To steward or not to steward, that is the question

Some thoughts on the ATS by James Armstrong. James has been working internationally as a business process coordinator responsible for a major Oil and Gas company since 2000 in countries such as Korea, Angola, Malaysia and more recently Papua New Guinea. He is currently working as an advisor, and completing an LLM on international law with a focus on Conflicts of law and the application and use of the ATS.

The Alien Tort Claims Act (ATS) was passed in 1789 and did in effect sit on the statute shelves for nearly two centuries, until the Filartiga case. The main impact of this Act has been to grant US Federal Courts the ability to hear cases dealing with private claims for a reasonable number of international law violations, provided they are in breach of the Law of Nations or a treaty of the United States. The synergy between ATS and conflicts of law issues, I would suggest, have now come to forefront; forum shopping has been seen as a defining factor with the applications of ATS and the US courts have recently, in the Kiobel case, provided us rules, namely the "touch and concern", that would seem, prima facie, to bring ATS in line with the British rules on conflicts of law. After all jurisdictional questions are about selecting the correct forum.

A recent case which has some significance here is *Al Shimari v CACI*[1], where Iraq national brought a case against CACI and L-3 services for torts, namely torture, war crimes, crimes against humanity, sexual assault and cruel, inhuman treatment[2]. The plaintiffs were former prisoners at the Abu Ghraib prison in Iraq; this prison was run and managed by US military personnel and or their contractors from 2003 until 2006; it has now been closed[3]. The plaintiffs claim that they suffered mistreatment at the hands of the servicer personnel and contractors responsible for the management of the prison and the prisoners. This case is significant as Justice Breyer[4] made the statement that the "*claim*" must "*touch and concern*", therefore extended, correctly so, the rationale behind the application of the "*touch and concern*" rule developed by *Kiobel*. He went further to look at the parties and indicated that that US Congress had taken a strong

position against the offense of torture and had created a statute dealing specifically with Torture, the Torture Victims Protection Act 1991. The key distinction between *Kiobel* and *CACI* is that *CACI* is an American corporation; the senior management are located within America; the employees for the prison where recruited in America; the senior management were made aware of the actions and events that had taken place in the prison. Adding all these elements up Justice Breyer concluded that congress has taken a strong position against torture and wanted to ensure that any American participating in such act would be brought to justice[5]. America should steward Americans: citizenship is a key factor.

Recently the American courts have applied the rules initially defined within *Kiobel* and subsequently applied and developed in *CACI*[6] to the *Chevron*[7] case. On reading this case the failings of the court to apply their own rules became apparent: they have failed to take into consideration not only the application of forum selection, as per their own rulings, but they have also failed to demonstrate a desire to steward their own, Americans, when their actions have, or may have, breached internationally accepted standards and laws. Stewardship of a countries individual, both natural and legal, should, I would suggest, be paramount when looking at the conflicts and trying to assess jurisdictional applications.

In my view, the US Courts are now demonstrating a desire -or at least are heading down a route- to remove the rational and possibility of giving jurisdiction for actions under ATS as opposed to looking to steward and control the actions of their own citizens, be these natural or legal. I was appalled to read the views of the Second Circuit Court of Appeals in *Mastafa v. Chevron Corp*[8]. This, as I am assure your are aware, was a joint case with Chevron and BNP claiming that they had aided and abetted human rights abuses by the Government of Iraq during the Saddam Hussein's regime. This case was brought under the ATS; the court looked to apply the decision from *Kiobel*[9] and stated that the citizenship, element as identified in *CACI*[10], was not relevant. They reiterate that for a case to be given jurisdiction by ATS it must a) touch and concern the United States with sufficient force to displace the presumption against extraterritoriality and: b) demonstrate that the conduct, prima facie, breaches a law of nations or treaty of the United States.

The main issue, I would suggest, for the application of ATS is now the

disagreement between the second and fourth circuit on the application of citizenship -the second circuit court clearly stating that the citizenship should have no bearing on the application of "*touch and concerns*".

I would suggest this is wholly wrong: a given country should take responsibility for stewarding the actions of their own citizens, especially when the other country has a less than acceptable legal system. I believe this view is in alignment with the UK courts and the views expressed by Justice Breyer in the CACI case; I would further suggest that this should be of paramount importance, and therefore this is a fundamental failing by the court that will adversely affect the ability of the courts to hear cases under ATS.

In the recent case of Abdul-Hakim Belhaj[11] the [UK] Court of Appeal has clearly indicated that there if no remedy is left open the home country should be able to hear the case; they were actually considering action against UK officials and agencies, here we are looking for the American courts to steward their own citizens, both legal and natural. I would go further and state that the American courts could well learn from the view taken by the [UK] Court of Appeal, who considered the implications of not accepting jurisdiction, and stated that this would have an adverse effect on the international view on British justice[12].

I therefore put it forward that the courts have not applied the findings in *Kiobel* correctly, as discussed and applied by *CACI*. *Kiobel* states that a "*mere corporate presents*"[13] should not be an indication of jurisdictionally liability; Shell only has a minor office in the USA and is in fact a Dutch company, not a wholly owned American corporation. This view is correct: a mere presence should not give arise to jurisdiction; however, Chevron has more than a mere presence and therefore the Court is in error regarding this element. Chevron can be identified as being an American corporation all the way back to 1876[14], unlike Shell which shows that its history and heritage is outside the USA[15].

At the end of the day, it seems that major corporations and the dollar are openly controlling the US courts: *CACI* is a small company with lots of media attention; *Chevron* is a major international oil company that brings in billions of dollars into the American market.

These are my views on what I can only describe as a vibrant and interesting time, although things are not moving in the right direction here. This reminds me of a

favorite phrase of mine

“The only thing necessary for the triumph of evil is for good men to do nothing.” ? Edmund Burke

[1] Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-Ejaili; Asa’ad Hamza Hanfoosh Al Zuba’e v CACI Premier Technology, Inc. CACI International, Inc. 13-1937

[2]
www.business-humanrights.org/en/abu-ghraib-lawsuits-against-caci-titan-now-I-3-0#c17777

[3]
http://www.nytimes.com/2014/04/16/world/middleeast/iraq-says-abu-ghraib-prison-is-closed.html?_r=0

[4] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) Justice Breyer Opinion, Chapter 2 , B

[5]Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-Ejaili; Asa’ad Hamza Hanfoosh Al Zuba’e v CACI Premier Technology, Inc. CACI International, Inc. 13-1937 page 31

[6] Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-Ejaili; Asa’ad Hamza Hanfoosh Al Zuba’e v CACI Premier Technology, Inc. CACI International, Inc. 13-1937

[7] Mastafa v. Chevron Corp., No. 10-5258-cv, 2014 WL 5368853 (2d Cir. Oct.23, 2014)

[8] Mastafa v. Chevron Corp., No. 10-5258-cv, 2014 WL 5368853 (2d Cir. Oct.23, 2014)

[9] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013)

[10] Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-Ejaili; Asa’ad Hamza Hanfoosh Al Zuba’e v CACI Premier Technology, Inc. CACI International, Inc. 13-1937

[11]Belhaj & Boudchar -v- The Rt. Hon Jack Straw, Sir Mark Allen (CMG) and others [2014] EWCA Civ 1394

[12] Belhaj & Boudchar -v- The Rt. Hon Jack Straw, Sir Mark Allen (CMG) and others [2014] EWCA Civ 1394, para 120

[13] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) Para 14 IV

[14] http://www.chevron.com/about/history/1876/

[15]http://www.shell.com/global/aboutshell/who-we-are/our-history/the-beginnings.html