this case our federal judiciary, to answer in light of its experience with particular remedies and its immersion in the nation's legal culture, rather than questions the answers to which could be found in customary international law.<sup>110</sup>

In *Sarei v. Rio Tinto*,<sup>111</sup> the Ninth Circuit joined the D.C. and Seventh Circuit post-*Kiobel* rulings finding that corporations may have liability under the ATS. Rejecting defendant Rio Tinto's argument that the ATS does not allow for corporate liability, the court noted that neither the text of the statute nor the legislative history indicates any restrictive language limiting the scope of liability to non-corporations.<sup>112</sup> The court held the appropriate determinative factor for determining whether international law extends liability to a defendant is "not whether there is a specific precedent so holding, but whether international law extends its prohibitions to the perpetrators in question."<sup>113</sup>

A clear U.S. federal circuit court split exists between the Ninth, Seventh, D.C., and Eleventh<sup>114</sup> Circuits, which explicitly held that corporations may be liable under the ATS, and the Second Circuit, which rejected

<sup>105</sup>*Id.* at 55.

<sup>106</sup>*Id.* at 52–53.

<sup>107</sup>643 F.3d 1013.

<sup>108</sup>*Id.* at 1017.

<sup>109</sup>*Id.*

<sup>110</sup>*Id.* at 1019.

<sup>111</sup>671 F.3d 736.

<sup>112</sup>*Id.* at 747–48.

<sup>113</sup>*Id.* at 760–61.

<sup>114</sup>Prior to *Kiobel*, the Eleventh Circuit held corporations may have liability. See *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) (“[W]e have . . . recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations.”).

corporate liability. The Second Circuit's *Kiobel* ruling was slated to be resolved by the Supreme Court.<sup>115</sup> "Kiobel reflects a deep and significant split at the circuit courts, because it concerns U.S. international legal obligations, because the stakes, in human and financial terms are high, because it was so obviously wrongly decided, the split that *Kiobel* represents has reached the U.S. Supreme Court."<sup>116</sup>

However, the Supreme Court did not rule on the corporate liability issue. While the Court affirmed the Second Circuit's *Kiobel* dismissal it so ruled based upon the presumption against extraterritorial application of the ATS. The Court held "[o]n these facts, all the relevant conduct took place outside the 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>117</sup> The only reference to corporations was the Court's statement—in the context of whether the conduct sufficiently touches and concerns the U.S.—that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."<sup>118</sup>

In a concurrence by Justice Breyer, four Justices rejected the presumption finding the statute provides jurisdiction where:

(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.<sup>119</sup>

The issue of corporate liability remains relevant because many of the potential defendants will be U.S. companies and, moreover, even foreign defendants may be unable to invoke the extraterritoriality argument depending on the extent their conduct touches and concerns the U.S.<sup>120</sup>

The next section discusses the rationale underpinning the argument that corporations do not have obligations under international law and thus bear no liability under the ATS. In support of this view, liability opponents cite to the historical dichotomy between private actor juridical entities such as "corporations" and formal "states". According to liability opponents, the ATS is applicable only to "states" since sovereign nations are the principal actors in international law.

## II. THE FOUNDATIONAL PREMISE AGAINST CORPORATE LIABILITY

The question of non-state actor liability for violating international law:

remains an area of substantial academic interest and public activity. In particular, focus has shifted beyond human beings, the "subjects" of international law in areas of armed conflict or human rights, and toward other non-state entities. As Philip Alston suggests, this includes "transnational corporations and other large-scale business entities, private voluntary groups such as churches, labour unions, and human rights groups, and [ ] international organizations including the United Nations itself, the World Bank, the International Monetary Fund, and the World Trade Organization."<sup>121</sup>

<sup>115</sup>The Court heard two rounds of argument, one on the issue of corporate liability, followed by an unusual Court request for the parties to brief the issue of extraterritoriality (available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1491.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf)). Argument on the extraterritoriality issue was held in October 2012. See <http://harvardhumarrights.files.wordpress.com/2012/10/10-1491rearg.pdf> (transcript of oral argument).

<sup>116</sup>Engle, *supra* n. 4, at 500.

<sup>117</sup>*Kiobel*, 133 S. Ct. at 1669. While five Justices so held, Justice Kennedy, part of the majority, stated questions remain regarding the applicability of the presumption to specific cases. "The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute . . . . Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation." *Id.* (Kennedy, J., concurring). Commentators have noted the myriad of possible ways conduct may "touch and concern" the United States. Opinio Juris, Roger Alford, *Kiobel Insta-Symposium: Degrees of Territoriality*, <http://opiniojuris.org/2013/04/22/kiobel-insta-symposium-degrees-of-territoriality/> (noting potential ways conduct may "touch and concern" the U.S. such as planning, financing, designing, profiting) (last accessed June 7, 2013).

<sup>118</sup>*Kiobel*, 133 S. Ct. at 1669. A reasonable inference from the sentence would be the Court is tacitly endorsing corporate liability.

<sup>119</sup>*Id.* at 1674 (Breyer, J., concurring in the judgment).

<sup>120</sup>See Oona Hathaway, *Kiobel Commentary: The Door Remains Open to "Foreign Squared" Cases*, (Bloomberg Law, SCOTUSblog (Apr. 18, 2013) (available at <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/>) (U.S. corporate defendants cannot invoke the presumption argument); Opinio Juris, Marty Lederman *Kiobel Insta-Symposium: What Remains of the ATS?* <http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-what-remains-of-the-ats/> ("Cases alleging *Sosa*-sufficient torts committed overseas by U.S. defendants" may still be actionable) (last accessed June 8, 2013).

<sup>121</sup>Ku, *supra* n. 4, at 735 (brackets in original).

Corporate liability opponents argue that corporate liability does not comport with international law.<sup>122</sup> The ATS provides that aliens can file claims for violations of “the law of nations” or a “treaty of the United States.”<sup>123</sup> Although the terms “international law” and “law of nations” are frequently used interchangeably,<sup>124</sup> as noted by Eric Engle:

The law of nations (jus gentium), colloquially known as international law, is divided into two branches: public international law and private international law (also known as jus gentium privatum). Public international law consists of two further branches, customary international law (jus gentium publicum) and international treaty law (just inter gentes). The United States currently interprets the law of nations, jus gentium, as indicating public international law, even though jus gentium consists of two distinct parts, jus gentium publicum and just gentium privatum.<sup>125</sup>

The ATS’s “law of nations” therefore should include both public and private international law thereby including “private actors” within the reach of the statute. However, liability opponents have focused on the public international law branch of “the law of nations” to base their arguments that the ATS does not cover non state actors.<sup>126</sup> The classical paradigm of public international law viewed states as “the” actors in international law and private individuals as “the” actors in private international law.<sup>127</sup> It is this perceived gulf of responsibility within public international law between formal state actors and juridical organizations that forms the basis of intellectual opposition to corporate liability under the ATS.<sup>128</sup>

Conventionally, international law was defined as:

the body of rules and principles of action which are binding upon civilized states in their relations with one another . . . [A]s a definite branch of jurisprudence the system which we now know as international law is modern . . . for its special character has been determined by that of the modern European state system . . .<sup>129</sup>

International law was interpreted as encompassing the rights and duties of states<sup>130</sup> who were thus the exclusive subjects of international law.<sup>131</sup> According to this view,

The lengthy majority opinion issued by the Second Circuit in *Kiobel* outlines the correct law: The ATS clearly cannot be applied to corporations because they are not liable under customary international law.<sup>132</sup>

The statist motif of international law opines “the only real subjects of persons in international law are states and their creations, mainly organizations consisting of states as members such as those of the U.N. system.”<sup>133</sup> Essentially, international law was viewed as a series of rules and conduct accepted within the international community of sovereigns excluding juridical organizations, such as corporations, which by definition are not members of the international community of states.<sup>134</sup> Thus, “international law” consisted of the relationships between sovereign nations as opposed to relationships between nations and individuals.<sup>135</sup>

<sup>122</sup>See e.g., *Kiobel*, 621 F.3d at 118 (“[C]ustomary international law includes only ‘those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*.’”)

<sup>123</sup>28 U.S.C. § 1350.

<sup>124</sup>ATS courts have often referred to international law as “customary international law.” See e.g., *Kiobel*, 621 F.3d at 116 n. 3 (“In this opinion we use the terms ‘law of nations’ and ‘customary international law’ interchangeably.”).

<sup>125</sup>See Engle, *supra* n. 4, at 501–502. Indeed, as pointed out by Engle, the ATS itself supports the two branches of public international law by reference to treaties. *Id.* at 512–513 (“[T]he *Kiobel* court’s willful blindness to international treaty law (jus inter gentes) is contrary to the black letter law of the Alien Tort Statute (ATS) itself”).

<sup>126</sup>As pointed out by Eric Engle, this narrow focus may be misplaced.

<sup>127</sup>*Id.* at 502 (“Private international law is most often accessed in the U.S. context through ‘conflicts of law’ i.e., the rules for allocating decisional authority in cross-jurisdictional contexts.”).

<sup>128</sup>*Id.* at 504 (“The schism between the ideas that first, states are the principal addressees of public international law, and second, that rights and duties may be ascribed to non-state actors under public international law is one key to understanding the significance of the Alien Torts Statute in the corporate context.”).

<sup>129</sup>See Brierly, *supra* n. 20, at 1.

<sup>130</sup>Rafael Domingo, *Gaius, Vattel, and the New Global Law Paradigm*, 22 Eur. J. Intl. L. 627, 629 (2011).

<sup>131</sup>*Id.* at 635.

<sup>132</sup>Cruz-Alvarez & Wade, *supra* n. 18, at 1131.

<sup>133</sup>Alvarez, *supra* n. 37, at 8.

<sup>134</sup>See *Restatement (Third) of Foreign Relations Law of the United States* § 102(1) (1987), which characterizes rules of international law as those “that [have] been accepted as such by the international community of states.”

<sup>135</sup>See e.g., Anne-Marie Slaughter, *Rogue Regimes and the Individualization of International Law*, 36 New Eng. L. Rev. 815, 816 (2002) (“[W]hat sovereign governments did within their own borders was of no concern to their neighbors. States were the subjects of international law; international law regulated only political and economic relations between states, not within them.”).

Julian Ku supports the no corporate liability view:<sup>136</sup>

For over two decades, U.S. courts have held that private corporations owe duties under customary international law and can be subject to lawsuits under the Alien Tort Statute (ATS) . . . . Despite this wide support, the view that corporations can be liable for violations of customary international law under the ATS is wrong.<sup>137</sup>

Ku argues that corporations cannot have liability under international law and opposes corporate liability under the ATS. “It is axiomatic that traditional international law treats states as its exclusive subjects. In the view of this traditional conception, only states had international legal personality and the capability to assert rights and to bear duties under international law.”<sup>138</sup> While individuals “may” have liability under certain limited circumstances, corporations cannot.<sup>139</sup>

Non-state parties, such as private individuals, organizations, or corporations, owe duties under only domestic laws and cannot violate international law directly.<sup>140</sup>

According to liability opponents, there is a quid pro quo wherein only states are subject to international law. “In this traditional conception, individual human beings and other non-state entities simply did not exist on the international plane.” But, in return, private actors such as individuals and corporations have no international law duties. “On the other hand, non-state actors owed no duties under international law either.”<sup>141</sup>

There is however, academic disagreement.

For centuries, there have been vast numbers of formally recognized actors in the international legal process other than the state, although far too many assume incorrectly that traditional or classical international law had been merely state-to-state and that under traditional international law individuals and various other non-state actors did not have rights or duties based directly in international agreements or customary international law.<sup>142</sup>

Paust refers to the states only view as misguided:

[F]or the last two hundred and fifty years international law has not been merely state-to-state. At best, claims to the contrary have been profoundly mistaken. At worst, they have been part of layered lies and attempts by malevolent myth mongers to exclude and oppress others, to deny responsibility, or to support radical revisionist ambitions. A claim that the only actors with formal participatory roles and/or recognized rights and duties other than the state have been natural individual persons is similarly mistaken. For example, this article has documented the manifest reach of international law to such non-individual entities as a company, corporation, union, vessel, court house, insurgent, belligerent, tribe, free city, people, and nation, among others.<sup>143</sup>

As demonstrated above, the historic narrative of international law was that sovereign states constituted the sole actor capable of violating international law.<sup>144</sup> However, this historic portrayal no longer makes sense.<sup>145</sup> The next section explains how the ritualistic distinction between “states” and “corporations” no longer comports with our globalized world today and discusses the blurring of the distinction between sovereigns and corporations.

### III. WHY THE FOUNDATIONAL PREMISE IS WRONG – TODAY’S INTERNATIONAL LAW ACTORS INCLUDE GLOBAL CORPORATIONS

The historical perspective consigning the sole actor status in international law to states was sensible when formal distinctions reflected the unique roles public actor sovereigns and private actor

<sup>136</sup>See Ku, *supra* n. 18, at 356.

<sup>137</sup>*Id.* at 354–55.

<sup>138</sup>Ku, *supra*, n. 4, at 733.

<sup>139</sup>Ku, *supra* n. 18, at 355. (“Indeed, customary law has only endorsed direct private-actor liability in the context of international criminal law, and even this somewhat-uncertain liability extends only to natural persons.”)

<sup>140</sup>*Id.* at 364.

<sup>141</sup>Ku, *supra*, n. 4, at 734.

<sup>142</sup>Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretext of Exclusion*, 51 Va. J. Int’l Law 977, 978 (2011); See also Roger P. Alford, *Apportioning Responsibility Among Joint Tortfeasors for International Law Violations*, 38 Pepp. L. Rev. 233, 234 (2011) (“There is no question that international law grants rights and imposes duties on entities other than states.”).

<sup>143</sup>*Id.* at 1003–1004 (2011).

<sup>144</sup>See *supra*, nn. 126–141 and accompanying text.

<sup>145</sup>See Muchlinski, *supra* n. 6, at 687–688 (2011) (discussing recent cases in continental Europe where corporations have been defendants in suits claiming the corporations are liable for environmental damage, human rights abuses and war crimes).

corporations played. However, the unique status of states as the actors in international law is a relic of a bygone era.<sup>146</sup> The state “has lost its monopoly” as the exclusive actor in international law.<sup>147</sup> Globalization and the blurring of the roles between states and corporations combine to make the “states only” paradigm of international law obsolete.

The old understanding of international law as something created solely by and for sovereigns is defunct. Today the production and enforcement of international law increasingly depends on private actors, not traditional political authorities. As with other public services that we used to take for granted—schools, prisons, energy utilities, and transportation networks—privatization has come to international law.<sup>148</sup>

In the past, states constituted the sole actors in international law as states were the actors capable of causing damage. However, three dynamic forces militate in favor of finding the distinction between states and global corporations antiquated: corporations are highly influential and powerful, capable of causing colossal harm;<sup>149</sup> governments have outsourced many public functions<sup>150</sup> and governments have entered the private sector.<sup>151</sup>

### A. The global corporation and The State: A comparison of near equals

Distinction between economically powerful states and large global corporations no longer reflects our interconnected global order. Thus, the states only paradigm “has become completely outdated in our time.”<sup>152</sup> Key players in international law can be states, global institutions, global corporations, and individuals.<sup>153</sup> Non-state actors, including large corporations, wield increasing influence over international affairs.<sup>154</sup> International relations today are the product of “[a] complex matrix of trans-national (if not supra-national) networks and relations, created by a great variety of non-state actors; international public companies; transnational (TNCs) or multinational corporations (MNCs), non government organizations (NGOs), international institutions, etc.”<sup>155</sup>

Large global corporations, possessing enormous power and influence, and conducting business across virtual borders can be considered as quasi or virtual states.

Every day, Google, RIM, and Facebook are behaving more like sovereign nations than corporations—controlling populations, taxing citizens, and passing laws regulating insiders and outsiders who conduct commerce within their virtual borders. Their future independence will solidify their sovereignty from unilateral regulation by any other nation, terrestrial or otherwise. In short, Google, RIM, and Facebook can already act with relative impunity. Each has sufficient power that it is impossible for any traditional nation to truly control them. If you need evidence, witness China’s failed attempt to ban Google when China’s population demanded access. Or Facebook’s frequent changes to their privacy policies, largely ignoring concerns of local regulators and legislators. The U.S. and the EU can pass all the rules they want on behavioral targeting, privacy, or data protection.<sup>156</sup>

Underscoring the similarities to sovereigns, corporations enjoy rights under international law. For example, rights conferred by the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>157</sup> Indeed, corporations have filed claims in the European Court of Human

<sup>146</sup>As noted *supra* n. 142–43 and accompanying text, some have argued that any such distinction was erroneous.

<sup>147</sup>See Domingo, *supra* n. 130, at 639.

<sup>148</sup>See Paul B. Stephan, *Privatizing International Law*, 97 Va. L. Rev. 1573, 1574–1575 (2011).

<sup>149</sup>Alvarez, *supra* n. 37, at 5.

<sup>150</sup>See Gillian E. Metzger, *Privatization as Delegation*, 103 Colum L. Rev. 1367, 1369 (2003) (“Recent privatization efforts, particularly in health care and welfare programs, public education, and prisons, reveal a trend of greater discretion and broader responsibilities being delegated to private hands.”).

<sup>151</sup>See Larry Catá Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience*, 19 Transnatl. L. & Contemp. Probs. 3, 61–62 (2010).

<sup>152</sup>See Domingo, *supra* n. 130, at 639.

<sup>153</sup>Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, 185 (1996).

<sup>154</sup>*Id.*

<sup>155</sup>See Domingo, *supra* n. 130, at 639.

<sup>156</sup>See Douglas J. Wood, *Say Hello to the World’s New Sovereign Nations: Facebook, Google and RIM* (“Say hello to the new sovereign nations of Google, RIM, and Facebook. Facebook now has more than five hundred million members, a population that would make it the third-largest nation in the world. Google, used everyday by hundreds of millions, is the most robust resource for knowledge in history, and forever expanding.”) [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202475267603&Say\\_Hello\\_to\\_the\\_Worlds\\_New\\_Sovereign\\_Nations\\_Facebook\\_Google\\_and\\_RIM=&src=EMC-Email&et=editorial&bu=Corporate%20Counsel&pt=Corporate%20Counsel%20Daily%20Alerts&cn=cc20101124&kw=Nation%3F%20Bah,%20They%20Can't%20Control%20ME!%20Welcome%20to%20War,%20Virtual%20World-Style](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202475267603&Say_Hello_to_the_Worlds_New_Sovereign_Nations_Facebook_Google_and_RIM=&src=EMC-Email&et=editorial&bu=Corporate%20Counsel&pt=Corporate%20Counsel%20Daily%20Alerts&cn=cc20101124&kw=Nation%3F%20Bah,%20They%20Can't%20Control%20ME!%20Welcome%20to%20War,%20Virtual%20World-Style)

<sup>157</sup>Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

Rights (“ECHR”) for infringements on the corporation’s rights.<sup>158</sup> The ECHR has enforced corporate rights extensively. “[T]he idea that companies and other entities qualify for protection under the ECHR has been so accepted within the Strasbourg court’s jurisprudence that there is literally no discussion on the question in court opinions.”<sup>159</sup>

Interestingly, corporations might argue that if they are to be treated as state-like entities bearing state-like responsibilities, corporations also enjoy rights similar to states, such as sovereign immunity. Sovereign immunity is a principle of international law.<sup>160</sup> However, it is generally applied in a restrictive fashion, meaning commercial activity or private-sector activity is not subject to immunity.<sup>161</sup> “The restrictive theory is linked to the phenomenon of states entering the marketplace and taking part in commercial activities like private persons.”<sup>162</sup> If the corporation is engaging in a “for profit” commercial endeavor, immunity should be inapplicable as it would fall within the rubric of restrictive sovereign immunity as it does for sovereign nations.

A significant measure of power is the extent of wealth attributable to an actor.<sup>163</sup> Against this benchmark, large global corporations’ wealth often rivals the financial power of states. Coupled with technology, global corporate power and influence rivals, and may eclipse, state power.<sup>164</sup>

“With the largest [transnational corporations] headquartered in the United States, Europe, and Japan, a single multinational firm today can wield as much economic power and influence as an entire nation.”<sup>165</sup>

Wielding enormous power and resources in our globalized free-enterprise oriented world,<sup>166</sup> “[t]he Corporation’ assumes a central position in modern economic life due mainly to the fact that major portions of our economic activities are performed by corporations.”<sup>167</sup> Large transnational corporations are the norm in this 21st Century world<sup>168</sup> and are “crucial actors in international business and have taken the mantle of economic leadership and development once relegated primarily to nation states.”<sup>169</sup> This fact alone militates strongly in favor of rejecting a formalistic “no liability” view.

<sup>158</sup>See *e.g.*, *Agrotexim v. Greece*, 330 Eur. Ct. H.R. 3 (Ser. A) (1995) (holding that the company, and not its shareholders, is the proper rights holder) (available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57951#{"itemd":\["001-57951"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57951#{))).

<sup>159</sup>Ku, *supra* n. 4, at 748–749. See also the United States Supreme Court decision in *Citizens United v. Fed. Election Commn.*, 558 U.S. 310, 365 (2010) (holding that corporations have rights to free speech).

<sup>160</sup>See Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?* 21 Eur. J. Intl. L. 853 (available at <http://ejil.oxfordjournals.org/content/21/4/853.full#fn-20>) (sovereign immunity immunizes sovereigns from liability). The principle of sovereign immunity is not without scholarly criticism. University of California, Irvine Law School Dean Erwin Chemerinsky critiques sovereign immunity based in part on the failure of accountability. See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201, 1213–14 (2001) (citing to the ruling in *U.S. v. Stanley*, 483 U.S. 669, 683 (1987) wherein the U.S. Supreme Court ruled sovereign immunity absolved the American government for damages arising out of governmental human medical experimentation using LSD in the 1950s. Dissenting, Justice Brennan noted the doctrine would also absolve Nazi Germany for human medical experimentation. *Id.* at 686 (Brennan, J., dissenting)).

<sup>161</sup>The European Convention on State Immunity (“ECIS”) and the UN Convention on Jurisdictional Immunities of States (“UNCJIS”) utilize this theory. See *e.g.*, ECIS Art. 3 (contractual obligation) and Art. 7 (commercial activities within the forum state) and UNCJIS Art. 10 (commercial transactions). The United States also uses a commercial activity exception to sovereign immunity. See FSIA § 1605(a)(2) (commercial activities either within or with direct effect on the United States).

<sup>162</sup>See Finke, *supra* n. 160.

<sup>163</sup>Laurence Lessig’s book, *Republic Lost*, documents how financially powerful private corporations have acquired great influence and power to such a degree that such entities constitute a danger to the United States. See also Thomas B. Edsell, *Putting Political Reform Right Into the Pockets of the Nation’s Voters*, N.Y. Times (Dec. 14, 2011) (available at <http://www.nytimes.com/2011/12/15/books/republic-lost-campaign-finance-reform-book-review.html?pagewanted=all>) (“With billions of dollars at stake, corporations—and powerful interests in general—have consistently found ways both to avoid and evade obstacles. Those with power have an unbroken record of finding ways to navigate around reform laws or turn regulatory standards to their own advantage. For example, the primary users of the Freedom of Information Act are not journalists and crusaders seeking to reveal illicit activities; they are businesses seeking to find out what government regulators are up to and what their competitors have disclosed to government agencies.”) (paragraph break omitted).

<sup>164</sup>Joe W. (Chip) Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 Rutgers J. L. & Pub. Policy 334, 357 (2009) (“The ‘corporate rise to power’ accelerated during the trade liberalization era of the 1990s to eclipse that of even some nation states.”).

<sup>165</sup>See Vega, *supra* n. 62, at 386.

<sup>166</sup>Chow, *supra* n. 13, at 817. (“The globalization of manufacturing operations by MNCs has been a hallmark of the modern age and has allowed MNCs to greatly increase their power and influence.”)

<sup>167</sup>Zohar Goshen, *Controlling Corporate Agency Costs: A United States-Israeli Comparative View*, 6 Cardozo J. Intl. & Comp. L. 99 (1998).

<sup>168</sup>See Brian F. Havel & Gabriel S. Sanchez, *The Emerging Lex Aviatica*, 42 Geo. J. Intl. L. 639, 640 (2011).

<sup>169</sup>See Joel Slawotsky, *The Global Corporation as International Law Actor*, 52 Va. J. Intl. L. Dig. 79, 84 (2012) (available at [http://www.vjil.org/assets/pdfs/vjilonline2/Slawotsky\\_Post\\_Production.pdf](http://www.vjil.org/assets/pdfs/vjilonline2/Slawotsky_Post_Production.pdf)).

As Justice Scalia noted in his concurrence in *Citizens United*, corporations are “the principal agents of the modern free economy.”<sup>170</sup>

In the technology-driven globalized world where money constitutes influence and power, the large global corporation wields awesome control. Indeed, ownership of large transnational enterprises constitutes authority. “In a global economy, ownership of companies is the most important way to have influence.”<sup>171</sup>

As corporations increased their public actor role, their “state-like power over their constituents of society did not wane, but instead increased.”<sup>172</sup> Large global corporations shape and influence the nations that they operate in:<sup>173</sup>

MNCs play a central role in the movement of capital and technology from developed countries to developing countries and thus have become major players in determining the economic, political, and social welfare of nations, particularly in developing nations that have a strong hunger for foreign capital and technology.<sup>174</sup>

To be sure, there have been prior examples of corporations wielding state like power over private citizens. For example, the British East Indies Company (“Company”) was a state-controlled company that was enormously influential over India and wielded both private and public actor power. “The East India Company foreshadowed the modern world in all sorts of striking ways . . . . And—particularly relevant at the moment—it was the first state-backed company to make its mark on the world.”<sup>175</sup> The Company was simultaneously involved in private market activity but also was enmeshed in administrative control, tax collection, and military power.<sup>176</sup> The similarities continue: the Company enjoyed business monopolies. “Many of today’s state-owned companies are monopolies or quasi-monopolies.”<sup>177</sup> The Company was thus remarkably similar to today’s state-owned enterprise and serves as an example of an actor that yields both public and private power.

The Company serves as an exemplar of an actor simultaneously possessing public and private actor functions similar to today’s large global corporation. However, as most historical comparisons, the parallels between the Company and today’s state-owned firms are not exact. “The East India Company controlled a standing army of some 200,000 men, more than most European states.”<sup>178</sup> Another distinguishing characteristic was the Company’s shares were not owned by the British government but rather by some government employees. In contrast, “[t]oday’s state-capitalist governments hold huge blocks of shares in their favourite companies.”<sup>179</sup> In addition, while the Company controlled large swaths of India (and several other locales), today’s large global corporation may have tremendous influence in many nations and over a substantially larger number of people. Moreover, today’s global corporation is empowered through powerful technology which can dominate a nation’s strategic industries such as financial, energy, communication and defense. The Company, while powerful and bearing similarities to today’s large global corporation, did not have the same extent of influence held by today’s large global corporation. “The current interrelated financial, economic, climate, energy, food, water, political, and security crises affecting the globe only highlight the historically unprecedented degree of interconnectivity and interdependence.”<sup>180</sup>

Notwithstanding these differences the Company’s conduct establishes that there were historical exceptions to the traditional demarcations between states and corporations.

In today’s world, both states and corporations have similar or even identical interests. This alignment of interests between sovereigns and large global corporations has been magnified by “globalization [ ] that has revolutionized the way business (and many other aspects of life) is now conducted in the

<sup>170</sup>*Citizens United*, 588 U.S. at 393 (Scalia, Alito, & Thomas, JJ., concurring).

<sup>171</sup>Mark Landler, *supra* n. 52 (available at [http://www.nytimes.com/2007/05/04/business/worldbusiness/04norway.html?\\_r=2&oref=slogin&](http://www.nytimes.com/2007/05/04/business/worldbusiness/04norway.html?_r=2&oref=slogin&)) (quoting Norwegian Finance Minister Kristin Halversen).

<sup>172</sup>Jackson, *supra* n. 38, at 330.

<sup>173</sup>*See e.g., Abdullahi*, 562 F.3d 163 (Nigeria outsourcing healthcare to Pfizer).

<sup>174</sup>Chow, *supra* n. 13, at 817.

<sup>175</sup>*The Company That Ruled the Waves*, *The Economist* (Dec 17, 2011) (available at <http://www.economist.com/node/21541753>) [hereinafter *Ruled the Waves*].

<sup>176</sup>*See id.*

<sup>177</sup>*Id.*

<sup>178</sup>*Id.*

<sup>179</sup>*Id.*

<sup>180</sup>Pitts, *supra* n. 164, at 335.

modern world.”<sup>181</sup> This coalition of interests underscores the blurring of the distinction between public states and private corporations.

In international relations, there are no enduring values as in the case of interpersonal relations. For states, there are mostly shifting interests of a passing nature. The states’ goals of power and wealth are in frequent contrast with the human goals of justice and peace aspirations. The protagonists of state interests all too often prevail over those advocating justice and peace.<sup>182</sup>

Both public states and private corporations have goals of financial power and wealth. Why should corporations be treated differently particularly in today’s global economy where states are private market actors in the private realm and private corporations engage in public actor functions. There is an absence of any reason, let alone a compelling one, militating towards treating a corporation differently so as to exempt them from liability. Since global corporations wield state like powers, corporate actors should be treated as quasi-state entities. Excluding a private corporate actor from liability for violations of international law runs counter intuitive.

“Limiting civil liability to individuals while exonerating the corporation directing the individual’s action . . . makes little sense in today’s world.”<sup>183</sup>

The global business, political and economic environments have drastically changed. The narrow view distinguishing between “sovereigns” and “corporations” must yield to the new realities: multiple actors exist spanning the globe that possess both public and private actor characteristics in varying degrees.

The world has since changed, and long-standing legal concepts are being increasingly challenged by dramatic cross-border developments that no longer allow domestic land laws to exist in isolation, but instead present pressing issues of cross-influences, regionalism, and universalism.<sup>184</sup>

These hybrid actors operate across borders and utilize major bases of business operations over continents, and exert enormous influence. “[G]lobalization is indeed producing an incomplete yet significant form of authority deep within the national State, that is, a hybrid authority that is neither fully private nor fully public, neither fully national nor fully global.”<sup>185</sup>

Moreover, not only do large global corporations possess enormous financial power, with the associated powerful influences, there is yet another reason to re-think the distinctions between states and corporations as private actors. As detailed in the next section, while historically a line of demarcation existed wherein corporations acted in the private sphere and states acted in the public realm, that line is becoming blurred.

## **B. The blurring of the distinctions between private and public actors**

Another factor militating in favor of finding global corporations as state-like actors is the evisceration of the traditional distinctions between public actor states and private actor corporations. Our world today no longer consists of pure private actors and pure public actors neatly divided and governed either by domestic or international law. Norway’s SWF provides an example of this phenomenon.

Norway has provided an architecture of governance that sits astride the borders of market and state, of public and private, and of national and international. It’s efforts to institutionalize this border-riding governance provides a window into the shape of cooperative and inter-systemic governance that is likely to play a greater role in shaping behavior in this century.<sup>186</sup>

Private corporations are actors in the public arena taking a role in traditionally state functions. The public functions of education, policing and defense operations no longer depend exclusively on public actors within a specific nation state but are affected by private corporations conducting business across borders. Indeed, large multinational corporations have been referred to as virtual “states.”<sup>187</sup>

<sup>181</sup>Chow, *supra* n. 13, at 815.

<sup>182</sup>See M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 Va. J. Intl. L. 269, 282 (2010).

<sup>183</sup>*In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d. 7, 58–59 (E.D.N.Y. 2005).

<sup>184</sup>Amnon Lehavi, *The Global Law of the Land*, 81 U. Col. L. Rev. 425, 427 (2010).

<sup>185</sup>Saskia Sassen, *Bordering Capabilities Versus Borders: Implications for National Borders*, 30 Mich. J. Intl. L. 567, 579 (2009).

<sup>186</sup>See Backer, *supra* n. 30, at 10.

<sup>187</sup>See Douglas J. Wood, *Say Hello to the World’s New Sovereign Nations: Facebook, Google and RIM* (“Say hello to the new sovereign nations of Google, RIM, and Facebook. Facebook now has more than five hundred million members, a population that would make it the third-largest nation in the world. Google, used everyday by hundreds of millions, is the most robust resource for knowledge in history, and forever expanding.”) [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202475267603&Say\\_Hello\\_to\\_the\\_Worlds\\_New\\_Sovereign\\_Nations\\_Facebook\\_Google\\_and\\_RIM=&src=EMC-Email&et=editorial&bu=Corporate%20Counsel&pt=Corporate%20Counsel%20Daily%20Alerts&cn=cc20101124&kw=Nations%3F%20Bah,%20They%20Can't%20Control%20ME!%20Welcome%20to%20War,%20Virtual%20World-Style](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202475267603&Say_Hello_to_the_Worlds_New_Sovereign_Nations_Facebook_Google_and_RIM=&src=EMC-Email&et=editorial&bu=Corporate%20Counsel&pt=Corporate%20Counsel%20Daily%20Alerts&cn=cc20101124&kw=Nations%3F%20Bah,%20They%20Can't%20Control%20ME!%20Welcome%20to%20War,%20Virtual%20World-Style).

Parallel to the development of private corporate actors operating in the public realm, the traditional private sector functions of capital market investment and the quest for profits are no longer the exclusive province of private entities. States are operating in the business world as private actors through vehicles such as sovereign wealth funds (“SWFs”) whereby they actively invest in world equity markets.<sup>188</sup> SWFs demonstrate convincingly that states are involved in traditionally private sector roles. States also own private sector businesses through state-owned enterprises (“SOEs”). Thus, the role of the private sector is no longer relegated exclusively to corporations. Given the blurring of the distinctions, there is little basis to treat global corporations differently than states.<sup>189</sup>

### 1. Corporations acting in the public sphere

Recent years have witnessed the state becoming unanchored from its public function moorings. “Just as law-making might have become unmoored from the state, the state has itself become unmoored. And so the issue of corporate citizenship serves as a proxy for the equally important converse issues – that of the private rights of states as participants in global markets.”<sup>190</sup> To a remarkable extent, corporations have replaced the role of the state.<sup>191</sup> Private actors “can and do perform government functions, from providing expertise to monitoring compliance with regulations to negotiating the substance of those regulations, both domestically and internationally.”<sup>192</sup>

Numerous historically “state” roles have been replaced by corporations.<sup>193</sup> The antiquated notion that states exclusively control the political, economic and social life of citizens must acquiesce to the fact that corporations are “actors who cannot be associated with a certain nation-state as their home base” and who wield enormous influence within states.<sup>194</sup>

In addition to wielding enormous economic power, corporations increasingly engage in state-like activity as a result of the privatization of traditional state functions (e.g., the management of prisons, public welfare programs, public utilities, and wars) and the tendency of corporations to elect to operate in environments where state power is weak or non-existent.<sup>195</sup>

Sovereigns often privatize or outsource to corporations the performance of traditionally state services. “The most common form of privatization in this arena has been outsourcing, an arrangement in which the government contracts with a private entity to render goods or services previously provided by the government.”<sup>196</sup> These formerly state-run functions, now conducted by private corporations, span the gamut of health care, welfare, education and prisons,<sup>197</sup> policing,<sup>198</sup> imprisonment,<sup>199</sup> military defense functions,<sup>200</sup> private sector construction of public sector infrastructure,<sup>201</sup> and other traditionally governmental services.<sup>202</sup>

<sup>188</sup>See Joel Slawotsky, *Sovereign Wealth Funds as Emerging Financial Superpowers: How U.S. Regulators Should Respond*, 40 *Geo. J. Intl. L.* 1239, 1250 (2009).

<sup>189</sup>See Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 *Nw. U. J. Intl. Hum. Rights* 262 (2008) (“Corporations, especially multinational enterprises (‘MNEs’), have become ever larger and more powerful since the 1970s, often surpassing the economic power and influence of states.”)

<sup>190</sup>See Larry Catá Backer, *Inter-Systemic Harmonization and its Challenges for the Legal State*, in *The Law of the Future and the Future of Law* 427, 431 (Sam Muller et al., eds. Torkel Opsahl Acad. EPublisher 2011) (available at [http://www.fichl.org/fileadmin/fichl/documents/FICHL\\_11\\_Web.pdf](http://www.fichl.org/fileadmin/fichl/documents/FICHL_11_Web.pdf)).

<sup>191</sup>See Jeffrey Bone, *Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought?* 24 *Can. J. L. & Jur.* 277, 301 (2011).

<sup>192</sup>Anne-Marie Slaughter, *A New World Order* 9 (Princeton U. Press 2004).

<sup>193</sup>See Richard J. Pierce, Jr., *Outsourcing Is Not Our Only Problem*, 76 *Geo. Wash. L. Rev.* 1216 (2008) reviewing Paul Verkuil, *Outsourcing Sovereignty* (2007).

<sup>194</sup>See Graf-Peter Calliess, *Transnational Corporations Revisited*, 18 *Ind. J. Global Leg. Stud.* 601, 607 (2011). See also Chow, *supra* n. 13, at 815–16.

<sup>195</sup>See Ronald Slye, *Corporations, Veils, and International Criminal Liability*, 33 *Brook. J. Intl. L.* 955, 961 (2008).

<sup>196</sup>See Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 *U. Chi. Legal F.* 265, 266 (2010).

<sup>197</sup>See Metzger, *supra*, n. 150, at 1369 (“Recent privatization efforts, particularly in health care and welfare programs, public education, and prisons, reveal a trend of greater discretion and broader responsibilities being delegated to private hands.”).

<sup>198</sup>See Elizabeth Joh, *The Paradox of Private Policing*, 95 *J. Crim. L. & Criminology* 49, 83–95 (2004).

<sup>199</sup>See Daphne Barak-Erez, *The Private Prison Controversy and The Privatization Continuum*, 5 *Law & Ethics Hum. Rts.* 138, 139–48 (2011).

<sup>200</sup>See e.g., Simon Chesterman, *We Can't Spy If We Can't Buy!: The Privatization of Intelligence and the Limits of Outsourcing Inherently Governmental Functions*, 19 *Eur. J. Intl. L.* 1055, 1056–73 (2008).

<sup>201</sup>See generally, Laura A. Malinsky, *Rebuilding with Broken Tools: Build-Operate-Transfer Law in Vietnam*, 14 *Berkeley J. Intl. L.* 438 (1996).

<sup>202</sup>See generally, Government Companies Law 1975 SH No. 5735 (Israel).

The privatization of prisons serves as an example of the outsourcing phenomenon.

In response to the explosion in prison population prompted by the drug enforcement policies of the 1980s and 1990s, governments began to rely more heavily upon the private sector for the provision of corrections services for adults. As a result, a significant number of state and federal prisoners are now in the custody of private entities.<sup>203</sup>

Private policing exemplifies another manifestation of the private actor engaged in the public sector. Protection of citizens and their property—a traditional core governmental sphere—is increasingly conducted by private actors. As one corporate executive noted, “today much of the protection of our people, and their property and their businesses, has been turned over to private security.”<sup>204</sup> The trend is global, and private sector policing is gaining popularity in many nations including Canada, Australia, and the U.K.,<sup>205</sup> and includes criminal investigations and arrests.<sup>206</sup> It is generally recognized that, in the United States, “[u]niformed private guards . . . now routinely guard and patrol office buildings, factories, warehouses, schools, sports facilities, concert halls, train stations, airports, shipyards, shopping centers, parks, government facilities—and, increasingly, entire commercial districts and residential neighborhoods.”<sup>207</sup>

Governmental outsourcing spans a variety of areas such as: drafting health policies; performing military defense functions; implementing border control; immigration, and implementation of asylum policies.

In the U.K., the government has asked private sector food corporations to assist drafting policy on food and alcohol.<sup>208</sup> There is a trend whereby private actors are assisting or replacing states with respect to rights. A “primary example of such reconfiguration of human rights is the manner in which the enforcement of human rights in the crucial area of labour rights is moved from states and international organizations to market actors via the idea of CSR (corporate social responsibility).”<sup>209</sup>

States are increasingly depending upon private contractors to perform traditionally state military functions.<sup>210</sup> “[I]t is clear that a broader array of non-state actors—from contractors to transnational terrorist organizations to regional bodies—are actively involved in today’s battlefields.”<sup>211</sup> Examples of public actor defense functions conducted by private entities include “truck driving to training for specialist military, police and security operations, communications support, aerial surveillance, intelligence, training, strategic planning, armed personal security, and conducting drone attacks.”<sup>212</sup>

Another illustration of corporate involvement in a traditional state function is the privatization of immigration and asylum. “It is clear that we are witnessing a gradual process in which states dilute their own exercise of sovereign power towards immigrants and transfer more authority to private and other non-state actors.”<sup>213</sup> The privatization of border control and immigration has been well-documented.<sup>214</sup> “Border control, admission of immigrants, social integration, and distribution of benefits and membership rights to persons are all thought of in international legal doctrine as acts of state sovereignty.”<sup>215</sup>

In addition, states are outsourcing the providing of “economic and social benefits to asylum seekers,” involving “private persons, corporations and NGOs” on a large scale.<sup>216</sup> “In some cases,

<sup>203</sup>Fairfax, *supra* n. 196, at 271 (footnotes omitted).

<sup>204</sup>See *e.g.*, Hearings Regarding Private Security Guards Before Subcomm. On Human Resources of the House Comm. On Education and Labor, 103d Cong. 132 (1993) (statement of Guardsmark, Inc. President Ira Lipman).

<sup>205</sup>David A. Sklansky, *Private Policing and Human Rights*, 5 L. & Eth. of Hum. Rts. 112, 115 (2011).

<sup>206</sup>See Joh, *supra* n.198, at 83–95.

<sup>207</sup>Sklansky, *supra* n. 205, at 114–15.

<sup>208</sup>Felicity Lawrence, *McDonald’s and PepsiCo to Help Write UK Health Policy*, The Guardian (Nov. 12, 2010) (available at <http://www.guardian.co.uk/politics/2010/nov/12/mcdonalds-pepsico-help-health-policy>). (“The Department of Health is putting the fast food companies *McDonald’s* and *KFC* and processed food and drink manufacturers such as *PepsiCo*, *Kellogg’s*, *Unilever*, *Mars* and *Diageo* at the heart of writing government policy on *obesity*, alcohol and diet-related disease, the Guardian has learned.”)

<sup>209</sup>See B.S. Chimni, *Prolegomena Class Approach To International Law*, 21 Eur. J. Intl. L. 57, 73 (2010) (describing how the debate on labor standards has shifted from a state-oriented focus to a focus on global corporations).

<sup>210</sup>See generally, Chesterman, *supra* n. 200.

<sup>211</sup>Daphné Richemond-Barak, *Rethinking Private Warfare*, 5 L. & Eth. of Hum. Rts. 159, 165 (2011).

<sup>212</sup>*Id.* at 165–66.

<sup>213</sup>Tally Kritzman-Amir, *Privatization and Delegation of State Authority in Asylum Systems*, 5 L. & Eth. of Hum. Rts. 193, 199 (2011).

<sup>214</sup>*Id.* at n. 23.

<sup>215</sup>*Id.* at 198.

<sup>216</sup>*Id.* at 209.

states privatize these service providers, giving a franchise to operators who directly provide them,” and “. . . these service providers are profit-driven and profit-oriented, a consideration that does not always conform to international and domestic obligations towards refugees.”<sup>217</sup>

Although states were once the primary vehicle to impose obligations, global corporations are taking a substantial role. As detailed above, global developments have conferred ever greater “public actor” power in corporations and corporate “state-like power over their constituents” is ever-increasing.<sup>218</sup> It is incontrovertible that private corporations engage in activities once considered within the exclusive realm of official state actor. This demonstrates convincingly that private corporations no longer act solely as pure private actors.

## 2. States acting in the private sphere

A similar disconnect between traditional roles has occurred in the private sector. The historical activities of the private sector—such as providing investment capital, trading for profit in the equity and debt markets, long-term ownership of shares in publicly traded corporations, venture capital, commodity extraction, real estate development and large scale farming—are no longer the exclusive roles of private individual and corporate actors. In these areas, sovereigns are increasingly taking on a private actor role similar to the roles of private individuals and corporations.

Larry Backer adroitly described this growing phenomenon:

This participation of states directly in markets (production, ownership, finance and the like) is not merely in the old and now fairly tame form of public, central planning-based, political regimes, or the sort of ownership that traditionally constituted state enterprises, i.e., mercantilist/Marxist-Leninist undertakings with a long and well understood history and purpose. What distinguishes this sovereign activity from its mid-20th Century form is the willingness of states not only to limit their control of internal economies, but also to invest their financial wealth outside their national borders. *In this respect, states assume the very role of the private economic actors that they once feared so much.* The 21st Century is witnessing a dramatic rise in the willingness of states to project economic power both at home and in host states through the same economic vehicles that threatened the states’ power in the 20th Century. *The facilitating cause of this change in approach is the creation of the very system that frees economic actors from the constraints of territory and more closely binds public actors thereto.* Just as private economic entities may now cross borders to affect transactions that maximize their wealth, so states are now discovering that they might do the same thing. Economic globalization does not exclude private market participants from its system of freely moving capital. Just as private actors are subject to the regulation and control of the sovereign in whose territories they act, states acting outside their borders as participants in local economic activity assume a similar character. Consequently, some states seem to have become, to some extent, pools of national economic wealth, the power of which matches or exceeds their traditional sovereign power.<sup>219</sup>

Indeed, similar to corporations, states have “reinvented” themselves and take on multiple roles including public, private and mixed. “[G]overnments are empowering themselves along multiple dimensions.”<sup>220</sup> Both sovereign wealth fund investments and the state-owned enterprise illustrate how public actor states are now operating in the private sector.

**a. Sovereign wealth funds:** The blurring of distinctions between public and private actors<sup>221</sup> is further exemplified by the emergence of sovereign wealth funds (“SWFs”). SWFs are financial superstars which allow public states to engage in private market activity.<sup>222</sup> SWFs are “large pools of capital” owned and controlled by various public states.<sup>223</sup> The amounts of capital owned and deployed

<sup>217</sup>*Id.* at 210.

<sup>218</sup>Jackson, *supra* n. 38, at 331.

<sup>219</sup>Backer, *supra* n. 151, at 10–11 (emphasis added).

<sup>220</sup>José E. Alvarez, *The Return of the State*, 20 Minn. J. Intl. L. 223, 256 (2011).

<sup>221</sup>See Havel & Sanchez, *supra* n. 168, at 659 (“The very existence of the Montebello Statement of Principles testifies to an alternative narrative of converging public and private action.”)

<sup>222</sup>Backer, *supra* n. 151, at 59 (“It is clear that SWFs represent a multifaceted nexus point for the convergence of public and private law. On the one hand, SWFs encompass attempts by states to participate in global markets like private individuals. On the other hand, SWFs may govern by other means. SWFs potentially allow states to convert private markets into public arenas through which they might project political and regulatory power abroad.”).

<sup>223</sup>Slawotsky, *supra* n. 188, at 1251.

by state-owned SWFs are staggering.<sup>224</sup> SWFs are increasingly acquiring ownership stakes in corporations all over the globe. State actor SWFs are involved in: utilities,<sup>225</sup> banking,<sup>226</sup> brokerage,<sup>227</sup> stock exchanges,<sup>228</sup> warehouses,<sup>229</sup> farming,<sup>230</sup> and infrastructure.<sup>231</sup>

By 2009, several Middle East funds had acquired substantial minority interests in the London Stock Exchange (Qatar SWF; UAE Dubai SWF), NASDAQ (UAE Dubai SWF); and the Bombay Stock Exchange (UAE Dubai SWF). As a consequence, SWFs are moving into positions of influence in contests for control of some of these Exchanges—a role that puts them in a position to affect the scope and character of markets in which securities are traded, and which serve as a source for corporate regulation beyond the state.<sup>232</sup>

Whether a SWF controls, dominates, or outright buys a corporation there can be no doubt that such activity represents involvement in a traditionally “non-state” activity resulting in states conducting business as private actors. The SWF phenomenon illustrates how states are no longer acting as pure public actors.

**b. State-owned enterprises:** Another example of the blurring of the demarcation between public and private actors is the state-owned enterprise (“SOE”). SOEs are involved in direct or partial ownership of business projects and joint venture partners with other states and corporations on a global basis. Large global SOEs have become substantial market players internationally.<sup>233</sup> “State-controlled companies account for 80% of the market capitalisation [sic] of the Chinese stock market, more than 60% of Russia’s, and 35% of Brazil’s. They make up 19 of the world’s 100 biggest multinational companies and 28 of the top 100 among emerging markets.”<sup>234</sup> The SOE represents a very powerful segment of the global economy and their market value rivals or surpasses the market value of private corporations in some nations.<sup>235</sup>

<sup>224</sup>*Id.* at 1239 (citing to financial data indicating that SWFs would be wielding nearly \$10 trillion within a few years).

<sup>225</sup>See Mark Scott, *China’s Wealth Fund Buys Stake in British Utility*, *The DealBook* (Jan. 20, 2012) (available at <http://dealbook.nytimes.com/2012/01/20/chinas-sovereign-wealth-fund-buys-minority-stake-in-british-utility/>) (“The *China Investment Corporation*, the country’s sovereign wealth fund, announced Friday that it had acquired an 8.68 percent stake in Thames Water, Britain’s largest water and sewerage company.”).

<sup>226</sup>See Elisa Martinuzzi & Sonia Siretti, *Aabar to Raise UniCredit Stake to Become Bank’s No.1 Investor*, *Bloomberg Business Week* (Jan. 18, 2012) (available at <http://www.businessweek.com/news/2012-01-18/aabar-to-raise-unicredit-sake-to-become-bank-s-no-1-investor.html>)

(“Aabar Investments PJS, the Abu Dhabi-based sovereign wealth fund, plans to increase its stake in UniCredit SpA to 6.5 percent through the lender’s rights offer, which would make it the bank’s biggest investor.”)

<sup>227</sup>See Yang Sung-jin, *Korean Sovereign Fund Suffers Loss*, *The Korean Herald* (Jan. 11, 2012) (available at <http://www.koreaherald.com/national/Detail.jsp?newsMLId=20120111000977>) (“Korea Investment Corporation, Korea’s sovereign wealth fund, suffered a net loss of 3.3 percent in terms of average yield last year, hurt by the turmoil in the global financial market and a massive loss linked to its investment in Merrill Lynch, industry sources said Wednesday.”)

The main culprit for the deeper loss is KIC’s poor stock investment, particularly concerning its holdings in Merrill Lynch. In early 2008, KIC bought \$2 billion worth of Merrill Lynch shares, but the U.S. firm was later taken over by Bank of America in the aftermath of the subprime mortgage crisis. As a result, KIC came to own 69 million shares in BoA, but due to plunging share prices, the fund’s losses stemming from its stake in BoA are estimated to have reached \$1.3 billion.”)

<sup>228</sup>See Niklas Magnusson & Will McSheehy, *Dubai, Qatar Buy Rival Stakes in LSE, OMX Exchanges*, *Bloomberg.com* (Sept. 20, 2007), <http://www.bloomberg.com/apps/news?pid=newsarchive&refer=Europe&sid=aY65yLteROQE>. (“Qatar Investment Authority said it purchased 20 percent of LSE shares and 9.98 percent of OMX, a move that may thwart Nasdaq’s plans to acquire the Stockholm-based exchange.”)

<sup>229</sup>See Kathleen Chu, *Global Logistic, CIC to Buy \$1.6 Billion of Japan Warehouses*, *Bloomberg.com* (Dec. 20, 2011), <http://www.bloomberg.com/news/2011-12-19/global-logistic-cic-to-buy-1-6-billion-of-japanese-assets-from-lasalle.html>. (“Global Logistic Properties Ltd. (GLP), a unit of the *Government of Singapore Investment Corp.*, and *China Investment Corp.* agreed to buy 15 Japanese warehouses for 122.6 billion yen (\$1.6 billion) as demand for modern storage is rebounding after the March earthquake.”)

<sup>230</sup>See Rabah Arezki et al., *International Monetary Fund, Global Land Rush*, 49 *Fin. & Dev.* 1 (Mar. 2012), <http://www.imf.org/external/pubs/ft/fandd/2012/03/arezki.htm> (“The sharp increase in international food prices during 2007–08 triggered a spate of cross-border land acquisitions by sovereign wealth funds, private equity funds.”)

<sup>231</sup>See Peter Edwards, *BORIS: FOREIGN CASH CAN PAY FOR AIRPORT* (Jan. 19, 2012), <http://www.cityam.com/latest-news/boris-foreign-cash-can-pay-airport> (“A NEW airport for the Thames Estuary could be built in as little as six years and backed by sovereign wealth funds, Boris Johnson claimed yesterday.”)(emphasis in the original).

<sup>232</sup>See Larry Catá Backer, *Sovereign Wealth Funds As Market Operators*, *Law at the End of the Day* (July 4, 2011), <http://lcbackerblog.blogspot.com/2011/07/sovereign-wealth-fund-as-market.html>.

<sup>233</sup>See Peter Mulchinski, *The Changing Face of Transnational Business Governance*, 18 *Ind. J. Global Legal Stud.* 665–695 (2011).

<sup>234</sup>See *Ruled the Waves*, *supra* n. 175.

<sup>235</sup>See *The Economist*, *New Masters of the Universe* (Jan. 21, 2012) (available at <http://www.economist.com/node/21542925>) [hereinafter *New Masters*].

(“The most striking thing about state-owned enterprises (SOEs) is their sheer collective might in the emerging world. They make up most of the market capitalisation of China’s and Russia’s stock markets and account for 28 of the emerging world’s 100 biggest companies.”)

These large business entities serve as examples of the partnership between the state and private sector and illustrate the alignment of interests between state controlled/owned corporations and the private sector. “There is a certain symmetry between private and state-owned MNE.”<sup>236</sup> The SOE constitutes a form of traditional private corporate activity being conducted by the “state” as a private actor conducting business on an international scale.<sup>237</sup> Many global energy producers are state-owned national petroleum corporations. “Thirteen of the world’s biggest oil companies are state-controlled. So is the world’s biggest natural-gas company, Gazprom.”<sup>238</sup>

More generally, national energy companies are no longer content just to sit at home and pump the oil or gas. They are increasingly venturing abroad in order to lock up future energy supplies or forming alliances with private-sector specialists to increase their access to expertise and ideas. Gazprom has been buying up oil and gas companies across eastern Europe and Asia. In 2008 it bought a 51% stake in Naftna Industrija Srbije, a Serbian energy giant. Chinese oil companies have been striking deals across Africa: in 2006 Sinopec bought a huge Angolan oil well for \$692 m. The multiplying alliances between national and international companies are not always successful: BP, for example, will not rush into any future deals with Russia’s Rosneft. But they are plugging national energy companies into the global market for people and ideas and closing the gap between the state-run and the private sector.<sup>239</sup>

SOEs thus provide yet another example of the erosion of the unique distinctions between states and private corporations. The SOE exemplifies the increasing phenomenon of states engaging in private actor functions on a global scale and underscores the erosion of the distinction between states and corporations.<sup>240</sup> Accordingly, the theoretical underpinning for holding that only sovereigns bear international legal obligations has similarly been eliminated.

## CONCLUSION

Global corporations engage in misconduct that can cause severe harm in the nations those private entities operate in. Immunization from legal liability may play a role in the decision to conduct business in a foreign state. “Using sophisticated corporate structures often involving a parent holding corporation and various overseas manufacturing subsidiaries, MNCs have been able to set up transnational production chains that can bypass or evade national laws on labor and the environment.”<sup>241</sup> The Bhopal disaster highlights the problem of a corporation that finds the cost of misconduct overseas less severe than in its home jurisdiction.<sup>242</sup>

To impose legal obligations on “states” but disallow these same obligations on “corporations” is an inherently flawed approach. To treat the large global corporation as not being subject to international law will potentially allow multinationals to engage in liability arbitrage. Such corporations can transfer litigation risk by selecting jurisdictions to engage in misconduct known for weak sovereign power. Moreover, “[p]owerful multinational corporations can pressure captive developing country governments, desperate more for income than for labor or environmental protections, to adopt friendly legislation.”<sup>243</sup>

The corporate liability issue is significant because as noted by the Norwegian SWF, many corporations act in areas of weak governance permitting them to engage in or be complicit in misconduct. As Norway’s Ethics Council notes:

[M]any of these companies were in direct violation of domestic law, the host state country did nothing to stop the violation of its own law and at time[s] supported the companies in their work.<sup>244</sup>

<sup>236</sup>Mulchinski, *supra* n. 233, at 697.

<sup>237</sup>See Backer, *supra* n. 151, at 61–62.

<sup>238</sup>See Ruled the Waves, *supra* n. 175.

<sup>239</sup>See New Masters, *supra* n. 235.

<sup>240</sup>See Peter Hettich, *Mere Refinement of the State Action Doctrine Will Not Work*, 5 DePaul Bus. & Com. L. J. 105, 150 (2006). (“There is no reason to treat states differently from private actors if a state is becoming a participant in a private agreement or in a combination with others to restrain trade.”).

<sup>241</sup>See Chow, *supra* n. 13, at 817.

<sup>242</sup>*Id.* at n.124 (“For example, some MNCs take advantage of lax environmental laws to set up dangerous operations overseas. Union Carbide, a U.S.-based multinational company, was able to set up a manufacturing facility in Bhopal, India. A gas leak from the Bhopal plant led to the deaths of more than 2,000 people and injured many more. Although Union Carbide settled the case at a cost of about \$470 million, the costs of such an accident, if it had occurred in the United States, would have likely been much higher.”).

<sup>243</sup>Jackson, *supra* n. 38, at 351.

<sup>244</sup>Backer, *supra* n. 30, at 65.

Corporations ought to be held accountable because in a global order where these large entities hold sway, weak governance zones will be exploited. Holding corporations liable will help defend the citizens residing in those governance challenged areas.

Given the incentive for corporations to operate in jurisdictions where laws or enforcement is lax, there would be substantial incentive for misconduct if the actor knows there is an exemption of civil liability.<sup>245</sup> Indeed, as noted by Tyler Giannini and Susan Farbstein, the *Kiobel* holding perversely “incentivizes states to abdicate state duties to corporations because incorporation may effectively insulate all parties—states, armed groups, and corporations—from liability.”<sup>246</sup> Under the no corporate liability view, sovereigns can outsource misconduct and escape liability. To prevent corporate liability would constitute a tantalizing incentive to engage in misconduct with the peace of mind no legal consequences will arise.

The large global corporation should have “the same duties and responsibilities towards its constituents as a state government.”<sup>247</sup> Today, large corporations share similar characteristics with state actors on the global stage. These juridical entities can wield more capital than many states, have dozens if not hundreds of “bases” of operation across continents and in fact often perform traditionally governmental functions. Moreover, traditionally state actors are increasingly operating in the arena of private corporate actors, operating large sovereign investment funds, state-owned companies and engaging in private market activity. Given the multiple roles states and private corporations play, and the ensuing erosion of distinctions, there is no reason that international law obligations should remain the sole province of sovereigns.

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<sup>245</sup>See *New York Cent. & Hudson R.R. Co. v. U.S.*, 212 U.S. 481, 494–95 (1909) (“[W]e see no good reason why corporations may not be held responsible for and charged with the knowledge and purpose of their agents . . . If it were not so, many offenses might go unpunished.”).

<sup>246</sup>See Gianni & Farbstein, *supra* n. 18 at 123.

<sup>247</sup>Jackson, *supra* n. 38, at 331.