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## The Hidden Flaw in *Kiobel*

### Under the Alien Tort Statute the *mens rea* standard for corporate aiding and abetting is knowledge

Angela Walker\*

The Alien Tort Statute (ATS) grants United States district courts jurisdiction to hear human rights cases brought by foreign citizens for conduct committed outside the country.<sup>1</sup> Despite the statute being over 200-years-old, it has only recently been revived as a way of holding corporations liable for human rights violations committed overseas. The last three decades have seen a significant increase in ATS litigation,<sup>2</sup> under which there are two-dozen pending cases against U.S. and foreign corporations for allegedly having aided and abetted serious human rights violations overseas.<sup>3</sup> In 1980, the Second Circuit established the ATS as a tool to remedy violations of international law in *Filártiga v. Peña-Irala*.<sup>4</sup> While *Filártiga* permitted a non-U.S. citizen to sue government officials or individuals acting on behalf of the government in American courts, it was not until 2002 that the Ninth Circuit, in its *Doe I v. Unocal Corp.* decision, found that a corporation could be liable under the ATS for violating international law.<sup>5</sup> Other circuits have since established that companies can be held liable for aiding and abetting human rights violations under the ATS.<sup>6</sup> In the 2004 *Sosa v. Alvarez-Machain*<sup>7</sup> decision, the Supreme Court set forth the test to establish actionable torts under the

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<sup>1</sup> The Alien Tort Statute reads: “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.” 28 U.S.C. §1350 (2010).

<sup>2</sup> EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INT’L CRIMES, INT’L COMM’N OF JURISTS, CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY: CIVIL REMEDIES 5 (2008) [hereinafter CIVIL REMEDIES].

<sup>3</sup> David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT’L L. 334, 339 (2011). Pending cases in which aiding and abetting liability remains at issue include *Balintulo v. Daimler AG*, No. 09-2778-CV (2d Cir. argued Jan. 11, 2010) (pertained to South Africa); *Mujica v. Occidental Petroleum, Inc.*, 564 F.3d 1190 (9th Cir. 2009) (appeal pending) (pertained to Colombia); *Doe VIII v. Exxon Mobil Corp.*, 658 F. Supp. 2d 131 (D.D.C. 2009), *rev’d in part*, 654 F.3d 11, No. 09-7125, 2011 U.S. App. LEXIS 13934 (D.C. Cir. 2011) (pertaining to Indonesia).

<sup>4</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876, 886–87 (2d Cir. 1980). The Second Circuit permitted Joelito Filártiga’s family to bring a case against American Peña-Irala for kidnapping and torturing Filártiga to death on behalf of Paraguay’s then president.

<sup>5</sup> *Doe I v. Unocal Corp.*, 395 F.3d 932, 947–56 (9th Cir. 2002), *vacated & reh’g granted*, 395 F.3d 978 (9th Cir. 2003), and *dismissed*, 403 F.3d 708 (9th Cir. 2005) (en banc).

<sup>6</sup> GLOBAL LABOR AND EMPLOYMENT LAW FOR THE PRACTICING LAWYER: PROCEEDINGS OF THE NEW YORK UNIVERSITY 61ST ANNUAL CONFERENCE ON LABOR 85 (Samuel Estreicher & Andrew P. Morris eds. 2010) (citing *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (11th Cir. 2005), *In re “Agent Orange” Product Liability Litigation*, 373 F. Supp. 2d 7, 52 (E.D.N.Y. 2005)).

<sup>7</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

ATS, but it has yet to confirm that corporate aiding and abetting liability under the ATS is actionable.<sup>8</sup>

¶12 This contentious issue concerning whether corporations are proper defendants under the ATS has created a circuit split. Within just four days this past July, two federal courts of appeals issued decisions finding that corporations are proper defendants under the ATS.<sup>9</sup> Judge Judith Rogers of the District of Columbia Circuit stated in *Doe v. Exxon Mobil Corp.* that “neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations.”<sup>10</sup> In *Flomo v. Firestone Natural Rubber Co.*,<sup>11</sup> the Seventh Circuit Court of Appeals also held that “corporate liability is possible” under the ATS (although it dismissed plaintiffs’ claims, reasoning that the alleged conduct did not violate a norm established with specificity under international law).<sup>12</sup> In addition to the D.C. and Seventh Circuits, appellate courts in the Second, Fifth, Ninth, and Eleventh Circuits have all held or assumed that corporations are proper defendants under the ATS.<sup>13</sup>

¶13 There is a countervailing wind, however, in the Second Circuit, which dismissed an ATS case against Shell and its Nigerian subsidiary in September 2010 for lack of subject matter jurisdiction. In *Kiobel v. Royal Dutch Petroleum Co.*, the court held that corporations are not proper defendants under the statute.<sup>14</sup> After the Second Circuit declined to grant an en banc rehearing in a five to five decision,<sup>15</sup> the Supreme Court granted certiorari last October to determine whether corporations are proper defendants under the ATS.

¶14 This article aims to shed light on a critical flaw in the Second Circuit’s analysis that is overshadowed by the discussion of subject matter jurisdiction. Both the majority and concurring opinions misinterpret a key element of corporate accessory civil liability under the ATS: the *mens rea* standard for aiding and abetting. While both the majority and Judge Pierre N. Leval, in

<sup>8</sup> GLOBAL LABOR AND EMPLOYMENT LAW, *supra* note 6, at 68. In *Sosa*, which involved state-sponsored kidnapping, the Supreme Court alluded to the possibility of holding companies responsible under the ATS, without specifically allowing or ruling this possibility out. *Sosa*, 542 U.S. at 733, n.21.

<sup>9</sup> *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11; 2011 U.S. App. LEXIS 13934, \*4 (D.C. Cir. 2011).

<sup>10</sup> *Exxon*, 654 F.3d at 11. Judge Rogers reinstated claims by Indonesian villagers who allege that Exxon is liable for incidents of torture, killing, and arbitrary detention committed by security forces serving an Exxon facility in Aceh. Rogers reasoned that the dismantling of IG Farben, a Nazi chemical-producer, should be regarded as precedent. Michael D. Goldhaber, *The Global Lawyer: Corporate Alien Tort Rouses From Its Deathbed*, THE AMLAW DAILY, July 18, 2011, <http://amlawdaily.typepad.com/amlawdaily/2011/07/globallawyer718.html>. “She also notes that the principle of corporate liability is generally accepted under domestic systems of law, and general principles of law are a standard source of customary international law, despite being overlooked by *Kiobel*.” *Id.*

<sup>11</sup> *Flomo*, 643 F.3d at 1021.

<sup>12</sup> Although Judge Posner affirmed the dismissal of claims by Liberian rubber tappers that Firestone had encouraged child labor on its vast rubber plantation in West Africa, he upheld corporate liability under the ATS. Posner rejected the Second Circuit’s premise in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) that corporations have never been prosecuted for violating customary international law, and argued that, by invoking customary international law, after World War II the allied powers dissolved German corporations that supported the Nazi war effort. *Id.* at 1017.

<sup>13</sup> *Id.* (citing *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192-1193, 1195, (D.C. Cir. 2004); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 91-92 (2d Cir. 2000); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999); *see also Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174 (2d Cir. 2009); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008) (en banc).

<sup>14</sup> 621 F.3d 111, 120 (2d Cir. 2010).

<sup>15</sup> *See Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379 (2d Cir. 2011) (en banc).

his concurring opinion, declare that purpose is the required standard,<sup>16</sup> it is Leval who sets forth the flawed analysis that has been the lingering confusion in the courts and that is the focus of this article. By misinterpreting international customary law, Leval incorrectly concludes that the required standard is purpose when in fact both international customary law and domestic tort law establish the knowledge standard.

¶5 While subject matter jurisdiction is currently the issue before the Supreme Court, the *mens rea* standard follows on its heels as the next most pressing ATS issue. Should the Supreme Court find that corporations are indeed proper defendants, federal courts should be aware of the Second Circuit’s misinformed analysis concerning the *mens rea* standard to avoid perpetuating incorrect law.

¶6 In *Kiobel*, Nigerian plaintiffs brought a class action against The Shell Petroleum Development Company of Nigeria (“SPDC”) and its corporate parents, formerly known as Royal Dutch Petroleum Company and Shell Transport and Trading Company (“Shell”). The complaint alleges human rights abuses related to the defendants’ oil and development activities in the Ogoni region of southern Nigeria in the 1990s.<sup>17</sup> Plaintiffs in this and the related actions in *Wiwa v. Royal Dutch Petroleum Co.*,<sup>18</sup> along with their decedents, protested SPDC’s oil exploration and development activities and allege that these protests were violently suppressed by agents of the Nigerian government with the assistance of SPDC and Shell.<sup>19</sup> Between 1993 and 1994, Nigerian military forces allegedly shot and killed Ogoni residents and attacked Ogoni villages—beating, raping, and arresting residents and destroying or looting property. Plaintiffs allege that SPDC and Shell assisted the military by (1) providing transportation to Nigerian forces, (2) allowing their property to be utilized as a staging ground for attacks, (3) providing food for soldiers involved in the attacks, and (4) providing compensation to those soldiers.<sup>20</sup>

¶7 The Second Circuit dismissed the case for lack of subject matter jurisdiction, holding that corporations may not be sued under the ATS since corporate liability is not a discernable norm of customary international law.<sup>21</sup> Judge Leval, concurring in the judgment only, argued that the majority’s ruling could potentially have the following effect:

According to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims’ claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.<sup>22</sup>

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<sup>16</sup> *Kiobel*, 621 F.3d at 122, 154 (Leval, J., concurring).

<sup>17</sup> *Id.* at 123, 189. Since 1958, SPDC has been engaged in oil exploration and production in Nigeria with extensive operations in the Ogoni region. Ogoni residents initiated the Movement for Survival of Ogoni People (MOSOP) to protest environmental damage caused by SPDC’s operations. In 1993, the Nigerian military began a campaign of violence against MOSOP and the Ogoni, which was allegedly “instigated, planned, facilitated, conspired, and cooperated in” by SPDC and Shell.

<sup>18</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812 (5th Cir. 2004).

<sup>19</sup> *Kiobel*, 621 F.3d at 123.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 149.

<sup>22</sup> *Id.* at 149-50. See also EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INT’L CRIMES, INT’L COMM’N OF JURISTS, CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY: FACING THE FACTS AND CHARTING A LEGAL PATH 12 (2008) [hereinafter FACING THE FACTS]. The Commission argues that holding corporations unaccountable under the ATS signifies the following: “Protection from liability will be granted to corporations for assisting in acts of genocide, sex-slavery, and piracy as long as the perpetrators incorporate themselves as a business.” *Id.* at 12.

¶8 The Second Circuit holding is internally inconsistent and runs counter to other federal court decisions and international standards of civil and criminal liability. According to the Seventh Circuit, *Kiobel* is the “outlier” decision on the question of corporate liability.<sup>23</sup>

¶9 *Kiobel* is also an outlier with regards to its assertion that purpose is the required *mens rea* standard.<sup>24</sup> One of the most commonly argued defenses to corporate accountability is that the corporate officers did not want the atrocities to be committed. As the ATS currently stands in the Second Circuit, this defense is a valid one. According to both domestic and international law, however, the appropriate *mens rea* standard for aiding and abetting is knowledge. The Nuremberg and Tokyo International Military Tribunals, the Rome Statute of the International Criminal Court (ICC), and U.S. courts have all set forth that a corporation will be held liable if it knows that its conduct would have a substantial effect on the harmful outcome. This article thus finds that under both domestic and international law, the *mens rea* requirement for aiding and abetting corporate liability is the knowledge standard.

¶10 Part I sets the stage by briefly explaining the need for corporate accessorial liability under the ATS. Part II gives an overview of the *mens rea* standard according to the International Commission of Jurists (Commission), an expert body on both civil and criminal liability for corporations. Both the majority and the concurring opinions in *Kiobel* address the Commission’s analysis in their discussions. While the majority inexplicably dismisses the expertise of the Commission, Judge Leval heavily relies on it for his arguments and yet chooses to depart from the Commission’s *mens rea* analysis. Correctly understanding the Commission’s analysis is a critical component in understanding the Second Circuit’s flawed analysis and in properly interpreting customary international law to determine ATS liability.

¶11 Part III deconstructs the Second Circuit’s argument that the *mens rea* standard for corporate accessorial civil liability is purpose. It addresses specifically the Court’s misinterpretation of the ICC’s Rome Statute, which is the root cause for the circuit split concerning the *mens rea* standard. Finally, part IV shows that the standard is in fact the knowledge standard according to A) U.S. domestic civil law, as is illustrated in the *Restatement (Second) of Torts* and subsequent case law and B) customary international law.

¶12 For purposes of this article, it is assumed that corporations may be sued under the ATS despite the *Kiobel* decision. Furthermore, while the various forms of complicity that amount to crimes under international law should be kept in mind—including instigating, ordering, planning or conspiring to commit a crime and the responsibility of a superior who fails to prevent or punish the commission of a crime—the scope of this paper is limited to the aiding and abetting standard,<sup>25</sup> the most common form of accessorial liability.<sup>26</sup> Lastly, while the Supreme Court left

<sup>23</sup> *Flomo*, 643 F.3d at 1017 (citing *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1193, 1195, 361 U.S. App. D.C. 468 (D.C. Cir. 2004); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 91-92 (2d Cir. 2000); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174 (2d Cir. 2009); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008) (en banc)).

<sup>24</sup> See *infra* Part IV.

<sup>25</sup> While aiding and abetting remains the primary theory of individual responsibility, the Ninth Circuit has discussed other theories of third-party liability under the ATS, such as joint venture, agency theory, and negligence or recklessness. *Doe I v. Unocal Corp.*, 248 F.3d 915, 947 n.20 (9th Cir. 2001). Judge Reinhardt, concurring in the opinion, argued that agency theory under federal common law should be used to determine liability. *Unocal Corp.*, 248 F.3d at 938, 972-74 (Reinhardt, J., concurring). See also *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008): the Eastern District of New York rejected the aiding and abetting theory concerning claims that police military unit arrested and tortured a Bangladeshi businessman on behalf of a company, but accepted the theories of agency and ratification to establish the link between the company and the government; the jury trial resulted in a USD 1.75 million damages award for the plaintiff. *Worldtel Bangladesh Holding*, 588 F.

open the door as to whether the aiding and abetting standard should be determined by domestic or international law,<sup>27</sup> this choice of law question will not be addressed since it is not outcome determinative for purposes of ascertaining the *mens rea* standard; this article finds that both sets of laws apply the knowledge standard.

#### I. THE NEED FOR CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

¶13 What is the importance of being able to hold corporations civilly liable for violations of international human rights? Under international human rights law, individuals have the right to remedies and reparations when their human rights are violated.<sup>28</sup> Individuals are also capable of committing violations of international law, as are legal persons, such as transnational corporations (TNCs).<sup>29</sup> As TNCs increase their role in the global economy, they also have increasing rights and duties.<sup>30</sup> To deter TNCs from facilitating or participating in egregious human rights violations, enforceable standards must be developed.<sup>31</sup>

¶14 While companies currently do not have direct human rights obligations under international law, they do under national laws.<sup>32</sup> In the U.S., examples of complaints that have been filed against companies include: the complaint against Bridgestone Firestone for mistreating its workers on a rubber plantation in Liberia, Chiquita for paying Colombian paramilitary groups to

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Supp. 2d at 387. Others argue that litigators should explore alternative theories of accomplice liability in the jurisprudence of international tribunals in order to establish ATS claims against corporations, such as joint criminal enterprise, conspiracy, instigation, and procurement all of which are characterized by direct and material corporate complicity. See Tarek F. Maassarani, *Four Counts Of Corporate Complicity: Alternative Forms of Accomplice Liability Under The Alien Tort Claims Act*, 38 N.Y.U. J. INT'L L. & POL. 39, 64 (2005).

<sup>26</sup> Scheffer & Kaeb, *supra* note 3, at 345; GLOBAL LABOR AND EMPLOYMENT LAW FOR THE PRACTICING LAWYER, *supra* note 6, at 127.

<sup>27</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004). Under *Sosa*, the Supreme Court establishes that international customary law defers civil liability to the standards of each country. A domestic court, however, may find that the domestic standard is based on international customary law. *But see* Scheffer & Kaeb, *supra* note 3, at 345 (citing *Sosa*, 542 U.S. at 724, 732) (“*Sosa* require[s] that civil claims under the ATS be based upon federal common law, which applies a knowledge standard for aiding and abetting.”). See also *Exxon*, 2011 U.S. App. LEXIS 13934 at \*133 (holding that domestic law is an appropriate source: “the court concludes, guided by *Sosa*, that under the ATS, domestic law, i.e., federal common law, supplies the source of law on the question of corporate liability.”).

<sup>28</sup> CIVIL REMEDIES, *supra* note 2, at 6. States are bound to protect human rights and provide access to judicial remedies when violations do occur. See, e.g., International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination arts. 2, 6, Mar. 7, 1966, 660 U.N.T.S. 195; Convention on the Rights of the Child art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of all forms of Discrimination Against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13; International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families art. 7, Dec. 18, 1990, 2220 U.N.T.S. 3; American Convention on Human Rights arts. 1, 25, Nov. 22, 1969, Inter-Am. Comm’n H.R.; European Convention on Human Rights art. 1, Nov. 4, 1950, Eur. Comm’n H.R.; Universal Declaration of Human Rights art. 8, Dec. 10, 1948; African Charter on Human and Peoples Rights art. 7, adopted Jun. 27, 1981, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986; and the U.N. Principles on Reparation, Mar. 21, 2006, GAOR. *Id.* at 6 n.10.

<sup>29</sup> Anita Ramasastry, *Corporate Complicity: From Nuremberg To Rangoon An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT’L L. 91, 96 n.15 (2002).

<sup>30</sup> *Id.*; *Citizens United v. Federal Election Commission*, No. 08-205 U.S. 1 (2010) enforcing the rights aspect while the Second Circuit in *Kiobel* failed to enforce the duties aspect.

<sup>31</sup> Ramasastry, *supra* note 29, at 96.

<sup>32</sup> GLOBAL LABOR AND EMPLOYMENT LAW, *supra* note 6, at 61-62, 64 (citing ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006)). Companies are encouraged to respect human rights through soft law, however, set forth by international bodies such as the Organization for Economic Co-Operation and Development, the International Labor Organization, the United Nations, and industry-specific principles, such as the International Council on Mining and Minerals. *Id.* at 61-62.

quell labor uprisings on the company's banana plantations, Wal-Mart for failing to stop suppliers from committing labor abuses, and Nestle for buying cocoa from farmers employing child labor.<sup>33</sup> In France, legal action was taken against French company Rougier S.A. and its foreign subsidiary la Société Forestière et Industrielle de la Doumé for illegally cutting down forests and destroying cultivations that were the Cameroon villagers' main source of livelihood, and against DLH France for purchasing timber from Liberian suppliers who illegally cut down local forests and then used the proceeds from DLH France to buy weapons to fuel Liberia's civil war.<sup>34</sup>

¶15 U.S. complaints that have been successful for plaintiffs include a default judgment of USD 80 million awarded to three Cuban workers trafficked to work in slave labor conditions for Curacao Drydock Company; a USD 20 million settlement by American retail apparel companies, including The Gap, for abusive labor conditions in Saipan; and a USD 75 million settlement paid by U.S.-based company Pfizer for testing its antibiotic Trovan on Nigerian children without their consent during a meningitis epidemic.<sup>35</sup>

¶16 It is thus evident that the law of civil remedies is increasingly being called upon to hold companies responsible for human rights violations.<sup>36</sup> Because human rights monitoring bodies, tribunals, or courts may not have jurisdiction to hear claims against companies and individuals, and often criminal law only allows the prosecution of individuals, civil remedies may be the only relief available for victims who seek to hold corporations liable.<sup>37</sup>

¶17 Furthermore, the purposes of civil tort liability differ from the purposes of criminal punishment. Civil tort liability aims to compensate victims for the harms inflicted on them. As Judge Leval states in *Kiobel*, "The only form of punishment readily imposed on a corporation is a fine" since a corporation is "incapable of suffering, of remorse, or of pragmatic reassessment of its future behavior. Nor can it be incapacitated by imprisonment."<sup>38</sup> He goes on to explain the importance of holding corporations civilly liable. "When criminal punishment is inflicted on an abstract entity that exists only as a legal construct none of th[e following] objectives is accomplished": giving society the satisfaction of retribution, disabling the offender from further criminal conduct, changing the criminal's conduct through infliction of punishment, and dissuading others similarly situated from criminal conduct.<sup>39</sup>

¶18 The *Kiobel* majority questions the purpose of penalizing a corporate actor when nations and international tribunals have the ability to prosecute individual employees for crimes.

<sup>33</sup> *Id.* at 65 (citing Complaint at 1–2, *Roe v. Bridgestone Corp.*, No. 05-8168 (C.D. Cal. 2005); Complaint at 459–499, *Does v. Chiquita Brands Int'l, Inc.*, No. 07-CV-10300 (S.D.N.Y. Nov. 14, 2007); First Amend. Complaint at 172–177, *Doe v. Wal-Mart Stores, Inc.*, No. 05-CV-7307 (C.D. Cal. Dec. 28, 2005); Complaint ¶¶ 35–37, *Doe v. Nestle S.A.*, No. 05-CV-5133 (C.D. Cal. July 14, 2005)).

<sup>34</sup> GLOBAL LABOR AND EMPLOYMENT LAW, *supra* note 6, at 65 (citing Dossier de presse, Les Amis de la Terre, 7 villageois camerounais attaquent Rougier devant les tribunaux français (Oct. 29, 2002), available at [www.amisdelaterre.org/Dossier-de-presse-7-villageois,191.html](http://www.amisdelaterre.org/Dossier-de-presse-7-villageois,191.html); GLOBAL WITNESS, SHERPA ET AL., INTERNATIONAL TIMBER COMPANY DLH ACCUSED OF FUNDING LIBERIAN WAR (2009), available at <http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=d37dcb0-09a3-11df-87d5-49e413573e51>).

<sup>35</sup> GLOBAL LABOR AND EMPLOYMENT LAW, *supra* note 6, at 65–66 (citing *Licea v. Curacao Drydock Company, Inc.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008); *Doe I v. The Gap, Inc.*, No. CV-01-0031, 2001 WL 1842389 (D.N. Mariana Is. Nov. 26, 2001); *Does I v. The Gap, Inc.*, No. CV-01-0031, 2002 WL 1000068 (D.N. Mariana Is. May 10, 2002); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); Ross Todd, *Pfizer Settles Drug Testing Case with Nigerian State for \$75 Million*, AM. LAW, Aug. 3, 2009, [http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202432695855&Pfizer\\_Settles\\_Drug\\_Testing\\_Case\\_With\\_Nigerian\\_State\\_for\\_Million](http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202432695855&Pfizer_Settles_Drug_Testing_Case_With_Nigerian_State_for_Million)).

<sup>36</sup> CIVIL REMEDIES, *supra* note 2, at 5.

<sup>37</sup> *Id.* at 6.

<sup>38</sup> *Kiobel*, 621 F.3d at 168 (Leval, J., concurring).

<sup>39</sup> *Id.* at 167–68.

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>40</sup> Anita Ramasastry points out, however, that since decision-making within a modern TNC may involve multiple persons whose collective activity leads to human rights violations, it may be difficult to apportion individual responsibility.<sup>41</sup> Furthermore, the actions of an individual perpetrator or group of perpetrators, when facilitated through a large corporate enterprise, may also create greater harm than an individual acting alone. Lastly, many who hold a collective or communitarian view of complicity would argue that the effects of corporate wrongdoing should be borne by the corporate entity and hence, ultimately its shareholders.<sup>42</sup> Judge Leval states,

...[T]he objectives of civil tort liability cannot be achieved unless liability is imposed *on the corporation*. Because the corporation, and not its personnel, earned the principal profit from the violation of others’ rights, the goal of compensation of the victims likely cannot be achieved if they have remedies only against the persons who acted on the corporation’s behalf...<sup>43</sup>

¶19 While companies currently are not strictly bound by international legal human rights obligations, States are. Under international law, States have the obligation to ensure the enjoyment of human rights by protecting those rights from abuse and providing access to a judicial remedy when the abuses do occur.<sup>44</sup> The U.S. provided one judicial remedy by passing the ATS. While civil human rights litigation is a phenomenon unique to the U.S., European jurisdictions provide for criminal prosecution for corporate international human rights violations.<sup>45</sup> France, for instance, does not have an ATS equivalent for universal civil jurisdiction, but it has universal (albeit limited) criminal jurisdiction. Whereas the ATS in the U.S. is predominantly used by foreign plaintiffs to bring civil actions in U.S. courts against corporations for human rights violations, the French system has the “partie civile” procedure where plaintiffs may file civil complaints against corporations for human rights violations in the context of criminal trials.<sup>46</sup>

¶20 Regardless of the fact that there exists a divergence in international human rights norms regarding civil and criminal causes of action and corresponding remedies,<sup>47</sup> governments have the legal obligation to take the steps necessary to ensure their laws respond effectively when they are called upon to address claims of gross human rights violations. International customary law and the vast majority of U.S. district courts do not exclude corporations from civil liability for their human rights violations.

<sup>40</sup> *Kiobel*, 621 F.3d at 119 (citing *The Nurnberg Trial (United States v. Goering)*, 6 F.R.D. 69, 110 (Int’l Military Trib. at Nuremberg 1946)). *See also* Ramasastry, *supra* note 29, at 96.

<sup>41</sup> *Id.* at 97.

<sup>42</sup> Ramasastry, *supra* note 29.

<sup>43</sup> *Kiobel*, 621 F.3d at 169 (Leval, J., concurring).

<sup>44</sup> CIVIL REMEDIES, *supra* note 2, at 6.

<sup>45</sup> Caroline Kaeb, *Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks*, 6 NW. U. J. INT’L HUM. RTS. 327, 352 (2008) (citing SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 14-16 (2004)).

<sup>46</sup> GLOBAL LABOR AND EMPLOYMENT LAW, *supra* note 6, at 67.

<sup>47</sup> *See* Kaeb, *supra* note 45, at 352 (“Whereas the ATS is quite vague and open in providing remedies for a ‘violation of the law of nations’ (28 U.S.C. § 1350), European statutes prescribe remedies for human rights violations along the lines of the international law categories of crimes against humanity, war crimes and genocide.”).

## II. AN OVERVIEW OF THE *MENS REA* STANDARD FOR CIVIL CORPORATE AIDING AND ABETTING LIABILITY ACCORDING TO THE INTERNATIONAL COMMISSION OF JURISTS

¶21 The three-volume report of the International Commission of Jurists (Commission) is a key source in the *Kiobel* decision. The Commission is a non-governmental organization, comprised of approximately sixty lawyers (including senior judges, attorneys and academics),<sup>48</sup> “dedicated to the primacy, coherence and implementation of international law and principles that advance human rights.”<sup>49</sup> The *Kiobel* majority attacks the Commission on the grounds that it is biased because it “promot[es] the understanding and observance of the rule of law and the legal protection of human rights throughout the world.”<sup>50</sup> Dismissing this argument as being “unconvincing,”<sup>51</sup> Leval relies on the Commission in his concurring opinion to support his argument that corporations are liable for human rights abuses under the ATS. He leaves out, however, the Commission’s analysis concerning the *mens rea* requirement, which is precisely where he diverges from the Commission’s assertion that the standard is knowledge.

¶22 The purpose of this section is to offer a brief overview of an authoritative analysis of international norms concerning the *mens rea* standard for aiding and abetting liability and to address an analytical flaw in both the *Kiobel* majority and concurring opinions.

¶23 “In every jurisdiction, despite differences in terminology and approach, an actor may be held liable under the law of civil remedies if through *negligent* or *intentional conduct* it causes harm to someone else,” according to the Commission.<sup>52</sup> That harm includes harm to life, liberty, dignity, physical and mental integrity, and property.<sup>53</sup> Even though common law countries have varying definitions of intent for purposes of civil liability, for those intentional torts designed to protect the aforementioned interests, conduct undertaken with knowledge of the likelihood of it resulting in harm could give rise to liability.<sup>54</sup>

¶24 Just like individuals, to be legally responsible for gross human rights abuses, a company must not only have assisted in causing the abuse, but it must also have the required state of mind. Intention, knowledge or foreseeability of risk may be brought into question differently depending on whether criminal or civil liability is at issue. Under the law of civil remedies, a company may have legal responsibility where it actively sought to contribute to gross human rights abuses or where it simply knew that its conduct was likely to contribute to such abuses.<sup>55</sup> This is the case

<sup>48</sup> *The Commission, Overview*, INTERNATIONAL COMMISSION OF JURISTS, <http://www.icj.org/default.asp?nodeID=342&langage=1&myPage=Overview> (last visited Oct. 10, 2011).

<sup>49</sup> *About Us, Overview*, INTERNATIONAL COMMISSION OF JURISTS, <http://www.icj.org/default.asp?nodeID=441&langage=1&myPage=Overview> (last visited Oct. 10, 2011).

<sup>50</sup> *Kiobel*, 621 F.3d at 185 (Leval, J., concurring)(citing Maj. Op. 44 n.47).

<sup>51</sup> *Id.* at 185.

<sup>52</sup> CIVIL REMEDIES, *supra* note 2, at 10. *See, e.g.*, relevant laws in civil law jurisdictions: Articles 1382 and 1383, French Civil Code; Article 823, German Civil Code; Article 1, Section 1, Chapter 2, Finnish Tort Liability Act; Article 2043 Italian Civil Code; Article 1.089, Spanish Civil Code; Article 106, Section 1, Chapter VI, General Principles of the Civil Law of the Peoples Republic of China; Article 20, Chapter 2, Philippines Civil Code; Article 1058 (1) & (2), Section 1, Division 9, Chapter 60, Armenian Civil Code; Article 2314 (read with Article 2284) Chilean Civil Code; Article 2341 Colombian Civil Code; Article 927 Brazilian Civil Code. In common law jurisdictions, laws are found in judicial decisions. *See* INTERNATIONAL ENCYCLOPAEDIA OF COMPARATIVE LAW: TORTS 5 (Andre Tunc, 1983). *Id.* at 10 n.16.

<sup>53</sup> CIVIL REMEDIES, *supra* note 2, at 11.

<sup>54</sup> *Id.* at 13 (citing UK: Bradford Corporation v. Pickles, 1895 A.C. 587; Daily Mirror Newspapers, Ltd. V. Gardner and Another, 1968 2 Q.B. 768; Canada: Non-Marine Underwriters, Lloyd’s of London v. Scalera, [2000] 1 S.C.R. 551).

<sup>55</sup> *See* Kaeb, *supra* note 45, at 334. According to Kaeb, corporate complicity standards under the ATS were first defined by the Ninth Circuit Court of Appeals in *Doe v. Unocal*. Despite the case being dismissed, many courts

even for *dolus eventualis*, where an actor knows that harm may occur as a result of its conduct, and even though it hopes that the harm does not take place, it consents to the harm by carrying out the course of conduct anyway.<sup>56</sup>

¶25 Furthermore, a company may be held civilly liable even where it has no knowledge as to the risk of harm, but should have known. A company legally “should have known” when the risk was reasonably foreseeable.<sup>57</sup> Willful blindness—or the legal equivalent of “don’t ask, don’t tell”—is not permitted by the law of civil remedies.<sup>58</sup> For example, if a company provides security forces with information that enables them to torture trade unionists working in the company, as long as the violence was reasonably foreseeable, it need not be clear at the time that the security forces would specifically inflict torture.<sup>59</sup> As long as a company should have known about the associated risks of its conduct, it does not matter if it did not know about the risk, purposefully or otherwise.<sup>60</sup> Thus, that a company did not wish to contribute to a human rights abuse is irrelevant to the question of whether it became complicit in those abuses.<sup>61</sup>

¶26 How can the *mens rea* of a company, which does not have a brain, be proven? Tort law establishes a company’s state of mind by assessing the state of mind of certain employees.<sup>62</sup> Legally, the board of directors, managing director, and other superior officers speak and act as the company and thus their state of mind will be assessed.<sup>63</sup> When these officers delegate their functions to other employees, their state of mind may provide evidence of the company’s state of mind.<sup>64</sup>

¶27 In determining whether a company is liable under the law of civil remedies, courts in both civil law and common law countries consider whether a reasonable person in the company’s shoes, with the information reasonably available at that time, would have known that there was a risk that its actions could harm a person.<sup>65</sup> The courts look at both what the company itself knew and what a reasonable company in its shoes should have known about the pending harm.<sup>66</sup> To determine what a reasonable company should have known, courts consider best practices in due diligence and risk assessment.<sup>67</sup> Then they consider what information such steps would have brought to light in order to determine what a company should have known. As societal expectations develop and expand, the expectations placed on a reasonable company will too, argues the Commission.<sup>68</sup>

¶28 What is considered to be sufficient evidence of knowledge or foreseeability for a company to be held liable as an aider or abettor? Scholars and courts have yet to decide on which

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refer to the opinion’s corporate complicity requirements. The Ninth Circuit, relying on standards set forth by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), held that to prove complicity, a plaintiff must show that the corporation “knew or had reason to know that its actions assisted the crime.” *Id.* (citing *Unocal Corp.*, 395 F.3d at 951).

<sup>56</sup> CIVIL REMEDIES, *supra* note 2, at 13.

<sup>57</sup> FACING THE FACTS, *supra* note 23, at 19.

<sup>58</sup> *Id.* at 23.

<sup>59</sup> *Id.* at 21.

<sup>60</sup> *Id.* at 23.

<sup>61</sup> *Id.* at 19.

<sup>62</sup> CIVIL REMEDIES, *supra* note 2, at 14.

<sup>63</sup> *Id.* at 15.

<sup>64</sup> *Id.*

<sup>65</sup> FACING THE FACTS, *supra* note 22, at 20.

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

<sup>67</sup> *Id.*

<sup>68</sup> CIVIL REMEDIES, *supra* note 2, at 16.

indicators establish the nexus between the action of the direct perpetrator and the corporation.<sup>69</sup> The Commission of Jurists has listed the following examples:

- A company's own inquiries produce information, or a company should have undertaken such inquiries;
- Information brought to the company's attention by an outside source, such as a government regulatory authority or nongovernmental organization (NGO);
- Publicly available information, including reports by the U.N., media, and NGOs;
- Unusual circumstances that would put a reasonable person on notice of a suspicious purpose for a particular transaction. For example, a customer might order an extraordinary quantity of a product, such as chemicals, which would unlikely be used for anything except unlawful activities;
- Duration of the business relationship with the principal perpetrator;
- Position of an individual business official in the company: if he or she was a member of decision-making boards, for example, or responsible for certain employees or contractors.<sup>70</sup>

¶29 Generally, it will be more difficult for a company to demonstrate that it did not know or could not have known about a risk the more serious that risk poses for third parties.<sup>71</sup>

¶30 Proximity is also a factor that helps courts determine legal responsibility for complicity. The more proximate the company is in time, space, and relationship to the principal perpetrator or its victims the more likely it is that courts will find that the company had the requisite knowledge or could have foreseen the harm.<sup>72</sup> According to the Commission, evidence of proximity includes the following factors: geographical proximity; economic and political relationships; legal relationships; and intensity, duration and texture of relationships.<sup>73</sup> The more the company should have foreseen the risks that its conduct could inflict harm, the higher the requirements are on the company to avoid or limit the harm.<sup>74</sup> Such requirements may include taking steps to avoid harm or even fulfilling a duty to proactively protect the person(s) from harm.

¶31 According to the International Commission of Jurists, to hold a corporation liable as an aider or abettor, one must show that the corporation knew or should have known about the harm or pending harm.<sup>75</sup>

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<sup>69</sup> Kaeb, *supra* note 45, at 334 (citing Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in *NON-STATE ACTORS & HUMAN RIGHTS* 177, 198-202) (Philip Alston, ed., 2005), available at [http://www.univie.ac.at/intlaw/reinisch/non\\_state\\_actors\\_alston\\_ar.pdf](http://www.univie.ac.at/intlaw/reinisch/non_state_actors_alston_ar.pdf)).

<sup>70</sup> *FACING THE FACTS*, *supra* note 22, at 21-23.

<sup>71</sup> *CIVIL REMEDIES*, *supra* note 2, at 18.

<sup>72</sup> *FACING THE FACTS*, *supra* note 22, at 24.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 26.

III. ADDRESSING THE FLAW IN *KIOBEL*

¶32 In both the majority and concurring opinions, the Second Circuit judges find that the *mens rea* requirement for corporate accessorial liability under the ATS is purpose. Judge Leval, unlike the majority, provides reasoning for this assertion. He writes, “the majority’s argument [that corporations cannot be held liable under the ATS] is illogical, internally inconsistent, contrary to international law, and incompatible with rulings of both the Supreme Court and this circuit.”<sup>76</sup> As will be discussed below, Leval’s commentary, ironically, also applies to his own assertion that the *mens rea* standard is purpose.

¶33 No authoritative source document of international law holds the view adopted by the majority and Leval that the purpose standard is to be imposed for corporate accessorial civil liability. As the following pages will analyze, domestic tort law as well as the vast majority of decisions rendered in U.S. federal courts also assert the knowledge standard.

A. Overview of the Second Circuit’s *mens rea* analysis

¶34 While the *Kiobel* majority relies on Judge Katzmann’s concurring opinion in the three-judge panel split in *Khulumani v. Barclay National Bank Ltd.*<sup>77</sup> to determine that there is no corporate liability under the ATS,<sup>78</sup> Leval bases his analysis on the same opinion to support his purpose standard.<sup>79</sup> Since the allegations failed to support a reasonable inference that Shell provided substantial assistance to the Nigerian government with a purpose to advance or facilitate the government’s human rights violations, Leval argues, the plaintiffs failed to state a valid claim of aiding and abetting.<sup>80</sup> By relying on Katzmann’s erroneous reasoning, Leval perpetuates incorrect law.

¶35 In *Khulumani*, Katzmann opined that a defendant may be held liable under international law for aiding and abetting the violation of that law by another [only if] the defendant (1) provides practical assistance to the principal which has substantial effect on the perpetration of the crime, and (2) does so with the *purpose* of facilitating the commission of that crime.<sup>81</sup> Judge Katzmann’s reasoning was adopted as law of the circuit in *Presbyterian Church of Sudan v. Talisman Energy Inc.*<sup>82</sup>

¶36 In *Kiobel*, Leval argued that the Complaint’s allegations were legally insufficient because they lacked a “reasonable inference that Shell provided substantial assistance to the Nigerian government *with a purpose to advance or facilitate* the Nigerian government’s violations of the Ogoni people.”<sup>83</sup> The Complaint asserts (1) that SPDC and Shell met in Europe in February 1993 and “formulate[d] a strategy to suppress MOSOP<sup>84</sup> and to return to Ogoniland,” (2) that “[b]ased on past behavior, Shell and SPDC knew that the means to be used [by the Nigerian military] in that endeavor would include military violence against Ogoni civilians,” and (3) that “Shell and SPDC” provided direct, physical support to the Nigerian military and police operations

<sup>76</sup> *Kiobel*, 621 F.3d at 174.

<sup>77</sup> *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

<sup>78</sup> *Kiobel*, 621 F.3d at 129 (Maj. Op.)

<sup>79</sup> *Kiobel*, 621 F.3d at 192 (Leval, J., concurring).

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

<sup>81</sup> *Id.* (citing *Presbyterian Church of Sudan et al. v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009), quoting *Khulumani*, 504 F.3d at 277) (Katzmann, concurring) (emphasis added by the Second Circuit in *Kiobel*).

<sup>82</sup> 582 F.3d 244, 259 (2d Cir. 2009).

<sup>83</sup> *Kiobel*, 621 F.3d at 192 (Leval, J., concurring).

<sup>84</sup> The Movement for Survival of Ogoni People (MOSOP). *Id.* at 123, 189.

conducted against the Ogoni by, for example, providing transportation to the Nigerian forces; utilizing Shell property as a staging area for attacks; and providing food, clothing, gear, and pay for soldiers involved.<sup>85</sup>

¶37

According to Leval, the allegation that Shell “knew” the Nigerian military would use military violence against Ogoni civilians does not support an inference that Shell *intended* for such violence to occur.<sup>86</sup> A petroleum company may well provide financing and assistance to the local government to obtain protection needed for petroleum exploration and extraction with knowledge that the government violates human rights in providing such protection.<sup>87</sup> In a footnote, Leval responds to the Complaint’s allegation that “SPDC Managing Director Philip B. Watts, with the approval of Shell, requested the Nigerian Police Inspector General to increase SPDC’s security...to deter and quell community disturbances.”<sup>88</sup> According to Leval, such a request is not a request for human rights violations, such as torture, crimes against humanity, or extrajudicial killing.<sup>89</sup> He writes, “Knowledge of the government’s repeated pattern of abuses and expectation that they will be repeated...is not the same as a purpose to advance or facilitate

<sup>85</sup> *Id.* at 192 (Leval, J., concurring). *See id.* at 189-90 for further facts indicating proximity: “In February 1993, following a demand by MOSOP for royalties for the Ogoni people, Shell and SPDC officials met in the Netherlands and England in February 1993 to ‘formulate a strategy to suppress MOSOP and to return to Ogoniland.’ In April 1993, SPDC called for assistance from government troops. The Nigerian government troops fired on Ogoni residents protesting a new pipeline, killing eleven. Later, SPDC’s divisional manager wrote to the Governor of Rivers State (in which Ogoni is located) and requested ‘the usual assistance’ to protect the progress of SPDC’s further work on the pipeline. In August through October 1993, the Nigerian military attacked Ogoni villages, killing large numbers of civilians. SPDC provided a helicopter and boats for reconnaissance, provided transportation to the Nigerian forces involved, provided SPDC property as a staging area for the attacks, and provided food and compensation to the soldiers involved in the attacks. In an operation in October 1993, SPDC employees accompanied Nigerian military personnel in an SPDC charter bus to a village where the military personnel fired on unarmed villagers.

In December 1993, SPDC’s managing director, with the approval of Shell, asked the Nigerian Police Inspector General to increase security in exchange for providing Nigerian forces with salary, housing, equipment, and vehicles. Shortly thereafter, the Nigerian government created the Rivers State Internal Security Task Force (ISTF). Shell and SPDC provided financial support for the ISTF’s operations, as well as transportation, food, and ammunition for its personnel. In April 1994, the Rivers State Military Administrator ordered the ISTF to “‘sanitize’ Ogoniland, in order to ensure that those ‘carrying out ventures . . . within Ogoniland are not molested.’” The head of the ISTF responded in May that ‘Shell operations still impossible unless ruthless military operations are undertaken for smooth economic activities to commence.’

From May to August 1994, the ISTF engaged in numerous nighttime raids on Ogoni towns and villages. During these raids, the ISTF ‘broke into homes, shooting or beating anyone in their path, including the elderly, women and children, raping, forcing villagers to pay “settlement fees,” bribes and ransoms to secure their release, forcing villagers to flee and abandon their homes, and burning, destroying or looting property,’ and killed at least fifty Ogoni residents. Plaintiffs and others were arrested and detained without formal charges and without access to a civilian court system, some for more than four weeks. In the detention facility, Plaintiffs and others were beaten and were provided inadequate medical care, food, and sanitary facilities. SPDC officials ‘frequently visited the . . . detention facility’ and ‘regularly provided food and logistical support for the soldiers’ who worked there.

In 1994, the Nigerian military created a ‘Special Tribunal’ to try leaders of MOSOP, including Dr. Barinem Kiobel, a Rivers State politician who objected to the tactics of the ISTF and supported MOSOP. Counsel to those brought before the Special Tribunal were ‘subjected to actual or threatened beatings or other physical harm.’ The Complaint alleges also that, with Shell’s complicity, witnesses were bribed to give false testimony before the Special Tribunal. In January 1995, the Nigerian military violently put down a protest against Shell’s operations and the Special Tribunal, and the protesters who were detained were subjected to ‘floggings, beatings and other torture[,] and money was extorted to obtain releases.’ Dr. Kiobel and others were condemned to death by the Special Tribunal and executed in November 1995.”

<sup>86</sup> *Id.* at 192 n.53.

<sup>87</sup> *Id.* at 193.

<sup>88</sup> *Id.* at 192.

<sup>89</sup> *Id.* at 192-93 n.53.

such abuses.”<sup>90</sup> As such, he argues, knowledge of the abuses does not justify the imposition of liability for aiding and abetting those abuses.<sup>91</sup> Thus, Shell’s knowledge of the Nigerian government’s intent to violate the law of nations would not be sufficient to support aider and abettor liability.<sup>92</sup>

¶38 According to the D.C. Circuit in *Exxon*, however, the Second Circuit in *Talisman* misapprehended the test for aiding and abetting under customary international law.<sup>93</sup> The D.C. Circuit found that not only is aiding and abetting a proper theory of liability under the ATS, but it also held that the relevant *mens rea* requirement is the knowledge standard.<sup>94</sup>

### B. Analysis of the Second Circuit’s erroneous reasoning

¶39 By relying on a split decision opinion in *Khulumani*, the Second Circuit in *Kiobel* furthered a misunderstanding of corporate aiding and abetting liability under the ATS. In particular, Leval, largely because he bases his analysis on Judge Katzmann’s opinion, incorrectly analyzes the *mens rea* standard (as did the Second Circuit in *Talisman* by relying on Katzmann, which will be discussed below). This section deconstructs the erroneous reasoning in Judge Katzmann’s opinion, the root cause of much misunderstanding of the ATS *mens rea* standard.

¶40 In *Khulumani*, Judge Katzmann passes over international law sources that specify a “knowledge” standard for aiding and abetting in favor of the Rome Statute, which he misinterprets as setting forth the “purpose” standard.<sup>95</sup> There are two flaws with this analysis: 1) the Rome Statute was never meant to reflect customary international law, and 2) the Second Circuit erred in concluding that the Rome Statute requires purpose.

¶41 Keeping in line with Katzmann’s analysis, Leval also relies primarily on the Rome Statute, which is ironic given his criticism of the majority opinion (the majority argues that because corporations cannot be held liable under criminal law, neither can they be defendants in international civil suits).<sup>96</sup>

The reasons why the jurisdiction of international criminal tribunals has been limited to the prosecution of natural persons, as opposed to juridical entities, relate to the nature and purposes of *criminal* punishment, and have no application to the very different nature and purposes of civil compensatory liability.<sup>97</sup>

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<sup>90</sup> *Id.* at 193.

<sup>91</sup> *Id.* at 194.

<sup>92</sup> *Id.*

<sup>93</sup> *Exxon*, 2011 U.S. App. LEXIS 13934, at \*69.

<sup>94</sup> *Id.* at \*79.

<sup>95</sup> Brief of David J. Scheffer, Director of the Center for International Human Rights at Northwestern University School of Law, as Amicus Curiae in Support of the Issuance of a Writ of Certiorari, *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2010 U.S. LEXIS 7652, at \*2 (May 19, 2010) (No. 09-1262) [hereinafter Scheffer, *Talisman Amicus*].

<sup>96</sup> *Kiobel*, 621 F.3d at 170 (Leval, J., concurring) (citing majority opinion at 46).

<sup>97</sup> *Id.* at 166 (Leval, J., concurring). Note, as will be discussed below, that Leval’s analysis is incorrect. The jurisdiction of international criminal tribunals in fact have not been limited to the prosecution of natural persons. Rather they have held corporations liable for their human rights abuses.

Leval points out that the majority cites neither scholarly discussion nor any source document of international law, and that in fact, those sources contradict the majority's assertion that no distinction exists between civil and criminal liability.<sup>98</sup>

¶42 Ironically, he then uses international criminal law to determine that the required *mens rea* standard under the ATS—which establishes civil liability—is purpose. His analysis is flawed in two crucial ways. First, he bypasses sources of international criminal law that set forth the knowledge standard for aiding and abetting. Second, he bypasses those sources in favor of the Rome Statute, which was never meant to reflect customary international law and furthermore has yet to be ratified by the United States. Furthermore, as will be discussed below, even if the Rome Statute would be an appropriate reference for customary international civil law, a proper interpretation would find that in fact, the Statute may readily be interpreted as setting forth the knowledge standard.

### 1. Interpreting the *mens rea* requirement under the Rome Statute

¶43 Katzmann, then the *Talisman* majority, and most recently Leval, all erred in misinterpreting the Rome Statute as setting forth customary law and the purpose standard. The Rome Statute should not be relied upon to determine the *mens rea* standard for corporate accessorial civil liability, as previously stated, for the following reasons: 1) in its entirety it does not purport to reflect customary international law, and 2) it has not been interpreted by the ICC as requiring purpose for aiding and abetting liability.<sup>99</sup>

¶44 According to David J. Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues and head of the U.S. delegation involved in negotiating the Rome Statute:<sup>100</sup>

The Second Circuit errs in drawing upon Article 25(3)(c) of the Rome Statute of the International Criminal Court as a demonstration of customary international law for aiding and abetting atrocity crimes under the Court's subject matter jurisdiction... The Rome Statute was never intended, in its entirety, to reflect international law.<sup>101</sup>

¶45 Last July, the D.C. Circuit found that the Rome Statute “is properly viewed in the nature of a treaty and not as customary international law.”<sup>102</sup> In fact, Article 10 specifically provides that the Rome Statute is not to be “interpreted as limiting or prejudicing in any way existing or developing rules of international law.”<sup>103</sup> Furthermore, the ICC recognized in *Prosecutor v.*

<sup>98</sup> *Id.* at 170.

<sup>99</sup> Scheffer, *Talisman Amicus*, *supra* note 95, at 5.

<sup>100</sup> Ambassador Scheffer served as the U.S. Ambassador-at-Large for War Crimes Issues (1997-2001), led the U.S. delegation that negotiated the Rome Statute and its supplemental documents from 1997 to 2001, and was its deputy head from 1995 to 1997.

<sup>101</sup> Scheffer, *Talisman Amicus*, *supra* note 95, at 2-3. *See also* Brief of David J. Scheffer, Northwestern University School of Law Center for International Human Rights, as Amicus Curiae in Support of the Issuance of a Writ of Certiorari, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), at 10 (July 12, 2011) (No. 10-1491) [hereinafter Scheffer, *Kiobel Amicus*].

<sup>102</sup> Exxon, 2011 U.S. App. LEXIS 13934, at \*67 (citing Rome Statute of the International Criminal Court art. 10, opened for signature July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002); Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909, 911, 917 n.11 (2000); Otto Triffterer, *Article 10*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 317 (Otto Triffterer ed., 1999).

<sup>103</sup> Exxon, 2011 U.S. App. LEXIS 13934, at \*67.

*Germain Katanga and Mathieu Ngudjolo Chui* that the Rome Statute does not necessarily represent customary international law.<sup>104</sup> Lastly, Judge Rogers, who wrote the D.C. Circuit's *Exxon* opinion, points out, "[a]s a treaty, the Rome Statute binds only those countries that have ratified it...and the United States has not."<sup>105</sup>

¶46 While it is universally accepted that corporations are subject to civil liability under domestic law,<sup>106</sup> domestic practice varies considerably worldwide on the *criminal* liability of corporations.<sup>107</sup> The lack of consensus among States concerning corporate liability (which the *Kiobel* majority argues is evidence that corporate liability is not firmly established as a matter of international law<sup>108</sup>) therefore relates to criminal, not civil liability.<sup>109</sup> Furthermore, Ambassador Scheffer notes that he was not advised by the Justice Department that Article 25(3)(c) on aiding and abetting was being settled as a matter of customary international law.<sup>110</sup> Article 25(3)(c) was negotiated not to codify customary international law, but to balance the many common law and civil law views about how to express the *mens rea* of the aider or abettor.<sup>111</sup>

¶47 While the Rome Statute does not purport to lay out customary law with regards to the aiding and abetting standard, should it be referenced a proper interpretation would find that the statute sets forth the knowledge standard. The language of Article 25(3)(c) of the Rome Statute reads that a person will be criminally liable for punishment for a crime within the ICC's jurisdiction if he "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."<sup>112</sup> Currently there is no ICC precedent that interprets Article 25(3)(c) with respect to accessorial liability for aiding and abetting.<sup>113</sup>

¶48 However, offering his insight into the Rome Statute negotiations, Scheffer asserts that the aider and abettor's liability under Article 25(3)(c) must be established with reference to the *mens rea* principles established in Article 30 of the Rome Statute, which expressly lays out the mental elements of crimes. Article 30 reads, "a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is *aware that it will occur in the ordinary course of events*."<sup>114</sup> Under

<sup>104</sup> Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 507-08 (Sept. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>.

<sup>105</sup> *Exxon*, 2011 U.S. App. LEXIS 13934, at \*68. See U.S. CONST. art. II, § 2, cl. 2.

<sup>106</sup> Scheffer, *Kiobel* Amicus, *supra* note 101, at 5 n.3: "See, e.g., CODE CIVIL [C. Civ.] art. 1382-84 (Fr.); BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], Aug. 18, 1896, § 31 (Ger.); MINPŌ [MINPŌ] [Civ. C.] art. 709, 710, 715 (Japan); see generally, INTERNATIONAL COMMISSION OF JURISTS, REPORT OF THE EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES (2008), available at <http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity>; see also *Exxon*, No. 09-7125, 2011 WL 2652384, at \*53 ("Legal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood.")

<sup>107</sup> Scheffer, *Kiobel* Amicus, *supra* note 101, at 5 (emphasis added).

<sup>108</sup> *Kiobel*, 621 F.3d at 119 n.16.

<sup>109</sup> Scheffer, *Kiobel* Amicus, *supra* note 101, at 4.

<sup>110</sup> Scheffer, *Talisman* Amicus, *supra* note 95, at 12.

<sup>111</sup> Scheffer, *Talisman* Amicus, *supra* note 95, at 11. See also Brief of David J. Scheffer, Northwestern University School of Law Center for International Human Rights, as Amicus Curiae in Support of Appellants and Reversal, *Doe I v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010), at 11-12 (July 1, 2012) (No. 10-56739).

<sup>112</sup> Rome Statute of the International Criminal Court art. 25(3)(c), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

<sup>113</sup> Scheffer & Kaeb, *supra* note 3, at 352.

<sup>114</sup> Rome Statute of the International Criminal Court, *supra* note 112, at 17 (emphasis added).

Article 30(3), “knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>115</sup>

¶49 Donald Piragoff, lead Canadian government negotiator on general principles of law during the Rome Statute negotiations, also shed light on the relationship between aiding and abetting liability under Article 25(3)(c) and the mental element requirements of Article 30(2):

Article 30 para. 2(b) makes it clear that “intent” may be satisfied by an awareness that a consequence will occur in the ordinary course of events. This same type of awareness can also satisfy the mental element of “knowledge,” as defined in article 30 para. 3.<sup>116</sup>

¶50 The word “intention” was too controversial in negotiations since it has different meanings in different contexts. In some countries, intention is inferred from an actor’s engaging in conduct with knowledge of the likely consequences.<sup>117</sup> Other countries preferred the term “knowledge” since it better reflects their national practice, and it had been applied in the jurisprudence of the Nuremberg and Tokyo International Military Tribunals and the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).<sup>118</sup> Thus, negotiators of the Rome Statute compromised by settling on the word “purpose,” which allows more flexibility when interpreted in accordance with the prior resolution of Article 30.<sup>119</sup>

¶51 The negotiators had the opportunity, but chose not to inject a shared intention standard into aiding abetting under Article 30.<sup>120</sup> The purpose standard for aiding and abetting would obliterate the distinction between aiders and abettors and perpetrators of atrocity crimes. In other words, the negotiators could have laid out aiding and abetting as a co-perpetrator mode of liability, but they did not.<sup>121</sup>

¶52 Thus, the Second Circuit judges in *Khulumani*, *Talisman*, and now *Kiobel*, misinterpreted the word “purpose” in Article 25(3)(c) to mean a shared intent standard for aiding and abetting. While there is no ICC precedent that interprets Article 25(3)(c), when read in conjunction with Article 30, it may reasonably be construed as establishing a knowledge standard for aiding and

<sup>115</sup> *Id.*

<sup>116</sup> Scheffer, *Talisman Amicus*, *supra* note 95, at 20 (citing Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 849, 855 (Otto Triffterer ed., 2d ed. 2008). *See also* Scheffer & Kaeb, *supra* note 3:

A question arises as to whether the conjunctive formulation [intent and knowledge] changes existing international jurisprudence that an accomplice (such as an aider or abettor) need not share the same *mens rea* of the principal, and that a knowing participation in the commission of an offence or awareness of the act of participation coupled with a conscious decision to participate is sufficient mental culpability for an accomplice. It is submitted that the conjunctive formulation has not altered this jurisprudence, but merely reflects the fact that aiding and abetting by an accused requires both knowledge of the crime being committed by the principal and some intentional conduct by the accused that constitutes the participation.... Article 30 para. 2(b) makes it clear that “intent” may be satisfied by an awareness that a consequence will occur in the ordinary course of events. This same type of awareness can also satisfy the mental element of “knowledge,” as defined in article 30, para. 3. Therefore, if both “intent” and “knowledge” are required on the part of an accomplice, these mental elements can be satisfied by such awareness. Scheffer & Kaeb, *supra* note 3, at 355 (citing Piragoff & Robinson, *supra* note 118, at 855).

<sup>117</sup> Scheffer, *Talisman Amicus*, *supra* note 95, at 12.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 16-17.

<sup>121</sup> *Id.*

abetting liability.<sup>122</sup> Regardless, it is up to the judges of the ICC, not the judges of U.S. district courts, to determine the proper criteria for accessorial liability under the ICC's jurisdiction.<sup>123</sup> Scheffer argues that when Article 25(3)(c) is interpreted by the judges of the ICC, they are likely to find the standard for aiding and abetting as it has developed in the jurisprudence of the international military tribunals at Nuremberg and Tokyo and the international and hybrid criminal tribunals, in State practice, and in the writings of leaders scholars, all of which assert the knowledge standard.<sup>124</sup>

¶53 Because the Rome Statute 1) is not a reflection of customary international law and 2) has not been interpreted by the ICC as requiring purpose for aiding and abetting liability, U.S. courts should ascertain the *mens rea* standard for aiding and abetting under the ATS from customary international law and domestic law, which have long applied the knowledge<sup>125</sup> standard.

¶54 The weight of international precedent has identified the knowledge standard for aiding and abetting liability.<sup>126</sup> Arguably, the purpose test set forth by the Second Circuit in Katzmann's *Khulumani* opinion and then *Talisman* was "just as fatal to the corporate alien tort as *Kiobel*."<sup>127</sup> By relying on the erroneous Rome Statute interpretation in *Khulumani* and *Talisman*, the Second Circuit in *Kiobel* once again misinterpreted Article 25(3)(c), which negates neither the large body of precedents that set forth the knowledge standard nor the common sense reality of how atrocity crimes are committed.<sup>128</sup>

#### IV. UNDER U.S. DOMESTIC LAW AND INTERNATIONAL CUSTOMARY LAW, THE *MENS REA* STANDARD FOR CORPORATE AIDING AND ABETTING LIABILITY IS KNOWLEDGE

¶55 Under both domestic and international law on civil liability, corporate defendants can be found liable for accessorial liability.<sup>129</sup> As the following sections will show, the applicability of the aiding and abetting doctrine to many corporate defendants in ATS litigation is perhaps *over* determined.<sup>130</sup> In other words, it has been argued that virtually every international law violation alleged under the ATS has a counterpart in American tort law.<sup>131</sup>

Genocide, torture, and rape are all incidents of battery, assault, intentional infliction of emotional distress, and where death results, wrongful death. Slave labor is a form of false imprisonment, as is excessive detention. Even in the earliest cases in which the Court found international law violations by relying on

<sup>122</sup> *Id.* at 5.

<sup>123</sup> See Scheffer & Kaeb, *supra* note 3, at 352. "Nothing discourages or prevents [the ICC judges] from looking to the growing jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, to state practice, and to scholarly texts for guidance on this issue." *Id.*

<sup>124</sup> Scheffer, *Talisman* Amicus, *supra* note 95, at 25.

<sup>125</sup> *Id.* at 5.

<sup>126</sup> Scheffer, *Talisman* Amicus, *supra* note 95, at 15 (citing ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 211, 214–18 (2d ed. 2008); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 234-35, 245 (Dec. 10, 1998); Brief for International Law Scholars William Aceves et al. as Amici Curiae Supporting Petitioners at 12–15, Presbyterian Church of Sudan, et al. v. *Talisman* Energy, Inc., No. 09-1262 (2d Cir. Apr. 30, 2010)).

<sup>127</sup> Goldhaber, *supra* note 10.

<sup>128</sup> Scheffer, *Talisman* Amicus, *supra* note 95, at 17.

<sup>129</sup> Anthony J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 BROOK. J. INT'L L. 871, 875 (2008).

<sup>130</sup> *Id.* at 873.

<sup>131</sup> *Id.* at 886.

norms with “definite content and acceptance among civilized nations,” these violations could be easily recast as common law torts.<sup>132</sup>

¶56

For example, the attack upon the French diplomat in the “Marbois incident” was a battery.<sup>133</sup> Piracy was a trespass to chattels.<sup>134</sup> As will be analyzed below, it matters not whether one looks to domestic civil law or international law to determine the *mens rea* element; both assert the knowledge standard.

*A. U.S. domestic law sets forth the knowledge standard*

¶57

Courts are split in their interpretations of the ATS’s silence on the issue of whether aiding and abetting is a mode of establishing a company’s liability under the statute. Unlike the Ninth Circuit in *Unocal*, which indicates that the ATS allows aiding and abetting claims,<sup>135</sup> other federal judges have rejected aiding and abetting claims absent Congressional direction.<sup>136</sup> Currently, U.S. courts can choose to apply international law or U.S. federal common law to determine third party liability under the ATS.<sup>137</sup> Although many courts look to international customary law to determine liability, domestic tort law is gaining traction as a source of law for corporate aiding and abetting standards, as is evident from the D.C. Circuit’s recent analysis in *Exxon*. This makes sense given the fact that international law does not take a position on civil liability with regards to either natural persons or corporations, but leaves that to each nation to resolve for itself.<sup>138</sup> By passing the ATS, Congress resolved that question for the U.S., unlike the majority of nations, in favor of civil liability.<sup>139</sup> As will be analyzed in this section, both a) domestic tort law (as exemplified in the *Restatement (Second) of Torts* § 876) and b) domestic case law (in which judges rely on international jurisprudence) assert that the *mens rea* standard for aiding and abetting liability is knowledge.<sup>140</sup>

<sup>132</sup> *Id.* See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004). Justice Breyer, in his *Sosa* concurrence, explains in his defense of the Alien Tort Statute that it is acceptable to recognize civil liability where criminal liability has been established internationally. Scheffer, *Kiobel Amicus*, *supra* note 101, at 7.

<sup>133</sup> *Republica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa.O. & T. 1784), *cited in Sosa*, 542 U.S. at 716–17.

<sup>134</sup> *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607), *cited in Sosa*, 542 U.S. at 720; *Moxon v. Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895), *cited in Sosa*, 542 U.S. at 720.

<sup>135</sup> The Ninth Circuit’s position has subsequently been confirmed. See *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 287 (E.D.N.Y. 2007) (indicating that there is a “vast body of law finding aiding and abetting liability available under the [ATCA].”); *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007). GLOBAL LABOR AND EMPLOYMENT LAW, *supra* note 6, at 133.

<sup>136</sup> GLOBAL LABOR AND EMPLOYMENT LAW, *supra* note 6, at 133 (citing *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004) (Sprizzo, J.) (drawing a parallel between federal securities litigation and the 1994 decision *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994)); see also *Khulumani*, 504 F.3d at 317 (Korman, J., concurring in part and dissenting in part). Some analysts argue that “it is likely that Congress approves of these claims as demonstrated by the legislative history of the TVPA, which anticipates aiding and abetting liability despite the TVPA’s silence on this point.” GLOBAL LABOR AND EMPLOYMENT LAW, *supra* note 6, at 133.

<sup>137</sup> GLOBAL LABOR AND EMPLOYMENT LAW, *supra* note 6, at 133.

<sup>138</sup> *Kiobel*, 621 F.3d at 170-72 (Leval, J., concurring).

<sup>139</sup> *Id.* at 183.

<sup>140</sup> Corporations may also be held liable even under certain U.S. criminal laws. U.S. courts require a corporate *mens rea*: they look at the employees’ acts and knowledge collectively to determine whether they would constitute a criminal offense if such acts had all been committed by one employee. GLOBAL LABOR AND EMPLOYMENT LAW, *supra* note 6, at 80. Thus, even if one employee did not have sufficient information to possess *mens rea* for an offense, if a number of employees possessed such information collectively, the corporation can be held criminally liable. *Id.* at 80-81. For instance, the D.C. district court found Philip Morris guilty of fraud regarding the health effects of smoking; the *mens rea* was inferred from the collective *knowledge* of (1) the company’s researchers who

¶58 Under U.S. domestic tort law, the *mens rea* standard for aiding and abetting is knowledge. Although the concept of assigning liability to those who enable or encourage tortious conduct has existed within common law for centuries, claims specifically concerning aiding and abetting have become increasingly common over the last two decades.<sup>141</sup> The *Restatement (Second) of Torts* § 876 allows for this imposition of liability on persons acting in concert. The *Restatement* attaches liability to an actor who knows that another's conduct constitutes a breach of duty but nevertheless provides substantial assistance or encouragement to that party.<sup>142</sup> The illustration under the *Restatement (Second) of Torts* § 876 cmt. d, illus. 10 (1976) explains:

*A* and *B* conspire to burglarize *C*'s safe. *B*, who is the active burglar, after entering the house and without *A*'s knowledge of his intention to do so, burns the house in order to conceal the burglary. *A* is subject to liability to *C*, not only for the conversion of the contents of the safe, but also for the destruction of the house.<sup>143</sup>

¶59 In addition to the *Restatement*, the vast majority of ATS courts that have had occasion to determine a *mens rea* standard for corporate aiding and abetting liability have determined that the appropriate standard is knowledge.<sup>144</sup> This includes the Eleventh Circuit Court of Appeals,<sup>145</sup> the Ninth Circuit,<sup>146</sup> and several Second Circuit district courts.<sup>147</sup> What follows is a brief synopsis of their analysis.

¶60 *Doe I v. Unocal*<sup>148</sup> is one of the few appellate decisions to discuss aiding and abetting liability under the ATS. Although the case was settled and then vacated, *Unocal* remains an important exemplar of the reasoning underlying the liability standard.<sup>149</sup>

*knew* the harmful effects of smoking and (2) the company's senior officers who, in making contrary statements, recklessly disregarded this *knowledge*. *Id.* at 81 (citing *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1, 896 (D.D.C. 2006)).

<sup>141</sup> Sebok, *supra* note 129, at 876 (citing *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795) (holding defendant liable for aiding and abetting in piracy because he knowingly supplied guns); *Henfield's Case*, 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (court recognized liability for committing aiding or abetting hostilities in violation of the law of nations)).

<sup>142</sup> Sebok, *supra* note 129, at 876. *See* RESTATEMENT (SECOND) OF TORTS § 876 (1979): "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself," cited in John Haberstroh, *The Alien Tort Claims Act & Doe v. Unocal. A Paquete Habana Approach to the Rescue*, 32 DENV. J. INT'L L. & POL'Y 231, 256 (2004).

<sup>143</sup> Sebok, *supra* note 129, at n.44.

<sup>144</sup> Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 479 (2007) (citing *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1344, 1355-56 (N.D. Ga. 2002) (looking to approaches used by ICTR and ICTY, which use similar standard, for assistance in adjudicating "accomplice liability" under ATS)).

<sup>145</sup> *See Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).

<sup>146</sup> *Bowoto v. Chevron Corp.*, No. C99-02506 SI, 2006 U.S. Dist. LEXIS 63209, at 17-19 (N.D. Cal. Aug. 21, 2006); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004).

<sup>147</sup> *S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 262 (S.D.N.Y. 2009); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 288-94 (E.D.N.Y. 2007); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005); *In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539, 554 (S.D.N.Y. 2005); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000).

<sup>148</sup> 395 F.3d 932 (9th Cir. 2002), *vacated en banc*, 395 F.3d 978 (9th Cir. 2003).

<sup>149</sup> Ryan S. Lincoln, *To Proceed with Caution? Aiding and Abetting Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 604, 605 (2010).

¶61 The Ninth Circuit considered a summary judgment motion submitted by defendant Unocal—a California-based gas company operating in Burma—on claims of aiding and abetting under the ATS.<sup>150</sup> The petitioners, Burmese villagers, alleged that Unocal was an accomplice to the Myanmar Military Government’s rape, murder, and torture of villagers within the context of forced labor that was used to build a pipeline.<sup>151</sup> The majority, led by Judge Pregerson, who relied heavily on *Prosecutor v. Furundzija*<sup>152</sup> and *Prosecutor v. Musema*,<sup>153</sup> found that the source of aiding and abetting law for ATS purposes is international law,<sup>154</sup> and that an actor is liable when he provides “knowing practical assistance” to a party who commits a crime in violation of international law.<sup>155</sup>

¶62 The majority held that a reasonable fact finder could determine that Unocal met the *mens rea* standard through actual or constructive knowledge,<sup>156</sup> that forced labor was being used by the Myanmar Military to construct a pipeline in the mining areas, and that Unocal gave practical assistance by hiring the Myanmar Military to provide security and build infrastructure along the pipeline route.<sup>157</sup> Additionally, Unocal had used photos, surveys, and maps in daily meetings with the Myanmar Military to show them where the company needed such security and infrastructure.<sup>158</sup>

¶63 Lastly, to determine whether Unocal aided and abetted the Myanmar Military’s acts of murder and rape, Judge Pregerson again cited *Furundzija* to show that even actual or constructive knowledge of the specific acts is not necessary; if a defendant knows that “one of a number of crimes will probably be committed and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime.”<sup>159</sup> *Unocal* came close to asserting the “Furundzija knowledge standard” for aiding and abetting liability under international law,<sup>160</sup> but the parties settled.

¶64 A New York federal district court also found that knowledge was the standard. In April 2009, the Southern District of New York applied the knowledge test in *S. African Apartheid Litig. v. Daimler AG*; Companies operating in South Africa could be held liable for their actions if they had knowledge that these actions would substantially assist the commission of offenses by the apartheid government.<sup>161</sup> That knowledge standard, however, was quickly superceded by the purpose standard when the Second Circuit Court of Appeals in October 2009 followed Judge Katzmann’s concurring *Khulumani* opinion and adopted the purpose standard as the law of the Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy*.<sup>162</sup>

¶65 Several other circuits have recognized that knowledge is the *mens rea* standard. Judges in *Mehinovic v. Vuckovic* held that the *mens rea* standard for aiding and abetting was knowledge.<sup>163</sup>

<sup>150</sup> *Id.* at 606.

<sup>151</sup> *Id.* (citing Unocal, 395 F.3d 932).

<sup>152</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

<sup>153</sup> *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment (Jan. 27, 2000).

<sup>154</sup> By relying on *Furundzija* and *Musema*, Pregerson gave strong deference to the ICTY’s and ICTR’s analysis of the current international aiding and abetting standard. Lincoln, *supra* note 149, at 606.

<sup>155</sup> Sebok, *supra* note 129, at 874 (citing *Unocal*, 395 F.3d at 951).

<sup>156</sup> Unocal, 395 F.3d at 953.

<sup>157</sup> *Id.* at 952.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 956 (quoting *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 246 (Dec. 10, 1998)).

<sup>160</sup> Haberstroh, *supra* note 142, at 255.

<sup>161</sup> *S. African Apartheid Litig. v. Daimler AG*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

<sup>162</sup> 582 F.3d 244, 259.

<sup>163</sup> *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002).

And in *Cabello v. Fernandez-Larios*, the Eleventh Circuit found a defendant liable of aiding and abetting under the ATS by virtue of “active participation,” defined as substantial assistance given to the principal done with knowledge that it would assist the activity at the time the assistance was provided.<sup>164</sup>

¶166 Hence, in *Kiobel*, as is evident from the *Restatement* and from relevant domestic case law, the Second Circuit needed to find that Shell had knowledge in order to hold it liable for aiding and abetting under the ATS. As was asserted by Leval, the *Kiobel* Complaint plausibly alleges that the appellants knew of human rights abuses committed by officials of the Nigerian government and took actions that contributed to the commission of those offenses.<sup>165</sup>

*B. Domestic courts that set forth the purpose standard have misinterpreted customary international law*

¶167 The customary international law standard required by *Sosa*<sup>166</sup> is applicable to future ATS cases not only in terms of subject matter jurisdiction, but also in terms of the *mens rea* element.<sup>167</sup> The customary law standard has long established a knowledge standard for aiding and abetting. As discussed above, federal common law, which is informed by customary international law,<sup>168</sup> also sets forth the knowledge standard for accessorial liability under the ATS. As the Second Circuit District Court previously found in *In Re South African Apartheid Litigation*,

[T]here are no applicable international legal materials requiring a finding of specific intent before imposing liability for aiding and abetting a violation of customary international law. As a result, I [Judge Shira Scheindlin] conclude that customary international law requires that an aider and abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the laws of nations.<sup>169</sup>

¶168 As will be analyzed below, several Second Circuit judges have arrived at the purpose standard through a misunderstanding of international customary law. In *Khulumani*'s three-judge panel split, Judge Katzmann determined that the defendant must act with a purpose of bringing about the abuses.<sup>170</sup> Katzmann's analysis then became law of the circuit in the *Talisman* decision,<sup>171</sup> which then became the case that the *Kiobel* judges relied upon for their assertion that the purpose standard was required for aiding and abetting liability.<sup>172</sup> The following section analyzes what went wrong with this Second Circuit precedent.

<sup>164</sup> *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005).

<sup>165</sup> *Kiobel*, 621 F.3d at 188 (Leval, J., concurring).

<sup>166</sup> An international customary norm must be a “norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.” *Sosa*, 542 U.S. at 725.

<sup>167</sup> Scheffer, *Talisman Amicus*, *supra* note 95, at 5.

<sup>168</sup> *Id.* at 6.

<sup>169</sup> Scheffer & Kaeb, *supra* note 3, 345-46 (citing *S. African Apartheid Litig.*, 617 F. Supp. 2d at 262).

<sup>170</sup> *Kiobel*, 621 F.3d at 188 (Leval, J., concurring).

<sup>171</sup> *Id.* at 193 (Leval, J., concurring).

<sup>172</sup> *Kiobel*, 621 F.3d at 154 (Maj. Op.), 193 (Leval, J., concurring).

### 1. What went wrong in the Second Circuit: *Khulumani* and *Talisman*

¶169 In *Khulumani*, three groups of South African plaintiffs brought ATS claims against approximately fifty corporate defendants alleging that they had “actively and willingly” maintained the apartheid system in collaboration with the South African Government.<sup>173</sup> The Second Circuit held that there was aiding and abetting liability under the ATS, but the three-judge panel split on the standard for liability. Judge Katzmman took the position that the plaintiffs’ claim for aiding and abetting should adopt the test set out in international law—specifically the Rome Statute<sup>174</sup>—while Judge Hall found that domestic law applied, specifically the *Restatement (Second) of Torts* § 876.<sup>175</sup>

¶170 Under the Restatement, and according to domestic case law,<sup>176</sup> the U.S. *mens rea* requirement for civil aiding and abetting is knowledge. Had Katzmman interpreted the Rome Statute correctly both judges would have arrived at the same knowledge standard. Instead—and despite conceding that the definiteness of the Rome Statute’s definition was ultimately uncertain—Katzmann asserted that the Rome Statute sets forth the purpose standard.<sup>177</sup>

¶171 Judge Korman, who concurred in part and dissented in part, agreed with Katzmman that the Rome Statute provides the proper international aiding and abetting standard.<sup>178</sup> He argued that footnote twenty in *Sosa* required courts to undertake a “norm-by-norm” analysis, to determine whether each norm of international law provides for aiding and abetting.<sup>179</sup>

¶172 The *Harvard Law Review* argues that the Second Circuit made the same mistake in looking to footnote twenty of the *Sosa* opinion in *Kiobel*: it is a question of *substantive* international law when judges determine whether an international norm applies.<sup>180</sup> The norm that imposes a duty must specify to whom the duty applies. Aiding and abetting, however, is part of a liability theory, the *Law Review* argues, and is not inherently part of a substantive norm.<sup>181</sup> Authorities from the *Restatement* to the Rome Statute to the rules for U.S. military commissions all define liability theories separately from the underlying offenses.<sup>182</sup> *Sosa* thus does not directly indicate whether federal common law or international law determines the standards for aiding and abetting.<sup>183</sup> Thus, neither does it directly establish the appropriate *mens rea* requirement.<sup>184</sup>

<sup>173</sup> *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007).

<sup>174</sup> *Id.* at 275 (Katzmann, J., concurring).

<sup>175</sup> *Id.* at 284-87 (Hall, J., concurring).

<sup>176</sup> *See id.* at 287-88 (Hall, J., concurring) (citing *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983)).

<sup>177</sup> Michael Garvey, Comment, *Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Legislative Prerogative*, 29 B.C. THIRD WORLD L.J. 381 (2009) (citing *Khulumani*, 504 F.3d at 275-76 (Katzmann, J., concurring) (“In drawing upon the Rome Statute, I recognize that it has yet to be construed by the International Criminal Court; its precise contours and the extent to which it may differ from customary international law thus remain somewhat uncertain.”)).

<sup>178</sup> *Khulumani*, 504 F.3d at 333 (Korman, J., concurring).

<sup>179</sup> *Id.* at 331.

<sup>180</sup> Case Comment, *Federal Statutes - Alien Tort Statute - Second Circuit Holds that Human Rights Plaintiffs May Plead Aiding and Abetting Theory of Liability: Khulumani v. Barclay Nat'l Bank Ltd*, 121 HARV. L. REV. 1953, 1957 (2008).

<sup>181</sup> *Id.* at n.43 (*See Khulumani*, 504 F.3d at 281 (Katzmann, J., concurring) (describing aiding and abetting as “a theory of identifying who was involved in an offense ... rather than as an offense in itself”); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, n.40 (2006) (plurality opinion) (calling aiding and abetting “a species of liability for the substantive offense ... not a crime on its own”); *Hefferman v. Bass*, 467 F.3d 596, 601 (7th Cir. 2006).

<sup>182</sup> *Id.* at 1958 n.44; *See Rome Statute*, *supra* note 112, art. 25; Crimes and Elements for Trials by Military Commission, 32 C.F.R. § 11.6(c) (2007) (defining aiding and abetting as a “form[] of liability” under which a “person is criminally liable as a principal” for war crimes); RESTATEMENT (SECOND) OF TORTS § 876(b) (1977).

<sup>183</sup> Some experts, however, argue that *Sosa* requires indirectly that federal common law applies. *See Scheffer & Kaeb*, *supra* note 3 (“*Sosa* require[s] that civil claims under the ATS [be] based upon federal common law, which

¶73 Under the *Sosa* standard, courts need not (but may) look to international customary law to determine the *mens rea* standard since customary law defers civil liability to the standards of each country. Should domestic courts look to international customary law, however, they would find that, like domestic tort law, it sets forth the knowledge standard. The Second Circuit judges created an unnecessary conflict. If Katzmman had interpreted the Rome Statute correctly, he would have found that it is in accordance with domestic tort law.

¶74 In *Talisman*, the Second Circuit answered the question of corporate intent by adopting Katzmman's opinion as law of the circuit. The Second Circuit held that the district court correctly dismissed the case because the plaintiffs could not show that Talisman Energy Inc. (Talisman), a Canadian energy company, provided substantial assistance to the Government of Sudan with the purpose of aiding its unlawful conduct.<sup>185</sup>

¶75 Talisman held a 25 percent stake in oil development operations of the Greater Nile Petroleum Exporting Company (GNPOC), which operated in Sudan. Amidst the Sudanese civil war, the GNPOC relied on Sudanese military forces for security while conducting its resource development operations.<sup>186</sup> The Sudanese military benefited from GNPOC's activities, such as the airstrips it built for development projects.<sup>187</sup> Plaintiffs argued that Talisman knew that these activities furthered Sudanese military actions, and brought suit alleging that Talisman aided and abetted the Government of Sudan in committing genocide, torture, war crimes, and crimes against humanity.<sup>188</sup>

¶76 The court relied on Judge Katzmman's concurrence from *Khulumani*, passing over Judge Hall's analysis, domestic ATS case law and tort law, and international law sources, all of which specify a knowledge standard for aiding and abetting, in favor of the Rome Statute.<sup>189</sup> The Second Circuit thus held that purpose, rather than knowledge, is the *mens rea* standard for aiding and abetting under the ATS.<sup>190</sup> Applying the purpose standard, the Court found that Talisman's knowledge of the Sudanese Government's international law violations did not rise to the *mens rea* level necessary to hold the company accountable.<sup>191</sup>

¶77 *Talisman*'s purpose standard for corporate aiding and abetting liability introduced a split from *Unocal*'s analysis.<sup>192</sup> When one looks to how other U.S. district courts have ruled on the issue, as well as to international sources, it is evident that *Talisman*, and now *Kiobel*, are the odd ones out.

¶78 The distinction lies in the weight given to different sources of international law. Within its scope of analysis, each circuit court included decisions by the Nuremberg and Tokyo Tribunals, the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Rome Statute, yet came down differently on the *mens rea* standard. That division in analysis is largely due to Judge Katzmman's misunderstanding of the Rome Statute, which in fact does not establish the higher purpose standard for civil aiding and abetting liability in domestic courts.

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applies a knowledge standard for aiding and abetting") (citing *Sosa*, 542 U.S. at 724, 732).

<sup>184</sup> Case Comment, *supra* note 180, at 1958.

<sup>185</sup> *Talisman*, 582 F.3d at 262.

<sup>186</sup> *Id.* at 249.

<sup>187</sup> *Id.* at 249-50.

<sup>188</sup> *Id.* at 247.

<sup>189</sup> *Id.* at 259.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 260-61.

<sup>192</sup> Lincoln, *supra* note 149, at 610.

### C. Customary International Law sets forth the knowledge standard

¶79 The *Sosa* decision makes it clear that courts must look to the norm of nations. Customary international law is defined by the *Restatement (Third) of the Foreign Relations Law* as “law [that] results from a general and consistent practice of States followed by them from a sense of legal obligation.”<sup>193</sup> These standards are derived from international conventions, judicial decisions from international tribunals, and general principles of law that are widely recognized within developed nations.<sup>194</sup> Contemporary discussions on aiding and abetting law generally focus on interpretations of the decisions rendered by special international tribunals involving Germany, Rwanda, and the former Yugoslavia,<sup>195</sup> where the knowledge standard has been applied to individuals prosecuted for aiding and abetting the commission of atrocity crimes.<sup>196</sup>

¶80 The Nuremberg Military Tribunal (“NMT”), an international court formed after World War II to hold accountable violators of international law, recognized aiding and abetting as a basis for criminal liability.<sup>197</sup> The London Agreement of August 8, 1945, established this tribunal and provided for the culpability of those who did not directly carry out war crimes, but who assisted in their commission.<sup>198</sup> The NMT found that the correct *mens rea* standard for aiding and abetting is knowledge.<sup>199</sup>

¶81 While the generally applied *mens rea* standard was the knowledge test,<sup>200</sup> there was one trial in which the NMT required a purpose standard. After World War II, in *United States v. Ernst von Weizsaecker, et al.* (The Ministries Case),<sup>201</sup> a German industrialist and chairman of the Dresdner Bank, Karl Rasche, was accused of knowingly providing loans to businesses that relied on forced labor. Despite evidence showing he was substantially certain his funding would

<sup>193</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

<sup>194</sup> Sebok, *supra* note 129, at 879 (See 1945 I.C.J. art. 38 (June 26), 59 Stat. 1055, 33 U.N.T.S. 933; See also *Filártiga v. Peña-Irala*, 630 F.2d 876 (1980)).

<sup>195</sup> Sebok, *supra* note 129, at 879.

<sup>196</sup> Scheffer & Kaeb, *supra* note 3, at 346 n.36; See Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgment, ¶ 501 (Dec. 13, 2004); Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶¶ 321, 326-29 (Nov. 16, 1998); Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Judgment, ¶ 229 (Jul. 15, 1999); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, ¶ 245 (Dec. 10, 1998) (finding that “the clear requirement in the vast majority of the [Nuremberg-era] cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime.”).

<sup>197</sup> Sebok, *supra* note 129, at 879.

<sup>198</sup> The four victorious allied powers established the London Agreement: France, the Soviet Union, the United Kingdom, and the United States. BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 30 (2d ed. 2010).

<sup>199</sup> See Scheffer & Kaeb, *supra* note 3, at 346 n.37; See also Scheffer, Talisman Amicus brief, *supra* note 95, at 28-30 (“The overwhelming weight of authority from the International Military Tribunal (‘IMT’) at Nuremberg, and subsequent zonal trials held by the United States and its allies...establishes that knowledge, not purpose, is the *mens rea* standard for criminal aiding and abetting liability under international law. For example, two top officials of the firm that supplied the poison Zyklon-B gas for Nazi gas chambers knowing it would be used to kill concentration camp prisoners were convicted for their assistance using the Nuremberg principles established by the IMT.”); *In re Tesch* (The Zyklon B Case), 13 Int’l L. Rep. 250 (1947)(confirmed aiding and abetting liability standard following the major Nuremberg trials and has been recognized as setting one of the major precedents for determining aiding and abetting liability of corporate officers. There, two top officials of the company manufacturing and selling Zyklon B gas for use in the Nazi gas chambers did so as business men for profit, but they also knew the intent of the Nazi officials was to murder the concentration camp prisoners with the gas. They were convicted of aiding and abetting strictly on a knowledge standard and not a shared intent standard with the Nazi perpetrators).

<sup>200</sup> Sebok, *supra* note 129, at 880.

<sup>201</sup> *United States v. Von Weizsaecker* (The Ministries Case), in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 853 (1949).

facilitate atrocities, the NMT acquitted the chairman because it was not proved that he had purpose.<sup>202</sup>

¶82 This case has been distinguished and dismissed as an outlying case, however. In other NMT trials, judges found defendants culpable for knowingly, not purposefully, contributing to the commission of an international crime.<sup>203</sup> In *United States v. Flick*, for example, a German industrialist was convicted of international crimes based on his knowledge and approval of decisions made by his deputy to use Russian prisoners of war as slave labor.<sup>204</sup> There were no facts proving that the deputy had the purpose to enslave the prisoners of war.<sup>205</sup> *Flick* is frequently cited for the proposition that knowledge is sufficient to establish aiding and abetting liability.<sup>206</sup>

¶83 A British military court, in analyzing *In re Tesch* (The Zyklon B Case),<sup>207</sup> offered additional clarity regarding the *mens rea* standard it applied. Here, the defendants sold poison gas to the Nazi party knowing that it would be used to commit mass murder, but without specific intent to harm those persons.<sup>208</sup> Nonetheless, the tribunal found the defendants culpable, explicitly holding that knowledge without purposeful intent was sufficient to create culpability in that situation.<sup>209</sup>

¶84 *United States v. Ohlendorf* (The Einsatzgruppen Case) also describes the mental state required to convict a third-party for assisting in the commission of a crime.<sup>210</sup> The NMT held that a Nazi interpreter who turned over lists of Communist party members to his organization, knowing that the Nazis would kill those individuals “served as an accessory to the crime.”<sup>211</sup>

¶85 More contemporary tribunals, such as the ICTR and the ICTY, recognize that the proper *mens rea* standard for aiding and abetting liability is knowledge.<sup>212</sup> As Katzmann himself points out, the ICTY and the ICTR tribunal decisions hold liable individuals who provide assistance with “the knowledge that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal.”<sup>213</sup> The ICTY in *Furundzija*, for instance, determined that a defendant's culpability for aiding and abetting turns on whether “the defendant knew that his or

<sup>202</sup> *Id.* at 852-55.

<sup>203</sup> Ramasastry, *supra* note 29, at 113-17.

<sup>204</sup> Sebok, *supra* note 129, at 880 (citing *United States v. Flick* (The Flick Case), in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3 (1949)).

<sup>205</sup> Sebok, *supra* note 129, at 881 (citing *Flick*).

<sup>206</sup> *Id.* at 881 (See Edwin V. Woodsome, Jr. & T. Jason White, *Corporate Liability for Conduct of a Foreign Government: The Ninth Circuit Adopts a "Reason to Know" Standard for Aiding and Abetting Liability Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 89, 108 (2003) (discussing *Doe v. Unocal*, 248 F.3d 915 (9th Cir. 2001)).

<sup>207</sup> 13 I.L.R. 250 (Brit. Mil. Ct. 1946).

<sup>208</sup> Sebok, *supra* note 129, at 882; See *In re Tesch* (Zyklon B Case), 13 I.L.R. 250.

<sup>209</sup> Sebok, *supra* note 129, at 882.

<sup>210</sup> *Id.* (citing *United States v. Ohlendorf* (The Einsatzgruppen Case), in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3, 569 (1950)).

<sup>211</sup> *Id.* at 882.

<sup>212</sup> Sebok, *supra* note 129, at 882-83.

<sup>213</sup> Khulumani, 504 F.3d at 278 (Katzmann, J., concurring).

her actions would aid the offense.”<sup>214</sup> It did not require that an accomplice share a common purpose with the actual perpetrators of the crime.<sup>215</sup>

¶86 The NMT, ICTR, and ICTY have all asserted the knowledge standard, and the Rome Statute also likely indicates the knowledge standard. This standard aligns with U.S. tort law under the *Restatement* and relevant case law. In order to establish aiding and abetting liability under the ATS, plaintiffs need show that a corporation has knowledge.

## V. CONCLUSION

¶87 While many experts focus on whether international law or federal common law should govern the standards for accessorial civil liability under the ATS, it is the misinterpretation of international customary law that is the root of the diverging opinions concerning the *mens rea* standard.<sup>216</sup> In fact, international law and domestic law reach the same conclusion, which is that the *mens rea* standard for accessorial civil liability is knowledge.

¶88 The D.C. Circuit’s recent opinion in *Exxon* regarding the fact that a) corporations are proper defendants under the ATS and b) the appropriate *mens rea* standard is “knowledge” further cements the split with the Second Circuit’s *mens rea* analysis. Should the Supreme Court decide that corporations are proper defendants under the ATS, the next critical issue will be the *mens rea* standard.<sup>217</sup> Federal courts and future litigants should be aware of the shortcomings in the Second Circuit’s latest *mens rea* analysis. The judges in *Talisman*, and now *Kiobel*, rely on Judge Katzmann’s erroneous interpretation in *Khulumani* of the aiding and abetting standards under international customary law.

¶89 By utilizing Katzmann’s concurring opinion, which is primarily based on a faulty analysis of the Rome Statute, the judges in *Kiobel* arrive at the flawed conclusion that the *mens rea* standard for corporate aiding and abetting liability under the ATS is purpose. Judge Leval criticizes the majority for basing its corporate accessorial liability analysis on the Rome Statute, which according to Leval should not be used to interpret civil liability or customary international law. Ironically, by relying on Katzmann’s *mens rea* reasoning, Leval ultimately applauded the use of the Rome Statute to ascertain aiding and abetting liability.

¶90 Courts should additionally take note that the U.S. has not ratified the Rome Statute. In fact, one of the very reasons the U.S. opted out of being party to the ICC is due to its divergence from customary international law.<sup>218</sup> Furthermore, the *Sosa* standard does not abandon federal common law, which is itself informed by customary international law with respect to accessorial liability standards. Thus, the Supreme Court would likely disprove of a federal court’s heavy reliance on the unratified Rome Statute, rather than federal common law, for guidance.

¶91 On balance, aiding and abetting based on a *mens rea* standard of knowledge meets with such specificity and universal acceptance to be actionable following *Sosa*.<sup>219</sup> The knowledge

<sup>214</sup> Sebok, *supra* note 129, at 883 (citing Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT’L & COMP. L. REV. 47, 74 (2003) (“A defendant’s culpability for aiding and abetting an international law offense will attach only if the defendant knew that his or her actions would aid the offense. The accomplice does not need to share the *mens rea* of the principal.”).

<sup>215</sup> See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 236-48 (Dec. 10, 1998); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, ¶¶ 180-81 (Jan. 27, 2000).

<sup>216</sup> Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 103 (2008).

<sup>217</sup> Lincoln, *supra* note 149, at 610.

<sup>218</sup> Scheffer, *Talisman Amicus*, *supra* note 95, at 26.

<sup>219</sup> Lincoln, *supra* note 149, at 617.

standard extends across the Nuremberg and Tokyo Tribunals, the Rome Statute, and current international criminal tribunals. Should there be any doubt, federal tort law also supports and confirms the knowledge standard.

¶92 The Second Circuit's *Kiobel* decision sits at odds with the Supreme Court's recent decision in *Citizens United v. FEC*,<sup>220</sup> in which the Supreme Court strengthened corporate rights by declaring that corporations are persons when it comes to free speech. Rather than increase responsibility and accountability with the expansion of such rights, the Second Circuit moved to decrease corporate liability by holding that corporations may not be sued for human rights abuses under the ATS.

¶93 To address concerns that lowering the *mens rea* threshold would open up corporations and the federal courts to a flood of claims, it should be emphasized that complicity requires a finding that the company's practical assistance or encouragement has a substantial effect on the furtherance of human rights abuses. Merely conducting commercial activities in a country that commits human rights violations, for instance, would not be sufficient to hold the company liable.<sup>221</sup> The "*Sosa* parameters" also apply; a company may only be liable for conduct that is universally accepted as reprehensible.<sup>222</sup>

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<sup>220</sup> 130 S. Ct. 876 (2010).

<sup>221</sup> GLOBAL LABOR AND EMPLOYMENT LAW, *supra* note 6, at 138.

<sup>222</sup> *Id.*