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Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations

By Brian Seth Parker*

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I. Introduction

The Second Circuit's 2010 ruling in Kiobel v. Royal Dutch

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In the interest of full disclosure, the author and Editorial Board would like to note after the final revisions of this Article were made, but before publication, the author provided pro-bono legal assistance to the plaintiffs' attorneys in Kiobel v. Royal Dutch Shell Petro. Co., which is discussed in this Article.
Petroleum Co.\(^1\) sent shockwaves through the human rights community. The three-judge panel, led by Judge José Cabranes, unexpectedly ruled to exclude corporations from jurisdiction under the Alien Tort Statute (ATS),\(^2\) despite the fact that neither party had briefed the issue.\(^3\) Since the mid-1990s, the Alien Tort Statute has been the primary legal mechanism for attempting to hold corporations responsible in United States courts for their complicity in the violations of international human rights around the world. As part of the original Judiciary Act passed by the first Congress in 1789, the ATS establishes jurisdiction of the federal courts to hear actions in tort, brought by aliens, for violations of the law of nations.\(^4\) Early ATS cases primarily consisted of suits against former dictators, generals, and other state actors involved in genocides, torture, and extrajudicial killings. More recently, however, human rights practitioners, bolstered by a burgeoning international corporate accountability movement, began recognizing the statute’s potential use in cases against corporations that often hold as much if not more power than states in the facilitation of human rights violations.\(^5\)

In the late 1990s, shortly after the Second Circuit found certain non-state actors subject to jurisdiction of the ATS in the case *Kadic v. Karadzic*,\(^6\) the international human rights community began filing suits against corporations. Since then, victims of human rights abuses from all over the world have brought dozens of ATS cases against the corporations that facilitated or supported the perpetration of those abuses in violation of international law. While monetary awards against individual ATS defendants have unfortunately been largely

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1. 621 F.3d 111 (2d Cir. 2010).
2. Alien Torts Claim Act, 28 U.S.C. § 1350; the statute is also referred to commonly as the “Alien Tort Claims Act” (ATS).
3. *Kiobel*, 621 F.3d 119 (majority opinion) (justifying the court’s interpretation of corporations as excluded from ATS jurisdiction, the majority states, “The principle of individual liability for violations of international law has been limited to natural persons – not ‘juridical’ persons such as corporations – because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an ‘international crime’ has rested solely with the individual men and women who have perpetrated it.”) (emphasis added).
4. *Id.* at 115-16.
6. 70 F.3d 232 (2d Cir. 1995) (finding Radovan Karadzic, the self-proclaimed president of Srpska, liable under the ATS even though he was considered a non-state actor because the Bosnian-Serb entity was unrecognized as a state).
uncollectable, a few plaintiffs have negotiated substantial money settlements from corporate defendants. Beyond monetary redress, ATS litigation provides plaintiffs with symbolic vindication and empowerment while serving as a deterrent against future corporate complicity in international law violations.

The *Kiobel* ruling, if upheld or followed by the Supreme Court this upcoming term, would erase this avenue of redress and significantly limit the ability of victims of human rights violations to seek civil remedies in the United States under the ATS. Since victims typically have no other feasible domestic or international venues to bring their claims against corporations, excluding corporations from ATS jurisdiction could preclude any redress for victims of these atrocious crimes. Judge Leval, in his stirring dissent in *Kiobel*, wrote,

> Without any support in either the precedents or the scholarship of international law, the majority take the position that corporations, and other juridical entities, are not subject to international law, and for that reason such violators of fundamental human rights are free to retain any profits so earned without liability to their victims... So long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy—all without civil liability to victims.

While Judge Leval's comments certainly speak to the chilling effect of the majority's holding, Judge Cabranes and the majority did provide a sliver of hope for victims of human rights abuses. The majority specifically left open the possibility to sue individuals for the

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10. See John B. Bellinger III, *Will Federal Court's Kiobel Ruling End Second Wave of Alien Tort Statute Suits*, 25 Wash. Legal Found. 3 (2010) (predicting how the current Supreme Court would rule if it were to hear *Kiobel*).

11. 621 F.3d at 150 (Leval, J., dissenting).
violations of corporations, stating, "[N]othing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law—including the employees, managers, officers, and directors of a corporation." But how? If Kiobel remains the law in the Second Circuit or is adopted by the Supreme Court in the future, how can victims of human rights abuses attach liability to the "individual men and women who have perpetrated [them]"?

The answer is unclear. Each potential avenue to attach liability to individuals for corporate complicity presents its own set of knotty obstacles. To begin with, victims have and will continue to face severe obstacles to achieving any level of success in suits against the actual perpetrators of the underlying human rights violation. Most glaringly, foreign torturers, mercenaries, and dictators very rarely have the requisite presence in United States territory that would allow for personal jurisdiction. Additional fundamental hurdles include the Act of State Doctrine, the Foreign Sovereign Immunities Act or common law immunity, the political question doctrine, and forum non conveniens, to name a few. Even if a plaintiff can obtain jurisdiction and avoid all of the above legal obstacles, the actual perpetrators of the crimes usually do not have the personal assets with which to satisfy a judgment. ATS suits against corporations gained traction chiefly because plaintiffs could avoid running into some of the above roadblocks.

As such, Kiobel would deprive human rights victims of the primary tool currently utilized in the efforts to seek justice and reparations for grave crimes facilitated by corporate involvement. Kiobel thus raises the stakes for developing a theory of individual liability for corporate actors. Even if Kiobel were overturned, any additional mechanism that could hold liable the individuals responsible for the corporation's illicit conduct would maintain substantial value to victims as an alternative theory of liability. This Article presents the doctrine of superior responsibility as a functional theory of liability to fill some of the gaps potentially left by Kiobel, or to add another arrow to the quiver if the Supreme Court reverses Kiobel.

Part II lays out the basic concept behind holding corporate officers responsible under the doctrine of superior responsibility and

12. Id. at 122 (majority opinion).
provides a brief policy discussion on the merits of superior responsibility in the corporate context. In Part III, the fundamental principles of superior responsibility are reviewed through a chronology of the doctrine's development from World War II tribunals to the ad hoc tribunals up to more recent cases in United States courts. Part IV touches on the threshold choice of law issues that plague ATS litigation and some of the theoretical problems that arise in transferring international criminal law into actions in tort. Part V analyzes the principles of superior responsibility as specifically applied to corporate officers under an ATS suit. In conclusion, this Article revisits the policy arguments in favor of holding individual corporate officers liable and highlights some areas of business activity most vulnerable to suit under the theory.

II. Superior Responsibility as an Alternative Theory of Liability

[Community, or its rulers, may be held responsible for the crime of a subject if they know of it and do not prevent it when they could and should prevent it.]

"Hugo Grotius, De Jure Belli ac Pacis: Libri Tres"

Broadly speaking, the doctrine of superior responsibility imposes liability on superiors when they know or should have known about their subordinates' violations of international law, but fail to prevent such acts or punish the perpetrators. Thus, as adopted by the United States courts, for superior responsibility to apply, a superior-subordinate relationship must exist in which the defendant has effective authority and control over the person or persons who committed the human rights abuses. Notably, unlike aiding and abetting liability, superiors are not charged with assisting the crimes.

13. The doctrine is also known as "command responsibility." The term "superior responsibility" will be used in this paper in line with the language used in the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). See J.D. Levine, The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court have the Correct Standard?, 193 MIL. L. REV. 52, 53 n.8 (2003) for a more thorough account of the terminology's development.


15. See, e.g., Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283, 1288 (11th Cir. 2002); see also Chavez v. Carranza, 559 F.3d 486, 499 (6th Cir. 2009).

16. Ford, 289 F.3d at 1288.
of their subordinates, but rather with failing to carry out their duty as superiors to prevent or punish the criminal conduct of their subordinates or persons under their control. In this sense, superior responsibility should be viewed as an accompanying alternative theory to aiding and abetting liability, as opposed to a stand-alone replacement.

Still, despite its limits, superior responsibility is attractive to plaintiffs as compared to other attributive conduct theories against individuals for its definitive “knew or should have known” mens rea standard. While both the customary international law standard and the federal common law standard for aiding and abetting require only a “knowledge” mens rea, Presbyterian Church of Sudan v. Talisman Energy, Inc., decided by the same Second Circuit panel as Kiobel, put that standard in doubt. The international standard adopted by the Second Circuit, derived from the Article 25(3)(c) of the Rome Statute of the International Criminal Court, requires a mens rea of “purpose” for the defendant’s complicit conduct in aiding and abetting human rights violators. Compared to the United States federal standards as well as the customary international law standards derived from the Nuremberg and Tokyo Military Tribunals and developed by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the “shared purpose” requirement imposes an extremely high threshold for plaintiffs to meet. Thus, in certain jurisdictions superior responsibility might feasibly succeed in cases where the “shared purpose” mens rea requirement of Talisman makes aiding and abetting suits logistically unnavigable because of the high burden of proof.


18. 582 F.3d 244 (2d Cir. 2009).


21. This might not be the case if the court adopted the new International Criminal Court (ICC) standard, discussed infra in Part II(D), which requires a more
The principal benefit of placing a duty on superiors to prevent the commission of atrocities is its deterrence function. Corporate officers and employees may be more cautious regarding action or decisions that might lead to human rights violations, and more vigilant in preventing or remedying those crimes, if liability can be traced directly back to the individuals. Especially due to the dangers inherent in leaving Kiobel and Talisman in place, the law should encourage some modicum of corporate social responsibility rather than providing a shield to enable what is oftentimes reckless disregard for international law and standards of decency, while at the same time advancing the ethic of corporate pursuit of profit at all costs. Embracing superior responsibility could serve that purpose by holding the individual decision makers and puppet masters responsible for their part in the human rights violations. Whether one agrees or disagrees with the idea of corporate ATS liability, there is little doubt that the courts can and should hold individuals complicit in international crimes liable.

Many multinational corporations have holdings exceeding the gross domestic products (GDPs) of most low- and medium-income countries and thus carry more influence than the states that attempt to govern them. The international community has therefore progressed towards holding corporations accountable under international law. Especially in poor developing countries and countries that rely heavily on resource extraction, corporations often have the leverage to exert a disproportionate amount of influence over the political, legal, and social climate. If used with care and good intentions, that influence can spur economic and legal development along with positive social change. Unfortunately, when used with impunity by corporate officers in the pursuit of profit without regard for external consequences, that influence can lead to horrific outcomes. In that way, corporations and the individuals running corporations often find themselves complicit in and responsible for


gruesome crimes. As the rest of the world moves towards holding corporate actors accountable for crimes, the United States should not and cannot shy away by providing protection for illegal behavior.

As the Supreme Court stated in United States v. Park,

The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.  

Importantly, regardless of whether they are influenced by the corporate culture or inundated by the corporate structure, individual people are the ones making decisions and taking actions on behalf of the company. In that respect, superiors are not just potential targets for human rights litigation; they are the right targets.  

Individuals make judgment calls on where to drill and how to drill, where to invest and how to invest, who to hire, and how to manage relationships with partners and subsidiaries. Within the role of the superior lies the authority and duty to control and oversee those working beneath. Superiors do not only make decisions for themselves; they also make choices that dictate the actions and behavior of their subordinates. Corporations are run by warm-blooded people, capable of making responsible and lawful decisions, and culpable when they decide not to.

Moreover, when reasonable, the law attempts to shift the burden of restitution onto those most able to handle that burden. The Supreme Court noted in United States v. Dotterweich that when faced with balancing relative hardships, “Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.”  

In the human rights context, if victims cannot otherwise achieve justice or


25. Just to be clear, this is not to say that superiors are the only “right” targets for culpability and liability.

compensation for their losses, the burden of restitution should fall on those who could have and should have prevented their subordinates from committing those crimes in the first place. Moreover, the corporate officers who failed to prevent the crimes, especially those with high-ranking jobs in multinational enterprises, often have enough personal wealth or insurance to satisfy a monetary judgment.

As will be demonstrated in Part V, superior responsibility only applies in a very narrow set of circumstances and provides corporate officers with ample guidance to ensure compliance with the law. Notwithstanding its narrow application, the use of the doctrine of superior responsibility in ATS cases could serve as an effective deterrent against reckless corporate behavior and foster more vigilant investigation and repression of human rights violations.

III. Basic Principles of Superior Responsibility

A. Emergence of the Doctrine After World War II

While no explicit statutes including superior responsibility provisions existed at the time of the Nuremberg and Tokyo Tribunals, the basic principles of the current doctrine trace back to World War II military court cases.27 The Tribunals faced cases against blatantly culpable superiors but had no concrete evidence that the superior had either ordered his soldiers or subordinates to commit atrocities, or that the superior had shared his soldiers’ intent to commit specific crimes.28 Out of this need arose a doctrine of attributive liability, in which superiors could be held liable for their role in directing or controlling the commission of atrocities without charging them for the crimes themselves.29

The trial of General Tomoyuki Yamashita, while not representative of the current doctrine, represents the most famous and perhaps the most far-reaching example of superior

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28. Wu & Kang, supra note 22.
29. Id.
Despite the complete lack of concrete evidence that General Yamashita ordered his troops to commit horrific crimes against the native Filipino population and American prisoners, the commission found Yamashita guilty of war crimes under a theory of superior responsibility. The commission wrote that the soldiers' crimes were so "extensive and widespread, both as to time and area, that they must either have been willfully permitted by the accused, or secretly ordered by the accused." In finding Yamashita guilty, the commission stated that where "there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops." The Supreme Court of the United States later denied Yamashita's writ of habeas corpus in what some saw as an early domestic endorsement of the doctrine of superior responsibility. The developing theory that arose from this case allowed courts to infer culpability from an outcome and avoid the evidentiary black holes inherent in requiring victims to provide concrete evidence that individual commanders ordered the perpetration of specific crimes.

B. Widespread Use Internationally and Domestically Post-World War II

After formal codification of the doctrine of superior liability in the Protocol I Additional to the Geneva Conventions of 1949, the theory played a prominent role in the prosecution of war criminals in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The Special Court for Sierra Leone and the Extraordinary

30. UNITED NATIONS WAR CRIMES COMMISSION, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948).
31. Id. at 18-23.
32. Id. at 13-18.
33. Id. at 34.
34. Id. at 35.
37. See Statute of the International Tribunal for the Former Yugoslavia, art. 7 ¶
Chambers of Cambodia, among others, have also applied the principle. Through repeated and descriptive usage in the ICTY and ICTR, superior responsibility has become a developed and refined principle of international law. The ICTY’s opinion in Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (hereinafter Celebici) is widely recognized as the seminal superior responsibility case in that it uprooted any notions that superior responsibility only applied to military commanders in wartime. As the first elucidation of command responsibility since the WWII Tribunals, the opinion provides a thorough discussion of the legal development of the doctrine in its analysis of Article 7(3) of the ICTY statute, which is substantively identical to the ICTR’s statute related to superior responsibility. The Eleventh Circuit adopted the ICTY’s standards from Celebici in Ford v. Garcia, and other district courts have relied heavily on ad hoc jurisprudence from the ICTY and ICTR in numerous cases in the United States.

C. Application During Peacetime

While the cases and statutes mentioned supra involve crimes in war or war-like contexts, the Ninth Circuit noted in Hilao v. Estate of Marcos that the United States has moved toward recognizing similar “command responsibility” for torture that occurs in peacetime, perhaps because the goal of international law regarding the treatment of noncombatants in wartime – ‘to protect civilian populations and
prisoners... from brutality' – is similar to the goal of international human-rights law.”

The ICTY echoed this sentiment, holding that the basis of the superior's responsibility lies in his or her obligations as superior to subordinates, and not in the "particular theatre in which the act was committed." The shift away from a strictly wartime doctrine broadens the range of superior responsibility and further supports the use of superior responsibility against corporate officers, who often operate in areas void of recognized conflict.

**D. Application to Civilians**

Dating back to its first usage in post-World War II cases up through the present, courts and tribunals have applied the doctrine of superior responsibility to civilians. The Tokyo Tribunals, for example, found the Japanese diplomat Koki Hirota guilty under a theory of superior responsibility for the violent crimes and rapes by Japanese troops near the Embassy in Nanking. As foreign minister, Hirota knew of these crimes but relied on an assurance by the War Ministry that the problem would be corrected and never again reported or tried to prevent the heinous murders and violations of women, despite ongoing reports of such incidents to his office. Regardless of his status as a civilian and lack of any formal authority over the soldiers committing the crimes, the Tribunal found Hirota guilty based on superior responsibility and sentenced him to death.

Similarly, a French military tribunal tried German steel industry executive Hermann Roechling for tolerating the use of forced labor at his plants, and the mistreatment of such workers, who were supplied by the German armed forces. The tribunal found Roechling guilty

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42. 103 F.3d at 777 (quoting In re Yamashita, 327 U.S. at 15).
45. Id. at 49, 610-11, 791.
46. See Vetter, supra note 27, at 125-27 (arguing that under the new ICC statute Hirota would likely escape a guilty verdict based on the more stringent standards for control and knowledge).
47. Government Commissioner v. Roechling, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, APP. B 1061, 1125, 1134 (1950) [hereinafter Roechling].
of permitting and supporting the torture and mistreatment of workers by the SS even though the prosecution, similar to the Yamashita case, had no concrete evidence showing that Roechling knew of or consciously disregarded information related to the mistreatment.\footnote{Roechling attended several secret conferences with Goering and other Nazi leaders, although he maintained that he did not know about the crimes. \textit{Id.} at 1077. \textit{See also} Vetter, \textit{supra} note 27, at 127-33 (arguing that under the new ICC statute the facts in the Roechling case would not support a conviction based on the nexus requirement in art. 28(2)(b) and the heightened knowledge standard of consciously disregarded).} Roechling had no \textit{de jure} authority over the Gestapo who actually mistreated the workers, but his influence as the executive of the steel plant implied that he could have used his \textit{de facto} authority to repress the violations.\footnote{\textit{Celibici}, Trial Chamber Judgment, ¶ 376.}

Since the World War II tribunals, United States courts and international tribunals all over the world have reaffirmed the extension of the principle of superior responsibility to civilians in nonmilitary positions of superior authority.\footnote{\textit{See id.; see also} Prosecutor v. Kayishema \& Ruzindana, Case No. 95-1-T, Judgment and Sentence, ¶¶ 209, 213-16 (ICTR May 21, 1999).} Notably, in \textit{Doe v. Qi}, a federal district court held a former mayor of Beijing responsible under superior responsibility for the crimes committed by Beijing police officers, due to the mayor's support of a policy of targeting and abusing victims of religious persecution.\footnote{349 F. Supp. 2d at 1328-31.} In a case with a corporate link, the ICTR held that the director of Gisovu Tea Factory, a public corporate enterprise, exercised \textit{du jure} authority over its employees who had committed serious human rights violations.\footnote{Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 148 (ICTR Jan. 27, 2000).} As seen by the diverging types of control exhibited in the Roechling and Qi cases, and as discussed further in Part V(B), liability can attach to civilian superiors who exercise either \textit{de jure} or \textit{de facto} control.

At present, that the doctrine of superior responsibility applies to civilians under customary international law is undisputed. However, in some cases the standard of liability for civilians is slightly different than the standard applied to a military superior. For example, the ICC Statute promulgated in 1998 clearly differentiates between military and civilian superiors. Article 28(2) provides the following civilian standard for superior responsibility:
(2) With respect to superior and subordinate relationships not described in paragraph 1 (concerning military commanders only), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces subordinates under his or her effective command authority and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces subordinates where:

The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; and

The crimes concerned activities that were within the effective responsibility and control of the superior; and

The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.\(^{1}\)

The above codification adopted by the ICC makes an explicit and intentional distinction between the standard for military commanders and the standard for civilian commanders. To begin with, the civilian standard adds the additional requirement under subsection 28(2)(b) that the crimes committed by the subordinates concern “activities that were within the effective responsibility and control of the superior.” As discussed infra in Part V(C), this extra requirement can considerably affect the scope elements in potential cases against corporate officers. The language of the ICC statute also alters the definition of effective control, discussed infra in Part IV(B). Under the civilian standard, sanctioning power is broader than that of the military commander in that it only requires the reporting of crimes rather than actual punishment of the perpetrators. The differences make practical sense. Military personnel in the field occupy that role twenty-four hours a day, seven days a week, causing every action taken during that time to fall under the scope of their duty and the control of their superiors. While the ICC Statute would obviously not be binding on a United States court, it stands as an influential authority of customary international law.\(^ {54}\) It remains to be

\(^{53}\) Rome Statute, supra note 19, art 28(b).

\(^{54}\) Following Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004), courts are supposed to look to the international norm, not the precise fact pattern from which the norm emerged.
seen how a United States court, in determining the elements of the doctrine with respect to a corporate officer under the ATS, would balance the weight of the ICC statute with the wealth of distinguishable international case law.

IV. Choice of Law

A civil case built on superior responsibility could arise in United States courts out of one of two statutes. If the facts involve torture, the Torture Victims Protection Act (TVPA) expressly provides a cause of action in federal court. While the ATS is strictly jurisdictional, the TVPA creates a substantive cause of action and provides detailed definitions of what actions fall under the act. Accordingly, human rights lawyers prefer to file suit under the TVPA whenever possible, and the same will undoubtedly be true for cases alleging liability for superior responsibility. In the legislative history of the TVPA, the Senate expressly recognized responsibility for “anyone with higher authority who authorized, tolerated or knowingly ignored those acts . . . .” Furthermore, the Senate Report refers to In Re Yamashita, in which the court held the commander responsible for war crimes which “he knew or should have known . . . were going on but failed to prevent or punish them.” As the district court noted in Doe v. Qi, the “Senate thus implicitly endorsed the application of command responsibility to acts of torture and extrajudicial killings whether committed by military or civilian forces.” The Qi court also noted that “the text of the TVPA does not limit its applicability to acts of military officials or the context of

55. There are two bases for standing under the Torture Victims Protection Act (TVPA): (1) where the plaintiff is a direct victim of the alleged torture, and (2) where the plaintiff brings a claim on behalf of a deceased tortured victim. Torture Victim Protection Act of 1991 §§ 2 and 3(b)(1), 28 U.S.C. § 1350. Not all police brutality nor every instance of excessive force used against prisoners, is torture under the TVPA; rather the term is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.


58. Id.

war. Thus, for complaints alleging torture directly at the hands of a superior's subordinates, the TVPA stands as a solid statutory basis to assert a claim against a corporate officer on superior responsibility grounds.

For cases involving crimes other than torture, or as a pleading option in the alternative to the TVPA, a suit can be brought under the ATS in federal court. As previously mentioned, the ATS states 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."\(^\text{61}\) The ATS, unlike the TVPA, does not provide a cause of action, but provides grounds for federal subject matter jurisdiction to recognize a right of action for a very limited type of international law claim. The Supreme Court, in *Sosa v. Alvarez-Maichain*, defined those claims as those that "rest on a norm of international character accepted by the civilized world and defined with the specificity comparable to the features of the eighteenth-century paradigms" of violation of safe conducts, infringement of the rights of ambassadors, and piracy.\(^\text{62}\) While new claims could emerge as customary international law evolves, current claims under the ATS usually involve genocide, torture, or extrajudicial killings.

Before addressing the substantive issues of applying superior responsibility to corporate directors under the ATS, it is important to touch on the choice of law debate that continually arises in similar ATS cases. First, choice of law issues will unquestionably arise at the initial stage of establishing federal subject matter jurisdiction over a superior responsibility claim. As noted previously, under the doctrine of superior responsibility, superiors are not charged with the crimes of their subordinates but rather with the failure to carry out their duty to prevent or punish the criminal conduct. Under this theory of liability, charges against the superior will almost never include direct perpetration of genocide, torture, or the exploitation of forced-labor. This begs the question: does the crime of failing to carry out a duty to prevent or punish a subordinate's violation of the law of nations constitute in and of itself a violation of the law of nations? As articulated by the Supreme Court in *Sosa*: 

\[...\ [F]ederal courts should not recognize claims under federal common law for violations

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60. *Id.*
of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when § 1350 (the Alien Tort Statute) was enacted. Even if the crimes committed by subordinates satisfy the Sosa requirement, one might still have to claim that the stand-alone crime of failing to prevent subordinates from committing atrocities as a civilian superior violates an international law norm with a comparable specificity and acceptance as piracy or an assault on a diplomat carried in 1789.

A similar issue arises in aiding and abetting cases, wherein defendants often argue that a party's contributory conduct might allow for or support a violation of the law of nations but does not constitute a violation of the law of nations in and of itself. Scholars and practitioners have hotly debated the topic. At any rate, significant disparities exist between aiding and abetting and superior responsibility in this regard, due to the nature of participation. Because superior responsibility does not require any direct participation or affirmative act by the defendant, it might seem a stretch to establish jurisdiction based on the underlying violation. Even more so than aiding and abetting, which punishes practical assistance, encouragement, or moral support that has a substantial effect on the perpetration of human rights violations, superior responsibility is a breach unto itself because it primarily punishes the lack of affirmative action. Under such reasoning, plaintiffs would have to establish that failing to prevent atrocities by a superior is intrinsically a violation of the law of nations. Due to the narrow standards set by Sosa, that might be a difficult burden to overcome in order to establish subject matter jurisdiction against corporate officers.

Nonetheless, the unwavering international jurisprudence regarding superior responsibility since the World War II Tribunals lends credence to the argument that norms of civilian superior responsibility meet the Sosa standards. Crimes based on the doctrine of superior responsibility have been tried consistently under evolving yet definite standards for over seventy years in every international
criminal court faced with the issue.

Second, with little to no guidance from the Supreme Court, judges have struggled to determine the source of substantive law under the ATS in order to adjudicate the merits of a case. Essentially, courts have yet to resolve whether domestic federal common law or customary international law establishes the rule of decision and substantive standards of liability. Beyond the complexity of litigating cases amidst a looming uncertainty over choice of law, plaintiffs potentially face a lose-lose situation in which the adoption of either standard would create substantial practical problems.

On the one hand, plaintiffs could argue that a violation of international law took place, but that because international law does not itself provide a civil cause of action, the defendant should be tied to that violation through domestic law. In that scenario, however, plaintiffs would undoubtedly run into credible arguments that the application of federal common law to foreign parties for violations on foreign territory would constitute an impermissible extraterritorial application of United States law, especially when the domestic standards do not align with customary international law standards. Moreover, while a handful of United States courts have applied superior responsibility, they have all done so on the basis of customary international law. In Ford, for example, the court adopted the superior responsibility standard used by the ICTY. As

65. In Khulumani v. Barclay Nat’l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007), for example, all three Second Circuit judges gave differing interpretations on the applicable source of substantive law. In Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), the case settled before an en banc review had the chance to clarify the issue. Due to the lack of consensus across circuit courts, or even within circuits, the Supreme Court will likely address the issue with the next ATS case before it.

66. Professor Wuerth suggests a third approach that relies solely on federal common law to govern the cause of action and the rule of decision. See Wuerth, supra note 64. A much less developed view would also look at the general principles of law as described in Article 38 of the Charter for the International Court of Justice – this line of argument has not been fleshed out in ATS cases and is therefore complicated and undetermined but it would allow you to look at domestic laws of other nations to see what principles are widely shared.

67. However, if the superior was based in the United States and the relevant conduct took place in the United States, then the violation actually occurred in the U.S. even though the harm occurs abroad.


69. 289 F.3d 1283.
such, it remains unclear what standards a United States court would apply as federal common law for superior responsibility.

On the other hand, one could argue for the application of customary international law across the board, similar to the use of foreign norms as the controlling law in some United States cases. But the absence of tort within customary international law complicates ATS cases attempting to convert international criminal law standards and norms into a civil cause of action in tort. Those who oppose relying on customary international law argue that while international criminal law prohibits certain conduct, it provides no civil cause of action or civil redress for victims of international crimes. As such, the argument follows that a plaintiff should not be able to import a domestic remedy into an international violation for the sake of personal preference.

This Article does not try to add fuel to either fire by arguing for one approach or the other. Instead, it recognizes that a vast amount of literature exists discussing the merits and complications of both approaches in the context of aiding and abetting liability. For the purposes of superior responsibility, the threshold ATS questions debated within the courts and the academic community are the same as those confronting aiding and abetting litigation. However, unlike aiding and abetting, both international and United States courts have applied similar standards for superior responsibility. The absence of stark disparities makes the analysis of the elements simpler for the purposes of this Article, allowing a more general review of both customary international law and federal common law related to superior responsibility. When a potential difference between the standards arises, this Article discusses the ramifications of the adoption of one approach over another.

V. Elements of Corporate Officer Superior Responsibility

The following analysis describes the essential elements of superior responsibility as applied to corporate officers under the ATS. Using case law from international tribunals and domestic courts, each section explains the specific requirements and obstacles

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70. This is due to the strong reliance of customary international law by United States courts in any application of the doctrine of superior responsibility. However, the adoption of a slightly modified standard for civilians recently by the ICC, a persuasive source of customary international law, could muddle the waters. See supra Part 2(D).
for plaintiffs and practitioners, noting matters that might lead to different results or standards if the court decides to apply the ICC statute’s standards.

A. Duty

Since a court must derive the superior’s liability from his or her subordinates’ illegal act, a duty must exist to convert an omission, the failure to prevent or punish, into an actus reus of the crime. Under international law, superiors have such an “affirmative duty” to prevent wrongdoings or punish those responsible for wrongful acts. Due to the doctrine’s origins in military law, some might ask, should a civilian corporate officer have the same or similar affirmative duties of responsibility to victims of human rights violations by his subordinates as a military commander? The better question, perhaps: if a corporate officer has a sufficient level of control over his or her subordinates, why shouldn’t that vest a similar affirmative duty to prevent human rights violations? Civilians in positions of power and authority voluntarily assume those positions and often receive handsome compensation for doing so. From that voluntary assumption of authority comes a presumption of knowing acquiescence to the correlated international law duties inherent in the control over subordinates.

Timothy Wu & Yong-Sung (Jonathan) Kang justify the imposition of this duty, stating, “From a regulatory standpoint, it is often a military or civil leader who is the only, or at least best-situated, person to prevent the commission of atrocities—society’s last line of defense. Under this analysis, the burden of the duty must be placed where it will make a difference.” Since superior responsibility does not apply per se to any and all superiors in the chain of command under a theory of strict liability, exclamations that the burden on corporate officers would be unfair are exaggerated. As detailed infra, civilians only have a duty to “take measures within their power” over subordinates under their control to prevent the

71. Wu & Kang, supra note 22, at 290.
72. See, e.g., Karadzic, 70 F.3d at 242 (stating that commanders must take appropriate measures to control troops for the prevention of such atrocities).
73. Wu & Kang, supra note 22, at 290.
74. Id.
75. Id.
abuses or notify the authorities.\textsuperscript{76} The law does not require heroism, only vigilance.

\textbf{B. Control}

The superior’s duty, as explained above, arises out of his or her control as a senior superior over the subordinate.\textsuperscript{77} Liability can only be attached if the superior has \textit{de jure} or \textit{de facto} control over the subordinate committing the initial crime.\textsuperscript{78} In a case where the corporate officer has \textit{de jure} authority (i.e., the perpetrator is an employee or otherwise formally under the corporate officer’s command), the burden of proof switches to the defendant, and “the Court may presume that possession of such power \textit{prima facie} results in effective control unless proof to the contrary is produced.”\textsuperscript{79} Thus, if a corporate officer were tied to the aiding and abetting violations of a subordinate corporate employee, the defense would have the burden to show that the superior did not have effective control over the subordinate. Effective control exists when the civilian superior has the material ability to either repress or prevent the commission of the offense or, through his or her position in the hierarchy, report the crimes and that in light of his or her position there is a likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures.\textsuperscript{80} Notably, beyond the establishment of control,

\textsuperscript{76} Qi, 349 F. Supp. 2d at 1333.
\textsuperscript{77} Celebici, Appeals Chamber Judgment, ¶ 303 (“The Appeals Chamber understands the necessity to prove that the perpetrator was the ‘subordinate’ of the accused, not to import a requirement of \textit{direct or formal} subordination but to mean the relevant accused is, by virtue of his or her position, senior in some sort of formal or informal hierarchy to the perpetrator.”).
\textsuperscript{78} Wu & Kang, supra note 22, at 292.
\textsuperscript{79} Ford, 289 F.3d at 1291 (citing Celebici, Appeals Chamber Judgment, ¶ 197).
\textsuperscript{80} ICJ REPORT, supra note 17, at 34 (citing Prosecutor v. Brdanin, Case No. ICTY IT-99-36-T, ¶ 281, Trial Chamber Judgment (Sep. 1, 2004)). The same kind of logic is central to finding a duty in the Responsible Corporate Officer (RCO) context for strict liability criminal claims against corporate officers for violations of the Resource Conservation and Recovery Act or the Food, Drug & Cosmetic Act: a duty is imposed upon those who “had, by reason of [their] position . . . responsibility and authority either to prevent . . . or promptly to correct the violation complained of.” However, as Wu and Kang suggest, the imposition of strict liability for the types of crimes applicable to ATS suit would be unreasonable. First, crimes such as genocide and torture do not fit the mold of strict liability crimes, which attach liability regardless of culpability or knowledge. Second, the difference in punishment is significant as RCO crimes carry with them nominal fines and misdemeanor charges. A case under the ATS could result in a multi-million dollar judgment and significant harm to the superior’s reputation. Wu & Kang, supra note 22, at 280-81, 292-93.
the doctrine of superior responsibility does not require proof that a superior's "behavior proximately caused the victim's injuries."81

The concept of effective control is not limited to superior-subordinate relationships in a military command-style structure or a strict hierarchical paradigm.82 It follows that a corporate officer need not have formal authority over the perpetrators of the underlying violation to be held liable.83 Neither the Japanese diplomat Koki Hirota nor the German steel executive Hermann Roehling had legal or formal authority over the soldiers committing the crimes, yet both were held ultimately responsible because they had "sufficient" authority.84 A position of formal authority can often indicate or imply a certain level of du jure control, but is not necessary in instances of de facto control. Conversely, a demonstration of the general influence of a superior alone without any real connection to the criminal subordinate will usually not satisfy the requirement.85

Whether derived from de jure or de facto control, legal responsibility is not reserved for those superiors with the sole or ultimate authority.86 Any superior in the chain of command with effective control over a subordinate can face liability based on that subordinate's crimes. The district court in Doe v. Qi found the mayor of Beijing liable for the arbitrary detention and torture of tens of thousands of practitioners of Falun Gong, a religious minority, despite the fact that he shared authority "collectively with others through governing bodies."87 The court added in footnote 47, "The fact that command is shared by more than one official should not

81. Chavez, 559 F.3d at 499; see also Hilao, 103 F.3d at 773.
82. Prosecutor v. Semanza, Case No. 97-20-T, Judgment and Sentence, ¶ 401 (ICTR May 15, 2003) (citing Prosecutor v. Bagilishema, Case No. 95-1A, Judgment, ¶ 56 (ICTR June 7, 2001)) (rejecting the notion that there must be a "de jure-like" relationship).
84. Celibici, Trial Chamber Judgment, ¶ 376 (describing sufficient authority as "a term not normally used in relation to formal powers of command, but rather one used to describe a degree of (informal) influence").
85. Id. ¶s 266, 303. In this regard consider the following RCO jury instruction: "Second, it must be shown that the officer had direct responsibility for the activities that are alleged to be illegal. Simply being an officer or even the president of a corporation is not enough. The Government must prove that the person had a responsibility to supervise the activities in question." United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 50-51 (1st Cir. 1991).
87. Qi, 349 F. Supp. 2d at 1332.
obviate the doctrine of command responsibility *per se*, lest responsibility could never be imputed to members of a governing body which authorized human rights violations.” 88 The existence of such a principle plays a critical role in the use of superior responsibility for corporate officers, who often govern by committee.

In discussing the control element, it seems prudent to differentiate between cases linking high-ranking corporate officers to the crimes of the initial violators of human rights, and cases linking those corporate officers to the crimes of persons in the company who aided and abetted the underlying crimes. While both types of violations can implicate the superior, establishing effective control and a superior-subordinate relationship is often easier in the former scenario. In general, due to the implementation of protective or intentionally detached corporate hierarchies, cases will become increasingly difficult as the defendants hold higher-ranking positions in a company. A suit against the President or CEO of a huge multinational corporation for the criminal acts of security personnel hired and directly supervised by a low-ranking manager in a foreign subsidiary would involve a far more attenuated link of control than a case against the manager who hired and directly interacted with the security personnel. Plaintiffs will have to analyze that risk in consideration of the fact that low- or mid-level corporate officers might not have the personal means to satisfy a judgment, and might not reside or have a presence in the territory of the United States for personal jurisdiction purposes.

Inherent in the control requirement lies the caveat that if the supervisor would have been or was powerless to prevent the violation, no liability will attach. If there is nothing the superior could have done to prevent or punish a crime, it seems unfairly onerous and of little deterrent value to impose liability. 89 Yet, while the duty allows superiors to escape liability for failing to prevent the inevitable, there are fairly stringent limits to what a superior can claim as objectively impossible. In the *Yamashita* case, for example, the defense argued that even if General Yamashita had been explicitly notified of the atrocities being committed by his troops he would have been powerless to swiftly prevent them. The court, however, ruled that while a defendant might be powerless to prevent future crimes at a certain time, the superior is still responsible if he or

88. *Id.* at 1334 n.47.
89. Wu & Kang, *supra* note 22, at 295.
she allowed the situation to develop to an irreversible stage. 90

C. Scope

Even if a plaintiff can demonstrate the existence of a superior-subordinate relationship with effective control, a superior defendant is limited to liability for actions within the scope of that relationship. 91 The ICC statute expresses this principle in Article 28(2)(b), requiring that “[t]he crimes concerned activities that were within the effective responsibility and control of the superior.” 92 The scope issue will undoubtedly play a larger role in suits against corporate officers than it has in past cases in international tribunals. First, cases against military commanders rarely discuss scope, likely because under the strict hierarchical nature of the military, very little that a soldier does falls outside the scope of the military commander's duty. 93 The same could equally hold true for employees of private military and security companies, which operate similarly. But what about local security forces hired by a mining company to protect the mine? If those security personnel rape and torture villagers in close proximity to the mine, would that fall under the scope of the mining company manager's control? Clearly, the facts will have to establish the determination of scope in each case, but it should be noted that very little guidance exists in prior superior responsibility cases.

91. The Restatement (Second) of Agency defines conduct arising under the scope of employment as "of the same general nature as that authorized, or incidental to the conduct authorized." Restatement (Second) of Agency § 229(1) (1958).
92. Rome Statute, supra note 19, art. 28(2)(b). This requirement is not found in the military standard, noting that civilian superiors do not have the same kind of total around-the-clock control over their employees as military commanders do over their soldiers. Greg Verter, Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC), 25 Yale J. Int'l L. 89, 120 (adding that since courts rarely construe statutes as merely stating the obvious, one might argue that the addition of the "crimes concerned activities" portion is an implicit embodiment of a causation element.)
93. Wu & Kang, supra note 22, at 295.
D. Knowledge and Foreseeability

The knowledge standard represents the starkest divergence on superior responsibility between the new ICC statute and the standards utilized by the plethora of international tribunals and United States courts applying the doctrine before the ICC. Under the ICC, a civilian superior must have either known "or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes." In contrast, the ICTY, ICTR, and the United States cases adopted a much broader standard that allows a finding of either actual or constructive knowledge. Actual knowledge can be shown through direct or circumstantial evidence. To establish constructive knowledge, as the ICTY stated in Celibici:

[A] showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know' [...] This information does not need to provide specific information about unlawful acts committed or about to be committed.

The disparity between the standards is drastic. Under the ICC, a plaintiff would have to overcome an elevated burden requiring (1) proof of the possession of information clearly indicating that subordinates had or were about to commit crimes; and (2) proof that the corporate officer consciously disregarded that information.

Under the "knew or should have known standard," a demonstration that prior knowledge fell within the accepted area of responsibility of the superior can be imputed through less specific circumstantial evidence. For example, the court can weigh factors such as the superior’s position in the company and the nature of that position. If a superior regularly received reports or communications from superiors with knowledge of the crimes or if the crimes were of general knowledge due to media reports, the court could draw a

94. Rome Statute, supra note 19, art. 28(2)(a).
95. ICJ REPORT, supra note 17, at 33.
96. Celibici, Appeals Chamber Judgment, ¶ 238.
97. Xuncax, 886 F. Supp. at 172 (finding that, as the Minister of Defense, "at a minimum, [defendant] was aware of and supported widespread acts of brutality committed by personnel under his command"); Semanza, ICTR-97-20-T, ¶ 404 (noting that an individual's position within a chain of command is a "significant" factor in determining whether he had knowledge).
determination that the superior had constructive knowledge. 98

Under either standard, the courts will presume knowledge if the superior deliberately refrained from obtaining available information, or if he or she was so negligent about obtaining information “that malicious intent can be inferred from the failure to do so.” 99 If coupled with the ICC’s high burden, however, this caveat still allows for corporate officers to escape liability through crafty hierarchical structuring or operational practices that keep them isolated. The law should not only punish blatant cases of willful blindness but should encourage vigilance in actively avoiding such ignorance. Companies with a high risk of complicity in human rights violations, such as natural resource extraction and private security, have to act with a high degree of professional diligence in assessing risk for a wide array of factors in any business dealing. Companies evaluate and analyze investments and operations comprehensively, to the point that claiming ignorance serves as no excuse when evidence of human rights violations, or the risk of human rights violations, stemming from the company’s involvement is objectively available. In this sense, showing that the superior had some information in his or her possession to “put him on notice of possible unlawful acts by his subordinates” should be enough in every instance to prove that the superior should have either immediately taken action to prevent or punish those unlawful acts or, at the very least, initiated further investigation.

In that vein, the Tokyo Tribunal required systematic measures as opposed to direct supervision in a case against government leaders relating to the management of prisoners of war. Recognizing the complex system of delegated duties in a prison system, the Tribunal held that the government officials failed in their duty to secure proper treatment of the prisoners by (1) failing to establish a system that did so; or (2) if having established such a system, by failing to secure the continued and efficient working of said system. 100 This approach in effect states that delegation to a subordinate is no excuse when

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98. Celibici, Appeals Chamber Judgment, ¶ 230 (noting a presumption of knowledge based on reports and other means of communication, which would put defendant on notice of the human rights abuses).

99. ICJ REPORT, supra note 17, at 33 (citing Prosecutor v. Akayesu, Case No. 96-4-T, Trial Chamber Judgment, ¶¶ 479, 489 (ICTR Sept. 20, 1998)); Xuncax, 886 F. Supp. at 172-74 (anyone with higher authority who “knowingly ignored” may also be liable under command responsibility).

100. TOKYO TRIAL TRANSCRIPT, supra note 44, at 48, 444.
reliance upon the subordinate is unreasonable. From a policy standpoint, this makes perfect sense in the corporate context. The CEO of a major oil company cannot be expected to control every single person working for the company, but the law should still discourage corporate officers from calculatedly keeping themselves in the dark or promoting a "profit at all costs" business model. The Tokyo Tribunal aimed to deter this by requiring a system that aims to effectively protect the rights of others through risk analysis, reporting requirements, and the prompt and careful handling of any reports or information regarding connected human rights violations. Under the ATS, individual officers should likewise be liable for their failure to perform this duty. If a human rights violation takes place despite the implementation of a system taking the above precautions, a high-ranking officer would not be held liable unless he or she should have reasonably known that such a system was faulty or intrinsically ineffective.

VI. Conclusion

From the above analysis, it is clear that superior responsibility only fits as a theory of liability into a narrow set of cases. While the theory can prove useful in those cases, it is far from a gap filler for Kiobel should the Supreme Court uphold or follow the Second Circuit's grant of ATS immunity for corporations. Still, when viewed as an alternative or additional theory of liability to holding the individual decision-makers responsible for their involvement in human rights violations, superior responsibility could serve a key function. By holding superiors civilly liable for irresponsibly or intentionally failing to control or punish subordinates who violate human rights, United States courts can allow victims to take legal action against blameworthy individuals who were often in the best position to prevent the violation and are often in the best position to provide redress for the violation.

101. Wu & Kang, supra note 22, at 294-95.
102. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 129 (1st ed. 1997) ("[A]s a practical matter, the extension of culpability under command responsibility raises special questions in the context of organizations without rigid military hierarchies. Prosecutors will need to determine the chain of command in the absence of clear rank or even formal decision-making structures. Reliance will need to be placed on witness testimony and other indicia of the customary practices observed within a particular group.").