KIOBEL V. SHELL: THE STATE OF TORT LITIGATION UNDER THE ALIEN TORT STATUTE

BY

RYAN CASTLE[1]

I. BACKGROUND OF THE ALIEN TORT STATUTE

One of the oldest acts passed by Congress, the Judiciary Act of 1789 contained a small provision meant to avoid international conflict and assuage foreign government concerns over whether US federal courts would protect the rights of their nationals while in the US.[2] The Alien Tort Statute (ATS) briefly reads: "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."[3] The ATS gives subject matter jurisdiction to hear claims by non-US citizens for a civil wrong committed against them under international law.

The ATS was created in direct response to the Marbois incident of 1784, in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary to the French Legation in Philadelphia.[4] Due to lack of state legislative efforts to provide a remedy, the federal government attached the ATS to the Judiciary Act.[5]

Since its passage, the ATS has been utilized by plaintiffs sparingly,[6] until the watershed *Filartiga v. Pena-Irala* case in 1980.[7] In that case, Paraguayan plaintiffs residing in the US brought a civil claim under the ATS against a Paraguayan ex-police sergeant, who was living in New York, for the torture and death of their son that occurred in Paraguay.[8] The Second Circuit held that ATS claims could be brought for human rights abuses recognized by the current international community, not just those of 1789.[9] A small flood of human rights cases under the ATS ensued, culminating in *Sosa v. Alvarez-Machain* in 2004.[10] In *Sosa*, the Supreme Court held that jurisdiction under the ATS exists if plaintiffs plead human rights violations with "no less definite content and acceptance among civilized nations than

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[1] J.D. Seattle University Law School; M.A. American University in Cairo. Ryan is also an Editor for *Global Gavel*. He can be reached at castler@seattleu.edu.

[2] This legislative purpose is heavily debated, but the above statement attempts to provide the most general wording possible. *See also* Colin Kearney, *International Human Rights—Corporate Liability Claims not Actionable Under the Alien Tort Statute—Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111(2d Cir. 2010), 34 SUFFOLK TRANSNATIONAL L. REV. 1.

[3] Alien Tort Statute (ATS), 28 U.S.C. §1350 (1789).

[4] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716-18 (2004); *Respublica v. De Longchamps*, 1 Dall. 111, 1 L.Ed. 59 (O.T. Phila.1784); *see also* Supplemental Amicus Brief for the United States at 9 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. ____ (2013). [hereinafter US Brief].

[5] *Sosa*, 542 U.S. at 716–18.

[6] Carolyn A. D'Amore, Note, Sosa v. Alvarez-Machain *and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 600 (2006).

[7] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

[8] Donald Earl Childress, III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 717 (2012).

[9] *Filartiga*, 630 F.2d.

[10] *Sosa*, 542 U.S.

the historical paradigms familiar when [the ATS] was enacted."[11] In 1789, disruption of safe conduct, infringement of the rights of ambassadors, and piracy were the only three violations of the law of nations.[12] The plaintiff's claim in *Sosa* of kidnapping did not meet those same paradigmatic standards, and the Court therefore dismissed the claim.[13]

II. THE *KIOBEL* DECISION

Most recently, in April 2013 the Supreme Court handed down its only other decision under the ATS in *Kiobel v. Royal Dutch Petroleum Company*.[14] In *Kiobel*, the plaintiffs brought suit against Royal Dutch Petroleum Company and Shell Transport and Trading Company, along with their joint subsidiary Shell Petroleum Development Company of Nigeria (SPDC) for extrajudicial killings, crimes against humanity, torture and cruel treatment, arbitrary arrest and detention, violations of the rights of life, liberty, security, and association, forced exile, and property destruction.[15] The plaintiffs argued that the defendants aided and abetted the Nigerian government in its suppression of a protest movement in the Niger Delta throughout the early 1990s.[16] The lower courts dismissed the suit, holding that corporations could not be sued under the ATS.[17] The Supreme Court first requested briefing and held argument on the issue of whether corporations can be sued under the ATS, but then reframed the issue as to whether the "ATS 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."[18] Both parties must have realized that the future of ATS litigation could be reformed dramatically.

Because the ATS is a jurisdictional statute, the contacts that the parties have with the forum are important. In *Kiobel*, the plaintiffs were Nigerian nationals residing in the US as asylum refugees.[19] The Defendants, after dismissal of SPDC, were Dutch and English corporations.[20] Additionally, Royal Dutch Petroleum Company and Shell Transport and Trading Company traded on the New York Stock Exchange, and an affiliated company owned an office in New York to explain its business to potential investors.[21] And the conduct occurred in Nigeria. Both parties were quick to argue that legislative history, however vague, and recent precedent show that the ATS did or did not allow for such a "foreign" suit. Despite the parties' conclusory proclamations to the contrary, no precedent

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[11] *Id.* at 732.
[12] *Id.* at 715.
[13] *Id.* at 733–37.
[14] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (2013).
[15] *Id.* at 2. After dismissal of several claims, the remaining allegations were: aiding and abetting torture, extrajudicial killings, crimes against humanity, and arbitrary arrest and detention. US Brief at 5.
[16] *Id.*; *see also* Steve Levine, *Can Goodluck Jonathan survive Nigeria's oil wars?*, Foreign Policy, Nov. 30, 2010, http://oilandglory.foreignpolicy.com/posts/2010/11/30/can_goodluck_jonathan_survive_nigerias_oil_wars; Sebastian Junger, *Blood Oil*, Vanity Fair, Feb. 2007, http://www.vanityfair.com/politics/features/2007/02/junger200702.
[17] *Kiobel*, 569 U.S. at 2.
[18] US Brief at 3.
[19] *Id.* at 5.
[20] *Id.*
[21] *Kiobel*, 569 U.S. at 14 (Breyer, J., concurring).

or legislative history directly speaks to what are the personal jurisdictional limits of an ATS suit.

The plaintiffs argued that all civil suits alleging violations against the law of nations could be brought under the ATS. More specifically, the plaintiffs wanted application of jurisdiction based on universal jurisdiction, which applies to criminal conduct on foreign soil by foreign defendants against foreign plaintiffs, as long as the conduct has international affects.[22] International affects exist here, so argued the plaintiffs, because plaintiffs are asylum-based residents in the US,[23] and defendants were present in the US,[24] while also conceding that substantial contacts must exist for universal jurisdiction to apply.[25] Plaintiffs further argued, in order to narrow their requested rule, that existing jurisdictional doctrines, like forum non-conveniens, exhaustion, and political question doctrine, should still apply to these completely foreign cases, and thus help mitigate against international tensions.[26]

At the other end of the jurisdictional spectrum, Defendants argued that the ATS should only apply to conduct occurring on US soil because the ATS originally applied only to conduct on the high seas and on US soil.[27] To rule otherwise would create international tensions, which the ATS was meant to prevent.[28]

Both parties skirted around the issue of personal jurisdiction.[29] The plaintiffs argued that the Defendants waived their defense of lack of personal jurisdiction by not asserting it in their original answer to the complaint.[30] Defendants argued that the location of the incident is the only factor to consider in determining if jurisdiction exists. Despite both parties' recognition that personal jurisdiction, as always, is required to bring suit, they treat the ATS as a different sort of statute not falling under typical jurisdictional requirements.

Among the dozens of amicus briefs filed, the United States, among others, did implicitly focus on how a suit under the ATS could meet personal jurisdiction requirements. The US requested that the Court only allow suits under the ATS where the defendants have sufficient contacts in the US.[31] In ATS suits, and generally suits with foreign policy implications, much weight is given to the opinions of the political branches of government.[32] Knowing this deference and the power that the US's brief wielded, both parties specifically argued against the US's more qualified application of the ATS.[33] The US's more qualified, or compromise, approach adhered to the *Filartiga* line of cases, which did not contain the completely foreign jurisdictional facts as found in *Kiobel*. The US argued that its focus on sufficient US contacts balanced the US's foreign policy goals of upholding human rights

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22 Supplemental Brief for Petitioners at 42, 48 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. ____ (2013). [hereinafter Petitioners' Brief].

23 Petitioners' Brief at 42.

24 Supplemental Reply Brief for Petitioners at 28 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. ____ (2013). [hereinafter Petitioners' Reply Brief].

25 Petitioners' Brief at 43.

26 Petitioners' Reply Brief at 23.

27 Supplemental Brief for Respondents at 11, 23 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. ____ (2013). [hereinafter Respondents' Brief].

28 *Id.*

29 Petitioners' Brief at 19, 20, 27, 39

30 Petitioners' Brief at 54.

31 US Brief at 20.

32 *Sosa*, 542 U.S. at 733 n.21.

33 Petitioners' Reply Brief at 23.

while not meddling in the affairs and actions of foreign governments.[34] Specifically, the US was concerned that the plaintiffs alleged claims of aiding and abetting wrongs committed by the Nigerian government could place the US's actions under legal scrutiny as well.[35] Moreover, a determination of plaintiffs' allegations would require the Court to first determine if the Nigerian government committed these alleged wrongs.[36] While the issues of suits alleging claims of aiding and abetting and of corporation liability were not addressed in *Kiobel*, the US urged caution in these areas.[37] Finally, in addition to its focus on sufficient contacts, the US requested that the Court require the use of other limiting doctrines, such as forum non conveniens, exhaustion, political question, etc. to further reduce international tensions.[38]

Ultimately, the Court, without explicitly stating so, appeared to defer to the US's position. The majority held that:

> On these facts, all the relevant conduct too place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application [of US law]. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.[39]

In creating this "sufficient force" opening, the majority permits suits with some amount of U.S. contacts, but not necessarily limited to conduct occurring on US soil. As the United States requested, however, the opening is vague and the rule narrow.[40]

III. IMPLICATIONS OF THE *KIOBEL* DECISION

It is this article's contention that the real battle in *Kiobel* was not jurisdictional, but doctrinal. Behind the jurisdictional arguments lay the issue of whether the Court should apply the doctrine of the presumption against extraterritoriality. This doctrine presumes that courts should not apply US law abroad unless it was the express intent of Congress to do so.[41]

The plaintiffs argued that the presumption against extraterritoriality only applies to extension of federal substantive law abroad.[42] The ATS merely provides a forum and procedural rules.[43] The defendants and the US argued that, under the ATS, federal common law incorporates the law of nations and thereby extends federal common law abroad.[44] Thus, the presumption applies to the ATS. The presumption is only overcome if Congress

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[34] US Brief at 5.
[35] *Id.* at 14-15.
[36] *Id.* at 21.
[37] *Id.*
[38] *Id.* at 22.
[39] *Kiobel*, 569 U.S. at 14.
[40] US Brief at 21.
[41] *Kiobel*, 569 U.S. at 4.
[42] Petitioners' Brief at 38-40.
[43] *Id.*
[44] US Brief at 11; Respondents' Brief at 14-17.

explicitly stated in the statute or legislative history compels the result that Congress intended to extend US law abroad.[45]

The justices all agreed that the doctrine only applies to extension of US substantive law abroad. Whether the ATS extended substantive or only procedural US law, however, was the major difference between Chief Justice Roberts's majority opinion and Justice Breyer's concurrence. The majority reasoned that the presumption applies in ATS cases because the statute incorporates the law of nations into the federal common law and thereby exerts federal common law abroad, the ATS has no explicit extraterritorial application, and the legislative history shows that the ATS was created to protect foreigners wronged on U.S. soil.[46] Breyer's concurrence first found that the ATS did not apply federal common law, that is prescriptive jurisdiction. The ATS merely provided a forum, that is adjudicative jurisdiction. Thus the doctrine does not apply.[47]

> Rather, guided in part by principles and practices of foreign relations law, I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.[48]

Justice Breyer's seemingly more broad jurisdictional approach was founded on his interpretation of piracy and vessel nationality. But it was also balanced with the interests of not projecting U.S. judicial power where the U.S. has little interests in the suit.

But is there really a difference between the concurrence and the majority? At least jurisdictionally, the holdings don't seem to be at odds, only that Justice Breyer's concurrence is less vague. More importantly, does the application of the presumption against extraterritoriality really make a difference that matters?

In theory, the *Kiobel* Court may have just ruled, generally, that federal court application of international law is, de jure, an application of federal common law. Thus, now, the presumption against extraterritoriality will apply against any application of international law. This consequence is not limited to the ATS, such as Justice Breyer's concurrence proposed: a specific application of jurisdiction to a specific statute. Ultimately, the majority's ruling limits the infusion of international law into the federal common law, and limits federal courts application of international legal concepts.

In practical application, both the majority and concurring opinion do not appear to undermine precedent. In all ATS cases cited by Petitioners, Respondents, and the United States, there arguably were contacts with the U.S. of sufficient force to warrant application of the ATS on jurisdictional grounds. Human rights groups need not be worried that the door is now closed to foreigners bringing suit for conduct occurring abroad.[49] Now, we know that the federal courts will not become international civil courts to remedy all human rights violations. As previous cases have demonstrated, a U.S. interest must still be shown.

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[45] *Kiobel*, 569 U.S. at 4

[46] *Kiobel*, 569 U.S.

[47] *Id.*

[48] *Kiobel*, 569 U.S. at 2 (Breyer, J., concurring).

[49] *See* The Center for Justice & Accountability, Kiobel v. Shell: *Light Dims on Human Rights Claims in the US*, http://cja.org/section.php?id=510 (accessed May 16, 2013).

IV. CONCLUSION

Like the battle over the presumption against extraterritoriality, a larger battle was also hiding in the background. *Kiobel*'s companion case, *Mohamad v. Palestinian Authority*,[50] addressed the original issue for which *Kiobel* was certified: entity liability.[51] Writing for the majority in *Mohamad*, Justice Sotomayor held that the Torture Victim Protection Act of 1991,[52] largely seen as complimentary to the ATS, only creates a right of action against natural persons, not entities.[53] It remains to be seen if this ruling will also apply to ATS suits against corporate entities. But, the difference in statutory language between the two Acts should provide ample battleground for the lower courts to continue their fight over corporate liability under the ATS.

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[50] 132 S. Ct. 1702, 182 L. Ed. 2d 720 (2012).

[51] BLOOMBERG LAW, http://www2.bloomberglaw.com/public/desktop/document/MOHAMAD_v_PALESTINIAN_AUTHORITY_No_1188_2012_BL_95451_US_Apr_18_2 (accessed May 16, 2013).

[52] 28 U.S.C. § 1350 (1991).

[53] *See* CJA, Mohamed v. Palestinian Authority: *The Liability of Organizations and Businesses for Torture and Extrajudicial Killing*, http://cja.org/article.php?list=type&type=519 (accessed May 16, 2013).