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Kiobel v. Royal Dutch Petroleum: A Practitioner's Viewpoint

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It's an honor to be here among so many distinguished scholars. I am not a scholar myself, although I like to think that my work is backed up by sound scholarship most of the time. Let me say, as a disclaimer, that while I am a litigator and a practitioner, my remarks today are on behalf of myself and not on behalf of my clients. I litigate transnational human rights and environmental law cases, including some cases under the Alien Tort Statute (ATS).[1] I am going to talk about the practitioner's viewpoint of *Kiobel v. Royal Dutch Petroleum Co.*,[2] and what might follow from the Supreme Court's decision. I am going to start by telling a story, because that is how our cases start. Some of you may know this story, or think you know it.

In the early 1990s, the Ogoni people of Nigeria began to organize into a non-violent protest movement.[3] They were mainly protesting the activities of the Royal Dutch/Shell oil company (Shell).[4] Shell had extracted oil from Ogoni lands for decades, resulting in an environmental catastrophe and countless oil spills.[5]

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1. 28 U.S.C. § 1350 (2006).

2. 133 S. Ct. 1659 (2013).

3. *See Ogoni March to Protest Oil Drilling in Nigeria*, EARTH ISLAND J., June 1993, at 33, 33 [hereinafter *Ogoni March*]; *see also* Steven Cayford, *The Ogoni Uprising: Oil, Human Rights, and a Democratic Alternative in Nigeria*, 43 AFR. TODAY 183, 187–89 (1996) (discussing the origins of the movement).

4. *Ogoni March*, *supra* note 3, at 33.

5. *See generally* Richard Boele et al., *Shell, Nigeria and the Ogoni. A Study in Unsustainable Development: I. The Story of Shell, Nigeria and the Ogoni People*, 9 SUSTAINABLE DEV. 74, 76–78 (2001) (describing the environmental impact of Shell's oil operations on the Ogoni land).

Natural gas is produced as part of the process of extraction, and the cheapest way to extract the oil involved Shell simply burning off the natural gas in enormous gas flares right next to Ogoni villages and water sources.[6]

The Movement for the Survival of the Ogoni People (MOSOP) demanded a stop to these practices, and demanded a share of the benefits of oil production that had been denied to them.[7] Thousands of Ogoni joined the movement, marching through the streets of Ogoni territory.[8] At that time, Nigeria was under military rule, so the regime's reaction to this movement was swift. Troops were sent in to suppress the movement—soldiers burned houses, tortured, maimed, raped, and killed.[9] In the midst of this suppression, four Ogoni tribal chiefs were killed in what was apparently mob violence.[10] The military regime used these killings as a pretext for rounding up a number of Ogoni leaders and accusing them of murder.[11] Nine Ogonis were sentenced to death before a military tribunal that systematically denied the accused their rights.[12] On November 10, 1995, they were hanged.[13]

Although the Ogoni were protesting against Shell's drilling activities, Shell's alleged involvement did not end there. On certain occasions, Shell called in Nigerian military troops to respond to various incidents.[14] They participated in joint operations with these brutal military units and they paid the military forces.[15] Allegedly,

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6. *See* Gabriel Eweje, *Environmental Costs and Responsibilities Resulting from Oil Exploration in Developing Countries: The Case of the Niger Delta of Nigeria*, 69 J. BUS. ETHICS 27, 39–40 (2006).

7. MOSOP submitted the Ogoni Bill of Rights to the Federal Government of Nigeria in 1990. MOVEMENT FOR THE SURVIVAL OF THE OGONI PEOPLE, OGONI BILL OF RIGHTS (1990). In the 1991 Addendum to the Ogoni Bill of Rights, MOSOP asserted, "multi-national oil companies, namely Shell (Dutch/British) and Chevron (American) have severally and jointly devastated our environment and ecology, having flared gas in our villages for 33 years and caused oil spillages, blow-outs etc., and have dehumanized our people . . . ." *Id.* at 7. Further, MOSOP urged the international community to "[p]revail on Shell and Chevron to stop flaring gas in Ogoni." *Id.* at 8.

8. *See* Boele et al, *supra* note 5, at 79; *Ogoni March*, *supra* note 3, at 33.

9. Howard French, *Nigeria Executes Critic of Regime; Nations Protest*, N.Y. TIMES, Nov. 11, 1995, at A1.

10. *See id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92 (2d Cir. 2000) (summarizing plaintiffs' allegations).

15. *See id.* at 92–93.

Shell bribed witnesses to give false testimony against the "Ogoni Nine."[16] Shortly before the executions, Shell's director of Nigerian operations allegedly stated that he could essentially stop the executions and get the government to pull back if the Ogoni gave up their protest movement.[17]

Now, you may think I am telling the story of the *Kiobel* case, and I am. Barinem Kiobel was a medical doctor, a prominent local official and one of the "Ogoni Nine" executed on November 10, 1995. His family came to the United States and brought suit under the ATS, accusing Shell of complicity in his death, among other abuses.[18] But, I am also telling the story of another case—*Wiwa v. Royal Dutch Petroleum Co.*[19] Ken Saro-Wiwa, as many of you may know, was the leader of the MOSOP, and he was executed as well.[20] Saro-Wiwa's family also came and sued in the United States.[21] Despite their similar genesis—in fact, the same trial and executions—the *Wiwa* case proceeded differently from the *Kiobel* case. As the *Kiobel* case was being considered by the Second Circuit Court of Appeals, the *Wiwa* case was proceeding toward trial in the district court.[22] In June of 2009, on the eve of trial, Shell decided to settle with the *Wiwa* plaintiffs, and paid over fifteen million dollars.[23]

So, you may be wondering: why did the cases turn out differently? Part of that is a question of civil procedure, which I will not get into. But another important factor is the claims that were alleged in these cases. Although both cases asserted claims under the ATS, such as torture, summary execution, and crimes against humanity, the *Kiobel* case only asserted ATS claims.[24] The *Wiwa* case also asserted claims under common law headings such as

16. *Id.* at 93.

17. *Report: Shell Tried to Trade Saro-Wiwa's Freedom*, ASSOCIATED PRESS, Nov. 19, 1995.

18. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

19. 226 F.3d 88 (2d Cir. 2000).

20. *Id.* at 92.

21. *Id.*

22. The Second Circuit heard arguments in *Kiobel* on January 12, 2009 and gave judgment on September 17, 2010. *Kiobel*, 621 F. 3d 111. In the meantime, *Wiwa* settled. Jad Mouawad, *Shell Agrees To Settle Abuse Case For Millions*, N.Y. TIMES, June 9, 2009, at B1.

23. Mouawad, *supra* note 22.

24. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (2013).

assault, battery, negligence, and wrongful death.[25] Although the case settled before trial, the *Wiwa* plaintiffs brought claims that would likely still be viable, regardless of what the Supreme Court did in the *Kiobel* case.

To understand the practical effects of the *Kiobel* decision, it is worth reviewing the unique features of the ATS, and how it fits into the transnational litigation picture. The ATS is not unique for allowing claims from around the world to be brought in U.S. courts.[26] Nothing in the ATS allows this, nothing in the ATS prevents it, but there is nothing special about the ATS in this regard. There is no special expansive rule of U.S. jurisdiction when it comes to ATS cases or human rights cases. The doctrine that allows these cases to be brought in the United States dates back to the eighteenth century, the "transitory tort" doctrine.[27] But there are a few things that make the ATS special. Of course, most notably, the ATS applies international law as the rule of decision.[28] Now, in some cases, that is a very powerful thing. There is a benefit to using the proper labels to describe heinous human rights abuses. One of the reasons that *Filártiga v. Peña-Irala*[29] was brought under the ATS and not in the New York state court was to call torture, "torture," and not "battery," for example.[30]

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25. Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386 (KMW), 2002 WL 319887, at *2 (S.D.N.Y. Feb. 28, 2002).

26. *E.g.*, Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2006).

27. The transitory tort doctrine is also known as *lex loci delicti*. In *Filártiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980), the Second Circuit explained, "It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction . . . . where the lex leci delicti commissi is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred." For a discussion of the evolution of the transitory tort doctrine in U.S. case law, see Chimène Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 U.C. IRVINE L. REV. 81, 83–87 (2013).

28. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) (ruling that, in ATS actions, "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the 18th-century paradigms we have recognized"). *But see* Ingrid Wuerth, *Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1934–43 (2010) (outlining possible alternative rules of decision).

29. 630 F.2d 876 (2d Cir. 1980).

30. *Cf.* Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995) ("[L]ooking to domestic tort law to provide the cause of action mutes the grave *international law* aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort. This is not merely a question of formalism or even of the amount or type of damages available; rather it concerns the proper characterization of the kind of wrongs meant to be addressed under § 1350: those perpetrated by *hostis humani generis* ('enemies of all mankind') in contravention of *jus cogens* (preemptory norms of international law). In this light, municipal

On the other hand, from a very practical litigation perspective, it is much more difficult to prove the elements of many international law claims than it is to prove the elements of ordinary common law claims. It is easier to prove the elements of battery than to prove the elements of torture. I litigate environmental law cases and no ATS case asserting environmental claims directly has proceeded to judgment favorably, or even to completion favorably. Although, right now, there is one case involving trans-boundary environmental harm that may be on the right track.[31] So, all of my environmental cases are transnational, but they are not ATS cases. They are ordinary transitory tort cases asserting ordinary toxic tort claims, like nuisance, battery, and negligence.

The ATS, of course, is a jurisdictional statute and it guarantees a federal forum.[32] So, maybe the *Filártiga* plaintiffs needed the ATS in order to get into federal court. Again, that is not necessarily a good thing from a practical litigation perspective. In many parts of the country, plaintiffs' lawyers try to stay away from federal court.[33] The most recent significant expansion of federal jurisdiction, the Class Action Fairness Act of 2005 (CAFA),[34] was pushed by the defense bar and corporate lobbying because they wanted the protection of federal courts.[35] In fact, one of my transnational environmental law cases was filed in California state court and we were removed to federal court under CAFA.

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tort law is an inadequate placeholder for such values."). *See generally* Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 17–22 (2013) (discussing the advantages and disadvantages of bringing human rights claims in state courts).

31. *See* Arias v. DynCorp, 856 F. Supp. 2d 46 (D.D.C. 2012). In *Arias*, Ecuadoran citizens brought an action against a U.S. contractor for injuries arising from fumigants sprayed over drug crops in Colombia. *Id.* at 48.

32. 28 U.S.C. § 1350 (2006) ("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."); *see Sosa*, 542 U.S. at 713–14.

33. *See* Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 57–58 (2009) (discussing the "real and perceived advantages" to plaintiffs of keeping their cases in state courts).

34. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

35. *See generally* Stephen Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008).

Another unique aspect of the ATS is that most courts have ruled that it has a ten-year statute of limitations,[36] which is a real benefit from a practical litigation perspective. The *Kiobel* case itself demonstrates this; it was filed in 2002, seven years after the events in question. Most state statutes of limitations are between one and four years long[37]—although in one of my cases, we litigated under a Nigerian statute of limitations, which is six years long. In many cases of severe human rights abuses, courts have applied doctrines for tolling the statute of limitations.[38] So, even where there are shorter statutes of limitations, there may be some relief from this.

Finally, another unique aspect of the ATS is that, in at least some parts of the country, exhaustion of domestic remedies may be required.[39] I say "may be required" because nobody knows what the Ninth Circuit meant in *Sarei v. Rio Tinto, PLC*, [40] a decision that has six cross-cutting non-majority opinions. But it is clear that, in some cases, the court could require the exhaustion of domestic remedies.

If severe restrictions were placed on the ATS or the ATS were not available for transnational cases, this would be a significant blow to human rights cases litigation and transnational environmental litigation, but not a fatal blow. The *Wiwa* case itself gives us an idea of what may happen after *Kiobel*, regardless of what the Supreme Court decides. *Doe I v. Unocal Corp.*[41] is another example of that. When we settled the *Unocal* case, we were proceeding to an en banc decision, but the other hammer against Unocal at that time was the

36. *See, e.g.*, Chavez v. Carranza, 559 F.3d 486, 492 (6th Cir. 2009) (finding that the ten-year statute of limitations applicable to claims under the Torture Victim Protect Act applies to claims under the ATS); Van Tu v. Koster, 364 F.3d 1196, 1199 (10th Cir. 2004) (same); Papa v. United States, 281 F.3d 1004, 1012–13 (9th Cir. 2002) (same).

37. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (LexisNexis 2006) (general three-year limitation period for civil actions); TENN. CODE ANN. § 28-3-104 (2000) (one-year limitation period for personal tort actions); OHIO REV. CODE ANN. § 2305.09 (LexisNexis 2010) (general four-year limitation period for tort actions).

38. *See, e.g.*, Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006) (finding equitable tolling of the limitations period warranted in an action alleging torture by a Salvadoran military officer); Kiwanuka v. Bakilana, 844 F. Supp. 2d 107 (D.D.C. 2012) (equitably tolling the limitations period in an action against former domestic employers, which involved claims of involuntary servitude, human trafficking, and forced labor).

39. *See generally* Regina Waugh, *Exhaustion of Remedies and the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 555 (2010) (discussing how various lower courts have ruled on the issue of exhaustion of remedies in the context of ATS litigation).

40. 671 F.3d 736, 757 (9th Cir. 2011) (en banc), *cert. granted, vacated and remanded*, 133 S. Ct. 1995 (2013), *dismissed on other grounds*, Nos. 02–56256, 02–56390, 09–56381, 2013 WL 3357740 (9th Cir. June 28, 2013).

41. 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005).

fact that we were proceeding to trial in California state court on ordinary common law claims.[42] So while the ATS claims had been dismissed on appeal, we were proceeding to trial in state court.

Turning back to the *Kiobel* case, I am going to do the guessing game about what might happen, speculate about different ways that the Supreme Court might come out, and discuss how that might affect the practice of litigation outside of the ATS. This is a difficult exercise. In my office, we have considered doing a betting pool on what the Supreme Court might decide. We ultimately gave up because there were far too many possibilities to be able to calculate it. However, I'll try to lay out at least a few of the potential outcomes.

The first option, which I think reasonably likely, is that the Court will not actually put any new restrictions on the ATS. However, that is not a very interesting thing to talk about. If the Court did that, it would be because there are a number of other doctrines that make these cases hard to litigate to begin with. I will move on to the other possibilities and how those might affect other kinds of transnational litigation.

As another option, the Court could agree with the Ninth Circuit and decide that exhaustion of local remedies is required.[43] I think there are a number of reasons, which I will not get into, why such an exhaustion requirement is inappropriate in domestic transnational litigation. Regardless of the merits of an exhaustion requirement for ATS cases, nobody, to my knowledge, argues that such a requirement should apply to other forms of transnational litigation. The argument for exhaustion in the ATS cases comes out of the international law context and the fact that in the international human rights system, exhaustion is sometimes required before taking a case to an international human rights body. However, it is not a doctrine that has been applied horizontally between coequal courts in one country to another.

42. *See* Doe I v. Unocal Corp., No. BC237980 (Cal. Super. Ct. Sept. 14, 2004) (denying Unocal's motion for judgment and ruling that the plaintiffs could proceed to jury trial), *available at* http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/legal/doe-v-unocal-09-14-2004.pdf.

43. *See Sarei*, 671 F.3d at 757.

In a third scenario, the Court could decide that the ATS does not apply to corporations. Everybody seems to think that is unlikely.[44] There are some extremely pessimistic views as to why the Supreme Court ordered reargument.[45] These have to do with wanting to rule against us on both corporate liability and extraterritoriality, and the Court realizing that it could not take the *Rio Tinto* case to rule against us on extraterritoriality, if it had already ruled against us on corporate liability.[46] This is because in order to do that, *Rio Tinto* would have to be dismissed on that ground. I don't buy it. I am not on the Supreme Court, but regardless of whether corporate liability is knocked out of the ATS, again, that would seem to have no implications for litigation under other doctrines.

Additionally, the Supreme Court could follow Kathleen Sullivan's argument and actually decide, based on a presumption against extraterritoriality, that the ATS has no extraterritorial application.[47] Again, this seems unlikely. At the second oral argument, not even the conservative justices seemed to be buying the notion that the ATS has no application outside of U.S. borders; everybody seems to think that the ATS applies to piracy, at the very least.[48] But again, this narrowing of the ATS would have no impact on other sorts of transnational litigation. Generally, the presumption against extraterritoriality simply does not come up in most transitory tort cases.

That leaves a number of areas where the Supreme Court might decide that some sort of connection or nexus to the United States is necessary in order to bring an ATS case. This gets into the discussion of adjudicative versus prescriptive jurisdiction, and whether the Supreme Court will decide that some sort of basis for prescriptive jurisdiction is required in order to bring an alien tort case, or an

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44. *See* Susan Farbstein, Tyler Gianni & Anthony Clark Arend, Debate, *The Alien Tort Statute and Corporate Liability*, 160 U. PENN. L. REV. PENNUMBRA 99, 108 (2011), *available at* http://www.pennumbra.com/debates/pdfs/ATS.pdf (criticizing a corporate carve-out as "deeply inconsistent with the history, text, and purpose of the ATS").

45. *See, e.g.*, Mike Sacks, *Supreme Court Expands Corporate Human Rights Case, Avoids Corporate Liability Question*, HUFFPOST POLITICS (Mar. 5, 2012, 3:37 PM), http://www.huffingtonpost.com/2012/03/05/supreme-court-corporate-human-rights-kiobel-royal-dutch-petroleum_n_1322007.html.

46. *Id.*

47. *See* Brief for Respondents at 54–55, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491).

48. For instance, at oral reargument, Justice Scalia said that he thought that the ATS's application to the high seas was "common ground." Transcript of Oral Reargument at 25, *Kiobel*, 133 S. Ct. 1650 (No. 10-1491).

extraterritorial or transnational alien tort case. These could include nationality jurisdiction or universal jurisdiction. It could be based on the doctrine of forum of necessity that has been applied in some European countries, where a suit can be brought here if it cannot be brought anywhere else.[49] Additionally, the Supreme Court might make up some other nexus requirement. For example, the *Kiobel* plaintiffs are residents of the United States,[50] and maybe that is enough to find a nexus.

But again, none of these bases for restricting the ATS would have any impact on transnational transitory tort cases outside of the ATS context. This is because these arguments are all based on the notion of prescriptive jurisdiction and the need to meet the international law requirements of prescriptive jurisdiction.[51] Our transitory tort cases that are not under the ATS very clearly fall under the adjudicatory jurisdiction concept in international law.[52] In many cases this involves the application of foreign law, but it involves a choice of law question where the court will decide what law appropriately applies. The question about whether the United States has the power to decide the case really only extends to whether the U.S. court has the power over the defendant. It is a question of personal jurisdiction, and when personal jurisdiction is present, other limitations on jurisdiction generally do not come up.[53] I say "generally" because in some cases, courts have decided that laws of particular states have no extraterritorial application.[54] That is an area in which there has been very little litigation, and I tend to think that sometimes judges get the law wrong. In any case, even if, for example, we were litigating in California and the California court decided that California law had no application to Nigeria, we would

49. This is sometimes referred to as *forum necessitatis*, and has been adopted by at least ten E.U. member states. *See* ARNAUD NUYTS, STUDY ON RESIDUAL JURISDICTION 64–67 (2007).

50. *Kiobel*, 133 S. Ct. at 1663.

51. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) (listing the requirements for prescriptive jurisdiction).

52. *See id.* § 421 (listing the requirements for adjudicatory jurisdiction).

53. *See id.* § 421(2)(a) ("In general, a state's exercise of jurisdiction . . . is reasonable if, at the time jurisdiction is asserted . . . the person or thing is present in the territory of the state, other than transitorily.")

54. *See, e.g.*, Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1024 (S.D. Ind. 2007).

proceed under Nigerian law.[55] In fact, we have done so. We went to trial in California on a case that included claims brought under Nigerian law.[56] There is no barrier to doing that.[57]

My ultimate point here is that whatever happens in the *Kiobel* case, it is not going to be the end of transnational litigation, it is not going to be the end of transnational human rights litigation, and it is not going to be the end of transnational environmental litigation or labor cases. In fact, many of the bases for narrowing the ATS would not even knock out that many alien tort cases. Yes, if they adopt the strict presumption against extraterritoriality, that would be the big one. However, almost every other possibility would knock out only a small number of existing ATS cases. For example, with regard to the nationality principle,[58] *Kiobel* in some ways is a bad case because there is a more tenuous connection to the United States than in many alien tort cases. Most ATS cases against corporations are against U.S. corporations, simply because it is difficult to get personal jurisdiction over a foreign corporation in the United States.[59] Limiting extraterritorial ATS cases to U.S. corporate defendants would not knock out that many cases. The requirement of exhaustion might knock out some cases, but litigators have been dealing with this under the Torture Victim Protection Act (TVPA)[60] for the last twenty years.[61] It has not been a significant barrier and in most of the countries where these cases arise, the exhaustion of remedies would

55. *See generally* Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887 (2011) (discussing the application of foreign law by U.S. courts).

56. Bowoto v. Chevron Corp., 621 F.3d 1116 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 1968 (2012).

57. *But see* Ashby Jones & Joe Palazzolo, *States Target Foreign Laws*, WALL ST. J., Feb. 7, 2013, at A3 (discussing recent attempts by some states to block their courts from applying foreign law).

58. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987).

59. Personal jurisdiction over a foreign corporation requires some sufficient tie to the state in which the action is brought. *See* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 250 (2008). *See generally* Sean K. Hornbeck, Comment, *Transnational Litigation and Personal Jurisdiction over Foreign Defendants*, 59 ALB. L. REV. 1389 (1996) (describing the complex history of personal jurisdiction rules relating to foreign defendants).

60. 28 U.S.C. § 1350 note (2006).

61. *See, e.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 178 (D. Mass. 1995) (explaining that exhaustion of remedies is generally not required under the TVPA "when foreign remedies are unobtainable, ineffective, or obviously futile" (quoting S. REP. NO. 102-249, at 10 (1991)).

likely be excused because it would be futile.[62] Additionally, the exhaustion doctrine would present a challenge to defendants because they would have to show what remedies are available in foreign forums, and presumably would have to submit to those remedies. That can result in unintended consequences, as we have seen in the *Chevron* litigation with Ecuador.[63] In one of our cases where we were defending a forum non conveniens motion, the defendant submitted a long declaration about the content of the foreign law and exactly how the case could be brought in a foreign forum, which was of tremendous help to us as we planned out our litigation in the foreign forum. They laid out the road map, and that is what defendants have to do if they want to not only win the forum non conveniens challenge, but also prevail on exhaustion of local remedies.[64]

Limiting ATS cases to universal jurisdiction also would knock out a few cases, but most ATS cases do involve what we commonly consider universal jurisdiction offenses. Not all—and personally I do not think that they should be so limited, partly because it is difficult to tell where the line can be drawn on universal jurisdiction. It is much easier to prove something is a violation of customary

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62. *See, e.g.*, Abiola v. Abubakar, 435 F. Supp. 2d 830 (N.D. Ill. 2006) (finding that plaintiffs had established that attempts to exhaust Nigerian remedies would be futile).

63. Texaco (later acquired by Chevron) was sued by Ecuadorian plaintiffs in the United States. The action was dismissed on forum non conveniens grounds, in favor of Ecuador as the alternative forum. Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002). The litigation in Ecuador resulted in a judgment, upheld by the Provincial Court of Sucumbios, for $18 billion against Chevron. Corte Provincial de Justicia de Sucumbios [Provincial Court of Justice of Sucumbios], Sala Unica, 3 enero 2012, Juicio No. 2011-0106 (Ecuador), *available at* http://cheverontoxico.com/assets/docs/2012-01-03-appeal-decision-english.pdf. But Chevron, which had once championed the credibility of the Ecuadorian courts, now claims that the judgment was obtained by fraud and that the courts are rife with corruption; it has sued the plaintiffs and some of their lawyers and consultants in New York, and Chevron has vowed never to pay the judgment. *See* Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012) (reversing district court grant of a world-wide anti-suit injunction to prevent enforcement of the Ecuadorian judgment on grounds of fraud); Chevron Corp. v. Berlinger, 629 F.3d 297 (2d Cir. 2011) (action against documentary filmmaker who promoted the Ecuadorians' cause); Chevron Corp. v. Donziger, 800 F. Supp. 2d 484 (S.D.N.Y 2011) (action against plaintiffs' attorney).

64. *See* C. Ryan Reetz, *Forum Non Conveniens and the Foreign Forum: A Defense Perspective*, 35 U. MIAMI INTER-AM. L. REV. 1, 9–20 (2004) (explaining the need for defendants to go beyond formal doctrine to succeed on forum non conveniens motions, and noting that "[o]ne persuasive technique is to . . . illustrat[e] for the court how the litigation would proceed differently in the two different jurisdictions, and why the proposed alternative forum would resolve the parties' dispute more efficiently and effectively"); *see also* STEPHENS ET AL, *supra* note 59, at 391–409 (discussing forum non conveniens and exhaustion arguments in transnational human rights litigation).

international law than it is to prove whether or not there is consensus on universal jurisdiction, absent a treaty specifying an obligation to prosecute, like the Convention Against Torture.[65]

My ultimate takeaway from this is not to be overly optimistic about the prospects of human rights litigation, but it should not all be doom and gloom either. Regardless of what happens in *Kiobel*, even if we are not still alive through the ATS, this project will not end. We are not closing up shop anytime soon and the defense bar knows this as well. They fully recognize that few, if any, of the existing cases would go away completely regardless of what the Supreme Court does in *Kiobel*.

POSTSCRIPT: WHAT HAPPENED IN *KIOBEL*

Subsequent to these remarks, the Supreme Court issued its decision in *Kiobel v. Royal Dutch Petroleum Co.*[66] Chief Justice Roberts' opinion for the Court's majority affirmed the dismissal of the *Kiobel* case, finding that a greater nexus to the United States was required, but it did so by finding that the presumption against extraterritoriality applied to the ATS.[67] The Court declined to address the original question that it certified—whether corporations can be sued under the ATS.

At first blush, the majority's opinion would seem to wipe out all ATS cases where injuries occurred abroad; as noted above, a strict application of the presumption against extraterritoriality would be the most extreme limitation on the use of the ATS as a tool for promoting accountability for human rights violations. But a closer read suggests that the opinion does not go nearly that far, and that the application of a presumption against extraterritoriality is not so clear-cut.

After stating all the reasons for applying the presumption against extraterritoriality, the Court implied that this would be applied to ATS lawsuits on a case-by-case basis—that the presumption could be "displace[d]" with respect to claims that "touch and concern the

65. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85; *cf.* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment (July 20, 2012), *available at* http://www.icj-cij.org/docket/files/144/17064.pdf (affirming Senegal's obligation under the Convention either to prosecute former Chad leader Hissène Habré, who Belgium accused of crimes against humanity, or extradite him to Belgium).

66. 133 S. Ct. 1659 (2013).

67. *Id.* at 1664.

territory of the United States with sufficient force."[68] As to what degree of connection to the United States would be enough, the Court was silent—except to say that, for a foreign multinational corporation, "mere corporate presence" does not suffice, because "[c]orporations are often present in many countries."[69]

The Court's discussion of transitory torts is also worth noting. The Court acknowledged the common-law doctrine that allows "courts to assume jurisdiction over . . . actions for personal injury[] arising abroad."[70] The Court found that doctrine to be inapposite in the *Kiobel* case, however, because such a transitory suit is predicated on "a well-founded belief that it was a cause of action in that place."[71] As noted above, in *Kiobel*, only ATS claims were brought; there were no ordinary transitory claims alleging that Shell's conduct would be actionable in Nigeria.

The Court's opinion seems to confirm that transitory tort cases will, as I suggested, continue to be a viable route for transnational human rights cases. But it also raises a question of whether the presumption against extraterritoriality should be analyzed differently in a case such as the *Wiwa* case, where, unlike *Kiobel*, the plaintiffs did allege transitory tort claims as well as ATS claims.[72] In such a case, the question is not whether a lawsuit against a foreign multinational for conduct occurring abroad should be litigated in the United States; the question is only whether that suit will proceed exclusively in state courts under common-law labels or whether, when that conduct also violates international law, recourse to the federal courts is possible.

The fact that these questions, among others, remain open is supported by Justice Kennedy's brief concurrence. Kennedy, whose vote was necessary for the five-Justice majority, takes pains to emphasize the limited nature of the Court's ruling and that the opinion "leave[s] open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."[73]

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68. *Id.* at 1669.

69. *Id.*

70. *Id.* at 1665.

71. *Id.* at 1666 (quoting Cuba R. Co. v Crosby, 222 U.S. 473, 479 (1912)).

72. Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386 (KMW), 2002 WL 319887, at *2 (S.D.N.Y. Feb. 28, 2002).

73. *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

In subsequent months and years, the federal courts will grapple with the question of what degree of connection to the United States is necessary to sustain an ATS case. Is conduct in the United States necessary? Is any suit against a U.S. corporation—one with more than "mere corporate presence"—permissible?[74] If a suit proceeds in state courts regardless of ATS claims, does that change the analysis? What if the United States has committed to providing domestic remedies for universal jurisdiction offenses? Regardless of the answers to these questions, there is still no likelihood that transnational human rights litigation is going away anytime soon—the state courts remain open to transnational lawsuits for transitory torts.

74. *Id.* (majority opinion).