

CASE NOTE

***KIOBEL V ROYAL DUTCH SHELL:* A CHALLENGE FOR TRANSITIONAL JUSTICE**

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*This case note reviews the 2013 US Supreme Court decision in *Kiobel v Royal Dutch Petroleum Co* ('*Kiobel*') with reference to its potential implications for transitional justice. It argues that the Alien Tort Statute was an innovative transitional justice mechanism that has, due to the *Kiobel* decision, been sharply curtailed. Moreover, what the Court offered by way of reasoning for its dismissal of the *Kiobel* case, and what it did not say regarding liability for corporations raise concerning issues for the prospects of non-American human rights victims seeking redress and justice in US courts.*

I INTRODUCTION: THE ALIEN TORT STATUTE AS TRANSITIONAL JUSTICE PATHWAY

The US Supreme Court's 2013 decision in *Kiobel v Royal Dutch Petroleum Co*¹ has narrowed the scope of the *Alien Tort Statute* ('ATS')² as a cause of action for foreign claimants, and restricted its use as an innovative pathway to advance transitional justice claims. Beyond the direct impact of curtailing the ATS' utility in such claims, the decision has significant implications for victims of gross human rights abuses and war crimes seeking to pursue justice through US courts.

The ATS is a 1789 US law (enacted by the first Congress) that grants US federal courts the jurisdiction to hear tort claims submitted by non-Americans for 'violations of the law of nations'.³ It lay largely dormant for two centuries, until the 1980s, when human rights advocates successfully invoked the ATS on behalf of foreign victims for abuses committed abroad by foreign governments.⁴ Following the 1995 landmark *Kadic* decision which stated that violations of the law of nations did not require state action to be actionable, a second wave of ATS

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¹ *Kiobel v Royal Dutch Petroleum Co*, 569 US ____ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion).

² 28 USC §1350.

³ Ibid: '[US] 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'.

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

litigation commenced, this time against multinational corporations.⁵ These judgments seemingly permitted US courts to exercise universal jurisdiction in hearing civil claims alleging grave breaches of international law in which the defendants and plaintiffs were not American, and the conduct did not occur on American soil. As a result, the ATS became one of the most powerful and successful legal pathways for victims of gross human rights abuses and other war crimes around the world to pursue justice. ATS cases included claims relating to abuses in conflict zones and repressive states, such as Colombia, Sudan, Liberia, Cote d'Ivoire, Indonesia and Myanmar.⁶ In this way, the ATS had become a viable and effective transitional justice instrument.⁷

Three aspects, in particular, of these ATS cases are noteworthy from a transitional justice perspective: firstly, they are civil suits (as opposed to criminal prosecutions); secondly, they are levelled not merely against government officials but against multinational corporations; and thirdly, they are brought in US courts, not in local courts in or near the conflict-zone. These characteristics distinguish the ATS as a novel transitional justice mechanism, and combined, challenge the 'traditional' or paradigmatic models of transitional justice processes, in terms of location, type of mechanism and targets of such processes. That is, transitional justice is frequently conceptualised as involving processes proximate to the conflict zone and to the victims, criminal prosecution or truth commissions, invariably targeted at political and military leaderships as well as individual combatants.⁸ Yet civil lawsuits, such as those launched under the ATS, offer abuse victims their 'day in court', a judicial adjudication of the conduct in dispute, and potential reparations to victims for harm caused — key objectives of transitional justice.⁹

Perhaps the most prominent ATS case with transitional justice overtones was *Sarei v Rio Tinto*.¹⁰ This case revolved around the actions of Rio Tinto — one of the largest publicly listed companies in Australia, and one of the largest mining companies in the world — on the small

⁵ *Kadic v Karadzic*, 70 F 3d 232 (2nd Cir, 1995).

⁶ For a list and descriptions of prominent ATS cases lodged in US Federal Courts, see: National Foreign Trade Council, *Alien Tort Statute*, USA Engage <<http://usaengage.org/Issues/Litigation/Alien-Tort-Statute-/>>.

⁷ Jeremy Sarkin and Carly Fowler, 'Reparations for Historical Human Rights Violations: The International and Historical Dimensions of the Alien Tort Claims Act Genocide Case of the Herero of Namibia' (2008) 9 *Human Rights Review* 331; Jeremie Gilbert, 'Corporate Accountability and Indigenous Peoples: Prospects and Limitations of the US Alien Tort Claims Act' (2012) 19 *International Journal on Minority and Group Rights* 25; Eric Posner, 'Remarks on the Alien Tort Claims Act and Transitional Justice' (2004) 98 *Proceedings of the Annual Meeting (American Society of International Law)* 49, 56.

⁸ Miriam Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 *Harvard Human Rights Journal* 39; David Forsythe, 'Human Rights and Mass Atrocities: Revisiting Transitional Justice' (2011) 13 *International Studies Review* 85; United Nations Peacebuilding Commission 'What is Transitional Justice: A Background', (Background Note, February 2008) <http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf>; International Center for Transitional Justice, 'What is Transitional Justice?' (Explanatory Note, 2009) <<https://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>>.

⁹ Ibid. See also: Helen Chang Mack and Monica Segura Leonardo, 'Editorial Note: When Transitional Justice Is Not Enough' (2012) 6 *The International Journal of Transitional Justice* 175; Martha Minow, *Between Vengeance and Forgiveness* (Beacon Press, 1998); Eric Posner and Adrian Vermeule 'Transitional Justice as Ordinary Justice' (2004) 117 *Harvard Law Review* 762.

¹⁰ *Sarei v Rio Tinto, PLC*, 221 F Supp 2d 1116 (2002). The allegations, and undisputed facts of the case, are summarised in the numerous court judgments. This is the initial court ruling in the 11 year litigation effort.

Papua New Guinean island of Bougainville, where it operated the world's largest open-pit copper mine.¹¹ Originally lodged in 2000 on behalf of thousands of Bougainvilleans, the lawsuit sought compensation from the company and its local subsidiary for their complicity in genocide, war crimes and other gross human rights abuses allegedly meted out by the Papua New Guinean police and military during Bougainville's war for independence during the 1990s.¹²

The 2001 Bougainville Peace Agreement, which brought an end to the conflict, guaranteed autonomy and eventual referendum on independence for the island.¹³ The Agreement also included provisions granting a sweeping amnesty from criminal prosecution to all parties involved in the conflict.¹⁴ Therefore, the ATS civil suit that had been filed a year earlier was one of the few legal avenues for islanders to seek legal accountability and redress.

An appeal (by Rio Tinto) to the US Supreme Court was about to be filed in this case challenging the ATS' applicability to events that occurred during a conflict on the other side of the globe, when the appellants in *Kiobel* — another long-running ATS lawsuit similarly arising from a situation of conflict and repression — had their writ of certiorari accepted.¹⁵ So it was that *Kiobel* became the vehicle for the Supreme Court to consider the limits of the ATS.

II *KIOBEL* — THE FACTS AND THE DECISION

The original claim in *Kiobel v Royal Dutch Petroleum* was filed in 2002 by the families of Dr Barinem Kiobel and 11 other Nigerian activists who were campaigning against the environmental degradation of the Niger Delta allegedly caused by the ongoing operations of global oil giants Royal Dutch Petroleum and Shell Oil, and their local Nigerian subsidiary. The claimants were seeking compensation under the ATS, alleging that the companies had, amongst

¹¹ Ibid.

¹² Ibid. See also John Braithwaite and Ray Nickson, 'Timing Truth, Reconciliation and Justice After War' (2012) 27 *Ohio State Journal of Dispute Resolution* 443; Anthony Regan, 'Autonomy and Conflict Resolution in Bougainville, Papua New Guinea' in Yash Gai and Sophia Woodman (eds), *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press, 2013) 412.

¹³ Bougainville Peace Agreement (signed 30 August 2001)
<http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/bougain_20010830.pdf>
Part B 'Autonomy', Part C 'Agreed Principles on Referendum'.

¹⁴ Ibid pt F, s 1, para 331.

¹⁵ Petition for writ of certiorari filed in *Sarei v Rio Tinto* on 23 November 2011. Petition for writ of certiorari filed on 6 June 2011, and granted on 17 October 2011 in *Kiobel v Royal Dutch Petroleum Co*. For a timeline of key events in the *Kiobel* litigation, see: 'Kiobel v Royal Dutch Petroleum' on *Supreme Court of the United States Blog* (2014) <<http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/>>.

other things, aided and abetted the unlawful detention, torture and extra-judicial killings of these activists (in 1995) by the Nigerian military.¹⁶

In 2010, the US Second Circuit Court of Appeals dismissed the suit, deciding that the ATS did not apply to corporations.¹⁷ The claimants petitioned the Supreme Court, requesting the Court review the question of the ATS' applicability to corporations as well as natural persons.¹⁸ Certiorari was granted, and oral hearings were held in February 2012. However, in an unusual move, a week later the Supreme Court requested additional arguments be presented (and ordered new briefs submitted) on a separate and distinct legal issue: the extent of the extra-territorial scope of the ATS.¹⁹ Re-argument in the case was held in October 2012, and it was on this question of law that the Court ultimately made its decision, handed down in April 2013.²⁰ The nine justices of the US Supreme Court were unanimous in dismissing the case. However, that unanimity belies the divergence in legal reasoning conveyed in *four* separate decisions.

In the opinion of the Court, Roberts CJ (joined by the other three 'conservative' justices Alito, Scalia and Thomas JJ) and Kennedy J wrote approvingly of a 2010 Supreme Court decision that stated that 'when a statute gives no clear indication of an extraterritorial application, it has none'.²¹ Roberts CJ declared that nothing in the text of the ATS or its drafting history, or court precedents rebuts the 'presumption against extraterritoriality'.²²

¹⁶ *Kiobel v Royal Dutch Petroleum Co*, 569 US ____ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion). For a summary of the facts of the case, and links to court documents and commentaries see: Business and Human Rights Resource Centre, *Kiobel case: US Supreme Court Review of Alien Tort Claims Act* (28 May 2014)

<<http://www.business-humanrights.org/Documents/SupremeCourtATCARReview>>. The group of activists included the world-renowned writer Ken Saro-Wiwa. Incidentally, an ATS claim was also filed (in 1996) on behalf of Ken Saro-Wiwa against Shell along similar lines as the *Kiobel* lawsuit. After fighting the claim for 13 years, Shell and their co-defendants settled the case in 2009 on the eve of trial. Reportedly, the settlement included a payment of \$15.5 million to the Saro-Wiwa family — a payment characterised by Shell, which continues to deny any culpability, as a 'humanitarian gesture'. See, eg, Jad Mouawad, 'Shell to Pay \$15.5 Million to Settle Nigerian Case', *New York Times*, 8 June 2009.

¹⁷ *Kiobel v Royal Dutch Petroleum*, 621 F 3d 111 (2nd Cir, 2010). This was a 2-1 split decision.

¹⁸ Petition for writ of certiorari filed on 6 June 2011 and granted on 17 October 2011. For a timeline of key events in the *Kiobel* litigation, see: 'Kiobel v. Royal Dutch Petroleum' on *Supreme Court of the United States Blog* (2014) <<http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/>>.

¹⁹ John Bellinger, 'Stop Press: Supreme Court Orders *Kiobel* Reargued to Address Extraterritoriality' on *Lawfare*, (5 March 2012) <<http://www.lawfareblog.com/2012/03/stop-press-supreme-court-orders-kiobel-reargued-to-address-extraterritoriality/>>; Lyle Denniston, 'Kiobel to be Expanded and Reargued' on *Supreme Court of the United States Blog* (5 March 2012) <<http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/>>.

²⁰ *Kiobel v Royal Dutch Petroleum Co*, 569 US ____ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion).

²¹ *Ibid* 4 (Roberts CJ). Citing with approval: *Morrison v National Australia Bank Ltd* 561 US ____ (2010) (US Supreme Court, Docket No. 08-1191, Decided 24 June 2011) (Slip Opinion). NAB had been sued for fraud under US securities law, relating to the 2001 multi-billion dollar write-down of the value of assets of a Florida mortgage servicing company that it had recently purchased. The Supreme Court held that US securities law does not apply to non-US securities — ie it does not apply extraterritorially, overturning a long-standing precedent to the contrary.

²² *Ibid* 7 (Roberts CJ).

Two of the justices (Scalia and Thomas JJ) of the majority also penned a concurring judgment that suggested the majority's formulation was too lax, and that any ATS cause of action 'will fall' unless the relevant action giving rise to the claim is 'domestic conduct,' that is 'within the US'.²³

The concurring opinion signed by the four 'liberal' justices (Breyer, Ginsburg, Kagan and Sotomayor JJ) rejected the majority's far-reaching denial of the ATS' extraterritorial jurisdictional scope. Instead, these justices narrowly constructed their judgment to address the facts of the case at hand, determining that 'the parties and relevant conduct lack sufficient ties to the United States for the ATS to provide jurisdiction'.²⁴ Nevertheless, this minority opinion makes clear that similar scenarios and claims brought before US courts *could* 'invoke a national interest,' in particular the US's 'distinct interest in preventing the US from becoming safe harbour ... for a torturer or other common enemy of mankind' that would satisfy the ATS' jurisdictional test.²⁵

In a further twist, Kennedy J, who provided the crucial fifth vote in support of the Roberts CJ opinion, also issued a separate one page opinion that reflected his discomfort with expansive interpretations of the majority's decision. Kennedy J stated that 'a number of significant questions regarding the reach and interpretation of the [ATS]' remain unanswered, including its 'extraterritorial application [which] may require some further elaboration and explanation' in future cases.²⁶

III TRANSITIONAL JUSTICE IMPLICATIONS

In the year since it was handed down, lower courts and legal scholars have continued to parse the *Kiobel* decision and apply the ruling in different ways.²⁷ Even at this juncture, despite disagreement as to the import and interpretation of the judgment, it seems that *Kiobel's* implications for transitional justice will be wide-ranging.

Firstly, the practical and direct consequence of *Kiobel*, in terms of transitional justice, is that it will likely sharply curtail the use of the ATS as a basis for victims of human rights abuses committed in conflict zones abroad to successfully seek recompense from alleged perpetrators in US courts. By rejecting the extraterritoriality of the ATS in most circumstances, a promising transitional justice pathway has been largely foreclosed.

²³ Ibid 1 (Alito J).

²⁴ Ibid 2 (Breyer J).

²⁵ Ibid.

²⁶ Ibid 1 (Kennedy J).

²⁷ See, eg, Ingrid Wuerth, 'The Supreme Court and the Alien Tort Statute: *Kiobel* v Royal Dutch Petroleum Co'. (2013) 107 *American Journal of International Law* 601; Ralph Steinhardt, 'Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink' (2013) 107 *American Journal of International Law* 841; Vivian Grosswald and David Sloss, 'Reviving Human Rights Litigation After *Kiobel*' (2013) 107 *American Journal of International Law* 858; Elizabeth Holland, *ATS Case Developments Post-Kiobel: Interpreting the 'Touch and Concern' Standard* (13 September 2013) Corporate Social Responsibility and the Law (Published by Foley Hoag) <<http://www.csrandthelaw.com/2013/09/case-developments-post-kiobel-interpreting-the-touch-and-concern-standard/>>.

Indeed, since *Kiobel*, several long-running ATS cases have also been dismissed. Most prominently, the Supreme Court vacated and remanded the *Sarei v Rio Tinto* case to a lower court for reconsideration in light of the *Kiobel* decision.²⁸ In a succinct two paragraph decision, the Ninth Circuit's Court of Appeals agreed to 'dismissal with prejudice' of all claims against Rio Tinto, thereby ending Bouganvilleans' 13 year attempt to see justice done.²⁹ Arguably, the quick dispatch of *Sarei* is indicative of what is to come for similar ATS lawsuits alleging human rights abuses committed in foreign lands by foreign companies against foreign victims.

Whilst the fate of so-called 'foreign-cubed' cases is now bleak, nevertheless, the *Kiobel* opinions hold out the possibility that the ATS could still be an effective instrument to pursue *American* companies for gross human rights abuses and war crimes committed abroad.³⁰ *Kiobel's* majority and minority opinions and, critically, Kennedy J's concurrence, leave open the possibility that ATS cases that sufficiently 'touch and concern the territory of the United States ... with sufficient force [may] displace the presumption against extraterritorial application'.³¹ The justices did not elaborate on what fact pattern may satisfy this standard, but extrapolating from the *Kiobel* scenario it is likely that it will be a limited category of cases that satisfy the test.³² Indeed, in an ATS suit seeking damages from several multinational companies for complicity in South Africa's Apartheid regime, the claims against two *foreign* companies were dismissed as they did not satisfy the 'touch and concern' test.³³ However, the claims against two US companies (IBM and Ford) were allowed to stand.³⁴

Furthermore, Breyer J's observation that there is a clear US national interest in not providing safe harbour to war criminals, seemingly leaves open the possibility for lower courts to find that 'foreign cubed' ATS claims alleging the most heinous of atrocities may well satisfy the 'touch and concern' test posited by the *Kiobel* majority to rebut the presumption of extraterritoriality.³⁵

²⁸ Writ of certiorari accepted on 22 April 2013 — days after the *Kiobel* decision handed down. On the same day, the Supreme Court vacated the judgment and remanded the case to lower court for further consideration.

²⁹ *Sarei v Rio Tinto Plc*, 02-56256 (9th Cir, 2013). The one paragraph Court order dismissed the claim 'with prejudice' — meaning that decision is final and absolute. The substance of the claims cannot be litigated again.

³⁰ See, eg, Rich Samp, 'Supreme Court Observations: *Kiobel v. Royal Dutch Petroleum* and the Future of Alien Tort Litigation', *Forbes* (New York) 18 April 2013; Katie Reford, 'Door Still Open for Human Rights Claims After *Kiobel*' on *Supreme Court of the United States Blog* (17 April 2013) <<http://www.scotusblog.com/2013/04/commentary-door-still-open-for-human-rights-claims-after-kiobel/>>.

³¹ *Kiobel v Royal Dutch Petroleum Co*, 569 US ___ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion) 14 (Roberts CJ).

³² See, eg, Meir Feder, 'Commentary: Why the Court unanimously jettisoned thirty years of lower court precedent (and what that can tell us about how to read *Kiobel*)' on *Supreme Court of the United States Blog* (19 April 2013) <<http://www.scotusblog.com/2013/04/commentary-why-the-court-unanimously-jettisoned-thirty-years-of-lower-court-precedent-and-what-that-can-tell-us-about-how-to-read-kiobel/>>.

³³ *In re South African Apartheid Litigation – Order 02 MDL 1499 (SAS)*, US District Court for the Southern District of New York (Scheidlin J), 26 December 2013.

³⁴ *Ibid.* Other cases that have been quickly dismissed or curtailed in the wake of the *Kiobel* ruling by the US Supreme Court include: *Al-Shimari v CACI* and *Balintulo v Daimler AG*. However, others continue. In *Sexual Minorities of Uganda v Lively*, a Federal Court judge declined to dismiss the case, and in *Ahmed v Magan* a judge awarded a \$15 million judgment in a successful ATS action. See also: Julian Ku and John Yoo, 'The Supreme Court Unanimously Rejects Universal Jurisdiction', *Forbes* (New York) 21 April 2013.

³⁵ *Kiobel v Royal Dutch Petroleum Co*, 569 US ___ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion) 2 (Breyer J).

As foreseen by the justices themselves, further litigation is required to clarify what foreign conduct (and by whom) may trigger application of the ATS.³⁶

Secondly, whilst *Kiobel* has perhaps curtailed the extent to which the ATS may entertain transitional justice claims, it will not end victims' pursuit of justice for abuses committed in conflict zones abroad. To the contrary, the spate of ATS lawsuits has provided sufficient case law (and high-profile multi-million dollar settlements) to encourage victims of atrocities to explore alternative routes and mechanisms to pursue justice. The *Kiobel* decision will likely shift and diversify transitional justice litigation to different jurisdictions and different bases of claims. As Childress argues, rather than stymieing human rights litigation, *Kiobel* may presage 'a brave new world of transnational human rights litigation'.³⁷

US state courts offer the possibility to pursue claims using the common law of torts (in contrast to the *statutory* tort of the ATS). The lawyers acting for the Bougainvillean claimants in *Sarei*, for example, have indicated they will seek to do so.³⁸ Moreover, claimants may also look beyond the US to other countries with permissive legal systems. For example, several countries (including Australia) have adopted legislation that provides for universal jurisdiction over international crimes, and may be amenable to entertain victims' compensation claims against the perpetrators of such crimes.³⁹

Thirdly, the underlying rationale of the *Kiobel* judgment to refuse to recognise the extraterritoriality of the ATS is interesting to contemplate and should give transitional justice advocates some pause. All the opinions impliedly accepted the position that the US, and US courts, should not be the 'custos morum [moral custodians] of the whole world'.⁴⁰ Evidently, the US Supreme Court was reluctant to sit in judgment on the conduct of other countries' wars, or prosecute those that perpetrate atrocities and human rights in far-off countries with no obvious connection to the US. Indeed, Roberts CJ explicitly worries that that may be akin to 'unwarranted judicial interference' in foreign policy — an area of policy best left to the other branches of government.⁴¹ Roberts CJ is concerned about negative repercussion if the courts

³⁶ Ibid.

³⁷ Donald Childress, 'Kiobel Commentary: An ATS Answer With Many Questions (And the Possibility of a Brave New World of Transnational Litigation)' on *Supreme Court of the United States Blog* (18 April 2013) <<http://www.scotusblog.com/2013/04/kiobel-commentary-an-ats-answer-with-many-questions-and-the-possibility-of-a-brave-new-world-of-transnational-litigation/>>. See also Donald Childress, 'The Alien Tort Statute, Federalism and the Next Wave of International Law Litigation' (2012) 100 *Georgetown Law Journal* 709.

³⁸ David Lornie, 'Class Action Suit Against Bougainville Copper Dismissed by US Court', *Papua New Guinea Post-Courier* (Port Moresby) 1 July 2013.

³⁹ Jonathan Kolieb, 'Australia: The Great Southern Land of Corporate Accountability?' (2013) 1 *Pandora's Box Law Journal* 61; Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World — 2012 Update* (2012, Amnesty International Publications); International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, 'Corporate Complicity and Legal Accountability, Volume 1: Facing the Facts and Charting a Legal Path', (Commission's Report, International Commission of Jurists, 2008).

⁴⁰ *Kiobel v Royal Dutch Petroleum Co*, 569 US ___ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion) 12 (Roberts CJ) quoting approvingly from *United States v The Jeune Eugenie*, 26 F Cas 832, 847 (Story J) (Mass, 1822).

⁴¹ *Kiobel v Royal Dutch Petroleum Co*, 569 US ___ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion) 5 (Roberts CJ).

were to weigh in on such issues and, as a result, he pulls the US court system back from exercising universal jurisdiction, even for trying heinous international crimes.⁴²

This reticence defers to and reflects the arguments put forward by the US Government's amicus brief, which urged the Court to deny the extraterritoriality of the ATS, and dismiss the suit.⁴³ Curiously, this was an about-face for the Obama Administration; for the first set of submissions, the US Government's amicus brief argued in favour of the Nigerian claimants, suggesting the ATS was applicable to corporations.⁴⁴ However, when the Court requested additional submissions on the question of the extraterritoriality question, the US Government's second amicus brief urged the Court to constrain the jurisdictional scope of the ATS, as it would complicate the conduct of US foreign policy and potentially jeopardise national interests.⁴⁵ (Interestingly, the US State Department's legal advisor and Yale University Law Professor Harold Koh refused to approve or sign this second amicus brief.)⁴⁶

The distinct possibility exists that similar 'foreign policy considerations' arguments may be invoked by US state courts and other countries' courts to eschew consideration of ATS-style transitional justice claims regarding conduct in foreign countries. In the absence of robust international mechanisms (the International Criminal Court notwithstanding), and the frequent lack of viable local avenues for justice in (post-) conflict zones, the judgment in *Kiobel* raises the question: where is the appropriate locus for justice to be pursued by and for victims of wartime atrocities?

Finally, it is worthwhile to reflect on the fact that the Court did not directly answer the question of corporate liability for international crimes under the ATS — the question for which it originally granted *cert* to ponder. Yet even Roberts CJ's opinion implied, in *obiter*, that corporations could be liable under the ATS.⁴⁷ The *Kiobel* judgment will contribute to the ongoing discussion as to from whom victims of wartime atrocities should be seeking justice. More broadly, is corporate involvement in transitional justice processes to be confined merely to the defendants in civil (and criminal) cases, or does their involvement go beyond that to assist the pursuit of justice in societies recovering from conflict in different ways?

⁴² Interestingly, Roberts CJ refers to concerns over 'judicial interference' in foreign policy matters, rather than relying on well-established arguments such as sovereign immunity, public interest or political question doctrines (which have in the past been invoked to dismiss cases involving foreign affairs). See, eg, Kenneth Anderson, '*Kiobel v Royal Dutch Petroleum Co*: The Alien Tort Statute's Jurisdictional Universalism in Retreat' [2012–13] *Cato Supreme Court Review* 149; 'Alien Tort Statute — Extraterritoriality — *Kiobel v Royal Dutch Petroleum Co*' (2013) 127 *Harvard Law Review* 308.

⁴³ 'Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance' Submission in *Kiobel v Royal Dutch Petroleum Co*, No. 10-1491, June 2011.

⁴⁴ 'Brief for the United States as Amicus Curiae Supporting Petitioners', Submission in *Kiobel v Royal Dutch Petroleum Co*, No. 10-1491, December 2011.

⁴⁵ 'Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance' Submission in *Kiobel v Royal Dutch Petroleum Co*, No. 10-1491, June 2012.

⁴⁶ See cover page of both briefs for signatories. See also Alison Frankel, 'Shell: Alien Tort Statute Not Meant for International Human Rights', *Reuters* (3 August 2012) <<http://blogs.reuters.com/alison-frankel/2012/08/03/shell-alien-tort-statute-not-meant-for-international-human-rights>>.

⁴⁷ *Kiobel v Royal Dutch Petroleum Co*, 569 US ___ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion) 14 (Roberts CJ).

IV CONCLUSION

ATS lawsuits arising out of abuses suffered during situations of conflict or widespread violence blazed a new path for pursuing transitional justice. In the post-*Kiobel* period, despite the likelihood that the ATS retains some viability, much of its potential for transitional justice has been severely circumscribed. The implications of this for human rights abuse victims (and their advocates) will be profound, and raises the question of whether a similarly innovative avenue to justice can be discovered elsewhere. Is it possible to unearth alternative legal mechanisms and jurisdictions that satisfy the goals of transitional justice but eschew the traditional binary choice between truth commissions and amnesties on the one hand, and criminal prosecutions on the other? And that pursue accountability for crimes committed by both governments and corporations? Only time will tell.
