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KIOBEL AND CORPORATE SOCIAL RESPONSIBILITY

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On October 1, 2012, the United States Supreme Court will rehear arguments in a landmark case concerning the involvement of multinational corporations in overseas human rights abuses. The case (*Kiobel v. Royal Dutch Petroleum*) was brought by Nigerian plaintiffs against Shell, the British/Dutch oil multinational, alleging that the company aided and abetted the Nigerian military dictatorship in the 1990s in the commission of gross human rights violations, including torture, extra-judicial execution, and crimes against humanity.

The implications of the case for human rights go well beyond multinationals domiciled in countries other than the U.S., however. For Shell seeks not only to dismiss the claims against it, but also to negate the statutory basis making it possible to use U.S. courts as a forum to adjudicate civil liability for gross human rights violations committed abroad—even when those violations are committed by U.S. nationals, and even if the Americans are natural persons.

At last count, 82 amicus briefs have been submitted to the Supreme Court, on both sides or in support of neither party.¹ They address most every conceivable question of law and interpretation. There is no value added in my going over the vast ground covered in them. Instead, my aim is to stimulate a broader discussion by asking how, if at all, the issue of corporate social responsibility plays into the mix of Shell's legal strategy and tactics. But first, some background.

Kiobel was brought under the 1789 Alien Tort Statute (ATS), which permits foreign nationals to bring civil suit in U.S. federal courts for violations of the law of nations and U.S. treaty obligations. Long a dormant statute, its modern era commenced in 1980 when the Second Circuit Court of Appeals ruled that the ATS constituted a valid basis on which to bring charges of torture committed in Paraguay, by a Paraguayan police official, against a Paraguayan citizen. Access to judicial remedy in Paraguay had been denied by the dictatorship of General Alfredo Stroessner, and U.S. jurisdiction was made possible when the accused was found to be residing in New York City. That case, *Filártiga v. Peña-Irala*, has been to global human rights litigants what *Brown v. Board of Education* was for advocates of racial integration domestically. A

decade and a half later, human rights lawyers successfully extended the reach of the statute to include corporations as legal persons. The first such case alleged that California-based Unocal, since bought by Chevron, aided and abetted the Burmese military in the commission of forced labor, rape, torture and extrajudicial killings in the construction of a pipeline that runs across Burma into Thailand. The same charges were brought against the French oil major Total, the actual operating company of the joint venture with Unocal, but they were dismissed because Total lacked a sufficient business presence in the United States for U.S. courts to exercise jurisdiction. *Doe v. Unocal* was settled by the parties just prior to a hearing by the full Ninth Circuit Court of Appeals in 2004. Other such suits followed.

The Supreme Court has already heard *Kiobel* once, on February 28, 2012. The question before it then was whether the ATS applies to corporate entities, or only to natural persons. The question arose because circuit courts had split. The Second Circuit brought the issue to the fore when it dismissed the case against Shell in *Kiobel* in 2010, a sharply divided opinion holding that the ATS did not apply to companies. The plaintiffs appealed.

Not long into the Supreme Court oral arguments, however, the focus shifted to the ATS's extraterritorial reach. Paul Hoffman, the plaintiffs' lead attorney, had just finished the second sentence of his opening presentation on corporate liability when Justice Anthony M. Kennedy interrupted him. Quoting from an amicus brief in support of Shell, submitted on behalf of Chevron and several other multinational corporations, Kennedy questioned whether any other jurisdiction in the world "permits its courts to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection." Justice Samuel A. Alito, Jr., added "there's no particular connection between the events here and the United States...What business does a case like that have in the courts of the United States?" Chief Justice John G. Roberts pushed this line of questioning to its limits: "If there is no other country where this suit could have been brought, regardless of what American domestic law provides, isn't it a legitimate concern that the suit itself contravenes international law?"²

But extraterritoriality was not the issue before the Court; corporate liability was. Extraterritoriality had not been briefed. Thus, shortly after the hearing the Court issued an order directing the parties to reargue the case during its 2012-2013 term, and to file supplemental briefs on this question: "Whether and under what circumstances the Alien Tort Statute allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

What is my interest in this case? I would not be involved in it at all were it not for the fact that Shell's initial Supreme Court brief and its lead attorney's oral argument misconstrued a central finding of a United Nations report I had authored. Let me explain the context. From 2005 to 2011, I served as the UN Secretary-General's Special Representative for Business and Human Rights. My initial assignment was to "identify and clarify" international standards and best practices concerning the respective responsibilities of states and business enterprises in relation

to human rights. Over the course of the mandate I convened nearly fifty international consultations and conducted extensive research, some of it with the *pro bono* assistance of law firms from eighteen countries. I submitted a comprehensive mapping of existing standards to the UN Human Rights Council in 2007, which then asked me to develop recommendations for how to strengthen the international human rights regime to provide greater protections against corporate-related human rights harm. That ultimately led to my drafting what have become known as the UN Guiding Principles on Business and Human Rights, which the Human Rights Council, in an unprecedented step, endorsed unanimously in June 2011. Key elements of the Guiding Principles have been incorporated or otherwise referenced by a wide array of international and national standard setting bodies—including in the “Reporting Requirements on Responsible Investment in Burma” issued by the U.S. government for American investors planning to conduct business in that country now that some sanctions imposed on it have been suspended. Throughout my six-year mandate, I enjoyed strong support within all stakeholder groups, including the business community.

Here is the reference to me by Kathleen Sullivan, Shell’s lead attorney, in her oral argument before the Supreme Court: “We cite the U.N. special representative, saying ‘I have looked at the international human rights instruments that are out there, and I find no basis for corporate liability.’ That’s the U.N. [speaking], not Congress.”³ Similarly, Shell’s brief argues that this statement supports their claim that “international-law sources on the specific offenses at issue refute corporate responsibility.”⁴ But there is a problem with that inference. The quotation is taken from a section of my 2007 report that specifically surveyed UN human rights treaties. There I did say that “the treaties do not address direct corporate legal responsibilities explicitly,” and “it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations.” But the UN human rights treaties do not comprise the entire corpus of relevant international law; there are other bodies of treaty law, and the ATS specifically recognizes customary international law. Thus, in the section of my report that immediately precedes the discussion of the UN treaties, entitled “Corporate Responsibility and Accountability for International Crimes,” I noted evidence of “an expanding web of potential corporate liability for international crimes.” And in the report’s conclusion I stressed that “the most consequential legal development” in business and human rights is “the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards.”⁵ In short, my findings do not support the claim Shell attributes to them.

Sullivan’s partial representation of my findings also overlooked a comment on this very point by the Court of Appeals for the District of Columbia Circuit. Exxon Mobil had made the same claim in its response to a case brought by plaintiffs in Aceh, Indonesia, which the D.C. Circuit Court corrected in its July 2011 ruling: “Exxon’s reliance on [the Special Representative’s report] is misplaced. Its selective quotation from the report overlooks the salient point...[T]he report points to the ‘extension of responsibility for international crimes to

corporations under domestic law’ and specifically recognizes that the ATS provides such a jurisdiction against corporations.”⁶

To set the record straight in *Kiobel*, I submitted an amicus brief to the Supreme Court in the second round of briefing, in support of neither party. However, as a long-time proponent of corporate social responsibility practices and author of the UN Guiding Principles, my concerns rose anew when I read Shell’s most recent brief, on the issue of extraterritoriality (“Supplemental Brief for Respondents”—hereafter “Supplemental Brief”). This is so on two counts.

First, Shell’s attorneys are now seeking to persuade the Supreme Court to issue an extraordinarily far-reaching ruling: that the ATS does not apply to corporations, including U.S. firms; that as it currently stands the ATS violates international law; and that, therefore, even for natural persons its reach should be pulled back to cover only violations committed within the jurisdiction of the United States and “possibly” on the high seas. Had this view held all along, there would have been no *Filártiga*, no successful Holocaust survivors’ claims, no statutory basis for civil action by foreign victims even against U.S. nationals for gross human rights violations abroad, whether committed by legal persons or natural persons. What is more, there might never have been the knock-on effects of ATS jurisprudence for legal developments in other countries, and also for the growth of voluntary corporate social responsibility initiatives at home and abroad, adopted by companies at least in part to avoid ATS-type liability.

Second, some of the arguments in support of this expansive aim include more of what the D.C. Circuit Court described as “selective quotation” as well as other misconstructions. Consider just one illustration of each regarding extraterritoriality.

Shell’s Supplemental Brief argues that the ATS should not have any extraterritorial reach. Justice Alito’s comment above, that there is no particular connection between the *Kiobel* events and the United States, implies that the nationality of the parties could be a basis for delimiting the statute, and a Supreme Court ruling to this effect would lead to dismissal of the case against Shell. But the Supplemental Brief is far more ambitious: it also seeks to exclude the overseas conduct of U.S. firms from the statute’s reach—and even acts by individual Americans that rise to the level of international crimes. On what grounds? The Supplemental Brief contends that the ATS was intended to reduce friction between the United States and other countries, but ends up increasing it by projecting U.S. jurisdiction into their midst. As evidence it cites, among other things, the amicus brief submitted by Shell’s two home countries, the United Kingdom and Netherlands. But that amicus doesn’t go nearly as far as Shell’s Supplemental Brief in seeking to undo the ATS. The Supplemental Brief also cites, not once but twice, complaints by South Africa in 2003 concerning a case brought under the ATS against American and European corporations that operated in that country during the apartheid era (the *Khulumani* case). This bears closer scrutiny. It is true that the South African government initially did complain that they had their own ways of dealing with the legacy of apartheid and objected to U.S. courts getting into the middle of things. But the Supplemental Brief nowhere refers to the fact that South Africa

changed its mind. A letter subsequently sent by South Africa's Minister of Justice to the U.S. judge hearing *Khulumani*, dated September 1, 2009, stated that "the Government of the Republic of South Africa, having considered carefully the judgement of the United States District Court, Southern District of New York, is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law."⁷ What accounts for the reversal? The plaintiffs modified the complaint to focus only on companies that allegedly made specific contributions to the practice of apartheid, which is considered a crime against humanity, excluding those that merely operated in the country, and the judge threw out the charges against the latter. The plaintiffs were satisfied, and so was the South African government. Whatever the demerits of the case might be, creating friction between the United States and South Africa is not among them. And it suggests that where friction does occur, ways can be found to manage it. In this context, it is also worth noting the amicus brief submitted by the Argentine Republic in *Kiobel*, stating that "[t]he *Filartiga* decision," which Shell seeks to reverse, "was a significant step toward ending the impunity of human rights violators in repressive regimes, and has been applauded as such in Latin America." Shell's Supplemental Brief dismisses this without a substantive response.

Another argument the Supplemental Brief advances against the ATS's extraterritorial reach is that even when suits are ultimately dismissed they can do damage to the companies involved in the meantime, thereby giving the companies "strong incentives to divest from foreign nations, disserving U.S. foreign policy interests and harming foreign beneficiaries of that investment."⁸ As a case in point, the Brief cites *Presbyterian Church of Sudan v. Talisman Energy*, a Canadian oil company that operated in Sudan during the genocide and civil war. It is true that an ATS suit was brought against Talisman and was eventually dismissed. It is also true that Talisman's stock price came under considerable pressure and that it eventually sold its interests in Sudan. But the imputed cause and effect relation between those two facts is problematic. I draw here on a source referenced by the Supplement Brief itself (Stephen J. Kobrin, "Oil and Politics: Talisman Energy and Sudan," 36 N.Y.U. J. INT'L L. & POL. 425 (2004)). The suit against Talisman was brought in November 2001. According to Kobrin, Talisman's stock began to drop within weeks after the deal to enter Sudan was announced in August 1998. Again according to Kobrin, Talisman's Sudan venture triggered what he calls "a tidal wave of protest" against the company, including public criticism from then U.S. Secretary of State Madeleine Albright; strong public concerns expressed by Canada's Foreign Minister at the time, Lloyd Axworthy, who appointed a high-profile fact-finding mission and threatened sanctions if it was found that Talisman's presence in Sudan was contributing to the conflict or human rights abuses; and a well-orchestrated campaign by activists and institutional investors—most of which took place in the two years before the ATS suit was brought. Indeed, the overall empirical evidence for ATS-induced divestment and its imputed disservice to the U.S. and host countries is scant. Nor is there any indication that Shell is considering divesting from Nigeria because plaintiffs there have brought two ATS suits—the first of which, *Wiwa*, was settled.

The substance of Shell’s legal arguments is hotly contested by many observers, as witnessed by the avalanche of amicus briefs the case has generated. But I want to turn to the issue of corporate social responsibility and ask how it relates, if at all, to the *Kiobel* case. The corporate responsibility to respect human rights is one of the three pillars of the UN Guiding Principles on Business and Human Rights—the other two being the state duty to protect against human rights abuse by third parties, including business; and the need for victims to have greater access to effective remedy, both judicial and non-judicial. The Guiding Principles provide a means to help narrow the widening gaps between the scope and impact of global economic forces and actors, and the capacity of societies to manage their adverse consequences. The corporate responsibility to respect human rights entails not infringing on the rights of others, and addressing harms that companies cause or contribute to. The American Bar Association is one of scores of entities to have endorsed the Guiding Principles. When it did so it urged not only governments and the private sector but also the legal community “to integrate into their respective operations and practices the United Nations Framework and Guiding Principles.”⁹

But what would the corporate responsibility to respect human rights involve in a case like *Kiobel*? What would it imply for a corporation that proclaims and aspires to socially responsible conduct? My professional encounters with Shell suggest that it has such commitments and takes them seriously. Of course, the company must be free to argue, in the courts and elsewhere, that it met both the law and its wider responsibilities to respect human rights whenever it believes that to be the case. Yet questions remain. Should the corporate responsibility to respect human rights remain entirely divorced from litigation strategy and tactics, particularly where the company has choices about the grounds on which to defend itself? Should the litigation strategy aim to destroy an entire juridical edifice for redressing gross violations of human rights, particularly where other legal grounds exist to protect the company’s interests? Or would the commitment to socially responsible conduct include an obligation by the company to instruct its attorneys to avoid such far-reaching consequences where that is possible? And what about the responsibilities of the company’s legal representatives? Would they encompass laying out for their client the entire range of risks entailed by the litigation strategy and tactics, including concern for their client’s commitments, reputation, and the collateral damage to a wide range of third parties?

I don’t know what the correct answers to these questions are, but because the stakes are so high *Kiobel* may be the ideal case for starting the conversation. What I do know is that if, on top of the many other reputational and legal challenges it has faced over the years, Shell also ends up being held responsible for so radically constricting the ATS, its road back to the corporate social responsibility fold will be long and hard.

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NOTES

* The views expressed herein are the author's and do not necessarily reflect those of any institution with which he is affiliated.

¹ All briefs are available at <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al/>.

² See Transcript of Oral Argument at 3, 7 and 8, respectively, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf/.

³ Transcript of Oral Argument at 49.

⁴ Brief for Respondents at 8, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. Supreme Court, January 27, 2012), available at <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al/>.

⁵ These quotations are from "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts," *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, UN Document A/HRC/4/035 (19 February 2007), paragraphs 41, 44, 22 and 84, respectively.

⁶ *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 49 (D.C. Cir. 2011).

⁷ Letter from Jeffrey Thamsanqa Radebe, MP, Minister of Justice and Constitutional Development, Republic of South Africa, to The Honorable Judge Shira A. Scheindlin, United States District Court, Southern District of New York, transmitted through David B. Goldstein of Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., Attorneys at Law, available at <http://www.khulumani.net/khulumani/documents/file/12-min.justice-jeff-radebe-letter-to-us-court-2009.html>.

⁸ Supplemental Brief for Respondents at 52, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. Supreme Court, August 1, 2012), available at <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al/>.

⁹ <http://www.abanow.org/2012/01/2012mm109/>.