The Supreme Court Hands Out a Pass to Multinationals and Other Would Be Violators of the Law of Nations

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Disclaimer

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ABSTRACT

The Second Circuit Hands Out a Free Pass to Multinationals and Other Would Be Violators of the Law of Nations. This note illustrates the flaws inherent within the *Kiobel* decision rendered by the U.S. Supreme Court that effectively immunizes multinational corporations (MNCs) from suits brought under the Alien Tort Statute (ATS) by ruling that the presumption against the extraterritorial application of domestic law applied to the claims under the ATS, and that nothing in the ATS rebutted that presumption. The decision seems to eviscerate the original intent of the Alien Tort Statute and leaves few, if any, enforcement mechanisms for ensuring that MNCs do not violate serious human rights violations abroad. The decision is especially dangerous because it creates even a lesser incentive for MNCs engaging in socially responsible behavior. Consequently, the *Kiobel* decision is a tremendous setback to the continued development of human rights accountability.

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I. INTRODUCTION.

Imagine a United States that is a safe haven for criminals who commit heinous human rights violations abroad, such as genocide, and torture. That sounds repugnant to many proud, patriotic, and law-abiding Americans, but that's exactly what the recent Supreme Court Decision in *Kiobel* could allow.[1] The case dealt with Nigerian residents that filed a class action under the Alien Tort Statute (ATS).[2] The plaintiffs claimed that Dutch, British, and Nigerian multinational corporations (MNCs), while engaged in oil exploration and production, aided and abetted the Nigerian government in committing human rights abuses in violation of the law of nations.[3] The defendants had been engaged in oil exploration and production in the Ogoni region of Nigeria since 1958. In response to these activities, residents of the Ogoni region eventually organized to protest the environmental effects of oil exploration there.[4] The Defendants responded by enlisting the aid of the Nigerian government to suppress the Ogoni resistance. Subsequently, throughout 1993 and 1994, Nigerian military forces shot and killed Ogoni residents and attacked Ogoni villages. During these attacks, there were allegations of beatings, rapes, unlawful arrests, and destruction and looting of property by the military forces with the assistance of the defendants.[5] The victims subsequently brought claims in the United States against the defendants for aiding and abetting the Nigerian government in violation of the law of nations, also known as customary international law (CIL), and the case was eventually heard by the Supreme Court. While *certiorari* was originally

[1] *Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013).
[2] 28 U.S.C. § 1350 (that 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).
[3] *Kiobel*, 621 F.3d at 117.
[4] *Id.* at 123.
[5] *Id.*

granted to determine whether corporations could be sued under the ATS, the Court after oral arguments ordered supplemental briefings and argument on a new question: To what extent could U.S. courts recognize a cause of action under the ATS for conduct that occurred within the territory of a foreign sovereign? The Court then unanimously concluded that the Nigerian nationals' case seeking relief for violations of the law of nations occurring outside the United States was barred because the presumption against the extraterritorial application of domestic law applied to the claims under the ATS, and that nothing in the ATS rebutted that presumption.[6] It left for another day the determination of just when the presumption against extraterritoriality might be overcome.[7] This conclusion was largely supported by the canon of statutory interpretation known as the presumption against extraterritorial application, which provides that when a statute gives no clear indication of an extraterritorial application, it has none, and reflects the presumption that U.S. law governs domestically but does not rule the world. The presumption serves to protect against unintended clashes between U.S. laws and those of other nations which could result in international discord.[8]

The controversial opinion, which has many human rights activists up in arms, undoubtedly deals a significant blow to international law and its undertaking to protect fundamental human rights since the United States is a proclaimed leader in this area. After all, it's one of the reasons that the U.S. is currently concerned with using armed force in Syria—thousands of innocent civilians have died reportedly due to violations of

[6] Kiobel v. Royal Dutch Petro. Co., 133 S. Ct. 1659.
[7] Id at 1673
[8] Id at 1664.

international law by the Assad regime.[9] Accordingly, despite the unanimous decision, this ruling appears to send a precarious message and likely takes off the table a significant deterrent to would be violators of human rights or other serious laws of nations. At first blush, the decision seems harmless since victims of human rights violations could technically pursue legal action in their home states instead of the U.S. pursuant to their domestic law. This defense of *Kiobel* flies in the face of reality, however, because human rights violations that generate ATS litigation primarily occur in countries with meager legal systems and corrupt governments. As a result, the victims typically cannot get sufficient relief from their countries of citizenship where the crimes are typically committed. In addition, many of the foreign nations that play host to MNCs are financially beholden to the MNC, which makes it impossible to pursue justice.

An egregious example of such a close relationship between a MNC and a government that led to extraordinary malfeasance is represented in the case of *Rio Tinto*.[10] Rio Tinto is a British-Australian multinational metals and mining corporation with one of its many operations in Papua New Guinea (PNG). The case arose from atrocities in PNG where thousands of people were killed following Rio Tinto's actions. The facts of the case are surely well known to the human rights attorney. In short, PNG is dependent on mining production for two-thirds of its export earnings.[11] Rio Tinto is headquartered in London. During the 1960s, it sought to build a mine in Bougainville, an

[9] http://www.theguardian.com/world/2013/aug/26/john-kerry-syria-statement-full-transcript (last visited Sep. 1, 2013) ("And there is a reason why no matter what you believe about Syria, all peoples and all nations who believe in the cause of our common humanity must stand up to assure that there is accountability for the use of chemical weapons so that it never happens again").
[10] Sarei v. Rio Tinto, PLC, 487 F.3d 1193, (9th Cir. Cal. 2007).
[11] *The World Factbook*, United States Central Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/pp.html (last visited Mar. 5, 2011).

island province of PNG.[12] To secure the deal for rights to natural resources, Rio Tinto offered the PNG government 19.1 % of the mine's profits to obtain its assistance in the venture. The ensuing operations apparently resulted in devastating environmental degradation and poisoning which ruined the health and subsidence of the islanders. The company subjected black islanders to "slave-like" conditions, and it also paid lower wages to the black islanders it employed compared to the white workers it recruited from off the island. As a result, in November 1988, Bougainvilleans engaged in acts of sabotage that forced the mine to close, and Rio Tinto sought the assistance of the PNG government to quell the uprising and re-open the mine.[13] Rio Tinto warned the impoverished PNG government that it would no longer invest in PNG if the government did not quell the uprising so that the company could recommence operations.[14] Accordingly, the PNG army mounted an attack killing many civilians, and around 15,000 Bougainvilleans died during the conflict. Rio Tinto allegedly provided the army troops with logistical support.[15] Repeated grave violations of human rights law and numerous crimes against humanity were committed, including aerial bombings and burnings of entire villages. Thousands of civilians were killed by systematic acts of cruelty, rape and degrading treatment, often at the behest of Rio Tinto,[16] who was clearly in a superior position to the poverty-stricken and poorly-governed nation. Unfortunately, the victims could not find justice in the corrupt PNG legal system.

[12] *Sarei*, 487 F.3d 1193, 1198.
[13] *Id.*
[14] Borchien Lai, The Alien Tort Claims Act: Temporary Stopgap Measure or Permanent Remedy?, 26 NW. J. INT'L L. & BUS. 139, 149 (2005).
[15] *Id.*
[16] *Sarei*, 487 F.3d at 1198.

The atrocities committed in PNG make this example one of the less complicated to analyze because of the extremity of the behavior, but just one of many across the world. Many developing nations rely upon the economic stimulus provided by MNCs and governments find themselves vulnerable to direct influence from MNCs. Thus, the likelihood of future perpetration of human rights abuses where MNCs are complicit with governments is high. If there were adequate and legitimate domestic legal remedies available in countries like PNG during the time of the violations, then *Kiobel* ruling may not be such a major concern for the victims or defenders of human rights because the victims could lean on their own legal system in PNG. But when the victims of such crimes cannot find a proper remedy in their home states, typically due to the close relationship between the MNC and the host government, the United States legal system was seen as a mechanism for redressing human rights violations, until the *Kiobel* decision. *Kiobel* therefore undermines the standing of the United States legal system as a protector of human rights and appears to slam the door shut on victims of human rights abuses committed abroad by corporations or individuals.[17] Similarly, rather than advancing the respect for the rule of law, *Kiobel* further emboldens MNCs to encourage human rights abuses. Although there was some disagreement in the circuit courts, the Supreme Court ruled this way despite a long history of U.S. federal courts having held that private corporations and individuals indeed owe duties under the law of nations, and can be subject to lawsuits under the ATS for violations of the law of nations that occur in foreign lands.[18] Consequently, the Court seems to tacitly condone irresponsible corporate

[17] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989) ("The Alien Tort Statute by its terms *does not distinguish among classes of defendants*).
[18] *See* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 187 (2d Cir. 2009); In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005); Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250, 1258

behavior with its decision because the reality of current mechanisms to police MNCs in the international arena are ineffective and allow corporations to essentially monitor themselves. This note will first identify the curious approach the Court took considering its presumption against extraterritorial application of the ATS, which essentially avoided the original issue of MNC liability under international law, and then explore a consequence of the decision as it relates to responsible corporate behavior.

II. Kiobel Inexplicably Defies Executive Guidance and Precedent Allowing Redress in U.S. Courts for Human Rights Abuses Committed Abroad.

A plain reading of the ATS clearly evinces that it was enacted with foreign matters in mind. It specifically refers to "aliens," "treaties," and the "law of nations." The ATS provides jurisdiction over (1) tort actions, (2) brought by aliens only, (3) for violations of the law of nations (also called CIL). Its purpose was to address violations of the law of nations.[19] The statute has been part of the U.S. Code for more than two hundred years.[20] Despite its meager legislative history, there have been executive governmental actions that provide guidance for courts to resolve ATS matters. For example, in 1795, Attorney General Bradford of the U.S., shortly after the enactment of the ATS, opined that a British corporation could pursue a civil action under the ATS for injury caused to it in violation of international law by American citizens. The American perpetrators, in concert with a French fleet, had attacked a settlement managed by the

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(N.D. Ala. 2003); Presbyterian Church of Sudan v. Talisman Energy, Inc. (Talisman I), 244 F. Supp. 2d 289, 314 (S.D.N.Y. 2003); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000); *See also* Khulumani v. Barclay Nat'l Bank, Ltd. 504 F.3d 254, 258 (2d Cir. 2008); Bigio v. Coca-Cola Co., 239 F.3d 440, 447 (2d Cir. 2000); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103-04 (2d Cir. 2000); Kadic v. Karadzic, 74 F.3d 377, 378 (2d Cir. 1996); Roe v. Bridgestone Corp., 492 F. Supp. 2d 988, 1008 (S.D. Ind. 2007); Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005); Bao Ge v. Li Peng, 201 F. Supp. 2d 14, 20 (D.D.C. 2000); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 445 (D.N.J. 1999).

[19] Sosa, 542 U.S., 715, 124 S.Ct. 2739.

[20] Jaffe v. Boyles, 616 F. Supp. 1371, 1381 (W.D.N.Y. 1985).

British corporation in Sierra Leone in violation of international law.[21] Then in 1907, the U.S. Attorney General rendered an opinion stating that an American corporation could be held liable under the ATS to Mexican nationals if the defendant's "diversion of the water of the Rio Grande was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty."[22] These Attorney General opinions, especially the one from 1907, are in direct conflict with *Kiobel*'s holding. *Kiobel* curiously dismissed Bradford's opinion from 1795 as one that "defies a definitive reading and we need not adopt one here…the opinion hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality."[23] *Kiobel*'s quick dismissal of these opinions, especially Bradford's, seems a bit bizarre since the Supreme Court relied on Attorney General Bradford's 1795 opinion in *Sosa*.[24] Since the days of these Attorney General opinions, the political branches have apparently remained quiet regarding the ATS.

Furthermore, *Kiobel* defies *Filartiga*, a celebrated and landmark Second Circuit case that advanced human rights.[25] In the 1970s, a lawsuit was filed in U.S. District Court on behalf of Dr. Joel Filártiga and Dolly Filártiga charging former Paraguayan official Americo Peña-Irala with the wrongful death of Joelito Filártiga.[26] Dolly Fitártiga and her younger brother, Joelito, lived in Asuncion, Paraguay with their mother and father, Dr. Joel Filártiga. The doctor was a well-known physician, painter, and opponent

[21] Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795).
[22] Mexican Boundary-Diversion of the Rio Grande, 26 Op. Att'y Gen. 250 (1907).
[23] Kiobel at 1668
[24] *Id.* at 155 (Leval, concurring).
[25] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. N.Y. 1980).
[26] Center for Constitutional Rights, http://ccrjustice.org/ourcases/past-cases/fil%C3%A1rtiga-v.-pe%C3%B1-irala (last visited Sep. 19, 2013).

of Latin America's "most durable dictator," General Alfredo Stroessner.[27] In 1976, 17 year old Joelito was abducted and later tortured to death by Americo Norberto Peña-Irala, the inspector general in the Department of Investigation for the Police of Asuncion. Later, Dolly Filártiga was forced out of her house in the middle of the night to view her brother's displayed mutilated body.[28] The District Court ultimately granted Peña-Irala's motion to dismiss the complaint and allowed his return to Paraguay. The court opined that although the proscription of torture had become "a norm of customary international law," the court was bound to follow appellate precedents which narrowly limited the function of international law only to relations between states. But on appeal the Second Circuit reversed by recognizing that foreign nationals who are victims of international human rights violations may sue their malfeasors in federal court for civil redress. Such redress is available even available for acts which occurred abroad so long as the court has subject matter jurisdiction and personal jurisdiction over the defendant. Freedom from torture is guaranteed under CIL and therefore the Court had subject matter jurisdiction.[29] Upon remand by the circuit in June 1980, the District Court granted plaintiffs' motion for a default judgment against Peña-Irala for failure to answer the complaint and referred the case to a magistrate for determination of the damages due the Filártiga family. The magistrate then awarded the Filártigas over $10 million in damages,[30] although it was never collected. The *Filártiga* decision set a precedent for claims involving an increasing number of internationally recognized rights, including freedom from torture, slavery, genocide, and cruel and inhuman treatment even if violations were committed outside of

[27] *Id*.
[28] *Id*.
[29] Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. N.Y. 1980).
[30] *Id*.

U.S. territory. As a result, *Filartiga* has continuously been hailed by international human rights experts in the U.S. and abroad.[31]

The *Kiobel* decision is a puzzling about-face. Under the precedent set by *Kiobel,* if the current Supreme Court were faced with the facts in *Filartiga,* the Court would apparently have required the *Filartiga* plaintiffs to demonstrate that torturers, such as Peña-Irala, committed their acts in the United States or in a location where it asserts unfettered jurisdiction. Of course no such demonstration could have been made and the case would have been dismissed. The *Filartiga* case was received with little controversy and viewed as methodologically sound. So sound, in fact, that it is generally accepted that the Torture Victim Protection Act (TVPA) was intended to be a codification by congress of the decision in *Filartiga*.[32] With the apparent retreat in *Kiobel*, people like Pena-Irala could do what he did in Paraguay and then move to the United States without fear of answering to the victims of such heinous atrocities. Absent filing a suit in the home country, which can be a difficult task, or successful extradition or rendition efforts, which tend to be riddled with political issues as evidenced by the recent U.S. and Russia controversy over Mr. Edward Snowden, [33] Pena-Irala could be sitting safe and sound in the United States without having to pay for his actions. The ATS acted as sort of a deterrent to would be violators of the law of nations, especially corporations complicit in this sort of behavior, but now that deterrent has effectively disappeared. Therefore, corporations have even less of a reason for socially responsible behavior, a prudential issue that *Kiobel* chose not to consider.

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[31] Center for Constitutional Rights, *supra* note 232.
[32] Eric Gruzen, The United States as a Forum for Human Rights Litigation: Is This the Best Solution?, 14 Transnat'l Law. 207, 232 (2001); *See also* Sahni, *supra* note 86, at 319.
[33] Mr. Snowden is the former National Security Agency (NSA) contractor that leaked sensitive information and then fled the U.S. to seek asylum from Russia.

III. Absent Redress under the ATS in the U.S. for Human Rights Violations Committed Abroad, Current Enforcement Mechanisms for MNCs Are Inadequate.

The primary enforcement mechanisms to ensure responsible corporate behavior seem to include the ATS, municipal laws, voluntary corporate codes of conduct, and pressure from Non-governmental Organizations (NGOs). Unfortunately, *Kiobel* diminished the scope and reach of the ATS thereby reducing MNC accountability. Although *Kiobel* didn't address the issue of corporate social responsibility (CSR), *Kiobel* actually encourages irresponsible MNC conduct. To exacerbate the problem, there are limited means through which corporations can be monitored and regulated because currently most international laws are directed at the actions of states, not corporations.[34] The ATS, however, could have been an influential tool to promote corporate CSR, especially in developing countries where local legal regimes are weak or non-existent, and where MNCs only half-heartedly follow their codes of conduct. The ATS could also have been a motivating and unique mechanism through which corporations could be held accountable to international standards, and subjected to international law under the auspices of the U.S. court system.[35] But *Kiobel* razed that possibility. Without the ATS, and in many cases municipal laws available to keep MNCs in check, regulation of MNCs is left to themselves by way of corporate codes or by the scrutiny of various Non-Governmental Organizations (NGOs).

[34] Udwadia, *supra* note 213, at 390.
[35] *Id.* at 386.

A. Corporate Codes of Conduct are Unenforceable and an Ineffective Means to Police MNC Behavior.

In response to mounting pressures for increased corporate accountability (from consumer groups and other NGOs, and from potential public regulation, litigation or prosecution) during the 1990s, voluntary private self-regulation was seen as a possible new way of filling the regulatory void opened up by globalization.[36] Self-regulation, as demonstrated by the international banking industry, is more fable than fact. Nevertheless, the 1990s saw a proliferation of corporate codes of conduct and an increased emphasis on corporate responsibility.[37] Such codes are typically created in one of several ways, to include (1) by companies for their own guidance, (2) by industries for other corporations to follow, or (3) by governments as a model for MNCs to consider (public codes).[38] Some commentators optimistically say that the development of codes of conduct relevant to human rights and other social issues, as well as standards for greater corporate reporting and disclosure, aid in the promotion of CSR[39] because they seek to constrain socially undesirable behavior of transnational non-state actors.[40] But the problem is that the codes, regardless of how they are created, are voluntary in nature and MNCs are invited to pledge themselves to the code rather than forced to do so.[41] Thus, the codes are not legally enforceable.[42] Can you imagine if all one had to do was to

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[36] Helen Keller, *Corporate Codes of Conduct and their Implementation: The Question of Legitimacy* 3, http://www.yale.edu/macmillan/Heken_Keller_Paper.pdf (last visited 4 Apr. 2011).
[37] *Id.*
[38] Sahini, *supra* note 86, at 35.
[39] Dr. Isabella D. Bunn, Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community, 19 Am. U. Int'l L. Rev. 1265, 1288 (2004).
[40] Murphy, *supra* note 164, at 103.
[41] *Id.*
[42] Keller, *supra* note 289, at 23 (discussing very loose compliance mechanisms in the codes. A survey of 132 codes found that 41% of the codes did not specifically mention monitoring, and as for cases of non-compliance, often no clear sanctions are defined).

"pledge" not to break the speed limit, and expect that "pledge" to be followed without any consequential external pressure? The efficacy of such a pledge to self-regulate would certainly be ambitious indeed.

Furthermore, since many corporations create their own codes and follow them to differing degrees, corporate codes lack usefulness and uniformity.[43] For instance, IKEA has agents monitor overseas labor conditions ensuring that children are not forced to engage in unlawful employment activities. That certainly is an effort that seems to be productive in preventing human rights violations. Conversely, Nike has been continually criticized for its lax regulation of the working conditions in its Indonesian, Chinese, and Vietnamese plants. Although both companies have corporate codes, they are not equally effective as a means of protecting human rights.[44] The inconsistency in complying or simply disregarding a corporate code reflects factors such as MNC's commitments to its own financial growth, public relations, and local country laws, which could prevent MNCs from following self-imposed regulations. Therefore, legal accountability may be needed to provide corporations with the incentive to follow their codes[45]particularly in less developed nations where human rights abuses are more likely to occur. The legal accountability incentive to follow codes to prevent human rights abuses could certainly come from the fear of suit and large U.S. judgments under the ATS; a consequence of ATS litigation that even the Second Circuit *Kiobel* court alluded to in its opinion.[46]

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[43] Udwadia, *supra* note 213, at 391.
[44] *Id.*
[45] *Id*.
[46] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116-117 (2d Cir. 2010) (juries hearing ATS claims are capable of awarding multibillion-dollar verdicts and such litigation has led many defendants to settle ATS claims prior to trial. In one ATS case, for example, a jury considering damages after a default judgment returned a $4.5 billion verdict against Radovan Karadzic, former president of the self-proclaimed Bosnian-Serb republic of Srpska).

As one may imagine, however, even the threat of legal accountability does not necessarily deter power wielding MNCs from engaging in lucrative projects that violate human rights. This is clearly evidenced from the uncertain record of ATS litigation involving MNCs, especially if the benefit of profit outweighs the legal ramifications of human rights violations. In fact, there is a growing sense that voluntary codes alone are ineffective and that their proliferation is leading to contradictory and incoherent efforts.[47] What's more, only a few codes include meaningful monitoring mechanisms or disclosure requirements designed to enhance compliance.

Similarly, the U.N. working group on MNCs acknowledges that the use of an entirely voluntary system for codes of conduct is not enough, and it anticipates that the international community will move toward the codification of binding norms backed by a range of implementation measures.[48] This U.N. finding along with the fact that there appears to be a reluctance of many firms to include independent monitoring to verify code compliance, invites suspicion that the codes may be used more for public relations purposes rather than a genuine attempt at improving corporate performance.[49] Consequently, since there is no legitimate codification of binding norms that MNCs are required to follow, it appears non-governmental organizations (NGOs) have taken the lead to push for enforcement of human rights. Although a noble effort, it's debatable how effective those efforts have been.

B. NGO Efforts to Pressure MNC Behavior Generally Fall Short.

NGOs are essentially private legally constituted organizations created by natural persons with no participation or representation of any government. They pursue issues of

[47] Bunn, *supra* note 292, at 1291.
[48] *Id.*
[49] Keller, *supra* note 289, at 56.

interest to its members by lobbying and/or direct action.[50] And within this system of corporate code "enforcement," corporate standards are even sometimes developed with the cooperation of elements of the NGO community and MNCs. The NGOs then monitor compliance with these self-imposed standards, and in an effort to compel compliance, violations are reported to the media. The media then theoretically publicizes breaches of standards to the corporation's consumer, investors and the financial community, and places great pressure on the corporation to act to correct the deficiencies.[51] In this way and within this focused area of relationships, NGOs basically act as substitutes for the state in virtually all respects.[52] As a result of NGO efforts nationally and internationally,[53] the global presence of NGOs indeed imposes a growing level of accountability on corporations.

But NGO oversight, although ambitious, is clearly disputed with respect to its efficacy. For instance, many of the codes drawn up by NGOs have been adopted by a relatively small number of firms.[54] In addition to drawing up codes, an important area of activity for NGOs involved in questions of corporate accountability is the review of various policy initiatives drawn up by corporations and other actions aimed at improving corporate standards.[55] These policy initiatives are evaluated for their content as well as their practical impact, which naturally raises questions for legal research and empirical

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[50] For comprehensive discussion on NGOs, *see* Peter Willetts, *What is a Non-Governmental Organization?*, available at http://www.staff.city.ac.uk/p.willetts/CS-NTWKS/NGO-ART.HTM (last visited 4 Apr. 2011).
[51] Larry Cat Backer, Wal-Mart: The New Superpower, 39 Conn. L. Rev. 1739, 1762 (2007).
[52] *Id.*
[53] The National Labor Committee (NLC) is a human rights NGO based in New York. The NLC "investigates and exposes human and labor rights abuses committed by U.S. companies producing goods in the developing world. Outside the United States, the NLC monitors the compliance of multinational corporations and the economic entities with which they do business on compliance with a host of legal and other human rights standards.
[54] Keller, *supra* note 289, at pg 55.
[55] *See* Bunn, *supra* note 292, at 1275.

study. Depending on their findings, NGOs can develop appropriate responses ranging from private consultations to field visits to public testimony and media coverage.[56] As a result of NGO efforts, some scholars believe that compliance with corporate codes is becoming an economic necessity as corporations fear the consequences of being targeted, shamed, and deemed a violator of human rights.[57] This is so because consumers today are often influenced by the characterization of corporations and choose not to purchase products that have been made in a socially irresponsible manner. Therefore, reports from NGOs on the inappropriate activities of a corporation have a significant effect on profits.[58] For instance, pressure from NGOs forced Heineken, Motorola, ARCO, and several other corporations to abandon their investments in Myanmar after Unocal's alleged endorsement of human rights violations there.[59]

Yet despite the apparent vigilant monitoring of corporate behavior by NGOs, a source completely independent of the MNC, some critics have charged that CSR efforts are merely elaborate public relations exercises designed to give the impression that MNCs are concerned about social issues.[60] In this respect, it's important to remember that NGOs as private entities have no power to actually do anything to the MNC. It's because of the "good-will" of the MNC and business prudence that a MNC would work with a NGO in the first place. If NGO efforts were really so effective, then crimes that have led up to ATS suits wouldn't be so common. This becomes blatantly evident by examining the recent influx of ATS litigation across a majority of the federal circuits. Having said that, the thought of potential liability would certainly be more of a deterrent

[56] *Id.* at 1265.
[57] Udwadia, *supra* note 213, at 393.
[58] *Id.*
[59] *Id.* at 394.
[60] Bunn, *supra* note 292, at 1291.

for MNCs than NGO oversight, which can do no more than apply "toothless" pressure or report alleged violations to the media for unfavorable coverage. NGO efforts may or may not persuade the MNC to change its ways.

To illustrate, in March 2006, the National Labor Committee (NLC) published a report that detailed a number of violations of Jordanian labor law and international human rights norms by a number of apparel factories in the Kingdom of Jordan. The report was aimed at Wal-Mart, Gloria Vanderbilt, Target, Kohl's, Thalia Sodi for Kmart, Victoria's Secret, L.L.Bean and others.[61] The report asserted that tens of thousands of foreign guest workers were stripped of their passports and trapped in involuntary servitude sewing clothing. Once the report was published, the New York Times published a story about the report detailing the findings. As a result, several members of the U.S. House of Representatives sent a letter to the U.S. Secretary of State and the U.S. Trade Representative to urge "that the Administration urgently initiate an investigation of labor conditions in Jordan, and that the U.S. Government offer its assistance to ensure the safety of the workers who courageously provided information to the NLC, and to protect such workers from retaliation by their employers."[62] The NLC, in its determined role as monitor, decided to follow up on its report. Six months after the report, the NLC noted that there was some improvement in some factories. However, many violations such as human trafficking, illegal working conditions, and forcible deportations continued to occur.[63] This example suggests that MNCs, although possibly influenced by outside pressure, don't really find socially responsible behavior as important as the duty it has to its shareholders to maximize profits whenever it can.

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[61] Backer, *supra* note 304, at 1763.
[62] *Id.* at 1765.
[63] *Id.*

C. The Ambitious Work of NGOs and Voluntary MNC Compliance With Corporate Codes Appears to Fall Short Due to Reality of Profits.

We increasingly hear that CSR has become an important business prerogative. Newspapers, magazines, books, and other media outlets espouse the benefits of corporations behaving responsibly, and caution managers about the business risks of a poor CSR performance.[64] Executives are reportedly informed that by demonstrating concern for the environment, human rights, community development, and the welfare of their employees, both in the U.S. and abroad, they will make their firms more profitable. And that their firms will gain a competitive advantage by appealing to the growing numbers of socially and environmentally oriented consumers, investors and employees.[65] Moreover, some scholars advocate that there is a positive correlation between CSR and the bottom line numbers of transnational corporations, and that numerous studies have shown an empirical edge for companies that are responsible in their business dealings.[66] Such positive behavior within the world community only stands to improve their brands because such responsibility is typically rewarded by customer loyalty, and it reflects a good will with prospective customers.[67]

Along the same lines, MNCs rely heavily on investment to satisfy costs. But human rights violations committed by MNCs is typically "front page" type of information, which generally scares off serious investors[68] The dearth of investors in those circumstances may be true to some extent, but main-stream investors still rarely

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[64] David Vogel, *CSR Doesn't Pay*, available at http://www.forbes.com/2008/10/16/csr-doesnt-pay-lead-corprespons08-cx_dv_1016vogel.html (last visited 4 Apr. 2011).
[65] *Id.*
[66] Chip Pitts, Address at the George Washington University School of Law (Oct. 14, 2010).
[67] *Id.*
[68] *Id.*

consider a firm's CSR record in deciding which shares to buy, sell or hold,[69] which only raises doubts about the genuineness of CSR, and reinforces the need for a legitimate enforcement mechanism like the embattled ATS. Whether or not CSR is in fact a profitable activity for corporations is hotly contested.[70]

For instance, it has been said that the corporate world is a self-serving, opportunistic world. It's geared for self-preservation and profit maximization with no regard for human dignity and even less for personal responsibility.[71] After all, despite the recent recession in the U.S. where the majority of hard working Americans (the ones that are fortunate to be working) are struggling to pay their mortgages, the corporations are making record profits.[72] The news of astronomical profits in the midst of economic difficulties naturally strikes a cord with many observers. As a result, some have the attitude that corporations are powerful institutions, yet they do not serve humanity well when their pursuit of profits leads to strategies that degrade the environment, violate human rights and the dignity of employees, endanger public health and safety and otherwise undermine the welfare of communities. One scholar has even audaciously said that "Corporate Social Responsibility" is an oxymoron because if the corporations were socially responsible entities we would not be facing a toxic world and exploited populations for profit. The belief that corporate responsibility "pays" is an enticing belief

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[69] Vogel, *supra* note 317.
[70] Cherie Metcalf, Corporate Social Responsibility as Global Public Law, 28 Pace Envtl. L. Rev. 145, 155 (2010).
[71] Lois A. Levin and Robert C. Hinkley, *Is Corporate Social Responsibility an Oxymoron?*, available at http://www.commondreams.org/views04/0726-11.htm (last visited 5 Apr. 2011).
[72] The New York Times, http://www.nytimes.com/2010/11/24/business/economy/24econ.html?_r=1 (last visited 5 Apr. 2011) (discussing earned profits at an annual rate of $1.659 trillion in the third quarter, according to a commerce department report. That is the highest figure recorded since the government began keeping track over 60 years ago, at least in nominal or non-inflation-adjusted terms).

indeed.[73] Who would not want to live in a world in which corporate virtue is rewarded and corporate irresponsibility punished? Unfortunately, the evidence for these rewards and punishments is rather weak. There is indeed a "'market for virtue" as proponents of CSR advocate, but it is a very limited one and it is not growing.

One can certainly find examples of firms with superior CSR performance that have done well for their shareholders, as well as firms with poor CSR reputations that have performed poorly. But one can find at least as many examples of firms with good CSR records that have not done well and firms with poor CSR reputations that rewarded their shareholders handsomely. This is because for most MNCs, most of the time, CSR is largely irrelevant to their financial performance. The MNC with possibly the world's poorest environmental reputation is ExxonMobil largely due to its reputed indifference to the problem of global climate change and its continued focus on fossil fuels.[74] Not to pick on ExxonMobil, but it is one of the world's most profitable corporations.[75] Conversely, one can also find examples of successful firms for whom CSR has been a core element of their business strategy. Patagonia and Seventh Generation come readily to mind, but it is important not to generalize from these examples.[76] To assume that the business environment has fundamentally changed and that we are entering a new world in which voluntary CSR efforts have become critical to the success of *all* or even *most* firms is misinformed and arguably naive.

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[73] Vogel, *supra* note 317.
[74] *Id.*
[75] Ben Rooney, http://money.cnn.com/2010/07/29/news/companies/Exxon/index.htm (last visited 5 Apr. 2011) (the world's largest public energy company reported net income of $7.56 billion, or $1.60 a share, in the second quarter, up 91% from $3.95 billion, or 81 cents a share, in the same period in 2009).
[76] Vogel, *supra* note 317.

What this discussion simply brings to the forefront is that even if the corporate codes are voluntarily followed by MNCs or by pressure from NGOs, MNCs really have only a negligible incentive to do so without the possibility of public enforcement for violation of human rights. This is especially in light of an opportunity to make vast profits and to please their shareholders for continued investment. After all, a business corporation is organized and carried on primarily for the profit of the stockholders, and the powers of the directors are to be employed for that end.[77] The discretion of Directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself.[78] As a result, corporations try to deliver the greatest value to their shareholders, and this leads them to engage in a cost-benefit analysis.[79] If the financial rewards of bad conduct are greater than what MNCs may have to pay, there is no real incentive to stop.[80] The findings from studies of codes of conduct that aim to improve corporate behavior suggest that this is in fact the dominant attitude.[81] A recent Organization of Economic and Cooperation and Development (OECD) report authored by a business sector advisory group puts the point clearly. It states categorically that "most industrialized societies recognize that generating long-term economic profit is the corporation's primary objective. In the long run, the generation of economic profit to enhance shareholder value through the pursuit of sustained competitive advantage is necessary to attract the capital required for prudent growth and perpetuation."[82] The

[77] Ian B. Lee, Corporate Law, Profit Maximization, and the "Responsible" Shareholder, 10 Stan. J.L. Bus. & Fin. 31, 34 (2005).
[78] *Id.*
[79] Skinner, *supra* note 270, at 365.
[80] *Id.*
[81] Keller, *supra* note 289, at 41.
[82] *Id.*

authors of the group did also acknowledge that ethics and ethics codes have a clear place in corporate governance whose goal is profit maximization.[83]

Despite the inadequate system of voluntary codes and the righteous efforts of NGOs, MNCs continue to operate as they wish, seemingly undeterred. Some might find that insulting, but *Kiobel* seemed to simply overlook the issue. It did not sufficiently consider this prudential matter that undoubtedly plays a factor into corporate behavior, especially in third world countries. Still, regardless of one's opinion about the lack of policing mechanisms for MNCs, and even if *Kiobel* is considered sound reasoning by its supporters, one can't deny the inequity behind the majority's logic because the victims of such human rights violations don't even get a legitimate day in court to tell their story. They are simply left with the emotional and physical scars left behind by MNC conduct and with essentially no remedy.

IV. Conclusion.

Inexplicably, the Supreme Court stunted the promotion of and accountability for enforcing human rights. The ATS' positive impact on human rights blossomed in the 1980s with the decision in the *Filartiga* case. Individuals committing egregious human rights violations in faraway places could no longer escape the rule of law. The Supreme Court, in restricting the reach of the ATS, has reversed course on the enforcement of human rights by incorrectly barring the application of the ATS to human rights violations committed by non-US residents or MNCs with sufficient jurisdictional ties to the U.S. One of the few tools for MNC human rights accountability has been eviscerated by the Supreme Court. What tools remain to enforce MNC accountability are as ineffective as the courts sitting in countries that foster complicity between MNCs and corrupt

[83] *Id.*

governments to inflict human rights abuses for sake of mutual economic pursuits. Furthermore, monitoring of corporate behavior by NGOs and self-imposed codes of corporate responsibility are almost laughable in comparison to judicial remedies. Considering the original intent of the ATS, which is to bring civil justice for the victims of the serious violators of the laws of nations, the risk of having a bold national reputation by enforcing human rights violations that occur anywhere in the world is outweighed by noble efforts to help the underprivileged and abused.