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

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ESTHER KIOBEL, *et al.*,

***Plaintiff-Appellants-Cross-Appellees*,**

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC,

***Defendants-Appellees-Cross-Appellants*.**

BRIEF OF *AMICI CURIAE* VICTIMS OF INTERNATIONAL TERRORISM IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES' PETITION FOR REHEARING *EN BANC*

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INTEREST OF *AMICI CURIAE*[1]

This *amici curiae* brief is respectfully submitted by alien plaintiffs in terrorism lawsuits pending in the Second Circuit whose claims may be dismissed if this Court's decision stands in *Kiobel v. Royal Dutch Petroleum Co.*, Docket Nos. 06-4800-cv, 06-4876-cv (Sept. 17, 2010). *Amici* are aliens who were injured, or family members of those killed and injured, in terrorist attacks on innocent civilians in Israel.[2] They allege that Arab Bank, PLC, a Jordanian-based financial institution with a branch in New York, purposefully provided financial support to notorious terrorists and terrorist organizations. Arab Bank also provided monetary incentives, or "rewards", to imprisoned terrorists and family members of suicide bombers or other terrorists killed in attacks on innocent civilians in Israel.

The holding of this Court in *Kiobel* conflicts with other Circuits that have specifically addressed the issue of corporate liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350.[3] This Court's opinion also conflicts with its own prior

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party or any other person other than *amici curiae*, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* have obtained consent from all parties to file this *amici curiae* brief in accordance with Fed. R. App. P. 29(a).

[2] *Amici* are plaintiffs in the following cases pending before the Honorable Judge Nina Gershon: *Almog v. Arab Bank, PLC*, No. 04-5564 (E.D.N.Y.), *Afriat-Kurtzer v. Arab Bank, PLC*, No. 05-388 (E.D.N.Y.), *Jesner v. Arab Bank, PLC*, 06-3869 (E.D.N.Y.), and *Lev v. Arab Bank, PLC*, No. 08-3251 (E.D.N.Y.)

[3] *See, e.g., Sinaltrainal v. Coca Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) (holding corporate defendants "may be liable for violations of the law of nations"), *citing Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008) ("the law of this Circuit is that [ATS] grants jurisdiction …

decisions implicitly recognizing corporate aiding and abetting liability under the ATS by rendering decisions on the merits.[4] *Kiobel* also conflicts with the sources of international law *amici* rely on in their pending cases. The unwarranted breadth of the decision of this Court could abolish ATS litigation in this Circuit, regardless of how heinous the offense, despite the Supreme Court's admonition that the ATS was not "stillborn." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

PREFACE

Rehearing is warranted for many reasons, including that the majority: (1) did not give the parties the opportunity to brief the issue of corporate liability under the ATS resulting in an incomplete record upon which to base its holding; (2) ignored the Nuremberg Military Tribunal's determination in the I.G. Farben case that "juristic persons" *could* violate the laws of war regarding property rights during military occupancy;[5] (3) ignored the fact that common-law tort liability, including against

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against corporate defendants"); *see also Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2006), *vacated on other grounds*, 550 F.3d 822 (9th Cir. 2008).

[4] *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Bano v. Union Carbide Corp.,* 361 F.3d 696 (2d Cir. 2004); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

[5] "*Where private individuals, including juristic persons,* proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, *is in violation of international law….* Similarly *where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations*." *8 Trials of War Criminals Before the*

corporations, existed at the time the ATS was enacted;[6] and (4) ignored the statutory language that the ATS provides jurisdiction for *tort* actions under federal common law which does not exempt corporations from liability.

Rehearing is also warranted for the sweeping overbreadth of the majority's decision. It prohibits claims against corporations and charities in international terrorism cases even though multiple sources of binding international law *do* recognize corporate liability. *Amici*'s argument focuses on the decision's overbreadth.

ARGUMENT

EVEN IF CORPORATE LIABILITY IS LIMITED UNDER THE ATS, THE MAJORITY'S HOLDING IS OVERBROAD IN PROHIBITING THOSE ATS ACTIONS WHICH SPECIFICALLY CONTEMPLATE CORPORATE LIABILITY – FOR EXAMPLE, TERRORIST FINANCING.

The majority's decision rewrites the ATS to require corporate liability standing alone to be a *universal* norm "under the customary international law of human rights." This approach has two flaws. First, it conflicts with *Sosa*. The Supreme Court stated, "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment" did not violate the law of nations. *Sosa*, 542 U.S.

Nuernberg Military Tribunals Under Control Council Law No. 10 ("The Farben Case") at 1132-33 (U.S. G.P.O. 1952).

The Tribunal made clear that it was addressing criminal individual conduct while stating "One cannot condone the activities of Farben in the field of spoliation. If not actually marching with the Wehrmacht, Farben at least was not far behind. But translating the criminal responsibility to personal and individual criminal acts is another matter." *Id.* at 1153.

[6] *See* 1 Blackstone, Commentaries on the Laws of England, at 463 (1765)(corporations have the capacity "to sue and be sued....and do all other acts as natural persons may").

at 738. It left open those more heinous causes of action that *do* violate the law of nations without assessment of which tortfeasors are liable – which is left to federal common law. Footnote 20 in *Sosa* drew no differentiation between individuals and corporations as "private actors" against whom liability may be asserted for "violation of a *given norm*." *Id.* at 732, n.20.

Second, rather than applying sources of international law to the case before it, *Kiobel* applied a bright-line rule. By contrast, the sources of international law underlying *amici's* terrorism financing claims specifically provide for corporate liability. *Kiobel* destroys this case-by-case analysis making its overbreadth manifest.

In *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2003), Circuit Judge Cabranes delineated the relevant sources of international law:

> the proper *primary* evidence consists only of those "conventions" (that is, treaties) that set forth "*rules* expressly recognized by the contesting states," … "international custom" insofar as it provides "evidence of a general practice *accepted as law,*" … and "the general principles of *law* recognized by civilized nations" ….

414 F.3d at 251 (*citing* Art. 38 of the Charter of the Int'l Court of Justice).

Covenants "are proper evidence of customary international law to the extent that they create legal obligations among the States parties to them." *Flores*, 414 F.3d at 256. The number and identity of the State Parties also support the covenant's evidentiary value. *Id.* at 257. In addition, "the evidentiary weight of a treaty increases if States

parties have taken official action to enforce the principles set forth in the treaty either internationally or within their own borders." *Id.*

The International Convention for the Suppression of the Financing of Terrorism ("Financing Convention"), Dec. 9, 1999, entered into force Apr. 10, 2002, GA Res 54/109, UN GAOR, 54th Sess., 76th Mtg., UN Doc A/54/109 (2000), meets all of these requirements. It has been ratified by 173 countries. It shows mutual concern: "[c]onsidering that *the financing of terrorism is a matter of grave concern to the international community as a whole*." Financing Convention, Preamble (emphasis added). It prohibits specific activity:

> Any person commits an offence within the meaning of this Convention if that person…provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Financing Convention, Art. 2. And it has been implemented by Congress at 18 U.S.C. §2339C. *See* Pub. L. 107-197 (June 25, 2002).

The Financing Convention explicitly references corporate liability stating:

> 1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a *legal entity* located in its territory or organized under its laws *to be held liable* when a person responsible for the management or control of that *legal entity* has, in that capacity,

> committed an offence set forth in article 2. Such liability may be criminal, *civil* or administrative.

Id., Art. 5(1) (emphasis added). Corporate liability does not prejudice individual criminal liability, *id.*, Art. 5(2), and legal entities would be "subject to effective, proportionate and dissuasive criminal, civil or administrative sanction … [which] may include monetary sanctions." *Id.*, Art. 5(3).

Terrorist financing as customary international law – and corporate liability for such violations – is further supplemented by multiple *binding* UN Security Council Resolutions adopted pursuant to Article 25 of the UN Charter. On September 28, 2001, the UN Security Council issued Resolution 1373 which:

> *Decides* that all States shall: (a) Prevent and suppress the financing of terrorist acts; (b) Criminalize the wilful provision or collection…of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; … [and] (d) *Prohibit their nationals or any persons and entities* within their territories from making any funds, financial assets or economic resources or financial or other related services available…for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts….

Resolution 1373 at ¶ 1 (emphasis added).

The US Government specifically incorporated corporate liability for terrorism financing. Acting pursuant to its power to "punish crimes in violation of the law of nations" under Art. I, Sec. 8 of the Constitution, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, §301 (a)(2) (Apr. 24, 1996), creating a criminal penalty for providing "material support or resources" – including the

provision of financial services – to designated foreign terrorist organizations. *See* 18 U.S.C. § 2339B. Both the United States Executive Branch and the UN have designated various corporations and charities as global terrorists for either carrying out terrorist attacks or engaging in financing terrorism worldwide in violation of the law of nations.[7] In addition, the Supreme Court, in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), determined that it is constitutional to impose liability on juridical entities, such as charities, that purported to provide material support or resources to two designated foreign terrorist organizations. The Court held, "Providing foreign terrorist groups with material support in any form also furthers terrorism by *straining the United States' relationships with its allies and undermining cooperative efforts between nations* to prevent terrorist attacks." 130 S. Ct. at 2726 (emphasis added). Further, "We see no reason to question Congress's finding that 'international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over

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[7] *See* http://www.ustreas.gov/offices/enforcement/ofac/sdn/sdnlist.txt, the "Specially Designated National List" maintained by the Office of Foreign Assets Control of the United States Department of the Treasury designating individuals, criminal organizations, and corporations (including, but not limited to, the following corporations: Al Haramain Foundation, Inc., Al Taqwa Bank, Al-Aqsa Foundation, Interpal (UK), Association de Secours Palestiniens (Switzerland), Iran Overseas Investment Bank PLC, Benevolence International Foundation, Comite de Bienfaisance et de Secours aux Palestiniens (France), Global Relief Foundation, Inc., and the Holy Land Foundation for Relief and Development); *see also* http://www.un.org/sc/committees/1267/consolidatedlist.htm, "The Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them" maintained by the UN's Security Council Committee established pursuant to Resolution 1267 including 92 separate "Entities and other groups and undertakings associated with Al-Qaida."

persons involved in a variety of terrorist acts….'" *Id.* This is the type of activity that the ATS was intended to remedy.

CONCLUSION

Kiobel's flaws are myriad. Amongst the most dangerous is overbreadth. It precludes actions against terrorist *entities* and terrorist *financiers* by overlooking sources of international law, improperly assessing those sources, ignoring congressional action, and misreading Supreme Court instruction on the role that the law of nations plays in giving effect to the ATS. To be sure "[t]he new rule offers to unscrupulous businesses advantages of incorporation never before dreamed of." Leval Op. at 1. This Court should grant *en banc* rehearing to address and reverse the majority's determination that corporate liability is unavailable under the ATS.

October 15, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

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