The Alien Tort Claims Act and the South African *Apartheid* Litigation: Is the End Nigh?

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1 INTRODUCTION

Years after *apartheid* has ended in South Africa, the country is still dealing with its effects on those who suffered at its ugly hands. For about ten years a number of *apartheid* victims have been struggling to obtain relief in the United States of America ("U.S.") from several corporations who "aided and abetted" *apartheid*'s crimes against humanity, without any final resolution to date. In 2002, a number of plaintiffs, all victims of the *apartheid* regime, instituted action in the U.S. Federal District Courts for damages under the Alien Tort Claims Act (the "ATCA").[1] The plaintiffs sought, and today still seek, reparations from a number of major corporations that conducted business in South Africa during *apartheid*. Although this matter is being litigated in the U.S. courts, the factual basis for the litigation rests on events that occurred in South Africa, and it involves corporations that conducted business in South Africa during *apartheid*. Without the ATCA, this litigation would not have been possible in the U.S. courts.

The purpose of this article is to consider whether, after more than ten years of litigation, the South African *apartheid* litigation may be soon drawing to a close, or whether many more years of litigation on these complex claims appears to be on the horizon. In order to achieve this purpose, this article, firstly, provides a brief look at the ATCA and its historical development. Secondly, the South African *apartheid* litigation instituted in the U.S. courts under the ATCA, and its progression, is set out. Thirdly, recent developments regarding corporate accountability under the ATCA are canvassed. Lastly, in light of the recent developments regarding corporate accountability, the future of the South African *apartheid* litigation is addressed.

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[1] The Alien Tort Claims Act 28 U.S.C. §1350. The Alien Tort Claims Act is also referred to as the Alien Tort Statute.

2 THE ALIEN TORT CLAIMS ACT

The ATCA was originally adopted in 1789 as part of the Judiciary Act in the U.S. The ACTA reads as follows:

> "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The ATCA confers subject matter jurisdiction on a Federal Court when a plaintiff, who is an alien, sues for a tort based on an act that violates either the law of nations or a treaty of the U.S.[2] In this context, "tort" means wrongs people have suffered or "personal injuries such as piracy theft".[3] A number of authors have, in modern times, given attention to the word "tort" and what precisely it means, but, despite this scholarly attention, consensus on the understanding of what Congress intended to say has proven elusive.[4] The law of nations is defined by customary usage and clearly expressed principles of the international community, but not all violations of international law are actionable under the ATCA. Generally, the only violations actionable under the ATCA are human rights violations of a high intensity.[5] Victims from around the world have brought claims in the U.S. courts, under the ATCA, for human rights violations including torture, genocide, summary execution, and arbitrary detention.[6]

For almost 200 years, the ATCA lay relatively dormant. From its adoption in 1789 until 1980 only two courts based their jurisdiction on the ATCA.[7] In 1980, this inactivity changed when the Second Circuit issued an opinion in *Filartiga v Pena-Irala*[8] allowing a claim under the ATCA, stating "that courts must interpret international law not as it was in 1789, but as it has

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[2] Bachman "Human rights litigation against corporations" 2007 *TSAR* 292 293; Strydom & Bachmann "Civil liability for gross human rights violations" 2005 *TSAR* 448 454; and *Khulumani v Barclay National Bank Ltd.* 504 F.3d 254 (2nd Cir. 2007) citing *Kadic v Karadzic* 70 F.3d 232 (2nd Cir. 1995).

[3] Bond "Can reparations for apartheid profits be won in US Courts?" 2008 *Africa Insight* 13.

[4] Barrie "The Alien Tort Statute: The US Supreme Court finally speaks" 2005 *South African Yearbook of International Law* 221 222.

[5] Bachmann 2007 *TSAR* 293.

[6] Bhashyam "Knowledge or purpose? The Khulumani litigation and the standard for aiding and abetting liability under the Alien Tort Claims Act" 2008-2009 *Cardozo Law Review* 245. See also *Kadic v Karadzic* 232 (genocide, war crimes, torture); *Hilao v Estate of Marcos* 103 F.3d 789 (9th Cir. 1996) (arbitrary detention, torture); and *Abebe-Jira v Negewo* 72 F.3d 844 (11th Cir. 1996) (torture, summary execution, arbitrary detention).

[7] In *Filartiga v Pena-Irala* 630 F.2d 876 (2nd Cir. 1980) the court only identified two previous cases that had relied upon the ATCA for jurisdiction (*Adra v Clift* 195 F.Supp. 857 (D. Md. 1961) and *Bolchos v Darrel* 3 F.Cas. 810 (D.S.C. 1975) (No. 1607) where it was used as an alternative basis for jurisdiction); http://cyber.law.harvard.edu/torts3y/readings/update-a-02.html (accessed 10-08-2012).

[8] *Filartiga v Pena-Irala* 876.

evolved and exists among the nations of the world today".[9] Torture, perpetrated under colour of official authority, was found to violate international law resulting in such conduct falling within the jurisdictional mandate of the ATCA. The basis for such a conclusion was found in the international community's unambiguous consensus against torture.[10] An act of torture, committed outside the territory of the U.S. and involving only non-American citizens both as victim and perpetrator, provides a sufficient basis for a successful civil action to be brought before a Federal Court under the ATCA.[11] Following on from the *Filartiga* judgment, the courts in the U.S. continued to interpret the ATCA and lay down rules and limits for such claims.

In the *Forti v Suarez-Mason* case,[12] the court found that the ATCA provides a cause of action and jurisdiction, and the "law of nations" test was developed. The "law of nations" test requires an international law norm to have a "universal, definable, and obligatory" character in order for a violation of the norm to constitute a violation of the law of nations, therefore, providing a legal ground for civil action under the ATCA.[13] In *Sosa v Alvarez-Machain* the U.S. Supreme Court had its first opportunity to consider and comment on the ATCA. The Supreme Court found that Congress intended the ATCA "to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offences against ambassadors, … violations of safe conduct, … and individual actions arising out of prize captures and piracy".[14] It was found that these were the only examples that Congress had in mind at the time of the adoption of the ATCA, and no further torts were considered at that time.[15] The Supreme Court found that the ATCA granted jurisdiction only for a limited number of common law actions alleging violations of the law of nations.[16]

The Supreme Court went further finding that a cause of action could not be found in or created by the ATCA. The ATCA was found to be purely jurisdictional, providing jurisdiction only if a cause of action is found in common law and only for a limited number

[9] *Filartiga v Pena-Irala* 881.
[10] Bhashyam 2008-2009 *Cardozo Law Review* 252.
[11] Bachmann 2007 *TSAR* 292-293.
[12] *Forti v Suarez-Mason* 672 F.Supp. 1531 (N.D. Cal 1987). The "law of nations" test was referred to by the Supreme Court in *Sosa v Alvarez-Machain* 542 U.S. 692 (2004).
[13] *Forti v Suarez-Mason* 1539-1540. See also Bachmann 2007 *TSAR* 293-294.
[14] *Sosa v Alvarez-Machain* 720. See also Barrie 2005 *South African Yearbook of International Law* 224.
[15] *Ibid*.
[16] Bhashyam 2008-2009 *Cardozo Law Review* 252.

of violations of international law which may result in personal liability.[17] Judicial restraint was however called for when recognising causes of action under federal common law.[18] "[F]ederal courts should not recognise private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted".[19] The Court provided some guidance and stated that, in determining which norms of international law merit the creation of a private tort remedy, "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized".[20] The Court pointed out that other principles serve to limit the availability of relief for violations of international law, which include the international law doctrine that a claimant must exhaust all domestic (or internal) remedies before resorting to a foreign forum, the policy of deference to other political branches, the opinion of the U.S. or foreign governments towards the case, and the case's potential effect on foreign relations of the U.S.[21]

To fit within the limits of the ATCA today, violations of international law must be understood as those "accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms", such as piracy and crimes against ambassadors.[22] The narrower interpretation of the ATCA in the *Sosa* decision curtailed the reach of the ATCA, but it did leave the door open for foreigners to use the ACTA to institute action in the U.S. for certain human rights abuses which may have been committed elsewhere in the world.[23] At present, the ATCA provides one of the few opportunities for litigants to seek redress in a country other than where the violation has taken place.

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[17] *Sosa v Alvarez-Machain* 724. See also Nemeroff "Untying the *Khulumani* knot: Corporate aiding liability under the Alien Tort Claims Act after *Sosa*" 2008-2009 *Columbia Human Rights Law Review* 231 240.
[18] *Sosa v Alvarez-Machain* 726-727. See also Nemeroff 2008-2009 *Columbia Human Rights Law Review* 240.
[19] *Sosa v Alvarez-Machain* 732.
[20] *Sosa v Alvarez-Machain* 725.
[21] *Sosa v Alvarez-Machain* 725. See also Bhashyman 2008-2009 *Cardozo Law Review* 255; and Nemeroff 2008-2009 *Columbia Human Rights Law Review* 241.
[22] *Sosa v Alvarez-Machain* 725. See also Bachmann 2007 *TSAR* 306.
[23] Reynolds "Khulumani reparations case" at http://globalpolicy.org/component/content/article/163/28122.html (accessed 10-08-2012).

3 THE SOUTH AFRICAN *APARTHEID* LITIGATION

During 2002 a number of South Africans, all victims of the *apartheid* regime, commenced legal action in the U.S. courts under the ATCA, seeking reparations from several major corporations conducting business in South Africa during *apartheid*.[24] Numerous separate actions were filed by three groups of plaintiffs in multiple Federal District Courts. These suits were filed against a number of multinational corporations for "aiding and abetting" crimes against humanity committed during *apartheid*.[25] The *Khulumani* plaintiffs, being one group of plaintiffs, lodged a complaint against twenty-three corporations, alleging various violations of international law.[26] The *Ntsebeza* and *Digwamaje* plaintiffs, being the other two groups of plaintiffs, lodged class actions "on behalf of the 'victims of *apartheid* related atrocities, human rights' violations, crimes against humanity and unfair discriminatory forced labor [*sic*] practices'".[27]

The litigation commenced by these three groups of plaintiffs faced strong opposition from the South African Government under the Thabo Mbeki leadership. The Mbeki Government was

[24] In the first complaint submitted by the *Khulumani* plaintiffs, twenty-three companies were cited as defendants. After an amendment to the claim and a consolidation in 2008, eleven companies were cited as defendants and, after the opinion of Judge Scheindlin was handed down in April 2009, only five defendants remained.

[25] *In re South African Apartheid Litigation* 346 F.Supp. 2d. 538, 542 (S.D.N.Y. 2004). This aiding and abetting allegedly occurred through the provision of ammunition, technology, oil and loans, and by providing the National Party Government of South Africa with support to maintain *apartheid*. See also Bohler-Muller "Against forgetting: Reconciliation and reparations after the Truth and Reconciliation Commission" 2008 *Stellenbosch Law Review* 466 474. The claims are all based upon allegations that the corporations aided and abetted *apartheid* crime, including torture, extrajudicial killings and denationalization, all committed in violation of international law. See also Dhooge "Accessorial liability of transnational corporations pursuant to the Alien Tort Statute: The South African Apartheid Litigation and the lessons of *Central Bank*" 2009 *Transnational Law & Contemporary Problems* 247 256-273.

[26] *Khulumani v Barclay National Bank Ltd.* 258. The *Khulumani* plaintiffs include the *Khulumani* Support Group, a South African non-governmental organisation of identified victims and survivors of *apartheid* human rights violations that "works to assist victims of *apartheid*-era violence and has 32 700 members who are survivors of such violence", as well as 91 individual plaintiffs who are "the personal representatives of victims of extrajudicial killing, or were themselves tortured, sexually assaulted, indiscriminately shot, or arbitrarily detained by the *apartheid* regime". The *Ntsebeza* and the *Digwamaje* plaintiffs each represent individuals who lived in South Africa between 1948 and 2002 and who suffered damages as a result of *apartheid*. See *Khulumani v Barclay National Bank Ltd*. 258, which judgment was handed down on 12-10-2007. See also Bohler-Muller 2008 *Stellenbosch Law Review* 473 and Dhooge 2009 *Transnational Law & Contemporary Problems* 256-257.

[27] *Digwamaje v IBM Corporation*, action docket 02 Civ. 6218 (JES); *Ntsebeza v Citigroup, Inc*, action docket 02 Civ. 4712 (JES); *Ntsebeza v Oerlikon Contraves AG*, action docket 03 Civ. 1023 (JES); *Ntsebeza v Holicim Ltd*, action docket 03 Civ. 1024 (JES); *Ntsebeza v Schindler AG*, action docket 03 Civ. 1025 (JES); *Ntsebeza v EMS AG*, action docket 03 Civ. 1026 (JES); *Ntsebeza v Exxon Mobil Corporation*, action docket 03 Civ. 1027 (JES); *Ntsebeza v American Isuzu Motors Inc*, action docket 03 Civ. 1749 (JES); and *Khulumani v Barclay National Bank Ltd.* 258. The *Digwamaje* plaintiffs brought further claims under the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2000)) and the Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. §§1961. These claims were dismissed by the court and fall outside the scope of this paper.

of the opinion that the "proceedings interfere with a foreign sovereign's effort to address matters in which it has the predominant interest", and that they should be dismissed.[28] President Thabo Mbeki, in his address to Parliament on 15 April 2003, stated that:[29]

> "we wish to reiterate that the South African Government is not and will not be party to such litigation. In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation."

The Mbeki Government in South Africa held the view that the issues raised in the ATCA litigation in the U.S. courts were essentially political in nature, that it would discourage direct foreign investment, and that the relief sought was inconsistent with the country's approach to achieving its long-term goals.[30]

A similar standpoint was adopted by the U.S. Department of State. The U.S. Department of State submitted a "Statement of Interest" asserting that "continued adjudication ... risks potentially serious adverse consequences for significant interests of the United States".[31] This statement made by the U.S. Department of State was based on the fact that the Government of South Africa had, on several occasions, made clear its view that these cases did not belong in the U.S. courts and that they threatened to disrupt and contradict the laws, policies and processes of South Africa aimed at dealing with the aftermath of *apartheid*.[32]

This opposition to the litigation by the South African Government continued until 2009 when the Minister of Justice and Constitutional Development for the Republic of South Africa,

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[28] Declaration by Penuell Mpapa Maduna, the then Minister of Justice and Constitutional Development of the Republic of South Africa and a member of the cabinet of President Thabo Mbeki, dated 11-07-2003 1. See also *Khulumani v Barclay National Bank Ltd*. 259.

[29] Also restated in a letter to Secretary Powell, Secretary of State, Washington DC, from Nkosazana Dlamini Zuma, the then Minister of Foreign Affairs in the Republic of South Africa, dated 04-05-2002.

[30] Declaration by Penuell Mpapa Maduna, the then Minister of Justice and Constitutional Development of the Republic of South Africa and a member of the cabinet of President Thabo Mbeki, dated 11-07-2003 8-9.

[31] *Khulumani v Barclay National Bank Ltd.* 259. After South Africa submitted its opinion on the matter, the District Court solicited the views of the U.S. Department of State and made enquiries as to whether the adjudication of the litigation in the U.S. courts would adversely affect that country's interests, and if so, the nature and significance of such impact.

[32] Taken from the brief filed by the U.S. during 2009 opposing the defendants' appeal, "SA litigation – US Gov Amicus Curiae 2009" at http://www.khulumani.net/khulumani/documents/category/5-us-lawsuit.html (accessed 10-08-2012) 9, which is discussed in more detail below.

Jeffrey Thamsanqa Radebe, addressed a letter to Judge Scheindlin of the District Court. In this letter, he states that:[33]

> "[t]he Government of the Republic of South Africa, having considered carefully the judgment of the United States District Court, Southern District of New York, is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law."

This decision not to oppose the litigation represented a marked change in the South African Government's stance on the litigation, and only came after the claims had been significantly narrowed by the courts.[34] The U.S. Government also indicated a change of heart towards the end of 2009, when they filed a brief as *amicus curiae* supporting the plaintiffs.[35]

Although a number of claims were lodged in various District Courts in the U.S., there was a transfer of all the cases to the Southern District Court of New York (the claims are collectively referred to as the "*Apartheid* Litigation").[36] Following the transfer, a majority of the parties cited as defendants in the actions requested a dismissal of the litigation.[37] Judge Sprizzo, in ruling on the motions to dismiss, held that the plaintiffs failed to establish subject matter jurisdiction under the ATCA and granted the defendant's motions to dismiss.[38] It was said that the *Apartheid* Litigation cases were based on a "political question", which a court should not interfere with, and that the aiding and abetting of violations of human rights is not itself a crime against humanity and therefore cannot be the basis of jurisdiction under the ATCA.[39]

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[33] Available at http://www.Khulumani.net/attachments/343_RSA.Min.Justice_letter_J.Scheindling_09.01.09.pdf (accessed 10-05-2010).

[34] The South African Government had changed and was under the leadership of President Jacob Zuma by this stage. According to a press statement issued by the *Khulumani* Support Group and the lawyers for the *Ntsebeza* & *Digwamaje* plaintiffs, dated 03-09-2009, this change in the South African Government's position undermines one of the corporations' major defences, that an American court should not hear the matter because the lawsuit undermines South Africa's sovereignty. The press statement can be viewed at http://www.apartheid-reparations.ch/documents/reparationen/Khulumani%203Sep09.pdf (accessed 10-08-2012).

[35] "SA Litigation – US Gov Amicus Curiae 2009" at http://www.khulumani.net/khulumani/documents/category/5-us-lawsuit.html (accessed 10-08-2012).

[36] *Khulumani v Barclay National Bank Ltd*. 258.

[37] Thirty-one of the 55 defendants in the *Ntsebeza* and *Digwamaje* actions filed a joint motion to dismiss and 18 of the 23 defendants in the *Khulumani* action filed a joint motion to dismiss.

[38] *In re South African Apartheid Litigation* (2004) 554-57; and *Khulumani v Barclay National Bank Ltd.* 259.

[39] *In re South African Apartheid Litigation* (2004) 543 & 553-557. See also Bohler-Muller 2008 *Stellenbosch Law Review* 476. Professor Bohler-Muller states that this is "[r]ather shocking, concerns about foreign investment trumped concerns about upholding and defending a culture of human rights and corporate social responsibility". Further, see Bohler-Muller "Reparations for apartheid human rights abuses: The case of Khulumani" 2008 *Africagrowth Agenda* 21.

The plaintiffs, unhappy with the dismissal of the *Apartheid* Litigation, appealed to the Second Circuit. On 12 October 2007, a three-judge panel dismissed the appeal in part and upheld the appeal in part.[40] It was said that the District Court had erred in holding that aiding and abetting violations of customary international law cannot provide a basis for ATCA jurisdiction.[41] The Second Circuit reinstated the plaintiffs' ATCA claims, expressly holding that "a plaintiff may plead a theory of aiding and abetting liability under the ATCA", but the case did not manage to yield a common theory of aiding and abetting.[42] Instead, each of the three judges (Katzmann, Hall and Korman) on the panel set out separate opinions and provided different standards to be used in an analysis of torts recognised under the ATCA, each judge interpreting differently *Sosa's* requirements for how a cause of action in ATCA suits should be identified.[43] While recognising aiding and abetting liability, Judges Katzmann and Hall left the District Court without a standard to apply to determine which torts are to be recognised under the ATCA: customary international law or federal common law as the basis for aiding and abetting liability under the ATCA.[44] The judges did not make a ruling on the merits of the *Apartheid* Litigation; instead, the cases were remanded back to the District Court (and Judge Sprizzo) to make a decision on whether the claims against the defendants should be successful.[45]

The dispute regarding the standard to be applied to determine what torts should be recognised under the ATCA was not new to the U.S. courts in the *Apartheid* Litigation. Prior to the judgment handed down on 12 October 2007, several courts had held that the ATCA covers aiding and abetting liability, therefore agreeing with the Second Circuit in the *Apartheid* Litigation.[46] However, other courts had declined to interpret the ATCA as imposing such liability,[47] or had avoided the issues by deciding cases on narrower grounds.[48]

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[40] *Khulumani v Barclay National Bank Ltd.* 263-264. The Second Circuit upheld the dismissal of the plaintiffs' claims under the Torture Victims Protection Act, finding that the plaintiffs failed to plead allegations sufficient to meet the "color [*sic*] of law" requirement of the Torture Victim Protection Act.

[41] *Khulumani v Barclay National Bank Ltd.* 260.

[42] *Khulumani v Barclay National Bank Ltd*. 260, and restated *In re South African Apartheid Litigation* 617 F.Supp. 2d. 228 (S.D.N.Y. 2009) 10, which judgment was handed down on 08-04-2009.

[43] *Khulumani v Barclay National Bank Ltd*. 254. See also Nemeroff 2008-2009 *Columbia Human Rights Law Review* 233.

[44] *Khulumani v Barclay National Bank Ltd.* 275-276 & 288-289. See also Hamblett "Judge narrows claims in Apartheid Torts case against multinational corporations" at http://www.law.com/jsp/article.jsp?id= 1202429769165 (accessed 10-08-2012).

[45] *Khulumani v Barclay National Bank Ltd.* 264 & 284.

[46] *Kiobel v Royal Dutch Petroleum Co.* 456 F.Supp. 2d. 457 (S.D.N.Y. 2006); *Presbyterian Church of Sedan v Talis Energy Inc.* 456 F.Supp. 2d. 633 (S.D.N.Y. 2006); and *Bodner v Banque Paribas* 114 F.Supp. 2d. 117, (E.D.N.Y. 2005).

[47] *Doe v Exxon Mobil Corp.* 393 F.Supp. 2d. 20 (D.D.C. 2005).

Following the reinstatement of the ATCA claims, the defendants petitioned the Supreme Court for a writ of certiorari.[49] However, given that some of the Supreme Court judges had conflicts of interests in their own investments, a number of them had to recuse themselves, leaving the Supreme Court unable to constitute the necessary quorum.[50] As a result, the matter was sent back to the Southern District Court of New York, with the appeal judgment still in force, in order for the pleadings to be addressed and a decision to be made as to whether the claims against the corporations could be successful on the facts.[51]

Back in the District Court with Judge Sprizzo, the plaintiffs filed two amended, consolidated complaints during October 2008.[52] The plaintiffs' amended claims were constructed to meet both the standards for aiding and abetting liability under the ATCA enunciated by Judge Katzmann and Judge Hall. In a repeat performance, all the defendants, except one, filed a further motion to dismiss the *Apartheid* Litigation, which motion was heard by Judge Scheindlin.[53] During April 2009, Judge Scheindlin handed down her ruling, narrowing down the claims by partly granting the motion to dismiss and partly denying the motion. It was decided that the plaintiffs could proceed with their claims against five defendants only, namely, Daimler A.G.,[54] Ford,[55] General Motors,[56] IBM,[57] and Rheinmetall[58] (collectively

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[48] *Carmichael v United Techs. Corp*. 835 F.2d 109 (5th Cir. 1988); and *Corrie v Caterpillar Inc.* 403 F.Supp. 2d. 1019 (W.D. Wash 2005).

[49] A petition for writ of certiorari is a document that a losing party files with the Supreme Court, in which the losing party requests the Supreme Court to review a decision of a lower court. A writ of certiorari will only be granted by the Supreme Court for compelling reasons.

[50] *In re South African Apartheid Litigation* (2009) 11. See also Bond 2008 *Africa Insight* 14. The Supreme Court judges owned shares in some of the corporations cited as defendants and/or had close family ties with the corporations, which resulted in conflicts of interest. See http://www.woek.de/web/cms/upload/pdf/kasa/publikationen/jobsonmadlingozi_2001_the_significance_of_the_ successful_appeal.pdf (accessed 10-08-2012).

[51] *In re South African Apartheid Litigation* (2009) 11-12; and *American Isuzu Motors Inc. v Ntsebeza* 128 S. Ct. 2424 (2008) (affirming under 28 U.S.C. § 2109).

[52] The *Digwamaje v IBM Corporation* complaint was incorporated into these two complaints at this stage. The *Khulumani* amended claim is a class action that provides for the inclusion of all individuals who fit the categories of extrajudicial killing, torture, prolonged unlawful detention, and cruel, inhumane, and degrading treatment in violation of international law. See further http://www.woek.de/web/cms/upload/pdf/kasa/publikationen/jobsonmadlingozi_2001_the_significance_of_the_ successful_appeal.pdf (accessed 10-08-2012).

[53] By this stage Judge Sprizzo had passed away. The matter was handed to Judge Shira A. Scheindlin to be dealt with in future.

[54] The *Ntsebeza* plaintiffs' claim against Daimler A.G. was allowed to remain. However, the *Khulumani* plaintiffs' claim against Daimler A.G. was dismissed with leave to amend. The claim against Daimler is for aiding and abetting torture; cruel, inhumane, or degrading treatment; extrajudicial killing; and *apartheid*.

[55] The *Ntsebeza* plaintiffs' claim against Ford was allowed to remain. However, the *Khulumani* plaintiffs' claim against Ford was dismissed with leave to amend. The claim against Ford is for aiding and abetting torture; cruel, inhumane, or degrading treatment; extrajudicial killing; and *apartheid*.

referred to as "the five defendants").[59] The claims against the international banks and other corporations operating in South Africa during *apartheid* were dismissed. The court rejected the defendants' arguments that the prudential doctrines of political question and comity called for the dismissal of the *Apartheid* Litigation.[60] According to Judge Scheindlin, the *Apartheid* Litigation would not interfere with U.S. foreign policy or important U.S. governmental interests or the TRC process.[61] In conclusion, Judge Scheindlin stated:[62]

> "[w]hat remains of these consolidated cases is vastly different from the dozen actions first filed in 2002 and 2003. Corporate defendants accused of merely doing business with the *apartheid* Government of South Africa have been dismissed. Claims that a corporation that aided and abetted particular acts could be liable for the breadth of harms committed under apartheid have been rejected. What survives are much narrower cases that this Court hopes will move toward resolution after more than five years spent litigating motions to dismiss."

Unsatisfied with the judgment allowing the case to proceed against them, the five defendants lodged an appeal against the April 2009 District Court's opinion. The five defendants filed a petition for writ of mandamus and a request for permission for interlocutory appeal with the Second Circuit.[63] The defendants sought to raise the proprietary of the District Court's refusal to dismiss the case on the grounds of comity and political question.[64] The plaintiffs requested the court to dismiss the appeal on the ground that the Appellate Court did not have jurisdiction.[65] On 11 January 2010, the Second Circuit heard the appeal against the April 2009

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[56] The *Ntsebeza* plaintiffs' claim against General Motors was allowed to remain. However, the *Khulumani* plaintiffs' claim against General Motors was dismissed with leave to amend. The claim against General Motors is for aiding and abetting torture; cruel, inhumane, or degrading treatment; extrajudicial killing; and *apartheid*.

[57] The *Ntsebeza* plaintiffs' claim against IBM was allowed to remain. However, the *Khulumani* plaintiffs' claim against IBM was dismissed with leave to amend. The claim against IBM is for aiding and abetting denationalization and *apartheid*.

[58] The *Khulumani* plaintiffs' claim against Rheinmetall was allowed to remain. The claim against Rheinmetall is for aiding and abetting extrajudicial killing and *apartheid*.

[59] *In re South African Apartheid Litigation* (2009) 56-73.

[60] Although the U.S. and South African Governments had indicated their objection to the litigation, the TRC, and its chairperson, Archbishop Desmond Tutu, had advised the court that the litigation would not hamper or conflict with its process or goals.

[61] *In re South African Apartheid Litigation* (2009) 134-135.

[62] *Ibid*.

[63] A writ of mandamus is issued by a superior court to compel a lower court or a Government officer to perform mandatory or purely ministerial duties correctly.

[64] Krohnke "US Federal Courts rely on the Rome Statute of the International Criminal Court in civil cases" http://www.amicc.org/docs/Krohnke%20on%20Khulumani.pdf (accessed 10-08-2012) 5.

[65] *Ibid*.

judgment. The arguments put forward by legal representatives for both sides focused on two main themes:[66]

(a) Whether a corporation can be held liable for crimes committed using the commodities and equipment that the corporation manufactured and sold to the *apartheid* regime knowing what the commodities and equipment were to be used for (i.e. corporate accountability); and

(b) What the current status of the Statements of Interest was that was submitted to the District Court in 2003 by the South African and the U.S. Governments respectively.[67]

The Second Circuit, after hearing the appeal, reserved judgment. This decision has not yet been handed down by the Second Circuit and is eagerly being awaited by the parties to the *Apartheid* Litigation.[68]

The latest development on the *Apartheid* Litigation can be described as a somewhat surprising event. One of the five remaining defendants, General Motors, filed for bankruptcy protection before a New York bankruptcy court shortly after the economic crisis in 2008. A claim was filed on behalf of a punitive class,[69] comprising of plaintiffs from the *Apartheid* Litigation, which was heard and disallowed by the bankruptcy court. The disallowing of the claim meant that General Motors had no legal obligation towards the punitive class claimants, and due to its liquidation status, was no longer a defendant who was part of the main action. More than a year after the bankruptcy court effectively excluded General Motors from the *Apartheid* Litigation, a without prejudice offer was received from General Motors. A settlement of US$ 1.5 million was agreed upon between General Motors and the named plaintiffs.[70]

During the long wait for the appeal judgment to be handed down, other cases have considered the issue of corporate liability under the ATCA. Disagreement has emerged, and it appears that it is not obvious that corporations can be held accountable under the ATCA. This dispute, and the result ultimately reached, may have a significant impact on the *Apartheid* Litigation given that the four remaining defendants are all corporations.

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[66] "Court hearing exposes multinationals" at http://www.khulumani.net/khulumani/statements/355-jan-11-2010-court-hearing-exposes-multinationals.html (accessed 11-05-2010).

[67] Both the South African and the U.S. Governments had detailed new positions in respect of the case since 2003, which positions were indicated in letters delivered to the District Court in September 2009.

[68] As at 14-08-2012.

[69] A punitive class means a class not yet certified by any court.

[70] For more on this see "Explanation by Khulumani attorney of the significance of the GM settlement" at http://www.khulumani.net/reparations/corporate/item/641-explanation-by-khulumani-attorney-of-the-significance-of-the-gm-settlement.html (accessed 08-08-2012).

4 CORPORATE LIABIITY UNDER THE ATCA

For a variety of reasons, civil action against corporations can play an important role in the fight against corporate human rights abuses. Civil accountability for human rights abuses has the potential to bring about change in corporate conduct, especially in those countries where human rights protection falls below an acceptable standard.[71] The ATCA has been regarded by some to be a powerful tool to be used by survivors of gross human rights abuses in the fight against corporations, especially multinational corporations. Corporate accountability under the ATCA may however be drawing to a close.

During the early years of ATCA litigation, the direct question of corporate accountability under the ATCA was never expressly considered by a court, although it had been assumed in a number of cases that such liability was capable of resulting under the ATCA.[72] This changed on 17 September 2010 when the United States Court of Appeals for the Second Circuit delivered a judgment in *Kiobel v Royal Ducth Petroleum Co*., canvassing the issue and concluding that corporate liability was not a possibility under the ATCA. It found that the plaintiffs' claims under the ATCA against corporations fell outside the "limited jurisdiction provided by the ATCA" as the plaintiffs had failed to allege violations of the law of nations.[73] The court stated the following:[74]

> "We emphasize that the question before us is not whether corporations are 'immune' from suit under the [ATCA]: That formulation improperly assumes that there is a norm imposing liability in the first place. Rather, the question before us … '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.' Looking to international law, we find a jurisprudence, first set forth in Nüremberg and repeated by every international tribunal of which we are aware, that offenses against the law of nations (i.e., customary international law) for violations of human rights can be charged against States and against individual men and women but not against juridical persons such as corporations. As a result, although international law has sometimes

[71] Bachmann 2007 *TSAR* 307.

[72] At the time of *Kiobel v Royal Dutch Petroleum Co.* 621 F.3d 111 (2d Cir. 2010) only one other court had addressed the issue of corporate accountability under the ATCA, being the Eleventh Circuit in *Romero v Drummond Co. Inc.* 552 F.2d 1303 (2008). The *Romero* case however provided very little analysis of the issue of corporate accountability under the ATCA, holding that law "grants jurisdiction from complaints of torture against corporate defendants" and the ATCA should thus support jurisdiction against corporations. For more, see also Gibson "D.C. Circuit and Seventh Circuit take issue with Second Circuit's Kiobel decision eliminating corporate ATS liability" at http://www.khulumani.net/khulumani/in-the-news/item/497-dc-circuit-and-seventh-circuit-take-issue-with-second-circuit%E2%80%99s-kiobel-decision-elminating-corporate-ats-liability.html (accessed 14-08-2012).

[73] *Kiobel v Royal Dutch Petroleum Co.* 9.

[74] *Ibid*.

> extended the scope of liability for a violation of a given norm to individuals, it has never extended the scope of liability to a corporation."

It was confirmed that Federal District Courts are provided with jurisdiction by the ATCA over a tort brought by an alien alleging a "violation of the law of nations or a treaty of the United States".[75] Jurisdiction is however limited to claims alleging a "violation of an international norm that is 'specific, universal, and obligatory'".[76] As corporations had escaped all forms of liability under the customary international law of human rights and, in several instances, had been explicitly rejected, corporations could not be the subjects of ATCA liability.[77] Thus, it was found that liability under the ATCA could only rest on States and individuals.[78]

After the controversial decision in the *Kiobel* matter, two further cases also addressed this exact point. The court, in *Doe v Exxon Mobil Corp*.,[79] reached a conclusion unlike that of its predecessor, *Kiobel*. In the *Exxon Mobil* case, the Court of Appeals for the District of Columbia Circuit adopts the view that the *Kiobel* decision "conflates the norms of conduct at issue in *Sosa* and the rules for any remedy to be found in federal common law".[80] It is found that where the conduct in question fits a norm that meets the criteria set out in *Sosa*, the ATCA provides federal jurisdiction, but for purposes of a remedy, it is the law of the U.S. that must provide the rule, not the law of nations.[81] The court went further and considered the historical context of the ATCA, finding that there is no reason to reach a conclusion that the First Congress was concerned mostly with risks posed by natural persons, drawing the U.S. into "foreign entanglements", but that they were content to allow corporations to draw the U.S. into such situations.[82] Further support for corporate accountability was found in the fact

[75] *Kiobel v Royal Dutch Petroleum Co.* 48.
[76] *Ibid*.
[77] *Ibid*.
[78] The Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.) grants sovereign states immunity from suits against them in American Courts. However, the Foreign Sovereign Immunities Act effectively denies sovereign immunity from liability arising out of their private, commercial activities. In these limited instances, therefore, such sovereign states may be subject to liability under the ATCA, and this has been said to limit "the class of defendants in future cases under the [ATCA] to individuals acting under color [*sic*] of state law." Flom "Human rights litigation under the Alien Tort Statute: Is the *Forti v Suarez-Mason* decision the last of its kind?" 1990 *Boston College Third World Law Journal* 321 342-346; and Strydom & Bachmann 2005 *TSAR* 459.
[79] *Doe v Exxon Mobil Corp.* No. 09-7125 2011 WL 2652384 (D.C. Cir. 08-07-2011). The D.C. Circuit court issued a 2-1 decision, with Judge Rogers writing for the majority. Judge Kavanaugh, in his dissenting opinion, agreed with the *Kiobel* decision, holding that the corporate accountability is not supported by customary international law, and is thus not available under the ATCA.
[80] *Doe v Exxon Mobil Corp.* 53.
[81] *Doe v Exxon Mobil Corp.* 56. Thus, the fact that the law of nations does not make provision for civil corporate accountability does not mean that corporations are immune from corporate liability.
[82] *Doe v Exxon Mobil Corp.* 64

that corporate liability was an accepted standard of tort law in the U.S. when the ATCA was adopted in 1789, thus making such a proposition unsurprising to the First Congress at the time of enactment.[83] In addition, the court held that "[n]either does the law of nations support corporate immunity under the [ATCA] where, for example, a corporation operates as a front for piracy, engages in human trafficking, or mass-produces poisons for purposes of genocide."[84]

The judgment rendered in *Exxon Mobil* ultimately reached the conclusion that the judgment in *Kiobel* is incorrect in that it ignores the wording of the ATCA, its history, and its purpose. It was furthermore found to be based on a misreading of footnote 20 in the *Sosa* decision, while ignoring the conclusion reached "that federal common law would supply the rules regarding remedies".[85] The court found that the *Sosa* decision of the Supreme Court directs one towards domestic law for the determination of the question of corporate liability, and the law of the U.S. has held corporations liable for torts since its founding.[86] Holding that every jurisdiction in the U.S., every civilized nation, and numerous international law treaties make provision for corporate accountability for torts, "it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for 'shockingly egregious violations of universally recognized principles of international law'".[87]

In *Flomo v Firesetone Natural Rubber Co*.,[88] the Seventh Circuit had its opportunity to consider the question of corporate accountability under the ATCA. The Seventh Circuit looked at the fact that all prior cases in courts of the same level, except one, had held or assumed (mostly assumed) that the ATCA can create liability for a corporation.[89] The only case that has held the contrary is *Kiobel,* which decision was said to be incorrect.[90] Despite finding that the factual basis for the *Kiobel* decision was incorrect, the Seventh Circuit found that even if no corporation had "ever been punished for violating customary international law", there will always be a first time for the enforcement of a norm through litigation.[91] In considering why corporations are seldom prosecuted for customary international law

[83] *Doe v Exxon Mobil Corp.* 66-68.
[84] *Doe v Exxon Mobil Corp.* 68.
[85] *Doe v Exxon Mobil Corp.* 80.
[86] *Doe v Exxon Mobil Corp.* 84.
[87] *Doe v Exxon Mobil Corp.* 84-85.
[88] *Flomo v Firestone Natural Rubber Co.* 643 F.3d 1013 (7th Cir. 2011).
[89] *Flomo v Firestone Natural Rubber Co.* 6.
[90] *Ibid*.
[91] *Flomo v Firestone Natural Rubber Co.* 6-7.

violations, the court finds that there appears to be no compelling reason for this, but rather a desire to keep such liability "within tight bounds".[92] In considering the relationship between international and domestic law, it said that substantive norms are imposed by international law, but it is up to the individual nations of the world to decide how to enforce them.[93] The court therefore reached the conclusion that corporate liability under the ATCA is possible.

After these two decisions, a strange anomaly resulted: corporations could be sued under the ATCA in the D.C., Seventh and Eleventh Circuits,[94] but not in the Second Circuit.[95] On 28 February 2012, the U.S. Supreme Court heard arguments on the point of corporate liability under the ATCA in *Kiobel v Royal Dutch Petroleum*, representing the first opportunity the Supreme Court has had to address the issue.[96] The U.S. Supreme Court hearing of the appeal has attracted much interest from the legal community, with over 20 *amicus curiae* briefs being filed in support of the plaintiffs, and almost as many in favour of the defendants.[97]

A number of arguments were submitted to the Supreme Court, both in favour of and against corporate accountability under the ATCA. Arguing that *Kiobel* adopted "a selective review of international sources", the petitioners (plaintiffs) take the view that the question of whether a corporation can be sued under the ATCA is a substantive enquiry and not a question of subject matter jurisdiction;[98] and that there is no basis for excluding corporate entities "from the universe of [ATCA] defendants".[99] The latter argument is based on several factors,

[92] *Flomo v Firestone Natural Rubber Co.* 8.
[93] *Flomo v Firestone Natural Rubber Co.* 12.
[94] For more on the D.C. Circuit, see *Doe v Exxon Mobil Corp*. 1*;* on the Seventh Circuit, see *Flomo v Firestone Natural Rubber Co.* 1 and on the Eleventh Circuit, see *Romero v Drummond Co. Inc.* 1303. The Ninth Circuit had also assumed corporate liability in the past.
[95] See *Kiobel v Royal Dutch Petroleum Co.* 1. See also "Kiobel officially an outlier: Yet another US court rules for corporate accountability for human rights abuses" at http://www.khulumani.net/reparations/corporate/item/502-kiobel-officially-an-outlier-yet-another-us-court-rules-for-corporate-accountability-for-human-rights-abuses.html (accessed 08-08-2012).
[96] The U.S. Supreme Court was petitioned to hear an appeal in the *Kiobel v Royal Dutch Petroleum Co*. case after the decision handed down by the Second Circuit. This followed the 5-5 split of the Second Circuit when it voted on whether or not to rehear the *Kiobel* case *en blanc*. For more see http://www.khulumani.net/reparations/corporate/item/486-major-new-corporate-case-at-court.html (accessed 08-08-2012). An *en blanc* court is a full bench court (entire bench) – the matter is heard before all the judges of a court (rather than by a selected panel). See http://en.wikipedia.org/wiki/en_blanc (accessed 08-08-2012). The issues before the Supreme Court also extend to a consideration of the extraterritoriality of the ATCA and whether it applies to acts that occur on foreign territory. See "SCOTUSblog: The ATS and importance of historical evidence" at http://harvardhumanrights.wordpress.com/tag/kiobel/ (accessed 16-08-2012).
[97] Weiss "The question before the US supreme court in Kiobel v Shell" at http://www.guardian.co.uk/commentisfree/cifamerica/2012/feb/28/question-before-supremem-court-kiobel-v-shell (accessed 08-08-2012).
[98] Brief for petitioners in *Kiobel v Royal Dutch Petroleum Co*. in the Supreme Court of the U.S. 12-18.
[99] Brief for petitioners in *Kiobel v Royal Dutch Petroleum Co*. in the Supreme Court of the U.S. 18-61.

including that the history, the text, and the purpose of the ATCA demonstrates that corporations can be sued under the ATCA;[100] that the Supreme Court's decision in *Sosa* does not provide support for the exclusion of corporate defendants from the reach of the ATCA;[101] that ATCA jurisprudence rejects the stance adopted in *Kiobel* that corporations are to be excluded from the reach of the ATCA;[102] that "corporate civil liability is recognized in international law";[103] the fact that modern international criminal tribunals excludes corporations is irrelevant;[104] that the question as to whether corporations are subjects of international law is unrelated to determining corporate liability under the ATCA;[105] and that policy arguments advanced in favour of excluding corporations are "[u]navailing" and should be dealt with by Congress.[106] After analysing and rejecting all the arguments advanced by the Second Circuit in *Kiobel* for the exclusion of corporate defendants, the petitioners request the Court to reverse the decision of the Second Circuit.[107]

In response to the brief filed by the petitioners, the respondents filed their brief. The arguments raised by the respondents include that it is an issue of subject matter jurisdiction when determining whether the ATCA applies to corporations or not;[108] and that jurisdiction under the ATCA does not extend to, and a cause of action is not afforded by, federal common law for the commission of the offences alleged by corporations.[109] In making the latter argument, it is alleged by the respondents that the determination of liability under the ATCA is a question of international law;[110] that there is no "Specific And Universal Norm of Corporate Responsibility" under international law for the offences alleged;[111] and that even if such corporate responsibility is recognised by international law for the offences alleged, no cause of action should be afforded by federal common law.[112] After setting out these arguments, the respondents conclude by requesting the Supreme Court to affirm the judgment handed down by the Second Circuit.[113]

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[100] Brief for petitioners in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 18-34.
[101] Brief for petitioners in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 35-39.
[102] Brief for petitioners in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 40-43.
[103] Brief for petitioners in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 43-47.
[104] Brief for petitioners in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 48-52.
[105] Brief for petitioners in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 52-56.
[106] Brief for petitioners in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 57-61.
[107] Brief for petitioners in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 61.
[108] Brief for respondents in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 11-16.
[109] Brief for respondents in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 16-48.
[110] Brief for respondents in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 17-26.
[111] Brief for respondents in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 27-43.
[112] Brief for respondents in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 43-48.
[113] Brief for respondents in *Kiobel v Royal Dutch Petroleum Co.* in the Supreme Court of the U.S. 56.

After calling for further briefs to be submitted on the issue of the application of the ATCA to acts committed in foreign territories, the U.S. Supreme Court submitted the case. The judgment on the issues raised before the Supreme Court is being eagerly awaited by a number of litigants, potential litigants, commentators, spectators and jurists across the globe. This ruling by the Supreme Court has the potential to dramatically alter the course of ATCA litigation in the future, and may reduce the protection available for fundamental human rights.

5 THE FUTURE OF THE *APARTHEID* LITIGATION

It appears that, after years of perseverance and dedication, the fate of the *Apartheid* Litigation may be beyond the control and input of those involved in the matter. Although a majority of the support and prior decisions seem to favour a finding of corporate accountability under the ATCA, there is no certainty that such a decision will be provided at the end of the day.

At the oral argument before the U.S. Supreme Court in *Kiobel*, the court gave all those appearing, being the petitioners, the respondents, and the United States (who filed a brief as *amicus curiae* supporting the petitioner), a difficult time, asking complex and probing questions, and questioning the parties' sources of authority.[114] However, some commentators have noted that the argument that corporations should be held accountable under the ATCA in the U.S. courts for human rights abuses in foreign territories, left "[a]t least a majority of the Jutices" looking unconvinced.[115] The argument advanced by the petitioners in favour of corporate accountability requires one to draw a distinction that not all seemed too willing to draw. Although the petitioners accept that international law is the right source to consider when determining whether atrocities violate the law of nations, they hold the view that the question whether a defendant can be sued for such a wrongdoing is a separate enquiry governed by domestic law.[116]

[114]The transcript of the oral argument can be found at http://www.supremecourt.gov/oral_arguments/argument_transcript/10-1491.pdf (accessed 16-08-2012).

[115] Denniston "Argument recap: Downhill, from the start" at http://www.scotusblog.com/?p=139919 (accessed 16-08-2012).

[116] The transcript of the oral argument can be found at http://www.supremecourt.gov/oral_arguments/argument_transcript/10-1491.pdf (accessed 16-08-2012) 3-7. See also Denniston "Argument recap: Downhill, from the start" at http://www.scotusblog.com/?p=139919 (accessed 16-08-2012).

Justice Kennedy finds that "the case turns in large part on" the allegation by corporations that "international law does not recognize corporate responsibility for alleged offenses here".[117] Carrying on, Kennedy quotes from the *amicus* brief filed by Chevron, "[n]o other nation in the world permits its courts to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection".[118] Kennedy then informs the court that he read through the briefs in an attempt to find authority to refute the statement, but to no avail.[119] The petitioners' case never quite recovered after these few comments by Justice Kennedy at the start, with the representative not managing to make out much of a case in favour of their position and the other Justices expressing their doubts as to whether the ATCA was really intended to go against the rest of the world.[120]

Despite the U.S. supporting the petitioners' argument for corporate accountability under the ATCA, one can only wonder whether this performance for the petitioners will be enough to win their case when weighed against the stellar performance of the respondents. The respondents started off with a slight advantage, having witnessed the near demise of the petitioners' case, and progressed from there. Their representative sought to reject every proposal that corporate liability for the offences was accepted by the world community.[121]

Although the majority of support prior to the oral argument before the U.S. Supreme Court appeared to favour the petitioners' case, the performances on the day, and the statements of the Justices, may provide a hint of support for the opposite view. Despite the support and the standard of the performances, only one thing remains certain: that the issue of corporate accountability under the ATCA will remain unresolved until such time as the decision is handed down, whichever way it may go. All those eagerly awaiting the decision can do is hope that the wait is not too long.

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[117] The transcript of the oral argument can be found at http://www.supremecourt.gov/oral_arguments/argument_transcript/10-1491.pdf (accessed 16-08-2012) 3. See also Denniston "Argument recap: Downhill, from the start" at http://www.scotusblog.com/?p=139919 (accessed 16-08-2012).

[118] The transcript of the oral argument can be found at http://www.supremecourt.gov/oral_arguments/argument_transcript/10-1491.pdf (accessed 16-08-2012) 3-4. See also Denniston "Argument recap: Downhill, from the start" at http://www.scotusblog.com/?p=139919 (accessed 16-08-2012).

[119] The transcript of the oral argument can be found at http://www.supremecourt.gov/oral_arguments/argument_transcript/10-1491.pdf (accessed 16-08-2012) 4. See also Denniston "Argument recap: Downhill, from the start" at http://www.scotusblog.com/?p=139919 (accessed 16-08-2012).

[120] The transcript of the oral argument can be found at http://www.supremecourt.gov/oral_arguments/argument_transcript/10-1491.pdf (accessed 16-08-2012) 4-15. See also Denniston "Argument recap: Downhill, from the start" at http://www.scotusblog.com/?p=139919 (accessed 16-08-2012).

[121] The transcript of the oral argument can be found at http://www.supremecourt.gov/oral_arguments/argument_transcript/10-1491.pdf (accessed 16-08-2012) 25-52. See also Denniston "Argument recap: Downhill, from the start" at http://www.scotusblog.com/?p=139919 (accessed 16-08-2012).

The decision of the U.S. Supreme Court may bring the *Apartheid* Litigation to an untimely end, leaving the remaining defendants beyond the reach of those who allegedly suffered human rights abuses at their hands. On the other hand though, hope may still be alive for the *Apartheid* Litigation plaintiffs in the wait for the fateful decision. There is no way of saying which way the Supreme Court will go and, ultimately, those involved in the *Apartheid* Litigation simply have to wait for the Supreme Court ruling in order to know their fate.

6 CONCLUSION

The ATCA, a once powerful tool in the fight against human rights violations, has found itself subject to more and more limitations from case law during the years of its usage. However, the ATCA may soon face its greatest danger – a finding that may result in a majority of the defendants of such litigation being excluded from its reach. Should such a decision be forthcoming, the ability of the ATCA to contribute towards the protection of human rights may be questionable.

After years of long, protracted litigation in the U.S. courts, the fate of the *Apartheid* Litigation rests in the hands of the U.S. Supreme Court in a totally unrelated case. The *Kiobel* decision by the Supreme Court has the potential to make or break the *Apartheid* Litigation. Should the Supreme Court find against corporate liability under the ATCA, the remaining defendants in the *Apartheid* Litigation will be beyond the reach of the claim, escaping all liability for the alleged conduct. On the other hand, should the Supreme Court find in favour of corporate liability, the *Apartheid* Litigation looks set to continue for some time still, subject to settlement, with the merits of the case not yet argued and decided.

Despite a possible conclusion for the *Apartheid* Litigation, the case has not been entirely without purpose. It has provided greater clarity on the claims actionable and possibilities under the ATCA, which may assist future plaintiffs in their endeavour to obtain relief under the ATCA. The settlement reached with General Motors has also provided the plaintiffs with some monetary relief, years later, but the question remains as to whether the *Apartheid* Litigation will yield any further benefits for those plaintiffs involved in the matter, or whether the settlement relief will be the full extent of their benefit. One can only hope, for the sake of the victims, that the *Apartheid* Litigation reaches finality soon, bringing some closure for those involved.