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Michelle Flash

American University Washington College of Law

Anna Naimark

American University Washington College of Law

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Panel Explores the Future of Human Rights Lawyering following the Supreme Court Hearing in *Kiobel v. Royal Dutch Petroleum*

by Michelle Flash* and Anna Naimark**

The American University Washington College of Law (WCL) hosted a panel discussion on *Kiobel v. Royal Dutch Petroleum* on October 2, 2012, the day after the United States Supreme Court reheard oral arguments in the case that will have broad effects for human rights lawyers. *Kiobel* is a class action suit brought under the Alien Tort Statute (ATS) against Royal Dutch Shell Petroleum Co. (Royal Dutch) and Shell Transport and Trading Co. The plaintiffs allege that the companies are responsible for aiding and abetting armed forces in the killing, torture, and cruel, inhumane, and degrading treatment of a group of Nigerians in the Ogonia region. The Second Circuit Court of Appeals ruled against the plaintiffs, finding that corporations could not be held liable under the ATS. The Supreme Court heard the case on February 28, 2012, and on March 5, 2012, ordered re-arguments on the question of extraterritoriality.

The WCL panel was composed of Paul Hoffman, lead counsel for the plaintiffs; Katie Redford, Co-Founder and U.S. Office Director of EarthRights International; John Bellinger III, partner at Arnold & Porter, LLP, and former Legal Advisor to the U.S. Department of State; and Andrew Grossman, litigator at BakerHostetler and Legal Fellow at the Heritage Foundation. Professor Stephen Vladeck, WCL Constitutional Law Scholar and Associate Dean for Scholarship, moderated. The panelists each presented their views on the oral arguments and then engaged in a lively discussion on the role of the ATS as a tool for human rights attorneys.

The core question before the Supreme Court was whether the ATS will survive, and if so, in what form. The Justices in February 2012 initially considered the more limited question of whether the ATS applied to corporate defendants, but the Justices then requested to rehear the case in order to decide the broader issue of whether federal courts may hear ATS claims that arise out of conduct in a foreign country. Both Hoffman and Redford expressed optimism about the content of the questioning

during oral arguments, asserting that the Justices were receptive to the concept of keeping the ATS alive due to the principle of *stare decisis* following the Court's 2004 decision in *Sosa v. Alvarez-Machain*. Hoffman and Redford both suggested that the Court will likely place some constraints on the ATS, such as an exhaustion of remedies requirement or a limit that would allow only "natural persons" as defendants. In contrast, both Bellinger and Grossman argued that the ATS is counter to principles of international law and should thus be severely limited or even struck down to protect U.S. foreign relations. Both Bellinger and Grossman asserted that if the ATS is sustained and used as a tool of universal jurisdiction, other nations might create a reciprocal statute and use it to hold U.S. officials accountable for violations of human rights law. To illustrate this point, Bellinger posed a hypothetical in which a country could determine that drone strikes were a violation of the law of nations and therefore seek to hold Secretary of State Hillary Rodham Clinton liable in its domestic courts.

The debate between the panelists illustrated the diverging concerns of what the repercussions of the pending Supreme Court decision may be: Redford and Hoffman expressed concern that the ATS's availability for foreign victims of alleged human rights violations in foreign states to seek justice in U.S. federal courts will cease. Bellinger and Grossman highlighted that to them, the more important concern is protection of the foreign relations of the United States from the repercussions of a statute with extraterritorial reach. If the Supreme Court sides with the plaintiffs, human rights advocates will undoubtedly see this case as a huge victory for the enforcement of human rights law and will seek to use it to promote corporate accountability across the globe in U.S. courts. On the other hand, if the Supreme Court significantly limits the scope of possible suits or discards the ATS altogether, human rights advocates would have one fewer avenue to address serious allegations of human rights abuses as claimed in *Kiobel*—an outcome that Hoffman said would not deter future advocacy. Under the most limiting ruling in *Kiobel*, the ATS would still be a cause of action in U.S. courts, but the courts would only have jurisdiction over lawsuits where the actions occurred in the United States.

Despite the highly disputatious panel discussion, after-panel informal interviews with Bellinger, Hoffman, and Redford indicated they had many common reflections concerning the oral arguments. None of the panelists said that the rehearing of *Kiobel* held any surprises. The panelists observed that the more liberal Justices predictably spoke a lot about *Filártiga v. Peña-Irala*, which paved the way for cases with ATS claims, and

* Michelle Flash, a J.D. candidate at the American University Washington College of Law, is the Print Publication Editor of the Human Rights Brief.

** Anna Naimark, a J.D. candidate at the American University Washington College of Law, is the Social Media Editor of the Human Rights Brief.

Christina M. Fetterhoff and Matthew Lopas, J.D. candidates at the American University Washington College of Law and Co-Editors-in-Chief of the Human Rights Brief, contributed to this report.

the more conservative Justices focused on concerns about the extraterritoriality of the statute. Bellinger predicted that the four liberal Justices would vote to reverse the lower court's dismissal of *Kiobel*, and the four conservatives would vote to affirm, with Justice Kennedy being the swing vote. Bellinger said, "I am not quite sure what will happen, but what I can tell you is that you will see a lot of concurring opinions." The panelists also agreed that a total ban on extraterritoriality would likely not happen and that the rehearing indicated that the Justices would like to preserve *Filártiga*. Limits on the ATS, however, seemed inevitable to the experts. Similar to their statements during the panel discussion, all three predicted that a possible outcome might include an exhaustion of remedies requirement.

Where the panelists split more was on the significance of *Kiobel* and the ATS in a broader sense. Redford said she sees *Kiobel* as being held out as an example for the types of human rights cases that should be brought and noted that the *Filártiga* cases rightly called the ATS a "beacon of hope." Hoffman added: "[N]o matter what happens to the ATS, they can't stop the movement. The ATS is only a tool in the greater movement." Bellinger expressed his view that the extraterritoriality of the ATS itself is a violation of international law. Regarding accountability, Bellinger argued that advocates should look to the nationality principle, which recognizes that a state can adopt laws that govern the conduct of its nationals abroad. Where the nationality principle is not decisive, such as with corporate accountability, he argued that advocates should focus on strengthening the United Nations Guiding Principles on Business and Human Rights and the Organisation for Economic Co-operation and Development guidelines to pressure countries to police corporations incorporated or operating inside their borders.

Redford and Hoffman had a different perspective on corporate accountability. Redford said that although the second oral argument focused on the ATS more broadly, the two separate oral argument sessions, when viewed as a whole, did address the issue of corporate accountability. She cited the hypothetical Justice Breyer put forth that if pirates incorporated their ship and became "Pirates, Inc.," they should still be held accountable

for the crime of piracy, mentioned in *Sosa* as conduct encompassed by the ATS, despite being a corporation. If the ATS is overturned, both Redford and Hoffman said that human rights lawyers could bring these cases to state courts, as in the case of *Doe v. Unocal* (9th Cir. 2003), where plaintiffs sought redress for human rights abuses

associated with the Unocal pipeline project in Burma. The state court route is an option that even Kathleen Sullivan (counsel for Royal Dutch Petroleum) conceded during the oral arguments. Hoffman added that if the Supreme Court invalidates the ATS's applicability to corporate defendants, advocates could just sue corporate officials. He explained that the fabric of international human rights law is strong, and even if the ATS is narrowed, human rights lawyers will find a way to hold corporations and people accountable. Hoffman's message to aspiring human rights lawyers was that they are a part of a larger movement that includes a lot of people; they cannot be successful unless each piece of the movement—including organizers and policy advocates—is successful. Bellinger's message to students mirrored the argument he made during the panel about government lawyers' responsibility to serve the United States: he asked that students remember that human rights lawyers also have clients and have to serve those clients and those clients' interests.

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