

**Kiobel v. Royal Dutch Petroleum: Another Round in the Fight Over Corporate Liability Under the Alien Tort Statute**

By [Chimène I. Keitner](#)

**Introduction**



On September 17, 2010, the Second Circuit dismissed a putative class action brought by Esther Kiobel, the wife of a member of the “Ogoni Nine” who was executed by hanging in 1995 along with Nigerian author and environmentalist Ken Saro-Wiwa.<sup>[1]</sup> The plaintiffs alleged that Royal Dutch Petroleum Company and Shell Transport and Trading Company,

acting through a Nigerian subsidiary, aided and abetted the Nigerian dictatorship’s violent suppression of protests against oil exploration and development activities in the Ogoni region of the Niger Delta. The *Kiobel* dismissal has garnered attention because of its broad holding that corporations are not subject to suit under the Alien Tort Statute. Absent action by the Second Circuit *en banc*, the U.S. Supreme Court, or Congress, corporations will no longer be subject to suit under the Alien Tort Statute in the Second Circuit, or in any circuit that adopts the Second Circuit’s reasoning.<sup>[2]</sup>

This *Insight* explores the background and implications of this major decision.

**Background: From *Filártiga* to *Unocal***

The Alien Tort Statute (ATS), a provision in the 1789 Judiciary Act, provides jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>[3]</sup> In *Filártiga v. Peña-Irala*, the Second Circuit held that two Paraguayan citizens could sue another Paraguayan citizen for torture that occurred in Paraguay.<sup>[4]</sup> The district court had personal jurisdiction over the defendant because he was “found and served with process” in the United States, and it had subject matter jurisdiction over the claim under the ATS because “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”<sup>[5]</sup> Twenty-four years later, in *Sosa v. Alvarez-Machain*, the Supreme Court interpreted the ATS in a manner “generally consistent with the reasoning” in *Filártiga*<sup>[6]</sup> to find that “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment” did not violate a sufficiently well-defined norm of customary international law to provide subject matter jurisdiction under the ATS.<sup>[7]</sup>

Between *Filártiga* and *Sosa*, plaintiffs began naming corporations, in addition to individuals, as defendants in ATS suits for a variety of injuries, ranging from torture to pollution and environmental damage to nonconsensual medical experimentation. These cases soon became a crucible for debates about the relationship between international law and U.S. law, and the appropriate role of U.S. courts in enforcing international norms. In March 2005, Unocal Corporation settled ATS and state law claims that had been brought against it and two of its senior executives.<sup>[8]</sup> More recently, Royal Dutch / Shell settled ATS claims brought against it by a group of plaintiffs led by the son of Ken Saro-Wiwa.<sup>[9]</sup> During the same period, the two corporate ATS cases that went to trial resulted in verdicts for the defendants.<sup>[10]</sup>

Most of the legal attention in corporate ATS cases has focused on corporations’ motions to dismiss for lack of subject matter jurisdiction under

[Click here to become an ASIL member](#)

**RELATED ASIL INSIGHTS**

[Samantar v. Yousuf: Foreign Official Immunity Under Common Law](#)

[Wiwa v. Shell: The \\$15.5 Million Settlement](#)

[Accountability of Private Security Contractors under International and Domestic Law](#)

[The Seventh Circuit Again Finds Jurisdiction for Private Remedies for Violations of Article 36 of the Vienna Convention on Consular Relations](#)

[U.S. Courts Rule on Absolute Immunity and Inviolability of Foreign Heads of State: The Cases against Robert Mugabe and Jiang Zemin](#)

[Partial Victory for Zimbabwe President Mugabe in U.S. Litigation Alleging Human Rights Violations](#)

[Alien Tort Claims Act Proceeding Against Robert Mugabe](#)

[Insights Archive>>](#)

**DOCUMENTS OF NOTE**

[Alien Tort Statute](#)

[Kiobel v. Royal Dutch Petroleum \(2d Cir.\)](#)

[Wiwa v. Shell Legal Documents](#)

[Sosa v. Alvarez-Machain](#)

[Bowoto v. Chevron Legal Documents](#)

[Sarei et al. v. Rio Tinto Legal Documents](#)

[Abdullahi v. Pfizer Legal Documents](#)

[Khulumani v. Barclay Nat. Bank Ltd Legal Documents](#)

[Presbyterian Church of Sudan et al v. Talisman Energy, Inc. Legal Documents](#)

[Doe I v. Unocal Legal Documents](#)

Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim under Rule 12(b)(6). The Second Circuit dismissed the ATS claims in *Kiobel* for lack of subject matter jurisdiction, because the claims were brought against corporations, rather than natural persons.<sup>[11]</sup>

## The Legal Questions

ATS cases against corporations raise a host of issues not addressed in *Sosa*, which involved an individual, not a corporate defendant. Because the ATS operates at the intersection of international and domestic law, courts must decide which body of law applies to various aspects of ATS cases.<sup>[12]</sup>

In *Presbyterian Church of Sudan v. Talisman Energy*, argued on the same day and before the same panel as *Kiobel*, the Second Circuit determined that international law, not U.S. law, establishes the standard for aiding and abetting liability.<sup>[13]</sup> The panel further found that international law requires purposefully—not just knowingly—aiding and abetting a violation.<sup>[14]</sup> Judge Leval, who concurred in the result in *Kiobel*, would have dismissed the *Kiobel* claims on the basis that the complaint “does not contain allegations supporting a reasonable inference that [Royal Dutch and Shell] acted with a purpose of bringing about the alleged abuses.”<sup>[15]</sup>

In the *Kiobel* majority opinion, Judge Cabranes, joined by Chief Judge Jacobs, dismissed the claims on different grounds. In the majority’s view, “the fact that corporations are liable as juridical persons under domestic law does not mean that they are liable under international law (and, therefore, under the ATS).”<sup>[16]</sup> In order for a violation to give rise to jurisdiction under the ATS, following *Filártiga*, “the nations of the world [must] have demonstrated that the wrong is of mutual, and not merely several, concern . . . .”<sup>[17]</sup> The majority therefore asked whether, under international law, it is wrong for a corporation to commit, or to aid and abet, violations such as “war crimes, crimes against humanity (such as genocide), and torture.”<sup>[18]</sup> Because no international tribunal has held a corporation liable for violating customary international law, the majority concluded that international law violations by corporations do not give rise to subject matter jurisdiction under the ATS.<sup>[19]</sup>

## The Role of “Juridical Entities”

Much of the contemporary jurisprudence regarding international law violations committed by individuals comes from international criminal tribunals. The majority in *Kiobel* thus approached the ATS largely through the lens of international criminal law. Their opinion cites the statement in the Nuremberg judgment that “[c]rimes against international law are committed by men, not by abstract entities”<sup>[20]</sup> to support the conclusion that individuals, not corporations, are liable for international law violations—even though the Nuremberg Tribunal’s point was that individuals *as well as states* can be held accountable for such violations.<sup>[21]</sup>

In the majority’s view, the Supreme Court foreclosed the application of domestic law to the question of corporate liability in footnote 20 of the *Sosa* opinion, which states that “[a] related consideration [for accepting a cause of action under the ATS] 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>[22]</sup> The majority interpreted the phrase “scope of liability”—which does not appear anywhere else in the *Sosa* opinion—to include the question of whether or not a named defendant can be a corporation or only a natural person (or, presumably, a state). It reasoned that “[t]here is no principled basis for treating the question of corporate liability differently”<sup>[23]</sup> from the questions of whether an international law violation can take place absent state action (the issue in footnote 20), or whether international law recognizes aiding and abetting as a mode of liability (the issue in *Talisman*). As a result, the majority determined that the ATS does not provide subject matter jurisdiction over claims against corporations.

As the concurrence pointed out, however, the early ATS case of *Hilao v. Estate of Marcos* involved the actions of an individual, but the legal consequences were borne by his estate, a juridical entity.<sup>[24]</sup> For the concurrence, this was an entirely appropriate application of domestic law: international law governed the substance of the violation, and domestic law governed the attribution of liability. The concurrence characterized corporate liability as a matter of “the appropriate remedies to enforce the norms of the

## ORGANIZATIONS OF NOTE

[U.S. Supreme Court](#)

[United States Court of Appeals for the Second Circuit](#)

[Center for Constitutional Rights](#)

[Royal Dutch/Shell Group](#)

Copyright 2010 by The American Society of International Law ASIL

The purpose of ASIL Insights is to provide concise and informed background for developments of interest to the international community. The American Society of International Law does not take positions on substantive issues, including the ones discussed in this Insight. Educational and news media copying is permitted with due acknowledgement.

The Insights Editorial Board includes: [Cymie Payne](#), UC Berkeley School of Law; [Amelia Porges](#); and [David Kaye](#), UCLA School of Law. [Djurđja Lazic](#) serves as the managing editor.

law of nations.”<sup>[25]</sup> If one were to adopt the concurrence’s approach, one could also think of corporate liability as a matter of *attributing* individuals’ conduct to the corporation (a question of domestic law), rather than *regulating* the conduct of individuals acting on the corporation’s behalf by defining their actions as wrongful (a question of international law).

## Implications

ATS claims have perplexed courts for at least three decades. Although ATS cases against individuals have, as a general matter, attracted support, cases against corporations have met much greater opposition. The U.S. State Department has supported the role of U.S. courts in enforcing human rights,<sup>[26]</sup> but it has also indicated the potential for certain ATS suits to interfere with the conduct of foreign relations.<sup>[27]</sup> The Supreme Court established a high threshold for actionability in *Sosa* in part because of these concerns.<sup>[28]</sup> The decisions in *Talisman* and *Kiobel* basically put a halt to cases against corporations in the Second Circuit. However, the *Kiobel* opinion may in fact give a boost to cases against individuals who acted on behalf of foreign states (the “abstract entities” in the Nuremberg judgment) or corporations (the “abstract entities” in the *Kiobel* judgment) with its unremitting emphasis on the fact that “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.”<sup>[29]</sup> This should give both foreign officials and corporate executives reason for pause.<sup>[30]</sup>

## Conclusion

It is only a matter of time before the Supreme Court weighs in on legal questions arising from cases brought against corporations under the ATS. Although it would be preferable to enable more appellate courts to analyze these questions before intervening, the time and costs involved in defending against ATS suits will likely push corporations to seek an authoritative resolution sooner rather than later. Plaintiffs with ATS claims against corporations are also anxious for review since, following *Talisman* and now *Kiobel*, they have lost one of their traditionally most hospitable fora in the Second Circuit.

## About the Author

Chimène I. Keitner, an ASIL member, is an Associate Professor of Law at the University of California, Hastings College of the Law, and a Co-Chair of the 2011 ASIL Annual Meeting Program Committee.

## Endnotes

[1] *Kiobel v. Royal Dutch Petroleum*, No. 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010).

[2] Less than ten days before the Second Circuit issued its opinion in *Kiobel*, a California district court reached the same conclusion. See *Doe I v. Nestle*, No. 2:05-cv-05133, at 121-60 (C.D. Cal. Sept. 8, 2010). The question of corporate liability was discussed briefly during oral argument before the Ninth Circuit *en banc* in *Sarei v. Rio Tinto*, No. 02-56256 (argued Sept. 21, 2010), but other issues have thus far predominated in that case. The audio recording of the oral argument is available at [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000006103](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000006103).

[3] 28 U.S.C. § 1350 (2010).

[4] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

[5] *Id.* at 878.

[6] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

[7] *Id.* at 738.

[8] See, e.g., Edward Alden & Doug Cameron, *Unocal Pays Out in Burma Abuse Case*, FIN. TIMES (Dec. 14, 2004), [http://rights.igc.org/press/unocal\\_settle\\_FT\\_1204.htm](http://rights.igc.org/press/unocal_settle_FT_1204.htm) (reporting on settlement in principle).

[9] See Ingrid Wuerth, *Wiwa v. Shell: The \$15.5 Million Settlement*, ASIL INSIGHTS (Sept. 9, 2009), <http://www.asil.org/files/insight090909pdf.pdf>.

[10] *Bowoto v. Chevron*, No. 3:99-cv-02506 (N.D. Cal.) (jury verdict reached on Dec. 1, 2008); *Estate of Rodriguez v. Drummond*, No. CV-03-BE-0575 (N.D. Ala.) (jury verdict reached on July 26, 2007).

[11] In a related development, one week before the *Kiobel* decision, the Ninth Circuit held that the Torture Victim Protection Act of 1991 does not apply to corporations, but only to natural persons, because that statute uses the term “individual.” See *Bowoto v. Chevron*, No. 09-15641, at 13-17 (9th Cir. Sept. 10, 2010).

[12] *But cf.* Ingrid B. Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1563455> (arguing that “the relationship between federal common law and international law . . . is best understood on a continuum”).

[13] *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009), *petitions for cert filed* Apr. 15, 2010 & May 20, 2010.

[14] *Id.* at 259. Arguably, international law supports a knowledge standard. See Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008), available at [https://www.uchastings.edu/hlj/Archive/vol60/Keitner\\_60-HLJ-61.pdf](https://www.uchastings.edu/hlj/Archive/vol60/Keitner_60-HLJ-61.pdf).

[15] *Kiobel*, at 74 (Leval, J., concurring).

[16] *Id.* at 6 (majority opinion).

[17] *Id.* (quoting *Filártiga*, 630 F.2d at 888).

[18] *Id.* at 8.

[19] *Id.* at 9. On December 4, 2009, a three-judge panel consisting of Judges Cabranes, Hall, and Livingston spontaneously requested supplemental briefing on this issue in the pending appeal in *Balintulo v. Daimler AG*, No. 09-2778 (2d Cir.), framing the question as “whether customary international law recognizes corporate criminal liability.”

[20] *Kiobel*, at 7 (quoting *United States v. Goering*, Judgment (Int’l Mil. Trib. Nuremberg Sept. 30, 1946), reprinted in 6 F.R.D. 69, 110 (1946-47), available at <http://www.uniset.ca/other/cs4/6FRD69.html>).

[21] See *Kiobel*, at 7 (noting that the “singular achievement” of international law since Nuremberg has been the recognition that the subjects of customary international law “now include not merely states, but also individuals”). The first ATS case to reach the U.S. Supreme Court was brought against a foreign state, not an individual. *Argentine Rep. v. Amerada Hess*, 488 U.S. 428 (1989) (claim brought by two Liberian corporations against the Argentine Republic for a tort allegedly committed by its armed forces on the high seas in violation of international law).

[22] *Sosa*, 542 U.S. at 733 n.20. The author notes that, as suggested elsewhere, in footnote 20, “[t]he *Sosa* majority was concerned with whether a private actor, as opposed to a state actor, can violate international law, not with whether a corporation, as opposed to an individual, can do so.” Keitner, *supra* note 14, at 72; see also *Kiobel*, at 53 (Leval, J., concurring) (adopting the same interpretation).

[23] *Kiobel*, at 24 (majority opinion).

[24] *Id.* at 23 n.12 (Leval, J., concurring) (citing *Hilao v. Estate of Marcos*, 103 F.3d 767, 776-77 (9th Cir. 1996)).

[25] *Id.* at 44 (Leval, J., concurring).

[26] See, e.g., Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in *Filártiga v. Peña-Irala*, reprinted in 19 I.L.M. 585 (1980).

[27] For example, the United States previously took the position that pending ATS litigation against corporations alleged to have aided and abetted apartheid in South Africa was adverse to U.S. foreign policy interests. See *Sosa*, 542 U.S. at 733 n.20.

[28] *Id.* at 727.

[29] *Kiobel*, at 7 (majority opinion).

[30] This emphasis on individual responsibility is consistent with the State Department's decision to impose sanctions on individual Iranian officials alleged to have committed human rights abuses. See Robert Burns, *US Slaps Sanctions on 8 Iranian Officials*, ASSOCIATED PRESS (Sept. 29, 2010), <http://www.google.com/hostednews/ap/article/ALeqM5iZfgLuKrg3QBRItJ0qQMlzglohD9IHQE9O3?docId=D9IHQE9O3>.

