«Cause(s) for Action»: The Kiobel Reader on Corporate Liability for (Aiding and Abetting) Human Rights Violations

Antoine Meyer, Grégoire Fleurot, Romain Svartzman*

1 October 2012. Washington, DC, 6:30 AM: the city slowly starts to move, while the first rays of sunlight seem to reach the US Capitol. At a five minutes walking distance from there, in front of the US Supreme Court, a line of around 100 persons are waiting. Some of them spent the whole night there, braving the rain that soaked the city a few hours earlier. Today, the Supreme Court will hear the first two cases of a new term after a break of about four months. This is a highlight in the US capital and room is pretty limited: between 40 and 60 should get in. Some of the persons in line are students, others are tourists from across the country. They will still need to be patient: the oral arguments will be heard from 10:00 AM. The first case to be heard, *Kiobel v. Shell*, is related to the *Alien Tort Statute* (ATS), a federal law passed in 1789 that allows foreign plaintiffs to file suit in the US for human rights abuses committed abroad. Today, the Supreme Court is considering whether any lawsuits under the ATS can be brought against corporations in the context of extraterritorial human rights violations.

Although the line is much less long than for more covered – and probably more easily understandable – cases and rulings, such as the health care reform in March of 2012, interest(s) at stake here reach well beyond the pavement of 1st Street, where the Supreme Court is located. The list of *amici* – so-called friends of the court – is a fascinating patchwork of constituencies[1]. Among those serving their arguments, hoping these will please the court: major human rights and environmental NGOs, the United Nations (senior and former staff), national human rights institutions, unions (such as the main US trade union AFL-CIO), Bar associations, legal scholars, historians, economists (including Nobel Prize winner Joseph E. Stiglitz), diplomats and former public officials, governments (including the US, the UK and the Netherlands together, Germany, Argentina, but also

* *Antoine Meyer, Institut Français des Droits et Libertés (IFDL); Board member of Droits d'Urgence, legal aid NGO, France.*
Grégoire Fleurot, Journalist, «Slate.fr» (online magazine); Co-laureate of the 2011 Prize for Innovative Journalism (Google France/ Journalism Schoool of Sciences-Po).
Romain Svartzman, Environmental and Social Consultant, World Bank Group.

[1] References and files of all *amici curiae* quoted in this article are available on the Supreme Court of the United States Blog, at http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/.

the European Commission), national members of Parliament, chambers of commerce, and some of the major multinational corporations. These multinational corporations, which all side with Shell, extract oil, produce and/or market steel, shoes, cars, sodas, bananas or complex financial products; some of them operate in over a hundred countries, often with subsidiaries. They include: Coca Cola, BP America, Chevron, Dole Food KRB, the Rio Tinto Group and some of the world's largest commercial banks represented by the Clearing House Association. Many of them have already been targeted by complaints similar to *Kiobel*.

In their original amended complaint, registered with the District Court for the Southern District of New York in May of 2004, twelve Nigerian plaintiffs, on behalf of themselves and a putative class, alleged that Shell aided and abetted the human rights violations committed against them by the Abacha dictatorship in the Ogoni region of the Niger Delta in Nigeria in the 1990s[2]. Their complaint recalls the context of those years in Nigeria: a «corrupt and brutal» military dictatorship, operating in a region densely populated by a disadvantaged minority, the Ogonis. The claim is that Shell and Shell Petroleum Development Company of Nigeria (SPDC) – its local subsidiary – «conspired to and acted under Governmental authority in a joint strategy to deploy military forces in a violent campaign to depopulate areas for oil exploration and extraction, terrorize the civilian population for the purpose of intimidating Plaintiffs and the Class, discourage peaceful protests against SPDC's oil exploration and extraction activities, and allow such activities to continue in Ogoniland»[3]. Seven counts are listed in the complaint: extrajudicial killings; crimes against humanity; torture, cruel, inhumane or degrading treatments; arbitrary arrest and detention; breaches of the rights to life, liberty and association; forced exile; and property destruction. Shell still denies the charges. These include, in practice, assistance in planning and coordination of raids and terror campaigns against civilians; importation of arms, logistical and transport services, and sharing of intelligence with Nigerian military police and/or other security personnel who committed such violations as well as cooperation and assistance in extrajudicial proceedings against Ogoni activists.

One of the protagonists in this case is Dumle J. Kunenu – «Plaintiff Kunenu». He is among those who came to hear the argument this morning. His efforts in gathering residents

[2] *Esther Kiobel & others vs. Royal Dutch Shell Company, Shell Transport and Trading Company p.l.c and Shell Petroleum Development Company of Nigeria, Ltd*, Civil Action no. 02CV 7618 (KMW), Amended Class action complaint, US District Court for the Southern District of New York, 14 May 2004.

[3] *Ibidem*, p. 2.

linked to a chapter of the Movement for the Survival of the Ogoni People (MOSOP) for rallies against Shell led to his arrest on 6 June 1994 and detention without charges. In detention, he suffered daily repeated beatings with serious injuries and deprivation of food, water and medical treatment. The complaint adds «he was released only after being forced to sign a pledge that he would never again participate in protests against Shell». On 16 March 1996, Dumle fled to a UNHCR camp in Benin, before reaching the US with a granted refugee status in July 1999. He has lived there since[4]. Not all survived the repression of those years: Mrs. Esther Kiobel also stands in the case for her late husband, Dr. Kiobel, one of the leaders of the grassroots movement, who was convicted of murder and executed in Port Harcourt on 10 November 1995, together with eight other activists (the «Ogoni Nine»). Mrs. Kiobel also fled to the US while government troops «burned her house and its content to the ground» shortly after[5]. Yet another of the 12 plaintiffs is Charles Baridon Wiwa – «Plaintiff Wiwa» – an active student leader with the National Union of Ogoni Student. He was arrested on 3 January 1996 for staging a protest against Shell. Exposed to torture, he escaped two attempts of abduction before finding refuge in the US. Plaintiff Wiwa is the nephew of the famous writer and poet Ken Saro-Wiwa, who did not have the opportunity to flee to another country: during his non-violent campaign against Shell, Ken Saro-Wiwa was arrested, tried by a «special tribunal» and sentenced to death. In 1994, a number of organisations (international PEN, Constitutional Rights Project, Civil Liberties Organisations and Interights) submitted complaints («communications») to the African Commission on Human and People's Rights on behalf of Ken Saro-Wiwa, Charles' uncle. At the time, the government turned a blind eye on the Commission's request for interim measures on the death sentences pronounced in October 1995 by the «special tribunal». Established under the Civil Disturbances Act, the mock courts had members directly appointed by the Head of State. In a landmark 1998 decision, the justices of the African Commission on Human and People's Rights found the Federal Republic of Nigeria in violation of several provisions of the African Charter on Human and Peoples' Rights (5, 6, 7(1c), 12(1) and (2))[6]. With no mince words:

4 *Ibidem*, p. 9.

5 *Ibidem*, pp. 4-5.

6 African Commission on Human and Peoples' Rights, decision on the case 137/94-139/94-154/96-161/97 International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) / Nigeria, at http://www.achpr.org/communications/decision/137.94-139.94-154.96-161.97/.

This is a blot on the legal system of Nigeria which will not be easy to erase. To have carried out the execution in the face of pleas to the contrary by the Commission and world opinion is something which we pray will never happen again. That it is a violation of the Charter is an understatement (para. 115).

In another decision in 2001[7], the same Commission judged that «the Nigerian government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis». It found that Nigeria had violated, among others, the right to freedom from discrimination, right to life, right to health, right to property, right to free disposal of wealth and natural resources, and right to a general satisfactory environment. The extent of environmental damages was corroborated by a report from the United Nations Environmental Programme published in 2011[8], which stated that the oil spills caused by Shell and other companies in Ogoniland will cost $1 billion to rectify and take up to 30 years to clean up.
These cases certainly help set the record straight, but they did not directly address issues of complicity and charges now facing Shell in the United States.

1. The Case(s)

The plaintiffs brought the case under the *Alien Tort Statute* (ATS), a federal law of the US that allows foreign plaintiffs to file suit in the US for human rights abuses committed abroad. The ATS was passed in 1789 and it was animated by the willingness of a new nation – the US – to demonstrate to the world that it was a law-abiding nation, including when it came to provide domestic remedy for breaches of international law. Following inconsistent rulings from district and second circuit federal courts on ATS litigations, this case 10-1491 – and much more with it – now stands before the justices of the US Supreme Court.
In February 2012, in its first oral argument, the Supreme Court had put a fundamental question to both parties: whether «corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide» as stated by the Second Circuit Court decision on appeal in the case, or if, as held in the first instance,

[7] African Commission on Human and Peoples' Rights, decision on the case *The Social and Economic Rights Action Center and the Center for Social and Economic Rights v. Nigeria*, 2001, section 58.

[8] United Nations Environmental Programme (UNEP), *Environmental Assessment of Ogoniland*, Nairobi, Kenya, 2011.

«corporations may be sued in the same manner as any other private party defendant under the Alien Tort Statute for such egregious violations». Between today's rehearing and the initial one, legal opinions, in the form of *amicus curiae* briefs, have rained with mounting intensity on the court – unveiling stances in an unprecedented (para-)legal battle. These *amicus curiae* shed light on the parties' standpoint when it comes to corporate liability for human rights violations. Opinions are sharply divided. Yet all contributors may agree on one thing, namely that this upcoming decision may partly redefine the boundaries of corporate liability for the years to come, in the US and beyond.

2. Legal Chapters… Book Unfinished

Mr. HOFFMAN: Mr. Chief Justice, and may it please the Court: The principal issue before this Court is the narrow issue of whether a corporation can ever be held liable for violating fundamental human rights norms under the Alien Tort Statute. Under Respondents' view, even if these corporations had jointly operated torture centers with the military dictatorship in Nigeria to detain, torture, and kill all opponents of Shell's operations in Ogoni, the victims would have no claim.
Justice KENNEDY: But, counsel, for me, the case turns in large part on this: Page 17 of the red brief says, «International law does not recognize corporate responsibility for the alleged offenses here»; and the – one of the – the amicus brief for Chevron saying «No other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection». And in reading through the briefs, I was trying to find the best authority you have to refute that proposition, or are you going to say that that proposition is irrelevant?
Mr. HOFFMAN: Well, there – there are a couple of questions within that.
Justice KENNEDY: And it's – it involves your whole argument, of course.
Mr. HOFFMAN: It does. Yes. (Laughter).

This opening exchange in the first hearing of 28 February 2012[9] captured a great deal of the essence of the case and key contentious point: (international) standard for liability and aiding and abetting standard, enforcement and universal civil

[9] *Kiobel vs. Royal Dutch Shell Pretroleum*, oral argument before the Supreme Court of the United States, at http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx.

jurisdiction for human rights violations. Question marks remain behind each of these. The nine Justices of the Court now have to come out of the jungle of arguments and make some common sense of it. Their decision is expected at some point during the first quarter of 2013.

3. Legal Basis for Liability: Reading Different (and Sometimes Backward)

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States (Law 28 USC, section 1350).

Kiobel is one of a series of cases which all brought to test the defining parameters of liability under the ATS. The ability for «aliens» to mobilise the ATS and therefore to sue before US federal jurisdictions supposes to find a violation of the «law of nations» – in short and modern terms: of international law. Core to this body of norms are international human rights conventions. Binding, they include the 1984 UN Convention, which provides for an absolute prohibition of torture, cruel, inhumane and degrading treatments or punishments. In 2004, examining the *Sosa vs. Alvarez-Machain* case – the only other ATS case that reached the US Supreme Court – the Justices had already been asked to clarify what could constitute a relevant violation of an internationally accepted norm. The case at issue then, an episode of arbitrary detention limited in time, did not meet the threshold. Torture certainly does, as Justices of the Second Circuit had already concluded in the *Filartiga vs. Pena Irala* (2nd Circuit, 1980), which brought the ATS out of the dusty archives of Congress almost 200 years after its adoption.

3.1. The Scope of International Human Rights Instruments

Sosa ratified that human right abuses are a valid reason to use the ATS. But the next question to be answered is «who can be sued under the ATS», and especially if corporations are concerned? In *Sosa*, the court left opened the door for litigation – but suggested a test, located for part in... a footnote. Footnote 20 reads as follows: «[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». This brings considerable debate, leading parties to different conclusions, in this case, when seeking to assign responsibility on a corporate actor for the breaches of international law.

The position of defendants, and a number of corporations siding along, is clear-cut. There would be «no norm of corporate liability for the offenses at issue» in the complaint of Esther Kiobel et al. International law sources do «recognize the norms of arbitrary arrest and detention, torture, and crimes against humanity» but that would be «only against States and natural persons, not against corporations». The UK and Netherlands governments, cited by Shell's defense counsel in February 2012[10], echo this viewpoint in their supporting *amicus*: «International human rights law grants certain rights to individuals and organizations, but it only imposes obligations on States [...]»[11]. KBR, a global engineering, construction and services company is among those who concur, stating in its own *amicus* that «customary international law has traditionally defined the rights and obligations only of sovereigns, and accordingly, most norms apply to sovereigns only»[12]. So the direct liability argument would not stand and corporations would be logically out of reach. Along these lines, plaintiffs would have a «novel and erroneous interpretation of international law in this area»[13].

The *amicus* brief of the UN High Commissioner for Human Rights (OHCHR), in support of the petitioners, brings a different approach to the matter. It recalls that international law has rarely, if ever, prohibited states from taking any action they deem appropriate against any category of natural or juridical persons in enforcing their international obligations. In fact, «all major international human rights treaties require States to take the necessary steps – consistent with their domestic legal systems and with the provisions of that specific treaty – to adopt the measures necessary to give effect to the rights recognized in the particular treaty»[14]. Thus, states should live up to their responsibility to take all necessary steps for the right to remedy enshrined in many international texts[15] to be effectively guaranteed in particular before national jurisdictions. Stretching this argument, when deciding on the reach of the ATS in

[10] Oral argument, in *Kiobel v. Royal Dutch Petroleum Co.*, 28 February 2012, p. 34, at http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx.

[11] Brief of the Governments of the UK and the Netherlands as *amici curiae* in support of the respondents, 3 February 2012, p. iii.

[12] Brief *amicus curiae* of KBR, Inc in support of respondents, pp. 10-11.

[13] Brief *amicus curiae* of the UK/Netherlands, p. 14.

[14] Brief *amicus curiae* of Navi Pillay, United Nations High Commissioner for Human Rights, in support of petitioners, p. 36.

[15] See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, UN Doc. A/RES/60/147, 16 December 2005.

Kiobel, the US Supreme Court would be *de facto* shouldering the responsibility for all branches of the US government and should consequently uphold a cause for action in this case and in others.

Part of the ATS-related liability issue thus chrystalises on notions of sanctionable *conduct* and *actor*, and where to find normative answers. For Shell and others, «who may be sued and held responsible» is not a *remedial question*, i.e. for US domestic law to determine, but rather an issue of *subject-matter jurisdiction*. In other words: the content of the international norm at issue is the reference point, defining the range of potentially liable actors. And for that matter, the answer suggested by defendants when it comes to civil liability of corporations for violations of international human rights law is a categorical «no». Corporations claim that American Federal Courts examining ATS complaints are up until now going beyond what international law provides. Along this line of reasoning, power and responsibility would lie with Congress to explicitly extend such civil liability to corporations if it wishes to do so. As Coca-Cola's brief puts it:

> Even when international law *mandates* that nations enforce the norm domestically, that domestic implementation is effected through the lawmaking body within each nation – normally, each country's legislature. Within our Nation's tripartite system of government, Congress is the legislative body charged with effecting that implementation. [...] The judicial role, by contrast, is much narrower. [...] Federal common law does not simply import abstract norms and then allow the courts to make new causes of action but rather imports only those [...] that already are understood to obligate each nation to provide a civil remedy [...]. In the United States [...] domestic separation of powers principles dictate that any such innovative lawmaking power be exercised by Congress, not by the courts[16].

Did passing the ATS created a «cause for action» allowing the judicial power to rule on cases involving human right violations and targeting corporations? The respondent's counsel, Ms. Sullivan, clearly stated that the Congress did not pass a statute to that effect[17]. Plaintiffs, their counsel and supporters believe it did. In this context, part of the efforts on both sides has been invested in interpreting the original intentions of the legislator when the ATS was passed, back in 1789. The question of precedents has thus involved historical readings of what the US

[16] Brief *amicus curiae* of The Coca-Cola Company and Archer Daniels Midland company in support of respondents, pp. 4-5.

[17] Oral argument before the Supreme Court of the United States, p. 31, at http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx.

Congress had in mind, when it passed the statute in the 18th century – and how situations of today would have played out then. This exercise of exegesis and transportation back and forth from the times of Pirates did not lack any comical comments, as illustrated by this exchange between the defendants' attorney and Justice Breyer:

MS. SULLIVAN (On behalf of the respondents): Justice Kennedy asked, and Justice Breyer renewed the question, is there any source in customary international law throughout the world that holds corporations liable for the human rights offenses alleged here? And the answer is there is none.
JUSTICE BREYER: You say there is not a case. That's a different matter.
MS. SULLIVAN: Not a case –
JUSTICE BREYER: Yes, but that's a different matter because you can have a principle that applies even though there isn't a case. And the principle that here would apply is what I said, Pirates, Incorporated. Do you think in the 18th century if they brought Pirates, Incorporated, and we get all their gold, and Blackbeard gets up and he says, oh, it isn't me; it's the corporation – do you think that they would have then said: Oh, I see, it's a corporation. Good-bye. Go home (Laughter)[18].

Defendants insist that the burden of proof rests with petitioners to show that the standard exists. A burden they would fail to carry.

3.2. Burden(s) of Proof: Textbooks... and «Authorities»

That the human rights treaty system itself is, at its core, rather state centric in the way it defines responsibility and liability, is hardly disputable. Yet international law, as a dynamic set of norms, works largely with domestic origins, translations and implementation mechanisms. Interpretation and development also derives from domestic steps of implementation (laws and case law in particular). So in the absence of an international authoritative «superbody» to adjudicate such cases and dictate whether violations of international law have been commissioned, the question becomes this: beyond an uncertain ATS case law, what contemporary norms or precedents across nations could suggest that a standard of corporate liability exists?
Corporations see no relevant basis in customary international

[18] *Ibidem*.

law for such a standard. The KBR brief concludes: «a survey of international legal sources finds that there is "embarrassingly little evidence of an international consensus [...] in favor of imposing liability on private corporations for general violations of customary international law"»[19]. Petitioners and supports such as the Office of the High Commissioner for Human Rights consider that defendants opt for a deliberately restrictive analysis of international law – the reference point for ATS cases – by looking solely at conventions and *customary* international law. They call to the bar the reserve store of international law – so-called *general principles of law*, which respondents relegated to a secondary source of international law[20]. As a number of human rights organizations and human rights law experts, including notably Amnesty International, the International Federation of Human Rights (FIDH) or Human Rights Watch state in a joint brief: «to the extent that treaties and customary international law leave gaps in the law or questions unaddressed, general principles of law are intended to fill any gaps that are bound to exist in the normative network of any community»[21]. Substance of the argument becomes this:

> Far from being «unknown», the attribution of liability to a corporation for egregious conduct is in fact generally affected and the provision of some form of redress to victims of serious corporate wrongdoing is commonplace. [...] Corporate conduct is regulated under all national legal systems. The majority in *Kiobel*, erroneously looked only to whether other countries had an exact replica of the ATS and when it failed to find an ATS clone in each country, it drew the incorrect conclusion that the liability allowed for by the ATS against corporations was an anomaly[22].

A comparative law effort leads them to the conclusion that «a general principle of law exists allowing for corporations to be held legally responsible for egregious conduct, including conduct constituting a specific breach of a universal and obligatory norm under international law»[23]. Procedures indeed exist in a number of countries including the UK (domestic tort law used for human rights violations committed outside of the country), Argentina, Belgium, France, Japan, the Netherlands or Spain; with *inter alia*, mechanisms of *action civile* allowing victims or their representative to seek tort damages against a defendant in a criminal case. Some of these references are also

[19] Brief *amicus curiae* of KBR, Inc in support of respondents, p. 13.

[20] The International Court of Justice identifies «general principles of law» as among the sources of reference to interpret international law and as one which is distinct from «international customary law». See ICJ, Statute, Article 38 1)c).

[21] Brief *amici curiae* of International Human Rights Organisations and International Law Experts in support of petitioners, p. 3.

[22] *Ibidem*, p. 3.

[23] *Ibidem*, p. 4.

identified in action-oriented efforts to outline effective redress options for victims and their supporters[24]. They also see a favorable process of harmonisation already at play, i.e. regionally within the European Union legislation[25]. Eventually, these organisations and experts also recall that a US Court found in a recent ATS case (*John Doe VIII et. Al.*, *appellants v. Exxon Mobil Corporation*[26]) that «legal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood»[27].

In fact, «authorities» is what both parties keep seeking, piling up legal and academic references. In the February hearing, Shell's defense Counsel suggested the now former UN Special Representative of the UN Secretary General on Business and Human Rights, John Ruggie, after years of global evaluation and consultations, had himself concluded there was no international liability standard opposable to corporations. The UN expert submitted an *amicus* brief in support of neither of the parties to correct «mistaken impressions» or «inaccurate presentation» of his views and findings pointing to observable evidence of «an expanding web of potential corporate liability for international crimes»[28].

When considering these issues of norms and relevant precedents, justices of the US Supreme Court may not all be wearing the same glasses. But there are more layers to the case. One concerns the standard for liability when it comes to «aiding and abetting» human rights violations – at stake in *Kiobel* and in the majority of ATS cases. Another has to do with enforcement of universal civil jurisdiction and extraterritorial application. Defendants and their supporters look in both directions for additional ramparts, crossing legal, political and economical lines of argument.

3.3. The Aiding and Abetting Standard: Any? «Knowledge» or «Purpose»?

Defendants and their supporters turn in their litigation strategy to a most actual issue in the field: the standard of liability for aiding and abetting human rights violations, with sometimes far-reaching statements. For defendants, neither international law nor federal common law recognises a cause of action for aiding and abetting the offenses at issue in *Kiobel*.

The National Foreign Trade Council, with a broad membership

[24] See for instance, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs*, Paris, FIDH, 2012.

[25] Council Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and ommercial matters: National courts in the EU have jurisdiction over any defendant corporation that is «domiciled» in the EU, irrespective of where the harm occurred or the nationality of the plaintiffs» (codification providing that corporations domiciled in any member state of the EU can be sued for torts that occur outside the jurisdiction of the home state).

[26] United States Court of Appeals for the District of Columbia Circuit, *John Doe VIII et. Al., appellants v. Exxon Mobil Corporation, et al. appellees*, decided on 8 July 2011.

[27] Brief *amici curiae* of International Human Rights Organisations and International Law Experts in support of petitioners, p. 16.

[28] His *amicus* brief cites a 2007 report which identifies «the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards» as «the most consequential legal development in the business and human rights constellation» in *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc. A/HRC/4/35, 19 February 2007.

of multinational corporations[29] and other platforms of US businesses, advocate for a *purpose* rather than a *knowledge* test, if corporations were to be considered liable under the ATS (which they should not, in their view). Then, the Court of Appeals' judgment in *Kiobel* should «be affirmed on the alternative ground that establishing aiding-and-abetting liability requires pleading and proving purpose to facilitate the direct violator's unlawful conduct, not mere knowledge of that conduct»[30]. Their analysis of customary international law leads them to the conclusion that purpose to facilitate the violation, not knowledge alone, is the predominant standard, and threshold required to establish aiding-and-abetting liability. Corporations also argue of disproportionate risks of legal uncertainty and exposure to opportunistic and abusive procedures otherwise, likely to generate disincentives for multinational corporations. Among these, BP America, Caterpillar, Conoco Phillips, General Electric, Honeywell, and International Business Machines[31]:

> The foreign Policy of the US often encourages commercial interaction with still-developing nations, in the hope of promoting change from within the system [...]. A purpose-based standard of *mens rea* will ensure that multinational corporations operating in developing nations are not faced with billion-dollar ATS claims based solely on their subsidiaries' incidental contacts with a government or military entity that has been accused of violating international law. [...] A corporate defendant accused of aiding and abetting human rights abuses of a foreign government may not be held liable unless it acted with the purpose of causing those abuses.

The *amicus* brief submitted by The Clearing House Association[32], representing some of the world's largest commercial banks, plays that same chord in straightforward terms, against the indetermination that «allows plaintiffs to premise multi-billion dollar claims on normal business activities, particularly those of financial services firms», using a statute that «enables plaintiffs to force settlements in meritless cases». According to their brief, if the court were to recognise that the case can be judged under the ATS, this «would expose the Association's members to litigation seeking potentially astronomical damage awards, based simply on their basic businesses of lending and providing other ordinary financial services. Financial services companies are subject to a disproportionate number of suits under the

[29] A list of the Board of Directors: National Foreign Trade Council (NFTC) is available at http://www.nftc.org/?id=232.

[30] Brief for of the National Foreign Trade Council, USA Engage, The United States Council for International Business, the American Petroleum Institute, the National Association of Manufacturers, the Organisation for International Investment, and the American Insurance Association, in support of respondent, February 2012, p. 3.

[31] Brief for BP America, Caterpillar, Conoco Phillips, General Electric, Honeywell, and International Business Machines, pp. 35-36.

[32] Brief for The Clearing House Association L.L.C., February 2012, pp. 2-3.

ATS. They are particularly vulnerable to ATS suits premised on overreaching theories of secondary liability, in which plaintiffs' attorneys characterize the defendants' core business of lending money as aiding and abetting merely because a state actor alleged to have violated international law obtained a generalized benefit from the borrowed funds». If the Supreme Court were to impose liability on corporations, «it should limit suits under the ATS to those predicated on primary liability or, alternatively, hold that secondary liability under the ATS requires proof of both the intent to further a violation of international law and substantial assistance in bringing about that violation».

This question of standard was in substance already addressed partly earlier in the Kiobel case, with one of the judges of the Second Circuit Court (Judge Leval) who – while considering against a majority that the case could be admissible under the ATS – affirmed that allegations of plaintiffs did not «support a reasonable inference that respondents provided substantial assistance to the Nigerian government with a purpose to advance or facilitate the Nigerian government's violations of the human rights of the Ogoni people»[33].

Beyond ATS-related issues, *amicus* briefs submitted by corporations by and large confirm that common understanding and interpretation are still largely to be found. In that context, important case studies are already available, with awaited decisions that will certainly contribute to taking the debate forward, if not in setting the standards. A number for instance recently emerged in the sector of communication technologies: in October 2012, following a complaint of the International Federation of Human Rights (FIDH) and the League for Human Rights (*Ligue des Droits de l'Homme - LDH*), a judicial investigation was opened on the activities carried out by Amnesys, a unit of the French technology group Bull, which sold surveillance equipment to Mouammar Khadafi's regime in Libya and is alleged to have helped the regime, through technical assistance and training of intelligence officers, to spy on the population. Other companies such as Narus, a subsidiary of Boeing, Chinese company ZTE or South African group VASTech are also suspected. The 2011 article of the «Wall Street Journal» which revealed the case recalled that «tech firms from the US, Canada, Europe, China and elsewhere have, in the pursuit of profits, helped regimes block websites, intercept emails and eavesdrop on conversations»[34].

33 Quoted in Respondents Brief, 27 January 2012, p. 6.

34 P. Sonne, M. Coker, *Firms Aided Libyan Spies. First Look Inside Security Unit Shows How Citizens Were Tracked*, in «Wall Street Journal», 30 August 2011, at http://online.wsj.com/article/SB10001424053111904199404576538721260166388.html.

For victims, results from in-court actions targeting corporations are variable, including under the ATS. A case brought by an association of Vietnamese victims against the Dow Chemical Firm (*Vietnam Association for Victims of Agent Orange/Dioxin v. Dow Chemical Co*) for providing the US with the Agent Orange used during the Vietnam war was eventually dismissed in 2005, with a confirmation by the Court of Appeal and a decision of the US Supreme Court not to review the case. The US court concluded that the government contractor defense – which protects government contractors from state tort liability under certain circumstances – applied to the manufacturers of Agent Orange. A similar suit brought in 1979 by US war veterans had been concluded with an off-court settlement with the firm worth $180 million[35]. Actions sometimes extend beyond the court system of courts. In 2010, Caterpillar Inc. has thus been targeted by a public campaign for selling D9 bulldozers to Israel Defense Forces, while, allegedly, knowing these would be used to destroy homes and injure or kill inhabitants[36].

Is there any common ground to start from in terms of standards in this area? The now former Special Representative on Business and Human Rights, following again a review of the relevant sources of international law, defended the existence of a fairly clear *knowledge* standard for individual aiding and abetting liability[37] – one that does not require the actor to «share the same criminal intent as the principal, or even desire that the crime occur»[38]. The UN *Guiding Principles on Business and Human Rights,* adopted in 2011 by the Human Rights Council[39], to serve as one common reference point, offer limited guidance but recall notably that:

> Business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties. [...]. For the purpose of these Guiding Principles a business enterprise's «activities» are understood to include both actions and omissions; and its «business relationships» are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services[40].

Now some of the statements of multinational corporations in the context of *Kiobel* seem at odds with such understanding and approach, and its implications in terms of due diligence.

[35] M.F. Martin, *Vietnamese Victims of Agent Orange and U.S.-Vietnam Relations*, 29 August 2012, pp. 29-30, at https://www.fas.org/sgp/crs/row/RL34761.pdf.

[36] L. Cohler-Esses, J. Nathan-Kazis, *Caterpillar Caught in Web of Middle East Politics*, 21 July 2010 (Issue of 30 July 2010), at http://forward.com/articles/129547/caterpillar-caught-in-web-of-middle-east-politics/.

[37] UNSRSG, UN Doc. A/HRC/4/35, cit., para. 31.

[38] Special Representative of the UN Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Clarifying the Concepts of «Sphere of Influence» and «Complicity»: Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/8/16, 15 May 2008, para. 42.

[39] *Guiding Principles on Business and Human Rights: Implementing the United Nations «Protect, Respect and Remedy» Framework*, 21 March 2011, UN Doc. A/HRC/17/31.

[40] *Ibidem*. Excerpt of Commentary of Principle 13.

3.4. Universal Civil Jurisdiction and Extraterritorial Use of the ATS

The first sentence in your brief in the statement of the case is really striking: This case was filed [...] by twelve Nigerian plaintiffs who alleged [...] that Respondents aided and abetted the human rights violations committed against them by the Abacha dictatorship [...] in Nigeria between 1992 and 1995. [...] What business does a case like that have in the courts of the United States? [...] There's no connection to the United States whatsoever (Justice Alito, US Supreme Court, Oral Argument, 28 February 2012).

The question of universal civil jurisdiction and extraterritorial application in ATS cases had already been put on the table with this rhetorical question by Justice Alito, seconded by Chief Justice Robert, taking his point further:

CHIEF JUSTICE ROBERTS: If there is no other country where this suit could have been brought, regardless of what American domestic law provides, isn't it a legitimate concern that allowing the suit itself contravenes international law?

Supporters of the defendants answer by the affirmative. The *amicus* of Chevron, Dole Food, Ford and others[41], recaptures previous standpoints:

Under international law, a nation's sovereignty over activities within its territory is presumptively absolute, subject to exceptions by national consent. Nations have consented to a foreign prosecution for certain «universal jurisdiction» crimes committed in their territories even though the foreign nation lacks any connection to the underlying behavior. They have not, however, consented to allow a foreign court to entertain civil causes of action on the basis of universal jurisdiction, as is done in ATS cases. [...] The extension of universal civil jurisdiction to the extraterritorial activities of corporations in ATS cases would exacerbate this international law problem. Such liability would exceed state consent not only in permitting civil actions in addition to criminal actions, but also in imposing liability on corporations when nations have consented in the relevant international laws to liability at most for individuals.

So, as elaborated by other contributors such as the National Foreign Trade Council, respect for foreign judicial systems would command the US courts renouncing jurisdiction over ATS

[41] Brief of Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline Plc, and the Procter & Gamble Company as *amici curiae* in support of respondents, 3 February 2012, pp. 2-3.

cases involving foreign persons whose rights would have been violated in foreign countries. Simple rule, but others consider that international law makes possible and commands quite the opposite. The UN Special Rapporteur on Torture, in his own contribution in support of petitioners, recalls the existence of a universal jurisdiction clause – notably in the Convention Against Torture (referring to Article 14 and guidance offered by the Committee against Torture) – which permits states to exert jurisdiction «over serious violations of international human rights law, regardless of where the violation occurred and regardless of the nationality of the victim or the perpetrator». Under this light, «when the national courts of a State provide a remedy for an egregious human rights abuse, they "act as agents of the international community to enforce rights that are owed to all people"»[42]. That's for standard of practice. Now for the actual practice of the standard:

> Numerous States fulfill their international legal obligations by providing civil and/or criminal remedies for extraterritorial human rights violations. State practice reflects a full spectrum of extraterritorial remedies. The United States, and an increasing number of other countries, grant civil jurisdiction to human rights victims to pursue damages against foreign abusers for acts that occurred outside national territory. A significant number of other States permit universal criminal jurisdiction over egregious human rights abuses and also permit the victims to join *an action civile* for monetary and other relief to the criminal proceedings. Additionally, some States permit civil remedies for extraterritorial human rights violations where no other competent foreign court is available to adjudicate the dispute. Various national courts require of the perpetrator a minimal territorial presence, while still others permit suits *in absentia*. While the precise requirements may vary, State practice shows a consistent and committed effort to ensure that no abuse goes without remedy and that no victim is deprived of justice and reparation. In sum, international law, the practice of States that implement it, and their obligations to provide effective redress under binding treaties, all lead to the conclusion that the United States is consistent with international law and practice in providing extraterritorial jurisdiction for plaintiffs to seek civil remedies under the Alien Tort Statute[43].

So in granting its domestic jurisdictions power to adjudicate extraterritorial cases, a state, and in this case, the US, would be providing an effective redress, consistent with its international

[42] Brief of Prof. Juan E. Mendez, UN Special Rapporteur on Torture as *amicus curiae* on Reargument in support of petitioners, 13 June 2012, pp. 2-3.
[43] *Ibidem*, pp. 3-4.

law obligations. Argentina, in a brief in support of petitioners[44] and in relation to the *Sosa* case, stressed the limited risk of a prescriptive justice in such a context:

Concerns that *Sosa v. Alvarez-Machain* improperly opened the door to excessive exercise of prescriptive jurisdiction by the United States are unfounded given the universal nature of the limited set of norms that *Sosa* protects and the fact that virtually all nations have legislated them domestically. Since only the most established of international law rules are involved, there simply is little risk of the United States improperly prescribing conduct to foreign jurisdictions. The foreign sovereigns will have accepted the prescription on their own, and in most instances will have also already incorporated it into their domestic law.

The UN *Guiding Principles on Business and Human Rights*, in cases concerning multinational corporations recalls that the possibility of extraterritorial jurisdiction is there, though suggesting limitations («International law generally does not require, but nor does generally prohibit, states from exercising extraterritorial jurisdiction over corporations domiciled in their territory and/or jurisdiction, provided that there is a recognized jurisdictional basis»). Opening his statement in this second hearing, Counsel Hoffman thought also useful to remind that plaintiffs in *Kiobel* sued in the US because this «is where they live», «this is their adopted homeland because of what happened and because they could get jurisdiction»[45].
Following the argument of petitioners and their supporters, there would be no obstacle to ATS jurisdiction in *Kiobel* (rather a responsibility), since the norm to be enforced enjoys universal recognition (respect, is, unfortunately, a different matter). That's for the legal-ethical point of view. But is that actually workable in practice? Some of the defendants and their supporters move the debate to the political playground to find additional arguments against extraterritorial ATS-based litigation.

4. Political Considerations: The Concerns with «Friction»

The Alien Tort Statute was enacted, there seems to be a consensus, to prevent international tensions, and this kind of lawsuit only creates international tension (Justice Alito, first oral argument, February 2012).

44 Brief for the Government of the Argentine Republic as *amicus curiae* in support of petitioners, 13 June 2012, pp. 3-4.

45 *Kiobel vs. Royal Dutch Shell Petroleum*, 2nd oral argument before the Supreme Court of the United States, at http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx.

4.1. Appeasing International Tensions… or Source of Bilateral Frictions?

There is limited historical evidence about the specific purpose of passing the ATS in 1789[46]. Scholars suggest that the American Congress passed the statute to assure that the United States would provide remedies for breaches of international law. It is widely accepted that the statute notably aimed at providing a legal remedy against piracy and breaches concerning diplomats and merchants, which had little ground to refer a matter to a court. In spite of this relative historical uncertainty, there is little doubt that the ATS was designed as a tool to remedy potential diplomatic tensions[47]. It even seems that the ATS was conceived as a step towards a new international legal system: as the Argentine government reminds it in its brief to the Supreme Court, scholar Emmerich de Vattel – author of the book *The Law of Nations* in 1758 and a strong supporter of the concept of universal jurisdiction – was by far the most widely cited international scholar at the time, and his visions certainly influenced the passing of the ATS. However, respondents and numerous briefs support the idea that the main consequence of using the ATS is to generate bilateral strains. One of the briefs filled by BP America, Caterpillar, Conoco Phillips, General Electrics and Honeywell reminds us that in the last decade, numerous governments have lodged protests with the US State Department or filed briefs objecting to the extraterritorial application of the ATS: Australia, Canada, China, Colombia, El Salvador, Germany, Israel, Papua New Guinea, South Africa, Switzerland and the United Kingdom[48]. The joint *amicus* of Netherlands and the United Kingdom (Royal Dutch Shell's two home-countries – where the company has respectively its headquarters and its registered office) goes along those lines. It denounces «overly broad assertions of extraterritorial civil jurisdiction», asserting that «good motives on human rights do not justify any government or any court ignoring basic international law requirements, including those related to the limits on national jurisdiction»[49].

Referred to in the debates, the tension that arose between the United States and South Africa illustrates the potential diplomatic consequences of theuse of the ATS. Several ATS cases were brought on behalf of apartheid victims, mainly against

[46] Earth Rights International (ERI), a nonprofit and nongovernmental organization that has litigated several cases under the ATS, argues that the statute «was important to prove to the world that our new Nation was a law-abiding country».

[47] In the 1780's, the *Marbois affair* – in which a French diplomat was assaulted in the United States but could not sue because he was not an American citizen – became notorious and embarrassing for the young republic.

[48] Brief of *amici curiae* BP America, Caterpillar, Conoco Phillips, General Electric, Honeywell, and International Business Machines in Support of Respondents, 3 February 2012, pp. 7-8.

[49] Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *amici curiae* in support of the respondents, pp. 2-9.

international and South African banks and mining companies charged with aiding and abetting the apartheid governments. In 2003, the President of South Africa, Thabo Mbeki, sharply criticised the ATS, considering «completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation». In the frame of one of these cases (*Khulumani* case) brought by South African plaintiffs, the UK, Germany, Switzerland and South Africa sent separate diplomatic notes to the United States, expressing their concerns about having US courts reviewing complaints brought by foreign plaintiffs against foreign defendants for conduct that took place entirely in the territory of a foreign sovereign[50].

The use of the ATS did create international tensions over the past years. Yet these may not be insurmountable. Tensions that arose with the South African government regarding the *apartheid cases* finally faded. In 2009, the South African Minister of Justice sent a letter to the US Judge of the District Court hearing the *Khulumani* case, stating the government of South Africa was «now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law». This reversal from South Africa followed the modification of the complaint filed by the plaintiffs (who decided to focus only on companies that allegedly contributed to the apartheid and to exclude those that merely operated in the country). The brief submitted by the Argentine government sheds lights on how the temporary frictions created by the ATS can be solved over time. The *Filartiga* case – the first modern ATS human rights case, in which a Paraguayan torturer who had moved to the US was sued for killing a 17-year-old in 1976, during the Stroessner dictatorship – was a «significant step toward ending the impunity of human rights violators in repressive regimes, and has been applauded as such in Latin America», according to the brief submitted by the government of Argentina. This case shows how what might have been qualified an interference with national sovereignty at one time – i.e. suing a Paraguayan national for torture and killing committed in Paraguay on a Paraguayan – is now considered a historic landmark case that helped fight human rights abuses which occurred during dictatorships in this

[50] The diplomatic note sent by the United Kingdom to the Secretary of State Condoleezza Rice in this regard was particularly alarming, by stating that the use of the ATS in this litigation «can interfere with national sovereignty, create legal uncertainty and costs, and risks damaging international relations with several affected foreign countries including close allies of the United States. [...] The democratically-elected Government of South Africa is charged with responsibility for dealing with the legacy of apartheid and is entitled to do so free from interference by these proceedings».

country but also in other countries of the region. In *Kiobel*, the Nigerian government initially objected to the suit, expressing that it would «jeopardize the on-going process initiated by the current government of Nigeria to reconcile with the Ogoni people» and «gravely undermine sovereignty and place under strain the cordial relations that exist with the government of the United States of America». Counsel Hoffman indicated in the re-hearing that the Nigerian government in fact no longer had a position on the case.

4.2. The «Balance of Interests»: The US Position(s)

The re-hearing of the case in October 2012 was marked by a reversal of the US position, now in favor of an exclusion of causes for action in aiding and abetting cases targeting foreign corporations, in an extraterritorial context.
The official position of the United States varied frequently over the years. The Carter administration supported the ATS while it was being used for the first time for human rights claims in *Filartiga*, but the Reagan administration has not followed this position with the same enthusiasm. The George H.W. Bush administration came back to a rather supportive position toward the ATS and also passed the Torture Victim Protection Act (TVPA), a statute that presents similarities with the ATS: it allows for the filing of civil suits, in the US, against individuals who committed torture or extrajudicial killing, acting in an official capacity for any foreign nation. One of the main differences with the ATS is that plaintiffs may also be US citizens, not only foreigners. The Clinton administration also led the ATS a step further in 1995, when it supported the use of the ATS to sue Radovan Karadzic, an indicted war criminal in Bosnia. The George W. Bush administration tried to give a radically new turn to the ATS, especially in the frame of the *Sosa* case, although the decision of the Supreme Court over this suit finally represented a significant step forward in defending and *modernizing* the ATS. The government's position by then was that decisions related to the ATS should belong to the Congress since they fall under the range of foreign policy decisions. For example, in a case brought against Exxon Mobil, which was indicted for human rights abuses in Indonesia, the State Department argued that a trial could strain the relations

with Indonesia and put at risk the efficiency of the *War on Terror* carried out by the US government with the collaboration of Indonesia, among other countries. But the US administration went further in *Sosa*, a rather complex case in which the US government paid Sosa, a Mexican national, to kidnap and bring to the US another Mexican national indicted for torturing and murdering a US Drug Enforcement Administration officer. The State and Justice Departments argued in a brief for the US government that human rights violations should not fall under the ATS, a position that was in contradiction with all cases heard since *Filartiga*. The Supreme Court's decision was the exact opposite of what the George W. Bush had been struggling for. It affirmed that today's federal courts are «authorized to hear the claims that are as universally recognized today as those that were actionable in 1789»[51] when the ATS was passed, i.e. piracy and breaches concerning diplomats and merchants. In other words, the decision ratified that the ATS could be used to seek accountability for human rights violations such as genocide, torture, slavery or murder.

In *Kiobel*, the State and Justice Departments filed a first brief in December 2011, arguing that corporations could be held liable under the ATS for certain violations of international law. However, the Obama administration's view shifted in an intriguing manner: the Justice Department filled a new brief in June 2012, but this time it was not co-signed by the lawyers of the State Department. This particular situation could be the result of a disagreement within the two Departments, and at some point strong divergence even within the State Department. This new brief urges the Supreme Court to refuse to recognize the ATS when a suit «challenges the actions of a foreign sovereign in its country» when, as in *Kiobel*, «foreign plaintiffs are suing foreign corporate defendants for aiding and abetting a foreign sovereign's treatment of its own citizens in its own territory». Secondary liability claims would «infringe significantly on US foreign policies» and would even indirectly put at risk the spread of democracy worldwide: the US government «has consistently recognized that international trade promotes democratic value – but the threat of secondary liability suits discourages companies, especially financial institutions, from engaging in that activity». ATS supporters claim that this brief aims at exempting foreign multinational corporations that are indirectly involved («aiding

[51] Earth Right International, *In Our Court. ATCA, Sosa and the Triumph of Human Rights*, July 2004, Washington D.C.

and abetting») in human rights violations. The case made by the US government would mean, in practice, that a large part of the ATS cases would become irrelevant. The latest oral intervention of the US representative before the Court offered an official glimpse of the reasoning at play, and as such a short introduction to the politics of international law:

Sollicitor General D. Verrilli: Well justice Scalia, in a case like this one, in cases under the Alien Tort Statute, the United States has multiple interests. We certainly have foreign relations interests in avoiding friction with foreign governments; we have interests in avoiding subjecting United States companies to liability abroad. We also have interests in ensuring that our Nation's foreign relations commitments to the rule of law and human rights are not eroded.
Justice Scalia: I understand that, but –
Sollicitor General D. Verrilli: It's my responsibility to balance those sometimes competing interests and make a judgment about what the position of the United States should be, consistent with existing law.
Justice Scalia: It – it was –
Sollicitor General D. Verrilli: And we have done so.
Justice Scalia – it was the responsibility of your predecessors as well, and they took a different position. So, you know, why – why should we defer to the view of – the current administration?
Sollicitor General D. Verrilli: Well, because we think they are persuasive your Honor.
Justice Scalia: Oh Okay.

4.3. Avoiding the Pitfalls: A Reasonable Manner to Apply the ATS?

Recognizing corporate liability will open the floodgates to abusive litigation (Brief of KBR Inc. in support of Royal Dutch Shell, February 2012).

One of the concerns related to the ATS is that the US federal courts would become «courts of the world», although this argument is weakened by the fact that other countries provide remedy for human rights violations in their own courts. In its brief, the engineering and construction firm KBR also argues that «often, corporate defendants simply settle ATS claims, so as to avoid bad publicity, legal expenses, and the uncertain risk of a negative outcome»[52]. This concern is present among the defendants, but it can also be perceived in the brief submitted by

[52] Brief *amicus curiae* of KBR, Inc in support of respondents, p. 32.

the European Commission (on behalf of the European Union)[53] in support of neither party: although it recognizes that «the US' exercise of universal jurisdiction under the ATS is consistent with international law», the brief makes the case for a statute should be strictly delimited to «claims involving the most grave violations of the law of nations» where «claimants must exhaust domestic and international remedies. [...] These limits ensure that universal jurisdiction is appropriately exercised».

The «floodgates to abusive litigation» line of argument seems also to be undermined by the actual facts. In its brief, the Rutgers Law School cites its own survey of all ATS cases since the *Sosa* decision in 2004: only 77 published decisions and 25 unpublished decisions were found[54]. This is particularly low in comparison to the total federal docket for civil litigation – in 2011, 289,252 cases were filed – or to cases brought under other issues: for example, 2,483 patents suits were filed in one single semester between 1 October 2011 and 31 March 2012. Moreover, most of ATS cases are dismissed, suggesting existing filters works[55]. In *Sosa*, the Supreme Court cautioned courts to consider the «practical consequences» to foreign policy. ATS claims can be dismissed, under specific conditions, on the grounds of their political risks. Limitative doctrines represent another safeguard to abusive litigation and to adverse foreign policy consequences, two of the main risks raised by respondents and in several briefs in their support.

Turning back to relevant history for the *Kiobel* case: in 2009, following a 13-year procedure, ten plaintiffs had already agreed on a settlement in three ATS cases brought against Royal Dutch Petroleum Company and Shell Transport and Trading, plc., Shell's Nigerian subsidiary, Shell Petroleum Development Company of Nigeria, and Brian Anderson, former Shell Nigeria CEO. Terms of the settlement were made public: it provided for a total of $15.5 million to cover part of the legal fees and costs of plaintiffs, to compensate them as well as family members of those executed, and for the establishment of a trust fund. In their official press release, plaintiffs indicated they were not speaking for the Ogoni people, but expressed satisfaction with the fact that this trust fund had «the potential to benefit thousands of other people in Ogoni». Shell and its Director entitled an editorial they published in «The Guardian» of 10 July 2009: *It Is Time to Move On - Shell's Decision to Settle Is Not About Guilt*

[53] Brief *amicus curiae* of the European Commission on behalf of the European Union in support of neither party, 13 June 2012.

[54] Brief *amicus curiae* of The Rutgers Law School Constitutional litigation clinic in support of petitioners on re-argument of the case, 3 June 2012.

[55] According to a study carried out in 2004 by Professor K. Lee Boyd, 77.2% of the 92 ATS cases filed between 1980 and 2004 were dismissed. See K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, in «Texas International Law Journal», vol. 40, 2004, p. 1, at www.tilj.org/content/journal/40/num1/Boyd1.pdf.

but to Help the Ogoni People and Boost Reconciliation[56]. The text of plaintiffs added on its part:

The dispute between Shell and the Ogoni people remains unresolved. [...] Justice in these cases is not a level playing field – the odds are stacked in favour of the corporations and this case highlights the need to level the legal playing field in issues like access to justice as well as the regime of rights and responsibilities that govern the global economy[57].

For their counsels, including Paul Hoffman, the settlement represented «one more step towards holding corporations accountable for complicity in human rights violations, wherever they may be committed» and «another building block in the efforts to forge a legal system that holds violators accountable wherever they may be and prevents future violations». So motives may well go beyond a search for damages some would qualify as opportunistic. For plaintiffs and their lawyers it is about justice, and the step-by-step move to a system of accountability for corporations.

5. Indirect Economic and Human Rights Impact of ATS Litigation in Questions

ATS is not bad for business, it is bad for bad business (Joseph Stiglitz).

Does corporate liability under the ATS adversely affect investment of companies and undermine the competitiveness of US corporations? That is one of the para-legal arguments put forward by some corporations siding with Shell in *Kiobel*. Earlier on, Judge Jacobs asserted that corporate liability could «beggar» companies[58]. According to him, there is «no consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them – and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees». Nobel Prize-winning economist Joseph Stiglitz argues the exact opposite in an *amicus* submitted to the Supreme Court. In his view, potential liability under the ATS does not deter

[56] M. Brinded, *It Is Time to Move On - Shell's Decision to Settle Is Not About Guilt But to Help the Ogoni People and Boost Reconciliation*, in «The Guardian», 10 July 2009.

[57] Statement of the plaintiffs in *Wiwa v. Royal Dutch/Shell*, *Wiwa v. Anderson*, and *Wiwa v. SPDC*, 8 June 2009.

[58] Litigation, 10 February 2010, at http://www.milbank.com/images/content/8/5/858.pdf.

«mutually advantageous and constructive foreign investment and trade», but can on the contrary make perfect business sense as an incentive for due diligence for US companies investing abroad and foreign companies wanting to invest in the US. The economist addresses three main concerns put forward in multiple briefs about the potentially negative impact of ATS on business.

First of them is that the use of ATS against corporations could drive them away from investing in less developed countries. According to J. Stiglitz, the risk of liability is just one among many considerations that drive investment decisions. And in the past ten years, companies have faced the specter of ATS liability but this has not had any impact on Foreign Direct Investments (FDI). Another concern is that ATS could place US businesses at a competitive disadvantage because some of their competitors from other countries would be beyond the reach of law. J. Stiglitz argues that without ATS, US companies may actually face greater risk of tort liability than their foreign counterparts because victims would turn to American state common law to enforce human rights standards (with more uncertainties). He also thinks US corporations that comply with human rights standards may have a competitive advantage because their competitors' costs of compliance will be higher than their own. On a preventive level, working on human rights compliance would reduce legal claims and litigation, saving possible legal costs. Yet another concern is that ATS liability would deter foreign investment in the US as foreign companies would seek to avoid the jurisdiction of US courts. J. Stiglitz argues that foreign investors, balancing the ATS liability risk against other factors such as the US's sophisticated capital markets and educated labor force, will continue to find the US attractive.

The economist is not the only one making a case for human rights as a way of actually gaining a business advantage. One other point is reputation – which can have large economic implications – as recalled in a best practice guide to human rights assessment (HRCA) developed by the NGO *Aim for Human Rights*: «History teaches us that many companies start implementing human rights the minute they are confronted with potential damage to their reputation. Others prefer to think ahead and act out of precaution. There is a good business case for the latter approach as limiting risks to human rights is limiting

the risk of damaging company or product reputation»[59]. Some of the other potential benefits include increased motivation and productivity of workers, effective risk identification and management, and participating in the development of an attractive investment climate. Some of the arguments are less convincing than others, i.e. when assuming that some governments that lack strong enforcement mechanisms will be prone to seek investments by companies that are more likely to adhere to international human rights standards. The impact of ATS and humans rights compliance on business partly depends on whether we look at the short or long term. ATS liability might hinder US companies' investment overseas in the short run, but in the long-term it encourages economic and social improvement in host countries, which ultimately benefits US corporations. J. Stiglitz thus argues that «continued investment in LDCs (least developed countries) by corporations that have incentives to meet international human rights standards can be expected to result in improved human rights conditions that in turn foster stability and long-term economic development and attract FDI».

6. Conclusion: Cause(s) for Action

1 October 2012. Washington, DC, 11:00 AM: The re-hearing of the case concludes with the sun now high up. A small group leaves the court. Among them, plaintiffs and their counsel before the District Court, Bret Flaherty, debriefing on the hearing. Plaintiffs seem enthusiastic, and confident about the fact that clear answers were put forward on the issue of extraterritoriality. Plaintiff Charles Wiwa reminds that Shell has clear links to the United States, that all plaintiffs live in the US, so justifying jurisdiction. A few NGOs tracking the case are present and distribute signs denouncing Shell's activities. Some media is also present to cover speeches and reactions from the key protagonists. But both the crowd and this media coverage seem little compared to the stakes in the case.
The US Supreme Court is expected to render its decision by the first quarter of 2013. Unsurprisingly, positions are at odds. For Shell «petitioners and their *amici* erred in their attempt to piece together elements of different international-law norms into a

59 Aim for Human Rights, *A Best Practice Guide to the Human Rights Compliance Assessment*, November 2007.

pastiche of corporate responsibility/liability»[60]. For defendants and those siding along, well-established grounds and early precedents back a cause for action in *Kiobel*. First ones may claim they are «not looking for a blanket of impunity» for companies. They could argue for a more consistent and even restrictive use of the ATS, voicing legitimate concerns about legal uncertainty. But their contributions suggest they would be pleased to see the shadow of ATS-based litigation purely gone. Petitioners, on their side, are struggling for a *status quo*, to sustain this avenue for redress drilled by a couple of creative human rights lawyers in the 1980s. Plaintiffs say the system should be upheld, offers a workable test to filter cases and prevent abusive litigation. Defendants see an opportunity for a categorical rule out. First ones have more to lose, second much to win.

The UN *Guiding Principles on Business and Human Rights* indicate enterprises should treat the risk of causing or being complicit in gross human rights abuses as a «legal compliance issue» wherever they operate (Principle 23). Question is whether the actual driver – this shadow of liability – is here to stay. On 8 July 2012, in the case *Doe v. Exxon Mobil*, the DC Circuit Court of Appeals issued a ruling contradicting the Second Circuit in *Kiobel*, and recognising «it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for shockingly egregious violations of universally recognized principles of international law»[61]. A confirmation that what is at stake is, beyond the specifics of the case, the future of one of the powerful drivers for accountability and redress mechanisms for victims.

Now beyond expected positions, the case reveals persisting uncertainties abound the boundaries of corporate liability for (complicity in) human rights violations, with conservatives and liberals likely to welcome with more or less enthusiasm arguments on both sides. Whatever the outcome, it will not entirely redefine the boundaries of corporate liability since the ATS remains a limited legal tool actionable for very specific occurrences and, to some extent a palliative to multilateral judicial mechanisms that are still to emerge. But *Kiobel* is certainly a turning point in the history of corporate social responsibility and its outcome will be a signal, either ways. For one of the main incentives behind the development of voluntary CSR strategies is the limitation of risks associated with ATS-based litigation, both reputational and financial.

[60] Brief for respondents, 27 January 2012, p. 25.

[61] United States Court of Appeals for the District of Columbia Circuit, *John Doe VIII et al., appellants v. Exxon Mobil Corporation, et al. appellees*, decided on 8 July 2011, pp. 84-85.

For now, positions adopted by multinational corporations in *Kiobel* are certainly worth putting in perspective with their engagement in a number of corporate social responsibility and voluntary human rights initiatives. Shell and some of the supporting corporations are members of initiatives such as the Global Compact (to name a few: Dow Chemical, BP, Rio Tinto). Since 2007, Shell annually reports under the Global Compact 10 principles with a progress communication on «robust commitments, strategies or policies in the area of human rights». Among the assessment criteria is a «commitment to comply with all applicable laws and respect internationally recognized human rights, wherever the company operates»: box is checked. With that perspective, efforts deployed in *Kiobel* by the corporation (and its supporters), are discomforting at best. As recently voiced by the former UN Special Representative of the Secretary General John Ruggie:

Of course, the company must be free to argue, in the courts and elsewhere, that it met both the law and its wider responsibilities to respect human rights whenever it believes that to be the case. Yet questions remain. Should the corporate responsibility to respect human rights remain entirely divorced from litigation strategy and tactics, particularly where the company has choices about the grounds on which to defend itself? Should the litigation strategy aim to destroy an entire juridical edifice for redressing gross violations of human rights, particularly where other legal grounds exist to protect the company's interests? Or would the commitment to socially responsible conduct include an obligation by the company to instruct its attorneys to avoid such far-reaching consequences where that is possible? And what about the responsibilities of the company's legal representatives? Would they encompass laying out for their client the entire range of risks entailed by the litigation strategy and tactics, including concern for their client's commitments, reputation, and the collateral damage to a wide range of third parties? [...] I don't know what the correct answers to these questions are, but because the stakes are so high *Kiobel* may be the ideal case for starting the conversation[62].

In order to start that conversation, which is also about consistency in commitments, debates and positions defended in *Kiobel* certainly need to be made accessible to (and challenged by) a broader community than *amici*, their lawyers, and DC tourists. This one cause for action – for a transparent and active public debate – may have its opponents too. But it is not disputable.

[62] J. Ruggie, *Kiobel and Corporate Social Responsibility. An Issues Brief by John G. Ruggie*, 4 September 2012.