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CASE AND COMMENT

TRANSNATIONAL HUMAN RIGHTS CASES? NOT IN OUR BACKYARD!

KIOBEL v Royal Dutch Petroleum 133 S.Ct. 1659 (2013) is the second case in which the US Supreme Court has examined the scope of claims under the Alien Tort Statute, 28 USC §1350 ("ATS"). Enacted by the first US Congress in 1789, the Statute gives federal courts jurisdiction over "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". In a previous case, *Sosa v Alvarez-Machain* 542 U.S. 692 (2004), the Supreme Court had ruled that federal courts can recognise a cause of action for claims under the ATS where the international norm alleged to have been violated is "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" of assaults against ambassadors, violation of safe conducts and piracy (724–5).

Kiobel involved a claim by Nigerian plaintiffs that British and Dutch corporations, acting through their Nigerian subsidiary, committed a tort in violation of international law by assisting the Nigerian government in carrying out crimes against humanity, arbitrary detention and torture. The Court of Appeal for the Second Circuit ruled that it could not recognise a cause of action for the plaintiffs because, in the view of the majority, customary international law does not impose liability on corporations for violations of its norms. This decision has been the subject of excoriating academic and judicial criticism, and subsequently resulted in a circuit split between the Second and the Seventh, Ninth and DC Circuit courts. When the Supreme Court reviewed the case, instead of focusing on the question of corporate responsibility, it ordered a second round of arguments on the question of whether federal courts can recognise causes of action for conduct abroad. As the Second Circuit had expressly declined to

deal with this issue, the additional arguments changed the central question in *Kiobel*.

In its long-awaited judgment, the Supreme Court unanimously affirmed the Second Circuit decision, not on the question of corporate responsibility, but on the basis that all the relevant conduct in the case occurred in another state. Although the dismissal was unanimous, the Justices disagreed over whether domestic law or international law regulates when federal courts can recognise a cause of action for claims arising out of conduct abroad. The Court did not explicitly address the question of whether corporations can be sued in ATS cases, but the opinions arguably assume the possibility of claims against corporations.

Writing for the five-Justice majority, Chief Justice Roberts held the US presumption against the extraterritorial application of Congressional statutes should also apply to judge-made causes of action under the ATS. As traditionally understood, "the presumption" is that Congressional statutes only regulate conduct within the territory of the United States, unless Congress has made it clear that a statute has extraterritorial effect. The presumption ensures that the courts adopt the true intention of Congress, but it also has the effect of preventing the judiciary from "erroneously adopt[ing] an interpretation of US law that carries foreign policy consequences not clearly intended by the political branches". In *Kiobel*, the majority took this long-standing rule of statutory construction and, without any substantive reasoning, applied it to the authority of the federal courts to recognise federal common law causes of action under the ATS, on the basis that the "danger of unwarranted judicial interference in the conduct of foreign policy is magnified … where the question is not what Congress has done but what courts may do".

The Supreme Court in *Sosa* had tied the power of the courts to recognise causes of action to the intentions of the first Congress in enacting the ATS; accordingly the Supreme Court in *Kiobel* examined the text, history and purpose of the ATS to determine if the presumption against the extraterritorial application of the ATS could be displaced. According to the majority, the words "tort only, committed in violation of the law of nations", somewhat surprisingly, do not "imply extraterritorial reach – such violations affecting aliens can occur either within or without the United States". From its selective analysis of the historical materials, the majority also concluded that the ATS was enacted to avoid the "diplomatic strife" that might arise if the federal government did not provide a forum for aliens to sue for torts committed on US territory in violation of the law of nations. Finally, the majority reasoned that if federal courts could

recognise causes of action involving conduct abroad, this would imply that other states "could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world". However, as Justice Breyer pointed out in his concurrence, this concern over the court's personal jurisdiction can be met by judicial doctrines such as *forum non conveniens* and exhaustion of remedies, and by the international law of jurisdiction.

Unlike the traditional application of the presumption against extraterritoriality to Congressional statutes, the presumption applied in *Kiobel* is not necessarily conclusive. According to the majority, "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 extraterritoriality". The reference to "US territory", rather than "US interests", will raise a few eyebrows: private international lawyers, for example, have long recognised connecting factors that go beyond old-fashioned territorial limits. More importantly, however, this "exception" to the presumption is inconsistent with the majority's conclusion that "nothing in the statute [ATS] rebuts th[e] presumption" and that decisions about extraterritorial application should be left "to the political branches". As this new test is an exception to the presumption, by the majority's reasoning, it should be justified by reference to Congressional intent. The test also misconstrues the purpose of the presumption, which is to act as a threshold for deciding whether a Congressional statute has any extraterritorial effect: if the presumption is not rebutted, the Statute stops at US borders; if it is rebutted, then its extraterritorial effect is determined by ordinary statutory interpretation. Nevertheless, the majority concluded that the new test was not met in *Kiobel* because (a) "all the relevant conduct took place outside the United States" and (b) "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices". Although this suggests that something more than "mere corporate presence" in US territory might be sufficient to displace the presumption against extraterritoriality, lower courts applying the *Kiobel* presumption have interpreted the new test narrowly, requiring at least some of the tortious conduct to occur within the US (*Al Shimari v CACI*, Order of 25 June 2013).

Four of the Justices disagreed with the majority's reasoning. Justice Kennedy briefly noted that the decision "leaves open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute". He chose not to specify these questions, but explained that some cases might not be covered by the majority decision "and in those disputes the proper implementation of the

presumption … may require some further elaboration and explanation". Justice Alito, joined by Justice Thomas, thought that the presumption should be applied as it had been in non-ATS cases: the conduct that violates international law and forms the basis of the cause of action must take place within the United States, otherwise the claim should be dismissed.

Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, rejected the majority's application of the "presumption against extraterritoriality" on the basis that ATS was clearly enacted with "foreign matters" in mind. Justice Breyer argued for a different presumption: namely, that when deciding whether to recognise a cause of action under the ATS, federal courts should ensure their decision is in accordance with the international law on prescriptive jurisdiction. He "assume[d] that Congress intended the statute's jurisdictional reach to match the statute's underlying substantive grasp", which is defined in *Sosa* by reference to customary international law, provided claims "avoid[ed] 'serious' negative international 'consequences' for the United States". Justice Breyer would therefore limit cases to situations where: (1) the alleged tort occurs on US territory (territoriality jurisdiction); (2) the defendant is a US national (nationality jurisdiction); or (3) the conduct "substantially and adversely affects an important American interest", which includes preventing the US "from becoming a safe harbour … for a torturer or other common enemy of mankind" (a form of protective jurisdiction). As the cause of action is for the violation of obligations drawn from international law, not from a Congressional statute, this approach is substantially more convincing than the majority's strained application of a US rule of statutory construction. It is also consistent with the analysis in *Sosa* and the practice of other states. Nevertheless, Justice Breyer still concurred in the dismissal of the case, because, in his view, "the defendants' minimal and indirect American presence" made it "farfetched" to believe that "this legal action helps to vindicate a distinct American interest".

Kiobel aroused intense public interest. Hundreds of people camped outside the Supreme Court to hear the two rounds of oral argument and the Court received 90 amicus briefs from numerous interested parties, both domestic and foreign. *Kiobel* did not close federal courts to transnational human rights cases, but with lower courts already quickly dismissing claims without engaging with the questions left behind by the decision, it may yet prove to be the beginning of the end of transnational litigation under the ATS.

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