06-4800, 06-4876

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENTE TUSIMA,

Plaintiffs-Appellants-Cross-Appellees,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC,

Defendants-Appellees-Cross-Appellants,

and

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES/CROSS-APPELLANTS IN OPPOSITION TO PETITION FOR REHEARING AND REHEARING *EN BANC*

October 22, 2010 (*Caption continued*)

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INTRODUCTION

On September 17, 2010, this Court held that the law of nations does not provide for corporate liability via the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. The panel unanimously agreed that Appellants' ("Kiobel") lawsuit, which has dragged on for more than eight years (and is a copy of the *Wiwa v. Shell* case commenced in 1996), must be dismissed. (Op. at 1-2.) Kiobel's petition[1] rests largely on the proposition that the issue of corporate liability was not raised by Shell. That claim is utterly frivolous. *See* Local Rule 35.1(d), 40.1(c). Additionally, Kiobel has not met—and cannot meet—the standard for rehearing or rehearing *en banc*.[2]

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[1] Many of the arguments raised by the *amici curiae* are not raised by Kiobel, and thus need not be considered by the Court. *See World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 753 n.3 (5th Cir. 2009); *United States. v. Vazquez-Botet*, 532 F.3d 37, 52 (1st Cir. 2008); *see also Knetsch v. United States*, 364 U.S. 361, 370 (1960).

[2] A petition for panel rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition". Fed. R. App. P. 40(a)(2). "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

ARGUMENT

I. SHELL RAISED THE ISSUE OF CORPORATE LIABILITY.

Kiobel contends: (1) appellate jurisdiction under 28 U.S.C. § 1292(b) did not extend to the issue of corporate liability; (2) corporate liability was not raised, briefed, or argued on appeal; and (3) the Court could not raise corporate liability *sua sponte* because it is not an issue of subject matter jurisdiction. Each of those arguments is meritless.

A. The Court's Appellate Jurisdiction Under 28 U.S.C. § 1292(b) Included the Issue of Corporate Liability.

Kiobel maintains that the panel's appellate jurisdiction did not extend to the issue of corporate liability. (Pet. 3 (citing *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996).) *Yamaha*, however, holds that appellate jurisdiction under 28 U.S.C. § 1292(b) "applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court". *Yamaha*, 516 U.S. at 205. Here, the district court certified its September 29, 2006, order granting in part and denying in part Shell's motion to dismiss. Thus, appellate jurisdiction exists to address all grounds for dismissing all or part of the complaint.

B. Corporate Liability Was Raised, Briefed, and Argued on Appeal.

Kiobel (and several *amici*) asserts that "[r]ehearing is . . . appropriate to address how the panel reached the corporate liability issue, which was never

raised, briefed, or argued in this case at any point, including this appeal" and that "the first inkling [Kiobel] had that corporate liability might be an issue in this appeal came when the decision was issued on September 17, 2010". (Pet. 2-3.) Those statements are patently false.

First, Shell's brief argued that "the law of nations does not attach civil liability to corporations under any circumstance", because the "Rome Statute and the charters governing the ICTY and ICTR restrict the jurisdiction of those tribunals to 'natural persons' only, excluding corporations from their coverage". (Brief of Appellees/Cross-Appellants ("SB") 30). It further stated: "the drafters of the Rome Statute explicitly considered and declined to recognize corporate liability" and "when Congress enacted the TVPA, it excluded the possibility of corporate liability for extrajudicial killing (and torture)". (SB 30, 31.)

Second, Kiobel's reply brief says: "Shell incorrectly claims that 'the law of nations does not attach civil liability to corporations under any circumstances'" because: (1) the documents to which Shell cited are the founding documents for entities that apply only "international *criminal* law"; (2) "[n]o Court has ever accepted the argument that corporations cannot be held liable in ATS suits"; and (3) "the Rome Statute['s] require[ment] that an individual cannot be held civilly liable until they have been held criminally liable . . . is simply a

provision of that particular treaty and has no basis in customary international law". (Reply Brief for Plaintiffs-Appellants-Cross-Appellees ("KRB") 45 n.31.)

Third, Shell's reply brief emphasized an argument central to the Court's holding on corporate liability: "if the defendant 'is a private actor such as a corporation', the international norm must specifically 'extend[] the scope of liability' to such an actor" because "footnote 20 is part of the Court's holding that the law of nations determines what acts and actors may be held liable under the ATS". (Reply Brief of Appellees/Cross-Appellants ("SRB") 1, 3.)

Fourth, Kiobel's December 29, 2008, letter to the Clerk of Court stated that the Eleventh Circuit had "affirmed that . . . the ATS permits suits against corporations", and confirmed that "Appellants in this case made th[at] argument[] . . . [in] their reply brief".

Fifth, corporate liability was discussed at length during oral argument. (*See* 1/12/09 Tr. ("Tr.") 16:15-26:5, 36:14-38:5, 49:11-50:17.) The Court asked Kiobel's counsel, "Has a corporation ever been held liable by any international tribunal for violation of international law?" (Tr. 16:18-20), and questions about corporate liability: under the Rome Statute (Tr. 17:21-18:1); in the Nuremberg trials (Tr. 18:15-16); and in international law generally (Tr. 21:13-18, 25:21-24).

Finally, Kiobel's argument that corporate liability was raised in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, but not in *Kiobel* (Pet. 4),

is untrue. *Kiobel* and *Talisman* were heard in tandem at the recommendation of Staff Counsel (*see* 2/13/07 Am. Civil Cross-Appeal Scheduling Order) and were both argued by Paul L. Hoffman, who told the Court that the cases presented "important overlapping issues" (*see* 6/30/08 Letter from Paul L. Hoffman to Catherine O'Hagan Wolfe). During oral argument in *Kiobel*—not *Talisman*—after observing that Kiobel was "not able to point to any decision of an international tribunal or court of appeal which has held that a corporation can violate international law, and thereby expose itself to liability under the ATS", Judge Cabranes suggested that Kiobel submit a supplemental letter on the issue. (Tr. 22:17-23:4.)

Kiobel's "first inkling" was not on September 17, 2010 (Pet. 2-3), but many years earlier, and repeated at each point thereafter at which the issue could have been raised.

C. Corporate Liability Via the ATS Is an Issue of Subject Matter Jurisdiction.

Kiobel also maintains that "[t]he majority overreached in deciding [the issue of corporate liability] *sua sponte* because the issue is not one of subject matter jurisdiction". (Pet. 3.) Putting aside that Shell—not the Court *sua sponte*—raised the issue, the Court followed the settled law in the Second Circuit since *Filartiga*: federal subject matter jurisdiction does not exist under the ATS unless the complaint pleads a violation of customary international law. *See Filartiga v.*

Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980) ("alleging a 'violation of the law of nations'" is a "*jurisdictional threshold*" that a plaintiff must meet to successfully bring suit under the ATS (emphasis added)); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) ("There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States).").

The ATS is not a garden-variety federal statute providing a cause of action, with jurisdiction provided by the "arising under" language of § 1331. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), explicitly held that the ATS is "only jurisdictional"; for the ATS to provide jurisdiction: (1) the alleged claim must set forth a violation of an international law norm with "content and acceptance among civilized nations" at least as definite as "the historical paradigms familiar when § 1350 was enacted", and (2) "international law [must] extend[] the *scope of liability* for a violation of a given norm to the perpetrator being sued". *Id.* at 729, 732 & n.20 (emphasis added); *see Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 n.9 (2d Cir. 2009), *cert. denied*, --- S. Ct. --- (Oct. 4, 2010). Scope of liability under the ATS must be a jurisdictional issue, because the statute is purely jurisdictional.[3]

[3] The cases cited by Kiobel (Pet. 3 n.5) are inapposite. *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192 (D.C. Cir. 2004),

II. *EN BANC* CONSIDERATION IS NOT "NECESSARY TO SECURE OR MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS".

A. The Decision Does Not Conflict with *Sosa*.

Kiobel cannot conflict with *Sosa* because *Sosa* did not involve a corporation. Indeed, Kiobel admits as much: "Nothing in *Sosa* inferentially supports or even discusses [corporate liability under the ATS]". (Pet. 8 n.11 (quoting Leval Op. at 53).) Kiobel attempts to manufacture a conflict with *Sosa*, stating that because "[i]nternational law has never been structured to supply all of the rules required to provide domestic tort remedies for violations of the law of nations", *Kiobel's* methodology would render "the ATS a nullity in direct conflict

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decided before *Sosa*, concluded that "it is not frivolous to assert that [the ATS] creates a cause of action", and therefore concluded that a claim of "arising under" jurisdiction was not frivolous. *Id.* at 1195. After *Sosa*, neither proposition is remotely tenable. *Reed Elsevier, Inc. v. Munchnick*, 130 S. Ct. 1237 (2010), addresses federal jurisdiction under the Copyright Act, not the ATS.

The argument in the *Brief of Amicus Curiae Professors of Federal Jurisdiction* (at 3) that subject matter jurisdiction exists over ATS claims as "long as the allegations invoking the court's jurisdiction are not 'wholly insubstantial and frivolous'" also fails. Without explicitly saying so, what the Professors seek is a reversal of the rule established in *Filartiga* and reaffirmed consistently thereafter by this Court: under the ATS, a court must "engage[] in a more searching preliminary review of the merits than is required, for example, under the more flexible 'arising under' formulation". *Filartiga*, 630 F.3d at 887.

with the central holding in *Sosa*".[4] (Pet. 5, 6.) Kiobel is incorrect for three reasons.

First, Kiobel is complaining about *Sosa's* own methodology: examining "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 an individual".[5] *Sosa*, 542 U.S. at 732 n.20.

Second, *Sosa* emphasized three historic examples that provide an important touchstone for evaluating the ATS. *Id.* at 716-17, 720-21 (discussing the Marbois incident, *Bolchos v. Darrell*, and Attorney General Bradford's 1795 opinion). Each of those incidents involved redress sought from individuals. *Id.* The Court's decision hardly renders the ATS "stillborn" (Pet. 5): it leaves viable

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[4] *First Nat'l City Bank (FNCB) v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983), cited by Kiobel (Pet. 14 n.19), is inapposite. *FNCB* contained no ATS claims. The question in *FNCB* was whether Cuba could avail itself of the U.S. courts to recover monies from a U.S. corporation on a *contract claim* while evading liability by creating, dissolving, and reformulating government-owned corporations. *See FNCB*, 462 U.S. at 613-16.

[5] Kiobel's related argument that the decision adopts Judge Bork's position in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Pet. 8), misconstrues both *Kiobel* and Judge Bork's concurrence. Judge Bork concluded that the ATS provides jurisdiction only if international law (or a federal statute) provides a private right of action. *Tel-Oren,* 726 F.2d at 820. *Kiobel* is not tethered to the existence of a private cause of action, but only to whether "international law extends the scope of liability for a violation of a given norm to the perpetrator being sued", as required by *Sosa*. *Sosa*, 542 U.S. at 732 n.20.

three historic examples of ATS liability, as well as *Filartiga*, *Kadic*, and similar ATS suits against natural persons.

Finally, Kiobel complains that this Court's decision conflicts with the spirit of *Sosa* by granting "corporations license to commit, abet and profit from the most serious human rights violations with impunity". (Pet. 1.) However, as the Court made clear, nothing in its decision "limits or forecloses corporate liability under any body of law *other than the ATS*" (*e.g.*, treaties or domestic statutes such as the TVPA); nothing in its decision "limits or forecloses suits under the ATS against a corporation's employees, managers, officers, directors, or any other person who commits . . . violations of international law"; and nothing in its decision "limits or forecloses Congress from amending the ATS"[6] to provide jurisdiction over corporations.[7] (Op. at 48-49.)

[6] As the discussion of the Antiterrorism and Effective Death Penalty Act of 1996 in the *Brief of Amici Curiae Victims of International Terrorism* (at 6-7) demonstrates, nothing in *Kiobel* prohibits Congress from acting under the Define and Punish Clause, U.S. CONST. art. I, § 8, to pass legislation providing for corporate liability for violations of the law of nations.

[7] *Kiobel* also argues (1) that the majority's interpretation of *Sosa* footnote 20 is incorrect and (2) that the fact that no international tribunals have held corporations liable is of no import because "the international tribunals the majority refers to were created solely for the purpose of adjudicating certain crimes". (Pet. 6-8.) Those arguments were already made (*see* KRB 45 n.31; Tr. 17:1-18:1, 18:15-19:23, 25:4-26:5), were addressed and rejected by the Court (*see* Op. at 21-22 & n.31, 45-46), and set forth no error of fact or controlling law.

B. The Decision Does Not Conflict with Second Circuit Law.

Before *Kiobel*, this Court had left the issue of corporate liability open. *See Talisman*, 582 F.3d at 261 n.12 (leaving open "the question of 'whether international law extends the scope of liability' [under the ATS] to corporations"); *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 283 (2d Cir. 2007) (Katzmann, J., concurring) ("[B]ecause the defendants have not objected to the imposition of liability [on the basis that defendants are corporations], we need not reach the issue at this time."); *id.* at 321-25 (Korman, J., concurring in part and dissenting in part) (indicating that the issue of corporate liability under the ATS is an open question); *see also* Op. at 5 n.10, 15-16. Thus, *Kiobel* could not conflict with this Court's precedent.

Kiobel's argument that the decision conflicts with the law of this Court because "[t]his Court has consistently entertained ATS actions filed against corporations" (Pet. 9) is incorrect. In all of those prior cases, the Court did not address the issue of corporate liability—the issue either went unnoticed, unaddressed, or was specifically left open for another day.[8] "Questions which

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[8] *See Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (no discussion of corporate liability), *cert. denied*, 130 S. Ct. 3541 (June 29, 2010); *Khulumani*, 504 F.3d at 282-83 (Katzmann, J., concurring) (explaining that the Court need not reach the issue of corporate liability because defendants did not raise the question); *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004) (no mention of corporate liability); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003)

merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents".[9] *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also* Op. at 15-16.[10]

C. Kiobel's Arguments Regarding the Text, History, and Purpose of the ATS Are Irrelevant.

Kiobel and several *amici* argue that the opinion ignores the text, history, and purpose of the ATS. (*See, e.g.*, Pet. 10-12.) However, they identify

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(affirming dismissal with no mention of corporate liability); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (affirming dismissal on ground of *forum non conveniens* without addressing corporate liability); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000) (holding no subject matter jurisdiction under ATS; no discussion of corporate liability); *Wiwa v. Royal Dutch Petrol. Co.*, 226 F.3d 88 (2d Cir. 2000) (no mention of corporate liability); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (discussing *forum non conveniens*, comity, and joinder without mention of corporate liability).

[9] In *Hibbs v. Winn*, 542 U.S. 88 (2004), cited in the *Brief of Amicus Curiae Public Good Law Center* (at 1, 3-4), the Supreme Court did not hold that its prior decisions failing even to mention the Tax Injunction Act had a *stare decisis* effect; instead, the Court rejected petitioner's argument on the merits. *See Hibbs*, 542 U.S. at 99-112. Moreover, this Court has expressly noted that the issue of corporate liability remained open, *supra*, which was not the situation in *Hibbs*. Finally, we note that the Public Good Law Center (at 5) agrees with us that "whether subject matter jurisdiction is present[] includ[es] asking whether claims could be brought against the type of defendant at bar".

[10] Kiobel's argument that the "majority's analysis fundamentally conflicts with the *reasoning* in *Filartiga*" tacitly admits that there is no conflict with *Filartiga*'s *holding*. (Pet. 10 (emphasis added).) Furthermore, when *Filartiga* was decided, it was clear that the law of nations imposed liability in some circumstances on individuals, not just states. Here, however, there is nothing in the law of nations suggesting that it ever reaches corporations. Kiobel points to no conflict with *Filartiga*, and is merely rehashing argument the Court considered and rejected.

no law with which the opinion conflicts[11] or errors of material fact,[12] and therefore do not address the rehearing standards. *Sosa* sets forth a framework for evaluating ATS claims: determine whether a norm exists with "content and acceptance among civilized nations" at least as definite as "the historical paradigms familiar

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[11] Kiobel maintains that Congress enacted the ATS "to provide jurisdiction for tort actions to compensate victims of violations of the law of nations". (Pet. 12.) However, "despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive". *Sosa*, 542 U.S. at 718-19. Indeed, far from concluding that Congress had any victim compensation purpose in mind, *Sosa* noted that "offences against this law [of nations] are principally incident to whole states or nations, and not individuals seeking relief in court". *Id.* at 720 (internal quotations and citations omitted) (alteration in original).

Kiobel's citation to *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (Pet. 11-12) is mystifying. *Exxon* does not even mention the law of nations or the ATS, but instead discusses whether Exxon could be held liable under maritime law for the Exxon Valdez oil spill in U.S. territorial waters.

[12] The *Brief of Amici Curiae Nuremberg Scholars* (at 13) argues that "criminally prosecuting I.G. Farben alongside the industrialists would have been pointless since it had already been punished under international law in Control Council Law No. 9". However, the Control Council was not a court applying the law of nations, but the interim government established by the Allies to rule Germany immediately after its defeat. *See* Control Council Proclamation No. 1, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf. Thus, the laws enacted by the Control Council were domestic laws of Germany, not judicial pronouncements of the law of nations. Moreover, when "the American Military Government promulgated a law that was to serve as the legal vehicle for the dissolution of I.G. in the American zone" in late February 1947, the law was "a sweeping *antitrust* law designed to prevent monopoly practices". JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN 158 (1978) (emphasis added). The breakup of I.G. Farben was not accomplished until 1953, and the shareholders of Farben became the shareholders of the five successor companies, *id.* at 160-161—hardly a "punishment" under customary international law.

when § 1350 was adopted" whose "scope of liability" extends "to the perpetrator being sued". *Sosa*, 542 U.S. at 729, 732 & n.20. *Kiobel* does just that.[13]

III. KIOBEL HAS NOT DEMONSTRATED THAT A "QUESTION OF EXCEPTIONAL IMPORTANCE" EXISTS.

Kiobel's sole argument concerning exceptional importance is that "[t]he Eleventh Circuit has squarely held that corporations are subject to suit under the ATS". (Pet. 9-10.) The alleged split with the Eleventh Circuit, however, does not warrant *en banc* consideration.

Neither *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009), nor *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008), the two cases cited by Kiobel (Pet. 9 n.14), considered whether corporate liability lies under the law of nations.[14] Both cases relied solely on *Aldana*, which contains no discussion of corporate liability whatsoever.[15]

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[13] Kiobel also takes issue with the sources of international law considered (or ultimately not considered) in the Court's decision. (*E.g.*, Pet. 13-14.) Those issues were addressed in *Kiobel* (*see, e.g.*, Op. at 41 n.47 (discussing propriety of referencing affidavits submitted in *Talisman*), 38 n.43 (discussing relevance of general principles of civil liability)), and do not set forth errors of fact or law that provide a basis for rehearing or rehearing *en banc*.

[14] *Sinaltrainal*, 578 F.3d at 1263, merely states, "In addition to private individual liability, we have also recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations", citing to *Romero*, 552 F.3d at 1309, and *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005). *Romero*, in turn, says only:

As discussed in Part II.B, *supra*, "[q]uestions which merely lurk in the record" do not give rise to precedent. *Webster*, 266 U.S. at 511. Accordingly, the statements in *Sinaltrainal* and *Romero* about corporate liability conflict with *Webster*, and are without force. The asserted conflict with cases that contain no analysis is not an "exceptional circumstance" justifying *en banc* review.[16]

> "The text of the Alien Tort Statute provides no express exception for corporations, *see* 28 U.S.C. § 1350, and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants. *Aldana*, 416 F.3d at 1242. Again, we are bound by that precedent." *Romero*, 552 F.3d at 1315.

[15] In none of the cases outside the Eleventh Circuit cited by Kiobel involving corporate defendants (Pet. 9 n.13) was the issue of corporate liability via the ATS discussed, much less decided.

[16] Nine days before this Court decided *Kiobel*, the United States District Court for the Central District of California dismissed ATS claims pending against several U.S. corporations, explaining "that international law does not recognize corporate liability for violations of international law". *Doe v. Nestle, S.A.*, No. CV 05-5133, 2010 WL 3969615, at *57 (C.D. Cal. Sept. 8, 2010). *Doe v. Nestle* thoroughly analyzed various sources of international law to determine whether corporate liability "is universally accepted and defined with the requisite specificity". *Id.* at *5, *57-75. Two other district courts have followed *Kiobel*. *See Flomo v. Firestone National Rubber Co.*, 1:06-cv-00627-JMS-TAB, 2010 WL 3938312, at *5-7 (S.D. Ind. Oct. 5, 2010) (finding "analysis of the *Kiobel* majority especially compelling" and dismissing ATS claim against corporation); *Viera v. Eli Lilly & Co.*, No. 1:09-cv-0495-RLY-DML, 2010 WL 3893791, at *2, 5 (S.D. Ind. Sept. 30, 2010) (finding "reasoning of the Second Circuit [in *Kiobel*] persuasive" and dismissing plaintiffs' ATS claims against corporation).

CONCLUSION

For the reasons set forth above, Shell respectfully requests that this Court deny Kiobel's request for rehearing and rehearing *en banc*.

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Respectfully submitted,

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