

Human Rights Litigation in the United States After *Kiobel*

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In April, the Supreme Court decided *Kiobel v. Royal Dutch Petroleum Co.*,¹ a case seeking to impose civil liability on an Anglo-Dutch corporation for atrocities carried out by Nigerian security forces against Nigerian nationals. Observers looked to the Court to provide some guidance on the growing number of lawsuits of this character brought in the United States. This lecture describes what the Court did, explains what it did not do, and speculates about what the future holds for human rights litigation in the United States.

Human rights litigators live in dread of the Supreme Court. Since 1980, they have wrung from the lower federal courts a series of victories making it reasonably easy to bring, if not necessarily win, lawsuits against persons accused of violating human rights law. Their victories included:

- Acceptance of the fundamental proposition that the customary international law of human rights enters the U.S. legal system as federal common law as the result of a 1789 jurisdictional statute called the Alien Tort Statute;²
- Recognition of a federal cause of action to enforce

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

² United States Judiciary Act of 1789 § 9, 28 U.S.C. § 1350 (1982).

this body of law;

- Endorsement of a license for judicial creation of international human rights law, freed from the bounds of existing legislation or treaties;
- Extension of liability to private actors, most importantly including multinational corporations;
- Including imputed liability for private actors as a means of extension;
- Application of this liability to foreign actors and conduct;
- Surmounting defenses such as act of state and foreign official immunity; and
- Relaxation of conventional restraints on international civil litigation such as personal jurisdiction and *forum non conveniens*.

All this came about with only the most minimal legislative authority and only intermittent and guarded support from the Executive. The litigators know that their victories rest ultimately on twin commitments, both more policy than legal. The judges who support their cause believe that human rights violations cry out for legal intervention, and think that civil suits in U.S. courts are a good, if not necessarily the best, way for this intervention to proceed. The litigators have reason to doubt that a majority of the Supreme Court shares these commitments. They worry that it might look more skeptically at the admittedly scant positive legal authority that the human rights plaintiffs have to support their claims.

In 2004, when the Court took up *Sosa v. Alvarez-Machain*, the human rights community held its collective breath.³ The case came from the Ninth Circuit, a court of appeals demonstrably out of step with the Justices in Washington, and involved a plaintiff who already had seen the Supreme Court overturn an earlier victory in the Ninth Circuit.⁴ The initial news that the Court indeed had again reversed the Ninth Circuit prompted depression and dismay. But a careful reading of the Court's opinion restored the litigators' spirits. The Court had seemed to endorse the first two points, had limited rather than upended the third; and said nothing discouraging about the remaining concepts that sustained human rights litigation.⁵ The courthouse doors were still open, and in the following years the number of suits even grew.

³ United States v. Alvarez-Machain, 504 U.S. 655 (1992).

⁴ *Id.*

⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Fear and loathing returned in 2011, when the Court agreed to review the Second Circuit decision in *Kiobel v. Royal Dutch Petroleum Co.*⁶ Human rights lawyers hated the lower court's ruling, which held that the federal common law of international human rights did not include corporate liability, a concept generally alien to public international law. But they doubted that the Supreme Court would do much good and feared that it would make much mischief. These fears came closer to realization in 2012, when the Court ordered re-argument so that it might consider, not just whether U.S. law held corporations civilly liable for human rights violations, but whether U.S. law imposed liability on anyone for conduct taking place outside the United States.

On the one hand, it might seem odd to say that a body of law designed to vindicate victims of international legal transgressions should confine itself to the territory of a single state. Who is international human rights law for, if not for everyone? On the other hand, the evolution of U.S. civil litigation into a means for righting wrongs that occur anywhere in the world, even where neither the victims nor the transgressors had any significant tie to the United States, seems a bit odd. To appreciate why, some appreciation of the foundations of international law is necessary.

International law embraces two fundamental principles, namely territorial sovereignty and state responsibility. International law intrudes on a sovereign's domestic acts only if the sovereign has agreed to the intrusion. Moreover, international law does not regard a sovereign as responsible for all acts anywhere in the world, but rather for acts taking place on its territory and those instances where it projects its authority and power outside its borders.

For the United States to hold itself out as an international lawmaker, prescribing the rules and consequences of disputes with which it had no connection under traditional international law concepts, struck some as not only unjustified, but itself a breach of international law. First, in the alien tort cases, the United State purported to resolve disputes in which it had neither any residual responsibility to the international community nor any grievance based any international law. Second, no other state had consented to the United States' assertion of the right to prescribe and apply the rules governing disputes about atrocities committed on that state's territory. Accordingly, the U.S. government during the first decade of the new century began to argue that the federal common law of international human rights should not extend past transactions that impli-

⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

cated U.S. responsibility under international law. As a practical matter, this meant limiting civil suits to transgressions that occurred on U.S. territory.

In essence, the issue brought two competing conceptions of international law into sharp contrast. One is universalist and focused on the needs of humanity as a whole; the other regards states as the only legitimate law-givers in the international sphere. On the one hand, many would argue that international law has evolved over the last half-century or so from a set of rules that only governs relations among states, to a body of law that also vindicates the fundamental interests of humanity against all who threaten them. In international law's universality, these proponents see an underlying commitment to core values from which no actor, state or non-state, can derogate. International law has become the pathway for human respect and flourishing in a profoundly transformed international landscape. Moreover, domestic judges do well when they lend their resources to this universalist enterprise.

The other conception is of an international legal system designed and constructed by states. States turn to international law and international institutions to solve problems that are beyond the capacity of any one state. They do not, however, make any more international law than they need, or at least want. In particular, identification of a particular problem, such as disregard of fundamental human rights, does not imply a license for any and all to impose a solution. Delegation to the International Criminal Court in the Hague of the authority to address particular human rights violations through international criminal proceedings does not mean that individual states have a parallel right to attack the same problems through civil litigation, at least not when those states have no connection to those problems other than that shared with all humanity.

As an abstract matter, both conceptions of international law, the universal and the state-based, have much to recommend themselves. In economic and social terms, people increasingly live in a global, transnational world that seems to push aside state authority. The communications revolution, embodied in the worldwide web and social media, seems to constitute humanity as an independent force, unshackled by traditional structures of authority. In the modern world, information is power, and information leaps easily over national borders. Shouldn't international law follow in the wake of these transformations and lose the state monopoly on lawmaking?

Yet however important is knowledge and the virtual world, the physical space on which states still exercise territorial sovereignty remains fundamental. The servers and the transmission networks exist physically, not virtually. People have a physical location. And where territory matters, so do states.

Considerations of raw power aside, only states enjoy the ultimate authority legitimately to employ force in pursuit of their objectives. There are plenty of violent private actors, but we normally think of them as criminals or terrorists, not alternative governance structures. Not all states organize themselves in ways that promote human flourishing and happiness—perhaps none do so optimally—but humanity has not yet devised alternatives to states when it comes to governing territory. Their competitors face real problems of legitimacy. And that means those who purport to proclaim law on behalf of humanity have a hard time explaining where their authority comes from, if not from states.

As it turned out, in *Kiobel* the Supreme Court did not choose between these competing visions of international law. Instead, the Court's majority focused on domestic law and domestic legal principles. It framed the question it had to decide not as an issue of what is right, but rather of what authority should federal courts ascribe to themselves in the face of ambiguous legislative commands. The case, in other words, turned on a particular conception of separation of powers, not international law. The human rights community still is not happy with the decision, but, as with *Sosa*, the news is not as bad as it first seemed.

Since the 1970s, the Supreme Court has concerned itself with what might be called the problem of self-judging federal jurisdiction. The Constitution makes clear that the subject matter jurisdiction of federal courts—the power of a federal court to hear particular kinds of disputes—is limited. During the 1960s, federal courts began devising strategies to overcome these limits through tricks of statutory interpretation. If Congress enacted a legal rule but did not specify how to enforce it, courts would imply a right of victims of rule violations to bring a federal claim for compensation. If Congress specified federal court jurisdiction as to a category of disputes, courts would infer a license to create the rules of decision that would apply within that category. And if Congress did not specify the boundaries of a rule, courts would extend it to foreign conduct, at least if the parties or conduct had some connection to the United States. These courts saw their own power as a good thing that wanted extension, at least when Congress had not clearly decreed otherwise.

By the 1970s, the Court began to express doubts about this tendency, and in the 1980s and 1990s, it pushed back hard. Among other things, it pronounced a presumption against extraterritoriality as a tool for interpreting ambiguous legislation. Courts always had interpreted statutes as bounded by the general international law limits on prescriptive jurisdiction, but the recent cases demanded more. If Congress wanted to regulate foreign transactions, it would have to do so clearly and explicitly. Thus, in 2010, the Court in *Morrison v. National Australia Bank* threw out five decades of lower court precedent and proclaimed that civil suits based on fraudulent securities transactions had no place in federal court, unless the transactions (and not the acts of fraud) occurred on U.S. territory.⁷

Critics of this development responded, extraterritorial as to what?⁸ Rare is the transaction where nothing connects the suit to the United States. What are the criteria for determining what exactly must be domestic, if some part of the case is domestic? The short answer is that it depends on the legislative scheme, but arguably this only pushes back the question. Are the federal securities laws about regulating sales of securities, or about regulating fraud? *Morrison* argued, based on reasonably strong evidence in the language of the legislation at issue, which the securities laws focus on sales. But what about other regimes where the clues provided by Congress are less evident?

This is the problem that *Kiobel* presents. The majority argued that *Morrison*'s presumption against extraterritoriality applies to the federal common law of international human rights, because Congress has not indicated that it wants U.S. courts to impose this common law on foreign transactions. But what exactly constitutes a foreign transaction? In *Kiobel*, everything was foreign—the plaintiffs, the defendants, the place where the atrocities occurred. The only link to the United States was that a U.S. court arguably had personal jurisdiction over the foreign defendant, and the plaintiffs wanted to be in that court.⁹ Every member of the Court agreed that this was not enough, whether one applied the presumption against extraterritoriality or some other standard. But, because this federal common law derives from a very old and until recently unused

⁷ *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010).

⁸ See, e.g., William S. Dodge, *The Presumption Against Extraterritoriality After Morrison*, 105 AM. SOC. INT'L L. PROC. 396 (2012).

⁹ The plaintiffs' theory as to why a New York court had personal jurisdiction over a foreign corporation that did not do business directly in the United States, but did have U.S. subsidiaries and had listed its stock on U.S. exchanges, will be assessed next Term in a case coming out of the Ninth Circuit. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 999 (9th Cir. 2011), cert. granted, 133 S. Ct. 1995 (2013). Although the facts of the two cases are not identical, they overlap significantly.

jurisdictional grant, Congress has not left us many clues about the purpose of this regulatory regime.

One might construct an answer, consistent with the state-based concept of international law. It is plausible; indeed I think the historical evidence is rather clear, that Congress adopted the so-called alien tort statute back in 1789 to address a problem of state responsibility under international law. By this I mean that Congress understood that foreign nations would hold the United States responsible for certain acts by private persons, and one way that the United States could respond to this obligation would be to permit victims of those acts to bring civil suits for compensation against their attackers. The events that probably prompted Congress to act involved outrages on the person or property of foreign diplomats on U.S. territory. Congress might further have understood that, under principles of territorial sovereignty as they were understood in 1789, international law would require a state to answer for private (non-state) conduct on its own territory, but not for conduct carried out by non-state actors on another sovereign's territory. If this reasoning is correct, then the presumption against extraterritoriality would limit the scope of civil liability based on the location of the conduct giving rise to a claim for compensation. In other words, did the international law violation occur within the United States?

But this construction stills demands an answer to the question, what constitutes an internationally wrongful act? What about internationally wrongful omissions? Does international law impose an obligation on a state to take action against persons found on its territory who have committed an international harm somewhere else? In other words, does international law require that states not give haven to persons responsible for international law violations, and in particular human rights violations? Does providing a haven for such a person satisfy the territorial limit expounded by the *Kiobel* majority?

Unfortunately, the *Kiobel* opinion does not give much of an answer. The majority states, rather cryptically, that "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."¹⁰ What counts as touching and concerning, as well as how to assess "force," goes unanswered. Even more unhelpful is Justice Kennedy's concurring opinion, given that he provided the crucial fifth vote. It says, "The opinion for the Court is careful to leave open a number of signifi-

¹⁰ *Kiobel*, 133 S. Ct. at 1669.

cant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition.”¹¹ Presumably what must occur within the United States is conduct that transgresses the federal common law derived from the Alien Tort Statute. Perhaps the conduct itself, and not its planning and direction, must occur domestically.¹² But we cannot have great confidence in the existence of other limits or exceptions to the territoriality requirement.

Justice Breyer and his colleagues, while agreeing with the outcome of dismissal, fully embraced the “haven” theory of international wrong. Breyer relied on a somewhat fanciful analogy between piracy and human rights violations, asserting that international law today imposes the same positive obligation on states to dispose of human right violators in their midst that it once did (and perhaps still does) with respect to pirates. The argument seems flawed. International law rather clearly requires states harboring perpetrators of torture, genocide and grave war crimes to either prosecute or extradite those persons, but it does not require those states also to give victims a path to compensation. But Breyer’s position at least provides some clarity and links the scope of liability to a theory about international law, even if theory itself is mistaken.

A short opinion by Alito, joined by Thomas, seems to make my point about this mistake. They argue that federal common law allows a civil suit only if conduct on U.S. territory violates a clear and widely accepted rule of international law. Breyer’s violation-by-omission concept flunks this test, although Alito is too polite to say so. But that accounts for only two votes, and a majority requires five.

Breyer’s point might be somewhat different. He might believe that once a state accepts the right of another state to impose criminal penalties on its nationals for conduct on its territory, as states do with respect to torture, genocide, and war crimes, it has as a matter of international law waived any objection to a civil suit involving the same conduct. This represents an application of the greater-comprises-the-lesser principle, and presumes that a criminal prosecution is a greater intrusion than is a civil suit for compensation.

I think this argument also is wrong, but the question is closer. It is not necessarily true that civil liability is a lesser intrusion than is criminal

¹¹ *Id.* (Kennedy, J., concurring).

¹² In *Sosa*, the Court interpreted the analogous Federal Tort Claims Act as not allowing tort suits where only the planning and supervision, and not the offending conduct, occurred in the United States.

liability. Especially under the unique U.S. system of civil litigation, civil liability can entail large monetary sanctions not tied to the level of injury suffered by a victim. Even more importantly, private parties decide when to bring a civil suit, and do not have to account for the diplomatic or political consequences of this decision. To the extent that a state exercises ultimate control over the decision when to prosecute (as they do, in every jurisdiction with which I am familiar, with respect to conduct defined as crimes under international law, even when private persons otherwise can initiate a criminal prosecution), the risk of burdensome and unfounded suits is much lower. It is exactly these arguments that have led courts in Australia, Canada, New Zealand and the United Kingdom to reject civil liability under those circumstances where the national prosecutor may bring a criminal prosecution for grave human rights abuses.¹³ Thanks to Kennedy's reservation, however, we don't know whether the haven theory is dead or merely sleeping. The *Kiobel* majority certainly did not endorse it, but neither did the majority of the majority (Scalia, Kennedy and Roberts) reject the theory, and, according to Kennedy, every question left undecided remains open. Only further litigation will produce answers.

What remains of human rights litigation in the United States? I can only speculate, but here are a few guesses:

1. In theory, Congress could respond to *Kiobel's* invitation by adopting a statute defining a civil action in federal court based on international human rights law. Even if such a statute exceeded the boundaries of prescriptive jurisdiction permitted by international law, U.S. courts would enforce it. On the one hand, Congress responded to the last two Supreme Court decisions on the presumption against extraterritoriality with new legislation.¹⁴ On the other hand, the present political climate does not hold out much promise of legislative action in any area of public interest, including matters even more important than international human rights. We shall have to wait and see.

2. The courts could distinguish claims against U.S. actors, including corporations, from those against foreign companies such as Royal

¹³ See *Zhang v Zemin*, (2010) 243 FLR 299 ¶ 121 (Austl.); *Jones v. Ministry of Interior of Kingdom of Saudi Arabia*, [2006] UKHL 26 (appeal taken from EWCA (Civ)); *Bouzari v. Islamic Republic of Iran*, (2004) 71 O.R.3d 675 ¶ 28 (Can. Ont. C.A.).

¹⁴ Congress responded to *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244 (1991), with Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1077 (codified at 42 U.S.C. § 2000e(f)). It responded to *Morrison* with Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 929P(b), 124 Stat. 1864 (codified at 15 U.S.C. §§ 77v(c), 78aa(b), 80b-14(b)). Both provisions provided for limited extraterritoriality.

Dutch Shell. Under some variant of the haven theory, the United States faces international accountability when it fails to redress international injuries inflicted by its subjects. I suspect this argument will not succeed, however. First, as a straightforward matter of international law, it simply is not true that a sovereign always is answerable for the wrongful conduct of its subjects. Especially if other sovereigns have jurisdiction to take action, such as when the misconduct occurred on their territory, there is no basis in international law to insist that the subject's sovereign must act as well. Second, as a practical matter, it is hard to imagine U.S. courts or Congress burdening U.S. companies with a legal obligation regarding their overseas conduct that does not apply to their foreign competitors. As recent patterns in Foreign Corrupt Practices Act enforcement illustrate, U.S. lawmakers, both legislators and law enforcers, try hard to even the playing field between U.S. firms and their foreign competitors.

3. Plaintiffs will seek to establish U.S. facts. They might allege, for example, that high corporate officials working in the United States took part in the wrongful conduct, such as by soliciting state action or accepting its benefits. Such allegations might survive a motion to dismiss and lead to settlements. But, for the reasons discussed above with respect to U.S. defendants, I doubt that the courts will endorse a rule that exposes U.S. firms to greater legal risk than their foreign competitors would face.

4. Plaintiffs will sue the U.S. government and U.S. officials for human rights abuses. This was the fact pattern in *Sosa*. It didn't work in that case because the United States waives its sovereign immunity only for acts on US soil, and the Supreme Court did not regard acts planned in the U.S. but carried out in Mexico as taking place on U.S. territory.¹⁵ Moreover, suits against U.S. officials for anything connected with their work are converted by statute into a suit against the United States.¹⁶ So the only suits that would survive a sovereign immunity defense would be those raising claims against U.S. officials for acts that the U.S. government would refuse to treat as part of their work.

5. Plaintiffs might bypass federal law altogether and sue in state courts. Nothing in principle bars a state court from hearing a claim under foreign or international law, as long as the plaintiffs can get personal jurisdiction over the defendant. States may even impose greater legal burdens on its own residents, as California arguably does with respect to

¹⁵ *Sosa*, 542 U.S. at 700–12.

¹⁶ *Osborn v. Haley*, 549 U.S. 225, 227 (2007) (certification by Attorney General that a tort suit against a federal employee arises out of the course of the employee's employment is conclusive, converting suit into one against the United States).

firms that have their headquarters in that state. The principal legal barrier for plaintiffs will be claims of federal preemption. Some Supreme Court cases indicate that states cannot use civil suits in a manner that substantially interferes with the foreign relations of the United States. Defendants also might argue more narrowly that the federal common law of international human rights preempts state efforts to adopt overlapping and different rules. It is impossible to predict how these arguments will play out.

These doctrinal developments are important and interesting, but it also may be worthwhile to step back and consider what these events reveal about the sociology of litigation. The early lower court suits on which the development of alien tort law rested—*Filártiga v. Peña-Iralain* 1980 and *Kadić v. Karadžić* 1995—pitted victims of atrocities against the thugs who perpetrated them.¹⁷ In neither case did the defendant have significant assets in the United States or any realistic hope of remaining in the country. Although both defendants may have been competently represented, they by no means had the best and most creative legal talent that the United States can offer. The plaintiffs, by contrast, had gifted as well as committed movement lawyers as their counsel. This inequality in arms made it unlikely that all of the weaknesses in the legal theories on which the plaintiffs relied would be exposed.

Over the last 18 years, these theories now have been tested by defendants that can afford the very best representation. Increasingly, they have relied not simply on experienced defense litigators, but on international law experts that appreciate the elisions in the principal liability theories that the plaintiffs have asserted. Moreover, the views of the government's lawyers have evolved, as the potential drawbacks of these suits have become evident. Especially in the Supreme Court, the community of international law experts no longer speaks with one voice, but rather quarrels over the core principles of international law that govern human rights litigation.

The Justices have come to see the matter as complicated, are for the most part uncomfortable about making any strong assertions in the area (Justice Breyer excepted), and have looked for other means of disposing of these cases. They have, in a word, come to view alien tort litigation mostly as a species of civil litigation, and not as a means for honoring, enriching, and enforcing international law. And within the context of civil litigation, the outcomes of *Sosa* and *Kiobel* fit into a broader pattern

¹⁷ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

of growing skepticism about the benefits of private suits to rectify public wrongs.

This suggests an even larger point. American lawyers tend to celebrate their judges, the federal ones in particular and the Supreme Court Justices most of all. We should, of course, be proud of our institutions. It seems, however, as if some lawyers believe that law isn't really law unless the Supreme Court has endorsed it. If what lawyers do does not find its way into litigation in a way that a court can apply and explain, practitioners seem to think that their commitments and principles simply do not count for much.

But civil litigation may not be the best place to look for international law, especially in the United States. A case is inevitably framed by the interests of the litigants, which may accidentally correspond to the general public interest. The U.S. system, exactly because it encourages creative claims and a good deal of experimentation, lends itself to generating what the social scientists call false positives—assertions about the state of the world that do not correspond to reality. In particular, there is no good filter to distinguish international law as we find it—*lex lata*—from international law as some would like it to be—*lex ferenda*.

Moreover, the correspondence between litigation and the application of international law is more incidental than direct. The Supreme Court observed a half century ago in the famous *Sabbatino* case that international law enters civil cases only fortuitously, and most of the instances where a principle of international law might matter never wind up in court.¹⁸ Courts, the *Sabbatino* majority explained, lack the competence to develop international law not only because of lack of expertise, but because their job—deciding cases—so rarely overlaps with international law enforcement. The Court's conclusion then—if you want international law, go to a political body with the capacity to make it—still has force today.

¹⁸ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431–36 (1964).