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## DEBATE

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### THE ALIEN TORT STATUTE AND CORPORATE LIABILITY

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In 2010, the Second Circuit decided *Kiobel v. Royal Dutch Petroleum*, holding that corporations are not proper defendants under the Alien Tort Statute. Invoking *Sosa v. Alvarez-Machain*, the Second Circuit found that human rights abuses committed by corporations were not sufficiently definite under international law to warrant jurisdiction in United States courts. Several other circuits have explicitly disagreed with the Second Circuit, however, and on October 17, 2011, the Supreme Court granted cert in *Kiobel*. Professor Farbstein and Professor Giannini argue that *Kiobel* is an outlier, comparing the logic and strength of its arguments to those in the Seventh and D.C. Circuits as well as the dissenting opinions in both the original decision and the Second Circuit's 5-5 decision to deny rehearing en banc. Professor Arend expands their argument by highlighting two particular failings of the Second Circuit's position. First, he argues that *Kiobel* misinterprets *Sosa*, relying on a distinction between state and non-state actors to find that there are different classes of defendants under the Alien Tort Statute. Second, Arend concurs with Farbstein's and Giannini's analysis that corporations have historically been found capable of violating international law.

## OPENING STATEMENT

*Will Kiobel Be Just an Aberration?*Susan Farbstain<sup>†</sup> & Tyler Giannini<sup>††</sup>

After granting certiorari on October 17, 2011, the Supreme Court will soon tell us whether *Kiobel v. Royal Dutch Petroleum Co.* is in fact an outlier—an aberration—in more than fifteen years of corporate Alien Tort Statute (ATS) litigation.<sup>1</sup> See 621 F.3d 111 (2d Cir. 2010) (interpreting 28 U.S.C. § 1350). The Second Circuit surprised the legal world with its *Kiobel* decision in September 2010. In a case brought by Nigerian plaintiffs against Royal Dutch/Shell for crimes against humanity and extrajudicial killing, the panel ruled, 2-1, that corporations could not be held liable under the ATS. *Kiobel*, 621 F.3d at 145. In the initial months that followed the decision, *Kiobel* provoked predictions of the end of corporate ATS litigation. However, since *Kiobel* came down, no other appellate court has adopted the Second Circuit's views. Rather, the opinion precipitated a wave of activity from other appellate courts rebuking the Second Circuit's conclusions and isolating its reasoning. These decisions show that among the circuit courts *Kiobel* is—to use Judge Richard Posner's word—an “outlier.” *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011); *accord Sarei v. Rio Tinto, PLC*, Nos. 02–56256, 02–56390, 09–56381, 2011 WL 5041927, at \*20 (9th Cir. Oct. 25, 2011) (en banc); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 40-41 (D.C. Cir. 2011); Rome-

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<sup>††</sup> Tyler Giannini is a Clinical Professor at Harvard Law School and the Clinical Director of the Human Rights Program. He has litigated Alien Tort Statute (ATS) cases for more than fifteen years, including while working with EarthRights International, an organization that he co-founded. In that capacity, Giannini served as one of the architects of *Doe v. Unocal Corp.*, a precedent-setting corporate ATS suit that settled in 2005. Farbstain and Giannini are currently co-counsel in two ATS cases and have submitted amicus curiae briefs in numerous other matters, including in support of the *Kiobel* appellants' petition for certiorari to the Supreme Court. The authors would like to thank Sarah Poppy Alexander for her valuable comments and assistance with this piece.

<sup>1</sup> The 1789 statute allows non-U.S. citizens to sue in U.S. courts for violations of international law.

ro v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008); *see also* Aziz v. Alcolac Inc., No. 10-1908, 2011 WL 4349356, at \*5 n.6 (4th Cir. Sept. 19, 2011) (declining to reach question of corporate liability and dismissing on alternative grounds). The Supreme Court will soon resolve the widening circuit split caused by this flurry of recent appellate decisions on the corporate liability issue.

Since the Second Circuit's seminal *Filártiga* decision in 1980, the ATS has become an increasingly important tool for survivors of gross human rights abuse to seek redress for their harms. *See* *Filártiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *Kiobel* marked a significant departure from the spirit of *Filártiga*, as well as a long line of ATS cases dating to the mid-1990s—including within the Second Circuit—that had proceeded against corporations. This history partially explains why the initial cracks in *Kiobel's* edifice came not from other circuits but from within the Second Circuit itself. The first sign that *Kiobel* had missed the mark was Judge Leval's blistering rebuttal that dissected the flaws in the majority's approach and pointed out the broader implications of the decision: "By adopting the corporate form, such an enterprise could have hired itself out to operate Nazi extermination camps or the torture chambers of Argentina's dirty war, immune from civil liability to its victims." *Kiobel*, 621 F.3d at 150 (Leval, J., concurring). Judge Leval noted that, in addition to the logical shortcomings of the majority's opinion and the perverse outcomes it would create, the decision undermined a central purpose of international law articulated in *Filártiga*: "By protecting profits earned through abuse of fundamental human rights protected by international law, the rule my colleagues have created operates in opposition to the objective of international law to protect those rights." *Id.*

In February 2011, in a 5-5 vote, the Second Circuit denied a petition for rehearing en banc in *Kiobel*. *See* *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379, 380 (2d Cir. 2011). Accompanying this vote, the divided circuit published an extraordinary exchange of views that revealed additional weaknesses in the opinion. Judge Katzmman, who did not sit on the original *Kiobel* panel, dissented from the decision not to rehear the case. He specifically emphasized that the majority's reliance on his earlier opinion in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 270 (2d Cir. 2007), was misplaced with regard to the question of corporate liability. Judge Katzmman understood that decision to be consistent with the principle "that corporations, like natural persons, may be liable for violations of the law of nations" un-

der the ATS. *Kiobel*, 642 F.3d at 381 (Katzmann, J., dissenting from denial of rehearing).

Further, in voting against rehearing, Judge Jacobs authored an opinion indicating that he joined the initial panel decision for policy reasons, not legal ones. He claimed that “[e]xamples of corporations in the atrocity business are few in history,” thus minimizing the concern that corporations would participate in human rights abuses, and stated the view that “the underlying question of law is one of no big consequence. . . . The incremental number of cases actually foreclosed by the majority opinion in *Kiobel* approaches the vanishing point.” *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 270-71 (2d Cir. 2011) (Jacobs, J., concurring in denial of rehearing). Judge Cabranes, who authored the original panel decision, felt compelled to pen a separate opinion in response to Judge Jacobs, explaining that “fidelity to the law, not a ‘policy agenda,’ dictated the majority opinion.” *Id.* at 272 (Cabranes, J., concurring in denial of rehearing).

The subsequent ATS decisions issued by the D.C. and Seventh Circuits this summer firmly rejected *Kiobel*'s logic and holding, noting numerous flaws in the court's reasoning. However, three particular shortcomings stand out. First, the other appellate decisions recognized that in asking whether there is a universal practice of imposing civil liability on corporations that violate international law, the *Kiobel* decision fundamentally misstated the structure of international law. In the *Firestone* opinion, Judge Posner emphasized “the distinction between a principle of [customary international] law, which is a matter of substance, and the means of enforcing it, which is a matter of procedure or remedy.” *Firestone*, 643 F.3d at 1019. The *Kiobel* court erred in looking to international law to discern a norm of corporate liability because, as Judge Posner explained, “[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them.” *Id.* at 1020. The D.C. Circuit similarly recognized that the *Kiobel* court's analysis “conflates the norms of conduct at issue in [*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)] and the rules for any remedy to be found in federal common law.” *Exxon*, 654 F.3d at 41; see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring).

Second, both the D.C. and Seventh Circuits noted that the historical premise underlying the *Kiobel* opinion is incorrect. The *Kiobel* majority asserted that even the most heinous corporate behavior—assistance in perpetrating the Holocaust—was not punished under international law because no corporation was prosecuted in the criminal

trials at Nuremberg. However, as Judge Posner explained, at the end of the Second World War the allied powers dissolved German corporations that had supported the Nazi effort “on the authority of customary international law.” *Firestone*, 643 F.3d at 1017; *see also Exxon*, 654 F.3d at 51-52. Control Council Law No. 9, which provided for the seizure of property owned by I.G. Farben, found that the company had “knowingly and prominently engaged in building up and maintaining the German war potential,” and ordered that some of its seized assets be made “available for reparations.” *Firestone*, 643 F.3d at 1017.

Third, Judge Posner emphasized the common sense reasons why the *Kiobel* opinion falls short. According to the *Kiobel* ruling, “a pirate can be sued under the Alien Tort Statute but not a pirate corporation (Pirates of the Indian Ocean, Inc., with its headquarters and principal place of business in Somalia).” *Id.* Judge Leval similarly noted the consequences of this outcome in his own opinion in *Kiobel*: “So long as they incorporate . . . businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot’s political opponents, or engage in piracy—all without civil liability to victims.” *Kiobel*, 621 F.3d at 150 (Leval, J., concurring).

Despite its clear rejection by other appellate courts, *Kiobel* nonetheless remains troubling, in part because it comes from the circuit where the modern era of ATS cases began. *See Filártiga*, 630 F.2d at 878. Dolly Filártiga brought that first case on behalf of her seventeen-year-old brother, who was tortured and killed by Paraguayan police. To her, the opinion signaled that the United States was a country “where human rights are respected, where there is a way to bring to justice people who have committed horrible atrocities.” Dolly Filártiga, Op-Ed., *American Courts, Global Justice*, N.Y. TIMES, March 30, 2004, at A21. The Second Circuit has traditionally provided opportunities for survivors to seek redress for violations of international law, which was exactly what the court intended when it issued *Filártiga*: “Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.” *Filártiga*, 630 F.2d at 890. As the D.C., Seventh, and Ninth Circuits have recognized, the ATS continues to allow survivors to pursue accountability—whether such violence is perpetrated at the hands of an individual or with the assistance of a corporation. This explains why it will be no surprise if the Supreme Court follows the spirit of *Filártiga* when it rules on *Kiobel* and confirms that Judge Cabranes’s decision was simply an outlier.

## REBUTTAL

*The Supreme Court Should Overturn Kiobel*Anthony Clark Arend<sup>†</sup>

On Monday, October 17, 2011, the United States Supreme Court granted certiorari in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). This is not surprising. As Professors Farbstain and Giannini explain in their excellent Opening Statement, since the Second Circuit ruled in *Kiobel* that corporate liability did not obtain under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, both the D.C. and Seventh Circuits have taken a contrary view. See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 40-41 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011).

While it is always difficult to predict how the Supreme Court will resolve the split in the circuits, I am inclined to think that the Court will reject *Kiobel* for several reasons—many of which have already been described by Farbstain and Giannini. But let me highlight two in particular.

First, I believe that the Second Circuit's decision in *Kiobel* fundamentally misinterprets the Supreme Court ruling in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In *Sosa*, the Supreme Court set forth the standard to determine whether a violation of a putative norm of customary international law rose to the level of a "tort . . . in violation of the law of nations" for purposes of the ATS. *Sosa*, 542 U.S. at 698-99 (quoting 28 U.S.C. § 1350). In the course of a discussion on "the determination whether a norm is sufficiently definite to support a cause of action," *id.* at 732, the Supreme Court notes in a footnote that a "related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.* at 732 n.20. For some reason, the Second Circuit latched onto this note to indicate that international law provides some form of standard about liability for different types of juridical persons. Referring to the footnote, the Second Circuit claims: "That language requires that we look to international law to determine our jurisdiction over ATS claims against a particular class of defendant, such as corporations." *Kiobel*, 621 F.3d at 127 (emphasis omitted). But if one

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continues to read the *Sosa* footnote, it becomes clear that the Court was not suggesting that there was an international law standard regarding the differentiation of individuals from corporations, but rather a standard about whether private actors versus state actors could be held liable. (The footnote continues on to compare Judge Edwards's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984), which detailed an insufficient consensus on whether torture by private actors violates international law, with *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (2d Cir. 1995), which found a sufficient consensus that genocide by private actors violates international law. *Sosa*, 542 U.S. at 732 n.20.) As the amicus brief of International Law Scholars in support of granting certiorari in *Kiobel* explains, the "text [of the footnote] shows that the Court was referring to a single class of non-state actors (natural and juristic individuals), not two separate classes as assumed by the *Kiobel* panel majority . . ." Brief of Amici Curiae International Law Scholars in Support of the Petition for Writ of Certiorari at 6-7, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Jul. 13, 2011), 2011 WL 2743197, at \*6-7. Indeed, as the International Law Scholars point out, the Supreme Court has previously noted that the "Alien Tort Statute by its terms does not distinguish among classes of defendants. . . ." *Id.* at 6 (quoting *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 438 (1989)).

Second, as Farbstain and Giannini note, there is ample evidence to support the proposition that international law clearly recognizes that juridical persons, such as corporations, can violate international law. Dating at least as far back as Nuremberg, international law has acknowledged that actors other than natural persons can commit violations of international law. Indeed, the International Law Scholars brief points to a long litany of recent claims to this effect:

A diverse array of treaties reveals the accepted understanding within the international community that corporations have international obligations and can be held liable for violations of international law. See, e.g., Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, art. 10(1), C.E.T.S. No. 196 (2005) ("Each Party shall adopt such measures as may be necessary, in accordance with its legal principles, to establish the *liability of legal entities* for participation in the offences set forth in Articles 5 to 7 and 9 of this Convention."); Convention against Transnational Organized Crime, Nov. 15, 2000, art. 10(1), 2225 U.N.T.S. 209 ("Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the *liability of legal persons* for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention."); Convention on Combating Bribery of Foreign

Public Officials in International Business Transactions, Dec. 17, 1997, art. 2, S. Treaty Doc. No. 105-43 (“Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the *liability of legal persons* for the bribery of a foreign public official.”); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57; International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 3, 1973 art. I(2), 1015 U.N.T.S. 243 (“The States Parties to the present Convention declare criminal those *organizations, institutions and individuals* committing the crime of apartheid.”); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3; Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251 (emphasis added in all cases). There is certainly no rule in international law that corporations, regardless of their relationship with a government, enjoy immunity for their state-like or state-related activities, as when they interrogate detainees, provide public security, work weapons systems in armed conflict, or run prisons. As noted by the Special Representative to the U.N. Secretary-General in his summary of international legal principles, the corporate responsibility to respect human rights includes avoiding complicity, which has been most clearly elucidated “in the area of aiding and abetting international crimes, *i.e.* knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime . . . .” *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 73-74, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

Brief of Amici Curiae International Law Scholars, *supra*, at 11-13.

But at the end of the day, whether corporate violations of international law can be punished in domestic courts through the remedy provided by a civil suit is a question that international law leaves to individual states. It does not matter whether there is an international law “standard” for civil liability for such violations—a point emphasized by both the D.C. and Seventh Circuits and highlighted by Farbstein and Giannini in their Opening Statement.

In short, in support of Farbstein and Giannini’s arguments, I believe that the Supreme Court will, in fact, reject the majority’s conclusion in the divided panel in *Kiobel* and hold that there is civil liability under the ATS for corporations that commit torts in violation of the law of nations.

But I would be remiss if I did not point to one interesting legal thread raised in the D.C. Circuit and in the International Legal Scholars brief—the issue of “general principles of law.” As will be recalled, the Second Circuit based its decision exclusively upon what it deemed to be rules of customary international law, concluding that there is no rule of customary international law establishing corporate liability for



purposes of the ATS. *Kiobel*, 621 F.3d at 145. The D.C. Circuit and the amicus brief for the International Law Scholars make an argument that, irrespective of whether there is a rule of customary international law, there is a general principle of law providing for corporate liability for violations of international law. See *Exxon*, 654 F.3d at 53; Brief of Amici Curiae International Law Scholars, *supra*, at 14.

Article 38 of the Statute of the International Court of Justice, as is well known, lists three main sources of international law: conventions, custom, and “general principles of law recognized by civilized nations.” Statute of the International Court of Justice, art. 38, para. 1(c). This last source is the most controversial and unclear in its meaning. See ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 49-53 (1999). One of the most widely accepted meanings of general principles is that the term refers to “general principles of law that are common to the domestic legal systems of states.” *Id.* at 49. And it is this meaning that the D.C. Circuit applies in *Doe v. Exxon*. The court notes that “the *Kiobel* majority overlooked general principles of international law as a proper source for the content of international law,” *Exxon*, 654 F.3d at 53, and concludes that “[g]eneral principles of international law . . . offer further support that corporate responsibility for the conduct of its agents under a principle of *respondeat superior* is recognized in the law of nations,” *id.* at 54.

So here is the question: will the Supreme Court venture into a discussion of general principles of law? If so, it would make a significant contribution to international legal jurisprudence on this source of international law. As far as I can tell, with the possible exception of a passing reference in a footnote in *United States v. Maine*, 475 U.S. 89, 103 n.18 (1986), the Supreme Court has never addressed the nature of general principles of law.

## CLOSING STATEMENT

*Kiobel Ignores History in Creating a Corporate Carve-Out*SUSAN FARBSTEIN & TYLER GIANNINI<sup>†</sup>

Professor Arend's excellent piece amplifies an important point: as explained in our Opening Statement, the Second Circuit's *Kiobel* decision is an outlier among the circuit courts. See *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010) (interpreting the Alien Tort Statute (ATS), 28 U.S.C. § 1350). Since the mid-1990s., courts have allowed ATS cases to proceed against corporations. While these cases have been hotly contested on numerous fronts, including the proper standard for aiding and abetting liability, the idea that corporations could be generally exempt from liability was not a central battle in ATS litigation until *Kiobel*. This may well be because the drafters of the ATS themselves never contemplated a corporate carve-out. Courts before *Kiobel* rightly understood that if a nonstate actor could be held to account for violations of international law, then that actor could be a private individual or a corporation. As Judge Richard Posner from the Seventh Circuit noted in his 2011 *Firestone* opinion, "All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable." *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011).

Of perhaps equal importance, the *Kiobel* opinion is deeply inconsistent with the history, text, and purpose of the ATS. Our amicus brief on behalf of legal historians, submitted in support of the petition for certiorari in *Kiobel*, explains why the First Congress crafted the ATS. 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, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Jun. 17, 2011), 2011 WL 2472743. The statute, enacted in 1789, was a significant component of the Founders' efforts to ensure that the young United States would comply with its obligation to uphold, respect, and enforce the law of nations. The Framers sought a federal forum to discharge this duty because states—and state courts in particular—had proven ineffective. Through the statute, the drafters intended to create a meaningful civil remedy

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(“tort only”) for aliens harmed by violations of the law of nations. The statute extends this remedy to “all causes,” confirming congressional intent to provide plaintiffs with broad remedies. Tellingly, the text of the ATS restricts the identity of the plaintiff but places no limit on the type of defendant subject to suit. To now read such a corporate exception into the statute runs counter to both the Framers’ broad remedial intent and the statute’s plain text.

Juridical entities were held liable for violations of the law of nations in national courts before and after the passage of the ATS. As Judge Posner noted, “if precedent for imposing liability for a violation of customary international law by an entity that does not breathe is wanted, we point to *in rem* judgments against pirate ships.” *Firestone*, 643 F.3d at 1021 (citing *The Malek Adhel*, 43 U.S. (2 How.) 210, 233-34 (1844); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40-41 (1825)). Furthermore, the East India Company was subject to tort liability long before the ATS’s enactment. *See, e.g., Skinner v. East India Co.*, (1666) 6 State Trials 710 (H.L.) 711 (Eng.) (allocating losses against the company for violations of the law of nations because failure to remedy acts “odious and punishable by all laws of God and man” would constitute a “failure of justice”).

Attempts to hold corporations liable under the ATS emerged in the mid-1990s. For example, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002), was filed in New York in 1993. Like many of the early modern corporate ATS cases, it involved allegations that a corporation entered into a business relationship with a repressive regime to facilitate natural resource extraction knowing that human rights abuses would result. The plaintiffs represented a class of Ecuadorians who claimed that Texaco’s business operations had seriously damaged the environment and their health. In response, the defendant asserted that a U.S. court was not an appropriate forum, and argued for dismissal on the ground of *forum non conveniens*. Critically, as in many other corporate suits that would follow, primary litigation questions concerned not whether the corporate defendant could be held liable, but where. *Id.* at 475; *see also Bigio v. Coca-Cola Co.*, 239 F.3d 440, 446 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99-108 (2d Cir. 2000); *Jota v. Texaco, Inc.*, 157 F.3d 153, 158-59 (2d Cir. 1998).

In 1997, *Doe v. Unocal Corp.* became the first corporate case to survive a motion to dismiss. 395 F.3d 932, 962 (9th Cir. 2002). The plaintiffs, Burmese villagers, asserted that Unocal hired the Burmese military to provide security for a gas pipeline despite its knowledge that the military had a record of human rights abuse. The Burmese

villagers alleged that they were subject to murder, forced labor, rape, and torture at the hands of the Burmese military when Unocal and its partners proceeded to construct the pipeline through their villages. The battleground in *Unocal* was not whether corporations could be held accountable for violations of international law, but rather under what legal standard. Specifically, the litigants and the court confronted the question of the standard of liability for corporations that aid and abet violations of international law. This debate included several questions that became central to many corporate ATS cases in subsequent years: whether the mens rea for aiding and abetting should be drawn from international law or federal common law, and whether the applicable standard should be purpose or knowledge. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009); *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254 (2d Cir. 2007).

Prior to *Kiobel*, the modern era of corporate ATS cases had centered on these unresolved debates. For more than a decade, numerous courts considered ATS cases without questioning the foundational issue of whether corporate liability was permissible under the statute. See, e.g., *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Mujica v. Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2009); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005); *Herero People's Reparations Corp. v. Deutsche Bank*, 370 F.3d 1192 (D.C. Cir. 2004); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003); *Doe*, 395 F.3d at 932, *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

Even the Second Circuit, prior to *Kiobel*, routinely adjudicated ATS suits against corporations. See, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Khulumani*, 504 F.3d at 254; *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Aguinda*, 303 F.3d at 470; *Bigio*, 239 F.3d at 440; *Wiwa*, 226 F.3d at 88; *Jota*, 157 F.3d at 153. In short, the modern era of corporate ATS cases prior to *Kiobel* parallels the much earlier history: simply excluding an important class of defendants from suit was anathema to holding responsible parties to account.

One important Second Circuit case, *Wiwa v. Royal Dutch Petroleum Co.*, was filed in 1996 on behalf of Nigerian plaintiffs and presented facts substantially similar to those in *Kiobel*. 226 F.3d at 88. The plaintiffs sued the company for conspiring with the Nigerian military and

supporting the military's commission of human rights violations, including the violent repression and extrajudicial killing of peaceful protestors who opposed environmental degradation. While Royal Dutch Petroleum maintained it was not responsible for the alleged violations, dismissal on the grounds that corporations were generally exempt from liability for human rights violations was never contemplated. In 2009, Royal Dutch Petroleum agreed to settle plaintiffs' claims for \$15.5 million.

The 2010 dismissal of *Kiobel* thus presents an especially striking contrast. The outcomes for the *Wiwa* and *Kiobel* plaintiffs could not be more different: one set received a modicum of justice through a settlement; the other, nothing. The Second Circuit's ruling, which denied the *Kiobel* plaintiffs an opportunity even to seek a remedy for their injuries, belies the history of the statute, its broad remedial purpose, and fifteen years of jurisprudence. The decision creates an exemption from liability solely through incorporation. The Supreme Court should correct this error and bring the case law back in line with both the history of the ATS and its modern jurisprudence.

## CLOSING STATEMENT

*Judge Leval Got It Right*

ANTHONY CLARK AREND

It is difficult to add anything to Professors Giannini and Farbstain's succinct, well-argued Closing Statement. All three of us agree that *Kiobel v. Royal Dutch Petroleum Co.* is an outlier and that the Supreme Court should reverse the Second Circuit's conclusion that corporate liability does not obtain under the Alien Tort Statute (ATS). 621 F.3d 111 (2d Cir. 2010) (interpreting 28 U.S.C. § 1350). Judge Leval, in his concurrence from the majority in the panel decision on *Kiobel*, sums it up very well. He concludes:

I cannot, however, join the majority's creation of an unprecedented concept of international law that exempts juridical persons from compliance with its rules. The majority's rule conflicts with two centuries of federal precedent on the ATS, and deals a blow to the efforts of international law to protect human rights.

*Kiobel*, 621 F.3d at 196 (Leval, J., concurring only in the judgment). Despite the Supreme Court's reluctance to tread too deeply in the water of the ATS, I expect they will reject the lower court's ruling on corporate liability. Such a decision from the Court will open federal courts to many similar suits and prevent corporations from hiding beyond a veil that has been the recent creation of only a single appellate court.

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