

***KIOBEL V. ROYAL DUTCH PETROLEUM  
CO.: CORPORATE LIABILITY UNDER THE  
ALIEN TORTS STATUTE***

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I. ABSTRACT:

In *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit overrules numerous prior decisions and contradicts sister

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circuits, finding that corporate liability in international law is not a sufficiently specific norm to support a finding of liability under the Alien Tort Statute. That decision is clearly erroneous. *Kiobel* violates the general principle of legality, immunizing corporate conduct from liability even in cases where States would be liable for violating *jus cogens* norms and thus also violates the principle of sovereign equality of States due to principles of comity and the *res judicata* effect of the decision. *Kiobel* is also an abnegation by the United States of U.S. obligations under international law. While no state is obliged to remedy *jus cogens* violations, each state is obliged to respect them. Because *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. This Article explains precisely why the court's decision in *Kiobel* misapprehends the structure and sources of international law and consequently reaches the wrong result for the wrong reasons. The U.S. Supreme Court will likely conclude that the ATS governs *jus cogens* claims against natural and artificial persons without a showing of state action, but requires state action or complicity with state action otherwise.

## II. INTRODUCTION

*Kiobel v. Royal Dutch Petroleum Co.*,<sup>1</sup> held that the Alien Tort Statute (ATS)<sup>2</sup> does not apply to corporations.<sup>3</sup> In my opinion, that decision was wrongly reached. *Kiobel* contradicts several prior decisions of the Second Circuit,<sup>4</sup> other federal

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

2. 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). Alien corporations do have the right to bring suit under the ATS for their injuries.

3. To be exact, the court held (wrongly) that the norm attributing civil liability to corporations under public international law is too indefinite to meet the specificity required to support imputation of liability under the ATS. *Kiobel*, 621 F.3d at 148–49.

4. Several Second Circuit decisions reached a different result than *Kiobel*. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261 n.12 (2d Cir. 2009); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 282–83 (2d Cir. 2007);

appellate circuits,<sup>5</sup> and ignores international practice.<sup>6</sup> To appreciate the errors in the majority's reasoning in *Kiobel* we must understand the structure of public international law, which often differs from the common law.

### III. PUBLIC INTERNATIONAL LAW VERSUS PRIVATE INTERNATIONAL LAW

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*).<sup>7</sup> Public international law consists of two further branches, customary international law (*jus gentium publicum*) and international treaty law (*just inter gentes*).<sup>8</sup> The

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Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009); Flores v. S. Peru Copper Corp., 414 F.3d 233, 237 n.2 (2d Cir. 2003); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).

5. Other circuits' decisions also reached a different result than *Kiobel*. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (concluding that a private party—suchh as Unocal, a corporation—may be subject to suit under the ATS for aiding and abetting violations of customary international law and for violations of certain *jus cogens* norms without any showing of state action); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) (“In addition to private individual liability, we have also recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations.”); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (“The text of the Alien Tort Statute provides no express exception for corporations, and the law of this Circuit is that (ATS) grants jurisdiction from complaints of torture against corporate defendants.”).

6. For example, the court in *Kiobel* refers to extraterritorial tort liability for violations of *jus cogens* as “a kind [of liability] apparently unknown to any other legal system in the world.” *Kiobel*, 621 F.3d at 115. That is readily falsified: Belgium and Spain are the most prominent examples of countries offering extraterritorial tort liability for violations of fundamental rights. France offers this remedy as well, and even some African countries permit private law enforcement of human rights claims in tort. See generally Eric Allen Engle, *Alien Torts in Europe? Human Rights and Tort in European Law* (2005) (Ger.), available at [http://works.bepress.com/eric\\_engle/23/](http://works.bepress.com/eric_engle/23/).

7. Sometimes U.S. courts seem to conflate private and public international law. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.* 244 F. Supp. 2d 289, 304 n.12 (S.D.N.Y. 2003) (“The term ‘law of nations’ is synonymous with international law.”).

8. “The law of nations. That law which natural reason has established among all men is equally observed among all nations, and is called the ‘law of nations,’ as being the law which all nations use. Although this phrase had a meaning in the Roman law which may be rendered by our expression ‘law of nations,’ it must not be understood as equivalent to what we now call ‘international law,’ its scope being much wider. It was

United States currently interprets the law of nations,<sup>9</sup> *jus gentium*,<sup>10</sup> as indicating public international law,<sup>11</sup> even though *jus gentium* consists of two distinct parts, *jus gentium publicum* and *jus gentium privatum*.

States, as a general rule, are the presumed addressees of duties and bearers of rights under public international law. Likewise, private individuals are ordinarily the addressees of private international law. 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. However, private international law also includes admiralty and law merchant (*lex mercatoria*),<sup>12</sup> the

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originally a system of law, or more properly equity, gathered by the early Roman lawyers and magistrates from the common ingredients in the customs of the old Italian tribes, those being the nations, gentes, whom they had opportunities of observing, to be used in cases where the *jus civile* did not apply; that is in cases between foreigners or between a Roman citizen and a foreigner . . . Jurists frequently employed the term ‘*jus gentium privatum*’ to denote private international law, or that subject which is otherwise styled the ‘conflict of laws’; and ‘*jus gentium publicum*’ for public international law, or the system of rules governing the intercourse of nations with each other as persons.” BLACK’S LAW DICTIONARY 859–60 (6<sup>th</sup> ed. 1990).

9. The “law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world” founded on the principle “that different nations ought in time of peace do to one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests.” 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66 (1766).

10. The phrases “international law” and the “law of nations” frequently are used interchangeably. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 41 (1990) (Introductory Note to Chapter 2) (“the law of nations later [was] referred to as international law”). These terms are not entirely synonymous. “International law” is of a far more recent vintage than “law of nations.” “Law of nations” derives from the Latin *jus gentium*, meaning literally “law of nations” (the root of *gentium* being gens, meaning a race, clan or people), and was used to refer to the law applied by Roman magistrates in foreign lands. The *jus gentium* is closely related to the concepts of natural law and natural reason, *jus naturale* and *naturale ratio*. By contrast, Jeremy Bentham first coined the phrase “international law” in 1789. *U.S. v. Yousef* 327 F.3d 56, 104 n.38 (2d Cir. 2003).

11. “ATS claims generally require allegations of state action because the law of nations are the rules of conduct that govern the affairs of a nation, acting in its national capacity, in relations with another nation”. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11<sup>th</sup> Cir. 2009).

12. Harold Hongju Koh, *Is International law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

latter today largely codified through the UCC, the UN Convention on Sale of Goods, and via arbitration.<sup>13</sup>

Thus, while individuals may, as an exception to the general rule, have rights and duties under public international law<sup>14</sup> (e.g. for violations of *jus cogens*), such exceptions are rare and infrequent.<sup>15</sup> Even when individuals possess a right under public international law, that does not necessarily indicate they also have a directly enforceable remedy;<sup>16</sup> the right may well inhere in the individual, yet only be enforceable by their State. Nineteenth century State theory wrongly presumed that States could and would effectively intercede on behalf of their wronged citizens as their protectors and that this political right of the Citizen or Subject to the legal right of diplomatic protection to be asserted by their state would be a more efficient system than the directly enforceable private law which it replaced. Today, in the wake of two global wars which tragically and conclusively proved the dualist nineteenth century construction of international law inadequate to preserve peace and protect people's basic rights, individuals once again have rights and duties under international law and directly enforceable remedies, which was also the case prior to the nineteenth century. However, directly enforceable individual rights and duties under public international law are exceptions to the outlined general rules and must be plead and proven by their

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13. "Private international law is the body of conventions, model laws, national laws, legal guides, and other documents and instruments that regulate private relationships across national borders." Louise Tsang, *Private International Law*, AM. SOC'Y OF INT'L LAW, <http://www.asil.org/pil1.cfm> (last visited Feb. 2, 2011).

14. *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11<sup>th</sup> Cir. 1996). ("[I]nternational law affords substantive rights to individuals and places limits on a state's treatment of its citizens."); *The Nurnberg Trial (United States v. Goering)*, 6 F.R.D. 69 ("[I]nternational law imposes duties and liabilities upon individuals as well as upon states . . . [I]ndividuals can be punished for violations of international law.")

15. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 805–06 (D.C. Cir. 1984) (Bork, J., concurring) (citing L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS*, 246–47 (1980); *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)* § 101 (1980); *id.* §§ 701–22 (1982)).

16. "[T]he usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422–23 (1964).

proponent.

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. The best way to address this fissure in the logic of international law is the concept of *jus cogens*. Non-state actors who violate *jus cogens*, whether natural or artificial persons, are subject to universal jurisdiction and legal liability,<sup>17</sup> either in crime or tort, without regard to state action for their wrongful act because the wrong is so vile and odious as to entail universal liability through any actor, any locus, and any forum.<sup>18</sup> Thus, international law permits attribution of criminal or civil responsibility to corporations for violations of international law<sup>19</sup> at the very least for corporate violations of *jus cogens* norms.

#### IV. *JUS COGENS*

*Jus cogens* norms are non-derogable<sup>20</sup> customary international laws, through which any wrongdoer may be tried in any forum for their *jus cogens* violation. While a state, through persistent objection *ab initio*, may exempt itself from general customary international law,<sup>21</sup> no state may avoid its *jus cogens* obligations. However, although no state is obligated to offer a remedy for a violation of a *jus cogens* obligation,<sup>22</sup>

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17. MATH NOORTMANN, CEDRIC RYNGAERT, NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 72 (2010).

18. Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations*, 39 VA. J. INT'L L. 425, 435–49 (1999).

19. Kendra Magraw, *Universally Liable? Corporate-Complicity Liability Under the Principle of Universal Jurisdiction*, 18 MINN. J. INT'L L. 458 (2009).

20. *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 274 (E.D.N.Y. 2007).

21. *Kane v. Winn*, 319 F. Supp. 2d 162, 202 n.62 (D.Mass. 2004) (citing Ted L. Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985)).

22. *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1152 (7th Cir. 2001) (“[A]lthough *jus cogens* norms may address sovereign immunity in contexts where the question is whether international law itself provides immunity . . . *jus cogens* norms do not require Congress (or any government) to create jurisdiction.”); *Al-Adsani v. United Kingdom*, 34 Eur. Ct. H.R. 11 para. 23 (2002); Scott A. Richman, Comment, *Siderman De*

every state may choose to enforce a *jus cogens* violation anywhere such violation occurs. A *jus cogens* norm triggers universal jurisdiction because the violator is an outlaw and may be taken by any State.<sup>23</sup> Not all instances of universal jurisdiction arise out of *jus cogens*, but any violation of *jus cogens* entails universal jurisdiction.<sup>24</sup> Further, although a state may choose not to enforce a *jus cogens* obligation, it must not hamper the enforcement of such obligations by other states: thus, where a state has, for example, a war criminal who has violated the *jus cogens* prohibition against war crimes, that state must either extradite or prosecute the accused (*aut dedere, aut judicare*).<sup>25</sup>

#### A. Legal Implications of *Jus Cogens*

*Jus cogens* norms entail universal jurisdiction. They are specific, universal, and obligatory rights. They are in those senses contemporary natural law: one universal law in all places,<sup>26</sup> the law of good conscience as an essential quality of humanity. There are very few such norms, however, they are fundamental and can be fairly readily enumerated. The earliest *jus cogens* norm to arise was the prohibition of piracy on the high seas.<sup>27</sup> Pirates were recognized as a universal concern of all

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*Blake v. Republic of Argentina: Can the FSIA Grant Immunity for Violations of Jus Cogens Norms?*, 19 BROOK. J. INT'L L. 967, 993 (1993).

23. *Sarei v. Rio Tinto PLC*, 650 F. Supp. 2d 1004, 1028 (D. Cal. 2009) (“[S]tates may exercise universal jurisdiction over acts committed in violation of *jus cogens* norms . . .”).

24. *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1182 (D.C. 1994) (explaining that each violation of *jus cogens* triggers universal jurisdiction, but not all violations triggering universal jurisdiction are *jus cogens*).

25. *Regina v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147, 154.

26. “True law is right reason in agreement with nature; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by Senate or People, and we need not look outside ourselves for an expounder or interpreter of it. And *there will not be different laws at Rome and at Athens.*” CICERO, *DE RE PUBLICA* 211 (Clinton Walker Keyes ed., 1928).

27. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2001).

states because their crimes occurred outside the territory of any state. Then, the slave trade was recognized as the next universally illegal action:<sup>28</sup> likely because transport of slaves involved countries which were not then among “civilized nations”, i.e. not part of the international legal system, and also because transit of slaves was most often over the high seas and associated with piracy. War crimes were the next recognized universal non-derogable norm;<sup>29</sup> then the various fascist atrocities, including genocide, crimes against humanity, and likely also crimes against peace (conspiracy to commit war of aggression).<sup>30</sup> In the post war era, it is certain that torture too entered into the number of universally condemned illegal acts under public international law, and most likely the prohibition of segregation (apartheid) is also a *jus cogens* norm.<sup>31</sup> In addition, the first use of nuclear weapons against civilian targets probably also violates *jus cogens*; targeting civilians is disproportional and thus illegal, even if not a crime against humanity.

Terrorism today is universally condemned, and were its definition not so politically controverted its prohibition would likely have already become a *jus cogens* norm. However, due to ambiguity, “air piracy”, hijacking, random bombing, use of hostages, and narco-trafficking—the various instances of non-state politically motivated violence—have not yet been adequately defined to be seen as universal, non-derogable, and unambiguous rules of public international law enabling universal jurisdiction. Similarly, child sex tourism, though already illegal by national extraterritorial laws of many states, is likely not yet a *jus cogens* norm. Scholarly attention to these issues is required in order to form the *opinio juris*<sup>32</sup> which must

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28. *Id.*

29. See Kjell Follingstad Anderson, *Dictionary of Gross Human Rights Violations: Jus Cogens*, SHARED HUMANITY, <http://www.sharedhumanity.org/LibraryArticle.php?heading=Jus%20Cogens> (last visited Jan. 30, 2012).

30. See Andrew J. Batog, *Universal Jurisdiction, both “Ancient” and “Modern” in United States Domestic Law*, RESPONDEAT (Aug. 7, 2012), <http://respondeat.wordpress.com/2011/08/07/universal-jurisdiction-both-%e2%80%9cancient%e2%80%9d-and-%e2%80%9cmodern%e2%80%9d-in-united-states-domestic-law/>.

31. *Id.*

32. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733–34 (2004) (“[W]here there is no



be linked to state practice to form customary international law.

*Jus cogens* norms imply individual rights and duties under public international law. This issue is known in European parlance as “direct effect”:<sup>33</sup> in the United States it is addressed under the doctrine of “state action”<sup>34</sup>. Both doctrines try to determine when public laws create directly enforceable rights, whether between individuals and the state or between individuals and other individuals. The U.S. approach is to determine whether the private actor is acting on behalf of the state; if the non-state actor has acted “under color of law” then it is quasi-state actor, and thus subject to rights and duties under domestic constitutional law (i.e. public law).<sup>35</sup> The color of state law doctrine has been applied by the United States to public international law, specifically in the Alien Torts context<sup>36</sup> where private law persons are complicit in the illegal acts of public law persons.

The European doctrine is a bit more complex. It is known as “third party effect” or “direct effect”. It seeks to determine when the public law creates rights in private persons.<sup>37</sup> Public law may have no effect on private rights, a vertical effect on private actors’ relations to the state, or a horizontal effect on legal relations between private law persons inter se. Thus, the effect of public law on private rights may be direct or indirect. If the public law merely has persuasive value concerning the

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treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.” (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

33. See, e.g., Eric Engle, *Third Party Effect of Fundamental Rights (Drittwirkung)*, 5 HANSE L. REV. 165, 165 (2009).

34. See Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1171–72 (1995).

35. 42 U.S.C. § 1983 (2006).

36. See Brad J. Kieserman, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 938 n. 29 (1999).

37. Engle, *Third Party Effect of Fundamental Rights (Drittwirkung)*, *supra* note 33, at 171–72.

interpretation of private rights, as a guide or goal to the determination of the private right, that effect is considered indirect. Indirect effect of public law on private rights is called indirect because the public law's application is merely persuasive, as an interpretive guide to other laws (whether public or private and whether vertical or horizontal).

There is also direct effect of public law on private rights. Direct effect exists when the public law applies directly creating binding rights/duties with respect to the private law persons. The idea of direct effect is most easily seen, to U.S. eyes, through the idea of a self-executing treaty.<sup>38</sup> A self executing treaty addressing private law persons in their relations to the public law person has vertical direct effect. Direct and indirect effect may also be found horizontally, as to private parties inter se. When the public law explicitly governs the private law relations of private law persons inter se the law is said to have horizontal direct effect. When the public law does not directly bind, but is nonetheless given a persuasive interpretive value as setting out social goals which may influence the court's interpretation of private law rights between private law persons that law is said to have horizontal indirect effect.

Both the color of state law doctrine and the doctrine of third-party effect, seek to determine whether the private law person has rights and duties under public law. They reach the same issue, but in slightly different ways. They are both tests to determine whether public (international) law entails private rights.<sup>39</sup> A hybrid of color of state law (quasi-state actions) and direct effect (private rights) would seem the best way to unify both doctrines, and if that occurs it will be one more example of norm convergence: first outcomes, then theories of law, and finally substantive rules of positive law converge internationally to common outcomes, theories, and rules—this is the globalization of law.<sup>40</sup>

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38. See Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 630 (1986).

39. Eric Engle, *The Rights Orchestra: Proportionality, Balancing, and Viking*, NEW ENG. J. INT'L & COMP. L. (hereinafter *Rights Orchestra*), available at <http://ssrn.com/abstract=1704503>.

40. See generally Eric Engle, *Contemporary Legal Thought in International Law: A*

Alternatively however, the question whether a public law applies to/is applied by a private law body could (particularly to a dualist) be seen as domestic and procedural as opposed to substantive and international.<sup>41</sup> The color of state law and direct effect doctrines both cohere with the logic of the international system's bifurcation between private and public law, but in somewhat different ways as a reflection of national laws.<sup>42</sup> These doctrines will likely converge to common outcomes and then into a common global rule combining the two doctrines into one harmonized approach.

### B. Natural Law<sup>43</sup>

As was mentioned, public international law is the embodiment of natural law<sup>44</sup> because it is universal and authoritative due to its power of moral suasion: it attracts compliance because it is rational<sup>45</sup> and good,<sup>46</sup> enabling states to

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*Synopsis 4* (Jul. 7, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1431178](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431178).

41. See generally *Rights Orchestra*, *supra* note 39, at 6–10 (comparing the U.S. balancing approach to rights with the proportionality tests done by E.U. courts).

42. See generally *id.* at 16 (explaining that nations establish framework rules and basic rights which guide the application of public law to private persons).

43. See generally ERIC ENGLE, *LEX NATURALIS, IUS NATURALIS: LAW AS POSITIVE REASONING & NATURAL RATIONALITY* (Donna M. Lyons & Jacob D. Zilhardt eds., 2010) (hereinafter *LEX NATURALIS, IUS NATURALIS*) (providing a detailed description of the complementary character of positive and natural law, and the distinction between natural law and natural justice).

44. THOMAS AQUINAS, *SUMMA THEOLOGIAE: JUSTICE 57–62*(2a2æ. 57–62). Question 57, esp. 3 (*jus gentium*).

45. See THOMAS HOBBS, *LEVIATHAN* 86–87, (A. R. Waller ed., 1904) (“[T]he Right Of Nature, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power as he will himself, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing anything, which in his own Judgment, and Reason, he shall conceive to be the aptest means thereunto. By Liberty, is understood, according to the proper signification of the word, the absence of external Impediments: which Impediments, may oft take away part of a man’s power to do what he would; but cannot hinder him from using the power left him, according as his judgment, and reason shall dictate to him. A Law Of Nature, (*Lex Naturalis*.) is a Precept, or general Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved. For though they that speak of this subject, use to confound *Jus*, and *Lex*, *Right* and *Law*; yet they ought to be distinguished; because Right, consisteth in liberty to do, or to forbear; Whereas Law,

secure the good life<sup>47</sup> for their citizens without fear of war.<sup>48</sup> International law is the embodiment of the law of reason,<sup>49</sup> of right reasoning in accord with the nature of things,<sup>50</sup> which explains why holding criminals liable for mass murder at Nuremburg was not an instance of *ex post facto* law.<sup>51</sup> The general principles of law are deduced logically<sup>52</sup> and confirmed by the various customs, usages and treaties of states and the nature of things into general deductive principles for the determination and ascription of other rights. The international legal system represents an enlightenment concept of law.<sup>53</sup> The

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determineth, and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent.”).

46. See generally CICERO, *DE RE PUBLICA* 211 (G. P. Goold ed., Clinton Walker Keyes trans., 1977).

47. See ARISTOTLE, *POLITICS* 111 (Ernest Barker trans., 1961).

48. See HOBBS, *supra* note 45, at 84 (“[W]hatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continual fear, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.”).

49. “[W]hatever natural reason decrees among all men, is observed by all equally, and is called the right of nations.” Gaius *DIGEST*. i, 1.

50. See generally *United States v. Yousef*, 327 F.3d 56, 104 n.38 (2d Cir. 2003) (“The *jus gentium* is closely related to the concepts of natural law and natural reason, *jus naturale* and *naturale ratio*.”).

51. See generally *LEX NATURALIS, IUS NATURALIS*, *supra* note 43, at 94.

52. See *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (“[T]he law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states. What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods.”); see also *The Amy Warwick*, 67 U.S. (2 Black) 635, 670 (1862) (“The law of nations is . . . founded on the common consent as well as the common sense of the world. It contains no . . . anomalous doctrine.”).

53. See Dietrich Schindler, *Max Huber-His Life*, 18 *EUR. J. INT’L L.* 81, 86 (2007) (“[T]he natural law of the Age of Enlightenment as an abstract system of law had strongly influenced international law in its formative stage and had partly become

Second Circuit in *Kiobel* erred by denying the fact that international law (specifically *opinio juris*) is adduced through logic and common sense.<sup>54</sup>

#### V. CIVIL VERSUS CRIMINAL LIABILITY IN PUBLIC INTERNATIONAL LAW

In civilian law jurisdictions which follow the German model, corporations cannot be liable in crime, because they are not moral persons:<sup>55</sup> they are mere legal fictions and moreover certain punishments (imprisonment, extradition) can not be applied to them: corporations in Germanic jurisdictions are instead liable in tort.<sup>56</sup> Because many countries do not impute criminal liability to legal persons (imputing instead civil liability for violations—*Ordnungswidrigkeitenrecht*),<sup>57</sup> international law has been reluctant to admit criminal liability of corporations, permitting but not requiring such liability because the enforcement of international law is generally through national courts.<sup>58</sup> Seeing the absence of obligatory *criminal* liability in some foreign jurisdictions, the *Kiobel* court wrongly extrapolated an untailed conclusion, that corporations under international

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customary international law.”).

54. *Kiobel*, 621 F.3d at 140 (“[T]he district court’s conclusion was flawed by its use of an improper methodology for discerning norms of customary international law: customary international law does not develop through the “logical” expansion of existing norms.); *cf.* *Yousef*, 327 F.3d at 103–04 (“The strictly limited set of crimes subject to universal jurisdiction cannot be expanded by drawing an analogy between some new crime . . . and universal jurisdiction’s traditional subjects”). Rather, as the Supreme Court has explained, it develops, if at all, through the custom and practice “among civilized nations . . . gradually ripening into a rule of international law.” *Sosa*, 542 U.S. at 715, 124 S. Ct. 2739 (quoting *The Paquete Habana*, 175 U.S. at 686, 20 S. Ct. 290), *cert. granted*, 132 S. Ct. 472 (U.S. 2011).

55. Eric Engle, *I Get by with a Little Help from My Friends? Understanding the U.K. Anti-Bribery Statute, by Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 INT’L LAW. 1173, 1180 (2010).

56. *Id.*

57. See Susanne Beck, *Meditating The Different Concepts Of Corporate Criminal Liability In England And Germany*, 11 GERMAN L.J. 1093, 1106–07 (2010) (providing an English language introduction to German corporate liability for wrongful acts comparing the common law and civil law).

58. Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT’L L. 159, 159–60 (1993).

law could not consequently be liable in *tort*,<sup>59</sup> ignoring the fact that criminal and tort law are two different branches of law with different standards of proof and absolving corporations entirely of any legal responsibility for violating non-derogable rules of international law. *Kiobel* breaches the United States' international obligation to respect the general principle of legality and of sovereign equality because of the *res judicata* effect of such decisions and comity.<sup>60</sup> The court in *Kiobel* immunized corporations from legal liability before U.S. courts for violations of non-derogable international law, immunity for actions which does not extend even to foreign States, elevating corporations thereby to a status superior to States under international law and thus violating the general principles of legality and of sovereign equality under international law.<sup>61</sup>

#### VI. THE LAW OF NATIONS INCLUDES TREATIES

The court in *Kiobel* erred in ascribing a general principle of non-imputation of *any* liability to corporations under *international* law from the fact of non-imputation of *criminal* liability to corporations in *domestic* law of jurisdictions following the German model of civil law. The court in *Kiobel* erroneously decided that the law of nations indicates only customary international law.<sup>62</sup> But the *Kiobel* court's willful blindness to

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59. Dorothy Shapiro, *Kiobel and Corporate Immunity Under the Alien Tort Statute: The Struggle for Clarity Post-Sosa*, 52 HARV. INT'L L.J. (ONLINE) 209, 213 (2011) ("Judge Leval . . . vigorously disagreed . . . finding ample support for civil corporate liability in international law.").

60. *Id.* at 221 n.50 (quoting Justice Breyer, "[s]ince enforcement of an international norm by one nation's courts implied that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations."); Angela Walker, *The Hidden Flaw in Kiobel: Under the Alien Tort Statute the Mens Rea Standard for Corporate Aiding and Abetting is Knowledge*, 10 NW. J. INT'L HUM. RTS. 119, 125 (2011).

61. Shapiro, *supra* note 59, at 214; Joel Slawotsky, *Corporate Liability in Alien Tort Litigation*, 1 VA. J. INT'L L. (ONLINE) 27, 30-33 (2011).

62. *Kiobel*, 621 F.3d at 116 (calling the law of nations "customary international law"). The terms "law of nations" and "customary international law" interchangeably. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 237 n.2 (2d Cir. 2003) (explaining that, in the context of ATS jurisprudence, "we have consistently used the term 'customary international law' as a synonym for the term the 'law of nations'"); *see also* The Estrella,

international treaty law (*jus inter gentes*) is contrary to the black letter law of the Alien Tort Statute (ATS) itself.<sup>63</sup> “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 [i.e. *jus gentium*] or a treaty of the United States [i.e. *jus inter gentes*].”<sup>64</sup> The ATS is **tort** law: criminal liability is irrelevant to it. However, even if criminal law were relevant, numerous treaties, many of which the United States has signed, impose civil or criminal liability on corporations.<sup>65</sup>

After ignoring the black letter of the ATS and excising U.S. Treaties as a basis for liability under the ATS, the court in *Kiobel* determined that customary public international law does not impose criminal liability on corporations and that as a consequence the ATS could not impose civil liability on corporations.<sup>66</sup> As the treaties cited show, both corporate civil and criminal liability are consistent with international law.<sup>67</sup>

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17 U.S. (4 Wheat.) 298, 307 (1819) (referring to non-treaty-based law of nations as “the customary . . . law of nations”).

63. Slawotsky, *supra* note 61, at 30 (“[T]here is nothing to indicate that corporations were excluded by the statute. All available evidence indicates that, to the contrary, corporations were always envisioned as part of the class of potential ATS defendants.”); Walker, *supra* note 60, at 129.

64. 28 U.S.C. § 1350 (2006).

65. Convention Against Transnational Organized Crime, art. 10(1), Nov. 15, 2000, S. Treaty Doc. No. 108–16, 2225 U.N.T.S. 209; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, Dec. 17, 1997, S. Treaty Doc. No. 105–43 (hereinafter OECD Anti-Bribery Convention); Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257 (not ratified by the United States); Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, amended Jan. 28, 1964, 956 U.N.T.S. 263 (not ratified by the United States, China, the Soviet Union, or Germany); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3 (not ratified by the United States, China, or the Soviet Union); Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 265 (not ratified by the United States, China, France, Germany, or the United Kingdom); Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, 974 U.N.T.S. 255 (not ratified by the United States, China, the Soviet Union, or the United Kingdom); Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, Dec. 17, 1976, reprinted at 16 I.L.M. 1450 (signed by six States but ratified by none).

66. Slawotsky, *supra* note 61, at 29.

67. *Id.* (“[C]orporate criminal law is becoming the norm, not the exception.”);

Furthermore, the common law recognizes corporate criminal liability;<sup>68</sup> thus, the extraterritorial application of common law subjects foreign corporations to criminal liability,<sup>69</sup> which constitutes a state practice of imposing corporate criminal liability internationally.<sup>70</sup>

The existence of this state practice shows that there is no international customary law against imposing criminal liability on corporations. Having decided an irrelevancy (the issue is civil, not criminal liability) wrongly (international law can, and does, impose and permit imposition of punitive and not merely restitutionary sanctions on corporations), the *Kiobel* court reached the absurd result that public international law does not impose civil liability on corporations, when in fact corporate liability is a universal state practice.<sup>71</sup>

The *Kiobel* court reached this clearly erroneous result because individual rights and duties of physical persons are recognized only *exceptionally* in public international law.<sup>72</sup> As a *general* rule, states are the sole addressees of international law,

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Shapiro, *supra* note 59, at 213 (citing Judge Cabranes' ample support showing corporate civil liability in international law).

68. "[A] corporation . . . has no mind of its own any more than it has body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation." *Lennard's Carrying Co. v Asiatic Petrol. Co.*, (1915) A.C. 705 (H.L.) 713 (U.K.) (Haldane, L.C.).

69. Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* 140 (Harvard Corporate Soc. Responsibility Initiative, Working Paper No. 59, 2010), available at [http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_59\\_zerk.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf) ("Obligations in relation to extraterritorial corporate activity tend . . . [to] arise as . . . more general obligations. These are: (a) criminalization of certain prescribed offences at domestic level . . . (b) some degree of extraterritorial regulation.").

70. Shapiro, *supra* note 59, at 213–214.

71. *Id.* at 218 ("[S]ome form of corporate liability for serious harms is a universal feature of legal systems across the globe.").

72. See Lorenzo Cotula & Margaret Vidar, *The Right to Adequate Food in Emergencies*, FOOD AND AG. ORG. OF THE UN (2002) (discussing international human rights law relating to adequate food during emergency situations); KATE JASTRAM & MARILYN ACHIRON, *REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW* (2001) (discussing protection of refugees under international law).



though there are exceptions,<sup>73</sup> notably *jus cogens* and certain treaties which are intended to have direct effect, such as self-executing treaties.<sup>74</sup>

The ATS gives effect both to customary international law and treaty law. International treaty law unequivocally imposes civil liabilities<sup>75</sup> and even permits imposition of criminal liabilities on corporations.<sup>76</sup> Consequently, the decision of the court in *Kiobel* that the law of nations does not impose civil liability on corporations is reversible error.

## VII. THE RATIONALE OF THE ATS

To understand the ATS we must put it in historical perspective. The United States started its independent legal existence as a usurper.<sup>77</sup> It was a rebel state; a republican state in an age of monarchy and a secular state (perhaps the first ever)<sup>78</sup> in an age of theocracy. It was, moreover, universalist and claimed to affirm the individual rights of all mankind (“all men are created equal”). This rebel republic was populated by a mix

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73. Cotula & Vidar, *supra* note 72, at 37 (“States are the duty-bearers under international human rights law.”); Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 91 (2012) (discussing how Congress must make non-self executing treaties enforceable in the United States); Allyssa D. Wheaton-Rodriguez, *The United States’ Choice to Violate International Law by Allowing the Juvenile Death Penalty*, 24 HOUS. J. INT’L L. 209, 223 (2001) (noting that *jus cogens* cannot be avoided by objector states). The U.S. has since ruled the juvenile death penalty unconstitutional. *Roper v. Simmons*, 543 U.S. 551 (2005).

74. Madeleine Grey Bullard, *Child Labor Prohibitions are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Laborer*, 24 HOUS. J. INT’L L. 139, 158 (2001) (“Peremptory norms, known as ‘*jus cogens*,’ proscribe a limited set of activities so universally condemned by the international community that they cannot be undertaken under any circumstances.”); Hathaway, *supra* note 73, at 56 (“A self-executing treaty is a treaty that creates a domestic legal obligation in the absence of implementing legislation.”).

75. OECD Anti-Bribery Convention, *supra* note 65, art. 2 (“Each Party shall take any measures necessary to establish . . . bribery of a foreign public official shall be a criminal offense.”).

76. Criminal Law Convention on Corruption art. 18, Jan. 27, 1999, E.T.S. No. 173.

77. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (“That these united Colonies are, and of Right ought to be Free and Independent States, that they are Absolved from all Allegiance to the British Crown.”).

78. JOSEPH J. ELLIS, AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC 8 (2007).

of European religious refugees,<sup>79</sup> tax evading privateers, proto-industrialists, slave owning aristocrats, and Africans—most but not all of whom were slaves, living alongside several indigenous native nations some of which were at various times allies or enemies of the former French, English, Spanish, Dutch, and Swedish colonies.<sup>80</sup> The United States was multiracial, polyglot, and religiously fragmented.<sup>81</sup> All that held it together was a vision of human equality, mutual respect, a love of liberty—and greed.<sup>82</sup> This rebel state, whose very existence was an implicit threat to every monarchy and theocracy on earth, faced the crucial task of anchoring its *de facto* independence *de jure* in order to avoid being split apart, invaded, and occupied. The United States had to prove to other States that it would honor its legal obligations despite its bastard origins.

Thus, the Alien Tort Statute served to notify all foreign powers that the rights of their subjects would be respected by the United States and its courts.<sup>83</sup> The purpose of the ATS was (and is) to guarantee to other States that the United States will honor its international obligations;<sup>84</sup> that it will not, e.g., harbor pirates, or in the modern age, war criminals and torturers. The ATS applies both to private international law and to public international law for that reason. Rather than limiting the ATS in the post-torture era, we should accept that ATS suits are both legal and necessary to show the international community that the United States is governed by the rule of law, not men and that torture is anathema despite the lawless mismanagement

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79. Anglo-Catholics in Maryland, Anabaptists in Pennsylvania, Jews and Huguenots in New York, and Puritans in New England.

80. Richard J. Maybury, *The Founding Fathers: Smugglers, Tax Evaders and Traitors*, THE DAILY BAIL (Aug. 3, 2010), <http://dailybail.com/home/the-founding-fathers-smugglers-tax-evaders-and-traitors.html>.

81. S. Mintz, *Diversity in Colonial America*, DIGITAL HISTORY, [http://www.digitalhistory.uh.edu/database/article\\_display.cfm?HHID=681](http://www.digitalhistory.uh.edu/database/article_display.cfm?HHID=681) (last updated Feb. 2, 2012); VINCENT N. PARRILLO, *DIVERSITY IN AMERICA* 44–45 (3d ed. 2009).

82. S. Mintz, *The Age of Revolution, 1765–1825*, DIGITAL HISTORY, [http://www.digitalhistory.uh.edu/bsol/bsol\\_part5.cfm](http://www.digitalhistory.uh.edu/bsol/bsol_part5.cfm).

83. Slawotsky, *supra* note 61, at 34 (“The purpose of the [ATS] is to provide redress in the federal courts for aliens who have suffered a violation of their rights under international law.”).

84. The *Kiobel* court seems to recognize that the purpose of the ATS is to guarantee U.S. compliance with international law. *Kiobel*, 621 F.3d at 140–41.

and overreaction of the Bush era.<sup>85</sup> How else could the United States credibly claim to continue its visionary mission of liberty for all persons and champion human rights? Leaders set the example.

### VIII. CONCLUSIONS

Because the decision in *Kiobel* created a split in the circuits and is so evidently erroneous, because the ATS implicates U.S. foreign policy, and because the stakes in human and financial terms are so high *Kiobel* went to the U.S. Supreme Court. The most rational resolution would be for the U.S. Supreme Court to affirm circuit decisions which have held that the ATS governs *jus cogens* claims against natural and artificial persons without a showing of state action but requires state action or complicity with state action otherwise. That approach would be consistent with international law, coherent with the courts' past decisions, and would also ensure that the ATS still plays its intended role, a pledge that the United States honors its international commitments both in fact and in law. *Salus republicae*.

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85. Andrei Mamolea, *The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 SANTA CLARA L. REV. 79, 145–48 (2011).