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UNSHACKLING FOREIGN CORPORATIONS: *KIOBEL'S* UNEXPECTED LEGACY

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Kiobel v. Royal Dutch Petroleum[1] disfavors American corporations. While largely unshackling foreign corporations from the risk of being haled before an American court to answer for human rights abuses abroad, the decision keeps American corporations constrained by human rights law. This is because application of the Alien Tort Statute, as announced in *Kiobel*, turns on whether a corporation's actions "touch and concern" the United States.[2] American corporations are simply far more likely to satisfy that standard than foreign corporations.

While *Kiobel* appears to favor corporations over human rights plaintiffs,[3] the reality is more complicated: *Kiobel* favors *foreign* corporations over others—human rights plaintiffs and American corporations. *Kiobel* does not spell "the death of human rights litigation" in U.S. courts, but rather the death of U.S. human rights litigation against foreign corporations.

The argument proceeds as follows. First, this paper shows that American corporations are, for practical purposes, still bound by human rights law, enforceable in U.S. courts. Second, it demonstrates that foreign corporations, however, are largely freed by *Kiobel* from similar obligations enforceable in U.S. courts. Some will suggest that the possibility of enforceable human rights obligations does not matter; economic self-interest will itself lead to human rights compliance, so any differential treatment in the law will have no consequence. This is an altogether too sanguine view; in fact, being unshackled from human rights obligations might well give a company a competitive advantage over a competitor subject to legal human rights obligations. After describing this differential treatment and why it matters, the essay concludes by delineating possible ways to resolve Kiobel's asymmetrical effects. Perhaps most promisingly, Congress could level the playing field by

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[1] 133 S.Ct. 1659 (2013).

[2] *Id*. at 1669.

[3] John Knox, *Death of a Statute: The Kiobel Ruling*, CENTER FOR PROGRESSIVE REFORM (Apr. 19, 2013), http://www.progressivereform.org/CPRBlog.cfm?idBlog=225B214A-B7B5-401A-372F9EE967F2A21C.

declaring the Alien Tort Statute to have extraterritorial effect, against foreign and domestic concerns alike.

1. Why American Corporations Are Still Bound

In *Kiobel*, the Supreme Court held that the Alien Torts Statute did not apply extraterritorially against the Dutch, British, and Nigerian corporate defendants in a case where "all the relevant conduct took place outside the United States."[4] As many scholars have noted, Chief Justice Roberts' opinion for the Court did not bar the application of the ATS in cases involving events abroad entirely, but rather required a sufficient territorial nexus with the United States: "[E]ven 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."[5] Thus, events abroad might still warrant application of the Alien Tort Statute if they touch and concern the territory of the United States with sufficient force. Thus, *Kiobel* "leaves the courthouse door open a bit" and will, for example, "likely be used by workers' rights advocates in subsequent litigation."[6] In an appraisal just a day after the decision was rendered, Oona Hathaway observed that the decision allowed for "foreign-squared" cases to be heard in U.S. court, "cases in which the plaintiff or defendant is a U.S. national or where the harm occurred on U.S. soil."[7] She concluded, "[T]he end result of the Supreme Court's decision yesterday may not be the end of the ATS after all, but instead a renewed focus of ATS litigation on U.S. corporations."[8]

As Hathaway observed, the door is open in particular for cases involving American defendants.[9] Among the types of cases that might survive Kiobel's strict standard are cases involving execution, cross-border conduct, planning and authorization, design and testing, training, construction, contracting, financing and money transfers, electronic communications, and unlawful gains that "touch and concern" the United States "with sufficient force."[10] In each of

[4] *Kiobel*, 133 S. Ct. at 1679.

[5] *Id.*

[6] Susan Bisom-Rapp, *The Irony of the Supreme Court's Decision in Kiobel v. Royal Dutch Petroleum*, WORKPLACE PROF BLOG (Apr. 18, 2013, 3:36PM), http://lawprofessors.typepad.com/laborprof_blog/2013/04/the-irony-of-the-supreme-courts-decision-in-kiobel-v-royal-dutch-petroleum.html.

[7] Oona Hathaway, *Kiobel Commentary: The door remains open to "foreign squared" cases*, SCOTUSBLOG, (Apr. 18, 2013, 4:27PM), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/.

[8] *Id*.

[9] Marty Lederman notes that cases involving U.S. defendants remain "unresolved" by *Kiobel*. Marty Lederman, *Kiobel Insta-Symposium: What Remains of the ATS?*, OPINIO JURIS (Apr. 18, 2013, 6:40PM), http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-what-remains-of-the-ats/#more-28626.

[10] I borrow here from Roger Alford's excellent list of the array of cases that might satisfy the standard. Roger Alford, *Kiobel Insta-Symposium: Degrees of Territoriality,* OPINIO JURIS,

these cases, American companies are far more likely to satisfy this standard than foreign companies, given that their headquarters and key personnel are more likely to be located here. The fact that the alleged human rights violator is a U.S. corporation will be front and center in a plaintiff's argument that a case "touches and concerns" the United States. In an ongoing ATS lawsuit, for example, the plaintiff, seeking to demonstrate that the case meets *Kiobel's* standards, argues that the defendant corporation operating in Iraq is a U.S. corporation headquartered in the United States.[11]

Perhaps future decisions in United States courts will reveal that these cases have little or no chance for success, foiled by a standard for "touch and concern" that is never satisfied, or a bar against suits against corporations, or a bar against veil piercing or theories of enterprise liability.[12] But betting on that likelihood seems foolhardy for corporations whose executives are likely to wish to avoid the debilitating effects of responding to lawsuits. Unless further rulings render the possibility of successful litigation remote, U.S. corporations must continue to mind human rights law in their foreign operations for fear that they will be haled into court to answer for abuses abroad.[13]

2. Why Foreign Corporations Are Largely Unbound

Even while American corporations will remain subject to the possibility of ATS actions and comport themselves accordingly, *Kiobel* largely renders foreign corporations free from the threat of ATS suits in the United States. The actions of foreign corporations will be much less likely to "touch and concern" the United States with "sufficient force" to justify application of the ATS. Their decision-making, key operations, and relevant technical support are far less likely to be rendered from the United States. Equally important, the logic of the *Kiobel* decision—that U.S. courts should avoid "diplomatic strife"[14] that might result from their speaking on foreign events—further strengthens the view that foreign corporations acting abroad are rendered largely outside the reach of the ATS. Critics of the use of the ATS by human rights plaintiffs had

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(Apr. 22, 2013, 9:56AM), http://opiniojuris.org/2013/04/22/kiobel-insta-symposium-degrees-of-territoriality/.

[11] Kevin Jon Heller, Is *This the Model of a Post-Kiobel Lawsuit?*, OPINIO JURIS (May 10, 2013, 12:01AM), http://opiniojuris.org/2013/05/10/is-this-the-model-of-a-viable-post-kiobel-ats-lawsuit/ (citing Al-Shimari v. CACI, CTR. FOR CONSTITUTIONAL RIGHTS, https://ccrjustice.org/ourcases/current-cases/al-shimari-v-caci-et-al .

[12] Justice Breyer notes that the majority "leaves for another day the determination of just when the presumption against extraterritoriality might be 'overcome.'" *Kiobel*, 133 S.Ct. at 1673.

[13] For American companies, then the stakes continue to be "too high for any corporate manager or director to deny or seek to evade" corporate social responsibility. David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 334 (2011).

[14] *Kiobel*, 133 S.Ct. at 1669.

observed the "strange form of litigation in which foreigners bring suits in U.S. courts against other foreigners, for human rights violations in foreign countries."[15] Indeed, foreign governments are more likely to be irritated by the assertion of jurisdiction by U.S. courts against their corporations than against U.S. corporations. Indeed, foreign governments often file amicus briefs in ATS cases when their own corporations are the defendants.[16] They have even gone so far as to state that they have no similar objection to U.S. courts applying the ATS to U.S. companies.[17]

Yet, will not foreign corporations also be subject to the ATS because of their U.S. operations? After all, many multinational corporations will have a local continuous and systematic presence sufficient to justify general jurisdiction. Chief Justice Roberts answers this, arguing that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[18]

Won't foreign companies have to face similar statutes in their home countries? In his concurrence in the judgment, Justice Breyer notes that "[m]any countries permit foreign plaintiffs to bring suits against their own nationals based on unlawful conduct that took place abroad."[19] Yet, as Beth Stephens notes, even if there have been criminal prosecutions abroad, "[c]ivil human rights litigation generally continues to be viewed as a peculiarly U.S. phenomenon."[20] This is in significant part because U.S. procedural rules tend to be far more plaintiff friendly than foreign courts, given contingency fees, the

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[15] Eric Posner, *The United States Can't Be the World's Courthouse*, SLATE.COM (Apr. 24, 2013), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/the_supreme_court_and_the_alien_tort_statute_ending_human_rights_suits.html.

[16] Canada objected to an ATS suit brought against a Canadian corporation for conduct that occurred in Sudan. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 CIV9882(DLC), 2005 WL 2082846, at *1–2 (S.D.N.Y. Aug. 30, 2005). In *Kiobel*, Germany, Netherlands, and the United Kingdom filed amicus briefs objecting to the assertion of jurisdiction in the case.

[17] Justice Breyer quoted the European Commission as stating that it is "uncontroversial" that the "United States may ... exercise jurisdiction over ATS claims involving conduct committed by its own nationals within the territory of another sovereign, consistent with international law." *Kiobel*, 133 S.Ct. at 1676 (Breyer, J., concurring in judgment).

[18] *Id.* at 1669.

[19] *Id.* at 1675-76 (Breyer, J., concurring in judgment) (citing *inter alia Guerrero v. Monterrico Metals PLc* [2009] EWHC (QB) 2475 (Eng.) (attacking conduct of U.K. companies in Peru); *Lubbe and Others v. Cape PLc* [2000] UKHL 41 (attacking conduct of U.K. companies in South Africa); *Rb. Gravenhage* [Court of the Hague], 30 December 2009, JOR 2010, 41 m.nt. Mr. RGJ de Haan (Oguro/Royal Dutch Shell PLC) (Neth.) (attacking conduct of Dutch respondent in Nigeria)).

[20] Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 3 (2002).

no loser pays rule, class actions, elaborate discovery, punitive damages, etc.[21] Thus, even if foreign companies face the possibility of claims brought under universal jurisdiction at home, the local procedural and substantive rules are likely to be less worrisome for corporate defendants than U.S. courts empowered to hear claims brought by aliens for torts overseas. Stephens also observes cultural reluctance outside the United States to use civil litigation to make policy.[22]

Foreign (and American) corporations might still face tort litigation in U.S. state courts, but this is as yet unclear.[23] Barring substantial risk of state enforcement, the end result is this: *Kiobel* leaves American corporations still in jeopardy of being sued for human rights abuses abroad, while rendering that possibility negligible for foreign corporations.

3. Why It Matters

Perhaps human rights constraints do not matter to corporations because they would abide by them even without legal obligation. Even if European companies are no longer bound by the Alien Tort Statute, they will still abide by human rights norms as a matter of self-interest, or so some will argue. Corporations that commit human rights abuses will suffer in the long run, abandoned by customers, financiers, and governments. Under this analysis, permitting a foreign corporation to violate human rights, while forcing American corporations to abide by human rights only confines American corporations to do what is in their own self-interest. This view sees the threat of suit in U.S. courts as surplusage, unnecessary to achieve the human rights goal.

Corporate social responsibility, including abiding by human rights standards, has gained traction among multinational corporations. As Peter Spiro observes, "Accountants, shareholders, NGOs, and other private standard-setters are increasingly vigilant to human rights compliance (think Apple and Foxconn to highlight only one recent example)."[24] Yet, even though media scrutiny (and ultimate end-user reaction) probably motivated Foxconn's recent efforts to improve conditions for the production of electronics gadgets for global markets,[25] much of this compliance practice has legal underpinnings.

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[21] *Id*. at 14-16. *Cf.* John C. Coffee, Jr.,*Privatization and Corporate Governance: The Lessons from Securities Market Failure*, 25 J. CORP. L. 1, 6-7 (1999) (describing plaintiff preference for U.S. litigation in context of investor lawsuits).

[22] Stephens, *supra* note 20, at 24-27.

[23] Christopher A. Whytock *et al*., *After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE 1 (2013).

[24] Peter Spiro, *Human Rights Will Survive Kiobel*, OPINIO JURIS (Apr. 17, 2013), http://opiniojuris.org/2013/04/17/human-rights-will-survive-kiobel/.

[25] Charles Duhigg & David Barboza, *In China, Human Costs Are Built Into an iPad*, N.Y. TIMES (Jan. 25, 2012), http://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html?pagewanted=all&_r=0; Nick Wingfield,

Statutes from the Foreign Corrupt Practices Act, to California's Transparency in Global Supply Chains Act, to the Alien Tort Statute provide legal mechanisms for deterring or disciplining human rights failures. Before the judgment in *Kiobel* was handed down, scholars observed that multinational corporations had adopted corporate social responsibility as part of everyday compliance practice because "today a corporation, whatever its competitive drive, risks defaulting on legal standards and not solely moral imperatives."[26] Bad press often follows the ATS lawsuit, even where public claims by victims not accompanied by legal process attract little attention. The imprimatur of a colorable legal claim, including the specter of real liability and damages claims often in the millions, compels newspapers to report on the claim and to follow it closely.[27]

The ability to engage in human rights abuses might well prove a competitive advantage to foreign corporations. Such abuses might enable them to access mineral resources in the lands of indigenous peoples who might find seek to thwart the environmental pollution or desecration of their lands.[28] Banks might be able to finance dictators or war. Communications and electronics companies may be able to offer equipment and software to autocrats to help them monitor and suppress dissidents.

4. Leveling the Playing Field

Leveling the playing field for international business competition is a fundamental ambition of international economic law. From trade law with its non-discrimination obligations to finance with its international capital adequacy requirements to global rules against corporate bribes of officials, international economic law seeks to encourage fair competition among corporations.[29] At times, the United States has accepted an uneven playing

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Apple's Chief Puts Stamp on Labor Issues, N.Y. TIMES (Apr. 1, 2012), http://www.nytimes.com/2012/04/02/technology/apple-presses-its-suppliers-to-improve-conditions.html?pagewanted=all.

[26] Scheffer & Kaeb, *supra* note 13, at 335.

[27] Laura Sydell, *Group Targets Yahoo Inc. Over China Cases*, NPR (Apr. 18, 2007), http://www.npr.org/templates/story/story.php?storyId=9658200; Miguel Helft, *Chinese Political Prisoner Sues in U.S. Court, Saying Yahoo Helped Identify Dissidents*, N.Y. TIMES, Apr. 19, 2007, at C4; Jad Mouawad, *Oil Industry Braces for Trial on Rights Abuses*, N.Y. TIMES (May 21, 2009), http://www.nytimes.com/2009/05/22/business/global/22shell.html?pagewanted=all; Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. TIMES (June 8, 2009), http://www.nytimes.com/2009/06/09/business/global/09shell.html.

[28] *Cf.* Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011).

[29] Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47 (1993); Katherine M. Morgan, *The Foreign Corrupt Practices Act: Toward A Definition Of "Foreign Official,"* 38 BROOK. J. INT'L L. 415, 422 (arguing that one major goal of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was to level the playing field).

field, where our corporations are bound to human rights obligations that many foreign corporations are not. In both the Foreign Corrupt Practices Act of 1977 (FCPA) and the Anti-Apartheid Act of 1986, Congress imposed human rights obligations that fell largely on American companies operating abroad. But in the FCPA, Congress sought to "extend the reach of the law as broadly as possible" and thus "piggybacked the FCPA on the federal securities laws, which govern all corporations, both domestic and foreign, that raise capital in U.S. public markets."[30] Equally important, the United States successfully lobbied other nations to follow suit.[31] The Anti-Apartheid Act permitted any American corporation required to terminate or curtail business in South Africa to sue in a U.S. federal court any company "that takes commercial advantage [of] such termination or curtailment."[32]

Some might suggest that each state police the activities of its corporations abroad. Perhaps the United States might push for an international treaty to this effect. But that might leave out some jurisdictions that took advantage of more ethically minded competitors, entering the breach where the more constrained companies cannot go. Even where a foreign jurisdiction allows a lawsuit at home, those lawsuits are likely to be less onerous than those in U.S. courts. Others might suggest that the playing field be leveled by definitively removing human rights constraints on American companies acting abroad. That would leave many human rights abuses unremedied.

A more promising strategy would be for Congress to make clear that the ATS has extraterritorial effect, thus no longer confining its application based on the closeness of the actions with the United States.[33] As Judge Pierre Leval writes, "keeping courts open to civil suits about human rights can bring solace and compensation to victims. More important, these suits draw global attention to atrocities, and in so doing perhaps deter would-be abusers."[34] At the same time, with foreign corporations subject to international human rights law alongside American corporations, American corporations seeking business opportunities abroad would not find themselves disadvantaged by the Supreme Court's decision in *Kiobel*.

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[30] Anupam Chander, *Googling Freedom*, 99 CALIF. L. REV. 1, 35 (2011).

[31] Congress directed the President to pursue an international anti-corruption agreement. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(d), 102 Stat. 1107, 1424; Foreign Corrupt Practices Act of 1997, 15 U.S.C.S. § 78dd-1 (1998).

[32] Pub. L. 99-440, § 403.

[33] Congress could not authorize extraterritorial application of the ATS without constraint. Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1967-1971 (2010) (identifying international law limits on prescriptive jurisdiction).

[34] Pierre N. Leval, *The Long Arm of International Law Giving Victims of Human Rights Abuses Their Day in Court*, FOREIGN AFFAIRS (Mar./Apr. 2013), http://www.foreignaffairs.com/articles/138810/pierre-n-leval/the-long-arm-of-international-law.