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## Corporate Accountability in Conflict Zones: How *Kiobel* Undermines the Nuremberg Legacy and Modern Human Rights

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### I. INTRODUCTION

On September 17, 2010, a two-judge majority of the Second Circuit held in *Kiobel v. Royal Dutch Petroleum Co.* that “corporate liability is not a discernable—much less universally recognized—norm of customary international law that we may apply

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pursuant to the [Alien Tort Statute].”<sup>1</sup> The Alien Tort Statute (“ATS”)<sup>2</sup> is a well-known tool that grants U.S. federal courts jurisdiction over civil suits brought by aliens for torts committed in violation of international law. The statute has been used for the past three decades to hold perpetrators of human rights abuses accountable in U.S. courts.<sup>3</sup> Some ATS cases have involved conflict zones,<sup>4</sup> and since the mid-1990s, ATS cases have been brought against corporations for their alleged involvement in human rights violations.<sup>5</sup>

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<sup>1</sup> *Kiobel v. Royal Dutch Petroleum Co. et al.*, No. 06-4800, 2010 U.S. App. LEXIS 19382, at \*1 (2d Cir. Sept. 17, 2010). Nigerian plaintiffs filed *Kiobel* in 2002, alleging that the Royal Dutch Petroleum Company and Shell Transport and Trading Company, through a subsidiary, collaborated with the Nigerian government to commit human rights violations to suppress lawful protests against oil exploration in the Ogoni region of the Niger Delta. In 2006, the district court granted in part and denied in part the defendants’ motion to dismiss. In particular, the district court granted the motion to dismiss for the claims of aiding and abetting extrajudicial killing, forced exile, property destruction, and violations of the rights to life, liberty, security, and association, holding that customary international law did not define these violations with the specificity required by *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *See Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 464–65, 467 (S.D.N.Y. 2006). The court denied the motion to dismiss for the claims of aiding and abetting arbitrary arrest and detention, crimes against humanity, torture, and cruel, inhuman, or degrading treatment. *See id.* at 465–67. The district court then certified its entire order for interlocutory appeal, finding there were substantial grounds for differences of opinion and that the issues presented were important and could resolve the litigation. The question of corporate liability was not addressed in the district court’s order. The appeal was argued in January 2009.

<sup>2</sup> 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

<sup>3</sup> *See, e.g., Sosa*, 542 U.S. 692; *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994).

<sup>4</sup> *See, e.g., Kadic*, 70 F.3d at 232 (bringing claims for abuses committed during conflict in Bosnia).

<sup>5</sup> *See, e.g., Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Sarei v. Rio Tinto, P.L.C.*, 550 F.3d 822 (9th Cir. 2008); *Viet. Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005); *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

Prior to the *Kiobel* court's ruling on September 17, no appellate court had ever held that corporations were not subject to suit under the ATS.<sup>6</sup> Indeed, numerous corporate ATS cases had proceeded through the courts with no indication that corporations could not be held liable or that this was an issue of subject matter jurisdiction.<sup>7</sup> By ruling that the scope of liability for a violation of a given international norm does not extend to corporations, the Second Circuit majority, in the words of concurring Judge Leval, "deals a substantial blow to international law and its undertaking to protect fundamental human rights."<sup>8</sup>

Taking the recent *Kiobel* decision as a starting point, this article examines the ramifications of the majority opinion with respect to corporate accountability in conflict zones, both in the ATS context and more generally. The article contends that *Kiobel* is out of step with the historical tradition of the international legal system to fill governance gaps, including by holding actors operating in conflict zones accountable for egregious violations of human rights when domestic systems fail to do so. This tradition dates back at least to the World War II era and the case of I.G. Farben, the largest industrial entity supporting Nazi Germany, which was sanctioned with the corporate death penalty—dissolution—for its participation in violations of international law. The I.G. Farben example clearly illustrates that the international system can regulate corporate actors operating in conflict zones. The article concludes that the implications of *Kiobel* are profound, as the decision creates unprecedented opportunities for corporate actors to shield themselves from liability for clear abuses of international law through incorporation. Indeed, *Kiobel* may incentivize the creation of present-day I.G. Farbens, an outcome at odds with jurisprudence in the modern human rights era.

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<sup>6</sup> Just days before *Kiobel* was decided, a district court in California became the first to dismiss an ATS suit on the grounds that customary international law does not apply to corporations. *Doe v. Nestle, S.A.*, No. 05-5133 SVW, 2010 U.S. Dist. LEXIS 98991, at \*192 (C.D. Cal. Sept. 8, 2010).

<sup>7</sup> See *Kadic*, 70 F.3d at 14.

<sup>8</sup> See *Kiobel*, 2010 U.S. App. LEXIS 19382, at \*113 (Leval, J., concurring). Judge Leval agreed that the complaint should be dismissed, but on the grounds that plaintiffs' pleadings were inadequate under *Twombly*. *Id.* at \*247–64 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). However, Judge Leval strenuously disagreed with the majority's position that corporate liability does not exist under customary international law. *Id.* at \*113.

The article begins with a discussion of how the *Kiobel* decision went off course.<sup>9</sup> First, Part II examines the basic parameters of the international legal system, which establishes a normative framework and leaves enforcement primarily to domestic jurisdictions. Typically, international enforcement mechanisms only play a role when domestic sovereigns fail to act, which commonly occurs in conflict zones. This section also explains how the Second Circuit's misunderstanding of these basic tenets and its conflation of the normative analysis with the enforcement mechanism analysis led the court to adopt an overly narrow rule at odds with the realities of the international legal system.

Part II then closely analyzes the sanctioning of I.G. Farben, the largest industrial supporter of the Nazi regime. The I.G. Farben example is particularly relevant to notions of corporate accountability in conflict zones. It illustrates how, in the aftermath of World War II, international law approached the question of accountability for a corporate entity when domestic remedies were not available. The *Kiobel* majority misinterpreted the historical record by relying on I.G. Farben to support its assertion that because the corporate entity itself was not prosecuted criminally at Nuremberg, there is no international consensus that corporations can be held accountable for violations of international law. However, as Part II details, a variety of enforcement mechanisms, both criminal and administrative, were deployed under international law during the post-World War II era to hold both individual industrialists *and* corporate actors accountable. I.G. Farben received the ultimate penalty when the Allied Control Council ordered it dissolved through Control Council Law No. 9.<sup>10</sup> Thus, the example of I.G. Farben demonstrates that international law has long held corporate entities accountable for egregious violations in conflict zones.

Part III builds on the preceding discussion to illustrate why the international approach to I.G. Farben's abuses was correct. To leave I.G. Farben without sanction under

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<sup>9</sup> It is beyond the scope of this article to discuss all the flaws in the *Kiobel* majority's legal reasoning. One major issue that this article does not directly address is whether federal common law or international law should resolve questions of corporate liability. Part II only tangentially touches on this question in its discussion of the relationship between the international and domestic legal systems. While the authors do not endorse international law as the proper source of law to decide questions of corporate liability, this article takes international law as its starting point and examines *Kiobel's* limitations in this context. For analysis of additional flaws in the majority opinion, see the concurrence of Judge Leval. *Kiobel*, 2010 U.S. App. LEXIS 19382, at \*113 (Leval, J., concurring).

<sup>10</sup> The Allied Control Council was the same entity that established the Nuremberg tribunal through Control Council Law No. 10 to prosecute criminally the Nazi industrialists who ran I.G. Farben. See Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes* (Dec. 20, 1945), in I ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 306, available at [http://www.loc.gov/rr/frd/Military\\_Law/Enactments/01LAW09.pdf](http://www.loc.gov/rr/frd/Military_Law/Enactments/01LAW09.pdf) [hereinafter Control Council Law No. 10].

international law (as the *Kiobel* majority would) has far-reaching implications for human rights, and international law more generally, in conflict zones. Part III examines the variety of relationships between states and corporations in conflict zones and explores the perverse incentives that the majority's rule creates. In particular, *Kiobel* potentially incentivizes states to abdicate state duties to corporations because incorporation may effectively insulate all parties—states, armed groups, and corporations—from liability. As Judge Leval observed, the majority's rule “offers to unscrupulous businesses advantages of incorporation never before dreamed of.”<sup>11</sup> Incorporation could become a perfect shield for those seeking to commit violations of international law with impunity.

Through Control Council Law No. 9, the Allied Control Council made clear that the dissolution of I.G. Farben was intended to “insure that Germany will never again threaten her neighbors or the peace of the world.”<sup>12</sup> The Nuremberg era laid the foundation for modern human rights. *Kiobel* profoundly threatens to undermine the Nuremberg legacy, as the decision indicates that some entities—corporations—are beyond the reach of customary international law.

## II. CONFLICT ZONES: THE ROLE OF THE INTERNATIONAL LEGAL SYSTEM AND THE SANCTION OF I.G. FARBEN

The *Kiobel* majority's rule is fundamentally problematic for the purposes of regulating corporate activity in conflict zones. The opinion misconstrues the role of the international legal system and conflicts with the legacy of post–World War II efforts to hold individuals, organizations, and corporations accountable for their participation in violations of international law. In conflict zones, the international system has primarily been concerned with prohibiting certain behavior (such as war crimes or genocide), and has provided enforcement mechanisms when domestic institutions fail to act. The scarcity of cases at the international level against corporations does not lead to the logical conclusion that such entities cannot be held to violate international norms. Indeed, the example of I.G. Farben provides the historical precedent for corporate accountability: an exact instance where the domestic system was unavailable to hold the corporation to account in a conflict zone. The international system therefore filled the governance gap and ordered the company dismantled so that it would no longer pose a threat to the “peace of the world.”

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<sup>11</sup> *Kiobel*, 2010 U.S. App. LEXIS 19382, at \*144 (Leval, J., concurring).

<sup>12</sup> Control Council Law No. 9 pmb., *Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof* (Nov. 30, 1945), in I ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 225, available at [http://www.loc.gov/rr/frd/Military\\_Law/Enactments/01LAW06.pdf](http://www.loc.gov/rr/frd/Military_Law/Enactments/01LAW06.pdf) [hereinafter Control Council Law No. 9].

## A. THE ROLE OF THE INTERNATIONAL SYSTEM

The *Kiobel* majority's logic conflates normative prohibitions with enforcement regimes<sup>13</sup> by requiring both elements to establish a violation of customary international law.<sup>14</sup> This is simply not how the international legal system works. The international legal system plays two critical roles in the arena of human rights: first, it establishes acceptable norms of conduct, such as prohibitions on torture, extrajudicial killing, and war crimes; and second, it provides, when possible and desirable, enforcement mechanisms that supplement and support domestic enforcement of the established norms. The structure of the international legal system is thus especially important in conflict zones, where the domestic legal system is often absent or fails to function effectively. In situations where the state is embroiled in abuses and unable to pursue perpetrators, the international system must protect international human rights norms by filling enforcement gaps.

Compliance and enforcement should not be conflated with the existence of the norm in question. The United States Supreme Court's *Sosa* decision makes clear that international law—the “law of nations”—is concerned with norms of conduct.<sup>15</sup> As Judge Leval elaborated: “[W]hat international law does is it prescribes norms of conduct. It identifies acts (genocide, slavery, war crimes, piracy, etc.) that it prohibits.”<sup>16</sup> In contrast to the international norms, enforcement has traditionally been left to the domestic arena.<sup>17</sup> The international legal system functions this way in part due to concerns about state sovereignty. This statist structure explains, for example, the requirement of exhaustion, whereby international fora acquire jurisdiction only after domestic remedies have been attempted.<sup>18</sup> In this way, the international legal system fills enforcement gaps when domestic systems do not or cannot pursue accountability. The international criminal tribunals for the former Yugoslavia and Rwanda, as well as the complementarity regime of the International

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<sup>13</sup> Enforcement mechanisms include tribunals, courts, or decisions by international bodies to sanction individuals, organizations, or corporations for a particular violation.

<sup>14</sup> See *Kiobel*, 2010 U.S. App. LEXIS 19382, at \*9–11.

<sup>15</sup> *Sosa v. Alveraz-Machain*, 542 U.S. 692, 725, 730 (2004); see also *Kiobel*, 2010 U.S. App. LEXIS 19382, at \*120, \*130–32 (Leval, J., concurring) (discussing ability to bring suit under ATS for violations of prohibited international norms); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 792 n.22 (D.C. Cir. 1984) (Edwards, J., concurring) (“The law of nations was traditionally defined as ‘the body of rules and principles of actions which are binding upon civilized states in their relations with one another.’”) (internal quotations and citations and emphasis omitted).

<sup>16</sup> *Kiobel*, 2010 U.S. App. LEXIS 19382, at \*196–97 (Leval, J., concurring).

<sup>17</sup> *Id.* at \*193.

<sup>18</sup> This relationship is vertical, not horizontal. See *Sarei v. Rio Tinto, P.L.C.*, 550 F.3d 822, 844 (9th Cir. 2008) (Reinhardt, J., dissenting).

Criminal Court—which can prosecute only when states are unable or unwilling to do so—are based on this premise.<sup>19</sup>

Conflict zones commonly trigger international mechanisms either because the parties involved in the fighting do not pursue investigations or prosecutions during or after the conflict, or because the conflict has left the country—including its domestic legal system—in disarray. However, the establishment of international tribunals in special circumstances, such as when post-conflict states are unable to proceed with domestic prosecutions, does not alter the preference for enforcement at the domestic level. Similarly, the absence of an international tribunal does not mean there is no international norm that can be enforced domestically, as the *Kiobel* majority contends. International law has the flexibility to pursue perpetrators—both juristic and natural persons, both internationally and domestically—to enforce egregious abuses. While admittedly such enforcement may not occur with the frequency that human rights advocates would prefer, this does not mean that international law fails to recognize that a violation has been committed.

The wisdom of separating the normative analysis from the enforcement analysis is reinforced when considering corporate accountability in conflict zones. For example, the normative prohibition on war crimes is particularly well-recognized and relevant to conflict zones. Yet if the *Kiobel* majority is correct in its analysis, then any customary norm will only crystallize—and be enforceable at the domestic level—after there has been an instance of *international* enforcement of that particular norm against a particular type of defendant. If international enforcement is required to establish the *existence of international law*, then a particular international legal norm will never exist until a remedial mechanism has been adopted.<sup>20</sup> Such a requirement conflates international enforcement with normative development, when the two are distinct.

The *Kiobel* majority's opinion would have profound ramifications beyond the ATS context, and affect, more broadly, the relationship between the international and domestic legal systems in preventing and redressing human rights violations. The traditional rule that domestic legal systems can enforce international norms as they see

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<sup>19</sup> Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002). Jurisdiction traditionally resides in the sovereign domestic arena and is given back, for example through the Rome Statute, on a limited basis. This fundamental precept of the international legal system dates back at least to Nuremberg, the paradigmatic example of the international legal regime stepping in to fill the void in a post-conflict zone, where the post-war German legal system was unable to undertake domestic prosecutions. This framework of limited international enforcement in no way affects the underlying prohibition on certain conduct, just how it is enforced.

<sup>20</sup> See *Kiobel*, 2010 U.S. App. LEXIS 19382, at \*198–99 (Leval, J., concurring). See also *infra* text accompanying notes 27–29 (discussing London Charter as creating international mechanism to enforce existing customary international law).

fit would be brought into question.<sup>21</sup> As Judge Edwards explained in his seminal concurrence in *Tel-Oren v. Libyan Arab Republic* (cited with approval by the Supreme Court in *Sosa*), “for two hundred years, it has been established that the law of nations leaves up to municipal law whether to provide a right of action to enforce obligations created by the law of nations.”<sup>22</sup> International law “enables each state to make an independent judgment as to the extent and method of enforcing internationally recognized norms.”<sup>23</sup> With respect to ATS suits, Judge Edwards therefore concluded that “to require international accord on the right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the ‘law of nations’ portion of *section 1350*.”<sup>24</sup> The *Kiobel* majority’s reasoning, which requires international enforcement to establish the existence of a particular norm, could similarly curtail domestic enforcement that relies on a substantive international norm for a given cause of action. Just as fundamentally, the opinion’s logic could undermine the very existence of previously well-established norms, such as the prohibition of torture.<sup>25</sup> In short, the fact that the international

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<sup>21</sup> The world’s diverse legal systems vary, and accordingly, international law allows each state to implement its own enforcement approach. As Judge Leval notes in his *Kiobel* concurrence, “[b]ecause the legal systems of the world differ so drastically from one another, any attempt to dictate the manner in which States implement the obligation to protect human rights would be impractical.” 2010 U.S. App. LEXIS 19382, at \*191 (Leval, J., concurring). Nevertheless, domestic legal systems routinely create some type of enforcement remedy—whether criminal, civil, or administrative—to hold corporations accountable for violations of international norms. *See, e.g.*, Brief for International Law Scholars as Amici Curiae Supporting Appellees at 6–19, *Ntsebeza v. Daimler, A.G.*, 2009 U.S. App. LEXIS 29244 (2d Cir. Dec. 4, 2009) (No. 09-2778). Although specific remedial actions vary across jurisdictions, the fact that no legal system exempts corporations from liability indicates the existence of a general principle of law to hold corporations accountable for violations of international law. *Id.* Whether and how a country addresses such abuses is a domestic question, left for states to answer through their laws.

<sup>22</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 n.2 (D.C. Cir. 1984) (Edwards, J., concurring).

<sup>23</sup> *Id.*; *see also id.* at 778 (Edwards, J., concurring) (“[G]iven the existing array of legal systems within the world, a consensus would be virtually impossible to reach—particularly on the technical accoutrements to an action—and it is hard even to imagine that harmony ever would characterize this issue.”).

<sup>24</sup> *Id.* Like Judge Bork in *Tel-Oren*, the *Kiobel* majority reads into the ATS a requirement that has “no basis in the language of the statute, its legislative history or relevant precedent.” *See id.* at 779. Judge Edwards points out that Judge Bork “read in” a requirement that “Congress had required that a right to sue must be found in the law of nations” when no such requirement existed. *Id.* The plain language of the ATS only specifies that the plaintiff must be an “alien,” but says nothing about any limitation on the type of defendant. 28 U.S.C. § 1350. Indeed, the Second Circuit has added another level of requirement—that the law of nations specify a particular “entity” for suit.

<sup>25</sup> The *Filartiga* court determined, in 1980, that torture violated well-established norms of international law. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 879–85 (2d Cir. 1980). This holding was reached despite the fact that, at that time, there was no international mechanism for holding a torturer liable, either civilly or criminally.

system does not provide for enforcement mechanisms in every situation does not mean that no normative framework governs for enforcement purposes at the domestic level.

B. A HISTORIC EXAMPLE OF CORPORATE ACCOUNTABILITY IN CONFLICT ZONES:  
THE SANCTIONING OF I.G. FARBEN

The international legal system held both natural and juristic persons accountable in the wake of World War II and the Holocaust. Yet as Judge Leval notes in his concurrence, the implications of the *Kiobel* majority opinion are that “[b]y adopting the corporate form . . . an enterprise [like I.G. Farben] could have hired itself out to operate Nazi extermination camps . . . immune from civil liability to its victims.”<sup>26</sup> Such a result undermines the legacy of post–World War II efforts to punish collaboration with Nazi Germany.

The Allied Control Council was the international body that governed occupied Germany in the wake of World War II. The London Charter codified the Council’s decision to prosecute the major war criminals before the International Military Tribunal for crimes against the peace, war crimes, crimes against humanity, and conspiracy.<sup>27</sup> Prior to the passage of the London Charter there was no international treaty enumerating these crimes (aside from war crimes) or individual criminal responsibility for such offenses. The Allies therefore relied on customary international law, which provided the violations, and then established an appropriate enforcement mechanism.<sup>28</sup> The Allied Control Council subsequently passed Control Council Law No. 10, allowing the Allies to conduct their own trials in occupied zones pursuant to the international law codified in the London Charter.<sup>29</sup>

However, the Allied Control Council did not rely exclusively on trials to punish collaboration with Nazi Germany. The Council also promulgated laws to disband organizations, such as the SS and the Gestapo.<sup>30</sup> It further ordered the dissolution of

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<sup>26</sup> *Kiobel*, 2010 U.S. App. LEXIS 19382, at \*115 (Leval, J., concurring).

<sup>27</sup> Brief for Nuremberg Scholars as Amici Curiae Supporting Plaintiffs-Appellants-Cross Appellees’ Petition for Rehearing and Rehearing En Banc at 3–5, *Kiobel*, 2010 U.S. App. LEXIS 19382 (2d Cir. Sept. 17, 2010) (No. 06- 4800).

<sup>28</sup> *Id.*

<sup>29</sup> Control Council Law No. 10, *supra* note 10, at 306; Brief for Nuremberg Scholars as Amici Curiae Supporting Plaintiffs-Appellants-Cross Appellees’ Petition for Rehearing and Rehearing En Banc at 5, *Kiobel*, 2010 U.S. App. LEXIS 19382 (2d Cir. Sept. 17, 2010) (No. 06-4800).

<sup>30</sup> Control Council Law No. 2, *Providing for the Termination and Liquidation of Nazi Organizations* (Oct. 10, 1945), in I ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 131, available at [http://www.loc.gov/rr/frd/Military\\_Law/Enactments/01LAW01.pdf](http://www.loc.gov/rr/frd/Military_Law/Enactments/01LAW01.pdf) [hereinafter Control Council Law No. 2].

certain corporations and the seizure of their assets.<sup>31</sup> These remedial actions (which are analogous to modern day administrative actions) were intended to punish such entities for their roles in violations of international law.<sup>32</sup> Therefore, upon closer examination, the example of I.G. Farben does not support the proposition that international law failed to sanction corporations for their abuses—just the opposite. Indeed, the Allied Control Council deployed an array of remedies to hold individuals and juristic entities, specifically corporations, to account for their involvement in violations of international law.

I.G. Farben was the largest industrial supporter of the Nazi regime. The corporation manufactured Zyklon B gas that was used to commit genocide by exterminating four million concentration camp inmates at Auschwitz, an I.G. Farben slave camp that produced rubber and oil.<sup>33</sup> The Allied Control Council recognized the sheer power that a firm like I.G. Farben exercised in supporting the Nazi regime and its abuses, fueling the ongoing conflict. The scale of I.G. Farben's contribution to the German war effort led the Allied Control Council to pass a law to effectuate the corporation's dissolution, "Control Council Law No. 9: Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof."<sup>34</sup> The purpose of the law was plain: "[T]o insure that Germany will never again threaten her neighbors or the peace of the world, and taking into consideration that I.G. Farbenindustrie knowingly and prominently engaged in building up and maintaining the German war potential . . ."<sup>35</sup> The Council's adoption of Control Council Law No. 9 articulates the reason for holding the corporate entity to account: the juristic person is capable of being complicit in violations of international law—in this case, the waging of aggressive war.<sup>36</sup> In order to prevent recurrence of such a violation, the perpetrator must be sanctioned.

The Second Circuit's *Kiobel* decision runs awry because it apparently ignores this enforcement action and misunderstands the significance of the decision not to

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<sup>31</sup> Control Council Law No. 9, *supra* note 12, at 225 (ordering dismantling of I.G. Farben as well as seizure of its assets); Control Council Law No. 57, *Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front* (Aug. 30, 1947), in VIII ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 1, available at [http://www.loc.gov/rr/frd/Military\\_Law/Enactments/08LAW57.pdf](http://www.loc.gov/rr/frd/Military_Law/Enactments/08LAW57.pdf) (ordering seizure of insurance company assets).

<sup>32</sup> Brief for Nuremberg Scholars as Amici Curiae Supporting Plaintiffs-Appellants-Cross Appellees' Petition for Rehearing and Rehearing En Banc at 8–9, 11, *Kiobel*, 2010 U.S. App. LEXIS 19382 (2d Cir. Sept. 17, 2010) (No. 06-4800); Control Council Law No. 9, *supra* note 12, at 225; Control Council Law No. 2, *supra* note 30, at 131.

<sup>33</sup> JOSEPH BORKIN, *THE CRIME AND PUNISHMENT OF I.G. FARBEN* 2–3, 122–23 (1979).

<sup>34</sup> Control Council Law No. 9, *supra* note 12, at 225.

<sup>35</sup> *Id.* pmb1.

<sup>36</sup> Brief for Nuremberg Scholars as Amici Curiae Supporting Plaintiffs-Appellants-Cross Appellees' Petition for Rehearing and Rehearing En Banc at 11, *Kiobel*, 2010 U.S. App. LEXIS 19382 (2d Cir. Sept. 17, 2010) (No. 06-4800).

prosecute corporations, including I.G. Farben, at the *criminal* trials at Nuremberg. The majority reads the absence of such criminal prosecutions as evidence of a lack of consensus about whether international law permits any suits against juristic persons.<sup>37</sup> This interpretation overlooks the historical record, which explains why there was no criminal prosecution of a corporate entity at Nuremberg.<sup>38</sup> The fact that other remedies had already been enacted explains the Allies' decision not to prosecute criminally the corporate entity. "With the aim of cleansing big business," Control Council Law No. 8 "purged all Nazi party members from supervisory or managerial posts in business."<sup>39</sup> The law punished both natural persons (employees) as well as juristic ones (businesses) in much the same way that an administrative action would. Control Council Law No. 9 went even further, ordering the ultimate administrative remedy for I.G. Farben—dissolution, the equivalent of the corporate death penalty.<sup>40</sup> The decision to effectuate this form of corporate death *predated*<sup>41</sup> the initiation of the prosecutions of individual corporate officials at Nuremberg, which flowed from Control Council Law No. 10.<sup>42</sup> In addition, important I.G. Farben assets, including some plants, were ordered destroyed.<sup>43</sup> The Council also included provisions related to the distribution and payment of reparations.<sup>44</sup> This series of actions represents a

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<sup>37</sup> *Kiobel*, 2010 U.S. App. LEXIS 19382, at \*32–33. As Judge Leval retorts in his concurrence, "[t]his argument demonstrates the illogic and internal inconsistency of the majority's position. The Nuremberg tribunal also did not impose liability for civil damages on Farben's executives whom it convicted criminally. If the fact that Nuremberg did not impose civil liability on the Farben corporation means that international law does not allow for civil liability of corporations, then the fact that Nuremberg did not impose civil liability on Farben's guilty personnel must mean that international law does not allow for civil liability of natural persons. Yet the majority concedes that such natural persons are liable for civil damages." *Id.* at \*132–33 n.7 (Leval, J., concurring) (internal citations omitted).

<sup>38</sup> It also ignores the fact that the Nuremberg tribunal simply did not contemplate questions of civil liability, nor have the subsequent international criminal tribunals. As explained in Section II, *supra*, the law of nations leaves the question of civil remedies to individual states.

<sup>39</sup> Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1147 (2009).

<sup>40</sup> Control Council Law No. 9, *supra* note 12, art. I, at 225 ("All plants, properties and assets of any nature situated in Germany which were, on or after 8 May, 1945, owned or controlled by I.G. Farbenindustrie A.G., are hereby seized by and the legal title thereto is vested in the Control Council."). *See also* BORKIN, *supra* note 33, at 157–58.

<sup>41</sup> Control Council Law No. 9 was passed on November 30, 1945. Control Council Law No. 9, *supra* note 12, at 226. Control Council law No. 10 was passed on December 20, 1945. Control Council Law No. 10, *supra* note 10, at 311.

<sup>42</sup> *See* BORKIN, *supra* note 33, at 157–58.

<sup>43</sup> Control Council Law No. 9, *supra* note 12, art. III(b), at 226 (providing for "destruction of certain plants"). *See also* BORKIN, *supra* note 33, at 157–58.

<sup>44</sup> Control Council Law No. 9, *supra* note 12, art. III, III(a), at 225–26 ("The Committee shall accomplish the following ultimate objectives in respect of the plants, properties, assets and activities of I.G. Farbenindustrie A.G.: a. Making certain plants and assets available for reparations . . . . Plants reported by the Committee as available for reparations or for destruction shall be processed through the normal channels.").

deliberate and conscious decision by the Allied Control Council to sanction severely a juristic entity that had closely collaborated with and supported the Nazi regime.

The *Kiobel* majority asserts that the fact that only individuals were charged at Nuremberg definitively demonstrates that there was no accountability mechanism under international law for pursuing I.G. Farben as a juristic entity.<sup>45</sup> This argument misses the mark. To contend that the lack of charges against the corporation indicates anything about corporate liability under international law ignores the simple fact that it made little sense to sue the corporate entity of I.G. Farben, given the penalties already imposed and the reality that I.G. Farben's remaining assets were held by the Allied Control Council itself by that time.<sup>46</sup>

Furthermore, “[d]eliberations about how to proceed against Krupp, Farben, and the others were not the sole province of prosecutors making dispassionate assessments about culpability.”<sup>47</sup> The Nuremberg prosecutors did explore bringing charges against I.G. Farben and other corporations, and understood that such suits were permissible under international law.<sup>48</sup> They did not decline to prosecute because they had any doubts about whether a corporation could violate international law. As discussed above, there were other factors that explained the lack of criminal charges.<sup>49</sup>

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<sup>45</sup> See *Kiobel*, 2010 U.S. App. LEXIS 19382, at \*32–33. See also *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 322 (2d Cir. 2007) (Korman, J., dissenting).

<sup>46</sup> See Control Council Law No. 9, *supra* note 12, art. I, at 225 (stating that the Control Council was seizing all I.G. Farben assets and that its “legal title thereto [was] vested in the Control Council.”). See also Bush, *supra* note 39, at 1118; BORKIN, *supra* note 33, at 158 (discussing rise in share price of I.G. Farben in late 1945 and early 1946 and stating that the director of the economics division of the office of the military government said that “the speculators must be ‘buying a piece of the Control Council’ since the council now held legal title to all I.G. assets.”).

<sup>47</sup> See Bush, *supra* note 39, at 1118.

<sup>48</sup> See *id.* at 1224.

<sup>49</sup> Corporate criminal liability is complicated, and not all legal systems embraced it at the time of the Nuremberg trials. There were principled reasons to prosecute only natural persons, not juristic or abstract ones. For example, some legal traditions believe criminal liability necessitates having a mens rea, which cannot be ascribed to an abstract juristic person. See, e.g., 2 INT'L COMM'N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY 57–58 (2008) (“National criminal laws were developed many centuries ago, and they are built and framed upon the notion of the individual human being as a conscious being exercising freedom of choice, thought and action. Businesses as legal entities have been viewed as fictitious beings, with no physical presence and no individual consciousness.”). For a discussion of the reasons why imposing criminal punishment on a corporation raises questions given the objectives of such punishment, see *Kiobel*, 2010 U.S. App. LEXIS 19382, at \*142–56 (Leval, J., concurring).

Nonetheless, the corporate entity was represented during the trials against individual employees. As a result of I.G. Farben's “semi-official presence in the courtroom, the bench allowed a lawyer for the company—an entity that was unindicted, devoid of assets, and dissolved by Control Council Law No. 9—to give a closing statement on its behalf.” Bush,

Finally, the Nuremberg judgment in the I.G. Farben case explicitly states that the corporation itself committed violations of international law (an unsurprising result given Control Council Law No. 9):

Where private individuals, *including juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified . . . is in violation of international law . . . . Similarly *where a private individual or a juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of [international law].<sup>50</sup>

Thus, the lack of criminal prosecution of corporations at Nuremberg does not support the Second Circuit’s conclusion that international law excludes juristic entities from liability. It only means that criminal prosecution was not chosen in this particular instance. Other remedies were deployed, however, which evidence that the international community took concerted and explicit steps to sanction severely corporate complicity in Nazi abuses. The Allies dismantled I.G. Farben to ensure that the company would not keep profits earned through illicit support of the German war effort, and this remedy may have been viewed as more severe and appropriate than a criminal conviction.<sup>51</sup> Finally, since Control Council Law No. 9 specifically envisioned that some assets would be reserved for reparations, the decision to dismantle the corporation—analogous to an administration action—also had elements that closely mirror civil remedies like the ATS.

The international legal system responded with swift and strong sanction against the corporate entity I.G. Farben for its complicity in international law violations committed during a conflict. Indeed, while *Kiobel* posits that the I.G. Farben example illustrates a lack of consensus that corporations could be held accountable under international law, the historical record demonstrates the contrary.

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*supra* note 39, at 1224. I.G. Farben’s attorney described the corporation as an “invisible defendant” from “a moral point of view.” *Id.* (citation and internal quotation marks omitted).

<sup>50</sup> 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1132–33 (1952) (emphasis added). *See also id.* at 1140 (“[W]e find that the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben, and that these offenses were connected with, and an inextricable part of the German policy for occupied countries as above described . . . . The action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich.”).

<sup>51</sup> Moreover, although I.G. Farben was held accountable for its complicity, were it instead directing the violations, it defies logic to assert that international law would not have held the entity to account.

### III. CONCLUDING THOUGHTS: AVOIDING PERVERSE INCENTIVES FOR CORPORATIONS AND STATES IN CONFLICT ZONES

There is good reason that the international system can sanction entities such as I.G. Farben for their role in egregious violations of international law. To do otherwise, as in *Kiobel*, creates perverse incentives for actors in conflict zones to collude with one another at the expense of human rights protections for civilians and communities. As Judge Leval notes, if left to stand, *Kiobel* would represent a major setback for international law and the respect of fundamental human rights:

[The majority's rule] offers to unscrupulous businesses advantages of incorporation never before dreamed of. So long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy—all without civil liability to victims.<sup>52</sup>

In essence, the majority's rule would have permitted the German state to privatize the gas chambers with the result that a company like I.G. Farben would then have been able to exterminate millions of people for profit with impunity. This stark example illustrates how the *Kiobel* court's rule might incentivize states to abdicate power to corporate actors, which would then use the corporate form as a shield from civil liability and a means of protecting illicit profits. In contrast, when it passed Control Council Law No. 9 dismantling I.G. Farben, the Allied Control Council intended exactly the opposite result—to demonstrate that corporate collaboration with regimes like Nazi Germany is not acceptable and that perpetrators will be held accountable.

Consideration of incentives is particularly important in conflict zones, where unscrupulous actors are often present. The UN Special Representative of the Secretary-General on Business and Human Rights, Professor John Ruggie, has written about the need to create proper incentives for actors—states and corporations—to respect, protect, and promote human rights.<sup>53</sup> Although the state has the duty to protect human rights under international law,<sup>54</sup> other actors still have significant

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<sup>52</sup> *Kiobel*, 2010 U.S. App. LEXIS 19382, at \*114–15 (Leval, J., concurring).

<sup>53</sup> The Ruggie Process is based on a framework that: (1) states have a duty to protect their citizens from abuse by third parties, such as corporations, (2) corporations have a responsibility to respect human rights, and (3) affected individuals have the right to access remedies for violations of human rights. *See generally* Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Protect, Respect and Remedy*].

<sup>54</sup> *See, e.g., id.* ¶ 18.

responsibilities, especially when, for example, a corporation acts with the state or has temporary control over state-like activities.<sup>55</sup>

Ruggie's framework has been carefully developed to avoid the situation where states can abdicate their human rights obligations to corporations. Yet Ruggie has also recognized that poor governance zones, such as conflict areas, present particular challenges for managing and regulating corporate behavior and protecting human rights.<sup>56</sup> Ruggie has stated that,

[t]he worst corporate-related human rights abuses occur amid armed conflict over the control of territory, resources or a government itself—where the human rights regime cannot be expected to function as intended and illicit enterprises flourish . . . . [g]overnments . . . are reluctant and poorly equipped to provide . . . assistance.<sup>57</sup>

Part of the problem is incentives, in particular avoiding situations where states are encouraged to relinquish state powers and obligations to corporations.<sup>58</sup> Corporations can and do play a variety of roles in relation to the state with regard to human rights violations.<sup>59</sup> In some cases, a corporation can act as a state agent and exercise governmental authority—for example, if a private entity detains someone for questioning at the behest of the state, knowing that human rights violations are likely to occur.<sup>60</sup> In other instances, a state can be effectively viewed as the agent of a corporation—for example, if a corporation engages government security forces to provide security at a plant and those government troops commit human rights abuses.<sup>61</sup> Yet another challenge is also recognizing the reality that in some

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<sup>55</sup> See, e.g., *id.* ¶ 24; see also Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, ¶¶ 44, 62–65, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) [hereinafter *Business and Human Rights*].

<sup>56</sup> *Id.* ¶¶ 44, 66–67.

<sup>57</sup> *Id.* ¶ 44.

<sup>58</sup> See *Protect, Respect and Remedy*, *supra* note 53, ¶ 55; see also Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Interim Report*, ¶ 68, delivered to the U.N. Economic and Social Council, E/CN.4/2006/97 (Feb. 22, 2006).

<sup>59</sup> See, e.g., Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 497–506 (2001) (discussing four different corporate relationships to the state: (1) acting under “color of law,” (2) acting as an agent of the state, (3) being complicit (or supporting) the state in abuses, and (4) commanding abuses (or situations where the state is acting for the corporation)). Beyond Ratner's four scenarios, there may be another: the situation where there is *no* state presence, which has particular relevance in some conflict zones. See *Protect, Respect and Remedy*, *supra* note 53, ¶¶ 47–49.

<sup>60</sup> Ratner, *supra* note 59, at 499–500.

<sup>61</sup> *Id.* at 505–06.

circumstances a corporation may have control and responsibility over an area, much like an armed insurgency may have physical control over a piece of land in a civil war. While the conflict may be a temporary situation (which admittedly may last years as in the case of World War II), international law still envisages holding all those acting in the area of poor governance to account.<sup>62</sup>

In short, conflict zones are frequently situations where the state is *not* present. This circumstance helps isolate the duties of non-state actors and explore the incentives of all actors with regard to human rights. The absence of a functional state cannot mean that no international norms exist.<sup>63</sup> For example, an armed group may control a particular area in a conflict zone, and a corporation may attach itself to that group in much the same way that it would relate to a state actor. In that instance, the corporation could be complicit in the abuses of the armed group,<sup>64</sup> or it could have a relationship like those described above with the state. In addition, in conflict zones, a corporation could sometimes act much like the state itself and be the most powerful institution, effectively governing a given area.

*Kiobel's* majority opinion creates the wrong incentives for preventing abuse in such situations. In extreme circumstances, it may encourage states or armed groups to abdicate all responsibility to corporations and foster situations in which corporations essentially act as *private* states, immune from liability for human rights violations. In other instances, collusion between powerful players in a conflict (government, insurgents, and corporations) could work to the detriment of local civilians and the environment. It is easy to imagine a situation similar to the facts underlying *Kiobel* in which the state, insurgents, and a corporation might agree to extract oil or minerals that would require displacing a civilian population. As local environmental defenders try to protest, the corporation would have the incentive to eliminate the resistance knowing that the other actors—the state and opposing armed groups—would be satisfied because the shared goal of profits from the extraction would be achieved.

Such unscrupulous behavior is exactly what the international community sought to discourage in the wake of World War II by dismantling I.G. Farben and prosecuting its employees. Indeed, legal decisions should not exacerbate either a state's incentive

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<sup>62</sup> See *Business and Human Rights*, *supra* note 55, ¶¶ 63–65 (discussing how companies may temporarily take on additional responsibilities even if this is not the normal situation).

<sup>63</sup> Indeed, certain norms, such as war crimes, genocide, and crimes against humanity have been recognized as so firmly entrenched that they apply to non-state actors even without the presence of the state. See *Kadic v. Karadzic*, 70 F.3d 232, 239, 241–42 (2d Cir. 1995) (establishing that war crimes, genocide, and crimes against humanity do not require *state* action).

<sup>64</sup> International law has come to recognize the importance of holding non-state actor armed groups accountable in conflict zones, in part because they exercise effective control and act like a state. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978).

to abdicate responsibility to a corporation, or a corporation's incentive to violate human rights. The Second Circuit's pronouncement that corporations cannot be held to account for egregious abuses under international law creates the wrong incentives on both fronts, and represents an unprecedented expansion of the power associated with incorporation—an expansion that international law has never envisioned. The world has seen the destruction that a corporation like I.G. Farben can cause. With *Kiobel*, however, the principle that the worst offenders must be held accountable has been turned upside down. Should the decision stand, it will continue to undermine the legacy of the Nuremberg era as well as the progress achieved since to deter and prevent corporate abuses.