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Children At Risk: Corporations Celebrate Kiobel & Circumvent Child Labor Laws

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CHILDREN AT RISK: CORPORATIONS CELEBRATE KIOBEL & CIRCUMVENT CHILD LABOR LAWS

Aaron Epstein*

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INTRODUCTION

The corporate exploitation of child labor is an international crisis. No matter their fiscal standing—a flourishing fortune 500 company or on the verge of bankruptcy—American companies have, in the current global recession, chosen to seek cheaper labor and manufacturing overseas. Many of the nations that attracted business offer inexpensive labor due to high unemployment, substandard labor laws, and inadequate regulation.¹ With countries realizing the high demand for foreign commerce, millions of children are put at risk to keep costs low and labor efficient.²

Despite the extraordinary size of the problem, the progression of viable solutions has thus far been minimal. One of the few remedies for victims came by way of a 200-year-old statute.³ The Alien Tort Statute (“ATS”) consists of a single sentence: “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.”⁴

For the past several decades, the ATS has been the prominent vehicle of litigation for foreign victims of human rights violations against corporations. This avenue came to an abrupt halt on April 17, 2013, when the Supreme Court held in *Kiobel v. Royal Dutch Petroleum*⁵ that the ATS applies only to conduct within the United States or on the high seas.⁶ And while specific crimes such as torture may still be actionable, the decision will make it far more difficult for human rights victims to sue corporations based on a

¹ *Causes of Child Labor*, CHILD LABOR PUBLIC EDUCATION PROJECT, http://www.continuetolearn.uiowa.edu/laborctr/child_labor/about/causes.html (last visited Apr. 22, 2013).

² *Id.*

³ *See* Alien Tort Statute, 28 U.S.C. § 1350 (2006).

⁴ *Id.*

⁵ 569 U.S. ___, (2013).

⁶ *See id.*

corporation's overseas activities.⁷ The Court did not, however, close the door completely. In one powerful sentence the Court noted the legislature's role in protecting foreign victims by stating "[i]f Congress were to determine otherwise, a statute more specific than the ATS would be required."⁸

Part I of this note will briefly look at the history of the ATS. Specifically, it will scrutinize exactly what was at stake in *Kiobel*, and how the decision will affect both current and future plaintiffs. Part II will show the reasons Congress should answer the call of the Supreme Court and provide more foreign protections by amending the ATS. In particular, Congress should uphold the traditional standards of moral fitness required to participate in the American economy. Part III analyzes the ATS and how it interacts with issues presented by child labor. Part IV will discuss efforts outside the legal spectrum and how the United States and other nations are currently fighting child labor.

I. THE ATS: A ROAD TO KIOBEL

Even though it passed over 200 years ago, the Supreme Court has only addressed the ATS once. In *Sosa v. Alvarez-Machain*,⁹ the court first considered the scope of the ATS.¹⁰ In the decision, Court noted that when passed by the first Congress, the ATS was intended to cover foreign intrusions of international norms which are recognized as "specific, universal and obligatory."¹¹

The Court left open the possibility of future applications of the ATS to account for emerging notions of international law, holding that courts are obligated to look at the

⁷ *See, e.g., id.*

⁸ *Kiobel*, 569 U.S. ___, (2013).

⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

¹⁰ *See id.*

¹¹ *Id.* at 749.

“present day law of nations.”¹² The Court clarified the scope of this application stating that the ATS is established where the rule of international law at issue reflects “norms of international character accepted by the civilized world.”¹³ A norm “sufficiently definite to support a cause of action should involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”¹⁴ The Supreme Court’s justifications in limiting the scope of the ATS are valid. A broad reading would be impractical to adjudicate, and would risk political confrontation with sovereign nations.

Following *Sosa*, it is no surprise that foreign aliens have attempted to expand the application of the ATS outside the bounds for which it was traditionally invoked.¹⁵ Most notably, victims attempted to invoke the statute for violations of human rights by transnational corporations. History suggests that those who authored the ATS over 200 years ago probably never predicted this type of application.¹⁶ The Court did however seem to suggest the anticipation of expansion of the doctrine to be applied to the present day norms.¹⁷ The question remains if corporate liability was the type of emerging norms that that first Congress intended to cover under the ATS.

A. *Corporate Liability under the ATS*

¹² *Id.* at 725.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The *Sosa* Court noted that the ATS was originally intended to cover three instances of international violations: the right of safe passage, infringement of the rights of ambassadors, and piracy.

¹⁶ See *EEOC v Arabian American Oil Co.*, 499 US 244, 248 (1991) (“It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”).

¹⁷ *Sosa*, 542 U.S. at 725 (stating “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”).

Because the Sosa Court failed to clarify what types of defendants the ATS applies to, it was left up to the lower courts to determine whether “customary international law” applies to non-state actors, including corporations. Not surprisingly, courts have been split on the issue.

The Eleventh Circuit was the first federal appellate court to directly address whether corporate liability was actionable under the ATS. There, the Court held that corporations were not protected from liability under the statute because the ATS provided no express exception.¹⁸ The Second Circuit disagreed in *Kiobel*, finding that the jurisdiction of ATS claims is controlled by international law,¹⁹ and that “the concept of corporate liability for violations of customary international law has not even begun to ‘ripen’ into a universally accepted norm of international law.”²⁰

B. *Kiobel: A monumental decision*

The victims in *Kiobel* were native to the Ogoni Region of Nigeria.²¹ They alleged that defendants Royal Dutch Petroleum and Shell Transport and Trading Company PLC, aided and abetted acts that violated their basic human rights.²² The plaintiffs maintained that in order to combat protests against oil exploration in the region, defendants provided support to the Nigerian military by way of transportation, supplying a staging ground for attacks, and other forms of support and compensation.²³

The district court dismissed the plaintiffs' claims, reasoning that “customary international law did not define those violations within the particularity required by

¹⁸ See *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

¹⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 126 (2d Cir. 2010).

²⁰ *Id.* at 137.

²¹ *Id.* at 123.

²² *Id.*

²³ *Id.*

Sosa.”²⁴ Recognizing the importance of the issues presented, the district court certified the order for interlocutory appeal.²⁵

The appellate court ultimately held that “the concept of corporate liability for violations of customary international law has not achieved universal recognition or acceptance as a norm in the relations of States with each other.”²⁶ The case shocked human rights activists as it provided a protective bubble for corporate atrocities.²⁷

Plaintiffs petitioned and were granted certiorari by the Supreme Court for review of the Second Circuit's decision.²⁸ On October 1, 2012, the Supreme Court heard oral arguments on a single issue: Whether victims can bring claims in U.S. federal courts under the ATS for human rights abuses committed in the territory of a foreign state.²⁹ On February 28, 2012, the Supreme Court heard arguments on the question decided by the Second Circuit: Whether corporations may be held liable for violations of international law.³⁰ The Supreme Court seemed primed to thoroughly explore both issues.

On April 17, 2013, the Supreme Court issued its opinion. The majority decision, written by Chief Justice Roberts, decided that the ATS is controlled by “the presumption against extraterritoriality.”³¹ Shocking many legal experts, the holding failed to discuss issues outside of extraterritoriality, including general corporate liability under the statute. The Court instead limited its holding to a presumption that Congress intends its statutes to

²⁴ *Id.* at 124.

²⁵ *Id.*

²⁶ *Id.* at 149.

²⁷ Ed Pilkington, *Supreme Court Prepares for Battle Over Human Rights Liability of Corporations*, THEGUARDIAN (Feb. 27, 2012, 11:03 AM), <http://www.guardian.co.uk/law/2012/feb/27/supreme-court-kiobel-human-rights>.

²⁸ Lyle Denniston, *Kiobel to be Expanded and Reargued*, SCOTUSBLOG (March 5, 2012, 2:01 PM), <http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Kiobel*, 569 U.S. ___, (2013).

apply only inside the United States unless there was a “clear indication” otherwise.³² In the ATS, the Court saw no such express intent.

The Court stressed that an extension of extraterritorial reach under the ATS could constitute “unwarranted judicial interference in the conduct of foreign policy.”³³ The Court also failed to find any evidence that the statute was passed in order to make the United States into a policing body over international norms.³⁴ The Court emphasized that to exercise extraterritorial jurisdiction could justify other nations to reciprocate such measures.³⁵ It noted that this type of measure would essentially give foreign nations the authority to drag U.S. citizens into foreign courts for acts committed anywhere in the world.³⁶

C. The Impact of Kiobel

The *Kiobel* decision will immediately have a significant impact on corporations that have connections in the United States and do business on foreign soil. Prior to the *Kiobel* decision, the ATS was the only source of relief for many victims of human rights violations on foreign soil. The decision to deny the ATS extraterritorial reach indicates that, at least for the time being, corporations will not likely face the same level of potential liability from their overseas activities under this statute as they have in the recent past. In addition, victims, including ones who had claims pending in U.S. federal courts, will now have to seek relief in other forums. As previously noted, however, this is subject to legislative change.

II. A NEEDED ACT OF CONGRESS

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

Justice Roberts passed the responsibility of making the final decision to Congress. "Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required."³⁷ The Court has thrown down the gauntlet. Congress should answer the call and expand the statute.

A. *The price of doing business*

Every entity wanting to reap the fruits of the American economy is limited by our guiding principles and subject to the penalties for a violation of these principles. For example, the right to freedom is only guaranteed to those living a life free of crimes against moral turpitude.³⁸ To practice law, one must show moral fitness.³⁹ To earn income, one must pay taxes.⁴⁰ There are also respective penalties for failing to play by these rules. The consequence of committing a crime is jail. If one chooses not to live a morally sound life, he or she can't practice law. If one doesn't pay taxes, he must prepare for a plethora of late fees and penalties. In short, every violation has an appropriate consequence.

With the decision in *Kiobel*, corporations that participate in the American economy and don't play by the rules face no consequences for their actions. It appears they can operate freely on American soil without fear of facing substantial liability.

B. *A giant problem with no end in sight*

³⁷ *Kiobel*, 569 U.S. ___, (2013).

³⁸ See *Beltran-Tirado v. I.N.S.*, 213 F.3d 1179 (9th Cir. 2000).

³⁹ See generally *Dent v. State of West Virginia*, 129 U.S. 114; cf. *Slochower v. Board of Higher Education*, 350 U.S. 551; *Wieman v. Updegraff*, 344 U.S. 183.

⁴⁰ See 26 C.F.R. § 1.1445-1; Treas. Reg. § 1.1445-1.

In addition to setting a standard of conduct within its own borders, the United States has always been a proud pioneer of providing justice where otherwise unavailable.⁴¹ The United States's inability to address child labor violations abroad represents just one example of the need to amend the ATS.

According to recent reports by the International Labor Organization ("ILO"), there are over 215 million children between the ages of five and seventeen currently trapped in child labor.⁴² Despite the problem being so evident around the globe, without any course of relief, there has been little attempt to punish those responsible or provide aid for the victims. The problem is fueled by a perfect storm of global recession and economic crisis.

C. A recessing American responsibility

Over the past fifty years, America has become a society that relies on the services and manufacturing of foreign nations.⁴³ This phenomenon is fostered by the current global recession. Facing economic strife, there has been a natural reaction for consumers to seek less expensive products and services. This, in turn, has put pressure on domestic corporations to lower costs. With survival being the paramount concern, many businesses have adopted a cut-throat business mentality and seem willing to stop at nothing to increase efficiency and lower manufacturing costs.

⁴¹ One recent example is the assignment of Osama Bin Laden. The operation, code-named Operation Neptune Spear, was carried out with U.S. executive authority in Pakistan despite not having any permission or support from the Pakistani government.

⁴² *Ryder Warns that Prospects for Jobs Recovery are Receding*, INTERNATIONAL LABOUR ORGANIZATION (Apr. 20, 2013), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_211157/lang-en/index.htm. 15 million of those being primary school-age children who are working rather than attending school. Gordon Brown, *Child Labour & Educational Disadvantage – Breaking the Link, Building Opportunity*, available at http://educationenvoy.org/child_labour_and_education_UK.pdf.

⁴³ *Annual Trade Highlights*, CENSUS.GOV (last updated Feb. 8, 2013), <http://www.census.gov/foreign-trade/statistics/highlights/annual.html> (The U.S. Census bureau reported that in 2012 the United States imported over 2.7 trillion dollars of goods and services).

This has led to a direct global increase in the exploitation of child labor. According to a recent report by the Department of Labor (“DOL”), due to recent economic events, 40% of countries are now at “extreme risk” of child labor.⁴⁴ The report also shows that in 2012 the economic downturn and worsening global security led to a 10% increase in countries that pose “extreme” child labor complicity risks for companies operating worldwide.⁴⁵

D. Poverty and corruption preventing progress

Congress should feel compelled to help those who cannot help themselves. While most countries have laws establishing minimum conditions and prohibiting employment of children under a specific age,⁴⁶ economic strife often compels families to send children to work. Poverty in particular has been long recognized as a catalyst for the use and dependence of child labor.⁴⁷

Individual studies support this correlation. A comprehensive study of Guatemala’s economy showed that families who were hit by major economic shock tend to have lower school attendance amongst their children and an increase in child labor.⁴⁸ The study further showed that the chance a child would be put to work increases following a major event such as an earthquake, flood, or fire—these are known as collective shocks.⁴⁹ Other economic shocks such as loss of employment or bankruptcy produced similar effects as the

⁴⁴ *Conflict and Economic Downturn Cause Global Increase in Reported Child Labour Violations – 40% of Countries Now Rated ‘Extreme Risk’ by Maplecroft*, MAPLECROFT (May 1, 2012), http://maplecroft.com/about/news/child_labour_2012.html.

⁴⁵ *Id.*

⁴⁶ *Chapter III: Legislation and Enforcement*, DOL.GOV, <http://www.dol.gov/ilab/media/reports/iclp/sweat5/chap3.htm> (last visited Apr. 22, 2013).

⁴⁷ *Causes of Child Labor*, *supra* note 1.

⁴⁸ Lorenzo Guarcello, Fabrizia Mealli, and Furio Rosati, *Household Vulnerability and Child Labor: The Effect of Shocks, Credit Rationing, and Insurance*, J. OF POPULATION ECON. (forthcoming2009), available at <http://hdl.handle.net/10.1007/s00148-008-0233-4>.

⁴⁹ *Id.*

collective shocks.⁵⁰ This theory was seen in a similar study of children in the Philippines following the 1998 economic crisis in Asia.⁵¹ The study specifically observed an increase in child labor among 10-14 year olds and a decrease in school enrollment.⁵² The effect of poverty can be particularly devastating on women.⁵³

Where poverty and economic crisis exist, even comprehensive labor laws can be ineffective absent adequate enforcement.⁵⁴ One particular study exposed abundant corruption in China's factory auditing processes.⁵⁵ The study explained that even though over 30,000 factories per year are subjected to an audit, it is cheaper to bribe officials than comply with standards.⁵⁶ "If a factory has 500 workers, to improve standards you might need to pay each worker another \$20 a month. But 500 workers times \$20 times 12 months is \$120,000 a year. It's much cheaper to bribe auditors."⁵⁷ Foreign regulations that are not properly administered effectively do not exist.

Another barrier to effective regulation is the threat to the individuals inspecting factories.⁵⁸ In some countries, it is common practice for officials who pose a threat to the labor practices of local business to be threatened or subjected to acts of violence.⁵⁹ The

⁵⁰ *Id.*

⁵¹ Joseph Y. Lim, *International Programme on the Elimination of Child Labour*, (ILO/IPEC Working Paper, 2000).

⁵² *Id.*

⁵³ *Women, Violence and Poverty – Breaking Out of the Gender Trap*, AMNEST INTERNATIONAL (Nov. 25, 2009), <http://www.amnesty.org/en/news-and-updates/feature-stories/women-violence-and-poverty-20091125> ("Poverty can restrict women's opportunities to make choices about their own lives. This can be exacerbated by custom, culture and religion which often combine to deny women access to decision-making processes and even crucial choices over their lives and bodies, such as whether to become mothers.").

⁵⁴ *Chapter III: Legislation and Enforcement*, *supra* note 46.

⁵⁵ *Id.*

⁵⁶ David Barboza, *Questions for Li Qiang of China Labor Watch*, THE NEW YORK TIMES (Jan. 26, 2012, 10:43 AM), <http://thelede.blogs.nytimes.com/2012/01/26/q-and-a-with-li-qiang-of-china-labor-watch/>.

⁵⁷ *Id.*

⁵⁸ 3. *Inspection, Enforcement, Compliance*, DOL.GOV, <http://www.dol.gov/oasam/programs/history/mono-regsafepart03.htm> (last visited Apr. 22, 2013).

⁵⁹ *World Report 2012: Guatemala*, HUMAN RIGHTS WATCH, <http://www.hrw.org/world-report-2012/guatemala> (last visited Apr. 22, 2013) ("The International Trade Union Confederation reported the killing of 16 trade

threat, however, is not limited to the inspectors. From union leaders to the factory workers themselves, any opposition has significant consequences by those violating human rights, and puts them and their families in imminent danger.⁶⁰

E. A desperate call for help

Not all of the issues surrounding child labor would be eradicated by an amendment to the ATS. Such an amendment would, however, put pressure on corporations to self-monitor their operations and subsidiaries overseas. The pressure to self-regulate is essential because many of the impoverished nations where crimes are being committed are simply unable to provide effective regulation or justice through their own government and court systems. Congress has the ability to take the first major step toward a change.

III. QUESTIONS STILL UNANSWERED FOLLOWING KIOBEL

Even if Congress chooses to amend the ATS and remove the presumption against extraterritoriality, many of Kiobel's questions will remain unanswered. Most notably, the Court did not address whether corporations, in general, are covered under the ATS. Justice Breyer's concurring opinion, joined by Justices Ginsburg, Sotomayor and Kagan, briefly addressed the issue.⁶¹ While they agreed with the outcome of the majority, they found that jurisdiction was lacking because foreign corporations, while having shares traded on U.S. exchanges, had an insufficient presence in the U.S. "to vindicate a distinct American interest."⁶²

unionists in 2009 and 10 in 2010. In May 2011 two unidentified men on a motorcycle shot and killed Idar Joel Hernández, finance secretary of the Izabal Banana Workers' Union (SITRABI). In April, Oscar González—another SITRABI official who worked at a Del Monte subsidiary in Morales, Izabal—was shot to death.”)

⁶⁰ *Id.*

⁶¹ *See* Kiobel, 569 U.S. ___, (2013).

⁶² *Id.*

This issue is one of many unanswered questions that remain in the wake of Kiobel. Two other major issues that still loom include the proper standard of specificity required to qualify as an international norm and the proper standard of mens rea.

A. *Ambiguity in corporate standards as an obstacle to liability under the ATS*

The Supreme Court should not view the ambiguity in universal corporate standards as a road block to liability under the ATS, but rather as a justification for the need of legal remedy. Taking the former view would have detrimental consequences on progress for victims of human rights. In *Sosa*, the Supreme Court limited causes of action under the ATS to "specific, universal, and obligatory" violations of international norms.⁶³ Since *Sosa*, lower courts have grappled with multiple levels of specificity required for a violation to be actionable under the ATS.⁶⁴

In *Flores v. Southern Peru Copper Corp.*, the Second Circuit Court of Appeals held that the right to wellbeing and life were not specific enough to be defined by international law.⁶⁵ Accordingly, in *Aldana v. Del Monte Fresh Produce*, the Eleventh Circuit Court of Appeals held that claims of inhumane treatment that did not involve acts of torture were non-actionable under the ATS.⁶⁶ The D.C. circuit court required more specificity. In *Doe v. Qi*, that court held that only specific acts of torture, and other similar treatment were covered by the ATS, and that more claims such as were non-justiciable.⁶⁷

The Supreme Court seemed poised to shed some light on the issue in *Kiobel*. In their brief to the Supreme Court, the plaintiffs in *Kiobel* argued that liability for corporate actors

⁶³ 542 U.S. 692 at 749.

⁶⁴ Henry J. Steiner, *International Human Rights in Context* 1195-98 (3d ed. 2008).

⁶⁵ 414 F.3d 233 (2d Cir. 2003).

⁶⁶ 416 F.3d 1242, 1247 (11th Cir. 2005).

⁶⁷ *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004)

for acts of torture and similar crimes have been a focus of international concern since the creation of corporations.⁶⁸ Therefore, corporate liability is a general principle *specific* to both international and domestic law.⁶⁹ The plaintiffs further argued that no international law prohibits the United States from choosing to enforce norms of international law against a corporation and its officers and directors.⁷⁰

Shell responded to the notion of corporate liability by arguing that no corporation has ever been convicted of torture or crimes against humanity in an international court of law.⁷¹ Shell compelled the Court to accept the notion that the liability of individuals is the proper application of the ATS.⁷² Shell claimed that allowing corporations to be held liable for these types of violations would provide undue hardships on corporations and disrupt international trade.⁷³

B. A strict standard of specificity will be a major encumbrance to exploited children

The Kiobel Court neglected to address the issue and thus subsequent interpretation will be left to lower courts. If narrowly defined by the courts, they will limit the types of claims a plaintiff may bring. Thus, a stringent standard may set the bar so high that human rights violations might be hard to sustain regardless of the type of defendant. A narrow reading would provide foreign plaintiffs substantial problems in the area of exploitation of child labor.

⁶⁸ Brief for Plaintiff Kiobel v. Royal Dutch Petroleum Co., 2012 WL 3864274 at 17.

⁶⁹ *Id.* at 2.

⁷⁰ *Id.*

⁷¹ Brief for Defendant Kiobel v. Royal Dutch Petroleum Co., 2012 WL 3245482 at 8.

⁷² *Id.* at 9.

⁷³ *Id.* at 23.

The United Nations and the ILO currently define child labor as any one of three categories:

- (1) Labor that is performed by a child who is under the minimum age specified for that kind of work (as defined by national legislation, in accordance with accepted international standards), and that is thus likely to impede the child's education and full development;
- (2) Labor that jeopardizes the physical, mental or moral well-being of a child, either because of its nature or because of the conditions in which it is carried out, known as hazardous work; and
- (3) The unconditional worst forms of child labor, which are internationally defined as slavery, trafficking, debt bondage and other forms of forced labor, forced recruitment of children for use in armed conflict, prostitution and pornography, and illicit activities.⁷⁴

It is evident that the definitions were left somewhat broad, and ripe for interpretation by the courts. While these standards put countries on notice of the general prohibition of child labor, the inherent ambiguity can be used as a potential defense to liability under the ATS.

The difficulty in defining child labor with any specificity is that the magnitude of the problem is too great for any single definition. As mentioned previously, there are over 215 million children currently trapped in child labor.⁷⁵ The problem exists on six continents, and among thousands of cultures and religions. What might be illegal in the United States could be a 500-year-old tradition in Bangladesh.

It is this natural ambiguity that should compel courts to refrain from pigeon-holing the ATS to a narrow set of international norms. Cases involving child labor and the corporate practices involved should be evaluated on a case by case basis. It is important to

⁷⁴ *Child Labour Statistics*, ILO, <http://www.ilo.org/dyn/clsurvey/lfsurvey.home> (last visited March 15, 2013).

⁷⁵ *Tackling Child Labour from Commitment to Action*, ILO, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&ved=0CEgQFjAC&url=http%3A%2F%2Fwww.ilo.org%2Fipeinfo%2Fproduct%2Fdownload.do%3Ftype%3Ddocument%26id%3D20136&ei=UiNFUcCOGZG04AOB7oGgAQ&usg=AFQjCNE3wlu96v5Ourg7re0y051yllw_Ww&sig2=3VWXLxvnQKhz-TrGnKUmXg.

have this case by case analysis and allow courts hear the unique facts of each case in the context in which they occurred, so proper relief may be provided.

C. A heightened mens rea standard places an excessive burden on plaintiffs

The Kiobel court also failed to address the mens rea requirement of the ATS. A subsequent interpretation that calls for a heightened mens rea would put an excessive burden on plaintiffs. In *Khulumani v. Barclay Nat'l Bank Ltd.*, the Second Circuit held that “a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.”⁷⁶

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the Second Circuit furthered this view, holding that “Sosa and our precedents send us to international law to find the standard for accessorial liability.”⁷⁷ The court clarified its position, noting that “the mens rea standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone.”⁷⁸ The court ultimately concluded that in order to be held liable, the plaintiffs were required to show that the defendants actions were intentional.⁷⁹

The D.C. Circuit takes a different view. In *Doe VIII v. Exxon Mobil Corp.*, the court decided that the ATS established liability for aiding and abetting because it “involves a norm established by customary international law and that the mens rea and actus reus requirements are those . . . whose opinions constitute expressions of customary

⁷⁶ 504 F3d. 254, 277 (2d Cir. 2007)

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 260–68.

international law.”⁸⁰ The Court ultimately decided that the proper mens rea was “knowledge.”⁸¹

The Fourth Circuit, however, recently rejected the knowledge requirement of Doe in *Aziz v. Alcolac*.⁸² In the decision, the court relied on *Sosa*, noting that courts must only find liability under the ATS where the violation is one which is specific and recognized among civilized nations.⁸³ The court stated that under this rationale, the correct standard was “specific intent.”⁸⁴

D. A heightened mens rea will place an undue burden of victims of child labor

Due to the structure of corporations, a decision that calls for a heightened mens rea would put an excessive burden on plaintiffs. Over the past few decades, corporations headquartered in developed nations have chosen to seek less expensive foreign options for labor and manufacturing. These corporations utilize an intricate and sometimes secret web of foreign-based contractors and sub-contractors that they neither control nor monitor.⁸⁵ Due to these complex structures, corporations are likely to claim ignorance when confronted with specific crimes committed by their subsidiaries.

Examples of this practice have led to the exploitation of children by some of the most recognized brands in American culture. In its own investigation, Apple recently revealed several cases of child labor in its supply chain.⁸⁶ In the report, Apple cited one

⁸⁰ 654 F.3d at 14–19.

⁸¹ *Id.*

⁸² 658 F.3d 388 (4th Cir. 2011).

⁸³ *Id.* at 400–01.

⁸⁴ *Id.*

⁸⁵ Laura Alfaro and Andrew Charlton, *Intra-Industry Foreign Direct Investment*, (Harvard Business School, Working Paper No. 08-018, 2007), available at <http://www.hbs.edu/faculty/Publication%20Files/08-018.pdf>.

⁸⁶ Juliette Garside, *Child Labour Uncovered in Apple's Supply Chain*, THEGUARDIAN (Jan. 25, 2013), <http://www.guardian.co.uk/technology/2013/jan/25/apple-child-labour-supply>.

particular Chinese subsidiary company that employed over 70 children under the age of 16.⁸⁷

It is very difficult, however, to show either intent or knowledge in the Apple situation. In a 2013 report, Apple declared that 88% of their suppliers are located in Asia versus 11% in the U.S.⁸⁸ Apple currently has over 150 contractors for manufacturing and assembly.⁸⁹ One of Apple's biggest suppliers in Asia is Foxconn.⁹⁰ Foxconn not only provides a significant amount of Apple products, but also provides a significant percentage of manufacturing for Sony and other major U.S. and foreign based companies.⁹¹ And while Apple and Sony have generally remained under the radar and out of the headlines over the past five years, Foxconn has been internationally criticized over multiple allegations of child labor⁹² and a horrific string of suicides among teenaged employees.⁹³

Child labor has been perhaps the most prevalent in the Cocoa industry. According to LaborRights.org, 40% of the world's cocoa supply comes from the Ivory Coast.⁹⁴ The U.S. State Department estimates that in 2005 approximately 109,000 child laborers on cocoa

⁸⁷ *Id.*

⁸⁸ *88% of Apple's Suppliers are in Asia, 11% in U.S.*, IMPACT LAB (Feb. 19, 2013, 10:54 AM), <http://www.impactlab.net/2013/02/19/88-of-apples-suppliers-are-in-asia-11-in-u-s/>.

⁸⁹ *Apple Suppliers 2011*, APPLE.COM, available at http://images.apple.com/supplierresponsibility/pdf/Apple_Supplier_List_2011.pdf.

⁹⁰ Dominic Rush, *Apple Manufacturer Foxconn Improves on Chinese Workers' Hours and Safety*, THEGUARDIAN (Aug. 21, 2012, 5:49 PM), <http://www.guardian.co.uk/technology/2012/aug/21/apple-manufacturer-foxconn-improves-safety>.

⁹¹ *Id.*

⁹² Don Resinger, *Foxconn Admits to Child Labor Law Breach with Underage Intern Hires*, CNET (Oct. 16, 2012, 4:35 AM), http://news.cnet.com/8301-1001_3-57533056-92/foxconn-admits-to-child-labor-law-breach-with-underage-intern-hires/.

⁹³ David Barboza, *After Suicides, Scrutiny of China's Grim Factories*, THE NEW YORK TIMES (June 6, 2010), <http://www.nytimes.com/2010/06/07/business/global/07suicide.html?pagewanted=all>.

⁹⁴ *The 14 Worst Corporate Evildoers*, INTERNATIONAL LABOR RIGHTS FORUM (Dec. 12, 2005), <http://www.laborrights.org/creating-a-sweatfree-world/ethical-consumerism/news/11434>.

farms were exposed to dangerous conditions.⁹⁵ Despite being well informed of the national labor practices, Nestle is the third largest buyer of Cocoa from the Ivory Coast.⁹⁶

The cocoa industry presents similar monitoring problems to the electronic manufacturing by Apple and Sony. It is general practice to harvest cocoa beans from multiple farms that are later combined before being exported.⁹⁷ “The cocoa supply chain includes many intermediaries between the farmer and consumer. Small farmers typically sell their cocoa harvest to local middlemen for cash. The middlemen work under contract for local exporters, who, in turn, sell cocoa to international traders and the major international cocoa brands.”⁹⁸ This practice is making it extremely difficult to trace the source of beans, and can lead to the distribution of beans from farms that employ child or forced labor.⁹⁹

The garment industry has also been accused of profiting from child labor. Prior to some bad publicity in 2011, Victoria’s Secret was a proud user of “fair trade” cotton.¹⁰⁰ What is unknown to the average consumer is that much of this cotton came from fields in Western Africa where child labor and torture are common practice.¹⁰¹ Due to the volatility of these regions, however, it is often very difficult to trace specific shipments to the fields that employ children.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Elliot J. Schrage & Anthony P. Ewing, *The Cocoa Industry and Child Labour*, 18 J. CORP. CITIZENSHIP 99, 101 (2005).

⁹⁸ *Id.*

⁹⁹ Sumana Chatterjee, *Nearly Hidden, Slavery on Ivory Coast Cocoa Farms is Easy to Miss*, KNIGHT RIDDER NEWS SERVICE (June 25, 2001), available at

<http://teacherweb.com/NJ/HammarskjoldMiddleSchool/Clarke/Fairtradeslaveryhidden.doc>.

¹⁰⁰ Cam Simpson, *Victoria’s Secret Revealed in Child Picking Burkina Faso Cotton*, BLOOMBERG (Dec. 15, 2011, 12:00 AM), <http://www.bloomberg.com/news/2011-12-15/victoria-s-secret-revealed-in-child-picking-burkina-faso-cotton.html>.

¹⁰¹ *Id.*

IV. SOLVING THE PROBLEM

As the world reacts to the Supreme Court's decision in *Kiobel*, transnational committees are left to fight the war against child labor on their own. While these organizations are making strides to establish universal standards and put pressure on foreign governments to comply, without the proper authority and cooperation these efforts will have limited impact.

A. *The ILO*

The ILO, a division of the United Nations, is perhaps the most influential governing body on international child labor issues. Currently consisting of over 180 countries, the ILO was set up to establish and oversee international labor standards.¹⁰² Its primary function is to provide a structured environment that allows countries to confront other countries about human rights violations.¹⁰³ In reality, however, the ILO has faced similar problems of policing and enforcement with no authority to force explicit action.¹⁰⁴

The first International Labour Conference was held in Washington in October 1919. The Conference adopted six conventions which dealt with maximum hours of work, protection for pregnant women, hours of work for women, and minimum age requirements for children.¹⁰⁵ In 1992, the agency established the International Program on the Elimination of Child Labor (IPEC). The goal of IPEC was to help countries meet their

¹⁰² *About the ILO*, ILO, <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited Apr. 22, 2013).

¹⁰³ *Id.*

¹⁰⁴ Shima Baradaran and Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS L. REV. 1, 2 (2011).

¹⁰⁵ *Origins and History*, ILO, <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>.

specific needs to combat child labor and raise awareness on the issue.¹⁰⁶ IPEC currently provides support in over 88 countries, with an annual expenditure of over \$74 million.¹⁰⁷

In 2011, the ILO adopted the Domestic Workers Convention.¹⁰⁸ The Convention was intended to help eliminate child labor in partnering nations and help an estimated 15 million working children.¹⁰⁹ The convention further calls for the inclusion of weekly days off, maximum work hours, minimum wage protections, and overtime compensation. Its establishment puts pressure on governments to set a minimum age for domestic work that complies with current ILO conventions while protecting those children that are legally permitted to work by ensuring that work does not deprive them of education.¹¹⁰

One major criticism of the ILO was the recent abandonment of the U.N. Code of Conduct on Transnational Corporations, which would have legally bound nations to the policies of the ILO, as opposed to the current voluntary compliance. This proposal, however, was eventually abandoned after pressure from developed nations, including the U.S.¹¹¹

B. ILAB

While the ILO has been important in the definition and influence of child labor, the United States has also developed actionable programs. In 1947, the U.S. established the Bureau of International Affairs (“ILAB”), a branch of the U.S. Department of Labor, to “ensure that workers around the world are treated fairly and are able to share in the

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Protect 15 Million Child Domestic Workers*, HUMAN RIGHTS WATCH (Feb. 25, 2013), <http://www.hrw.org/news/2013/02/25/protect-15-million-child-domestic-workers>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Baradaran, 43 COLUM. HUM. RTS L. REV. at 2.

benefits of the global economy.”¹¹² ILAB has provided approximately \$600 million to programs in over 80 countries throughout the world to help remove children from exploitative work.¹¹³

C. Self-market regulation

Individual industries have also attempted to police international labor markets. For example, the U.S. apparel industry established the Worldwide Responsibly Apparel Production (WRAP) monitoring group.¹¹⁴ The group, however, has been heavily criticized for its ineffectiveness.¹¹⁵ One of its most notable lapses occurred when an “estimated 200 children, some 11 years old or even younger, were found sewing clothing for Hanes, Wal-Mart, J.C. Penney, and Puma” at a WRAP certified factory in Bangladesh.¹¹⁶

V. CONCLUSION

While committees such as the ILO and ILAB are making strides to establish universal standards, these efforts will likely produce little change in the current corporate culture of international labor without legitimate authority.

The Supreme Court had the chance in *Kiobel* to establish that authority. International norms have evolved over the past 50 years to include corporations as powerful economic actors. These corporations not only benefit from the American consumer market, but engage in a wide spectrum of activity within the American economy. Because of this participation, Congress should amend the ATS. An amendment that rejected the presumption of extraterritoriality would pressure corporations to self

¹¹² *ILAB Mission Statement*, DOL.GOV, <http://www.dol.gov/ilab/mission.htm>.

¹¹³ *Id.*

¹¹⁴ *Children Found Sewing Clothing for Wal-Mart, Hanes & Other U.S. & European Companies*, LABOR & WORKLIFE, http://www.law.harvard.edu/programs/lwp/NLC_childlabor.html (last visited Apr. 22, 2013).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

regulate. It would force corporations to spend profits earned from outsourcing labor and manufacturing to make sure their own operations and any foreign subsidiaries are in compliance with internationally recognized labor standards.

If Congress fails to act, however, all is not lost. With advancements in technology, the world is becoming more accountable. From the cotton fields in West Africa to the clothing manufactures in Bangladesh, the once unheard victims of child labor now can reach the ears and eyes of the world through photos, video, and a plethora of other outlets. But hearing these cries is only the beginning. As a society we also need to become more accountable. We need to regulate ourselves, what we buy, and pressure those who benefit from violating human rights, especially those of children.