

Kiobel: no Role for the United States as World Police

Many thanks to Elise Maes for this reflection on the *Kiobel* decision. Elise Maes is research fellow of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law.

After more than a decade of awaiting and predicting the final outcome in the case of *Kiobel v. Royal Dutch Petroleum Co.*, the United States Supreme Court reached a decision on April 17, 2013.

The case is a class action suit brought by Esther Kiobel on behalf of Nigerian residents against Royal Dutch Petroleum and its affiliates “Shell Transport and Trading Company” and “Shell Petroleum Development Company of Nigeria” (hereinafter referred to as “Shell”). The defendant companies are incorporated in the Netherlands, the United Kingdom, and Nigeria, respectively. They have been engaged in oil exploration and production in the Ogoni region of Nigeria. A group of Nigerian citizens protested against the environmental destruction caused by Shell’s oil exploration in the region. The plaintiffs claim that Shell has been complicit in the torturing and killing of the protestors by the Nigerian military. In other words, Shell allegedly aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria.

None of the relevant facts of the case seem to point towards the United States. The unlawful conduct took place in Nigeria, the victims are Nigerian citizens (who are now legal residents of the United States) and the companies who allegedly took part in the crimes are incorporated in European and African countries. Nonetheless, in 2002 the plaintiffs filed their claim with a United States District Court. The suit was brought under the Alien Tort Statute (ATS), 28 U.S.C. §1330, enacted in 1789, which states: “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.”

At issue in the *Kiobel* case was the proper interpretation of the Alien Tort Statute. Originally, the Supreme Court was only asked to rule on the matter whether corporations can be held liable for international human rights violations under the

ATS. But the Court broadened the scope of its judgment and also answered the question whether and under what circumstances US courts may hear a case brought under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the United States.

Last Wednesday (April 17, 2013), the Supreme Court rendered its judgment and ruled unanimously. Four justices concurred with the Chief Justice's opinion. The other four justices concurred in the outcome of the decision, but followed a different reasoning. Succinctly put, the Court decided that the plaintiffs were not entitled to damages under the ATS. More broadly, the Court ruled that the ATS is not applicable to actions committed on foreign soil. The justices stated that "the presumption against extraterritoriality applies to claims under the Alien Tort Statute, and nothing in the statute rebuts that presumption". This judgment seems to put an end to the extraterritorial jurisdiction of the United States for claims brought under the ATS for human rights violations that were committed on foreign territory and that have no sufficient link to the United States. From now on, one cannot file a claim for human rights violations against a corporation in the USA, simply because they have a presence in the USA. Chief Justice Roberts justly wrote that "corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." An additional connection to the United States is required. Justice Kennedy wrote in his concurrence that the Court's opinion leaves open a lot of significant questions regarding the reach and interpretation of the ATS. One of these remaining questions would indeed be what would constitute an additional sufficient connection. Professor Childress' recent blog post provides several hypotheses and possible answers to that question (<https://conflictflaws.de/2013/what-will-kiobel-impact-be-on-alien-tort-statute-claims/>).

Even though the Kiobel case turned out to be a substantial victory for the defendant corporations, they did not get their most favorable outcome. When it comes to the first question regarding the interpretation of the ATS, the Supreme Court has not closed the door to all cases of human rights violations committed by corporations. The Court did not decide that corporations are immune from the ATS.

The reactions to the judgment are - as expected - divided. Multinational companies read the judgment with a sigh of relief. Human rights lawyers on the other hand state that this judgment is not only a disaster for the Nigerian citizens,

but the narrow interpretation of the ATS also drastically cuts down on the means and odds to seek redress for other future victims of international human rights violations in foreign and especially in developing countries. The USA are said to be turning their back on a global trend towards human rights enforcement. Some argue that the Supreme Court has interpreted the ATS in a way that is inconsistent with decades of use of the ATS. For over thirty years, the ATS has been used to bring human rights cases before federal courts.

Nonetheless, the judgment has its merits. From a human point of view, it is an understatement to say that it is tragic that the plaintiffs in this case will not be compensated. However, one cannot bend the law as far as one would like it to reach. The text of the ATS does indeed grant the United States jurisdiction for certain international law violations, but it does not explicitly state that this is the case for conduct on foreign soil. By clearly bringing the presumption against extraterritoriality to the fore, the Supreme Court restores the guiding principle that a nation does not have jurisdiction for causes of action that occur outside their borders. And even for foreign victims of human rights violations committed on foreign territory, the Supreme Court left the door to the US courtrooms ajar. The Chief Justice's words "and even where claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application" indicate that in limited cases there is still the possibility to set aside the presumption against extraterritoriality. In other words, a case that concerns human rights violations committed on foreign territory but which nonetheless shows a greater nexus to the United States, may still fall under United States jurisdiction. Whereas professor Childress argues that in the end the possibilities for foreign victims to file ATS claims in federal court will be very limited, in my view the Supreme Court has left the US courts just the right amount of space to rule in cases of international human rights violations concerning foreign victims. A too far reaching extraterritorial jurisdiction for the United States in international human rights cases would establish a type of legal colonialism. It is not up to the United States - or any other country for that matter - to become the world police when it comes to human rights violations and to rule on these violations, regardless of where they occur. Or as Justice Story puts it: "No nation has ever yet pretended to be the custos morum of the whole world..." (*United States v. The La Jeune Eugénie*). In the Kiobel case, it would be up to Nigeria to choose their own means to deal with the conflict in their own way.

In conclusion, it may be said that the Supreme Court has found the right balance in the Kiobel judgment: the Court does not claim the United States to be “a uniquely hospitable forum for the enforcement of international norms” irrespective of where the violation takes place, but leaves room to rule on such cases and to give redress to the victims, as long as these cases show a sufficient connection with United States territory.