

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 06-4800, 06-4876

ESTHER KIOBEL et. al. v. ROYAL DUTCH PETROLEUM CO., et. al.

Motion for: Reconsideration or, in the Alternative, Petition for Consideration En Banc of Motions for Leave to File Briefs in Support of Plaintiffs-Appellants' Petition for Rehearing and Rehearing En Banc

Set forth below precise, complete statement of relief sought: Amici curiae seek leave to file briefs in support of the petition for rehearing en banc, either after reconsideration by the panel or consideration by the full court en banc

MOVING PARTY: Amici International Law Scholars, Professors Of Federal Jurisdiction And Legal History, Victims of International Terrorism, Nuremberg Scholars, Human Rights And Labor Organizations and The Public Good Law Center

OPPOSING PARTY: Defendants-Appellees-Cross-Appellants Royal Dutch Petroleum Co., et. al.

MOVING ATTORNEY: Richard Herz EarthRights International 1612 K St NW #401 Washington, DC 20006 202-466-5188 rick@earthrights.org

OPPOSING ATTORNEY: Rory O.Millson Cravath, Swaine & Moore LLP 825 Eighth Avenue New York, NY 10019 212-474-1000 rmillson@cravath.com

Court-Judge/Agency appealed from: S.D.N.Y., Hon. Kimba Wood

Please check appropriate boxes:

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has consent of opposing counsel:

Has request for relief been made below? [] Yes [] No

A. been sought? [x] Yes [] No

B. been obtained? [] Yes [x] No

Has this relief been previously sought in this Court? [] Yes [] No

Has service been effected? [x] Yes [] No [Attach proof of service]

Is oral argument requested? [] Yes [x] No (requests for oral argument will not necessarily be granted)

Requested return date and explanation of emergency:

Has argument date of appeal been set? [] Yes [x] No If yes, enter date:

Signature of Moving Attorney: Date: 11/11/2010

ORDER

IT IS HEREBY ORDERED that the motion is GRANTED DENIED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____

By: _____

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Case Nos. 06-4800-cv, 06-4876-cv

ESTHER KIOBEL, individually and on behalf of her late husband, DR.
BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER,
CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS
DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE
J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS
NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father,
CLEMENT TUSIMA,
Plaintiffs-Appellants-Cross-Appellees,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT & TRADING CO.,
Defendants-Appellees-Cross-Appellants,
SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**JOINT MOTION OF PROSPECTIVE *AMICI CURIAE* INTERNATIONAL
LAW SCHOLARS, PROFESSORS OF FEDERAL JURISDICTION AND
LEGAL HISTORY, NUREMBERG SCHOLARS, HUMAN RIGHTS AND
LABOR ORGANIZATIONS, VICTIMS OF INTERNATIONAL
TERRORISM, AND THE PUBLIC GOOD LAW CENTER FOR
RECONSIDERATION OR, IN THE ALTERNATIVE, PETITION FOR
CONSIDERATION EN BANC OF THEIR MOTIONS FOR LEAVE TO
FILE BRIEFS IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION
FOR REHEARING AND REHEARING EN BANC**

Prospective *amici curiae* International Law Scholars, Professors of Federal
Jurisdiction and Legal History, Nuremberg Scholars, Human Rights and Labor

Organizations, Victims of International Terrorism, and The Public Good Law Center hereby move this Court for reconsideration of each of their motions for leave to appear and file briefs in support of Plaintiffs-Appellants' Petition for Rehearing and Rehearing En Banc, or, in the alternative, hereby petition for consideration of these motions by the Court en banc. *Amici* submit that the full Court should have the opportunity to review such briefs to assess whether they would assist in the determination of whether to grant en banc rehearing or, if such rehearing is granted, whether they would assist the en banc Court. Thus, *amici* request that leave to file their briefs, if not granted by the panel, either be left undecided until the question of en banc review has been determined, or be decided by the full Court.

Pursuant to Local Rule 27.1, *amici* have notified opposing counsel of the filing of this motion. Opposing counsel have informed *amici* that they take no position on the filing of this motion and will not file a response unless requested by the Court.

Upon the recommendation of Court staff, *amici* have joined together to file this motion in order to allow its more efficient consideration.

PROCEDURAL HISTORY

On October 15, 2010, *amici* International Law Scholars, Professors of Federal Jurisdiction and Legal History, Nuremberg Scholars, and Human Rights

and Labor Organizations each filed a motion for leave to file a brief in support of Plaintiffs-Appellants' Petition for Rehearing and Rehearing En Banc. On October 18 and October 22, 2010, respectively, *amici* Victims of International Terrorism and the Public Good Law Center filed similar motions. The proposed *amicus* briefs were attached to each motion. On October 29 and November 1, 2010, the Court issued orders denying each motion. It is the understanding of *amici* that the motions were considered by the three-judge panel only, and were neither circulated to nor considered by the full Court.

ARGUMENT

One of the purposes of the en banc procedure is to allow the full Court to consider the correctness of a panel's decision; the procedure thus allows the full Court, not merely a three-judge panel, to review and decide upon a petition for rehearing en banc. *See, e.g.*, Fed. R. App. Proc. 35. As the Chief Judge has suggested, use of the en banc procedure may be necessary because, without it, a single panel could evade review by the full court. *Lin Zhong v. United States Dep't of Justice*, 489 F.3d 126, 139 (2d Cir. 2007) (Jacobs, C.J., dissenting from the denial of rehearing en banc). Thus, review by the full Court is an important feature of the en banc process.

The participation of *amici curiae* is likewise often important in en banc cases. Although en banc review is a rarity in this Circuit, those cases that are

reheard en banc frequently involve the participation of one or more *amici*. See, e.g., *Arar v. Ashcroft*, ___ F.3d ___, 2009 U.S. App. LEXIS 23988 (2d Cir. Nov. 2, 2009) (en banc) (indicating the participation of six *amici* or groups of *amici*); *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc) (one *amicus*); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc) (thirteen *amici* or groups of *amici*); *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc) (two *amici* or groups of *amici*); *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc) (one *amicus*); *United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001) (en banc) (four *amici* or groups of *amici*). This is understandable, because one of the categories of cases appropriate for en banc review is those that involve “question[s] of exceptional importance,” Fed. R. App. Proc. 35(a), and such cases are likely to interest a range of non-parties who seek to participate as *amici*.

Amici believe that reconsideration is warranted here because each of their briefs presents a unique contribution that would aid the Court in its determination of whether to rehear this case en banc. The International Law Scholars note that the panel failed to recognize that international law never defines the means of its own domestic enforcement, that a diverse array of treaties reveal the accepted international understanding that corporations can be held liable for international law violations, that corporate liability is also a rule of international law derived

from general principles of law, and that failure to punish violations of international human rights law violates the obligation to provide a remedy.

The Professors of Federal Jurisdiction and Legal History discuss the fact that interpreting the ATS to not allow suits against corporations would run counter to the original purposes of the statute.

The Nuremberg Scholars show that the panel majority misinterpreted the legacy of the Nuremberg Trials and that Nuremberg jurisprudence imposed sanctions on corporations for international law violations.

The Human Rights and Labor Organizations note that international law is primarily enforced through domestic mechanisms and that international law therefore points to U.S. domestic law to answer the question of who may be sued in a U.S. court. Moreover, there is a global consensus that corporations are subject to international human rights law. Likewise, international law derived from general principles common to the world's legal systems encompasses corporate liability, and the panel's decision cannot be reconciled with *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983), which applied international law rules derived from general principles and did precisely what the majority claims no court has done—held a corporation liable for a violation of an international human rights norm.

The Victims of International Terrorism, while incorporating the arguments by the petitioners and the other amici, argued that, even if the majority's decision was correct that corporate liability should be limited in some way under the Alien Tort Statute, the majority's decision was overbroad in applying a bright-line rule rather than a case-by-case determination regarding specific norms of customary international law. As a case in point, they argued that financing of terrorism constitutes a norm of customary international law that specifically addresses corporate liability within the international conventions and binding U.N. Security Council Resolutions which establish the norm; however, the majority's decision would foreclose corporate liability in these terrorist financing cases arising under the Alien Tort Statute.

The Public Good Law Center explains that review is needed to secure uniformity of this Court's decisions, since this Court's previous assumption of jurisdiction over corporate defendants in prior ATS cases constitutes applicable precedent.

As presented in their individual motions for leave to file, each *amicus* or group of *amici* has both the requisite expertise and interest to assist the Court in this case. *Amici* therefore request that the panel reconsider its denials of their motions for leave to file.

If the panel does not reconsider its orders pursuant to Local Rule 27.1(g) and grant the motions, however, it should either leave the question open or the full Court should decide. Like most of the federal Courts of Appeals, the Second Circuit has no rules governing the submission of briefs of *amici curiae* in support of petitions for rehearing en banc. Former Local Rule 27(f) stated that motions “for leave to file a brief as amicus curiae” could be determined by a single judge, but the current Local Rules do not address the issue at all. *Amici* submit that, in light of the importance of full court review in en banc cases, this rule should not be applicable to the submission of briefs in support of rehearing en banc. This accords with the Circuits with rules that address this issue, which indicate or imply that motions by *amici curiae* to submit briefs in the en banc process should not be decided either by a single judge or by the original three-judge panel. The Ninth Circuit’s rules provide, “Motions for leave to file an amicus curiae brief to support or oppose a petition for en banc rehearing are circulated to all members of the court.” 9th Cir. R. 29-2(f). The Tenth Circuit takes a different approach: “The court will receive but not file proposed amicus briefs on rehearing. Filing will be considered shortly before the oral argument on rehearing en banc if granted, or before the grant or denial of panel rehearing.” 10th Cir. R. 29-1. Finally, the Eleventh Circuit’s rules, which expressly provide for motions for leave to file “an amicus brief in support of a petition for rehearing en banc,” 11th Cir. R. 35-6,

suggest that such motions are not decided in the same manner as other *amicus* motions. Eleventh Circuit Rule 27-1 states that “a single judge is authorized to act, subject to review by the court,” on a motion “to file briefs as *amicus curiae prior to issuance of a panel opinion*” (emphasis added)—but not thereafter. In each of these Circuits, it is clear that the consideration of such motions is handled differently in the en banc process than in a regular panel appeal.

Thus, *amici* submit that it would be appropriate either to leave the decision on whether to accept their briefs for filing until after the Court has ruled on the petition for rehearing, or for the full Court to rule on whether to grant leave to file.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the panel reconsider the denial of their motions for leave to file briefs in support of Plaintiffs-Appellants’ Petition for Rehearing and Rehearing En Banc, and, if the panel does not grant these motions, either that consideration of these motions should be deferred until after en banc review has been granted or denied, or that the full Court consider the motions en banc.

Dated: November 12, 2010

Respectfully submitted,

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Marco Simons
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Counsel for Nuremberg Scholars

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that on November 12, 2010, I caused to be served a true copy of the **Joint Motion Of Prospective *Amici Curiae* International Law Scholars, Professors Of Federal Jurisdiction And Legal History, Professors Of Federal Jurisdiction, Nuremberg Scholars, Human Rights And Labor Organizations, And The Public Good Law Center For Reconsideration Or, In The Alternative, Petition For Consideration En Banc Of Their Motions For Leave To File Briefs In Support Of Plaintiffs-Appellants' Petition For Rehearing And Rehearing En Banc**, by first class mail and an electronic PDF copy of the foregoing motion by e-mail upon the following persons:

Attorneys for Defendant-Appellee-Cross-Appellant:

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Philadelphia, PA 19103
cdavino@bm.net

Executed in New York, NY, on November 12, 2010.

Jonathan Kaufman

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of November, two thousand ten.

Before: Dennis Jacobs,
Chief Judge.

Esther Kiobel, individually and on behalf of her late husband,
Dr. Barinem Kiobel, Bishop Augustine Numene John-Miller,
Charles Baridorn Wiwa, Israel Pyakene Nwidor, Kendricks
Dorle Nwikpo, Anthony B. Kote-Witah, Victor B. Wifa, Dumle
J. Kunenu, Benson Magnus Ikari, Legbara Tony Idigima,
Pius Nwinee, Kpobari Tusima individually and on behalf of his
late father, Clemente Tusima,

Plaintiffs-Appellants-Cross-Appellees,

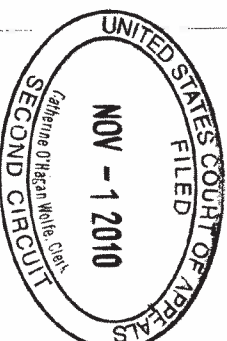
v.

Royal Dutch Petroleum Co., Shell Transport and
Trading Company PLC,

Defendants-Appellees-Cross-Appellants,

Shell Petroleum Development Company of Nigeria, LT D.,

Defendant.



ORDER

Docket No. 06-4800-cv

IT IS HEREBY ORDERED that the motions by International Law Scholars, Professors of Federal Jurisdiction, Nuremberg Scholars, and Professors of Federal Jurisdiction and Legal History for leave to file *amicus* briefs in support of Appellants-Cross-Appellees' petition for rehearing *en banc* are DENIED.

FOR THE COURT,

Catherine O'Hagan Wolfe,
Clerk


A handwritten signature in cursive script, appearing to read "Catherine O'Hagan Wolfe".

Judy Pisanont, Motions Staff Attorney

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the **1st** day of November, two thousand ten.

Before: Dennis Jacobs,
 Chief Judge.

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J. Kunenu, Benson Magnus Ikari, Legbara Tony Idigima,
Pius Nwinee, Kpobari Tusima individually and on behalf of his
late father, Clemente Tusima,

Plaintiffs-Appellants-Cross-Appellees,

v.

Royal Dutch Petroleum Co., Shell Transport and
Trading Company PLC,


Defendants-Appellees-Cross-Appellants,

Shell Petroleum Development Company of Nigeria, LT D.,

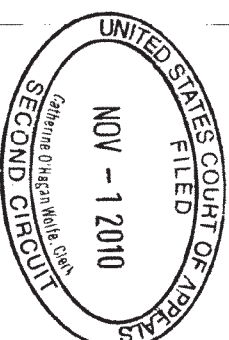
Defendant.

IT IS HEREBY ORDERED that the motion by *amici curiae* Public Good Law Center for permission to file a brief in support of Appellants-Cross-Appellees' petition for rehearing and for rehearing *en banc*; and the motion for *pro hae vice* admission of attorney Thomas Bennington, solely for the purpose of filing the brief, are DENIED.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk


Catherine O'Hagan Wolfe

Judy Pismanont, Motions Staff Attorney



ORDER
Docket No. 06-4800-cv

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 29th day of October, two thousand and ten.

Before: Dennis Jacobs,
Chief Judge.

Esther Kioel, individually and on behalf of her late husband,
Dr. Barinem Kiobel, Bishop Augustine Numene John-Miller,
Charles Baridorn Wiwa, Israel Pyakene Nwidor, Kendricks
Dorle Nwikpo, Anthony B. Kote-Witah, Victor B. Wifa, Dumle
J. Kunenu, Benson Magnus Ikari, Legbara Tony Idigima, Plus
Nwiness, Kpobari Tusima individually and on behalf of his late
father, Clemente Tusima,

Plaintiffs-Appellants-Cross-Appellees,

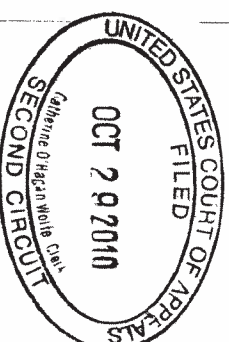
v.

Royal Dutch Petroleum Co., Shell Transport and Trading
Company PLC,

Defendants-Appellees-Cross-Appellants,

Shell Petroleum Development Company of Nigeria, LT
D.,

Defendant.



ORDER

Docket No.: 06-4800-cv (L)

IT IS HEREBY ORDERED that the motion by amicus curiae Human Rights and Labor Organizations for permission to file a brief in support of Appellants-Cross-Appellees petition for rehearing and for rehearing *en banc* is DENIED.

FOR THE COURT,

Catherine O'Hagan Wolfe, Clerk

A handwritten signature in cursive script, appearing to read "Catherine O'Hagan Wolfe".
A circular stamp from the United States Court of Appeals for the Second Circuit, identical to the one above.

Judy Pisanonot, Motions Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 29th day of October, two thousand and ten.

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Nwiness, Kpobari Tusima individually and on behalf of his late
father, Clemente Tusima,

Plaintiffs-Appellants-Cross-Appellees,

v.

Royal Dutch Petroleum Co., Shell Transport and Trading
Company PLC,

Defendants-Appellees-Cross-Appellants,

Shell Petroleum Development Company of Nigeria, LT
D.,

Defendant.



ORDER

Docket No: 06-4800-cv (L)

IT IS HEREBY ORDERED the motion by the Victims of International Terrorism for leave to file amicus curiae brief in support of Appellants-Cross-Appellees' petition for rehearing *en banc* is DENIED.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk

A handwritten signature in cursive script, appearing to read "Catherine O'Hagan Wolfe".

Judy Pisanont, Motions Staff Attorney