State-sponsored Terror, Alien Tort Claims, the Kiobel Case

On April 17, 2013, five Supreme Court Justices held that victims of human rights violations, committed by a subsidiary of Shell Oil had no right to sue in federal court in the United States. In the 1990s, in Nigeria's Ogoniland, residents protested the environmental harm being done by a subsidiary of Royal Dutch Shell of the Netherlands and its English affiliate during exploration and production of oil. The Nigerian government reacted against these demonstrations by plundering villages, and raping and killing protesters. The Shell subsidiary encouraged these actions, and provided financial and logistical support. These were crimes against fundamental principles of human rights. The plaintiffs reside in the United States. A private person or entity who aids and abets a state actor in wrongful conduct shares the liability. Under U.S. law, this would be true of a Ku Klux member helping a sheriff's deputy brutalize a civil rights worker, and the Supreme Court has so held.

The conduct described in the plaintiffs' case amounts to state-sponsored terrorism, and one had thought that there arose a duty on the part of all branches of government to address and remedy it.

The Court's majority opinion was for five Justices, although Justice Kennedy's concurrence provides a possibly limiting caveat. Four Justices concurred in the result, and on a different theory than the majority; their votes, plus that of Justice Kennedy, might signal that there is yet an opportunity to fashion a judicial remedy for the kinds of human rights violations at issue in this case.

That said, the majority opinion is a mess. It mixes up subject matter jurisdiction, forum selection and choice of law. This folly is all in the service of saying that a venerable federal statute, enacted in 1791 to protect human rights, is now made nearly useless to serve that intended and laudable purpose. The case is *Kiobel v. Royal Dutch Petroleum*.

The Majority's Tortured Rationales

The Alien Tort Claims Act, or ATCA, has been a formidable weapon in the struggle to get redress for victims of human rights crimes. For a good brief overview, see http://en.wikipedia.org/wiki/Filártiga_v._Peña-Irala. ATCA, which was part of the Judiciary Act of 1789, says that 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." The Court held that this statute permit a court to hear any lawsuit involving a wrongful act committed outside the United States. The Court said that allowing a court to hear and decide such a case might interfere with the executive branch and Congressional control over foreign and military policy, and therefore the statute must be presumed not to have extraterritorial application. Besides, the Court said, "United States law governs domestically but does not rule the world." This rationale is contrary to the statutory text and the evident intent of those who wrote it. It mixes up subject matter jurisdiction with forum selection and choice of law in ways that should horrify students of civil procedure. It is out of step with a basic tenet of international law about the responsibility of national courts. And finally, in light of United States military and paramilitary acts around the world, it is just plain silly. I address these issues in turn. (For a more detailed treatment of the basic issues, see my book *Thinking About Terrorism* (2007). Lord Justice Stephen Sedley's book *Ashes & Sparks* (2011) also has a good essay on the general subject of human rights norms.)

Text and Meaning of the Alien Tort Statute

Those who drafted the ATCA knew and understood the issues that a new nation faced. They were conscious of the imperial power being exercised by Spain, Portugal, France, the Netherlands and England. They wrote a statute that gave United States courts power to interpret and apply "the

law of nations." These words were those that Blackstone had used in his Oxford lectures. They echoed the writings of Hugo Grotius and other 17th Century writers, who had a broad and historically-rooted understanding of the limits on permissible sovereign conduct.

The 1789 authors might have said instead "international law," for that phrase had also come into use around 1776 in an essay by Jeremy Bentham, who credited a French legal writer for first using the word "international." Bentham sharply rebuked the Blackstone formulation of "law of nations," and argued that there could be no such law that stood any higher than the will of a particular sovereign. That is, if the Spanish wanted to sponsor piracy, or the Portuguese wanted to indulge in torture or the slave trade or any such iniquity, neither the world community nor any other sovereign state had any right to say anything about it.

Thus, by choosing the words "law of nations," the Congress intended to give the courts power to do what the *Kiobel* court says they may not do: to consider whether the conduct of a foreign sovereign might be subject to suit in the United States courts.

Note that I say "might." As we shall see, there are many and sometimes good reasons that such a power should not be exercised in a particular case. But to construe this statute as barring all such exercises is contrary to its text and history.

In addition to ignoring text and history, the Court's stated also performs a peculiar sleight of hand. It speaks of deference to foreign policy in the treatment of foreign sovereigns. It is true that the Executive branch has great responsibility in that field, and its actions are entitled to deference crom the coordinate branches. But in the Kiobel case, the government of Nigeria was not a defendant. No foreign sovereign's interest was involved, except perhaps the reputational harm that might be done when the evidence showed what had been done to the victims. United States policy towards Nigeria could not possibly be affected by the trial of this lawsuit.

No, the Court accorded the deference due sovereigns to a multinational oil company. Multinationals notoriously seek to avoid accountability by "outsourcing" jobs that can be exported, and making deals with complicit governments for activities such as agriculture, mining and oil production that must be done where the goods are grown or found. It is therefore essential that the courts in metropolitan countries where the multinationals have their headquarters to take a role in defining and policing illegal conduct. In past times, the Supreme Court has recognized the power of great corporations to do great harm, and has wisely interpreted statutes to make them accountable. See Tigar, It Does the Crime But Not the Time, 17 Am. J. Crim. L. 211 (1990), citing *NY Central RR v. US*, 212 US 481 (1909). And we have recently been taught that corporations are persons at least to the extent of having free speech rights. (The Court had asked for briefing on whether corporations are liable under the ATCA, but did not decide the question. While corporate criminal liability in US law is "only" 104 years old, civil liability has been recognized in Western legal systems for at almost two millenia.)

Jurisdiction, Immunity, Forum Selection and Choice of Law

The ATCA confers subject matter jurisdiction, that is the power to hear a case. It does not interfere with other provisions of law that permit a court to dismiss or transfer the case. In this sense, the Court's Kiobel holding is grossly overbroad, for it uses a flawed interpretation of a jurisdictional statute to achieve goals that could be met with other, narrower, procedural devices.

Sovereigns are amply protected by a broad though not unlimited immunity from suit. Thus, all of the Court's expressed concerns are met by the Foreign Sovereign Immunities Act, under which the *Kiobel* plaintiffs could not have added Nigeria as a defendant even if they wanted to. This point simply emphasizes that all the *Kiobel* majority has done is put the mantle of protection normally accorded to sovereigns around the shoulders of Shell Oil.

The doctrine of immunity is powerful. It can and sometimes should be interposed to prevent the courts of one sovereign from imposing their views on another sovereign or its officers. The doctrine has contours and limits that judicial tribunals are busy defining and refining. When Spain sought to extradite Augusto Pinochet for trial on charges of torture and genocide, his

admitted claim to immunity as former President of Chile did not reach far enough to insulate him from liability for those crimes. http://en.wikipedia.org/wiki/Augusto_Pinochet. In the Yerodia case, the International Court of Justice spoke cautiously about the immunity doctrine and its reach. You can read about the case by following this link: http://en.wikipedia.org/wiki/Abdoulaye_Yerodia_Ndombasi. Be sure to read the Congolese judge's opinion.

Second, a court with subject matter jurisdiction can hold that a lawsuit that arises in a foreign country, and as to which the evidence may be found there, should be tried in that country. That is the doctrine of *forum non conveniens*.

Third, United States courts can express deference to the legal regimes of other countries by applying foreign law when that is appropriate – the choice of law issue. I reiterate, however, that the Congressional purpose for using the phrase "law of nations" was to signal that conduct that might be tolerated in a foreign state might nonetheless be held to be a basis for liability in the courts of the United States. Again, I stress that the U.S. courts would not be confronting the sovereign state of Nigeria about its legal rules; they would be saying that when a multinational corporation does business there, it may be held to the standards expected by the metropolitan countries where it is headquartered.

The Duties of National Courts

Where are the *Kiobel* plaintiffs to do for redress? Surely not back to the place where the killings, rapes and plundering took place, to ask for a hearing from those responsible for the harm that was done. Are they then to wait for a decade or two or three until some transnational court is set up to address these issues. We know from recent examples that such courts might try the local offenders on criminal charges, but none of those courts has or exercises the power to hold the metropolitan country sponsors of terror accountable.

Under the law of nations as it has developed since Nuremburg, national courts have primary responsibility for addressing human rights violations. The obligations of temporary or permanent transnational courts are secondary. This principle has been elaborated in recent years, but it well antedates the ATCA and has been applied by the United States Supreme Court in the past.

The Unregulated Superpower

Kiobel is not the Court's first decision that limits the power of US courts to address state-sponsored terrorism. Other notions, such as "non-self-executing treaties," "political question," and "state secrets" have also been used as building blocks for a system of rights without remedies.

However, its expressed concerns leave one wondering where the Justices have been living for the past 60 years. Deference to foreign sovereigns? Letting other countries devise and enforce their own legal rules? The CIA participated in overthrowing the governments of Guatemala, Iran, Chile and the Dominican Republic. American military power invaded Grenada, Afghanistan, Iraq. American aircraft bombed the former Yugoslavia and Libya. The United States has military bases in 63 countries. It has at least 700 military bases and installations worldwide. United States military personnel are working in more than 150 countries. Our drones are in the sky in many places. The United States supplies arms and military assistance to dozens of countries worldwide.

Assume, for purposes of argument, that this governmental presence and consequent influence is entitled to some deference from judicial examination. Even such deference does not create a zone of impunity for corporations who decide to surf the wave of US influence for their shareholders' profit.

To repeat, Shell Oil is not a government. I have been to Shell's headquarters. They can't be a government. They don't have a duty-free shop.