Out of Bounds

Accountability for Corporate Human Rights Abuse After *Kiobel*

EarthRights International

About EarthRights International (ERI)

EarthRights International (ERI) is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of human rights and the environment, which we define as "earth rights." We specialize in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. Through these strategies, EarthRights International seeks to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment in the communities where we work.

About this Report

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Preface

For over a year, we at EarthRights International (ERI) awaited the Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum (Shell).* At stake in the case was more than three decades of legal work by human rights defenders and the fate of the Alien Tort Statute (ATS), a law that has been critical to the protection of human rights in U.S. courts. The ATS has been particularly important to EarthRights International since our first lawsuit, *Doe v. Unocal*, brought by villagers from Myanmar (Burma) who had suffered forced labor, rape and torture.

On February 28, 2012, the Supreme Court heard oral arguments in *Kiobel*, focusing on whether corporations could be sued for participating in egregious human rights abuses. In a surprising move, the Supreme Court then held a second round of arguments on October 1, 2012, on the broader question of whether U.S. courts should continue to have the authority to hear any cases regarding human rights abuses committed in other countries.

On April 17, 2013, the Supreme Court finally dismissed the *Kiobel* case, concluding that Shell could not be sued for abuses occurring outside the United States because it was a foreign corporation and the case's only connection to the United States was the fact that Shell does business here. Although this is ordinarily enough to sue a foreign corporation, a majority of the Supreme Court ruled that the ordinary rules did not apply to cases of egregious human rights abuses under the ATS. This decision ran contrary to 30 years of ATS cases based on violations occurring overseas. While the outcome is disappointing, the Court's many splintered concurring opinions mean the holding leaves more questions than it answers.

In 2004 we had found ourselves in a similar position, nervously awaiting a decision from the Supreme Court in another case, *Sosa v.*

Alvarez-Machain. In upholding the ATS as a key tool in vindicating human rights, the *Sosa* Court nine years ago stood up to a powerful corporate lobby and a hostile Bush Administration that had waged a crusade against the ATS. This time, however, the Court cemented its status as the most corporate-friendly court in history and defied both precedent and logic by imposing new limitations on the ATS that will help protect perpetrators of human rights atrocities. The Court's decision sends a message that corporate interests are more important than human rights and greatly undermines U.S. leadership on human rights and corporate accountability.

What the Court's decision in *Kiobel* means for future ATS cases will be the subject of extensive debate and much more litigation to come. But a few things are clear: first, the Supreme Court did not hold that international human rights law does not apply to corporations. Second, it will be harder now to bring ATS cases for abuses that occur outside the United States, particularly against foreign defendants with little connection to the United States. Third, while the effectiveness of the ATS as a tool to fight human rights abuses may be diminished, corporations that participate in human rights abuses here or abroad will continue to be held accountable in the United States, in both federal and state courts.

"The Court's decision sends a message that **corporate interests are more important than human rights** and greatly undermines U.S. leadership on human rights and corporate accountability."

It has always been difficult to hold corporations accountable for human rights abuses – suing big business for their complicity in abuses is a David and Goliath struggle. The Court's ruling puts another small

but significant obstacle in the path of those seeking justice. From our perspective as a human rights organization that has worked on these cases for more than 17 years, although we are disappointed, not a whole lot has changed with the Court's decision. These cases were never easy, and the Court's ruling did not make it any easier, but many cases can still be litigated in the federal courts. The *Kiobel* decision did nothing to limit our ability to seek remedies in state court.

But it is time to look beyond *Kiobel* – beyond the ATS – and to seek new tools to fulfill the United States' obligations to hold corporations accountable and to provide remedies for human rights violations, as well as for environmental harm and other injuries. In this age of ever-growing corporate presence and influence, we need to ensure that communities have the ability to stand up for their rights. *Kiobel* should be the last time that we allow protection of human rights to be overridden by the interests of multinational corporations.

Executive Summary

Hardly noticed for almost two hundred years after its enactment in 1789, the U.S. Alien Tort Statute (ATS) has, in the past three decades, been critical to the search for justice for victims of human rights abuses. For many survivors, it has represented their only chance for justice.

This report presents a summary of the history, jurisprudence and politics of the ATS, explaining how this obscure law became one of the most important and hotly-contested tools in the area of business and human rights and the target of attack by the corporate lobby, the Bush Administration, and eventually even the Obama Administration. We track the rise of the ATS through its highs, including the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*, to its recent holding in *Kiobel v. Royal Dutch Petroleum (Shell)*. We consider the future of ATS claims and other avenues for human rights litigation more broadly in light of the holding, and conclude that new tools are needed to fulfill U.S. obligations to hold corporations accountable.

The Introduction explains why and how the ATS emerged as a tool for human rights advancement and a focal point for corporate accountability issues, providing an overview of the last 30 years of ATS litigation.

Chapter One presents an introduction to the *Kiobel* case, discussing the facts underlying the litigation, the principal legal issues addressed by the Supreme Court, and the Supreme Court's ultimate decision. We also look at how the Obama Administration reversed course and in fact argued against the ATS and the victims of human rights abuses before the Court and we raise the question of whether this reflects a broader trend by the administration backtracking on its early commitments to corporate accountability and human rights.

Chapter Two then takes a step back and presents a history of the ATS from its first days in 1789 to the present. It identifies the original intent of the statute, and how that intent has been translated in modern times, allowing the survivors of gross international human rights violations committed abroad to bring suits against government officials and corporate actors responsible for, or complicit in, the abuses.

Chapter Three looks at the faces behind the cases, presenting the stories of the victims of corporate human rights abuses, including those that have found some measure of justice through ATS cases, those to whom justice has been denied, and those that are still fighting on. The case studies presented here demonstrate the breadth of situations in which the ATS has been invoked, and the ways in which the ATS has been employed as a tool in seeking accountability for human rights violations.

Chapter Four debunks the principal myths espoused by the opponents of the ATS. It lays out the main arguments made against the ATS, focusing particularly on the arguments frequently raised by the corporate lobby.

Chapter Five makes the case for the importance and value of the ATS in the protection and defense of international human rights. It lays out the affirmative arguments for the ATS, highlighting its value both to the survivors of human rights violations and to the United States as a whole as a matter of public policy.

Chapter Six concludes with a look towards the future. It examines the state of the law following *Kiobel*, discussing the ongoing usefulness of the ATS as well as other avenues for human rights litigation in U.S. courts. It finds that we need to look beyond the ATS and current law to develop new tools to combat corporate human rights abuses and to provide remedies to victims.

Introduction

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. [1]

These thirty-three words are the entirety of the Alien Tort Statute (ATS) as it was written in 1789. Largely ignored for the first two hundred years of its existence, the ATS has taken on great significance in the past three decades and inspired passionate debate. Though it has always been narrow in scope, the ATS has been critical to the promotion of human rights. The statute helps ensure that the United States will not serve as a safe haven for rights abusers, and has served as a model for other nations. The ATS has also given abuse victims access to justice, punished perpetrators, and helped deter future abuses.

At first glance, the requirements for an ATS lawsuit seem simple: the plaintiff must be an alien – a foreign citizen – alleging a "tort," which is basically any injury that does not arise from a contract. The alleged tort must violate the "law of nations" or a U.S. treaty.[2] In this context, the "law of nations" refers to the concept of customary international law[3] – these are international rules that do not come primarily from treaties, but "result[] from a general and consistent practice of states followed by them from a sense of legal obligation."[4] The Supreme Court's decision in *Sosa v. Alvarez-Machain* confirmed that only violations of the most well-established rules of international law can be heard.[5]

Starting in 1980, in the seminal case of *Filártiga v. Peña-Irala*, U.S. courts determined that basic human rights protections, such as the protection against torture, were included in the international law rules that could form the basis of an ATS lawsuit.[6] Although international

Jane Doe I achieved a measure of justice for the death of her baby through *Doe v. Unocal*.

human rights law often deals with abuses by governments, the courts recognized that ATS cases could proceed against private individuals and corporations if they committed the most serious abuses – such as genocide, crimes against humanity, war crimes, and slavery[7] – or if they participated in abuses by government officials.[8]

Alongside the corporate lobby, the George W. Bush Administration challenged the use of the ATS by human rights lawyers and victims of abuses; when the first ATS case reached the U.S. Supreme Court, the Bush Administration argued that the statute could not be used in human rights cases or for abuse outside the United States. In that case, *Sosa v. Alvarez-Machain*, the Supreme Court rejected or ignored these arguments, and confirmed the use of the ATS for a narrow class of egregious international human rights violations.

This important victory for human rights lawyers and victims of human rights abuses spawned a new offensive by the corporate lobby to limit victims' ability to use the ATS, making ever more radical arguments that corporations were not bound by international human rights law, and that abuses in foreign countries could not be heard in the United States. Every federal appellate court to hear these arguments rejected them outright – except for the Second Circuit, in New York, which held in *Kiobel* that corporations should be immune from liability for rights abuses. As a result of this split among the appellate courts, the Supreme Court agreed to take up the case.

The Supreme Court's decision in *Kiobel* did not adopt the Second Circuit's position that corporations are immune, but it did limit the scope of future ATS claims by concluding, for the first time, that victims may not bring cases for abuses outside the United States, against a foreign multinational corporation, when the case's only connection to the United States is the fact that the corporation does business here – which would ordinarily be enough to allow a lawsuit. The Court's decision, however, raises more questions than it answers and the actual scope of the ATS going forward will be the subject of extensive litigation.

The Court's holding in *Kiobel* is disappointing, and in some cases, we will have fewer tools than we did before. But EarthRights International is still in business seeking justice and accountability on behalf of the brave survivors of egregious human rights abuses. After *Kiobel*, it is time to look for new ways to strengthen accountability for corporate human rights abuses, both in the United States and around the world.

Chapter One

The *Kiobel* Case

"Do you think in the 18th century if they brought Pirates, Inc., and we get all their gold, and Blackbeard gets up and he says, 'Oh, it isn't me; it's the corporation,' do you think that they would have then said, 'Oh, I see, it's a corporation. Good-bye. Go home.'?"

-Justice Stephen Breyer

In the early 1990s, the Ogoni people of Nigeria created a peaceful movement to protest the actions of Royal Dutch Shell and its Nigerian affiliate, Shell Petroleum Development Company of Nigeria, on their lands. The Ogoni sought to end Shell's destruction of the Niger Delta and to share in the benefits of Nigeria's oil wealth. In response, Shell allegedly financed, armed, and otherwise assisted and colluded with the Nigerian military government to use military force both to depopulate Ogoni areas for oil extraction and to terrorize the civilian population in order to discourage any peaceful resistance to oil operations. The military, allegedly supported by Shell, targeted individuals associated with the Movement for the Survival of the Ogoni People (MOSOP), as well as their families. In a campaign of crimes against humanity, the soldiers killed, raped, tortured, and detained Ogonis, leading many to flee the country.[9]

In 1994, the Nigerian military arrested Dr. Barinem Kiobel and several MOSOP leaders, including internationally-acclaimed writer and activist Ken Saro-Wiwa, on false charges. The military allegedly held these leaders, known as the "Ogoni Nine," incommunicado, tortured them, and then tried them in a kangaroo court established by the military government using unfair procedures. The sham trial gained international attention, and was condemned by foreign governments, including the United States and the United Kingdom. Nonetheless, the military government executed the Ogoni Nine in November 1995, which directly led to Nigeria's suspension from the Commonwealth of Nations.[10]

Dr. Kiobel's wife, Esther Kiobel, was also one of those targeted. When she attempted to bring her husband food while he was detained, she was allegedly stripped, beaten, and detained without charge, and an official attempted to rape her.[11] She was held for three weeks without proper food, water or sanitary facilities. Faced with continuing threats against her life and her family, she fled to the UN refugee camp in Benin until she was granted asylum by the United States in 1998.

The lawsuit in the lower courts

In 2002, Esther Kiobel and other victims and families of those similarly injured filed a lawsuit in U.S. federal court in New York, under the Alien Tort Statute (ATS). A similar lawsuit against Shell arising out of the same events was brought by the families of Ken Saro-Wiwa and five other members of the Ogoni Nine, and several other Ogoni victims of violence. EarthRights International represented the plaintiffs in that case, *Wiwa v. Royal Dutch Petroleum*, which settled in June 2009, on the eve of trial, for $15.5 million to compensate the plaintiffs and provide a trust for the benefit of the Ogoni people.[12]

The *Kiobel* case, however, took a different path, facing a number of legal challenges brought by Shell's lawyers. The district court dismissed several of the claims in 2006, but held that the claims for aiding and abetting torture, crimes against humanity, and arbitrary detention were sufficiently defined under international law to fall within the ATS and allowed these claims to proceed.[13] Both the plaintiffs and Shell appealed.

In 2010, in a surprising decision, two judges of the Second Circuit Court of Appeals dismissed the case, ruling, for the first time in the history of the ATS, that the statute does not permit suits against corporations – an argument that Shell had not even made. The third judge on the panel, the respected Senior Judge Pierre Leval, disagreed in a scathing 88-page opinion, criticizing the majority's interpretation of the statute and international law:

> *there is no basis for [the majority's] contention. No precedent of international law endorses this rule. No court has ever approved it[.] … No treaty or international convention adopts this principle. And no work of scholarship on international law endorses the majority's rule. Until today, their concept had no existence in international law.*[14]

The plaintiffs asked all ten judges of the Second Circuit to rehear the case, but the judges split five-five, leaving the decision standing, with several judges strenuously dissenting from that result.[15] Plaintiffs then sought review by the U.S. Supreme Court, which agreed to hear the case. By the time of the Supreme Court hearing, four other U.S. Courts of Appeals had disagreed with the Second Circuit, ruling that corporations can be sued under the ATS.[16]

Arguments before the Supreme Court

When the plaintiffs brought the case before the Supreme Court, it was on this narrow question: whether corporations can be sued for their participation in gross human rights abuses, like they can for all other torts, or whether they enjoy a unique immunity from liability under the ATS. On February 28, 2012, the Supreme Court heard oral arguments on that issue.

Shell's lawyers argued that corporations should not be held liable under the ATS in any circumstances. Justice Breyer asked,

> *Do you think in the 18th century if they brought Pirates, Incorporated, and we get all their gold, and Blackbeard gets up and he says, oh, it isn't me; it's the corporation -- do you think that they would have then said: Oh, I see, it's a corporation. Good-bye. Go home.*[17]

Shell's attorney, Kathleen Sullivan, responded, "Yes, the corporation would not be liable."[18] Shell's lawyers also raised the equally broad and radical argument that plaintiffs should never be allowed to use the ATS to sue for violations occurring outside of the United States.

Shortly after oral argument, on March 5, 2012, the Court took the highly unusual step of ordering the case to be re-briefed and re-argued the following term on the issue of whether and under what circumstances the ATS can be used to sue for abuses that occur in foreign

countries. The second round of arguments was heard on October 1, 2012. Shell's attorney took this new position to even further extremes at oral argument, arguing that the ATS never governs conduct outside of the United States – not even with respect to piracy on the high seas.[19]

The Obama Administration's troubling Record

President Barack Obama took office voicing a commitment to human rights and corporate accountability. In the first round of briefing before the Supreme Court, the Obama Administration submitted a brief in support of the ATS, urging the Court to allow *Kiobel* to proceed and hold that corporations could be sued.[20] In the second round, however, the Administration reversed course – the Department of Justice argued that *Kiobel* and cases like it should be dismissed,[21] asserting that the ATS should not apply when the case involves the conduct of a foreign corporation that takes place outside of the United States. The State Department, however, which had signed onto the first brief, refused to sign the second one. Sources within the Administration confirm that, although the brief makes extensive arguments about the foreign policy interests of the United States, officials at the State Department unsuccessfully fought against the Justice Department's restrictive interpretation of the law – which is troubling in part because two high-ranking Justice officials, Attorney General Eric Holder and Deputy Solicitor General Sri Srinivasan, had previously represented corporate defendants in ATS cases.[22]

This disappointing backpedaling on human rights is only one example of what has become a trend in the Administration of backing away from its promised commitment to corporate accountability for human rights. In the midst of the *Kiobel* case, President Obama nominated Srinivasan to be a judge on the U.S. Court of Appeals for the

D.C. Circuit – considered the second most important court in the United States. Srinivasan built a specialized practice defending multinational corporations like Exxon against allegations of human rights abuses and has been instrumental in designing a legal strategy intended to secure special exemptions for corporations from liability for serious abuses and to undermine the ATS. Worse, he is rumored to be the Obama Administration's choice to fill the next Supreme Court vacancy.[23] Little is known about how Srinivasan would rule on the bench, but his past practice shows a concerning preference for pro-corporate, anti-human rights judicial activism. Putting Srinivasan on such an important court stands in direct conflict with Obama's public commitment to human rights and corporate accountability.[24]

Sri Srinivasan

Despite early rhetoric on respect for human rights and corporate accountability, the Administration has instead promoted "voluntary" corporate social responsibility initiatives, which have no means of enforcement.[25] But international law requires states to provide remedies for human rights abuses.[26] By focusing only on encouraging support for voluntary multi-stakeholder initiatives and simultaneously encouraging the Supreme Court to limit one of the only remedies available to victims of severe human rights violations, the Obama Administration misses the point.

The Supreme Court's decision

On April 17, 2013, the Supreme Court dismissed the case against Shell, holding that the company could not be liable in U.S. courts under the ATS for acts committed overseas. The decision was devastating for Esther Kiobel and the other plaintiffs who have fought so long for justice.

In terms of the future of ATS cases, however, the Court's decision raised more questions than it answered. Although all nine justices believed the case should be dismissed, they had different reasons. There were a number of separate and fractured concurring opinions that leave open the possibility that victims of human rights abuses may still hold companies and individuals accountable in cases with a stronger connection to the United States than *Kiobel* had.

Corporate Liability. Despite the fact that the Supreme Court originally agreed to hear *Kiobel* in order to decide whether corporations could be sued under the ATS, the Court ultimately paid little attention to the issue in its opinion. It is clear, however, that the Court declined to adopt the Second Circuit's view that no ATS cases could be brought against corporations at all. Although the question was never directly addressed, each of the opinions assumed that cases could be brought against corporations and individuals alike.

Extraterritorial Application. A majority of the justices, made up of the conservative wing of the Court, focused on the "presumption against extraterritoriality," a doctrine that assumes that a federal law does not apply outside of the United States unless Congress clearly indicates it was intended to reach outside U.S. territory. The majority opinion, authored by Chief Justice Roberts, concluded that the presumption applied to ATS lawsuits, and that it was not overcome in Esther Kiobel's case.

The U.S, Supreme Court Justices

Interestingly, however, the last part of the majority's opinion appears to limit the Court's holding to the specific aspects of this case – that the wrongful conduct was committed abroad by a foreign defendant, and the case's only connection to the United States was the fact that Shell did business here. The majority concluded that because "[c]orporations are often present in many countries" it would "reach too far to say that mere corporate presence suffices" to bring the case against Shell within the scope of the ATS.[27] But Chief Justice Roberts' opinion left the door open to future extraterritorial claims by suggesting that claims that "touch and concern the territory" of the United States with "sufficient force to displace the presumption against extraterritorial application[,]" might fare differently.[28]

Justice Kennedy joined the majority opinion, but also wrote a brief concurrence, noting that the majority was "careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."[29]

Justice Alito wrote a separate concurrence, joined by Justice

Thomas. These justices would have limited the ATS only to cases where "the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations."[30]

The four more liberal justices joined an opinion authored by Justice Breyer that took a different approach than applying the presumption against extraterritoriality. Justice Breyer instead argued that liability under the ATS should be available where (1) the alleged violations took place in the United States, (2) the defendant was a U.S. national, or (3) violations "substantially and adversely" affect an important U.S. interest, including "a distinct interest in preventing the United States from being a safe harbor" for the common enemies of mankind.[31]

How the Supreme Court got it wrong

The Supreme Court majority's reasoning contradicts judicial precedent and congressional intent, and adopts an inconsistent interpretation of U.S. and international law. Indeed, as one scholar has noted, applying the presumption "simply makes no sense in light of the fact that the statute was enacted in 1789, and the earliest manifestation of a judicially invented presumption against extraterritoriality came about in 1818."[32]

The ATS does not prohibit conduct; it simply allows federal courts to hear cases where **the conduct is already prohibited by international law**, which applies everywhere.

The Court held that the basis of the presumption against extraterritoriality is that "U.S. law governs domestically but does not rule the world."[33] This maxim is true enough, but it misses the point when applied to

the ATS. Unlike other U.S. laws, the ATS does not prohibit conduct; it simply allows federal courts to hear cases where the conduct is already prohibited by international law, which applies everywhere. Therefore, in enforcing "specific, universal, and obligatory" norms of international law, U.S. courts are not giving U.S. law extraterritorial reach. And international law does not prohibit the enforcement of such norms; in fact, a key principle of international law dictates that states have broad authority to exercise extraterritorial criminal and civil jurisdiction to enforce international law.[34]

The Court recognized that the ATS does not prohibit conduct, but stated that "the principles underlying the canon of interpretation similarly constrain courts considering [lawsuits] that may be brought under the ATS."[35] Ironically, the Court cited to the potential "serious foreign policy consequences" that could be triggered in some ATS cases,[36] but one of the principal reasons that Congress passed the ATS was to avoid foreign policy consequences, by allowing cases involving international law to be heard in federal courts, not simply state courts. In fact, one likely result of the *Kiobel* decision will be that more international cases will proceed in state courts – the opposite of what Congress intended.

The majority's conclusion that ATS lawsuits require greater connections to the United States than other types of lawsuits also sharply breaks from established precedent – to the benefit of individuals and corporations that commit, or are complicit in, atrocities. Indeed, in the 30 years of ATS litigation since *Filártiga*, most ATS cases have involved atrocities occurring abroad,[37] and prior to *Kiobel*, federal appellate courts have consistently rejected any suggestion that the ATS is limited to U.S. territory.[38] For example, the Seventh Circuit, in *Flomo v. Firestone*, recently explained:

Courts have been applying the statute extraterritorially (and

Joelito Filártiga was kidnapped and tortured to death.

> *not just to violations at sea) since the beginning; no court to our knowledge has ever held that it doesn't apply extraterritorially; and* Sosa *was a case of nonmaritime extraterritorial conduct yet no Justice suggested that therefore it couldn't be maintained. Deny extraterritorial application, and the statute would be superfluous, given the ample tort and criminal remedies against, for example, the use of child labor (let alone its worst forms) in this country.*[39]

As the Seventh Circuit noted, the conclusion that the ATS applied to injuries abroad was supported by the Supreme Court's own decision in *Sosa v. Alvarez-Machain*, where the injuries occurred in Mexico.[40] The issue of the extraterritorial reach of the ATS was raised before the Court and was in fact "central to the briefing, oral argument, and the Court's analysis and holdings."[41] Indeed, the Bush Administration had argued before the Court in *Sosa* that the ATS in no way "applies to alleged torts … that occur outside of the United States,"[42] but the Court did not adopt

this position; instead, the Court found that cases like *Filártiga* had been properly decided. While *Sosa* may not directly conflict with *Kiobel*, it strongly suggests that *Kiobel* is a narrow decision that would not bar a case like *Sosa* – where there was direct involvement of U.S. officials – or cases like *Filártiga*, where a torturer was found in the United States.

Likewise, Congress has never restricted the territorial reach of the ATS, and the one time Congress considered the statute, it explicitly endorsed and strengthened the *Filártiga* line of cases.[43] After *Filártiga*, Congress passed the Torture Victim Protection Act (TVPA), which allows victims of torture and extrajudicial killing that occur outside the United States to sue in U.S. courts, regardless of whether the victim is an alien or a U.S. citizen.[44] As the D.C. Circuit recently explained in finding that the ATS was intended to include conduct occurring outside of the United States:

> The conclusion that ATS lawsuits require greater connections to the U.S. than other types of lawsuits also sharply breaks from established precedent.

> *The Report of the Senate Committee on the Judiciary states that the "TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained" in ATS lawsuits such as* Filártiga*, explaining that in that case "two citizens of Paraguay alleged that a former Paraguayan inspector general of police had tortured and killed a member of their family in Paraguay." S.Rep. No. 102–249, at 4 (1991). The TVPA thus "enhance[d] the remedy already available under" the ATS by extending that civil remedy also to U.S. citizens who may have been tortured abroad. Id. at 5. Expressing approval for the ATS, the Senate Committee report*

thus noted that "[c]onsequently, that statute should remain intact." Id. The Report of the House Committee on the Judiciary is to the same effect. See H.R. Rep. No. 102–367, at 3 (1991).[45]

Regardless of the wisdom of the Court's holding, however, litigators will have to make sense of a decision that raises many new questions about the extent to which the presumption against extraterritorial application will apply to future ATS cases and the standard under which these cases will be evaluated. All of this will be the subject of extensive litigation.

Chapter Two

From Piracy to Corporate Accountability

Photo: © Ed Kashi

Origins of the Alien Tort Statute

The ATS was originally passed by the First Congress as part of the Judiciary Act of 1789, which set up the system of courts for the newly created federal government.[46] When the statute was passed, state courts throughout the nation already had the power to hear tort claims brought by aliens, for any injuries. Concerned that, where the injuries violated international law, the state courts' failure to adequately address such claims could harm U.S. foreign relations, Congress decided to give the new federal courts jurisdiction to hear them. No new legislation was necessary to lay out the specific violations of international law that would fall within the ATS because the law of nations was considered part of the common law of the United States. At the time, aliens could bring suit in federal court for injuries such as violations of safe conducts, infringements of the rights of ambassadors, breaches of neutrality in wartime, and piracy.

The very first official interpretation of the ATS, given by the Attorney General in 1795, demonstrated the contemporary understanding that the law applied to acts occurring outside the territory of the United States.[47] The legislative history, the text of the statute, and established precedent all support this view. The text of the ATS refers to "any civil action"[48] and places no territorial limits – this is notable since elsewhere in the Judiciary Act of 1789 such limits are included.[49] More fundamentally, however, by incorporating claims arising from violations of the "law of nations," the statute was intended to have a reach co-extensive with those international norms – norms which are not limited to any specific territory, and whose violation was often considered a crime against the whole world.[50] Indeed, piracy, one of the principal concerns of international law in 1789, typically only occurs outside the United States.

Virtually every ATS case brought to date – including both *Filártiga* and *Sosa* – has concerned abuses committed in a foreign country. And

prior to the Court's decision in *Kiobel*, no federal appellate court had ever suggested that this was a problem.[51]

Filártiga and the modern era of human rights litigation

Although enacted in 1789, the ATS was largely ignored for two centuries. Then in 1980, the U.S. Court of Appeals for Second Circuit decided *Filártiga v. Peña-Irala*.[52] Americo Peña-Irala, the Inspector General of Police in Asunción, Paraguay, had tortured seventeen year-old Joelito Filártiga to death in retaliation for Joelito's father's political activities. Joelito's father and sister eventually moved to Brooklyn, New York, where they discovered that Peña-Irala was also living. Working with lawyers from the Center for Constitutional Rights, the Filártigas brought a lawsuit against Peña-Irala under the ATS for torture in violation of international law.

The Second Circuit determined that the Filártigas' claim met all the requirements for a lawsuit under the ATS: the plaintiffs were "aliens" alleging a "tort" (the injuries associated with torture), and the tort was committed "in violation of the law nations." Peña-Irala was subsequently found liable by a lower court in the amount of $10 million. Although he fled without paying, Joelito's sister Dolly Filártiga felt justice had been served:

> *I came to this country in 1978 hoping simply to confront the killer of my brother. I got so much more. With the help of American law I was able to fight back and win. Truth overcame terror. Respect for human rights triumphed over torture. What better purpose can be served by a system of justice?*[53]

The use of the ATS adopted in *Filártiga* was affirmed and clarified by the Supreme Court in *Sosa*, where the Court held that human rights claims may be filed under the ATS if they are as "specific, universal, and

obligatory" today as the parallel examples from the 18th century. The ATS thus permits suits for violations of international law as it has developed over the past two centuries – developments that include the birth of the international law of human rights. In its decision in *Sosa*, the Supreme Court cited *Filártiga* with approval,[54] and never questioned whether it was appropriate to apply the ATS to conduct taking place abroad having no connection to the United States.

In the wake of *Filártiga*, federal courts allowed ATS lawsuits for other human rights abuses, including genocide,[55] war crimes and crimes against humanity[56] and summary execution.[57] But courts have not allowed every alleged violation to proceed, rejecting claims that failed to meet the standard, including confiscation of property,[58] failure to inform a prisoner about the right to consular assistance,[59] child labor,[60] and environmental damage.[61]

Virtually every ATS case has concerned abuses committed in a foreign country. **Prior to *Kiobel*, no federal appellate court ever suggested this was a problem.**

Courts have also clarified who could be sued in an ATS suit. The *Filártiga* case established that a government official who was a torturer could be sued. Subsequent cases applied the ATS to government officials who directed or oversaw the perpetrators, based on the notion of "command responsibility," which had been applied at the Nuremburg trials.[62] The Supreme Court, however, limited the ability of victims to sue foreign governments, holding that another law creates immunity for foreign states.[63]

The courts confronted an ATS lawsuit against a non-government official in the case against Radovan Karadzic, the leader of the unofficial

Karadzic set the stage for victims of human rights violations to hold corporations accountable under the ATS for grave human rights abuses.

Bosnian Serb army. He and his army carried out a campaign of genocide, rape, torture, and summary execution, among other abuses, and did so "not acting under the authority of a state."[64] In *Kadic v. Karadzic*, the Second Circuit held that private individuals may be sued for a narrow class of grave human rights violations – notably genocide, war crimes, and crimes against humanity – regardless of governmental involvement.[65] Other courts have suggested that slavery and forced labor also fall into this category.[66] The court also decided that while acts such as torture only violate international law if there is governmental involvement, a private person may nonetheless be held liable for these violations when acting together with a governmental official.[67]

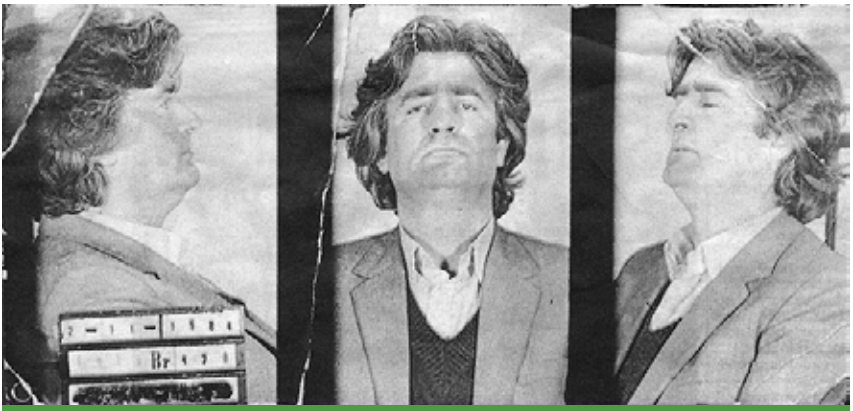
Doe v. Unocal and corporate complicity

Since the invention of the business corporation, courts have allowed lawsuits against corporations just like individuals. Thus, the rule that non-governmental officials can be sued for committing especially grave abuses, or for assisting governmental officials, also applies to corporations. The *Karadzic* decision therefore set the stage for victims of human rights violations to hold corporations accountable under the ATS for their involvement in grave human rights abuses.

One of the key corporate cases was *Doe v. Unocal*, in which ERI sued on behalf of Myanmar villagers who were enslaved, tortured, and raped

by Myanmar military forces providing security for Unocal's pipeline. In 1997, a U.S. federal district court agreed to allow the case against Unocal to proceed, concluding that corporations and their executives can be held legally responsible under the ATS for violations of international human rights norms.[68] The federal court later dismissed the case, but the plaintiffs filed suit in California state court, alleging that the same abuses were also ordinary torts such as assault and battery. [69] The Ninth Circuit Court of Appeals then reinstated the ATS claims, holding that the California oil company could be held liable for gross human rights abuses because it had given "practical assistance" to the Myanmar military, despite knowing that the soldiers would commit forced labor and other abuses.[70] After the Supreme Court decided *Sosa*, and on the eve of trial in state court, Unocal settled with the plaintiffs.[71]

At the heart of the *Unocal* case was the issue of corporate complicity. The Ninth Circuit's ruling showed that a corporation could be held accountable for assisting in acts committed by its governmental partners, even if they were not directly committed by employees of the company. Courts have continued to recognize that corporations may



Radovan Karadžić was successfully sued for war crimes under the ATS, in *Kadic v. Karadzic.*

be sued for aiding and abetting abuses.[72] By addressing the question of corporate complicity in human rights abuses, courts showed a willingness to take on the problem of the growth of multinational corporations' international power without corresponding global accountability. Critics of the ATS have argued that victims should sue in their home countries, and allowing U.S. courts to hear their cases undermines the sovereignty of those countries. But this critique ignores the reality of corporate abuses, which often occur in countries ruled by the brutal regimes committing the violations, or where the national governments lack the ability to regulate, much less punish, massive corporate enterprises. By acknowledging the corporation's role as a culpable partner in human rights crimes, courts have taken an important step towards filling that accountability vacuum.

Since the *Unocal* case, the Supreme Court has affirmed this step by implying that corporations can be held liable for complicity in the most egregious abuses, even in *Kiobel*.[73] A number of cases against corporations have been brought without any question as to whether corporations might be entitled to some form of immunity.[74] Indeed, four U.S. Courts of Appeals have all explicitly confirmed that corporations can be held liable under the ATS for their complicity in human rights violations.[75]

Sosa and the lead-up to *Kiobel*

In the wake of *Unocal*, the corporate lobby launched an unprecedented attack on the ATS, submitting a flurry of briefs in federal courts at every level in its effort to undermine the statute and shield corporations from liability for their complicity in crimes against humanity.

The Supreme Court declined to adopt these arguments when it finally weighed in on the ATS in the 2004 *Sosa* decision. The Supreme Court upheld the use of the ATS as a tool for victims to sue in U.S. courts for violations of the most serious human rights abuses. In holding that the

ATS allowed federal courts to hear human rights claims, the Court also clarified the criteria for asserting claims under the ATS and noted that there were several checks on the judiciary in allowing such cases to go forward.[76] A claim under the ATS must rest upon "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized," which included piracy, infringements of the rights of ambassadors, and violations of safe conduct.[77] In practice, this standard has limited courts to hearing ATS claims for violations of international law that are as "specific, universal, and obligatory" today as the parallel examples from the 18th century. The Supreme Court also cited the *Filártiga* case with approval,[78] and never questioned whether it was appropriate to apply the ATS to conduct taking place abroad having no connection to the United States.

Lower courts have allowed cases to proceed only where abuses violate well-established norms of international law, such as prohibitions on terrorism, human trafficking, and forced labor.

Since *Sosa*, lower courts have allowed cases to proceed only where claims implicate well-established norms of international law. Many frivolous claims have been rejected; courts have additionally allowed suits for terrorism,[79] nonconsensual medical experimentation on humans,[80] human trafficking,[81] and forced labor.[82]

Chapter Three

What's at Stake:
The Humans behind the Cases

Photo: © Ed Kashi

The ATS has become a critical tool for the vindication of international human rights. The ATS provides victims of human rights violations with the hope of justice, and a mechanism by which it can be achieved. At the same time, the existence of the ATS has helped to reduce the chances that perpetrators, including multinational corporations, will find a safe haven in the United States. As human rights abuses and abusers are transnational, so too must be the ability of victims to access mechanisms for justice, particularly where the national courts of a human rights-violating regime do not present an adequate forum for demanding justice. The ATS has promised to meet this need, providing a mechanism for accountability and a safeguard against impunity. The following are some of the cases in which the ATS has been invoked as a means for demanding justice.

Corporate-sponsored rape, forced labor and killing in Myanmar (Burma)

Doe v. Unocal is a paradigm case of corporate complicity. In 1996, a group of Myanmar villagers sued the California oil company Unocal, alleging that the company was responsible for abuses committed by Myanmar soldiers who had been hired by Unocal and the French oil company Total to provide security for their gas pipeline project. Since the military regime seized power in Myanmar in 1988, it had committed numerous egregious human rights abuses, including forced labor, torture, rape, summary and arbitrary executions and forced relocation.[83] The human rights abuses that accompanied Unocal's project were thus predictable. As a federal court hearing the Unocal case described:

> *[the] evidence demonstrate[ed] that before joining the Project, Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work*

The Rise of Corporate Power

The past few decades have seen the wealth and power of undemocratic multinational corporations grow exponentially with the increase of corporate-driven globalization and foreign direct investment, particularly in developing countries. The sad truth is that corporations have long been able to use their economic might, and the political power that goes along with it, to assist repressive governments, quash political participation, and violate rights. Multinational corporations also often have the legal, political and economic resources to shield themselves from accountability in the countries where they operate. But the global community has begun to take notice. Due in part to the early corporate ATS cases that showed corporations can and do profit from and are complicit in the most egregious human rights abuses, corporate accountability issues are now at the fore.[84]

All too often corporate abuse is associated with natural resource extraction – oil, natural gas, and mining in particular. Extractive companies have proven more than willing to partner with abusive regimes to exploit such resources. Democracy, rule of law, human rights, and accountability simply do not always go hand in hand when natural resources are at issue.

Corporations that have been sued under the ATS have typically utilized government troops to provide security for their projects, despite the fact that those troops have poor human rights records. This is all the more problematic since extractive industry projects are often opposed by local people – who often are not even consulted – and the project may become a focus of protest. This can result in a vicious cycle whereby local people oppose the project, leading to increased security ordered by intolerant governments,

John Watson, Chevron CEO, is often called the poster-child for corporate irresponsibility.

Photo: Government.ru (CC-BY)

which leads to human rights abuses against perceived opponents of the projects, which leads to greater local opposition and resistance.

The stories of ATS plaintiffs and the victims of corporate abuse reveal the human faces behind the law. Without the ATS, these and many other stories, each unique but all sharing abuse and tragedy in common, would remain untold, unheard, and without legal remedy.

Myanmar soldiers in a truck provided by Unocal and Total's pipeline project.

> *and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing, and would continue to commit these tortious acts.*[85]

Among the "numerous acts of violence" were the rapes of Jane Doe II and her teenage great-niece Jane Doe III. While returning home with two pigs to celebrate Christmas, they were seized by soldiers providing security for the pipeline. Both women were sexually assaulted. Although Jane Doe II heard her niece crying for help, she was too terrified to go to her aid.[86]

Other plaintiffs were forced to work for the military in tasks linked to the pipeline. Villagers like John Doe IX and John Doe VII were forced

to build helipads near and along the pipeline used by Unocal officials and employees. Other villagers, including John Does I, VII and IX, were forced to build roads and other pipeline infrastructure, while still others were forced to serve as "pipeline porters" carrying heavy loads of food, ammunition, and other supplies for soldiers patrolling the pipeline.[87] When John Doe I escaped forced labor, soldiers pursued him, arriving at his home where his wife, Jane Doe I, was nursing her baby beside a cooking fire. She told the soldiers that she didn't know where her husband was, but they beat her and kicked her into the fire. Jane Doe recovered from her injuries; her baby died.[88]

Abusive security personnel at ExxonMobil's facilities in Indonesia

Eleven Indonesian citizens brought suit against oil giant Exxon Mobil for abuses allegedly committed by the company's security personnel at its natural gas facility in Aceh, Indonesia. The suit alleges that the security personnel – Indonesian soldiers hired, equipped, and controlled by Exxon – tortured, sexually assaulted, kidnapped and killed members of the plaintiffs' families who lived or worked in villages within Exxon's sprawling operations in rural Aceh.[89]

Plaintiff John Doe II was stopped by Exxon security personnel while he was riding his motorbike near Exxon facilities. The security personnel put his motorbike in their truck and then beat him severely. They tied his hands behind his back, blindfolded him, threw him in their truck and took him to a camp within Exxon's facilities. There, John Doe II was held for three months, blindfolded the entire time, and frequently tortured, including through the application of electricity. Before finally releasing him, the soldiers took John Doe II outside the building where he was held and showed him a pit with a large pile of human heads; they threatened to kill him and add his head to the pile. Even after John Doe

II was allowed to return to his home, the security personnel came to his village and burned down his house; he narrowly escaped.[90]

While visiting a refugee camp, John Doe III was shot three times by Exxon security forces. He was then take to their camp and tortured for hours. According to his complaint, the security personnel "broke his kneecap, smashed his skull, and burned him with cigarettes." After he was taken to a hospital, he was returned to his captors, who held him for a month and "tortured him regularly." He was only released after a local human rights organization bribed government officials to let him go.[91]

The plaintiffs claim that despite knowledge of these abuses, Exxon continued to retain members of the Indonesian military as security personnel and has refused demands to investigate, improve, or put an end to the abusive practices of its security force.[92]

Torture by military contractors at Abu Ghraib

Several ATS suits have been brought against private military contractors for their role in the torture of detainees at the Abu Ghraib prison and other sites in Iraq. In *Al-Quraishi v. L-3 Services, Inc.*, for example, 72 plaintiffs alleged that U.S. military contractor L-3 Services (formerly Titan Corp.) and one of its employees tortured plaintiffs while they were detained in military prisons.

The lead plaintiff, Wissam Abdullateef Sa'eed Al-Quraishi, a 37-year-old married father of three, was hung on a pole for seven days at Abu Ghraib, only being released from this position to be interrogated. During his detention, Al-Quraishi was subjected to beatings, forced nudity, electrical shocks, humiliating treatment (including being held down while feces was poured over his body), and mock executions as a gun was held to his head and the trigger pulled.[93]

A detainee at the Abu Ghraib prison.

Another plaintiff, Mr. Al-Janabi, an Iraqi blacksmith, was repeatedly tortured at Abu Ghraib prison where he was held for ten months before being released without being charged with any crime.[94] Among the acts of torture which he described, Al-Janabi was placed in a wooden crate; poked in the eyes and threatened to have his eyes clawed out; hung upside-down from his feet until he lost consciousness; and stripped naked to be photographed and placed in a pyramid with other naked prisoners.[95]

Corporate complicity in Apartheid-era human rights abuses

Following the end of Apartheid in South Africa, two ATS cases[96] were brought in the United States seeking accountability for corporate complicity in the human rights violations committed by the former regime. The two cases, now combined in the case *In re South African Apartheid Litigation*, propose to be a class action on behalf of the

victims of the abuses perpetrated by the Apartheid government that can be tied to the complicity of four corporations: Daimler, General Motors, Ford, and IBM.[97]

The claims filed against the three automakers – Daimler, Ford, and GM – allege that the companies aided the apartheid regime by providing armored military vehicles they knew would be used to violently suppress and terrorize South Africa's black population, including through the use of extrajudicial killings. The plaintiffs also allege that these companies collaborated with South African security forces, providing information that was used to facilitate arrests, harassment, and torture of employees who were active in the struggle against apartheid. Plaintiffs allege that company personnel were directly involved in interrogations.

IBM is charged with developing the technology and computer support specifically designed to create race-based identity documents that stripped black South Africans of their nationality and citizenship.

Banking services for terrorist organizations

Almog v. Arab Bank and several similar cases were brought under the ATS for the bank's alleged role in aiding and abetting terrorist activities. The cases were brought by the survivors and family members of those killed or seriously injured in attacks by terrorist groups such as Hamas, the Palestinian Islamic Jihad, the Al-Aqsa Martyrs' Brigade and the Popular Front for the Liberation of Palestine.[98]

The plaintiffs allege that Arab Bank was the primary banker for a massive campaign to funnel money from public and private sources to the Palestinian terrorist groups and the families of suicide bombers, even creating and managing a formalized process to ensure that the families receiving the money certified that their deceased relative was indeed

a suicide bomber.[99] The complaint alleges that these banking services directly aided and abetted the terrorist organizations in the commission of terrorism and crimes against humanity.[100]

Software design for oppressive Chinese state security apparatus

In *Doe v. Cisco Systems*, a group of Falun Gong practitioners from China sued the U.S. technology company Cisco Systems, alleging that Cisco specifically designed network security software for the Chinese government that has enabled it to censor, track, and target dissidents for detention and torture.[101] The lawsuit alleges that Cisco did so despite knowing that China intended its system to facilitate the violent persecution of dissident groups.[102]

The plaintiffs were detained merely for visiting Falun Gong websites or sharing information online about the human rights abuses suffered by Falun Gong practitioners in China. While detained, the plaintiffs were beaten, deprived of sleep, and brutally tortured or otherwise abused.[103] One of the plaintiffs was beaten to death while in custody,[104] while another has disappeared and is presumed dead.[105] Others have fled the country[106], or are currently living in hiding from the Chinese state.[107]

Arming and financing paramilitary violence in Colombia

In the mid-2000s, a series of cases were filed against the banana company Chiquita for funding, arming, and otherwise supporting paramilitary terrorist organizations in Colombia in their violent campaign against the civilian population in order to maintain its control of Colombia's banana-growing regions. The plaintiffs in these cases are family members of trade unionists, banana workers, political organizers, social activists,

Chiquita financed AUC death squads in Colombia, allegedly in order to produce bananas without labor and social unrest.

Photo: © Archivo El Tiempo

and others targeted and tortured or killed by terrorists, most notably the paramilitary organization United Self-Defense Groups of Colombia (Autodefensas Unidas de Colombia, or AUC).

These plaintiffs alleged that Chiquita financially supported these paramilitary groups in order to produce bananas in an environment free from labor opposition and social disturbances.[108] Chiquita's board of directors acted within the United States to approve and make the payments with knowledge of their use – indeed, it pled guilty to a federal crime for doing so, and was required to pay a $25 million fine.[109]

Genocide and war crimes against indigenous communities in Papua New Guinea

Rio Tinto, an international mining company headquartered in London, operated the largest open-pit copper mine in the world on the island

of Bougainville, Papua New Guinea. The company allegedly dumped billions of tons of toxic waste into the land and waters that has led to the death or illness of many residents. The harms were so egregious that the local people rose up to oppose the mine, hoping to close it. Rio Tinto allegedly demanded an abrupt armed response and quickly provided the military with necessary equipment, including attack helicopters and vehicles for use against the local population.

The company is alleged to have assisted with transporting, arming, and housing troops that massacred thousands of people. The military blockaded the island for almost a decade, preventing medical aid and other necessities from reaching the population. Rio Tinto's top manager for the region is quoted as saying the purpose was to "starv[e] the

Ruins of Rio Tinto's abandoned copper mine in Bougainville, Papua New Guinea.

Photo: madlemurs (CC-BY-NC-ND)

bastards" out.[110] The victims claim that the blockade caused the deaths of thousands of children, and by the time the war ended in 1999, 10% of the population had been killed.

The plaintiffs sued the company in the United States in 2000. In 2011, the federal Court of Appeals ruled that the ATS claims against the company for abetting war crimes and for genocide should go forward, finding sufficient allegations of conduct that violates international law.[111]

Involuntary medical experimentation on children in Nigeria

Nigerian children and their guardians sued Pfizer, Inc., the world's largest pharmaceutical company, under the ATS for allegedly testing an experimental drug on them, and other children, without their consent, resulting in the deaths of eleven children and leaving many others blind, deaf, paralyzed or brain-damaged.

According to the complaint, Pfizer, working together with Nigerian government officials, gave two hundred sick children dangerous doses of drugs that had never been tested on children and were known to cause life-threatening side effects in animals. By 1999 the drug had been banned for use in children, banned entirely by the EU, and limited only to adult emergency care in the United States.[112] The Second Circuit Court of Appeals decided that international law prohibited nonconsensual medical experimentation on human beings, and that Pfizer could be sued under the ATS.[113]

As this report was being finalized, courts issued decisions dismissing ATS claims in the Abu Ghraib cases, the Arab Bank cases, and the Rio Tinto case, and strongly suggesting the imminent dismissal of ATS claims in the Apartheid litigation - all as a result of the Kiobel ruling. With the exception of Rio Tinto, these decisions may be subject to further challenge, and the cases may yet survive.

Chapter Four

Setting the Record Straight

Despite the Supreme Court's affirmance of the ATS as an appropriate tool for human rights victims in *Sosa*, the ATS has continued to come under attack by corporations. For years, they spread unfounded myths claiming that the ATS would unleash dire foreign policy and economic consequences and would thwart the War on Terror.[114] These radical arguments received little recognition by the courts until they found their way before the current Supreme Court, with its unabashedly pro-corporate slant. More than 80 amicus (or "friend of the court") briefs were filed by both opponents and supporters of the ATS in the *Kiobel* case.[115] On the side of Shell, the largest and most powerful corporations in the world (including current and past defendants in ATS cases) argued that the ATS should not apply to corporations, and that it should not be available to victims who suffer egregious human rights violations that occur outside of the United States. Human rights organizations, scholars, economists, former U.S. diplomats and international law experts defended the ATS and argued in favor of Esther Kiobel, and of the *Filártiga* legacy. Below, we highlight some of the myths promoted by corporations, refute them, and demonstrate that the ATS has been a critical tool for human rights victims.

The ATS does not violate international law or interfere with U.S. foreign policy

A number of corporations took the radical position in their briefs that providing a remedy under the ATS to victims of violations that occur outside of the U.S., no matter who the perpetrator is, violates international law.[116] This position not only seeks corporate immunity for conduct occurring overseas, but goes even farther such that it would provide immunity for individual genocidaires, war criminals, and torturers. Numerous briefs filed by human rights experts in response argued why the position was legally flawed and bad policy.[117]

The ATS does not impose US law on other nations and does not violate international law

The basis of the corporations' argument is that by allowing ATS suits for actions that occur in other nations, the United States is imposing its own national law on other nations. But this misstates the purpose of the ATS. The statute applies to torts that concern violations of international law, not national law, and merely allows U.S. courts to hear claims involving violations of universally accepted norms that already apply elsewhere.

But that aside, the United States, like any country, always has the power to decide how its own citizens may act, even when they travel abroad.[118] And even for non-U.S. citizens, any nation may prosecute certain egregious, universally-condemned conduct under the international law principle of "universal jurisdiction," regardless of where that conduct occurs.[119]

Universal jurisdiction is not a new concept. Indeed, when the ATS was written, the framers had in mind the pirate as the ultimate wrongdoer, considered then to be the "enem[y] of the human race", and punishable for breaches of the law of nations wherever he came ashore.[120] Much like the pirates of old, today's perpetrators of the most egregious human rights violations are subject to universal jurisdiction because human rights abuses are recognized to be of universal concern to the global community.

All too often, countries where such violations occur are either complicit in the atrocities themselves, or lack the capacity, the will, or the legal machinery to bring "today's pirates" to justice. To deal with this reality, many countries have passed laws providing for civil remedies for victims of human rights violations that take place in foreign countries.[121] Indeed, international law scholars agree that all states are permitted, and in fact encouraged, to provide remedies against perpetrators of the most serious violations of international law, if the perpetrator can be

found within their jurisdiction.[122]

Thus, by providing a remedy for victims of egregious human rights violations, U.S. courts hearing "extraterritorial" ATS cases support international law in two important ways. First, international law requires countries to provide effective remedies to victims of human rights violations.[123] Allowing victims to bring civil cases under the ATS thus directly enables victims to realize their right to an effective remedy and brings the United States into compliance with its obligation to provide one.[124]

Second, by providing a remedy under the ATS, the United States is upholding and enforcing international law. A basic principle of international law is that international law provides rules of conduct while each country decides for itself how to enforce international law and remedy violations. Indeed, as the Second Circuit explained in *Kadic v. Karadzic*, "[t]he law of nations … leaves to each nation the task of defining the remedies that are available for international law violations."[125] Similarly, the UN's top human rights official, the High Commissioner for Human Rights, explained that international law "authorizes States to exercise universal jurisdiction in cases where victims seek civil remedies for gross human rights violations and serious violations of international humanitarian law."[126] Allowing victims to bring civil cases under the ATS is not only authorized under international law, it upholds international law by promoting and enforcing international law norms.[127]

Federal courts are capable of properly managing their dockets to avoid interfering with foreign policy concerns

A related criticism is that allowing ATS cases for harms arising abroad could lead to serious foreign policy consequences. This, however, ignores the carefully developed doctrines that federal courts have applied for decades to dismiss cases dealing with international issues that should not be adjudicated in a U.S. courtroom.[128] ATS cases do not present

unique challenges for the federal courts; foreign policy issues can arise in a variety of cases, and the rules applied in those cases are sufficient to address any concerns in ATS cases.

The "political question" doctrine permits courts to dismiss cases that adversely affect U.S. foreign policy on a case-by-case basis.[129] The argument that international human rights cases are inherently "political" greatly exaggerates the foreign policy significance of many of these cases and indicates an unwarranted lack of confidence in court's abilities to determine when they should decline jurisdiction for political reasons. Indeed, courts have dismissed a number of cases on political grounds.[130]

Likewise, the "act of state doctrine," also frequently invoked by defendants in ATS cases, states that our federal courts should not be put in a position to judge the official acts of another government within its own territory. This doctrine is also applied by courts on a case-by-case basis. Although courts have found that it "would be a rare case in which the act of state doctrine precluded suit" under the ATS,[131] the doctrine remains available and has been used where dismissal is appropriate.[132]

Another related legal device is forum non conveniens (FNC), which permits courts to dismiss ATS cases on the grounds that they are more appropriately heard by another country. Courts consider such factors as the location of the witnesses and evidence, the availability of an alternative forum, relative costs of a suit in the United States and elsewhere, and fairness considerations.[133] Courts have proved willing to dismiss cases on FNC grounds when they determine the case is more appropriately heard in the location where the alleged abuses occurred.[134]

Hearing ATS claims in federal courts is consistent with Congress's intent

Before the ATS was passed in 1789, state courts throughout the nation had jurisdiction to hear tort claims brought by aliens for violations of

the law of nations. Congress was concerned, however, that states were not taking seriously the claims of foreigners for violations of international law, and that failure to adequately address such claims could send the new nation into war. Thus, because state courts had proved unable to provide adequate redress and a consistent and effective forum to foreigners who were injured in violation of international law, Congress specifically gave the new federal courts jurisdiction over those claims through the ATS.[135]

Allowing victims to bring civil cases under the ATS is not only authorized under international law—it upholds international law.

Thus, even without the ATS, foreigners can still bring claims for human rights violations in courts in the United States. But rather than appealing to federal courts, as the ATS permits them to do, they would have to direct their claims to state courts. Since the early days of our founding as a nation, state courts have adjudicated tort actions involving foreign defendants, foreign conduct, and foreign plaintiffs, and will continue to do so.[136] In passing the ATS, Congress did not enable cases to be brought in the United States that could not have been brought otherwise; it simply allowed those cases to be heard in federal court when they concern violations of international law.

So, if state courts can and do adjudicate claims by foreigners involving foreign conduct, and they can do so against corporations, why do we care so much about what happens to the ATS? For the very reasons that the founders gave federal courts jurisdiction to hear ATS claims: because the many state courts could not be relied upon to treat the foreigners' claims fairly and consistently, nor to pay sufficient attention to the foreign relations implications of certain cases.

[T]he foreign relations implications of this and other issues … underscores the wisdom of the First Congress in vesting jurisdiction over such claims in the federal district courts through the Alien Tort Statute. Questions of this nature are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the courts of the fifty states.

– U.S. Court of Appeals for the Second Circuit, *Filártiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. N.Y. 1980)

In asserting a radical new interpretation of the ATS and of international law, Shell and its friends asked the Supreme Court to forget this history, and this legacy. Restricting the federal courts' ability to hear ATS cases that arise abroad will just send us back in time more than 200 years: plaintiffs like Esther Kiobel whose claims are barred by the Kiobel decision may still bring claims in courts in the United States, but they will be forced to do so in state courts, to style their claims according to state law rather than call them by name – violations of internationally recognized human rights – and to be subject to the inconsistencies of the varied laws of the several states.[137]

The failure of the corporate critique

The corporate lobby has consistently argued that ATS will result in numerous, "frivolous" and expensive lawsuits that will clog the nation's courts, unfairly burden corporations, and damage international relations. Indeed, immediately following the Supreme Court's decision in *Kiobel*, president and CEO of the U.S. Chamber of Commerce issued the following statement: "The U.S. Supreme Court's decision today ensures that trial lawyers cannot continue to use the American judicial system to

expose global businesses to frivolous and costly lawsuits."[138]

The history of ATS cases have proven these extravagant claims untrue. Federal courts have an arsenal of tools to weed out frivolous cases, and they have not hesitated to use them to dismiss ATS cases.[139] On the other hand, in several cases courts have found that there is sufficient evidence of corporate participation in gross human rights abuses to allow a jury to hear the case. The corporate lobby's myth that the ATS "opens the floodgates" to frivolous lawsuits is particularly misplaced when one considers the significant barriers faced by victims of human rights abuses when they try to seek justice in court. Even before *Kiobel*, federal courts were using demanding rules for filing complaints, highly narrow interpretations of international law, and overly formalistic views of corporate structure, among other things,[140] in order to limit ATS cases filed against multinational corporations.[141]

The ATS has not and does not open the floodgates to litigation

Despite the corporate lobby's somewhat hysterical claim that the ATS would unleash a cascade of litigation against corporations for simply doing business in countries with weak human rights records,[142] the history of the ATS has proved otherwise. The U.S. Chamber of Commerce, which has often submitted briefs arguing that the ATS is bad for business, itself admitted that, in more than two decades of ATS litigation, just over 150 ATS claims have been filed against corporations, or, on average, only about seven suits annually.[143] This pales in comparison to the nearly 300,000 civil cases filed annually in U.S. federal courts over that same period.[144] Indeed, in 2012 alone, more than 15,000 employment discrimination cases were filed in the federal courts[145] – 100 times the total number of ATS cases filed against corporations in the past 20 years.

In fact, there have been far more law review articles written about the ATS than actual ATS cases – one 2012 study found 1,914 law

review articles discussing the ATS and only 173 judicial opinions since *Filártiga*.[146] Even before *Kiobel*, there was never a flood of ATS litigation, and allowing victims of human rights abuses greater access to justice in the United States will not swamp the federal courts.

The ATS has not and will not coerce corporations into settling frivolous cases

The corporate lobby has also claimed that ATS liability will lead to frivolous cases and fraudulent or coerced settlements. But this ignores the simple fact that, although there have been a few settlements in ATS cases, companies generally do not settle frivolous cases. To the contrary, companies vigorously litigate ATS cases, and typically only settle when they have tried multiple efforts to dismiss the case. Moreover, as mentioned above, federal judges are capable of managing their docket and ensuring that only meritorious cases move forward.

The truth is that even before the Court's decision in *Kiobel*, ATS plaintiffs already faced more hurdles in federal courts compared to other litigants. There is a strict limitation on the types of violations to which the ATS applies. Both before and after *Sosa*, federal courts have acted with extreme caution when deciding whether to allow a suit based on international law. In all cases, the burden falls on the plaintiffs to show that a norm exists under customary international law.

On average, only seven ATS cases are filed against corporations every year. **There has never been a "flood" of ATS litigation.**

Plaintiffs also face significant practical and monetary obstacles in bringing ATS cases. The resources of human rights victims often pale in comparison to the resources of the corporate defendants. For example, in the 2009 settlement

of *Wiwa v. Royal Dutch Petroleum Co. (Shell)*, the defendants agreed to pay a total of $15.5 million.[147] Shell makes more than this amount in a single day.[148]

The ATS is not bad for business

Since *Unocal*, corporations and their advocates, such as the U.S. Chamber of Commerce and the National Foreign Trade Council (NFTC),[149] have sought to frame the threat of the ATS in economic terms, alleging that liability will curtail foreign investment, cause economic damage abroad, and hurt business. In the *Flomo v. Firestone* case, for example, decided shortly after the *Kiobel* decision in the Second Circuit, the U.S. Chamber of Commerce argued "that corporations shouldn't be liable under the Alien Tort Statute because that would be bad for business."[150] Judge Richard Posner, a respected and generally conservative law and economics scholar, ridiculed that argument.[151]

A look back shows that corporations and their advocates have been positing doomsday scenarios for years, and none of them have come to pass. One 2003 study predicted that ATS litigation would depress worldwide U.S. trade by 10%, lead to a loss of 25% of foreign direct investment in countries that are frequent targets of ATS suits, and cost the United States hundreds of thousands of manufacturing jobs.[152] None of these predictions have materialized. According to a more recent study, "there is simply no significant empirical evidence that the United States has borne economic costs from ATS litigation."[153]

Indeed, in a brief submitted to the Supreme Court, Prof. Joseph Stiglitz, a winner of the Nobel Memorial Prize in Economics, squarely refuted the corporate position. Prof. Stiglitz showed that 1) the ATS has not and will not force corporations to withdraw their foreign direct investment from developing countries; 2) U.S. corporations will not be disadvantaged compared to other corporations not subject to jurisdiction in the United States; and 3) that the ATS actually provides

an economically efficient mechanism for addressing human rights violations.[154]

The simple truth is that the ATS is only bad for businesses that act as though they were above the law.[155]

> *[T]here is no convincing evidence that the possibility of being sued under the ATS for human rights violations has ever deterred companies subject to jurisdiction of our federal courts from investing in countries where the investment would be profitable despite the potential exposure to liability. Moreover, it is important to recall that ATS liability would apply only to those firms that take advantage of such countries' failure to enforce or respect human rights norms.*
>
> - Prof. Joseph Stiglitz, Brief of Joseph E. Stiglitz As *Amicus Curiae* In Support Of Petitioners, *Mohamad v. Palestinian Auth., Kiobel v. Royatl Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (Nos. 11-88 and 10-1491)

Chapter Five

The Case for the ATS

"I came to this country in 1978 hoping simply to confront the killer of my brother. I got so much more. With the help of American law I was able to fight back and win. Truth overcame terror. Respect for human rights triumphed over torture. What better purpose can be served by a system of justice?"

-Dolly Filartiga

Photo: © Ed Kashi

Although there has been rapid progress in the recognition of international human rights in the past several decades, protection of these rights, and remedies for their violation, has lagged behind. Human rights violations by governments and private entities, such as corporations, continue to occur across the globe. When governments or the powerful corporations that influence them are the perpetrators of abuses, the government often lacks incentives to hold those who break the rules accountable. In such circumstances, civil remedies like the ATS are one of the few tools that human rights victims have to seek justice. In addition to compensation for their suffering, ATS litigation can provide victims the opportunity to tell their story and draw attention to wider systemic problems and abuses. ATS litigation, unlike most civil litigation, also enables victims to call the abuses they have suffered by their real names — torture, crimes against humanity, extrajudicial killing — in a court of law.[156]

This is precisely what Esther Kiobel did on October 1, 2012. That morning, minutes after her case was argued before the Supreme Court, Esther Kiobel stood on the steps of the highest court in the United States, thousands of miles from the Niger Delta, and told the crowd of supporters gathered around her what she had suffered. Holding a copy of the complaint filed in the *Kiobel* case, Esther recounted how she believed Shell had worked with the Nigerian security forces to torture and extrajudicially kill her husband. Inside the building, the Supreme Court Justices were reading her complaint and deciding the fate of her case.

The ATS provides a remedy for human rights victims that have no other recourse

"Everyone has the right to an effective remedy..."

Article 8, Universal Declaration of Human Rights

ATS plaintiffs are typically unable to seek justice in the countries where they have been abused. This is not surprising, because even when corporations commit or assist in human rights violations, the abuses typically involve governments and their agents. Victims often find it too risky, or even impossible, to tell their story in the courts of that state. How could Esther Kiobel expect to find justice in the courts in Nigeria when the basis of her claim is that the Nigerian government colluded with Shell to torture and murder her husband? It is because of situations faced by people like Esther Kiobel that federal jurisdiction over ATS lawsuits provides such a valuable forum for foreigners seeking the justice that was unavailable to them at home.[157]

As the American Bar Association (ABA) explained to the Supreme Court in *Kiobel*:

> *the ATS has proved to be an important means of securing relief for such victims who have fled their home countries under the threat of persecution, and who cannot return to pursue their cases in the courts of their home countries. That, of course, is the situation alleged by [the Kiobel plaintiffs]. Limiting the ATS to exclude such claims, in many cases, would deny the possibility of justice to such persons.*[158]

The ATS helps the United States to continue its global leadership on human rights

For the past 30 years, countries around the world have looked to the United States as a leader in recognizing and enforcing universally recognized human rights norms. The ATS is one reason why. Since *Filártiga*, the ABA has "observed the positive impact that the ATS has had in motivating other countries to enact laws providing remedies for international human rights law violations and inspiring foreign courts to provide effective processes for the resolution of human rights claims."[159]

The ATS cases since *Filártiga* have played an especially important role in the development of human rights law in Latin America.[160] During the latter half of the 20th Century, countries throughout Latin America were saddled with authoritarian dictatorships or military juntas responsible for the torture, murder and disappearance of thousands of civilians. Even when those countries returned to democratic rule, the new governments lacked the political will to prosecute the wrongdoers and often erected legal obstacles to bar victims from bringing suit. When former torturers and generals relocated to the United States, some of their victims turned to the ATS for justice.

As the Argentine government explained to the Supreme Court in the *Kiobel* case, "[t]he *Filártiga* decision was a significant step toward ending the impunity of human rights violators in repressive regimes, and has been applauded as such in Latin America."[161] Pointing to the murders, torture and property theft at issue in the ATS case *Forti v. Suarez-Mason*, the Argentine government insisted that "the Alien Tort Statute cases emerging from the atrocities of Argentina's military government could not have received a hearing in Argentina at the time they were brought" and would have been barred by its strict statute of limitations.[162] *Filártiga's* legacy gave both strength and encouragement to human rights groups throughout South America to document abuses in their communities and to pursue accountability.[163] The Argentine Supreme Court itself has looked to the ATS

"ATS precedents have powerfully influenced the development of human rights law and adherence to the rule of law throughout the world and have served as a model for foreign courts hearing international human rights cases."

- ABA

"as a critical link in the history of ending impunity for gross human rights violations."[164]

As the ABA has observed, "ATS precedents have powerfully influenced the development of human rights law and adherence to the rule of law throughout the world and have served as a model for foreign courts hearing international human rights cases."[165] The ABA's brief to the Supreme Court in *Kiobel* went on to argue that narrowing the ATS "would diminish the United States' voice in fostering universal adherence to norms of international law[,]"[166] and would be utterly inconsistent "with this nation's historic commitment to promoting accountability for human rights violations and encouraging all nations to develop effective remedies for violations."[167] That historic commitment is long-standing and enjoys strong bipartisan support.[168]

The United States continues to support international efforts to protect human rights, including where businesses are complicit in abuses. In 2011, the United States co-sponsored a resolution at the U.N. Human Rights Council that endorsed the U.N. Guiding Principles on Business and Human Rights, which provide global standards for preventing and addressing corporate human rights violations.[169] The U.S. endorsement of the Guiding Principles, which now enjoy worldwide support, demonstrates a recognition that corporate actors can and do violate international human rights law, and that they should be held accountable. As Navi Pillay, the U.N. High Commissioner for Human Rights, stated in her brief in support of plaintiffs in the *Kiobel* case, there is "no convincing

The reality is that corporations complicit in human rights abuses can and do profit from it. **The ATS forces them to internalize the human costs of those violations.**

reason to accept" that states and individuals should be held accountable for gross violations of human rights while simultaneously immunizing corporations.[170]

Thirty years ago, the U.S. government took the position that our nation's credibility in its commitment to human rights was a key concern for the Second Circuit to consider in deciding *Filártiga*.[171] Today, that same concern for the credibility of the United States should support the use of the ATS to remedy corporate complicity in human rights abuses.

The ATS helps the United States deny safe haven to wrongdoers and deters future harms

The ATS sends a signal to the world that the United States will not provide safe haven to human rights violators, be they individuals or corporations. Over the past thirty years, ATS cases have enabled victims of egregious human rights violations to seek justice against their perpetrators who have fled to the United States. In *Mamani v. Berzain*, Bolivian victims brought suit against the former President of Bolivia and his Minister of Defense for their role in extrajudicial killings and crimes against humanity; the former officials had escaped Bolivia and were hiding out in Florida and Washington, D.C.[172] In *Yousuf v. Samantar*, Somali victims brought suit against a Somali government official living in Virginia for torture, killing, and other atrocities.[173] Dolly Filártiga used the ATS when she realized that her brother's torturer was living only a few miles away from her in New York City. When the Second Circuit heard Dolly's case, it recognized the importance of ensuring the United States did not provide refuge from liability to those who commit egregious human rights abuses in violation of the law of nations.

The ATS has also played a role in deterring abuses. In the years since *Filártiga*, the prospect of ATS litigation has changed the way that corporations think about human rights and their potential liability. Thirty years ago, most corporations did not mention human rights in

their policies and public statements. Today, corporations are increasingly expected to demonstrate a commitment to respecting human rights and assure customers and the public that they are not violating human rights. Many of the world's largest corporations sign on to multi-stakeholder initiatives and corporate social responsibility initiatives.[174] Such initiatives demonstrate important shifts in the global attitude towards corporate responsibility; nonetheless, they are insufficient on their own to ensure accountability since few impose binding obligations or hold violators accountable. The ATS goes further and actually increases the cost of violating human rights.[175]

The reality is that some corporations that are complicit in gross human rights abuses can and do profit from it. But the ATS forces corporations to internalize the human costs of those violations. The mere threat of an ATS lawsuit has a tremendous impact on how corporations operate in the future and on how they address past wrongdoing.[176] Furthermore, as the U.N. High Commissioner for Human Rights recognized, the ATS also "has positive deterrent effects because the prospect of litigation before independent courts provides incentives for States, corporations, and individuals to prevent gross human rights violations and adapt their practices accordingly."[177]

The Supreme Court's holding in *Kiobel* threatens to undermine the potential of the ATS to continue to deter future abuses. Foreign multinationals like Shell can take some comfort in the knowledge that they can continue to do business in the United States, without fear of ATS liability, while abusing human rights around the world – as long as the company and the case do not have any other ties to U.S. territory. *Kiobel* might not provide shelter to individuals seeking refuge in the United States, however; Justice Breyer's concurrence suggested that he would not invoke the presumption against extraterritoriality where it would result in providing safe harbor, noting that "preventing the United States from becoming a safe harbor" for the "common enemy of mankind" is

"an important American national interest."[178] How broadly *Kiobel* will be interpreted, and thus how many ATS claims it will preclude, remains to be seen. Even without the ATS, however, claims can still be brought in state court – accordingly, some deterrent effect of U.S. litigation remains.

The ATS helps ensure that U.S. companies promote human rights, a key U.S. foreign policy goal

Corporations that operate in countries with weak human rights records should promote the rule of law, not profit from its absence. Enhancing and promoting the rule of law, and specifically protecting human rights, has long been a principle goal of U.S. foreign policy.

Corporations who partner with brutal regimes often speak of "constructive engagement," the idea that increased business ties and economic development will lead to increased observance of human

The ATS upholds human rights norms, at home and abroad.

Photo: Rainforest Action Network

rights and political freedoms. The ATS compliments a constructive engagement approach, because it ensures that business engagement is truly constructive – investment that assists in human rights abuses is destructive, not constructive; it reinforces and contributes to the very abuses that constructive engagement is supposed to help end. Because courts in ATS cases have always distinguished between merely investing in a repressive country and actually assisting in human rights abuses, the ATS helps ensure that multinational corporations are actually being constructive when they invest in nations with poor human rights records.[179]

As most companies would recognize, the business community itself is also better off when corporations respect and promote legal rights, including international human rights law, in the countries in which they operate. Upholding these norms both at home and abroad is critical to raising performance standards and ensuring a stable climate for all investors. These conditions reduce risks for investment, foster growth and stability and actually attract new and sustained investment with an environment more conducive to development.[180] The simple truth is that better business practices are better for business. Corporations would be better off without the exception to the rule that they seek.

Chapter Six

Conclusion: The Law and the Court after *Kiobel*

"Lord, take my soul, but the struggle continues."
-Ken Saro-Wiwa

Photo: © Jack Laurenson / Bhopal Medical Appeal

Kiobel places an unfortunate and misguided new limit on the ability to enforce universally accepted human rights principles. After *Kiobel*, it will be harder to bring cases against foreign companies for abuses that occurred in foreign countries. But this is by no means the end of efforts to hold corporations that have participated in atrocities accountable in U.S. courts. In fact, it should herald a new beginning; U.S. policymakers should undertake efforts to ensure that multinationals who do business in the United States do not escape accountability.

The impact of *Kiobel* and the future of ATS litigation

With the *Kiobel* decision, the U.S. Supreme Court took a small but significant step to limit access to remedies for survivors of human rights violations, but it did not close the door entirely. *Kiobel* should not bar all ATS cases arising abroad. In fact, the Supreme Court specifically suggested that such cases could still be brought in the future, but it "left for another day" the determination of exactly when and how.[181] In the coming years, litigants, lawyers, and lower federal courts will have the task of determining just what the Supreme Court meant in *Kiobel*. In the meantime, we feel confident that a few basic conclusions can be drawn from the *Kiobel* decision when properly read.

First, the holding in *Kiobel* was extremely narrow – in other words, it was specifically tied to the facts of the case. In *Kiobel*, the Shell oil companies who were named as defendants were Dutch and British corporations alleged to have assisted the Nigerian military in committing abuses in Nigeria. The companies' only presence in the United States was that they were listed on the New York Stock Exchange and maintained an investor relations office in New York. Presented with these facts, the Supreme Court held the "mere corporate presence" in the United States of a foreign multinational corporation was insufficient to allow the case

to be brought in U.S. court.[182] But, as previously discussed in Chapter 1, the Supreme Court suggested that other cases could proceed where they "touch and concern" the United States with "sufficient force." The Court did not absolutely prohibit cases arising abroad from being brought in U.S. courts.

All three concurring opinions in the *Kiobel* decision – expressing the views of seven justices – confirm that the holding is narrow. Justice Kennedy, who joined the majority opinion, noted with approval that the Court was "careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."[183] Kennedy made clear that "[o]ther [ATS] cases may arise" that are not foreclosed "by the reasoning and holding of today's case."[184] Justice Breyer's four-justice concurrence observed that the majority "leaves for another day the determination of just when" cases arising abroad may proceed.[185] And Justice Alito likewise stated that "Th[e majority's] formulation obviously leaves much unanswered."[186] All of these statements demonstrate the limited reach of *Kiobel*.

Second, the Court in *Kiobel* did not rule that only cases involving conduct by defendants in the United States may proceed; the "touch and concern" requirement appears to be broader than this. Justice Alito, joined by Justice Thomas, wrote a concurrence because those justices would have preferred a different approach than the majority[187] – they would have required conduct in the United States that violates international law, thus confirming that the majority did not adopt any such requirement.

Third, while there will be much debate over which claims meet the "touch and concern" requirement, we believe that *Kiobel* should allow for claims against U.S. corporations and residents, no matter where the abuse occurred. Countries always have an interest in the acts of their own citizens and residents. Indeed, when U.S. nationals commit or are

Kiobel threatens decades of progress in international human rights law, but left the door ajar for some ATS cases.

complicit in human rights abuses, international law holds the U.S. itself responsible. Preventing the U.S. from becoming a safe haven for torturers is the legacy of *Filártiga*, which the Supreme Court cited with approval in *Sosa*.[188] *Kiobel* has done nothing to undermine the continuing vitality of *Filártiga*.

Fourth, while some corporations might read the *Kiobel* decision as a green light for committing human rights abuses abroad with impunity,[189] this would be a mistake. The ATS will continue to apply abroad in a number of cases, and although the issue of whether corporations could be sued was fully briefed and argued before the Supreme Court, no Justice suggested that corporations were not subject to international human rights law. In fact, the *Kiobel* decision assumes that corporations could be sued. The Court would have had no reason to discuss whether "mere corporate presence" was enough to allow a case in U.S. court if

The Supreme Court entertained Shell's arguments when virtually no lower court had ever accepted them. Corporations found a friend with the Court.

corporations simply could not be sued.

These issues will be the subject of extensive litigation in federal courts in the coming years; the Supreme Court left much to be clarified by the district courts and courts of appeals. In the coming years, corporate defense lawyers will try to muster the best arguments possible to convince the courts that human rights survivors should not be given their day in court. This leaves to human rights advocates the continual task of reminding the federal judiciary of the proper interpretation of laws, such as the ATS, that are intended to uphold international law and provide remedies to those who suffer its violations.

State court litigation after *Kiobel*

Significantly, the Supreme Court's decision did nothing to limit victims' ability to bring claims in state court against corporations. Prior to the ATS, foreigners could bring claims in state courts for injuries that occurred anywhere in the world, even against foreign defendants. And while the use of the ATS after *Filártiga* has brought more cases into federal courts, similar cases have continued to be heard in state courts around the country.

The *Kiobel* case was in some ways exceptional because the plaintiffs did not also file claims under state law. It is common practice for attorneys bringing ATS cases to plead the correlating state law claims as well; for example, a claim of "torture" under the ATS in federal court can be styled as "assault and battery" in state court, while "summary

execution" can be styled as "wrongful death." No matter how courts read *Kiobel*, Plaintiffs will continue to assert state law claims.

ERI's case *Doe v. Unocal* is a good example of how important state claims have been, and thus will continue to be. The ATS claims against Unocal were originally dismissed, and while that decision was on appeal, the plaintiffs re-filed in state court alleging "ordinary" tort claims such as negligence and battery. When Unocal finally settled and agreed to compensate the plaintiffs, it was the state court case that was only months away from trial; the ATS case was still in the hands of the federal Court of Appeals.[190] There are certainly advantages and disadvantages for plaintiffs in state court, but these cases will continue.[191]

Corporate power and the rise of the corporate court

Beyond the interpretation of the specific holding in the *Kiobel* decision and the inevitable fights over its implementation, a fundamental issue highlighted by this case is the issue of corporate power and regulation of corporate conduct. Make no mistake, while the Court specifically addressed the issue of extraterritoriality in its *Kiobel* decision, the case reached the Supreme Court largely because it was brought against a powerful corporate defendant. Indeed, the initial question on appeal in *Kiobel* was whether or not corporations could be sued at all for human rights abuses. It was only during the second round of arguments that the question shifted from one regarding corporate immunity to one regarding abuses committed abroad.

But despite the shift in legal argument, corporations resoundingly weighed in on Shell's behalf against the application of the ATS outside the United States. And the reason was simple: the ability for litigants to use the ATS as a tool for accountability against unscrupulous corporations that violate international law abroad, especially in countries with weak legal systems, is a threat to corporations' bottom line. Challenging either the status of the corporation as defendant, or the application of

Paul Hoffman, lead counsel in *Kiobel*, outside the U.S. Supreme Court.

the ATS to overseas acts, was viewed as a way for corporations to lessen their potential liabilities. Shell and its corporate allies found a friendly audience with the current Supreme Court. Even if the Court didn't adopt all of Shell's arguments and prohibit all lawsuits against corporations or all claims arising abroad, the fact that the Court entertained both of these arguments when virtually no lower court had ever accepted them, is nothing short of remarkable.

We should therefore be concerned about the *Kiobel* decision not simply for its legal effect, but for what it says about the Supreme Court. The current Supreme Court "has been more sympathetic to corporate interests than any court since World War II."[192] According to a study published in the Minnesota Law Review, which reviewed more than 1,750 decisions from 1946 to 2011, the Court under Chief Justice John Roberts "has repeatedly shielded business from lawsuits involving class actions,

workplace disputes and consumer complaints."[193] The U.S. Chamber of Commerce has also found a friendly audience with the Supreme Court to a degree that is truly astounding. Although the Supreme Court hears very few cases, granting only about one percent of the petitions filed, it has granted nearly one of every three petitions supported by the U.S. Chamber of Commerce.[194]

Kiobel may be best understood not according to the legal doctrines discussed by the Supreme Court, but in the context of a line of cases in recent years that promote corporate power rather than accountability and regulation, including the Citizens United campaign financing case and the Wal-Mart discrimination class action.[195] In *Kiobel*, as in these other cases, the Court opted to limit the legal tools available to those seeking to rein in abuses of corporate power.

U.S. courts did not always share this pro-corporate bias. Indeed, for years, corporations were viewed with skepticism and even contempt by legislators and judges. In a 1933 Supreme Court case, *Liggett Co. v. Lee*, Justice Brandeis, in a scathing dissent from the majority opinion, reminded the Court of this important history. He wrote:

> *The prevalence of the corporation in America has led men of this generation…to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life and, hence, to be borne with resignation. Throughout the greater part of our history a different view prevailed. …Limitations upon the scope of a business corporation's powers and activity were [] long universal.*[196]

Without those limitations, Justice Brandeis warned, and through the huge increase in their size, "corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution — an institution which has brought such concentration of economic power that so-called private corporations are sometimes able

to dominate the State."[197]

These fears, voiced 80 years ago, are highly relevant to the current Supreme Court, and to many government officials as well. The notion that the law should provide protections against corporate power, once so prevalent,[198] has largely been supplanted by an unyielding faith in market forces. Today corporations are ubiquitous, minimally regulated, and hugely powerful – dominating the political, economic, and cultural processes that define our social and political space. And the legal restraints existing to deal with the consequences are comparatively minimal. *Kiobel* represents yet one more weakening of the corporate accountability framework.

This raises the critical question of how human rights victims and their advocates can counteract this pro-corporate judicial and legal bias. The task ahead then, is to work to ensure that we have a legal and judicial system that prevents corporations from infringing on people's rights and holds corporations accountable when they do.

Toward greater corporate human rights accountability

Although the courts should do their job to allow cases that do not fall under *Kiobel*, Congress should also step in to counteract the Supreme Court's decision. Chief Justice Roberts practically invited congressional action on this question in the conclusion of his opinion, noting that if Congress decides to pass new legislation, it should be more clear as to its extraterritorial reach. Indeed, if Congress does not act, many international human rights cases will be brought in state courts in the United States. While this will still produce some degree of accountability and deterrence, it is exactly the opposite of the Framers' intent in passing the ATS. Congress should take this opportunity to closely evaluate the United States' responsibility, and role as a leader, in eliminating corporate human rights abuses.

New legislation need not be complex, and it need not impose any new regulations on corporations' activities. Instead, it should ensure that conduct that is already prohibited – such as aiding severe human rights abuses – should be subject to remedies and punishment in the United States.

The road ahead is long but ATS claims have been a critical tool available for victims of corporate human rights violations and we expect that will continue, even if the ATS is less available to victims of severe abuses than before *Kiobel*. And while the scope of future ATS claims remains uncertain, it is important to remember that there are other avenues to accountability that remain available, even if they are not ideal.

Endnotes

Introduction

1 28 U.S.C. § 1350.
2 *See Filártiga v. Peña-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).
3 *See Kadic v.Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); *Filártiga*, 630 F.2d at 884; *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988).
4 Restatement (Third) of Foreign Relations Law § 102(2), cmt. c (1987).
5 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).
6 *See, e.g., Kadic*, 70 F.3d at 239; *Filártiga,* 630 F.2d at 884; *Forti*, 694 F.Supp.at 709.
7 *See Kadic,* 70 F.3d at 236-240.
8 *See Beanal v. Freeport-McMoran, Inc.*, 969 F.Supp. 362, 371 (E.D. La. 1997), *aff'd* 197 F.3d 161 (5th Cir. 1999).

Chapter One

9 Amended Complaint at 2, *Kiobel v. Royal Dutch Petroleum*, (No. 02 CV 7618) (KMW) [hereinafter "*Kiobel* Complaint"].
10 The Commonwealth of Nations is an international association working in cooperation towards the shared goals of democracy, human rights, and development. *See* http://www.thecommonwealth.org/Internal/191086/191247/the_commonwealth/.
11 *Kiobel* Complaint at 4.
12 Settlement Agreement and Mutual Release, *Wiwa v. Royal Dutch Petroleum*, June 8, 2009, *available at*: http://ccrjustice.org/files/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf (last accessed July 12, 2013).
13 *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 468 (S.D.N.Y. 2006).
14 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 151 (2d Cir. 2010) *aff'd*, 10-1491, 2013 WL 1628935 (U.S. 2013) (Leval, J., concurring only in the judgment). Judge Leval modified this statement slightly just before the opinion was published, noting that since he wrote the opinion but just before the court issued it, that "a California district court dismissed an ATS action in part on the basis of its acceptance of the majority's view that customary international law does not apply to corporations. *Doe v. Nestlé, S.A.,* No. CV 05–5133 SVW (JTLx), slip op. at 120 (C.D.Cal. Sept. 8, 2010)."
15 *See Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268 (2d Cir. 2011).
16 *Sarei v. Rio Tinto*, 671 F.3d 736 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013), *remanded to* 2013 U.S. App. LEXIS 13312 (9th Cir. June 28, 2013); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39-57 (D.C. Cir. 2011), *vacated*, 2013 U.S. App. LEXIS 16566 (D.C. Cir. July 26, 2013); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1017-21 (7th Cir. 2011).
17 Transcript of Oral Argument at 25, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __ (slip op.) (2013) (No. 10-1491), (heard on February 28, 2012) *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf.
18 Transcript of Oral Argument at 25-6, *Kiobel v. Royal Dutch Petroleum Co.*, 569

U.S. __ (slip op.) (2013) (No. 10-1491), (heard on February 28, 2012) *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf.

19 Transcript of Oral Argument at 25, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __ (slip op.) (2013) (No. 10-1491), (heard on October 1, 2012) *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf.

20 *See* Brief for the United States as *Amicus Curaie* supporting Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

21 *See* Supplemental Brief for the United States as Amicus In Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

22 ERI sought records of Holder's and Srinivasan's involvement in the *Kiobel* case under the Freedom of Information Act, but at this writing has received little information from the Department of Justice.

23 *See e.g.* Jeffrey Toobin, *The Supreme Court nominee-in-waiting*, The New Yorker, (Apr. 9, 2013) *available at* http://www.newyorker.com/online/blogs/comment/2013/04/sri-srinivasan-dc-circuit-nominee-supreme-court.html ("The stakes in this nomination are clear: if Srinivasan passes this test and wins confirmation, he'll be on the Supreme Court before President Obama's term ends.").

24 *See* Adam Serwer, *Who is Sri Srinivasan, Obama's "Supreme Court Nominee in Waiting"?* MotherJones (Apr. 10, 2013), *available at* http://www.motherjones.com/mojo/2013/04/who-sri-srinivasan-supreme-court; *and see* Letter to Jeremy Paris and David Best, U.S. Senate Committee on the Judiciary from EarthRights International (April 5, 2013), *available at* https://www.documentcloud.org/documents/682485-letter-re-nomination-of-sri-srinivasan-4-5-2013.html.

25 *See* U.S. Department of State's Bureau of Democracy, Human Rights & Labor, "U.S. Government Approach on Business and Human Rights," *available at*: http://www.humanrights.gov/2013/05/01/u-s-government-approach-on-business-and-human-rights/#footnote1.

26 *See e.g.* Universal Declaration of Human Rights, Article 8; International Covenant on Civil and Political Rights, Article 2(3): UN Guiding Principles on Business and Human Rights.

27 *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __ (slip op. at 14) (2013) (No. 10-1491).

28 *Kiobel*, 569 U.S. __ (slip op. at 14).

29 *Kiobel*, 569 U.S. __ (slip op. at 1) (Kennedy, J., concurring).

30 *Kiobel*, 569 U.S. __ (slip op. at 2) (Alito, J., concurring).

31 *Kiobel*, 569 U.S. __ (slip op. at 7) (Breyer, J., concurring).

32 Anthony Colangelo, *Kiobel* Insta-Symposium: An Extraterritorial Cause of Action, http://opiniojuris.org/2013/04/17/kiobel-insta-symposium-an-extraterritorial-cause-of-action/.

33 *Kiobel*, 569 U.S. ___ (slip op. at 4) (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).

34 *See e.g.* Supplemental Brief Yale Law School Center for Global Legal Challenges as *Amicus Curaie* in Support of Petitioners at 2, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __ (slip op.) (2013) (No. 10-1491). The Ninth Circuit addressed this argument in *Sarei v. Rio Tinto, PLC*, and determined that: "the primary considerations underlying the presumption against extraterritoriality—the foreign relations difficulties and intrusions into the sovereignty of other nations likely to arise if we claim the authority to require persons in other countries to obey our laws – do not come into play. This is because…we are not asserting an entitlement

to 'make law' for the 'entire planet.' Instead, and especially in light of *Sosa*, the ATS provides a domestic forum for claims based on conduct that is illegal everywhere, including the place where that conduct took place. It is no infringement on the sovereign authority of other nations, therefore, to adjudicate claims cognizable under the ATS, so long as the requirements for personal jurisdiction are met." 671 F.3d 736, 746 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013), *remanded to* 2013 U.S. App. LEXIS 13312 (9th Cir. June 28, 2013).

35 *Kiobel*, 569 U.S. ___ (slip op. at 7).

36 *Kiobel*, 569 U.S. ___ (slip op. at 13).

37 *See e.g. Doe v. Exxon Mobil Corp.,* 654 F.3d 11, 26 (D.C. Cir. 2011), *vacated*, 2013 U.S. App. LEXIS 16566 (D.C. Cir. July 26, 2013) (finding that "[t]o the extent that the historical record is inconclusive, modern developments convince us that it is entirely appropriate to permit appellants to proceed ... even though much of the conduct ... occurred in Indonesia," and concluding that one such "modern development" was that "modern ATS litigation has primarily focused on atrocities committed in foreign countries").

38 *See* Petitioner's Supplemental Reply Brief at 8, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __ (slip op.) (2013) (No. 10-1491) (citing Supplemental brief of Rutgers Law School Constitutional Litigation Clinic as Amicus Curaie in Support of Petitioners at 13-22).

39 *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1025 (7th Cir. 2011). Other courts have shared this view. *See e.g. Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744-45 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013), *remanded to* 2013 U.S. App. LEXIS 13312 (9th Cir. June 28, 2013) ("We categorically rejected the argument that the ATS applies only to torts committed in this country."); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 44–45 (D.C. Cir. 2011), *vacated*, 2013 U.S. App. LEXIS 16566 (D.C. Cir. July 26, 2013); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 247 (S.D.N.Y. 2009) ("Given the universal agreement of federal courts, as well as the inapplicability of the presumption against extraterritorial application of statutes, defendants' extraterritoriality defense is rejected. The ATCA provides this Court with the authority to hear claims for torts committed abroad, including the allegations at issue in this case.").

40 Petitioners' Supplemental Reply Brief at 6, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

41 Petitioners' Supplemental Reply Brief at 6 & n.2, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491)(internal footnotes omitted) (citing to Brief for the United States as Respondent Supporting Petitioner at 46-50; Reply Brief for the United States as Respondent Supporting Petitioner 19-20; and the Transcript of Oral Argument).

42 *Doe v. Exxon Mobil*, 654 F.3d at 26 (quoting Brief for United States at 8, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)).

43 Petitioners' Supplemental Reply Brief at 2, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __ (slip op.) (2013) (No. 10-1491); *See also Doe v. Exxon Mobil*, 654 F.3d at 26 (explaining that "Congress in enacting the TVPA expressly endorsed federal courts' exercise of jurisdiction over" ATS cases where the conduct occurred outside the U.S.).

44 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. §1350 (1994)).

45 *Doe v. Exxon Mobil*, 654 F.3d at 26.

Chapter Two

46 *See* Judiciary Act of 1789, ch.20, §9, 1 Stat. 73, 76–77 (providing jurisdiction over "all crimes and offences that shall be cognizable under the authority of the United States, *committed within their respective districts, or upon the high seas*") (emphasis added).
47 Attorney General William Bradford, *Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795).
48 The original text used the language "all causes." Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77.
49 Compare Judiciary Act of 1789, ch.20, §9, 1 Stat. 73, 76–77 (providing jurisdiction over "all crimes and offences that shall be cognizable under the authority of the United States, *committed within their respective districts, or upon the high seas*") (emphasis added).
50 *See Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (Pa. 1784).
51 *See e.g. Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 151 (2d Cir. 2010) *aff'd*, 10-1491, 2013 WL 1628935 (U.S. 2013) (Leval, J., concurring only in the judgment) (noting with the exception of one recent district court case, no case had held ATS could not apply to conduct outside U.S.).
52 *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).
53 *See Statement of Dolly Filártiga*, March 29, 2004, No Safe Haven Website, *available at* http://web.archive.org/web/20040712144119/http://www.nosafehaven.org/state_filartiga.html.
54 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).
55 *See Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).
56 *Kadic*, 70 F.3d 232.
57 *See In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992).
58 *See Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983).
59 *See Bieregu v. Ashcroft*, 259 F. Supp. 2d 342 (D.N.J. 2003).
60 *See Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011).
61 *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d. Cir. 2003).
62 *See Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).
63 *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). Some limited exceptions to this general immunity exist, such as cases in which the foreign state has waived immunity, and those involving commercial activity occurring in or having a direct effect in the U.S.
64 *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).
65 *Kadic*, 70 F.3d at 239.
66 *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).
67 *Kadic*, 70 F.3rd at 245.
68 *Doe v. Unocal Corp*, 963 F.Supp. 880.
69 *See* State Court Complaint, *Unocal Corp. v. Los Angeles County Superior Court*, 2003 Cal. LEXIS 3270 (Cal. May 14, 2003) *available at* http://www.earthrights.org/sites/default/files/legal/Unocal-state-complaint-2003.pdf (last viewed April 15, 2013) (alleging, for example, wrongful death, negligence, recklessness, conversion, false imprisonment, assault and battery, etc.).
70 *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9 Cir. 2003), *and vacated and appeal dismissed following settlement*, 403 F. 3d 708 (9th Cir. 2005).
71 *Doe v. Unocal*, 403 F. 3d 708 (9th Cir. 2005), *vacating* 395 F.3d 932 (9 Cir. 2002), *and dismissing appeal following settlement of* 395 F.3d 932 (9th Cir. 2002).

72 The D.C. Circuit, Eleventh Circuit, and Ninth Circuit have concluded that the "knowledge" standard is the appropriate measure of aiding and abetting liability. *See, e.g., Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011), *vacated on other grounds*, 2013 U.S. App. LEXIS 16566 (D.C. Cir. July 26, 2013) (adopting a "'knowledge' *mens rea* and a showing for *actus reus* of acts that have a substantial effect in bringing about the violation" for aiding and abetting liability); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005) (describing the necessary elements, requiring a finding that the alleged aider and abettor "substantially assisted some person or persons who personally committed or caused one or more of the wrongful acts that comprise the claim," and "knew that his actions would assist in the illegal or wrongful activity at the time he provided the assistance"); *Sarei v. Rio Tinto*, 671 F.3d 736 (9th Cir. 2011), *vacated on other grounds*, 133 S. Ct. 1995 (2013), *remanded to* 2013 U.S. App. LEXIS 13312 (9th Cir. June 28, 2013). The Second Circuit, however, has embraced a more demanding "purpose" standard. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (holding that the aider and abettor must share the same purpose as the perpetrator).

73 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op. at 14) (2013) (No. 10-1491).

74 *See, e.g., Mujica v. Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2009); *Sinaltrainal v. Coca-Cola*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1253 (11th Cir 2005). *See also, e.g., Herero People's Reparations Corp. v. Deutsche Bank, AG*, 370 F.3d 1192, 1195 (D.C. Cir. 2004); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988); *Tel-Oren v. Libran Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). Prior to the Supreme Court's decision in *Kiobel* one district court in the country reached the same conclusion. *Doe v. Nestlé, S.A.*, 748 F. Supp. 2d 1057, 1143 (C.D. Cal. 2010). This decision was overruled by the *Sarei* decision. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013), *remanded to* 2013 U.S. App. LEXIS 13312 (9th Cir. June 28, 2013).

75 *Doe v. Exxon Mobil*, 654 F.3d at 39-57; *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1017-21 (7th Cir. 2011); *Sarei*, 671 F.3d 736.

76 *Sosa*, 542 U.S. at 725.

77 *Sosa*, 542 U.S. at 720, 725.

78 *Sosa*, 542 U.S. at 732.

79 *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

80 *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

81 *Rodriguez Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008).

82 *See e.g., Licea v. Curacao Drydock*, 584 F. Supp. 2d at 1366 (holding that the ATS claim was sustainable as, "[f]orced labor constitutes a violation of a well-established, universally-recognized norm of international law").

Chapter Three

83 *Doe v. Unocal Corp.*, 110 F.Supp.2d 1294, 1296 (C.D. Cal. 2000).

84 For example, the United Nations Commission on Human Rights, and its successor the Human Rights Council, issued two three-year mandates to John Ruggie, the Special Representative of the Secretary General on the human rights and transnational corporations and other business enterprises, from 2005 through 2011. *See* U.N. Human Rights Comm'n, Res. 2005/69, U.N. Doc. E/CN.4/RES/2005/69 (Apr. 20, 2005); U.N. Human Rights Council, Res. 8/7, U.N. Doc. A/HRC/RES/8/7 (June 18, 2008). Prof. Ruggie's work culminated in the Guiding Principles on Business and Human Rights, which the Human Rights Council adopted in 2011, and also created a new Working Group on the issue of human rights and transnational corporations and other business enterprises in order to promote and implement the Guiding Principles. *See* U.N. Human Rights Council, Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (June 16, 2011).

85 *Doe v. Unocal Corp.*, 110 F.Supp.2d at 1306.

86 Deposition of Jane Doe II, July 31, 2002, *Doe v. Unocal Corp.*, No. BC 237980 (Los Angeles County Superior Court).

87 *See Doe v. Unocal Corp.*, 395 F.3d 932, 939 (9th Cir. 2002); *see also* Deposition of John Doe V, July 24, 2002, *Doe v. Unocal Corp.*, No. BC 237980 (Los Angeles County Superior Court).

88 Deposition of Jane Doe I, July 22, 2002, *Doe v. Unocal Corp.*, No. BC 237980 (Los Angeles County Superior Court).

89 Complaint for Equitable Relief Damages ¶¶ 2, 56-57, *Doe v. Exxon Mobil Corp.*, (D.D.C. filed June 20, 2001) (No. 01-1357), *available at* http://iradvocates.mayfirst.org/sites/default/files/06.11.01%20Exxon%20complaint.pdf [hereinafter *Exxon* Complaint].

90 *Exxon*, Complaint, ¶ 68.

91 *Exxon,* Complaint, ¶ 50.

92 *Exxon* Complaint, ¶¶ 65-67.

93 Second Amended Complaint, ¶¶ 10-20, *Al-Quraishi et al v. Nakhla et al*, No. 8:08-cv-1969 (Md. 2008) *available at* http://ccrjustice.org/files/Al_Quraishi%20Second%20Amended%20Complaint%2010%201%2008.pdf [hereinafter *Al-Quraishi, Second Amended Complaint*].

94 *Al-Quraishi, Second Amended Complaint*, ¶¶ 21-36.

95 *Al-Quraishi, Second Amended Complaint*, ¶¶ 21-36.

96 The original cases were *Khulumani v. Barclays National Bank* and *Ntsebeza v. Daimler A.G.*

97 *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

98 Complaint, ¶ 13, *Almog v. Arab Bank*, No. cv 04 5564 (E.D.N.Y., Dec. 21, 2004) *available at* http://toobigtopunish.org/sites/default/files/Almog-complaint.pdf [hereinafter *Almog* Complaint].

99 *Almog* Complaint, ¶¶ 17-22.

100 *Almog* Complaint, ¶¶ 17.

101 First Amended Complaint ¶ 1, *Doe v. Cisco Systems*, No. 5:11-cv-02449-JF-PSGx (N.D. Cal., Sept. 2, 2011), *available at* http://www.hrlf.net/FirstAmendedComplaint.pdf [Hereinafter *Doe v. Cisco Systems* First Amended Complaint].

102 *Doe v. Cisco Systems* First Amended Complaint ¶¶1, 63-74, 96-107.

103 *Doe v. Cisco Systems* First Amended Complaint ¶¶ 135-235.

104 *Doe v. Cisco Systems* First Amended Complaint ¶ 224.

105 *Doe v. Cisco Systems* First Amended Complaint ¶ 207.
106 *See, e.g., Doe v. Cisco Systems* First Amended Complaint, ¶ 164, 235.
107 *See, e.g., Doe v. Cisco Systems* First Amended Complaint ¶152.
108 First Amended Class Action Complaint ¶ 2, *Doe v. Chiquita*, No. 08-01916-MD-MARRA/JOHNSON, (S.D. Fla. Feb 26, 2011) *available at* http://www.earthrights.org/sites/default/files/documents/Chiquita-1st-amended-complaint.pdf.
109 Department of Justice, "Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay $25 million fine," (Mar. 19, 2007), *available at* http://www.justice.gov/opa/pr/2007/March/07_nsd_161.html.
110 Complaint at 4, *Tamuasi v. Rio Tinto*, No. 1337.10 0020 BSC.DOC (N.D. Cal, Sept. 6, 2000).
111 *Sarei v. Rio Tinto*, 671 F.3d 736 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013), *remanded to* 2013 U.S. App. LEXIS 13312 (9th Cir. June 28, 2013).
112 *Abdullahi v. Pfizer, Inc.,* 562 F.3d 163, 170 (2d Cir. 2009).
113 *Abdullahi v. Pfizer,* 562 F.3d at 187.

Chapter Four

114 *See* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789* (Inst. for Int'l Econ. 2003).
115 To read the amicus briefs submitted in *Kiobel*, *see* http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/(last visited November 20, 2012).
116 *See* Brief Of Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline Plc, And The Procter & Gamble Company as *Amici Curiae* in Support of Respondents at 4-17, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).
117 *See* http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/ for access to the amicus briefs in the second round of the *Kiobel* arguments.
118 Supplemental Brief of EarthRights International as *Amicus Curiae* in Support of Petitioners at 30, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __ (slip op.) (2013) (No. 10-1491) (citing Restatment (Third) of Foreign Relations Law § 402(2)) (other citations omitted).
119 Supplemental Brief of EarthRights International as *Amicus Curiae* in Support of Petitioners at 30, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __ (slip op.) (2013) (No. 10-1491) (citing Restatment (Third) of Foreign Relations Law § 404 and Chevron. Br. at 11-12) (noting Respondents concede this point).
120 Emerich de Vattel, Law of Nations 179 (1758, reprinted ed. 1805) (§ 233).
121 *See* Brief Of Professor Juan E. Méndez U.N. Special Rapporteur On Torture As *Amicus Curiae* On Reargument In Support Of Petitioners at 29-34, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __ (slip op.) (2013) (No. 10-1491). *See also* Brief of *Amicus Curiae* The Association of the Bar of the City of New York in Support of Petitioners at 23 n.27, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491); BBC, *Dutch Court Compensates Palestinian for Libya Jail*, March 28, 2012, *available at* http://www.bbc.co.uk/news/world-middle-east-17537597 (discussing Dutch court civil verdict awarding 1.3 million Euros to Palestinian doctor suing Libyan officials in tort for torture and imprisonment for eight years in Libya); Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, in GLOBAL LABOR AND EMPLOYMENT LAW FOR THE PRACTICING LAWYER 65 (Andrew P. Morriss & Samuel Estreicher, eds., 2010) (discussing civil tort litigation in France

against French corporations for alleged human rights violations occurring in Cameroon and Liberia).

122 Restatement (Third) of the Foreign Relations Law of the United States § 404.

123 Supplemental Brief Of *Amicus Curiae* Navi Pillay, The United Nations High Commissioner For Human Rights In Support Of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491), (collecting authorities).

124 Supplemental Brief Of *Amicus Curiae* Navi Pillay, The United Nations High Commissioner For Human Rights In Support Of Petitioners at 10-11, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491) ("As of September 2011, at least 145 out of 193 United Nations Member States – more than three-quarters of the world's nations – had adopted laws providing for some form of universal jurisdiction over genocide, war crimes, crimes against humanity, and/or torture.") (*citing*, Amnesty Intn'l, Universal Jurisdiction: A Preliminary Survey of 12 Legislation Around the World 1 (2011)).

125 *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984)(Edwards, J., concurring)); *see also Flomo v. Firestone Nat. Rubber Co., LLC,* 643 F.3d 1013, 1020 (7th Cir. 2011) ("International law imposes substantive obligations and the individual nations decide how to enforce them"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422–23 (1964).

126 Supplemental Brief Of *Amicus Curiae* Navi Pillay, The United Nations High Commissioner For Human Rights In Support Of Petitioners at 4, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491) (emphasis added).

127 Supplemental Brief Of *Amicus Curiae* Navi Pillay, The United Nations High Commissioner For Human Rights In Support Of Petitioners at 35, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

128 *See Iwanowa v. Ford Motor Co.,* 67 F. Supp. 2d 424, 483 (D.N.J. 1999) (in case for damages for forced labor in WWII, court found executive branch had reserved authority for addressing reparations through peace treaties).

129 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

130 *See e.g. Iwanowa v. Ford Motor Co.*, 67 F. Supp at 483; *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007) (upholding dismissal on political question grounds since permitting action to proceed would necessarily require the judicial branch to question the political branches' decision to grant extensive military aid to Israel).

131 *Kadic v. Karadzic*, 750 F.3d 232, 250.

132 *See Roe v. Unocal Corp.,* 70 F. Supp. 2d 1073 (C.D. Cal. 1999) (concluding that, although the act of state doctrine did not bar claims that civilians were forced to work by Myanmar soldiers, the doctrine did bar similar claims by a former soldier who was acting under official orders); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964) (disallowing case against Cuban authorities for expropriation of property where the court found property expropriation not clearly in violation of international law); *Doe I v. Liu Qi,* 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (undertaking act of state analysis post-*Sosa*).

133 *See e.g., Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (dismissing case on FNC and finding that Ecuador provided a more appropriate forum).

134 *See e.g., Aguinda*, 303 F.3d 470; *see also United Bank for Afr. PLC v. Coker*, 2003 U.S. Dist. LEXIS 20880 (S.D.N.Y. 2003) (employee's counter claims in RICO action brought by Nigerian bank dismissed because Nigerian action was preferable and Nigeria offered an adequate forum); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 446 (2d Cir. 2000).

135 *See, e.g.,* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 583 (J. Elliot ed. 1836) ("We well know, sir, that foreigners cannot get justice done them in these [state] courts. . . ."); *See* Brief Of *Amici Curiae* Professors Of Legal History William R. Casto, Martin S. Flaherty, Robert W. Gordon, Nasser Hussain and John V. Orth In Support Of Petitioners at 7, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

136 For more on transitory torts, *see* Supplemental Brief Of EarthRights International as *Amicus Curiae* in Support Of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491); Supplemental Brief Of *Amici Curiae* Professors Of Legal History William R. Casto, et al., in Support Of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

137 *See* Supplemental Brief Of EarthRights International as *Amicus Curiae* in Support Of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491) (explaining how transitory tort doctrine has permitted plaintiffs to bring tort actions in a state court wherever the tortfeasor may be found. Of course, state law often has shorter statutes of limitations than the ATS, and so a plaintiff like Esther Kiobel would have to act quickly.)

138 Statement of Thomas J. Donohue, President and CEO of Chamber of Commerce, *US Chamber Commends Supreme Court for Reining in Abuses of Alien Tort Statute*, (Apr. 17, 2013), *available at* http://www.uschamber.com/press/releases/2013/april/us-chamber-commends-supreme-court-reining-abuses-alien-tort-statute.

139 *See, generally,* Brief Of Professors Of Civil Procedure And Federal Courts As *Amici Curiae* On Reargument In Support Of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491); Brief Of The American Bar Association As *Amicus Curiae* In Support Of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

140 Examples of other such doctrines include (1) political question doctrine, *see, e.g., Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007) (dismissing on political question); *Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005) (relying on the foreign government's position in concluding that "[t]he Executive's judgment that adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling and renders this case nonjusticiable under the political question doctrine"); (2) act of state, *see, e.g., Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007); (3) comity, *see, e.g., Sarei*, 487 F.3d 1193; (4) *forum non conveniens*, *see, e.g.*, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (dismissing on FNC); *Turedi v. Coca-Cola Co.*, 343 F. Appx. 623 (2d. Cir. 2009) (dismissing on FNC); (5) immunity, *see, e.g.*, *Samantar v. Yousuf*, 130 S.Ct. 2278 (2010); and (6) exhaustion of domestic remedies, *see, e.g.*, *Sarei*, 487 F.3d 1193 (discussing the propriety of applying a prudential exhaustion requirement in ATS cases).

141 Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 Georgetown L. J. 709, 728 (2012).

142 *See*, for example, Pieter H.F. Bekker, Provisional Report on "Corporate Aiding and Abetting and Conspiracy Liability under International Law," given on 4 July 2003 in the Hague at a panel on Corporate Responsibility of the American Society of International Law and the Netherlands Society of International Law. *See also* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789* (Inst. for Int'l Econ. 2003).

143 Brief of *Amicus Curiae* Chamber of Commerce of the U.S.A. in Supp. of Defs.-Appellees and Affirmance at 22, *Flomo v. Firestone*, 643 F.3d 1013 (7th Cir.2011).

144 *See* United States Courts, Judicial Facts and Figures 2010, tbl. 4.1 (217,879 civil

cases filed in 1990; 282,895 civil cases filed in 2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table401.pdf (last accessed July 16, 2013).

145 Judicial Business of the United States Courts, 2012 Annual Report of the Director, Table C-2A: Cases Commenced, by Nature of Suit, 2008 through 2012, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C02ASep12.pdf (last accessed July 16, 2013).

146 Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 Georgetown Law Journal 709, 719 (2012) (In total, to put the importance of the case in perspective, there have been about 173 judicial opinions since *Filártiga* in cases brought "at least in part" under the ATS, and at least 1,914 law-review articles mentioning the term.)

147 Settlement Agreement and Mutual Release, *Wiwa v. Royal Dutch Petroleum*, June 8, 2009, *available at*: http://ccrjustice.org/files/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf (last accessed July 12, 2013).

148 Supplemental Brief Of Volker Beck And Christoph Strasser, Members Of Parliament of The Federal Republic of Germany, *Amici Curiae* In Support Of Petitioners at 15, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op) (2013) (No. 10-1491).

149 *See*, *e.g.*, Brief of the National Foreign Trade Council *et al* as *Amici Curiae* in Support of Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *available at* http://www.sdshhlaw.com/Alvarez/NFTC%20Amicus%20Brief.pdf (last accessed, November 20, 2012); Brief of *Amicus Curiae* Chamber of Commerce of the U.S.A. in Supp. of Defs.-Appellees and Affirmance, *Flomo v. Firestone*, 643 F.3d 1013 (7th Cir. 2011).

150 Brief for Chamber of Commerce of the U.S.A. as *Amicus Curiae* in Supp. of Defs.-Appellees, *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011).

151 *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011) ("One of the amicus curiae briefs argues, seemingly not tongue in cheek, that corporations shouldn't be liable under the Alien Tort Statute because that would be bad for business. That may seem both irrelevant and obvious; it is irrelevant, but not obvious.").

152 Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789* 38-40 (Inst. for Int'l Econ. 2003).

153 *See* Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 Wash. U. L. Rev. 1117, 1156–59 (2011).

154 *See* Brief of Joseph E. Stiglitz As *Amicus Curiae* In Support Of Petitioners, Mohamad v. Palestinian Auth. & Plo; *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (Nos. 11-88 And 10-1491).

155 Courts faced with the argument that corporate ATS liability would be "bad for business" have rejected this argument for a number of reasons. For example, in *Flomo v. Firestone* the court noted that "One of the *amicus curiae* briefs argues, seemingly not tongue in cheek, that corporations shouldn't be liable under the Alien Tort Statute because that would be bad for business. That may seem both irrelevant and obvious; it is irrelevant, but not obvious. Businesses in countries that have and enforce laws against child labor are hurt by competition from businesses that employ child labor in countries in which employing children is condoned." 643 F.3d at 1021.

156 In contrast, were these claims to be brought in state courts, they would be styled as traditional tort violations: assault, battery, or intentional inflection of emotional distress, for example.

157 This is a reason courts have rejected arguments by ATS defendants that plaintiffs should be required to "exhaust their legal remedies" in the nation where the alleged violation occurred before coming to US courts. For example, in rejecting this argument in *Flomo v. Firestone*, the Seventh Circuit explained that like the "[t]he implications of the argument border on the ridiculous; imagine having been required to file suit in a court in Nazi Germany complaining about genocide, before being able to sue under the Alien Tort Statute." 643 F.3d 1013, 1025 (7th Cir. 2011).

158 Brief of The American Bar Association as *Amicus Curiae* In Support Of Petitioners at 18, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

159 Brief of The American Bar Association as *Amicus Curiae* In Support Of Petitioners at 16-7, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

160 *See e.g.* Adrián F. J. Hope, *Reflexiones sobre el caso "Filártiga" y el nuevo derecho internacional*, 97 El Derecho 975, 975 (1982); Carlos E. Colautti, *La jurisdicción extraterritorial y los delitos contra el derecho de gentes*, 1999-E La Ley 996, 996 (1999); Pablo L. Manili, *Las empresas multi- nacionales y los derechos humanos,* 2003-I Jurisprudencia Argentina 995, 1002 (2003), *cited in* Brief for The Government of The Argentine Republic as *Amicus Curiae* In Support Of Petitioners at 11, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

161 Brief for The Government of The Argentine Republic as *Amicus Curiae* In Support Of Petitioners at 3, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

162 Brief for The Government of The Argentine Republic as *Amicus Curiae* In Support Of Petitioners at 5, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491) (discussing *Forti v. Suarez Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987)).

163 *See* Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 Chi. J. Int'l L. 1, 8-9, 13-15(2001) *cited in* Brief for The Government of The Argentine Republic as *Amicus Curiae* In Support Of Petitioners at 6, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

164 *See Simón*, CSJN, 328-2 Fallos 2056, 2237 (2005) (Maqueda, J. concurring) *cited in* Brief for The Government of The Argentine Republic as *Amicus Curiae* In Support Of Petitioners at 11, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

165 Brief of The American Bar Association as *Amicus Curiae* In Support Of Petitioners at 5-6, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

166 Brief of The American Bar Association as *Amicus Curiae* In Support Of Petitioners at 5-6, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

167 Brief of The American Bar Association as *Amicus Curiae* In Support Of Petitioners at 5-6, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

168 Brief Of Former United States Diplomats Diego Asencio, et al., as *Amicus Curiae* in Support Of Petitioners at 10, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

169 U.N. Hum. Rts. Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/RES/17/4 (June 16, 2011).

170 Supplemental Brief Of *Amicus Curiae* Navi Pillay, The United Nations High Commissioner For Human Rights In Support Of Petitioners at 21, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op) (2013) (No. 10-1491).

171 United States statement in *Filártiga*: "With respect to the potential foreign policy impact, the State Department advised that where there is international consensus on a protected human right and on the scope of protection . . .there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." Memorandum for the United States as *Amicus Curiae* at 22-23, *Filártiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980), *available at* http://ccrjustice.org/files/May%201980%20US%20Amicus%20Brief%20-%20Filartiga.pdf.

172 *Mamani v. Berzain*, 654 F.3d 1148 (11th Cir. 2011).

173 *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) *aff'd*, 130 S. Ct. 2278 (2010). Other examples include *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 (D.C. Cir. 1985), where victims brought suit against a Nicaraguan leader of a paramilitary group who was residing in Florida, and *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009), where victims brought suit against a former Salvadoran military officer who had been living in Tennessee.

174 *See, e.g.*, Lifeworth Annual Review of Corporate Responsibility, New Academy of Business, *available at* http://www.lifeworth.net/; *See also* John G. Ruggie, Issue Brief: *Kiobel* and Corporate Social Responsibility, at 4 (Sept. 4, 2012), Harvard Kennedy School, *available at* http://www.business-humanrights.org/media/documents/ruggie-kiobel-and-corp-social-resonsibility-sep-2012.pdf (attributing the rise of voluntary corporate social initiatives at home and abroad to least in part to corporations desire to avoid ATS-like liability).

175 *See* Brief of Joseph E. Stiglitz As *Amicus Curiae* In Support Of Petitioners, *Mohamad v. Palestinian Auth. & PLO*; *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (Nos. 11-88 And 10-1491). ,

176 For example, the mere prospect of ATS litigation prompted German corporations and the German government to work with Holocaust victims' associations to work out an agreement on compensation for the abuses they suffered. *See* Michael Bazyler, *Nuremberg in America: Litigating the Holocaust in the U.S. Courts*, 34 U. Rich. L. Rev. 1, 194-97 (2000); *cited in* Supplemental Brief Of Volker Beck And Christoph Strasser, Members Of Parliament of The Federal Republic of Germany, *Amici Curiae* In Support Of Petitioners at 5, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

177 Supplemental Brief Of *Amicus Curiae* Navi Pillay, The United Nations High Commissioner For Human Rights In Support Of Petitioners at 3, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op.) (2013) (No. 10-1491).

178 *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (slip op. at 2) (2013) (No. 10-1491) (Breyer, J., concurring).

179 *See* Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 Harv. Hum. Rts. J. 207 (2008).

180 *See* Brief of Joseph E. Stiglitz As *Amicus Curiae* In Support Of Petitioners at 5-6

and 14, *Mohamad v. Palestinian Auth. & PLO*; *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___ (slip op.) (2013) (Nos. 11-88 And 10-1491), discussing Shannon Lindsey Blanton & Robert G. Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, 69 J. OF POL. 143, 153 (2007).

Chapter Six

181 *Kiobel*, 569 U.S. ___ (slip op. at 6) (Breyer, J., concurring).
182 *Kiobel,* 569 U.S. ___ (slip op. at 14).
183 *Kiobel*, 569 U.S. ___ (slip op. at 1) (Kennedy, J., concurring).
184 *Kiobel*, 569 U.S. ___ (slip op. at 1) (Kennedy, J., concurring).
185 *Kiobel*, 569 U.S. ___ (slip op. at 6) (Breyer, J., concurring).
186 *Kiobel*, 569 U.S. ___ (slip op. at 1) (Alito, J., concurring).
187 *Kiobel*, 569 U.S. ___ (slip op. at 1) (Alito, J., concurring).
188 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); *see also* Transcript of Oral Argument at 13:21-23, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __ (slip op.) (2013) (No. 10-1491), (heard on February 28, 2012) (Kennedy describing *Filártiga* as "binding and important precedent"), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf.
189 *See, e.g.*, Jen Alic, "*Shell vs. Kiobel*: Green Light for Multinational Human Rights Abuses," April 22, 2013, www.oilprice.com.
190 The Ninth Circuit Court of Appeals, which had initially issued an opinion in the case in 2002, had ordered the case re-heard by a larger panel of judges, *see Doe v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003), and then following the Supreme Court's *Sosa* decision had requested that the case be argued again. *See* Order, *Doe v. Unocal Corp.*, No. 00-56603, Docket No. 183 (9th Cir. Oct. 26, 2004). In California state court, the judge had denied Unocal's effort to avoid a jury trial, *see* Ruling on Unocal Defendants' Motion for Judgment, *Doe v. Unocal Corp.*, No. BC 237980 (Los Angeles County Superior Court Sep. 14, 2004), and had set a trial date for June 21, 2005. *See* Notice of Ruling, *Doe v. Unocal Corp.*, No. BC 237980 (Los Angeles County Superior Court Nov. 9, 2004). The settlement was announced on March 21, 2005. EarthRights International, Final Settlement Reached in *Doe v. Unocal* (Mar. 21, 2005), *available at* http://www.earthrights.org/legal/final-settlement-reached-doe-v-unocal.
191 For an overview of the advantages and disadvantages plaintiffs face in state court as compared to federal court, *see* Paul Hoffman & Beth Stephens, *International Human Rights Cases under State Law and In State Courts*, 3 U.C. IRVINE L. REV. 9 (2013).
192 Lincoln Caplan, *The Corporate Friendly Court*, N.Y. Times, May 18, 2013, *available at* http://www.nytimes.com/2013/05/19/opinion/sunday/the-corporate-friendly-court.html.
193 Lincoln Caplan, *The Corporate Friendly Court*, N.Y. Times, May 18, 2013, *available at* http://www.nytimes.com/2013/05/19/opinion/sunday/the-corporate-friendly-court.html.
194 Lincoln Caplan, *The Corporate Friendly Court*, N.Y. Times, May 18, 2013, *available at* http://www.nytimes.com/2013/05/19/opinion/sunday/the-corporate-friendly-court.html.
195 One of the most striking aspects of this pro-corporate bias on the Supreme Court is perhaps how noiselessly it operates: by deciding cases on seemingly procedural technicalities (such as in *Dukes* or *Comcast*, which involved the

technical requirements to bring a class action; or *Iqbal*, which involved the federal pleading standards), the Supreme Court is able to act as though the decision were legally compelled and do so in a language that is not accessible to the general public. *Citizens United* was a clear exception here—since there was no hiding the pro-corporate implications of a decision that involved no less than a radical new interpretation of the First Amendment. Perhaps because of outcry against *Citizens United* the Supreme Court has tried to maintain the subsequent pro-corporate decisions with a lower profile—deciding cases on technical legal questions or by deciding for the corporation by without providing a clear ruling that would anger the public (as in *Kiobel*).

196 *Liggett Co. v. Lee*, 288 U.S. 517, 548, 554 (1933) (Brandeis, J., dissenting).

197 *Liggett Co. v. Lee*, 288 U.S. at 565 (Brandeis, J., dissenting).

198 *See, e.g.,* Franklin Delano Roosevelt, "A Rendezvous with Destiny," Speech before the 1936 Democratic National Convention (June 27, 1936).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