



**The Supreme Court and Human Rights Litigation:  
What is at stake in *Kiobel v. Royal Dutch Shell Petroleum*?**

- On October 1, 2012, the first day of the fall term, the Supreme Court will hear arguments in *Kiobel v. Royal Dutch Petroleum*, a lawsuit that seeks to hold Shell Oil accountable for its alleged complicity in the killing of the “Ogoni nine,” a group of Nigerian environmental activists.
- The Court will decide an issue fundamental to human rights litigation: ***whether victims of human rights abuses committed outside of the U.S. can continue to bring claims in U.S. courts when their tormentors are living in our country.***
- The Court will interpret one of our oldest laws: the Alien Tort Statute (ATS), which Congress enacted in 1789 to give the federal courts jurisdiction over tort claims by non-U.S. citizens for violations of international law. Early on, the U.S. made a commitment to international law and human rights: George Washington opposed the cruel or inhuman treatment of British soldiers.
- Today, as in 1789, the ATS protects the U.S. from becoming a safe haven for international criminals, and it gives victims their day in court. In 2012, the world’s war criminals, torturers, and *génocidaires* often evade justice by fleeing abroad. According to Amnesty International, more than 1000 human rights abusers have sought refuge in the U.S. For the past three decades, federal courts have recognized that human rights abusers who come to the U.S. to live or do business can be held liable to their victims under the ATS.
- The modern era of human rights litigation began with the 1980 case, *Filártiga v. Pena Irala*. Joelito Filártiga, the 17-year-old son of a Paraguayan opposition figure, was tortured and killed by Paraguayan police. The Filártiga family sought justice in Paraguay, but the courts were closed. For daring to bring a case, their lawyer was shackled to a wall and disbarred. But when Dolly Filártiga learned that her brother’s torturer had fled to New York, she brought suit under the ATS. In a landmark ruling, a federal appeals court held that torturers, like pirates, had become *hostis humani generis*—enemies of all mankind—and could be sued in federal court for violating international law under the ATS, wherever the torture occurred.
- In 1991, Congress reinforced the use of the ATS in human rights cases by passing the Torture Victim Protection Act (TVPA). While the ATS only applies to aliens, the TVPA gives both U.S. citizens and foreign nationals the right to sue for torture and extrajudicial killing.
- In 1998, the Center for Justice & Accountability (CJA) was founded with a primary mission of using the ATS and the TVPA to hold human rights abusers accountable when they have sought safe haven in the U.S. CJA’s clients, many of whom are U.S. residents and citizens, have brought successful cases against perpetrators from more than a dozen countries including Chile, Haiti, El Salvador, and Somalia.
- Less than a decade ago, the Supreme Court upheld the constitutionality of the ATS in *Sosa v. Alvarez-Machain*, a case concerning the forcible abduction of a Mexican national in Mexico, by a former Mexican official. The Court ruled that the ATS applies to a core group of international violations that are universally condemned—regardless of where they are committed—including genocide, slavery, and war crimes.

- Now, despite decades of case law to the contrary, Shell is arguing that the ATS does not apply to human rights abuses committed on foreign soil. Shell is asking the Court to ignore its own precedent in *Sosa* and to rewrite the law. ***If the Court accepts these arguments, human rights abusers would be able to travel freely and shelter their assets in the U.S.*** Deposed dictators like Ferdinand Marcos and brutal generals like Mohamed Ali Samantar, who presided over human rights abuses in Somalia in the 1980s, would be allowed safe haven.
- What is at stake is monumental because the ATS is the only avenue for most human rights victims to hold perpetrators accountable. In the home countries of many victims, there is no legal forum available to seek justice. The Supreme Court is considering removing the U.S. as their last resort.

### **Background on the *Kiobel* Case**

- The *Kiobel* case was filed in 2002 by 12 Nigerian plaintiffs, all legal residents of the U.S. who have received political asylum. The lead plaintiff, Esther Kiobel, is the wife of the late Dr. Barinem Kiobel, one of the Ogoni Nine, a group of Nigerian environmental activists who protested the devastating impact of Shell’s oil operations on the Ogoni people of the Niger Delta. The Ogoni Nine were detained by the Nigerian military *junta* on spurious charges, held incommunicado, tortured, and hanged following a sham trial in November 1995.
- In 2002, Esther Kiobel and the other plaintiffs brought suit in federal court in New York against Royal Dutch Petroleum Co.; Shell Transport & Trading Co., Plc.; and its wholly owned subsidiary Shell Petroleum Development Company of Nigeria Ltd. (hereinafter, “Shell”). The plaintiffs allege that Shell aided and encouraged the Nigerian government to summarily execute the activists in a bid to suppress environmental protests against Shell’s oil operations. Specifically, they allege that Shell bribed and tampered with witnesses and paid Nigerian security forces that attacked Ogoni villages.
- After Shell moved to dismiss the case, the lower court judge, Kimba Wood, ruled in the fall of 2006 that Shell could be held liable for violations of international law including torture, arbitrary detention, and crimes against humanity, but not for aiding and abetting extrajudicial killing.
- Both parties appealed the decision to the U.S. Court of Appeals for the Second Circuit. On September 17, 2010, a majority of the appeals panel (Judges Dennis Jacobs and José Cabranes) issued a sweeping opinion—over a vigorous dissent by Judge Pierre Leval—holding that **corporations could not be sued under the ATS, invoking a novel theory that international law does not hold corporations liable for human rights crimes.**
- The plaintiffs brought their case to the Supreme Court on this narrow question—whether a corporation could be sued under the ATS for violating international law. But Shell saw an opportunity to challenge the geographical scope of the ATS. At oral argument in March 2012, Justices Alito, Kennedy, and Roberts raised several questions on the law’s global reach. **The Court called for briefing and reargument on this broader question: whether the ATS will continue to apply to human rights abuses committed within the territory of a foreign country.**

### **CJA, *Kiobel* and Human Rights Litigation**

- CJA is an international human rights organization dedicated to deterring torture and other severe human rights abuses around the world and advancing the rights of survivors to seek truth, justice

and redress. CJA uses litigation to hold perpetrators individually accountable for human rights abuses, develop human rights law, and advance the rule of law in countries transitioning from periods of abuse. CJA currently represents over 200 survivors of torture and other human rights abuses and has brought successful cases against human rights abusers from Chile, El Salvador, Haiti, Honduras, Peru and Somalia who have sought safe haven in the U.S.

- Paul Hoffman of the law firm Schonbrun, DeSimone, Seplow, Harris, Hoffman & Harrison, LLP is arguing the case on behalf of the plaintiffs. Mr. Hoffman is one of the founders of CJA and a recipient of the Center for Justice & Accountability's *Judith Lee Stronach Human Rights Award*.
- CJA filed an amicus brief with the Supreme Court in *Kiobel v. Royal Dutch Shell Petroleum* on behalf of 12 of our clients and Dolly Filártiga. The brief argues that ATS cases often have a strong nexus to the United States because many foreign human rights abusers and their victims live here. These cases also serve an important purpose. They further our country's longstanding commitment to denying safe haven to human rights abusers and the companies that aid them. Because the fear of persecution stops many survivors from seeking justice back home, the ATS provides the only meaningful remedy for many human rights abuses.
- CJA and our clients have brought successful ATS cases against some of the world's worst human rights abusers who managed to find refuge in the United States including:
  - ***Former Somali Defense Minister General Mohamad Ali Samantar***, who retired to Fairfax, Virginia, oversaw the military of Somalia during the brutal excesses of the Siad Barre regime, including the bombing of Hargeisa where no fewer than 5,000 Somali citizens were killed and nearly half a million displaced. After a trip to the U.S. Supreme Court in 2010 on immunities issues (*Yousuf v. Samantar*), General Samantar conceded liability under the ATS for his role in directing soldiers who committed torture, arbitrary detention, crimes against humanity and war crimes.
  - ***Former Salvadoran Defense Minister, General Eugenio Vides Casanova***, who retired to Miami, Florida, was responsible for military forces who killed four U.S. churchwomen in El Salvador in 1980, and who tortured our Salvadoran clients. Vides Casanova was found liable for the torture of our clients under the ATS and TVPA, and, in 2012, was ordered to be deported from the United States for his role in these abuses.
  - ***Former Haitian Colonel Carl Dorélien***, who was responsible for the infamous Raboteau Massacre, escaped justice in Haiti and retired to Florida where he won the state lottery. Dorélien was found liable for crimes against humanity and other abuses under the ATS.
  - ***Former Chilean Death Squad Leader, Colonel Fernandez Larios***, who also retired to Miami, Florida, participated in Pinochet's notorious "Caravan of Death," in which he was responsible for the torture and murder of Chilean economist Winston Cabello. Cabello's family sued in U.S. court and Fernandez Larios was found liable under the ATS for crimes against humanity, torture, and extrajudicial killing.
  - ***Former Salvadoran Captain Alvaro Saravia***, one of the architects of the assassination of Archbishop Oscar Romero, retired to Modesto, California. Saravia was found liable for crimes against humanity under the ATS. Although Saravia fled the United States, CJA's ATS suit led him to confess to his role in the killing, and catalyzed a national discussion in El Salvador.

- **Former Haitian Death Squad Leader, Emmanuel "Toto" Constant**, moved to Queens, New York where he became a mortgage broker. Constant was found liable under the ATS for torture and crimes against humanity, including the systematic use of sexual violence against women. In 2008, Constant was convicted of mortgage fraud and the judge considered Constant's human rights violations—brought to light in CJA's ATS suit—as a factor in his sentencing.

### Key Legal Arguments in *Kiobel v. Royal Dutch Shell*

**The Supreme Court has already decided that the ATS applies to human rights abuses that were committed on foreign soil.**

- Eight years ago, in *Sosa v. Alvarez Machain*, the Supreme Court ruled that the ATS applies to tort claims against defendants present in the United States for a narrow set of universally condemned international law violations, without any geographic limitation.
- The Court ruled that a **plaintiff may only sue under the ATS for international law violations that are "specific, universal, and obligatory" and have achieved a universally recognized status comparable to piracy in the 18th Century.**

**Limiting the ATS to abuses on U.S. soil would undermine our country's longstanding commitment to deny safe haven to human rights abusers.**

- Civil liability is itself a denial of safe haven. It ensures that deposed dictators and their henchmen cannot abuse their own citizens, plunder their nation's treasury, and then enjoy a comfortable retirement in the United States.
- The ATS empowers refugees who live in the U.S. to hold accountable their torturers and killers who also live here.

**Congress gave the ATS the same global reach as the international laws it was designed to enforce.**

- The ATS enforces global rules of international law that are already binding in foreign countries: it does not project U.S. law or values into foreign territory.
- The First Congress intended the ATS to enforce international law, and international law does not stop at the U.S. border. Congress clearly intended the ATS to apply to piracy overseas. And like piracy, today's core human rights crimes—*e.g.*, genocide, slavery, or crimes against humanity—are worldwide prohibitions.

**A territorial limit on human rights litigation is a solution in search of a problem. ATS suits are rare. Not one has provoked a major international incident. And only the strongest cases alleging serious abuses survive the first stages of litigation.**

- A survey of all ATS cases since the *Sosa* decision in 2004 found only 77 published decisions, and 25 unpublished decisions.<sup>1</sup> To put this in perspective, 2,483 patent suits were filed in *just six months*

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<sup>1</sup> Brief of the Rutgers Law School Constitutional Litigation Clinic at 13-20, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. 2012).

between October 1, 2011 and March 31, 2012.<sup>2</sup> ATS cases represent a small sliver of the total federal docket for civil litigation, which saw 289, 252 cases filed in district court in 2011.<sup>3</sup>

- Federal courts only allow the strongest and most serious allegations under the ATS to proceed. There are already well-established legal doctrines and procedural rules for dismissing ATS claims that might lack merit or risk international tension. According to a 2004 study by Professor K. Lee Boyd, 77.2% of the 92 ATS or TVPA cases filed between 1980 and 2004 were dismissed under these doctrines.<sup>4</sup>

### **U.S. courts routinely hear tort (i.e. personal injury) suits involving overseas conduct under the bedrock principle that tort liability follows the defendant wherever he or she travels.**

- There is nothing unusual about U.S. courts hearing cases against U.S. residents for injuries they inflict overseas. For more than three hundred years, British and U.S. common law has recognized that all torts are transitory: a defendant may be sued for his wrongful acts wherever he is found.
- Transnational tort suits are common in the U.S. If a New York resident gets into a car accident in Canada, he can be sued in New York. If a tourist is injured while on safari in South Africa, she can sue a tour operator based in California.

### **The U.S. is in good company when it comes to imposing civil liability for human rights abuses committed overseas.**

- At least twenty-one other countries—including Argentina, Canada, France, Germany, Italy, and Spain—have laws on the books that authorize civil jurisdiction for violations of international law that are committed by a foreign person against a foreign victim in a foreign territory.
- As Justice Breyer noted in *Sosa*, under international law all states have universal criminal jurisdiction to prosecute certain human rights abuses—including genocide, war crimes, and crimes against humanity—regardless of where they occur. This “universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.”<sup>5</sup> This is because many states in the world combine criminal and tort law, by permitting victims to recover civil damages in criminal cases.

### **Human rights abusers who take refuge in the U.S.—whether they are individuals or corporations—should bear the cost of healing those they injure.**

- Whenever possible, the cost of healing survivors and providing refugees with a new life in the U.S. should be borne by the human rights abuser, not by the victim or the public. The U.S. is the world’s most generous country in receiving refugees: every year, we admit tens of thousands of asylum seekers. And the U.S. public spends millions annually to provide treatment to survivors under the Torture Victim Relief Act. We spend many millions more on foreign aid to countries destabilized by mass atrocities. Why should human rights abusers be free to live in America without having to pay for the injuries they inflict?

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<sup>2</sup> Patstats: U.S. Patent Litigation Statistics, University of Houston Law Center, <http://patstats.org/Patstats3.html>.

<sup>3</sup> Judicial Business of the United States Courts, Summary Fiscal Year 2011, available at <http://www.uscourts.gov/Statistics.aspx>.

<sup>4</sup> K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT’L L. J. 1, 2 (2004).

<sup>5</sup> *Sosa v. Alvarez Machain*, 542 U.S. 692, 763 (2004) (Breyer, J., concurring).