

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT
4
5

6 At a stated term of the United States Court of Appeals
7 for the Second Circuit, held at the Daniel Patrick Moynihan
8 United States Courthouse, 500 Pearl Street, in th City of
9 New York, on the 4th day of February, two thousand eleven.

10
11 PRESENT: DENNIS JACOBS,
12 Chief Judge,
13 JOSÉ A. CABRANES,
14 ROSEMARY S. POOLER,
15 ROBERT A. KATZMANN,
16 REENA RAGGI,
17 RICHARD C. WESLEY,
18 PETER W. HALL,
19 DEBRA ANN LIVINGSTON,
20 GERARD E. LYNCH,
21 DENNY CHIN,
22 Circuit Judges.

23
24 - - - - -x

25
26 ESTHER KIOBEL, individually and on behalf
27 of her late husband, DR. BARINEM KIOBEL,
28 BISHOP AUGUSTINE NUMENE JOHN-MILLER,
29 CHARLES BARIDORN WIWA, ISRAEL PYAKENE
30 NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B.
31 KOTE-WITAH, VICTOR B. WIFA, DUMLE J.
32 KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY
33 IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA,
34 individually and on behalf of his late
35 father, CLEMENTE TUSIMA,
36 Plaintiffs-Appellants-Cross-Appellees,

37
38 - v.-

39
40 ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT

06-4800-cv
06-4876-cv

1 AND TRADING COMPANY PLC,
2 Defendants-Appellees-Cross-Appellants,
3
4 SHELL PETROLEUM DEVELOPMENT COMPANY OF
5 NIGERIA, LTD.,
6 Defendant.
7

8 - - - - -x
9

10 **ORDER**

11
12 Following disposition of this appeal on September 17,
13 2010, an active judge of the Court, together with a senior
14 judge, requested a poll on whether to rehear the case in
15 banc. A poll having been conducted and there being no
16 majority favoring in banc review, rehearing in banc is
17 hereby **DENIED**.
18

19
20 FOR THE COURT:
21 CATHERINE O'HAGAN WOLFE, CLERK
22
23
24


Catherine O'Hagan Wolfe

DENNIS JACOBS, Chief Judge, concurring in the denial of rehearing in banc:

1 I concur in the denial of rehearing in banc for the
2 reasons set forth in my opinion concurring in the denial of
3 rehearing by the panel.

1 Gerard E. Lynch, *Circuit Judge*, joined by Rosemary S. Pooler, Robert A. Katzmann, and
2 Denny Chin, *Circuit Judges*, dissenting from the denial of rehearing *in banc*:

3
4 Because I believe that this case presents a significant issue and generates a circuit
5 split, see Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008), and because I
6 believe, essentially for the reasons stated by Judge Leval in his scholarly and eloquent
7 concurring opinion, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir.
8 2010), that the panel majority opinion is very likely incorrect as to whether corporations
9 may be found civilly liable under the Alien Tort Statute for violations of such
10 fundamental norms of international law as those prohibiting war crimes and crimes
11 against humanity, I would rehear the case en banc. I therefore respectfully dissent.

1 KATZMANN, *Circuit Judge*, dissenting from the denial of rehearing *in banc*:
2

3 In this matter of extraordinary importance, this court divided 5-5 as to whether to proceed
4 to *in banc* rehearing. In voting in favor of rehearing this case *in banc*, I fully concur in Judge
5 Lynch’s dissent. I make these additional comments.
6

7 Some of the points of disagreement between the panel majority and Judge Leval relate to
8 the views that I expressed in my concurring opinion in *Khulumani v. Barclay National Bank*
9 *Ltd.*, 504 F.3d 254 (2d Cir. 2007). In that opinion, I concluded that courts under the Alien Tort
10 Claims Act, 28 U.S.C. § 1350 (“ATCA”), should “determine whether the alleged tort was in fact
11 committed in violation of the law of nations, and whether this law would recognize the
12 defendants’ responsibility for that violation.” *Id.* at 270 (Katzmann, *J.*, concurring) (internal
13 quotation marks and citation omitted). In *Presbyterian Church of Sudan v. Talisman Energy,*
14 *Inc.*, 582 F.3d 244 (2d Cir. 2009), the unanimous panel — Chief Judge Jacobs, Judge Leval, and
15 Judge Cabranes — adopted this analysis as the “law of this Circuit,” and held that we must look
16 “to international law to find the standard for accessorial liability” under the ATCA, *id.* at 258-59.
17

18 I write separately to respond to the contentions by the panel majority that “[my]
19 reasoning in *Khulumani* leads to the inescapable conclusion” that corporations cannot be liable
20 under the ATCA, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 130 n.33 (2d Cir. 2010),
21 and that Judge Leval’s reasoning disregarded my *Khulumani* opinion by ignoring the rulings of
22 international criminal tribunals with respect to corporate liability, *id.* at 146-47.¹ I disagree. I
23 see no inconsistency between the reasoning of my opinion in *Khulumani* and Judge Leval’s well-
24 articulated conclusion, with which I fully agree, that corporations, like natural persons, may be
25 liable for violations of the law of nations under the ATCA.

¹ As to the status of corporate liability under the ATCA, my concurring opinion in *Khulumani* observed that “[w]e have repeatedly treated the issue of whether corporations may be held liable under the ATCA as indistinguishable from the question of whether private individuals may be.” 504 F.3d at 282 (Katzmann, *J.*, concurring). However, I stated that “we need not reach the issue at this time” because “[t]his argument was not raised by the defendants on appeal and therefore the issue was not briefed by the parties.” *Id.* at 282-83.