UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SOUTH AFRICAN APARTHEID LITIGATION	**02 MDL 1499 (SAS)**
This Document Relates to:	
LUNGISILE NTSEBEZA , *et al.*, **Plaintiffs,** **-against-** **DAIMLER AG, *et al.*,** **Defendants.**	**02 Civ. 4712 (SAS)** **02 Civ. 6218 (SAS)** **02 Civ. 1024 (SAS)**
SAKWE BALINTULO, *et al.*, **Plaintiffs,** **-against-** **DAIMLER AG, *et al.*,** **Defendants.**	**03 Civ. 4524 (SAS)**

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER FINDING CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

The Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013) ("*Kiobel II*") unambiguously rejected the rationale underlying the Second Circuit's opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*") and *Kiobel I* is therefore not binding precedent on the issue of corporate liability. Recent cases from the Second Circuit and the Southern District of New York, on which Defendants primarily rely, do not alter this conclusion.

I. THE SUPREME COURT'S DECISION IN *KIOBEL II* UNAMBIGUOUSLY REJECTED THE DECISION IN *KIOBEL I* ON THE ISSUE OF CORPORATE LIABILITY

In dismissing the claims in *Kiobel II* under the presumption against extraterritoriality, the Supreme Court in *Kiobel II* accepted jurisdiction over the corporate entity. *Kiobel II*, 133 S. Ct. at 1664 (applying *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (2010) to ATS claims rather than to the subject matter jurisdiction question). The Court thereby directly contradicted the holding of the Second Circuit panel in *Kiobel I* that, under the ATS, courts lack subject matter jurisdiction over corporate defendants. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89, 94 (1998) (holding courts must resolve jurisdiction before addressing merits issues).[1]

A. Extraterritoriality is Uncontrovertibly a Merits Issue

Defendants' argument that the *Kiobel II* presumption against extraterritoriality concerns jurisdiction, rather than the merits, Opp. Br. at 7, completely misreads ATS jurisprudence,

[1] Defendants mischaracterize Plaintiffs' argument. Plaintiffs do not argue that *Licci* overruled *Kiobel I*. Opp. Br. at 12. Rather, it is Plaintiffs' position that *Kiobel II* contradicted *Kiobel I* and the *Licci* panel recognized that contradiction with the core holding of *Kiobel I*. Plaintiffs also argued, unlike Defendants' characterization, Opp. Br. At 5, that *Kiobel II* rejected the rationale of *Kiobel I*. *See, e.g.*, Pltf. Br. at 1-2 (*Kiobel II* "squarely contradicted the holding of the Second Circuit"); *id.* at 5 ("*Kiobel II* directly conflicts with the Second Circuit corporate liability holding"); *id.* (the Supreme Court "disregarded and contradicted the core holding of *Kiobel I*").

including *Sosa* and *Kiobel II*. *Sosa* rejected the notion that the ATS is purely jurisdictional. Rather, it recognized that courts should establish, in certain circumstances, common law causes of action as claims under the Statute. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, 724, 732 (2004); *see Kiobel II* at 1663 (affirming this *Sosa* framework).[2]

Defendants' arguments ignore this framework, conflating jurisdictional analysis with analysis about claims. Throughout *Kiobel II*, the Court distinguishes between the jurisdictional nature of the ATS and the extraterritorial reach of the *underlying causes of action*. *See Kiobel II*, 133 S. Ct. at 1664 ("The question here is not whether petitioners have stated a proper claim under the ATS, but whether a *claim* may reach conduct occurring in the territory of a foreign sovereign") (emphasis added); *id.* at 1665 ("To begin, nothing in the text of the statute suggests that Congress intended *causes of action recognized under it to have extraterritorial reach*.") (emphasis added); *id.* at 1661 (". . . provide no support for the proposition that Congress expected *causes of action* to be brought under the statute for violations of the law of nations occurring abroad") (emphasis added); *id.* at 1667 ("We do not think that the existence of a cause of action against them is a sufficient basis for concluding that *other causes of action under the ATS* reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves.") (emphasis added); *id.* at 1668-69 ("Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a *cause of action for conduct occurring in the territory of another sovereign*.") (emphasis added); *id.* at 1669 ("even where the *claims* touch and concern the territory of the United States, they

[2] Defendants' approach collapses all ATS questions into questions of subject matter jurisdiction. Courts have found that causes of action are not subject matter jurisdiction questions and that subject matter jurisdiction will exist for ATS claims so long as they are not "wholly insubstantial and frivolous". *See Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1194 (D.C. Cir. 2004) (citing *Bell*, 327 U.S. at 682-83).

must do so with sufficient force to displace the presumption against extraterritorial application") (emphasis added). The plain reading of *Kiobel II* is that the presumption against extraterritoriality is not a matter of jurisdiction but rather a merits issue that applies to *claims* brought under the ATS.[3]

Defendants' argument that extraterritoriality is a matter of jurisdiction in the ATS context fundamentally misunderstands *Morrison v. National Australia Bank Ltd.* and its application to the ATS in *Kiobel II*. *Morrison* did not address extraterritoriality with regard to a jurisdictional provision of a statute, but rather with regard to a substantive provision. The court held that "to ask what conduct § 10(b) [of the Securities Act of 1934] reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case." 130 S. Ct. at 2877 (internal quotations omitted). *Morrison* found that the district court had subject matter jurisdiction under 15 U.S.C. § 78aa of the Act, but then turned to § 10(b), a substantive statutory provision, in order to decide whether the statute applied extraterritorially. *Id.* The Court found that it did not. The *Morrison* Court analyzed § 10(b) because the statute's jurisdictional provision was silent on the matter of extraterritoriality as a claim.

While the ATS is a jurisdictional statute, like the analogous § 78aa discussed in *Morrison*, the ATS also involves common law causes of action, which are analogous only to *Morrison*'s substantive statutory provision § 10(b). Because *Morrison* does not apply to jurisdictional provisions, the Court's application of the "principles" underlying the *Morrison* analysis was only relevant to the ATS common law causes of action and not to subject matter

[3] Defendants misread *Kiobel II*'s discussion that "the ATS . . . is 'strictly jurisdictional.'" *Kiobel II*, 133 S. Ct. at 1664 (quoting *Sosa*, 542 U.S. at 713). The remainder of the paragraph makes clear that *Morrison* and its extraterritoriality analysis are being applied to courts "considering *causes of action*." *Id.* (emphasis added).

jurisdiction, as Defendants assert.[4] *See Kiobel II*, 133 S. Ct. at 1664 (quoting *Morrison*, 130 S. Ct. at 2869)[5](discussing that, while the ATS is jurisdictional, principles of *Morrison* apply to ATS "causes of action").

B. Under *Steel Co.*, the Supreme Court was Required to Reach the Non-Merits Corporate Liability Issue Before Turning to the Issue of Extraterritoriality

It is well settled that courts, including the Supreme Court, must resolve jurisdictional issues before addressing merits issues. *See Steel Co.*, 523 U.S. at 88-89, 94. The holding in *Kiobel I* relied on the premise that corporate liability is not a merits issue, but, rather, is a subject matter jurisdiction issue. *Kiobel I*, 621 F.3d at 149. In order to reach its decision regarding the extraterritorial application of the ATS in *Kiobel II*, the Supreme Court had to have determined that subject matter jurisdiction existed over the claims in the first instance. Thus, by accepting subject matter jurisdiction and deciding *Kiobel II* on the merits element of extraterritoriality, the Supreme Court unambiguously rejected any contrary holding in *Kiobel I*. *Id.*

Defendants seek support for the argument that *Kiobel II* did not overrule *Kiobel I* in *Tymoshenko v. Firtash*, No. 11-CV-2794, 2013 WL 4564646 (S.D.N.Y. Aug. 28, 2013). *Tymoshenko* is inapposite. First, *Tymoshenko* is a district court case that was decided before the Second Circuit in *Licci* recognized that *Kiobel II* cast doubt on whether *Kiobel I* is still good law. Second, *Tymoshenko* considered only the argument that because *Kiobel II* did not "expressly foreclose corporate liability", *Kiobel I* no longer applies. *Id*. at *3. The rule, however, in the Second Circuit is that even if the Supreme Court "implicitly" overrules the rationale of a Second

[4] Because *Morrison* applies to substantive *statutory* provisions and not *common law* causes of action, the Court applied the "principles" of *Morrison* to the ATS in *Kiobel II*. *Kiobel II*, 133 S. Ct. at 1661.

[5] Nothing in the jurisdictional piece of the ATS (i.e. the statute itself) rebuts the presumption against extraterritoriality. Therefore, like the *Morrison* Court, the *Kiobel II* Court went on to apply "the presumption against extraterritoriality to *claims* under the ATS." 133 S. Ct. at 1669.

Circuit decision, a prior decision is no longer binding. *See In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (quoting *United States v. Allah*, 130 F.3d 33, 38 (2d Cir. 1997)).

In addition, *Kiobel II* elucidates its intention to allow claims against corporations to proceed: "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Kiobel II*, 133 S. Ct. at 1669. Indeed, the Ninth Circuit has already interpreted this "mere corporate presence" language to conclude that "corporations can face liability for claims brought under the Alien Tort Statute." *Doe v. Nestle USA, Inc.*, 738 F.3d 1048, 1049 (9th Cir. 2013). *Kiobel II*'s "mere corporate presence" language only reinforces that the corporate liability holding of *Kiobel I* has been superseded by *Kiobel II*. *Kiobel II*, 133 S. Ct. at 1669.[6]

II. THE SECOND CIRCUIT'S FOOTNOTE IN *CHOWDHURY* DOES NOT OVERRULE THE SUPREME COURT'S *KIOBEL II* DECISION AS TO CORPORATE LIABILITY

The *Chowdhury* court dismissed an ATS case on the issue of extraterritoriality—a merits issue as defined by *Kiobel II*. *Chowdhury v. WorldTel Bangladesh Holding, LTD.*, No. 09-4483-cv, 2014 WL 503037 (2d Cir. Feb. 10, 2014). The *Chowdhury* panel held that, because all of the relevant conduct occurred in Bangladesh between Bangladeshi citizens, Plaintiffs' ATS claims were barred against both the individual and corporate defendants on extraterritoriality grounds. *Id*. at *5. In arguing there is no corporate liability for ATS claims in the Second Circuit, Defendants rely heavily on footnote 6 of the *Chowdhury* majority, which states that the *Kiobel I* opinion remains good law in light of *Kiobel II*. *Id.* at n.6. However, footnote 6 cannot be reconciled with *Kiobel II* itself or the *Licci* panel's decision to reopen the issue of corporate

[6] *Kiobel II* is also consistent with the Supreme Court's decision in *Citizens United v. Fed. Election Comm'n*. 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (holding that, under the First Amendment, the government may not suppress political speech on the basis of a speaker's corporate identity).

liability *unless* the footnote is dicta and *Chowdhury* falls within a narrow *Steel Co.* exception. *See Center for Reprod. Law and Policy v. Bush*, 304 F.3d 183, 194 (2d. Cir. 2002) (quoting *Steel Co.*, 523 U.S. at 98 (discussing *Norton v. Mathews*, 427 U.S. 524, 530-31 (1976))). Judge Pooler's concurrence affirms the non-binding, non-precedential nature of footnote 6 regarding corporate liability. *Chowdhury*, at *2, n.2 (J. Pooler, concurring).

While normally the court would not be able to reach a merits issue without first resolving all jurisdictional issues, an exception exists for cases "where the outcome has been 'foreordained' by another case such that 'the jurisdictional question could have no effect on the outcome,'" *Center for Reprod. Law and Policy*, 304 F.3d at 194 (quoting *Steel Co.*, 523 U.S. at 98 (discussing *Norton*, 427 U.S. at 530-31)).[7] That exception is relevant in *Chowdhury* given that the panel had to reach the merits for the individual defendant. *Chowdhury* involves claims against an individual defendant, who would not have been subject to dismissal on *Kiobel I* grounds even before *Kiobel II* rejected its core rationale. Thus, the panel had to reach the merits regarding extraterritoriality for the individual defendant, and that analysis foreclosed the action against the corporate defendant as well. Thus, under this narrow exception, the *Chowdhury* panel did not have to reach the issue of jurisdiction regarding corporations, making footnote 6 advisory.

Judge Pooler's concurrence is consistent with this principle: that the merits analysis of *Kiobel II* was central to the decision, and that footnote 6 is merely dicta. Judge Pooler directly states that the panel's footnote regarding corporate liability is dicta and clarifies the narrowness

[7] *Center for Reprod. Law and Policy*, 304 F.3d at 195 ("[W]here the precise merits question has already been decided in another case by the same court, it is the adjudication of the [threshold] standing issue that resembles an advisory opinion—the very concern that animates the *Steel Co.* rule. It would be ironic if, in our desire to avoid rendering an advisory opinion, we were to address a novel standing question in a case where the result is foreordained by another decision of this Court." (citing *Steel Co.*, 523 U.S. 83, 123–24)).

of the panel's opinion. *Chowdhury*, at *2, n.2 (J. Pooler, concurring) ("The relevance of the Supreme Court's reference to corporate presence for the disposition of this case need not be explored here, because as the majority opinion notes, and as I agree, "all of the relevant conduct," took place in Bangladesh. (citation omitted). As such, the assertion that *Kiobel* 'did not disturb the precedent of this Circuit' with respect to corporate liability [citation omitted], *is not pertinent to our decision, and thus is dicta.*")) (emphasis added).[8] Judge Pooler's discussion made clear, however, that nothing more can be drawn from the decision than that.

In these instant cases, there are no related matters or cases that control the merits issue of extraterritoriality, and thus this Court must directly consider the import of the Supreme Court's decision on jurisdiction and corporate liability as held in *Kiobel II* on the Second Circuit's contrary earlier holding in *Kiobel I*. This is wholly consistent with the decision in *Licci* recognizing that *Kiobel II* changed the status of *Kiobel I* regarding corporate liability. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 174 (2d Cir. 2013).[9] By remanding the issue to the district court in a case involving only corporate defendants, the *Licci* panel determined that there was, at least, an open question regarding whether *Kiobel I* was still good law.[10] Had the *Licci* panel viewed *Kiobel I*'s holding on corporate liability to be binding, it could not have remanded consideration of that to the district court.

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[8] In addition, Judge Pooler noted that the question of the nationality of the Defendant was not a factor in *Chowdhury*. *See Chowdhury*, at *5, n.4 (J. Pooler, concurring). In the instant cases, the nationality of the Defendants—U.S. corporate entities—is relevant, and thus, a separate *Kiobel II* analysis is necessary, in contrast to *Chowdhury*, which did not deal with U.S. nationals.

[9] Acting pursuant to its authority as an appellate panel to reconsider a decision of a prior panel if "its rationale is overruled, implicitly or expressly, by the Supreme Court . . . ," *Licci* reopened the corporate liability issue because it recognized that *Kiobel II* had affected the Second Circuit's decision in *Kiobel I*. *Sokolowski*, 205 F.3d at 534-35 (quoting *Allah*, 130 F.3d at 38).

[10] In a prior opinion issued while *Kiobel II* was pending, *Licci* stated "current law" in the circuit mandated dismissal under *Kiobel I* but noted "[s]hould the Supreme Court reverse our decision in *Kiobel [I]*," the panel would likely send the case back to the district court for further

III. CONSIDERING THE MERITS, CORPORATIONS ARE LIABLE FOR VIOLATIONS OF THE LAW OF NATIONS UNDER THE ATS

Kiobel II supports corporate liability under the ATS. *See Kiobel II*, 133 S. Ct. at 1669. All other circuits to consider the matter, including those that have ruled on the issue since *Kiobel II*, have recognized the liability of corporate conduct. *See, e.g.*, *Nestle*, 738 F.3d at 1049; *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 747-48 (9th Cir. 2011), *vacated on other grounds*, 133 S. Ct. 1995 (2013); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). Defendants avoid the clear weight of authority by trying to advance two flawed arguments. Opp. at 11.

First, Defendants wrongly contend that it is irrelevant whether corporate liability is a 12(b)(1) or 12(b)(6) issue. Although the ATS requires a violation of the law of nations to trigger subject matter jurisdiction, federal common law supplies the rules governing the scope of tort remedies. *Sosa*, 542 U.S. at 714, 720-21, 724. *See* Opening at 14-16. A court lacks subject matter jurisdiction over a purported ATS claim when it fails to allege a violation of a "universal norm" under customary international law. *See In re Terrorist Attacks on September 11, 2001*, 714 F.3d 118, 122, 125 (2d Cir. 2013); *see also Flores v. S. Peru Copper Corp.* 414 F.3d 233, 241 (2d Cir. 2003) (dismissing ATS claim for want of subject matter jurisdiction because plaintiffs failed to submit evidence sufficient to establish that intra-national pollution violates customary international law); *Herero* 370 F.3d at 1194. *Kiobel I* was explicitly focused on the issue of whether a federal court had subject matter jurisdiction over a claim against a corporation

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proceedings. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F. 50, 73 (2d Cir. 2012). The panel noted that, if *Kiobel I* was affirmed, it would "likely be required" to dismiss the ATS claims. *Id.* This prior opinion confirms the interpretation that the *Licci* panel's remand to the district court was done because it did not consider *Kiobel I* as binding.

under the ATS and therefore looked to customary international law to define a "norm" of corporate liability. 621 F.3d at 117-18.

The conclusion in *Kiobel I* that corporate liability is a norm rather than a theory of liability is tied to the assertion that corporate liability goes to the court's subject matter jurisdiction and is a matter of international law.[11] *Kiobel I*'s analysis about subject matter jurisdiction thus relies on a notion that there needs to be a *Sosa* norm of "corporate liability", which is a different analysis from that related to a theory of liability. Defendants' assertion that whether corporate liability is a "norm" or a theory of liability makes no difference fails to recognize that the theory of liability analysis is fundamentally different in kind and therefore reliance on *Kiobel I* is no longer justified. As Plaintiffs have argued, the issue of corporate liability should be analyzed in terms of federal common law. Opening at 14-20. The other circuits that have considered the issue have concluded that corporations may be liable under the ATS because it is such a well-established principle of domestic law within the United States. *See, e.g.*, *Sarei*, 671 F.3d at 747-54; *Flomo*, 643 F.3d at 1015-21; *Exxon*, 654 F.3d at 40-57.[12]

Second, Defendants' argument that *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012), is a significant guide for interpreting the ATS is clearly erroneous. Opp. at 16-17. To

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[11] *Kiobel I* stated: "By conferring subject matter jurisdiction over a limited number of offenses defined by *customary international law*, the ATS requires federal courts . . . to examine the specific and universally accepted rules that the nations of the world treat as binding. . . . We must conclude, therefore, that insofar as plaintiffs bring claims under the ATS against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs' claims fall outside the limited jurisdiction provided by the ATS." *Kiobel I*, 621 F.3d at 118.

[12] The application of international law also supports the conclusion that corporations are permissible defendants under the ATS. Opening at 20-24. *Kiobel I's* rejection of general principles as a source of international law is inconsistent with Supreme Court precedent. In *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623, 633 (1983) ("FNCB"), the Supreme Court relied on customary international law to establish the primary violation, *id.* at 622-23, but relied on general principles of law to pierce the corporate veil and find corporate liability for that violation, *id.* at 628-31.

the contrary, *Mohamad* explicitly rejected that argument holding that there is no "comparative value" between the statutory interpretation of the TVPA and the federal common law application under the ATS on the issue of whether corporations may be held liable. 132 S.Ct. at 1709. *Mohamad* is based on the textual interpretation of the TVPA and the "use of the term 'individual' to describe the covered defendant". *Id.* at 1709-10 ("The text of the TVPA convinces us that Congress did not extend liability to organizations, sovereign or not."). Indeed, *Mohamad*'s textual analysis of the TVPA leads more aptly to the conclusion that the absence of a limitation of the type of defendant in the ATS supports the inclusion of both natural and juridical persons as potential defendants. The text of the ATS explicitly limits the category of *plaintiffs* to "aliens," 28 U.S.C. § 1350, but it imposes no comparable limitation on the universe of *defendants*. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (observing that ATS "by its terms does not distinguish among classes of defendants"). Corporations remain within the universe of potential ATS defendants.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kristen M. Ward, hereby certify that on February 28, 2014, a copy of the Reply Memorandum in Support of Plaintiffs' Motion for an Order Finding Corporate Liability Under the Alien Tort Statute was filed and served on all parties of record by way of CM/ECF.

/s/ Kristen M. Ward
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