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## WHEN IS A CORPORATION A PERSON? WHEN IT WANTS TO BE. WILL *KIOBEL* END ALIEN TORT STATUTE LITIGATION?

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### I. INTRODUCTION

This article analyzes *Kiobel v. Royal Dutch Petroleum Co.*, only the second major Alien Tort Statute (ATS) case to reach the United States Supreme Court.<sup>1</sup> The narrow issue presented to the Court is whether corporations can be held liable for violations of international law under the ATS. However, this article will explain that while the issue of corporate liability is relatively clear, the Court is likely to seize this opportunity to reshape ATS jurisprudence, possibly eliminating the ATS as a tool to enforce international human rights standards in United States courts.

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<sup>1</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 115 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268, 269 (2d Cir. 2011), *reh'g denied en banc*, 642 F.3d 379, 380 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011) (No. 10-1491). The Supreme Court granted certiorari to review a decision of the United States Court of Appeals for the Second Circuit. *Id.*

In *Kiobel*, like *Wiwa v. Royal Dutch Petroleum Co.*, the plaintiffs allege that a defendant oil company aided and abetted the Nigerian government's violations of human rights in connection with suppressing opposition to a proposed oil pipeline by torture, arbitrary detention, and other mistreatment of its citizens.<sup>2</sup> The claims in *Kiobel* are typical of many ATS cases where plaintiffs allege that a multinational corporation, operating in a country outside of the United States, has aided and abetted a repressive government in brutally suppressing opposition to government policy.<sup>3</sup>

During oral argument, the conservative Justices focused on the ATS itself, while the liberal Justices attempted to focus the discussion on the issue of corporate liability. It appears that the Court is badly fractured between the pro-ATS wing (Justices Breyer, Ginsberg, and Kagan) and the conservative anti-ATS wing (Justices Roberts, Alito, Scalia, and Thomas).<sup>4</sup> *Kiobel* provides an opportunity for a results-oriented Supreme Court to finally end human rights activists' efforts to use the ATS to promote corporate social responsibility—perhaps by simply establishing a new doctrine of corporate immunity or perhaps by eliminating the jurisdictional reach of the ATS. Since the United States Court of Appeals for the Second Circuit's decision in *Filartiga v. Pena-Irala*, courts have routinely held that United States courts may consider claims involving violations of human rights in foreign countries.<sup>5</sup> In *Kiobel*, the Supreme Court may choose to summarily invalidate the entire body of modern ATS jurisprudence by declaring that United States courts lack jurisdiction over extraterritorial claims.

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<sup>2</sup> See *Kiobel*, 621 F.3d at 117; *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386(KMW), 2002 U.S. Dist. Lexis 3293, at \*1 (S.D.N.Y. 2002).

<sup>3</sup> The most prominent examples are *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009); *Doe v. Exxon Mobil Corp.*, 393 F.Supp. 2d 20 (D.D.C. 2005); and *Sarei v. Rio Tinto, PLC*, 221 F.Supp. 2d 1116 (C.D. Cal. 2002). More than thirty similar cases have resulted in published opinions.

<sup>4</sup> Justices Scalia and Thomas previously disagreed with parts of the Court's decision in *Sosa v. Alvarez-Machain*, which approved the use of the ATS as a tool to litigate claims of international law violations occurring outside of the United States. 542 U.S. 692, 739 (2004) (Scalia, J., concurring). Justice Alito repeatedly questioned the constitutionality of the ATS under Article III during oral argument in *Kiobel*. See generally Transcript of Oral Argument, *Kiobel*, No. 10-1491 (2012) [hereinafter *Kiobel Hearing*], available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1491.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf). However, as Justice Ginsberg observed, "*Sosa* accepted that [such claims] would be . . . viable action[s]." *Id.* at 13. Chief Justice Roberts's questions to Deputy Solicitor General Kneeder indicate a skeptical approach to the ATS. See generally *id.*

<sup>5</sup> See generally 630 F.2d 876 (2d Cir. 1980). The *Filartiga* court observed, "[c]ommon law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred." *Id.* at 885. Virtually every ATS case involves actions alleged to have occurred outside of the United States. Nevertheless, in 2004, the Department of Justice submitted an amicus brief to the Supreme Court in *Sosa*, arguing that the ATS did not authorize extraterritorial jurisdiction. The Court ignored this argument, tacitly approving the concept of extraterritorial jurisdiction. See BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 42–43 (2d ed. 2008).

On the other hand, the Court may reject the Second Circuit Court of Appeals' poorly reasoned and unprecedented rejection of the settled principle of corporate liability, and clarify the rule set forth in *Sosa v. Alvarez-Machain* that only well-established norms of international law can be enforced under the ATS.<sup>6</sup> The Court could also resolve complicated questions regarding whether and when international law—as opposed to federal common law—should apply in ATS cases.

## II. CORPORATE LIABILITY UNDER THE ATS

In the United States Court of Appeals for the Second Circuit's decision in *Kiobel*, Judge Cabranes, joined by the ultra-conservative Judge Jacobs,<sup>7</sup> held that corporations enjoy immunity from civil liability under the ATS.<sup>8</sup> *Kiobel* acknowledged that “[a] legal culture long accustomed to imposing liability on corporations may, at first blush, assume that corporations must be subject to tort liability under the ATS, just as corporations are generally liable in tort under our domestic law (what international law calls ‘municipal law’).”<sup>9</sup> Judge Leval concurred in the judgment to dismiss the complaint because he found that the plaintiffs had not established a *prima facie* case, but wrote a strong concurring opinion sharply disagreeing with the holding that corporations cannot be held liable under international law.<sup>10</sup>

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<sup>6</sup> See generally 542 U.S. 692 (2004). In 2009, the author believed, like most observers of ATS litigation, that there was no serious doubt that corporations were liable to the same extent as any other party. In the author's treatise *Human Rights and the Alien Tort Statute: Law History and Analysis*, he noted that “defendants have continued to argue that the law of nations does not apply to corporations,” but that *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009), had characterized the issue as a “long settled question.” PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE: LAW HISTORY AND ANALYSIS 207–08 (ABA Books 2009) [hereinafter *Henner*].

<sup>7</sup> Judge Jacobs, the Chief Judge of the Second Circuit, was appointed by George Bush in 1992 after working nineteen years for a large Wall Street firm, Simpson Thacher & Bartlett, LLP. He is a member of the Federalist Society and before his opinion in *Kiobel*, he was known for incorporating right-wing policy statements in his opinions and speeches. See Glenn Greenwald, *Dennis G. Jacobs: Case Study in Judicial Pathology*, SALON (Sep. 22, 2011, 4:23 AM), [http://www.salon.com/2011/09/22/jacobs\\_3/singleton](http://www.salon.com/2011/09/22/jacobs_3/singleton) (commenting on Judge Jacobs's virulent dissent from the en banc holding in *Amnesty Int'l USA v. Clapper*, 667 F.3d 163 (2d Cir. 2011), and quoting Jacobs as saying “the only purpose of this litigation is for counsel and their plaintiffs to act out their fantasy of persecution . . . and to raise funds for self-sustaining litigation.” 667 F.3d at 203).

<sup>8</sup> See generally, *Kiobel*, 621 F.3d 111 (2d Cir. 2010).

<sup>9</sup> *Id.* at 117. In support of this proposition, *Kiobel* cited the landmark case of *N.Y. Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 492 (1909), which held that corporations can be held criminally liable. *Kiobel*, 621 F.3d at 117. *Kiobel* also cited the recent case of *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010), which held that corporations have the same constitutional rights as natural persons to make political contributions. *Kiobel*, 621 F.3d at 117 n.11. *Kiobel*'s reference to *Citizens United*, while holding that corporations do not have the same responsibilities as natural persons for tortious activities, is ironic, if not Orwellian.

<sup>10</sup> *Kiobel*, 621 F.3d at 150–96.

The *Kiobel* majority held that the issue of corporate liability was a “norm” that required a consensus of international law to be applied in ATS cases, and that corporations were not civilly liable under international law for human rights violations because no such norm existed.<sup>11</sup> Prior to the Second Circuit Court of Appeals’ decision in *Kiobel*, corporate defendants had occasionally argued that they were not subject to liability under the ATS, but had never been successful. In 2008, the United States Court of Appeals for the Eleventh Circuit held that the ATS “grants jurisdiction from complaints of torture against corporate defendants.”<sup>12</sup> In 2005, Judge Jack Weinstein held that “[a] corporation is not immune from civil legal action based on international law” and adopted an amicus brief that noted that corporate liability “had been widely recognized or assumed by federal courts,” citing seven specific cases.<sup>13</sup>

*Presbyterian Church of Sudan v. Talisman Energy, Inc.*, decided by the same Second Circuit Court of Appeals judges as *Kiobel*, held that a court should apply international law to determine whether liability could be imposed for aiding and abetting and for engaging in a joint criminal enterprise.<sup>14</sup> However, the court did not address the District Court’s lengthy discussion of corporate liability.<sup>15</sup>

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<sup>11</sup> *Id.* at 131–45.

<sup>12</sup> *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

<sup>13</sup> *Loi v. Dow Chem. Co.*, 373 F. Supp. 2d 7, 54–59 (E.D.N.Y. 2005), *aff’d sub nom* Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008) (citing *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113–14 (5th Cir. 1988); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004); and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 311–19 (S.D.N.Y. 2003).

<sup>14</sup> 582 F.3d 244, 259–60 (2d Cir. 2009).

<sup>15</sup> *See id.* at 268. The District Court considered the question of which corporate entity might be liable in great detail. The court engaged in an extensive choice of law analysis, to determine whether the parent or a subsidiary corporation would be a liable party. However, the District Court accepted without question that some corporations might be liable parties under the ATS. *Presbyterian Church of Sudan*, 453 F. Supp. 2d at 682–87. On appeal, the Second Circuit “assume[d] without deciding that the corporations . . . may be held liable for the violations of customary international law . . . .” *Presbyterian Church of Sudan*, 582 F.3d at 261 n.12. The *Kiobel* majority cited this footnote to characterize “the question of corporate liability . . . as an open question in our Circuit.” 621 F.3d at 117 n.10 (citing Judge Korman’s concurrence in *Khulumani v. Barclay National Bank*, 504 F.3d 254, 321–25 (2d Cir. 2007) and the majority opinion in *Doe v. Nestle*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) for the proposition that corporations are not liable under the ATS, and claiming that “others have acknowledged, either explicitly or implicitly, that the question remained unanswered,” citing Judge Katzmans’s refusal to address the issue in *Khulumani* because the issue had not been raised, and the United States’ brief in opposition to a petition for certiorari from the Second Circuit Court of Appeals’ decision in *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009)). In *Pfizer*, the United States argued that the Supreme Court should not grant certiorari to consider the issue because it had not been considered below. Brief for the United States as Amicus Curiae in Opposition to the Petition for a Writ of Certiorari at 9 n.2, *Pfizer, Inc. v. Abdullahi*, No. 09-34, 2010 WL 2214874 (May 28, 2010). In footnote ten, the *Kiobel* majority simply ignored

The failure to address corporate liability is striking because eight months earlier in *Pfizer v. Abdullahi*, a different Second Circuit panel held that a corporation was liable under the ATS for conducting non-consensual medical experiments on human subjects.<sup>16</sup> In *Pfizer*, the court simply assumed, without comment, that a corporation could be liable under the ATS for violating international law.

In *Wiwa v. Royal Dutch Petroleum Co.*, Nigerian citizens alleged that Royal Dutch Petroleum had aided and abetted the same Nigerian government human rights abuses at issue in *Kiobel*.<sup>17</sup> The United States Court of Appeals for the Second Circuit simply assumed the corporate defendant could be liable while analyzing personal jurisdiction and *forum non conveniens* at length,<sup>18</sup> ultimately resulting in a \$15.5 million settlement on the eve of trial.<sup>19</sup>

Since the Second Circuit Court of Appeals' decision in *Kiobel*, corporate defendants have asserted claims of corporate immunity in ATS cases. In two cases where a lower court preceded *Kiobel*, defendants only raised the issue for the first time on appeal, presumably because defendants had not believed that a claim of corporate immunity had a reasonable chance of success before the District Court.<sup>20</sup> Corporate immunity has since been rejected by the United States Courts of Appeals for the D.C., Seventh, and Ninth Circuits, which explicitly refused to follow the *Kiobel* majority and instead relied upon the concurring opinion of Judge Leval.<sup>21</sup>

In *Doe v. Exxon-Mobil*, Judge Rogers of the D.C. Circuit wrote a thorough and scholarly response to *Kiobel*.<sup>22</sup> She began by distinguishing the issue of "corporate

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the weight of authority recognizing corporate liability under the ATS, such as *Romero v. Drummond Co.*, *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7 (2d Cir. 2005), and the long history of cases simply assuming that corporations could be liable parties. *Kiobel*, 621 F.3d at 117 n.10.

<sup>16</sup> See generally *Abdullahi*, 562 F.3d 163 (holding Pfizer's conduct violated an international norm that was: (1) obligatory, (2) specific and definable, and (3) of mutual concern to the nations of the world and therefore met the *Sosa* criteria for an ATS claim); see *Henner*, *supra* note 6, at 175–76.

<sup>17</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92–93 (2d Cir. 2000).

<sup>18</sup> *Id.* at 94–107 (analyzing personal jurisdiction and *forum non conveniens*).

<sup>19</sup> See Press Release, Ctr. for Constitutional Rights and EarthRights Int'l, *Settlement Reached in Human Rights Cases Against Royal Dutch/Shell* (June 8, 2009), [http://wiwavshell.org/documents/Wiwa\\_v\\_Shell\\_Settlement\\_release.pdf](http://wiwavshell.org/documents/Wiwa_v_Shell_Settlement_release.pdf). Note that this settlement was reached after the January 2009 argument in *Kiobel*, but before the September 2010 decision.

<sup>20</sup> *Cf. Aziz v. Alcolac, Inc.*, 658 F.3d 388, 394 n.6 (4th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011). Corporate defendants allege that the issue of corporate liability is a matter of subject matter jurisdiction, rather than a merits question, and therefore can be raised for the first time on appeal. Whether corporate liability is a jurisdictional question is one of the issues currently before the United States Supreme Court in *Kiobel*.

<sup>21</sup> See *infra* notes 85–88.

<sup>22</sup> 654 F.3d at 39–57.

liability” from the “conduct-governing norms at issue in *Sosa*,” then concluded that corporate liability was consistent with the purposes of the ATS, agency law, and international law.<sup>23</sup> In *Flomo v. Firestone Natural Rubber Co.*, the conservative Judge Posner, mentioned as a potential Supreme Court nominee during the Bush administration, also rejected corporate immunity, calling the *Kiobel* decision an “outlier.”<sup>24</sup>

In *Sarei v. Rio Tinto, PLC*, seven judges of the United States Court of Appeals for the Ninth Circuit, sitting *en banc*, affirmed a lower court ruling permitting the action to proceed.<sup>25</sup> The judges explicitly refused to follow *Kiobel* and held that corporations could be liable parties.<sup>26</sup> Writing for the court, Judge Schroeder adopted “the sounder view . . . expressed in Judge Leval’s concurrence” and held that the question of corporate liability was a question of international law; the court should first determine whether a violation of a norm of international law had been established, and then proceed to the question of whether a particular private actor could be liable for it.<sup>27</sup> He held there was “no legitimate basis” for the “position that the [ATS] is a complete bar to corporate liability.”<sup>28</sup>

Judge McKeown held that the “long and consistent tradition of corporate liability in tort under the federal common law leaves no doubt that corporate liability is available under the ATS.”<sup>29</sup> However, Judge McKeown also held that

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<sup>23</sup> *Id.* at 41.

<sup>24</sup> *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011).

<sup>25</sup> 671 F.3d 736 (9th Cir. 2011). The several lengthy opinions in *Sarei* have raised virtually every extant issue under the ATS, and *Sarei* could be a vehicle for a very comprehensive review of ATS principles by the Court. See generally *id.* The United States Supreme Court scheduled the petition for certiorari for conference on March 2, 2012, but no decision was announced. See John Elwood, *Relist (and Hold) Watch*, SCOTUS BLOG (Mar. 8, 2012, 10:22 AM), <http://www.scotusblog.com/2012/03/relist-and-hold-watch-13/>. Because the Court has now ordered supplemental briefing in *Kiobel* to address broader issues, which could effectively resolve all ATS litigation, it is not clear whether the Court will ever find it necessary to review *Sarei*. See Lyle Denniston, *Kiobel to be Expanded and Reargued*, SCOTUS BLOG (Mar. 5, 2012, 2:01 PM), <http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/>.

<sup>26</sup> See *Sarei*, 671 F.3d at 747. The opinion of the court was written by Judge Schroeder, joined by Judges Silverman and Berzon; Judges Reinhardt, Pregerson (joined by Rawlinson), and McKeown (joined by Reinhardt and Berzon) wrote concurring opinions. All of those opinions held that corporations could be liable under the ATS. The four dissenting Judges, Bea, Ikuta, Kleinfeld, and Callahan, did not address the issue of corporate liability.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 748. The court noted that two district courts, one in Virginia and one in Maryland, had found corporations liable for war crimes under the ATS and cited the Geneva Convention as evidence that international law is not limited based upon the identity of the perpetrator of war crimes. *Id.* at 764 (citing *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009) and *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 744 (D. Md. 2010)).

<sup>29</sup> *Sarei*, 671 F.3d at 785 (McKeown, J., concurring in part and dissenting in part) (citing *Cook Cnty. v. U.S. ex rel. Chandler*, 538 U.S. 119, 125 (2003)).

the substantive international norms at issue in *Sarei* did not exclude corporate liability under international law.<sup>30</sup> Judge Reinhardt believed that corporations can be liable under the ATS, but continued to maintain, as he did in *Doe v. Unocal*,<sup>31</sup> that questions like corporate liability should be determined as a matter of domestic law (i.e., federal common law), rather than international law, and federal common law provides for corporate liability.<sup>32</sup>

In a recent case, *Aziz v. Alcolac, Inc.*, the United States Court of Appeals for the Fourth Circuit declined to reach the question of corporate liability and dismissed an ATS case on alternate grounds.<sup>33</sup> The United States Court of Appeals for the Fifth Circuit, in the 1999 case of *Beanal v. Freeport-McMoran, Inc.*, simply assumed a corporation could be liable under the ATS.<sup>34</sup> As previously noted, the Eleventh Circuit in *Romero v. Drummond Co.* has flatly rejected the idea of corporate immunity from liability.<sup>35</sup> District courts in the Third and Fourth Circuits have rejected the corporate immunity principle advocated by the *Kiobel* majority.<sup>36</sup>

*Kiobel* now represents the law of the Second Circuit. The Southern District of New York, within the Second Circuit, is home to some of the most prominent ATS cases in the country, including *In re South African Apartheid Litigation*.<sup>37</sup> In that case, ATS plaintiffs are suing some of the biggest multinational corporations in the world, alleging the corporations were liable under the ATS for aiding and abetting apartheid.<sup>38</sup> This issue might have reached the United States Supreme Court as an appeal from the Second Circuit decision in *Khulumani v. Barclay National Bank Ltd.*<sup>39</sup> However, the Court could not review *Khulumani* in 2008

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<sup>30</sup> *Id.* at 789–92.

<sup>31</sup> *Doe v. Unocal Corp.*, 395 F.3d 932, 964–69 (9th Cir. 2002) (Reinhardt, J., concurring).

<sup>32</sup> *Sarei*, 671 F.3d at 770–72 (Reinhardt, J., concurring).

<sup>33</sup> 658 F.3d 388, 394 n.6 (4th Cir. 2011).

<sup>34</sup> 197 F.3d 161, 163 (5th Cir. 1999).

<sup>35</sup> 552 F.3d 1303, 1315 (11th Cir. 2008).

<sup>36</sup> See *Krishanthi v. Rajaratnam*, No. 09–CV–05395 (DMC–JAD), 2011 WL 2607108, at \*1–2 (D.N.J. 2011); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 744 (D. Md. 2010).

<sup>37</sup> 617 F. Supp. 2d 228 (S.D.N.Y. 2009). The decision of the district court was on remand from the decision of the United States Court of Appeals for the Second Circuit in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

<sup>38</sup> The original list of defendants from the first reported decision in the case includes: Citigroup, Inc., IBM Corporation, Schindler AG, Exxon Mobil Corporation, American Isuzu Motors, Inc., and Barclays National Bank. See generally *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

<sup>39</sup> *Khulumani* addressed the issue of aiding and abetting liability under the ATS. Two judges held that such liability exists, but Judge Katzmman based his concurring opinion on international law while Judge Hall relied upon federal common law. 504 F.3d at 264–84 (Katzmann, J., concurring); *id.* at 286–88 (Hall, J., concurring). Judge Korman's dissent would have applied international law, but also questioned whether corporations could be liable. *Id.* at 321–25 (Korman, J., dissenting).

because it did not have a quorum due to conflicts of interest since a majority of the Court owned stock in at least one of the corporate defendants.<sup>40</sup> If *Kiobel* is affirmed, the plaintiffs in *In re South African Apartheid Litigation* will be unable to proceed.

### III. THE *KIOBEL* DECISION

#### A. *Interpretation of Sosa*

In *Sosa v. Alvarez-Machain*, the United States Supreme Court held that federal courts have jurisdiction under the ATS to hear claims of violations of international law only if there is a claim that an international norm that is “specific, universal, and obligatory” was violated.<sup>41</sup> International law clearly proscribes certain torts, including torts committed by state actors (such as torture and extrajudicial killing), and some torts committed by private citizens (such as piracy, and war crimes).<sup>42</sup> Other torts (such as environmental harm) that interfere with political freedoms, and common law torts (such as assault and battery) do not violate international law, either because there is no international consensus regarding the tort, or because the action—even though perhaps prohibited by the law of every nation—does not involve issues of international concern.<sup>43</sup>

Perhaps the most contentious issue in post-*Sosa* ATS litigation is the language in footnote twenty, stating that a relevant question is “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”<sup>44</sup> In *Kiobel*, the United States Court of Appeals for the Second Circuit held this statement meant a court can only find jurisdiction under the ATS if it concludes that a particular tort violates international law and that international law would impose liability upon a particular defendant.<sup>45</sup> It is generally understood that other sources of law, mostly federal common law, should apply to determine

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<sup>40</sup> See generally *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

<sup>41</sup> 542 U.S. 692, 732 (2004) (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)) (internal quotation marks omitted).

<sup>42</sup> See *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 743 (9th Cir. 2011); *Henner*, *supra* note 6, at 133–77 (listing the torts which are actionable under the ATS and describing which ones require a showing of state action).

<sup>43</sup> *Henner*, *supra* note 6, at 190–98.

<sup>44</sup> *Sosa*, 542 U.S. at 732 n.20.

<sup>45</sup> *Kiobel's* holding, as has been observed in the briefs to the United States Supreme Court, ignores the statement of the Court in its other ATS case: “The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same defect after the passage of the FSIA as before with respect to defendants other than foreign states.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).



procedural questions where international law does not provide an answer.<sup>46</sup> The *Kiobel* majority conceded that the domestic or municipal law of a particular country should decide questions that constitute remedies.<sup>47</sup> However, the court then held that footnote twenty determined that “[w]hether a particular remedy . . . can be enforced *against* a certain individual or entity is not a question of *remedy*; it is a question of the scope of *liability*.”<sup>48</sup>

Contrary to *Kiobel*, footnote twenty does not indicate that the question of corporate liability is a norm of international law. Nor does footnote twenty suggest any distinction between corporations and individuals. Instead, the footnote simply drew a distinction between the liability of state actors and the liability of private actors.<sup>49</sup>

### B. *Application of International Law*

The *Kiobel* decision was presaged by *Presbyterian Church of Sudan* where Judge Jacobs stated: “[F]ootnote [twenty] of *Sosa*, while nominally concerned with the liability of non-state actors, supports the broader principle that the scope of liability for ATS violations should be derived from international law.”<sup>50</sup> This language is crucial to understanding the background of Judge Cabranes’s majority opinion in *Kiobel*, which claims to consider “customary international law to

<sup>46</sup> Judge Hall, in his concurring opinion in *Khulumani*, cites an amicus brief for the principle that it is a “hornbook principle that international law does not specify the means of its domestic enforcement” and cites other authority for this proposition. 504 F.3d 254, 286–87 (2d Cir. 2007).

<sup>47</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 147 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011) (No. 10-1491).

<sup>48</sup> *Id.* at 147 n.50. The sharpest criticism of *Kiobel*’s holding is Judge Rogers’ opinion in *Doe v. Exxon Mobil*:

The Second Circuit’s approach overlooks the key distinction between norms of conduct and remedies . . . and instead conflates the norms and the rules (the technical accoutrements) for any remedy found in federal common law. And in so doing, the majority in *Kiobel* . . . misreads footnote [twenty] in *Sosa*, on which it primarily relies . . . .

654 F.3d 11, 50 (D.C. Cir. 2011).

<sup>49</sup> Footnote twenty compared two previous ATS cases: *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984), where the court analyzed whether individual terrorists could be liable under the ATS without state action; and *Kadic v. Karadzic*, 70 F.3d 232, 239–41 (2d Cir. 1995), where Radovan Karadzic was held liable for atrocities in Serbia, even though he was not a state actor. In *In re Agent Orange Product Liability Litigation*, Judge Weinstein cited footnote twenty for the proposition that “the Supreme Court acknowledged that corporations can be sued under the ATS.” 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005).

<sup>50</sup> *Presbyterian Church of Sudan*, 582 F.3d 244, 258 (2d Cir. 2009). Judge Jacobs was joined by Judges Cabranes and Leval, the same panel that decided *Kiobel*. *Presbyterian Church of Sudan* also declared that Judge Katzmann’s concurring opinion in *Khulumani*, holding that international law should determine whether a claim of aiding and abetting liability was actionable under the ATS, was the law of the Second Circuit. *Id.*

determine both whether certain conduct leads to ATS liability and whether the scope of liability under the ATS extends to the defendant being sued.”<sup>51</sup>

Courts have sharply disagreed as to whether international law or federal common law should apply to ancillary issues under the ATS.<sup>52</sup> The majority of courts that have considered the issue have looked to international law, rather than federal common law, to determine a variety of ancillary questions, such as violations of aiding and abetting or conspiracy.<sup>53</sup> However, even if international law applies, the United States Court of Appeals for the Second Circuit in *Kiobel* was the first court to hold that an ancillary issue must satisfy an established “norm” of international law as a precondition for a court to assert jurisdiction under the ATS.<sup>54</sup>

The *Kiobel* majority concluded that corporate liability was not recognized under international law.<sup>55</sup> The court discussed the Nuremberg tribunals and found that liability had only been imposed upon individuals, not corporations.<sup>56</sup> Since Nuremberg, international tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have only asserted jurisdiction over individuals, and not corporations.<sup>57</sup> The court did not find that treaties imposed corporate liability and criticized the contrary conclusion reached by the District Courts in *Presbyterian Church of Sudan* and *In re Agent Orange Product Liability Litigation*.<sup>58</sup>

### C. Judge Leval’s *Kiobel* Concurrence

Judge Leval’s forty-seven-page concurring opinion characterized the majority as:

“[D]eal[ing] a substantial blow to international law and its undertaking to protect fundamental human rights . . . [by permitting] one who earns profits by

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<sup>51</sup> 621 F.3d at 120 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004)).

<sup>52</sup> For example, see the dispute between Judges Katzmann and Hall in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); and Judges Pregerson and Reinhardt in *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002). See also *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202–03 (9th Cir. 2007).

<sup>53</sup> The choice of law issue as to whether international law, rather than federal common law, should apply when international law addresses the question has not been definitively decided. A variety of procedural issues, such as statutes of limitations, standing to sue, and the availability of certain types of relief, are not discussed in international law and must be addressed by the relevant domestic or municipal law.

<sup>54</sup> 621 F.3d at 147–48 (characterizing the issue of whether a particular remedy can be enforced against a party as a question of scope of liability, rather than a question of remedy).

<sup>55</sup> *Id.* at 131–32.

<sup>56</sup> *Id.* at 132–36.

<sup>57</sup> *Id.* at 136–37.

<sup>58</sup> *Id.* at 138–41, 140 n.41.

commercial exploitation . . . [to] shield those profits . . . simply by taking the precaution of conducting the heinous operation in the corporate form.”<sup>59</sup>

Judge Leval commenced his critique of the majority by describing the role that international law has played in protecting fundamental human rights. He noted that since the Nuremberg trials, international law has increasingly focused on humanitarian and moral concerns (e.g., efforts to stop trafficking in women, piracy, and genocide), and held that there was no purpose for international law to adopt a principle of corporate immunity from liability.<sup>60</sup> After discussing these policy concerns, Judge Leval recounted the history of ATS litigation and noted the absence of any precedent for the majority’s rule.<sup>61</sup> He also cited the two opinions of the Attorney General of the United States, which “refute . . . the majority’s view that corporations have neither rights nor obligations under international law.”<sup>62</sup>

Two separate parts of Judge Leval’s concurrence, parts II(C) and III(D), criticized the majority for taking *Sosa*’s reference to a “norm” out of context. Judge Leval argued that *Sosa*, including footnote twenty, plainly referred to norms of conduct, not remedies.<sup>63</sup> *Sosa* held that a United States court could award damages under international law even in the absence of a specific statute authorizing a cause of action.<sup>64</sup> If damages against individual defendants can be awarded as a remedy despite the absence of an “international norm,” there is no reason why corporate liability cannot be imposed as well. If the Court in *Sosa* meant to require a showing that corporate liability was a norm of international law, the Court would never have approved the line of cases beginning with *Filartiga*, which routinely determined that civil damages were an appropriate remedy despite the absence of such a remedy under international law.<sup>65</sup>

Judge Leval also noted that the international tribunals cited by the majority were criminal tribunals and the unsuitability of criminal punishment for corporations does not determine whether civil liability can be found under international law.<sup>66</sup> He maintained that an issue pertaining to civil liability is a question of damages

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<sup>59</sup> *Id.* at 149–50 (Leval, J., concurring).

<sup>60</sup> *Id.* at 159–60.

<sup>61</sup> *Id.* at 160–63.

<sup>62</sup> *Id.* at 162 (discussing the opinions of the Attorney General in 1795 and 1907). The 1907 opinion specifically referenced the possibility that an American corporation could be sued by Mexican nationals under the ATS for the diversion of the water of the Rio Grande. 26 Op. Att’y Gen. 252, 253 (1907); *see also* 1 Op. Att’y Gen. 57 (1795).

<sup>63</sup> *Kiobel*, 621 F.3d at 163–65, 176–79.

<sup>64</sup> *Id.* at 164; *see generally* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>65</sup> *See Sosa*, 542 U.S. at 724–25 (discussing the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d 1980)); *supra* note 5.

<sup>66</sup> *Kiobel*, 621 F.3d at 163.

or remedies, not a substantive norm. The relative silence of international law regarding such issues, including the question of civil liability for corporations, simply means that international law leaves questions of remedies, including the possibility of monetary damages against a particular entity, to the law of individual nations. Judge Leval also noted that international law certainly did not provide an exemption from liability for juridical entities such as corporations.<sup>67</sup>

#### *D. Request for Rehearing and En Banc Review*

Plaintiffs moved for a panel rehearing, and an unidentified Second Circuit judge polled the other circuit judges as to whether the case should be heard *en banc*.<sup>68</sup> Because the full Circuit was evenly split, rehearing *en banc* was denied for lack of a majority.<sup>69</sup> Judge Lynch argued for the *en banc* review because of the importance of the issue, the split in the circuits, and because he believed the majority opinion was “very likely incorrect” for the reasons stated by Judge Leval.<sup>70</sup> Judge Katzmman wrote a separate dissent, stating he agreed with Judge Leval’s reasoning.<sup>71</sup> He also stated his disagreement with the *Kiobel* majority’s conclusion that his opinion in *Khulumani* “leads to the inescapable conclusion” that corporations cannot be liable under the ATS.<sup>72</sup> Although Judge Katzmman’s opinion in *Khulumani* relied upon international law to determine whether aiding and abetting liability could be imposed under the ATS, he had not stated that the question of aiding and abetting liability was a substantive “norm” under *Sosa*, requiring universal acceptance.<sup>73</sup>

All of the three panel judges wrote opinions in response to the petition for panel rehearing.<sup>74</sup> Chief Judge Jacobs defended the original decision, arguing that corporations should be immune from litigation because of their role as “engines of their national economies, sustaining employees, pensioners and creditors—and paying taxes.”<sup>75</sup> He also argued that corporations needed to be protected by prompt dismissal of ATS suits without “invasive discovery” and possible bad

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<sup>67</sup> *Id.* at 174–76.

<sup>68</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379, 380 (2d Cir. 2011), *denying reh’g en banc* 621 F.3d 111 (2d Cir. 2010).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (Lynch, J., dissenting) (noting that *Kiobel* contradicted *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008)).

<sup>71</sup> *Id.* (Katzmann, J., dissenting).

<sup>72</sup> *Id.* (quoting *Kiobel*, 621 F.3d 111, 130 n.33 (2d Cir. 2010)).

<sup>73</sup> *See id.* at 380–81 (explaining the *Kiobel* opinion).

<sup>74</sup> *See generally* *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268 (2d Cir. 2011), *denying reh’g* 621 F.3d 111 (2d Cir. 2010).

<sup>75</sup> *Id.* at 270 (Jacobs, J., concurring).

public relations.<sup>76</sup> He further argued “examples of corporations in the atrocity business are few in history.”<sup>77</sup>

Judge Jacobs also noted the possible effects of ATS on foreign relations.<sup>78</sup> His opinion prompted Judge Cabranes, the author of the *Kiobel* appellate decision at issue, to reaffirm that he based his opinion on “fidelity to the law, not a ‘policy agenda.’”<sup>79</sup> Judge Leval, in uncommonly strong language for an appellate court opinion, characterized Judge Jacobs’s opinion as revealing “an intense, multifaceted policy agenda” and restated the arguments that he had made in his concurring opinion.<sup>80</sup>

Judge Leval expressed amazement at Judge Jacobs’s confidence that corporations do not behave badly and noted that “slave trading, piracy and mercenary warfare can be lucrative but expensive businesses . . . requir[ing] capital and . . . the protections afforded by such juridical forms of organization . . . .”<sup>81</sup> Judge Leval also noted that Somalian pirates already have adopted a business organization format, and he described the private contractors who perform armed protective services abroad.<sup>82</sup> He stated that “[t]he question is whether, when a child enslaved for prostitution eventually obtains her freedom and sues, she can recover the profits the business earned from the sale of her body. The majority’s answer is an unhesitating No.”<sup>83</sup>

Judge Leval noted the foreign policy concerns expressed by Judge Jacobs, but characterized the majority’s remedy as “substantial overkill.”<sup>84</sup> He also pointed

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<sup>76</sup> *Id.* at 271.

<sup>77</sup> *Id.* This statement is truly remarkable, in light of the specific allegations that have been made in ATS cases alone, describing horrific allegations against multinational companies, particularly but not exclusively companies involved in mining and oil. *Cf.* Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009) (non-conventional medical experimentation); Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (use of forced labor to build a pipeline); Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (war crimes associated with oil development in Sudan); Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003) (torture and extrajudicial killing of union activists); Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (genocide, war crimes, racial discrimination in connection with mining); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (use of slave labor by German subsidiary of United States corporation during World War II).

<sup>78</sup> *Kiobel*, 642 F.3d at 270 (Jacobs, J., concurring).

<sup>79</sup> *Id.* at 272 (Cabranes, J., concurring).

<sup>80</sup> *Id.* (Leval, J., dissenting).

<sup>81</sup> *Id.* at 275.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 275 n.4.

<sup>84</sup> *Id.* at 274.

out the absence of any guidance from the Department of State with respect to the *Kiobel* litigation.<sup>85</sup>

#### IV. BEFORE THE SUPREME COURT

The United States Supreme Court granted certiorari solely to address the questions of:

1. Whether the issue of corporate civil tort liability under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.
2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held.<sup>86</sup>

It is difficult to believe that the *Kiobel* holding of corporate immunity has any validity because it is virtually unprecedented and is a clear misinterpretation of both *Sosa* and international law. Additionally, it was not argued with any force prior to *Kiobel*, and was rejected by every court to consider it—including the United States Courts of Appeals for the D.C.,<sup>87</sup> Seventh,<sup>88</sup> Ninth,<sup>89</sup> and Eleventh<sup>90</sup> Circuits. Nevertheless, the case is now before the United States Supreme Court with at least four members who are politically conservative and who may be looking for a vehicle to stop ATS litigation against United States corporations. This is only the third ATS case to reach the Supreme Court and the first case since *Sosa*.<sup>91</sup> Justice Scalia and Justice Thomas, who dissented in the Supreme Court's *Sosa* ruling, are still on the Court, and there are four Justices who did not participate in *Sosa* (Roberts, Alito, Sotomayor, and Kagan).

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<sup>85</sup> *Id.* at 276. In its brief to the United States Supreme Court supporting the reversal of *Kiobel*, the United States did not raise any foreign policy concerns. See generally Brief for the United States as Amicus Curiae Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2011 WL 6425363 (Dec. 21, 2011).

<sup>86</sup> *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 WL 687061 (Mar. 5, 2012), available at <http://www.supremecourt.gov/orders/courtorders/030512zr.pdf>.

<sup>87</sup> *Doe v. Exxon-Mobil Corp.*, 654 F.3d 11, 39–57 (D.C. Cir. 2011).

<sup>88</sup> *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011).

<sup>89</sup> *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011).

<sup>90</sup> *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008).

<sup>91</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 116–17. *Kiobel* inaccurately states that “the Supreme Court in its entire history has decided only one ATS case,” referring to *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Id.* at 116–17. However, the Court addressed the question

Paul Hoffman, a veteran ATS litigator, commenced his argument by describing the “principal issue” as “whether a corporation can ever be held liable for violating fundamental human rights norms under the Alien Tort Statute.”<sup>92</sup> Justice Kennedy opened the questioning by asking not only about corporate liability, but also about the theory that the ATS permits United States courts to exercise extraterritorial jurisdiction over human rights abuses anywhere in the world.<sup>93</sup>

Most of Mr. Hoffman’s time was spent responding to persistent questions from Justice Alito, with one question from Chief Justice Roberts, pertaining to whether United States courts should hear a claim that arose in Nigeria and was brought by Nigerian plaintiffs against companies based in Holland and the United Kingdom.<sup>94</sup> Justice Ginsburg observed that the questioning seemed to address issues in *Filartiga* that had been resolved in *Sosa*, and that the case before the Court pertained to corporate liability.<sup>95</sup> However, Justice Kennedy stated cryptically that “*Filartiga* is a binding and important precedent for the Second Circuit.”<sup>96</sup> He then went on to ask whether the *Kiobel* plaintiffs could have brought a lawsuit in another jurisdiction, commenting that the *Filartiga* plaintiffs could only have sued in the United States.<sup>97</sup> During rebuttal, Justice Scalia inquired into Mr. Hoffman’s position as to whether aiding and abetting liability was determined by domestic or international law.<sup>98</sup>

The United States supported the petitioners.<sup>99</sup> Both Justices Kagan and Scalia questioned Deputy Solicitor General Edwin Kneedler regarding whether corporate liability was a matter of enforcement (i.e., a remedy) for a substantive norm.<sup>100</sup> Chief Justice Roberts prefaced a question to Mr. Kneedler by stating, “under international law, it is critically pertinent who’s undertaking the conduct

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of the immunity of a foreign nation from an ATS claim in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). It is true that the Supreme Court did not decide any ATS case prior to the Second Circuit’s decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which inaugurated modern ATS litigation and *Sosa* is the only ATS case where the Court has addressed the post-*Filartiga* use of the ATS to vindicate international human rights.

<sup>92</sup> *Kiobel Hearing*, *supra* note 4, at 3.

<sup>93</sup> *Id.* at 3–4.

<sup>94</sup> *Id.* at 8.

<sup>95</sup> *Id.* at 13.

<sup>96</sup> *Id.* It is not clear if he was implying that *Filartiga* was limited to the Second Circuit or to the particular situation where plaintiffs had no other forums. Presumably, *Filartiga* was approved by the Supreme Court in *Sosa*, and unless the Court says otherwise in *Kiobel*, is binding for the entire country.

<sup>97</sup> *Id.* at 13–14.

<sup>98</sup> *Id.* at 55–56. Mr. Hoffman stated that international law would apply. *Id.*

<sup>99</sup> *Id.* at 15.

<sup>100</sup> *Id.* at 16–20.

that is alleged to violate international norms.”<sup>101</sup> Justice Roberts seemed to reject the argument that domestic law defines who is a liable party. He specifically referred to the distinction between state and non-state actors, but Justice Roberts may be indicating that he believes that the issue of corporate liability must be a norm of international law.<sup>102</sup>

Kathleen M. Sullivan of Quinn Emanuel Urquhart & Sullivan, LLP argued for the respondents and faced skeptical questioning regarding the corporate liability exemption. Justices Breyer, Ginsburg, and Kagan tried to focus on the issue formally presented to the Court—the corporate liability issue.<sup>103</sup> In contrast, it appears that the conservative Justices are more concerned with issues of extraterritoriality and jurisdiction than corporate liability.

Since it may be difficult to justify an exemption from liability for corporations, the anti-ATS Justices may be trying to stop ATS litigation by revisiting issues that were decided in *Sosa*. It may also be easier for the conservatives to persuade Justice Kennedy, who sided with the majority in *Sosa*, to reconsider the jurisdictional reach of the ATS than to persuade him to hold that corporations enjoy immunity.<sup>104</sup> Justice Sotomayor, who was not on the Court when *Sosa* was decided, did not give any indication of her leanings and asked only two questions: one pertaining to the difference between corporate liability and *respondeat superior* liability, and one pertaining to the ability to sue under the Torture Victim Protection Act.<sup>105</sup>

The Court could have granted certiorari in *Sarei v. Rio Tinto, PLC*,<sup>106</sup> a case which addresses virtually all of the pending issues in ATS litigation including, among other issues, whether various substantial torts constitute violations of the law of nations and whether liability can be imposed for “aiding and abetting.” The Court, however, did not rule on the petition for certiorari for *Sarei*. Instead, it ordered supplemental briefing and re-argument in *Kiobel* to address “whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”<sup>107</sup>

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<sup>101</sup> *Id.* at 21.

<sup>102</sup> *Id.* at 21–22.

<sup>103</sup> *Id.* at 25–34.

<sup>104</sup> Justice Kennedy wrote the opinion of the Court in *Citizens United v. Federal Election Commission*, which held that corporations have the same rights as individuals for the purposes of political contributions. 558 U.S. 50 (2010). It might be difficult for Justice Kennedy to now say that corporations are not subject to the same liabilities.

<sup>105</sup> *Kiobel Hearing, supra* note 4, at 21, 52.

<sup>106</sup> *See supra* note 25 (discussing the Supreme Court’s apparent decision to hold *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (No. 11-649)).

<sup>107</sup> *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 WL 687061 (Mar. 5, 2012), available at <http://www.supremecourt.gov/orders/courtorders/030512zr.pdf>.



The Court will determine the jurisdictional reach of the ATS in *Kiobel*, and possibly determine questions of aiding and abetting liability as well (“under what circumstances” may refer to liability for accessory parties). The decision on these issues may remove the need to decide the narrow issue of corporate liability at all. If courts cannot recognize a cause of action occurring outside of the United States, there is no need to decide whether corporations are immune from liability for actions abroad.<sup>108</sup>

## V. CONCLUSION

Although the conservative majority on the United States Supreme Court may be hostile to the idea of ATS litigation, it is hard to see how the Justices can adopt the blanket exemption from liability for corporations advocated by *Kiobel*. The Second Circuit’s holding is an unprecedented departure from established case law and has been rejected by all other courts to consider the issue. In addition, Judge Jacobs’s admission that his position is motivated by policy considerations may be tough for the conservative Court justices to swallow since they generally oppose deciding cases on the basis of policy rather than strict construction of law.

It will be ironic if *Kiobel* ends ATS litigation. After thirty years of fighting—involving hotly disputed legal arguments about numerous complicated issues that could have been decided in a variety of ways—*Kiobel* presents a strange theory that corporations enjoy immunity from civil liability, an argument most observers believe has no merit and had long since been resolved. Nevertheless, that argument has won opponents of ATS cases a ticket to the United States Supreme Court. The Court may have been waiting for an excuse to end the nuisance that ATS cases have posed, by simply denying that the ATS confers jurisdiction against multinational corporations for violations of international law that occur outside of the United States.<sup>109</sup>

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<sup>108</sup> If the Court concludes in *Kiobel* that actions can not be brought under the ATS for violations of international law that occur abroad, the Court will not need to decide the issues raised in *Sarei*.

<sup>109</sup> It is generally recognized that “international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presenting for their determination.” *The Paquete Habana*, 175 U.S. 677, 700 (1900). However, the conservative majority on the Court has recently expressed clear hostility to expanding the application of international law in United States courts. *Cf. Medellín v. Texas*, 552 U.S. 491 (2008) (limiting the enforcement of international treaties to treaties that have been implemented by domestic legislation).