No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, ET AL.,

Petitioners,

v.

SHELL PETROLEUM N.V., SUCCESSOR TO ROYAL DUTCH PETROLEUM COMPANY, AND THE SHELL TRANSPORT AND TRADING COMPANY, LTD., FORMERLY KNOWN AS THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether corporate liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is an issue of subject matter jurisdiction.

2. Whether the court of appeals properly dismissed Petitioners' law-of-nations claims against Respondents, foreign holding corporations whose foreign subsidiary allegedly aided and abetted acts in Nigeria by the Nigerian government against its own citizens.

PARTIES TO THE PROCEEDINGS

Petitioners are 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, and Kpobari Tusima, individually and on behalf of his late father, Clement Tusima.

Respondents are Shell Petroleum N.V., successor to Royal Dutch Petroleum Company, and the Shell Transport and Trading Company, Ltd., formerly known as The "Shell" Transport and Trading Company, p.l.c. Shell Petroleum Development Company of Nigeria, Ltd., was a defendant in the district court, but was not a party to the proceedings before the court of appeals and is not a respondent here.*

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents submit the following corporate information:

Respondent Shell Petroleum N.V., successor to Royal Dutch Petroleum Company, is a wholly owned subsidiary of Royal Dutch Shell, p.l.c.

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* The caption on Kiobel's petition for certiorari incorrectly lists Shell Petroleum Development Company of Nigeria, Ltd. as a respondent.

Respondent the Shell Transport and Trading Company, Ltd., formerly known as The "Shell" Transport and Trading Company, p.l.c., is a wholly owned subsidiary of Respondent Shell Petroleum N.V., except for one share that is held by a dividend access trust for the benefit of one class of ordinary shares of Royal Dutch Shell, p.l.c.

Royal Dutch Shell, p.l.c. is a publicly traded company. No publicly traded company has a 10% or greater stock ownership in Royal Dutch Shell, p.l.c.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The decision below does not "assert[] a radical overhaul of all existing ATS jurisprudence". (Petition for Writ of Certiorari ("the Petition" or "Pet.") 10.) The Second Circuit's determination that (1) the issue of corporate liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is one of subject matter jurisdiction, and (2) claims against corporations fall outside the jurisdiction provided by the ATS, represents a straightforward application of this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Sosa made three propositions clear. *First*, "the [ATS] is in terms only jurisdictional". *Sosa*, 542 U.S. at 712; *see id.* at 729. *Second*, *Sosa* does not support Petitioners' argument that the ATS was enacted to provide "broad remedies" (Pet. 25, 30); rather, *Sosa* instructs that courts should exercise great caution "when considering the kinds of individual claims that might implement the jurisdiction of the" ATS. *Sosa*, 542 U.S. at 725. *Third*, as part of the determination of whether a norm of international law supports a cause of action, courts must consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued". *Id.* at 732 & n.20.

Petitioners allege that Shell Petroleum N.V. and the Shell Transport and Trading Company, Ltd., through their subsidiary Shell Petroleum Development Company of Nigeria, Ltd., aided and abetted the Nigerian government's violations of

human rights. Faithfully adhering to *Sosa*'s instructions, the Second Circuit considered whether the law of nations provides jurisdiction over those claims. Examining the present state of international law, the court found "a jurisprudence, first set forth in Nuremberg, and repeated by every international tribunal of which [it was] aware, that offenses against the law of nations . . . for violations of human rights can be charged against States and against individual men and women but not against juridical persons such as corporations." (Appendix to the Petition ("Pet. App.") A-15.) Following *Sosa*'s admonition to exercise caution, the Second Circuit concluded that the ATS "simply does not confer jurisdiction over suits against corporations". (*Id.* at A-16-17.) It therefore dismissed Petitioners' complaint for lack of subject matter jurisdiction. (*Id.* at A-81.)

The Second Circuit's determination that corporate liability under the ATS is an issue of subject matter jurisdiction does not "conflict[] with virtually every other ATS appellate decision involving a corporate defendant". (Pet. 16-17.) Indeed, the only other court of appeals explicitly to determine whether corporate liability under the ATS is a jurisdictional issue has agreed with the Second Circuit that it is, *see Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008), a result compelled by *Sosa* in any event.

Post-petition, a conflict between the Second Circuit and the Seventh and District of Columbia Circuits developed on the question of whether the ATS provides jurisdiction over corporations. *See*

Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, Nos. 09-7125, 09-7127, 09-7134, 09-7135, 2011 WL 2652384 (D.C. Cir. July 8, 2011), *petition for reh'g en banc filed* (D.C. Cir. Aug. 8, 2011). However, in addition to the fact that the Second Circuit's decision represents a straightforward application of *Sosa*, review by this Court is unwarranted because: the Second Circuit's decision is not as far-reaching as Petitioners suggest; this case presents a poor vehicle through which to address the question of corporate liability under the ATS; and review now would be premature. Additionally, the panel unanimously agreed that this case should be dismissed, so a grant of a writ of certiorari here would have no effect on the outcome of this case.

A. Factual Background

Respondent Shell Petroleum N.V., successor to Royal Dutch Petroleum Company, and Respondent the Shell Transport and Trading Company, Ltd. ("Shell Transport"), formerly known as The "Shell" Transport and Trading Company p.l.c., (collectively, "Shell") are Dutch and English holding companies, respectively. (Pet. App. A-22 & n.25.) Together they wholly own The Shell Petroleum Company, Ltd., a holding company that, in turn, owns Shell Petroleum Development Company of Nigeria, Ltd. ("SPDC"). (*Id.* at A-170 n.50.) SPDC is a corporation organized under the laws of Nigeria with its corporate headquarters in Nigeria. (App. 4a ¶2.)[1]

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[1] References to "App." are to the appendix attached hereto.

SPDC began operating oil production facilities in the Ogoniland region of Nigeria in 1958. (Pet. App. A-22.) SPDC is separate and distinct from the respondent holding companies, which, as holding companies, do not engage in operational activities in Nigeria or elsewhere. (*See* App. 9a ¶ 3, 14a ¶ 3.)[2] SPDC was named as a defendant by Petitioners, but was dismissed by the district court for lack of personal jurisdiction. (*See* Pet. App. at A-170.)

Petitioners Esther Kiobel, *et al.* (collectively "Petitioners" or "Kiobel") are Nigerian nationals who allege that they or their relatives were killed; tortured or subjected to cruel, inhuman, or degrading treatment; unlawfully detained; deprived of their homes and property; or forced into exile by the armed forces and police of the Nigerian government. Kiobel maintains that Shell, through SPDC, "aided and abetted the Nigerian government in committing human rights abuses directed at plaintiffs". (*Id.* at A-21-22.)

B. Proceedings Below

1. The District Court's Decision

On September 29, 2006, the district court entered an order granting in part and denying in part Shell's second motion to dismiss. Acknowledging that "Plaintiffs' claims are essentially claims for secondary liability, i.e., claims that

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[2] *See also* Pet. App. A-181 n.54 ("the Shell entities are holding companies . . . that . . . operate in Nigeria only 'through subsidiaries', specifically SPDC"); A-181-85 (Kiobel has not pleaded a basis for a claim of agency or alter ego liability).

Defendants 'facilitated,' 'conspired with,' 'participated in,' 'aided and abetted,' or 'cooperated with' government actors or government activity" (Pet. App. B-11), the district court began by determining that "where a cause of action for violation of an international norm is viable under the ATS, claims for aiding and abetting that violation are viable as well" (*id.* at B-12). The district court then concluded that Kiobel could proceed on the claims for crimes against humanity; torture or cruel, inhuman, and degrading treatment; and arbitrary arrest and detention. The district court dismissed Kiobel's claims regarding extrajudicial killing; rights to life, liberty, security, and association; forced exile; and property destruction. (*See id.* at B-13-23.) However, stating that "[r]easonable minds may differ as to whether any of the acts described above is actionable under the ATS post-*Sosa*", the district court *sua sponte* certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (*Id.* at B-21-23.)

2. The Appeal

Kiobel appealed the dismissal of the extrajudicial killing claim only. Shell cross-appealed, arguing that all of Kiobel's remaining claims should be dismissed.

Shell argued that *Sosa* requires that international law govern not just what conduct is proscribed, but also who may be held liable. (*See, e.g.*, App. 40a-41a, 44a-48a, 58a-60a, 161a-164a, 167a-169a.) In particular, Shell argued that "the law of nations does not attach civil liability to corporations under any circumstance", and offered as

support the fact that the Rome Statute and the charters governing the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda "restrict the jurisdiction of those tribunals to 'natural persons' only, excluding corporations from their coverage". (App. 59a.) Shell also discussed how "the drafters of the Rome Statute explicitly considered and declined to recognize corporate liability" (*id.*) and how "when Congress enacted the TVPA, it excluded the possibility of corporate liability for extrajudicial killing (and torture)" (*id.* at 60a).

Kiobel responded to Shell's arguments regarding corporate liability under the ATS by asserting that "Shell incorrectly claims that 'the law of nations does not attach civil liability to corporations under any circumstances'" and arguing that (1) the documents to which Shell cites are the founding documents for entities that apply "international *criminal* law", and (2) "[n]o Court has ever accepted the argument that corporations cannot be held liable in ATS suits". (App. 138a n.31.)

Shell addressed Kiobel's response in its reply brief, arguing that "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'" (App. 161a (alteration in original)) and that "footnote 20 [of *Sosa*] is part of the Court's holding that the law of nations determines what acts and actors may be held liable under the ATS" (*id.* at 163a).

The issue of corporate liability was also extensively discussed during oral argument, with the

panel asking Kiobel's counsel such questions as: "Has a corporation ever been held liable by any international tribunal for a violation of international law?" (Jan. 12, 2009, Audio Recording of Oral Argument ("Rec." (hours : minutes : seconds)) 0:26:26)[3], and "Would it be fair to say that the concept of corporate liability for a violation of international law is not uniformly or firmly established in international law?" (Rec. 0:32:11). Additionally, after noting 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" (Rec. 0:33:38), Judge Cabranes suggested that Kiobel submit a supplemental letter on the issue (Rec. 0:34:08). Counsel for Kiobel later did so.[4] (*See* App. 190a-206a.)

3. The Second Circuit's Decision

On September 17, 2010, the Second Circuit unanimously held that this lawsuit should be dismissed, although the panel split on the grounds for dismissal. Following *Sosa*'s instruction that determining whether a norm of international law supports a cause of action under the ATS involves consideration of "whether international law extends

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[3] No official transcript of the argument is available, but Shell will provide a compact disc containing a copy of the official audio recording to the Court upon request.

[4] Although Judge Cabranes suggested the submission of a supplemental letter during oral argument in this case, Kiobel's counsel submitted the letter only in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), heard before the Second Circuit in tandem with *Kiobel*.

the scope of liability for a violation of a given norm to the perpetrator being sued", *Sosa*, 542 U.S. at 732 & n.20, the majority considered whether international law extends the scope of liability for Kiobel's claims to corporations. After finding that "no corporation has ever been subject to *any* form of liability under the customary international law of human rights", the majority concluded that, in light of *Sosa*, the ATS "simply does not confer jurisdiction over suits against corporations" (Pet. App. A-16-17) and dismissed Kiobel's complaint (*id.* at A-81).

Judge Leval, though disagreeing with the majority's reasoning, was "in full agreement that *this* Complaint must be dismissed". (*Id.* at A-90.) He identified two alternate grounds that independently compelled dismissal of Kiobel's claims: (1) the Amended Complaint fails to plead facts supporting a reasonable inference that the defendants acted with a purpose of bringing about human rights abuses as required by *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (Pet. App. A-168-69); and (2) "the pleadings do not support a plausible inference that Shell, the parent holding companies, themselves rendered assistance to the Nigerian government" (*id.* at A-181 n.54).

4. The Petitions for Rehearing

On February 4, 2011, the Second Circuit entered orders (1) denying Kiobel's request for panel rehearing (Pet. App. D-3) and (2) denying Kiobel's request for rehearing *en banc* (*id.* at C-2).

Concurring in the denial of Kiobel's request for panel rehearing, Judge Cabranes explained that fidelity to controlling law dictated the majority opinion: "Because corporate liability is not a discernable, much less universal, norm of customary international law, it cannot form the basis of a suit under the ATS. That is the long and short of the matter." (*Id.* at D-24-25.)

After the Second Circuit's issuance of the mandate, Kiobel filed (1) a second petition for rehearing *en banc* and (2) a motion to recall the mandate. On March 1, 2011, the Second Circuit denied Kiobel's motion to recall the mandate (App. 1a- 2a), and denied Kiobel's second petition for rehearing *en banc* as moot (Pet. App. C-7).

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS UNWARRANTED TO DECIDE WHETHER DISMISSAL SHOULD HAVE BEEN UNDER RULE 12(B)(1) OR 12(B)(6).

Kiobel's first ground for issuance of a writ of certiorari is that the Second Circuit's dismissal for lack of subject matter jurisdiction conflicts with the decisions of this Court and with "every other ATS appellate decision involving a corporate defendant". (Pet. 16 (capitalization altered).) Kiobel is incorrect. Not only did *Sosa* control the Second Circuit's conclusion that corporate liability under the ATS is jurisdictional, but the Second Circuit's decision is consistent with the only other court of appeals to

decide the issue.[5] Furthermore, whether the issue of corporate liability under the ATS is jurisdictional has no bearing on the outcome of this case.

A. The Second Circuit's Decision Does Not Conflict with Any Decision of This Court.

Unlike garden-variety federal statutes providing a cause of action with jurisdiction conferred by the "arising under" language of § 1331, the ATS "creat[es] no new causes of action". *Sosa*, 542 U.S. at 724. Instead, the ATS is "only jurisdictional", *id.* at 712, conferring "original jurisdiction" on the district courts over civil actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States", 28 U.S.C. § 1350. Two criteria must be met before the ATS can provide jurisdiction over claims in violation of the law of nations: (1) a plaintiff alleges 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 extends the scope of liability for a violation" of that norm "to the perpetrator being sued". *Sosa*, 542 U.S. at 732 & n.20. Thus, pursuant to *Sosa*, scope of liability—including the identity of the perpetrator being sued—is a jurisdictional issue: if international law

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[5] Neither of the post-Petition appellate decisions addressing corporate liability decide whether the issue is jurisdictional. *See Flomo*, 643 F.3d 1013 (no discussion of whether corporate liability is jurisdictional); *Doe v. Exxon Mobil Corp.*, 2011 WL 2652384, at *20 (finding it "unnecessary to decide" whether corporate liability is jurisdictional).

does not extend liability to the perpetrator-defendant, federal courts are not permitted to recognize a cause of action subject to jurisdiction under the ATS.[6]

Relying principally on *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), Kiobel argues that the Second Circuit's decision amounts to an inappropriate "drive-by jurisdictional" ruling that "miss[es] the critical differences between 'true jurisdictional conditions and nonjurisdictional causes of action'". (Pet. 11 (quoting *Reed Elsevier*, 130 S. Ct. at 1244).) Actually, those cases confirm the soundness of the Second Circuit's decision.

Morrison, *Reed Elsevier*, *Arbaugh*, and *Steel Co.* each involved a statute containing both (1) a substantive provision setting forth certain prohibited behavior or establishing certain rights and (2) an accompanying jurisdictional provision conferring power to adjudicate claims regarding those behaviors

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[6] Kiobel suggests that footnote twenty-one of *Sosa* "treated the issue of corporate liability as a merits-related issue and not a matter of subject matter jurisdiction". (Pet. 14.) Footnote twenty-one, however, merely suggests several possible additional principles limiting the availability of relief for violations of international law. The principle to which Kiobel refers, "case-specific deference to the political branches", *Sosa*, 542 U.S. at 733 n.21, suggests nothing about whether corporate liability under the ATS is an issue of subject matter jurisdiction, but only that satisfaction of the two criteria referenced above may not entitle a plaintiff's claim to proceed.

or rights on the federal courts.[7] It is that type of statute that gives rise to this Court's concern about "drive-by" jurisdictional rulings. When a statute contains both substantive and jurisdictional provisions, courts should not treat substantive provisions as if they create jurisdictional conditions.

Unlike the statutes involved in those cases, the ATS does not include an underlying substantive statutory provision. It was enacted as part of the Judiciary Act of 1789, which specified the jurisdiction of the federal courts, and is codified in Title 28 ("Judiciary and Judicial Procedure"), Section 85 ("District Courts; Jurisdiction") of the United States Code, surrounded by the more familiar jurisdictional provisions covering federal questions, diversity, claims against the United States or foreign nations, and the like. As a result, all of the ingredients the ATS specifies—including a "tort . . .

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[7] *See Morrison*, 130 S. Ct. at 2877 & n.3, 2881-82 (§ 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), prohibits employing "any manipulative or deceptive device or contrivance", and 15 U.S.C. § 78aa grants district courts jurisdiction over violations); *Reed Elsevier*, 130 S. Ct. at 1241, 1245 (the Copyright Act gives copyright holders exclusive rights, *see e.g.*, 17 U.S.C. § 501(a), and 28 U.S.C. § 1331 and 28 U.S.C. § 1338 provide district courts with jurisdiction over infringement actions); *Arbaugh*, 546 U.S. at 515 (Title VII sets forth a right to be free of certain harassment, and 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3) confer jurisdiction over Title VII claims on the federal courts); *Steel Co.*, 523 U.S. at 87, 90 (§ 11046(a)(1) of the Emergency Planning and Community Right-To-Know Act of 1986 provides a right to sue users of toxic chemicals, *see* 42 U.S.C. § 11046(a)(1), and §11046(c) confers the district courts with jurisdiction over such actions, *see* 42 U.S.C. §11046(c)).

committed in violation of the law of nations"—are, by definition, jurisdictional thresholds. 28 U.S.C. § 1350.[8] Thus, scope of liability under the ATS *must* be jurisdictional: unless international law says that liability for a violation of one of its norms extends to the perpetrator being sued, federal courts are not empowered to hear the case.[9]

B. The Second Circuit's Decision Does Not Conflict with the Decisions of Any Other Court of Appeals.

Kiobel maintains that the Second Circuit's "subject matter jurisdiction decision . . . conflicts with virtually every other ATS decision involving a

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[8] The fact that the ATS does not specifically identify the nature of the defendants who may be sued is irrelevant. The ATS clearly states that it confers jurisdiction only over violations of the law of nations; if the law of nations does not extend liability to corporations, they are not subject to jurisdiction under the ATS. Familiar jurisdictional provisions contain similar conditions. For example, 28 U.S.C. § 1331, which confers "arising under" jurisdiction, does not mention the "face of the well-pleaded complaint" doctrine, much less the rule that federal question jurisdiction exists over state-law claims if they necessarily contain a substantial disputed question of federal law, *see Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312-14 (2005).

[9] Kiobel asserts that the Second Circuit's decision "would transform nearly every issue in an ATS case into an issue of subject matter jurisdiction" and that this would create "serious consequences for the efficient processing of these cases". (Pet. 15.) It is, however, not the Second Circuit's decision that has rendered issues under the ATS jurisdictional, but rather this Court's unanimous determination that the ATS is "only jurisdictional". *Sosa*, 542 U.S. at 729.

corporate defendant".[10] (Pet. 16-17.) Kiobel is wrong.

First, only one other court of appeals has decided whether corporate liability under the ATS is an issue of subject matter jurisdiction, and that court reached the same conclusion as the Second Circuit: it is. *See Romero*, 552 F.3d at 1315 (concluding that "[b]ecause the Alien Tort Statute is jurisdictional" it had to address the defendant's argument "about corporate liability under that statute").

Second, no conflict is created by ATS cases against corporations in which the issue of corporate liability was not raised: "Questions which 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." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

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[10] Despite this sweeping statement, Kiobel cites to only one case with which the Second Circuit's decision purportedly conflicts, *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192 (D.C. Cir. 2004). (Pet. 17.) *Herero*, however, is inapposite. *Herero* was decided before *Sosa* and concluded (1) that "it is not frivolous to assert that [the ATS] creates a cause of action" and (2) that a claim of federal question jurisdiction based on the statute was, therefore, not frivolous. *Herero*, 370 F.3d at 1195. To the extent *Herero* conflicts with the Second Circuit's decision, it also conflicts with *Sosa* and is no longer good law.

C. Whether Corporate Liability Is an Issue of Subject Matter Jurisdiction Is Irrelevant to the Outcome of the Case.

Putting aside the fact that no conflict exists, the Second Circuit could properly have reached the issue of corporate liability even if it were not jurisdictional. Therefore, Kiobel's first question does not justify the grant of a writ of certiorari, because it is of no consequence to the outcome of this case.

As explained *supra*, upon granting in part and denying in part Shell's second motion to dismiss, the district court *sua sponte* certified its decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Pet. App. B-21-23.) The district court sought guidance from the court of appeals as to "the viability of Plaintiffs' claims". (*Id.* at B-23.) Indeed, the district court was powerless to constrict appellate review under 28 U.S.C. § 1292(b) because "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court". *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996). Accordingly, pursuant to both the terms of the district court's § 1292(b) certification and *Yamaha*, the Second Circuit was vested with appellate jurisdiction to address *all* grounds for dismissing all or part of the complaint, including the ground of lack of corporate liability under the ATS.[11]

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[11] Kiobel's complaint that the Second Circuit decided the issue of corporate liability under the ATS "*sua sponte*" (Pet. 14; *see* Pet. 3) is without basis. Shell raised the issue of corporate

Swint v. Chambers County Commission, 514 U.S. 35 (1995), cited by Kiobel (Pet. 16 n.7), is inapposite. *Swint* addresses the unavailability of pendent party jurisdiction in an appeal premised on the collateral order doctrine. The scope of an appellate court's jurisdiction under the collateral order doctrine and § 1292(b) are different: the collateral order doctrine permits review of specific issues only, *see Swint*, 514 U.S. at 49-50; as discussed above, § 1292(b) permits review of the entire order issued by the district court.[12]

II. CERTIORARI IS UNWARRANTED TO DECIDE WHETHER THE ATS PROVIDES JURISDICTION OVER CORPORATIONS.

Although there is a nascent conflict between the Second and Seventh and District of Columbia Circuits regarding whether the ATS provides jurisdiction over corporations, granting Kiobel's request for a writ of certiorari is unwarranted for four reasons: (1) the Second Circuit's decision represents a straightforward application of *Sosa*; (2) the Second Circuit's decision is not as far-reaching as Kiobel supposes; (3) this case presents a

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liability under the ATS in its briefing, Kiobel responded, and the issue was discussed at oral argument. *See supra* pages 5-7.

[12] *United States v. Stanley*, 483 U.S. 669 (1987), cited in *Swint*, is also inapposite. *Stanley* admonishes the court of appeals for resurrecting a plaintiff's "long-dismissed FTCA claims", when the only claims addressed in the order on § 1292(b) review were the plaintiff's *Bivens* claims. *Id.* at 677. Here, the Second Circuit confined its review to the order appealed from, and did not rule on any prior orders of the district court.

poor vehicle for review; and (4) review now would be premature.

A. The Second Circuit's Decision Is a Straightforward Application of *Sosa*.

Sosa sets forth a specific methodology for courts to apply before recognizing a claim subject to jurisdiction under the ATS: the claim must assert a violation of a norm of international law with no "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted", *Sosa*, 542 U.S. at 732, and international law must "extend[] the scope of liability for a violation of [the] norm to the perpetrator being sued", *id.* at 732 n.20. *Sosa* additionally emphasizes that courts should exercise "caution" when considering whether to recognize a new cause of action, and provides five reasons for that caution: (1) "the prevailing conception of the common law has changed since 1789 in a way that counsels restraint"; (2) "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law"; (3) in the "great majority of cases", "a decision to create a private right of action is one better left to legislative judgment"; (4) "the potential implications for the foreign relations of the United States . . . should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs" because "[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of

foreign governments over their own citizens"; and (5) courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity". *Id.* at 725-28 (citations omitted).

In determining that corporate liability does not exist under the ATS, the Second Circuit adhered strictly to *Sosa*'s instructions, first applying *Sosa*'s methodology by scouring the law of nations for any indication of a norm subjecting corporations to liability, and, finding none, exercising *Sosa*'s prescribed caution. Kiobel, however, maintains that the Second Circuit's decision conflicts with *Sosa* in four separate ways: (1) by "ignor[ing] the plain language, history and purpose of the ATS"; (2) by "rest[ing] on a fundamental misinterpretation of footnote 20"; (3) by disregarding the fact "that federal common law provides the cause of action in ATS cases"; and (4) by "ignor[ing] a major source of international []law". (Pet. 26, 31, 34, 37 (capitalization altered).) Not one of those purported conflicts actually exists.

1. The Second Circuit's Decision Does Not Conflict with the Language, History, or Purpose of the ATS.

a. The Language of the ATS

The ATS states that it provides jurisdiction only over "violation[s] of the law of nations or a treaty of the United States". 28 U.S.C. § 1350. Thus, by the terms of the ATS, it is the law of nations and the

treaties of the United States that determine the universe of defendants over which the ATS may assert jurisdiction.[13] As the Second Circuit determined, the law of nations simply does not include corporations in that universe.

b. The History of the ATS

Sosa emphasized three historic examples that animated the ATS: (1) the May 1784 Marbois incident; (2) the case of *Bolchos v. Darrel*, 3 F. Cas. 810 (No. 1,607) (D. S.C. 1795); and (3) the 1795 opinion of Attorney General Bradford, 1 Op. Att'y Gen. 57. *See Sosa*, 542 U.S. at 716-17, 720-21. Each of those incidents concerned redress from natural persons, not corporations.

Kiobel's arguments that "[t]he Founders would have been familiar with the use of tort remedies against corporations when the ATS was enacted" (Pet. 28) and that "[t]he majority ignores the well-established liability of corporations . . . in the law merchant and maritime law, both integral parts of the law of nations at the time the ATS was enacted" (Pet. 29) miss the mark. Even if the Founders were

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[13] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), cited by Kiobel, itself undermines Kiobel's argument that the ATS provides jurisdiction over corporations because its text does not explicitly distinguish among classes of defendants. In *Amerada*, the Second Circuit had held that "'who is within' the scope of [the ATS] is governed by 'evolving standards of international law'". *Id.* at 433. This Court did not dispute that proposition, but merely held that the later-enacted, comprehensive Foreign Sovereign Immunities Act provided the "sole basis for obtaining jurisdiction over a foreign state". *Id.* at 434.

familiar with corporate liability as a matter of *domestic* law, that does not mean they intended to provide for corporate liability under the ATS, which provides jurisdiction only over violations of *the law of nations*.[14] Similarly, *in rem* jurisdiction over ships has nothing to do with corporate liability. The ship in *in rem* cases is neither a corporation nor a litigant. It is merely the subject of the litigation. Indeed, *in rem* jurisdiction negates the applicability of the ATS. *See Moxon v. The Fanny*, 17 F. Cas. 942, 948 (No. 9,895) (D. Pa. 1793) (ATS jurisdiction unavailable in *in rem* action because "[i]t cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for"); *see also Sosa*, 542 U.S. at 720.

c. The Purpose of the ATS

Kiobel also maintains that the Second Circuit's decision conflicts with *Sosa* and the purpose of the ATS because "[t]he purpose of the ATS was to provide for broad remedies for law of nations violations against any tortfeasor". (Pet. 30.) *Sosa* says just the opposite: "It was this *narrow* set of violations of the law of nations, admitting of judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS with its reference to tort." *Sosa*, 542 U.S. at 715 (emphasis added). *Sosa* further admonishes that judicial power with respect to the ATS is limited to recognizing a "*narrow* class of international norms",

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[14] *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2009), cited by Kiobel (Pet. 29), is inapposite. *Exxon* does not mention the law of nations or the ATS.

subject to "vigilant doorkeeping", *id.* at 729 (emphasis added), through the exercise of "judicial caution", *id.* at 725. Indeed, the entire thrust of *Sosa* is the narrowness of ATS jurisdiction and the caution courts should exercise before allowing a claim under the ATS to proceed.

Additionally, Kiobel admits that the ATS "was one of the First Congress' answers to the inability of the Continental Congress to respond to violations of treaties or the law of nations that might escalate into war". (Pet. 28; *see Sosa*, 542 U.S. at 715 (the ATS was adopted to reach "impinge[ments] upon the sovereignty of the foreign nation [which,] if not adequately redressed[,] could rise to an issue of war").) Kiobel suggests no escalation of international tensions that might arise from the decision that Nigerians injured in Nigeria by the Nigerian government with the alleged assistance of a Nigerian corporation should not be able to sue Dutch and English parent corporations in United States courts. Indeed, the history of the ATS suggests that its jurisdiction would not have extended to acts taken within the territory of a foreign sovereign: the thought that United States courts would have reached the Marbois incident had it occurred in Spain is unfathomable. *See Sosa*, 542 U.S. at 727 ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.").

2. The Second Circuit's Decision Does Not Conflict with *Sosa* Footnote Twenty.

Footnote twenty of *Sosa* states:

> A related consideration 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. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (C.A.D.C. 1984) (Edwards J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

Sosa, 542 U.S. at 732 n.20.

Kiobel desires to read the "Compare" signal as limiting the Court's statement, so that courts should consider only whether a norm requires state action. (*See* Pet. 31-32.) Justice Breyer's separate concurrence does not read footnote twenty as Kiobel would have it, *see Sosa*, 542 U.S. at 760 (Breyer, J., concurring) ("The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue."), and the Court's analysis of *Sosa*'s complaint itself suggests that the identity of the perpetrator is as important as the nature of the alleged offenses, *see id.* at 737 ("And all of this assumes that Alvarez could establish that Sosa was

acting on behalf of a government when he made the arrest, for otherwise he would need a broader rule still."). Furthermore, Kiobel's position makes no sense. Given *Sosa*'s instruction to exercise caution before recognizing a cause of action subject to ATS jurisdiction, there is no reason courts should limit themselves to considering only whether a norm requires state action. As Kiobel acknowledges, international law treats different types of defendants differently, not only based upon whether they are state actors. (*See* Pet. 33 (acknowledging that international law provides certain immunities to, for example, diplomats and heads of state and that corporations have been excluded from international criminal enforcement mechanisms).) Courts considering whether to exercise ATS jurisdiction should do the same.

3. The Second Circuit's Decision Does Not Conflict with *Sosa*'s View of the Role of Federal Common Law.

Kiobel asserts that "the tort cause of action recognized under the ATS derives from federal common law, not international law" and "[t]he drafters of the ATS understood that the rules of decision in ATS cases would be found in common law". (Pet. 34.) Kiobel's argument evidences a fundamental misunderstanding of the interaction between the ATS and federal common law.

First, a cause of action subject to jurisdiction under the ATS does not "derive" from federal common law. Instead, *Sosa* says that federal courts are empowered to use their ability to *create* federal common law to recognize causes of action *from the*

law of nations that are subject to jurisdiction under the ATS. *See Sosa*, 542 U.S. at 724-25, 732.

Second, *Sosa* places tight controls on when a federal court can use its power to create federal common law to recognize a cause of action subject to jurisdiction under the ATS. Specifically, a court can create causes of action for violations of the law of nations only if that law has sufficiently "definite content and acceptance among civilized nations" and only for which "international law extends the scope of liability . . . to the perpetrator being sued". *Id.* at 732 & n.20. As a result, federal common law does not determine who is subject to suit under the ATS.[15]

Third, Kiobel's complaint that "[t]he majority's reasoning would . . . overturn *Filartiga* because there are equally no cases imposing civil liability on individual torturers under international law" (Pet. 35) is wrong.[16] As Kiobel repeatedly insists, "[i]t is up to each State to determine whether to provide corporate tort liability for violations of the law of nations". (Pet. 36; *see id.* at 35.) In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the Second Circuit concluded that the defendant could be held liable under international criminal law, and therefore could be held liable civilly in tort. *Id.* at

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[15] Even if federal common law determined the scope of liability under the ATS, it would not follow that corporations would be subject to suit. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 65-66 (2001) (no corporate liability for *Bivens* actions).

[16] Additionally, as explained in Shell's conditional cross-petition (No. 11-63), Congress displaced the claims recognized in *Filartiga* by enacting the Torture Victim Protection Act, 28 U.S.C. § 1350 note.

876, 880, 887-88. In this case, the Second Circuit correctly determined that Shell cannot be held liable under international criminal law, and, therefore, cannot be held civilly liable in tort. (*See* Pet. App. A-72-76.) Kiobel's argument that the Second Circuit's decision conflicts with *Filartiga* rests on the internally inconsistent premise that courts may create a civil cause of action by borrowing from international criminal law standards applicable to natural persons, but simultaneously strip away all the limitations—such as the absence of corporate liability—that exist in international criminal law.[17] As Kiobel points out, not only have "corporations . . . been excluded from the recently-created international criminal enforcement mechanisms", but even though "many states have included corporations as appropriate defendants under the implementing *legislation* passed to comply with their obligations under the Rome Statute" (Pet. 33 (emphasis added))—which itself excludes the concept

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[17] As *Sosa* observed, because civil law does not contain the same checks as criminal law, it is dubious at the outset for a court unilaterally to create a civil right of action based on a violation of international criminal law. *See Sosa*, 542 U.S. at 727 ("The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion."); *see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) ("We have been quite reluctant to infer a private right of action from a criminal prohibition alone."). Providing for civil liability against corporations, when international criminal law imposes liability only on individuals, requires an even further step.

of corporate liability[18] (*see* Pet. App. A-52-54)—the United States has not enacted any such implementing legislation. Indeed, the Torture Victim Protection Act ("TVPA") specifically excludes corporations from its scope, imposing liability for torture and extrajudicial killing on "individual[s]" only. 28 U.S.C. § 1350 note § 2(a); *see Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126 (9th Cir. 2010); *Mohamad v. Rajoub*, 634 F.3d 604, 607 (D.C. Cir. 2011). Thus, Kiobel's own argument demonstrates the absence of any universal and obligatory norm of international law that would hold Shell liable for allegedly aiding and abetting human rights violations by the Nigerian government.[19]

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[18] The *Brief of Ambassador David J. Scheffer* ("*Scheffer Brief*") argues that "no conclusion should be drawn regarding the exclusion of corporations from the Rome Statute other than that no timely political consensus could be reached to use this particular treaty-based international court to prosecute corporations under international criminal law for atrocity crimes". (*Scheffer Brief* 9-10.) But that conclusion is exactly what is germane to corporate liability under the ATS—that the negotiators of the Rome Statute could not agree to impose criminal liability (or even civil penalties (*id.* at 8)) on corporations engaging in human rights violations confirms that there is no universal recognition of such liability within international criminal law that can give rise to a federal common law claim subject to jurisdiction under the ATS.

[19] The *Brief of Amici Curiae Nuremberg Scholars* ("*Nuremberg Brief*") argues that because "the Allied Control Council . . . deployed a range of remedial actions to hold both natural and juristic persons accountable for violations of international law", the international law that came out of the Nuremberg trials "unequivocally shows that corporations . . . are the subjects of international law and can be held accountable . . . for violations of international law". (*Nuremberg*

4. The Second Circuit's Decision Did Not Improperly Ignore General Principles of Law Common to Legal Systems.

Kiobel incorrectly asserts that the Second Circuit erred by not taking into account "[g]eneral principles of law common to all legal systems". (Pet 37.)

Brief 2-3, 4.) The Control Council, however, was not a court applying the law of nations, but the interim government established by the Allies to rule Germany. *See* Control Council Proclamation No. 1 Art. II, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/01INT02.pdf. Thus, the laws enacted by the Control Council were domestic laws of Germany, not judicial pronouncements of the law of nations. Additionally, the Allies' dissolution of the Nazi Party and its related entities says nothing about punishment of corporations under international law—the Nazi party was the former governing body of Germany, and its dissolution (as well as the dissolution of its related entities) was the consequence of its military defeat. Furthermore, the *Nuremberg Brief*'s discussion of the dismantling of German industries (at 11-20) has nothing to do with corporate punishment for complicity in human rights violations. The *Nuremberg Brief* itself suggests that those dissolutions were enacted by the victors of war to curtail German economic power, in particular Germany's "industrial cartels". (*Id.* at 4, 11.) Indeed, the law of the American Military Government "promulgated . . . to serve as the legal vehicle for the dissolution of I.G. [Farben] in the American zone" was "a sweeping *antitrust* law designed to prevent monopoly practices". JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN 158 (1978) (emphasis added). When the breakup of I.G. Farben was ultimately accomplished in 1953, the shareholders of Farben became the shareholders of the five successor companies, *id.* at 161—hardly a "punishment" under international law.

The fact that a legal norm exists in all nations does not make that norm part of customary international law:

> [T]he mere fact that every nation's municipal law may prohibit theft does not incorporate "the Eighth Commandment, 'Thou Shalt not steal' . . . (into) the law of nations." It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of [the ATS].

Filartiga, 630 F.2d. at 888 (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)) (first alteration and omission in original). The law of nations concerns the relationship of nations to each other. *See, e.g., Sosa*, 542 U.S. at 714-15. Thus, customary international law results not merely from a consistent practice among states, but from a "general and consistent practice of states *followed by them from a sense of legal obligation*". RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (emphasis added). Accordingly, even if all countries provide for corporate accessorial liability as a matter of domestic law, that is insufficient to incorporate such a norm into the law of nations.[20] Unless states have adopted

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[20] *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) *("FNCB")*, cited by Kiobel (Pet. 37-38), is inapposite. *FNCB* contained no ATS claims. Although Kiobel maintains that *FNCB* "held a corporation

such a norm out of a sense of mutual obligation, the norm has not been incorporated into customary international law. Neither Kiobel nor *amici* cite any evidence demonstrating that has happened here.

B. The Second Circuit's Decision Is Not as Far-Reaching as Kiobel Suggests.

Kiobel posits that the Second Circuit's decision "creat[es] a blanket immunity for corporations engaged or complicit in universally condemned human rights violations" (Pet. 10), thus "invit[ing] corporations to violate universal international norms with impunity" (*id.* at 21). The Second Circuit's decision, however, is not nearly as far-reaching as Kiobel suggests.

The Second Circuit did not hold that corporations are "immune" from liability for human rights violations. (*See* Pet. App. A-15 ("We emphasize that the question before us is not whether corporations are '*immune*' from suit under the ATS . . . .") (emphasis added).) Instead, the Second Circuit explicitly emphasized that nothing "in [its] opinion limit[s] or foreclose[s] criminal, administrative, or civil actions against *any* corporation under a body of law *other than customary international law*-for example, the domestic laws of

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liable for [a] violation of international law" (Pet. 37), the Court actually determined that Banco Para el Comercio Exterior de Cuba was a "government instrumentality" whose "separate judicial status" should be disregarded. *FNCB*, 462 U.S. at 633; *see id.* at 630-32. Accordingly, the set-off permitted was against the government of the Republic of Cuba, not a private corporation.

any State. And, of course, nothing in [its] opinion limits or forecloses legislative action by Congress." (*Id.* at A-19.) Nor does the decision "foreclose[] suits under the ATS against the individual perpetrators of violations of customary international law-including the employees, managers, officers, and directors of a corporation". (*Id.*) Indeed, the Second Circuit's recent decision in *Liu Bo Shan v. China Construction Bank Corp.*, No. 10-2992-cv, 2011 WL 1681995, at *1 (2d Cir. May 5, 2011), reinforces the degree to which *Kiobel* is a narrow holding, leaving open the issue of whether the ATS provides jurisdiction over state-owned corporations.[21]

C. This Case Presents a Poor Vehicle Through Which to Address Corporate Liability Under the ATS.

The essence of Kiobel's complaint is that Dutch and English holding companies should have to answer in a United States court for acts committed in Nigeria by the Nigerian government, allegedly with assistance from their indirect Nigerian subsidiary. (*See* Pet. App. A-181 n.54.) Setting aside the issue of corporate liability, this is not the kind of

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[21] Kiobel concedes that in the past twenty years there has been only one ATS case against a corporation in which plaintiffs have prevailed at trial, one additional default judgment, and "a handful" of settlements. (*See* Pet. 8 n.3; *see also Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355, 1357 (S.D. Fla. 2008) (noting default).) Thus, even given its broadest interpretation, it is hard to imagine how the Second Circuit's decision could have the type of impact—"undermin[ing] the ATS's deterrence of international law violations" (Pet. 21)—Kiobel envisions.

case over which the ATS should provide jurisdiction.[22]

First, the ATS was adopted to reach "impinge[ments] upon the sovereignty of . . . foreign nation[s] [that] if not adequately redressed could rise to an issue of war". *Sosa*, 542 U.S. at 715. Forefront in the drafters' minds were incidents like the Marbois affair of 1784, in which a French adventurer assaulted the Secretary of the French Legion *in Philadelphia*. *See id.* at 716-17. Kiobel suggests nothing about this case—brought by Nigerian citizens against Dutch, English, and Nigerian companies for acts that occurred in Nigeria—that implicates the international affairs of the United States. Indeed, quite to the contrary, the only thing about this case that impinges on the sovereignty of a foreign nation is Kiobel's suit itself, which asks United States courts to pass judgment on Nigeria's treatment of its own citizens and the behavior of purely foreign corporations.[23]

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[22] Should this Court grant Kiobel's petition, Shell intends to raise each of the arguments set forth below as an alternate ground for affirmance.

[23] It is doubtful that even the D.C. Circuit, which has held that the ATS provides jurisdiction over corporations generally, would allow this lawsuit to proceed. *See Doe v. Exxon Mobil Corp.*, 2011 WL 2652384, at *10-11 & n.15 (relying on allegations that some of the defendants, which are United States corporations, "engaged in acts in the United States that were part and parcel of the harm" that plaintiffs had suffered, and stating that "where, as here, plaintiffs may ultimately prove that Exxon provided substantial practical assistance . . . from its offices in the United States, jurisdiction over extraterritorial harm is all the more appropriate").

Second, regardless of whether the ATS reaches corporations generally, it should not reach *these* corporations. As Judge Leval explained: "On the assumption that the Complaint adequately pleads actions of SPDC sufficient to constitute actionable aiding and abetting of Nigeria's human rights abuses, the mere addition of the name of a European holding company to the allegation does not plausibly plead the holding company's involvement." (Pet. App. A-181 n.54.)

Third, as the district court recognized, Kiobel's claims against Shell are "essentially claims for secondary liability, i.e., claims that Defendants 'facilitated,' 'conspired with,' 'participated in,' 'aided and abetted,' or 'cooperated with'" the Nigerian government. (*Id.* at B-11.) Neither the Shell holding companies nor SPDC are alleged to have directly engaged in any acts of extrajudicial killing, torture, arbitrary arrest, or property destruction. Pursuant to the methodology employed in *Sosa*, to determine whether the ATS provides jurisdiction over Kiobel's claims, the proper question is not whether a norm of international law exists, for example, prohibiting extrajudicial killing or aiding and abetting extrajudicial killing, but whether a norm of international law exists that prohibits the specific type of conduct allegedly engaged in by Shell. *See Sosa*, 542 U.S. at 738. Kiobel, however, has not demonstrated the existence of norms of international law prohibiting even the acts attributed to SPDC—for example, requesting increased security from the Nigerian government. (*See* Pet. App. A-178 n.53.)

Fourth, allowing the ATS to provide jurisdiction over Kiobel's claims is incompatible with the serious separation of powers issue that animated *Sosa*. The law of nations concerns relationships among nations. *See Sosa*, 542 U.S. at 714-715. International human rights law principally concerns how nations treat their own citizens. As a result, international human rights law is almost entirely treaty and convention based. Although the United States has bound itself to abide by the terms of several treaties aimed at promoting human rights, the United States Senate has frequently declared that the rights guaranteed and activities prohibited by such treaties are not self-executing, requiring implementing legislation to carry them into effect as domestic law.[24] *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect"); TREATIES AND OTHER INTERNATIONAL AGREEMENTS 4. Because the President and Senate have generally refrained from

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[24] *See, e.g.*, United States Senate Resolution of Ratification, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17486, S17491-92 §III (1) (daily ed., Oct. 27, 1990) (Articles 1 through 16 are not self-executing); United States Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. 8068, 8071 (1992) (Articles 1 through 27 are not self-executing); *see also* CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE ("TREATIES AND OTHER INTERNATIONAL AGREEMENTS") 287 (Comm. Print 2001), *available at*: http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf.

making treaties involving human rights self-executing, allowing claims for human rights violations to proceed under the ATS would be anathema to the Constitutional grant of treaty authority, the delegation to Congress of the power to define the law of nations, and *Sosa*'s directive that courts seek "legislative guidance before exercising innovative authority over substantive law". *Sosa*, 542 U.S. at 726.

Fifth, it would be particularly improper for courts to recognize claims for human rights violations against corporations because when implementing, in part, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment via the TVPA, 28 U.S.C. § 1350 note, Congress excluded corporations from the TVPA's scope. *See Bowoto*, 621 F.3d at 1126; *Mohamad*, 634 F.3d at 607. Instead, Congress provided for civil liability against "[a]n *individual* who . . . subjects an *individual* to torture . . . or subjects an *individual* to extrajudicial killing". 28 U.S.C. § 1350 note § 2(a) (emphases added).

Finally, in recognition of some of the above-described deficiencies in Kiobel's case, the *Kiobel* panel unanimously found that Kiobel had failed to state a claim against Shell. Concurring in the judgment, Judge Leval explained that he was in "full agreement" with the majority "that *this* Complaint must be dismissed". (Pet. App. A-90.) Given the Second Circuit's unanimity with respect to dismissal, a grant of certiorari would have no impact on the outcome of this case, and is, therefore, unwarranted.

See, e.g., *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation.")

D. Review of the Issue of Corporate Liability Under the ATS Is Premature.

The intercircuit conflict alleged by Kiobel (Pet. 18-20) involved two Eleventh Circuit cases, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) and *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008), that erroneously concluded they were bound by a prior decision, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005). The issue of corporate liability, however, was not briefed, argued, or decided on appeal in *Aldana*.

It is only in the last month that the Seventh and District of Columbia Circuits have addressed the issue. *See Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, Nos. 09-7125, 09-7127, 09-7134, 09-7135, 2011 WL 2652384 (D.C. Cir. July 8, 2011). Although those decisions conflict with *Kiobel*, given their recency, the debate they create has not yet had time to mature. Indeed, the issue of corporate liability under the ATS is currently *sub judice* before at least two other circuits—the Ninth Circuit *en banc*, *see Sarei v. Rio Tinto*, Nos. 02-56256, 02-56390 (argued Sept. 21, 2010), and the Fourth Circuit, *see Aziz v. Alcolac, Inc.*, No. 10-1908 (argued May 12, 2011)—both of which may build on or clarify the reasoning of the Second, District of Columbia, and Seventh Circuits.

Accordingly, Shell respectfully submits that a grant of certiorari is unwarranted.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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