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RECENT DEVELOPMENTS IN *KIOBEL VS. ROYAL DUTCH PETROLEUM*: AN IMPORTANT HUMAN RIGHTS FORUM IN PERIL?

Humberto Fernando CANTÚ RIVERA*

I. THE ALIEN TORT STATUTE, *KIOBEL* AND ITS DEVELOPMENT BEFORE THE US SUPREME COURT

The Alien Tort Statute¹ (Title 28 –referring to the Judiciary and Judicial Procedures—, §1350) is a disposition of the United States Code, enacted in 1789, that constitutes a recourse for alien citizens to bring tort actions for the violation of internationally recognized norms of customary law. Used since the 1980s to bring claims for violations of human rights committed abroad, it has become the most notorious judicial recourse worldwide for trying to hold corporations liable for their direct or indirect involvement in actions that have taken place in foreign countries and that could be qualified as severe violations of international law—specifically of human rights abuses and international crimes. The Alien Tort Statute is therefore

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¹ “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”.

designed as a domestic civil responsibility remedy to address situations occurred in foreign soil and to obtain redress for the damages suffered.²

Despite many claims having been brought against corporations for alleged violations of international law, no case has ever been decided on its merits, basically due to settlements between the corporations and plaintiffs or for the courts deciding to decline jurisdiction to hear the cases. However, a claim brought by Esther Kiobel and others against Royal Dutch Petroleum and Shell has made its way to the Supreme Court of the United States, which has heard two arguments while discussing issues such as extraterritoriality and the applicability of the Alien Tort Statute to corporations.

Esther Kiobel, Individually and on Behalf of Her Late Husband, Dr. Barinem Kiobel, et al., Petitioners v. Royal Dutch Petroleum Co., et al., registered under Docket 10-1491, is based on the alleged aiding and abetting of Royal Dutch/Shell to the Abacha dictatorship in Nigeria between 1992 and 1995, which resulted in human rights violations committed in the Ogoni region of the Niger Delta by the Nigerian military, against twelve Nigerian human rights and environmental defenders. The abuses were alleged to be a widespread and systematic campaign of torture, extrajudicial executions, prolonged arbitrary detention and indiscriminate killings, which constituted crimes against humanity executed to violently suppress the opposition of the locals against the oil operations of such corporations.³

This same situation had given way to other claims, such as *Wiwa*,⁴ a case which was however settled between the parties before the trial started, without the corporation admitting responsibility for the crimes

² According to Clapham, there are no clear guidelines in international law in relation to corporate civil responsibility, since the main situations that have been addressed have been individual criminal responsibility and state civil responsibility. Therefore, he inclines to follow the developments of international law contained in the International Law Commission's Articles on State Responsibility, which leave open the possibility to encompass individual civil responsibility. Clapham, Andrew, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press, 2006, pp. 262 y 263.

³ Brief for Petitioners at 2-3, *Kiobel v. Royal Dutch Petroleum*, núm. 10-1491 (U.S. Supreme Court, June 6, 2011)

⁴ The *Wiwa v. Royal Dutch Petroleum (Shell)* case involved alleged violations of international law suffered by members of the Movement for the Survival of the Ogoni People (MOSOP), in which Shell would have participated in complicity with the Nigerian military, providing them with logistical and transportation support, which was then

occurred, therefore using it to try to create an image of social responsibility and commitment.

Kiobel's main controversy took place before the U.S. Court of Appeals of the Second Circuit, in which the main contention point was whether the Alien Tort Statute allowed victims to bring claims against corporations. The panel in the Court of Appeals held that the statute would not allow tort actions against corporations, basing their decision on the argument that international law only binds states and individuals, but not legal entities.⁵ However, the claim made its way into the Supreme Court of the United States of America due to the appeal by the plaintiffs, the last instance that will decide the reach and use of the Alien Tort Statute as a source of remedy for victims of human rights abuses worldwide.

II. MAIN ISSUES: EXTRATERRITORIALITY AND THE APPLICATION OF THE ALIEN TORT STATUTE TO CORPORATIONS

The main issues that have been examined in *Kiobel* are extraterritoriality and the application of the Alien Tort Statute to corporations, which were the primary focus of the Court in the reargument of the case on October 1st, 2012.⁶

Regarding *extraterritoriality*, the attorney for the plaintiffs, Paul Hoffman, focused on three points: that it is national courts that implement international law and decide to what extent it is applied in their jurisdiction; that the international community—and in this case the European Union through its *amicus* brief—supports universal jurisdiction, because of the *jus cogens* character of certain human rights norms and the interest of States in this regard to enforce their protection, as well as the fact that the ATS exercises *adjudicative jurisdiction*, which provides a forum to adjudicate international law claims; and that the EU also supports civil jurisdiction within universal jurisdiction, provided

used by the military to execute some of its members, among other crimes, for their opposition to the oil-exploration activities.

⁵ This argument will be analyzed below, in a contrary sense to the interpretation given to the Court of Appeals of the Second Circuit.

⁶ The Court decided that the questions presented were whether the issue of corporate civil tort liability under the ATS is a merits question or an issue of subject matter jurisdiction, and whether corporations are immune from tort liability for violations of the law of nations or if they may be sued as any other private party defendant under the ATS.

that the United States also accepts international opposition and exhaustion of local remedies.

On the side of the respondents, Kathleen Sullivan stated in defense of Royal Dutch Petroleum that the United States of America objected to the notion of universal civil jurisdiction⁷ within the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for fear that American corporations abroad would be subjected to the same legal treatment for alleged violations of the law of nations.

As well, she argued that by accepting jurisdiction under the ATS, they would be projecting the law of the United States onto foreign countries for actions that occurred within them, not in American territory—therefore not within the scope of its territorial jurisdiction—, potentially risking diplomatic friction with foreign sovereigns. Thus, the respondents argued that the ATS is a prescriptive jurisdiction that enacts regulations and projects them overseas for acts that would not normally give jurisdiction to any court other than that of the territory where the abuses were committed.

Several Justices of the Supreme Court, while interrogating the attorneys, made important remarks regarding their interpretation of how to approach *Kiobel* and international human rights law in general: first of all, Justice Scalia asserted that national courts are entitled to decide what constitutes a violation of international law, whenever said violation occurs within their territory, hinting at the extra-limitation of the ATS and US law into foreign States, in which the US would not be in a position to determine if such actions constituted indeed a violation.

⁷ Shell contends that the ATS is not a valid exercise of universal jurisdiction, since States have only consented to universal criminal jurisdiction, not universal civil jurisdiction. However, the Rome Statute establishing the International Criminal Court set forth in its article 75.2 that a convicted person may be ordered to pay the appropriate reparations, including restitution, compensation and rehabilitation, therefore including within the principle of universal jurisdiction a civil element destined to repair the damages caused by the *actus reus*. For example, the ICC in its first judgment made clear that a criminal penalty should be accompanied by its corresponding reparation to the victim; however, due to Thomas Lubanga's economic position, this would not be possible (*Decision establishing the principles and procedures to be applied to reparations*, ICC-01/04-01/06, 7 August 2012, paras. 131, 289.b). If as it is in this case, the defendant is a legal person with transnational commercial operations, reparation would be more feasible—and the main type of redress that could be given to the victims, due to the material difficulty in imposing criminal sanctions on corporations.

Justice Sotomayor, on the other hand, seemed to incline to a position more favorable to having a case-by-case approach to universal jurisdiction while reflecting on the *amicus* brief filed by the European Commission, mentioning that US tribunals could be forums by necessity whenever the alien had exhausted both domestic and international avenues in search for relief and redress. However, she also made remarks in the sense that no exhaustion of remedies had occurred in *Kiobel*, which would then waive the jurisdiction of American courts.

In an *amici curiae* by the former Special Representative of the Secretary General (SRSG) for the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Professor Philip Alston and the Global Justice Clinic at the New York University School of Law, the *amici* stated that in his mandate as SRSG, he had found that international law does not generally require nor prohibit the exercise of extraterritorial jurisdiction by states over corporations, therefore depending exclusively on domestic law and the existence of a recognized jurisdictional basis.⁸ Given that the Alien Tort Statute would comply with both characteristics mentioned in the brief, the extraterritorial application of the statute should not be dismissed merely on the basis that it violates international law, since there is no explicit standing on the subject, but rather a growing understanding that no such prohibition exists.

In relation to the *application of the Alien Tort Statute to corporations*, the discussion has mainly focused on the interrelation between international criminal law and international human rights law, and the fact that the International Criminal Court doesn't have jurisdiction over corporations or other legal persons. The main reference to this point in the reargument of *Kiobel* was brought in relation to the Convention against Torture by Justice Breyer, who tried to make the link between torture carried out by a corporation under the Convention, re-directing his efforts after acknowledging that this international instrument does not address corporate responsibility, only State responsibility.

In her interventions before the Supreme Court, Kathleen Sullivan argued that according to the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises,

⁸ *Amicus Curiae* of John Ruggie, Philip Alston and the Global Justice Clinic at NYU School of Law, at 3, *Kiobel v. Royal Dutch Petroleum*, núm. 10-1491 (U.S. Supreme Court, June 12, 2012)

in the current state of international law there would not be room or basis for corporate liability in relation to human rights abuses.⁹ However, the issue of the crime committed, and not precisely the author, came out in several occasions, being suggested that the pirates to whom the Alien Tort Statute referred when it was enacted in 1789 could very well be adapted to the current reality in the figures of torturers or any other criminal who violates internationally recognized customary law.¹⁰

However, in its *amicus curiae* brief with Philip Alston and the Global Justice Clinic, John Ruggie refuted the argument that the lack of a current international body for adjudicating corporate responsibility for international crimes points to the fact that such responsibility does not exist, stating that ‘just as the absence of an international accountability mechanism did not preclude individual responsibility for international crimes in the past, it does not preclude the emergence of corporate responsibility today.’¹¹

On the contrary, the SRSB supported the notion that corporations might face criminal or civil liability depending exclusively on the implementation of international standards in domestic law, either through criminal dispositions or via the establishment of a civil cause of action.¹²

⁹ Despite the Respondents lawyer’s affirmation, the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, mentioned that his report was partially represented, indicating otherwise that there is a growing potential for corporate criminal liability in international law, which would be extended to companies for international crimes under domestic jurisdiction, reflecting nevertheless international standards. *Vid.* Ruggie, John G., *Kiobel and Corporate Social Responsibility*, available at <http://www.business-humanrights.org/media/documents/ruggie-kiobel-and-corp-social-resonsibility-sep-2012.pdf>

¹⁰ Justice Kagan referred to this situation while citing *Sosa v. Filártiga* (“For purposes of civil liability, the torturer has become like the pirate and slave trader before him, an enemy of all mankind”), stating afterwards that under this precedent, “there were certain categories of offenders who were today’s pirates”. As well, Justice Breyer made several remarks in this sense: “If, when the statute was passed, it applied to pirates, the question to me is who are today’s pirates. And if Hitler isn’t a pirate, who is? And if, in fact, an equivalent torturer or dictator who wants to destroy an entire race in his own country is not the equivalent of today’s pirate, who is?” See Transcript of Oral Argument at 26 and 40, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf

¹¹ *Amicus Curiae* of John Ruggie, Philip Alston and the Global Justice Clinic at NYU School of Law, at 7, *Kiobel v. Royal Dutch Petroleum*, núm. 10-1491 (U.S. Supreme Court, June 12, 2012).

¹² *Ibidem*, pp. 7 y 8.

Nevertheless, despite the application of the Alien Tort Statute to corporations being one of the main focal points in the first argument of *Kiobel* before the Supreme Court, its approach was reduced drastically in favor of the extraterritoriality argument discussed above. A final decision on the continuation of the Alien Tort Statute as a jurisdictional instrument for the protection of violations of international law—including international human rights and customary law—is expected for March 2013.

Another important argument that was brought before the Supreme Court was that international law has only developed so far as to cover universal criminal jurisdiction, but not civil jurisdiction¹³—a notion that would be contrary to several principles well established in international law, such as the universality of human rights or the responsibility to protect that derives both from international human rights law and humanitarian law, or of more recent developments such as the need to provide appropriate remedies for victims of human rights abuses (as stated in the Guiding Principles on Business and Human Rights). However, article 75 of the Rome Statute¹⁴ of the International Criminal Court, as well as legal scholarship have inclined to the position that universal criminal juris-

¹³ This point has been strongly defended in the amicus brief filed by Jack Goldsmith in favor of Chevron, in which he mentions that “Under international law, a nation’s sovereignty over activities within its territory is presumptively absolute, subject to exceptions by national consent. Nations [...] have not, however, consented to allow a foreign court to entertain civil causes of action on the basis of universal jurisdiction, as is done in ATS cases”. Brief of Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline Plc, and the Procter & Gamble Company as *Amici Curiae* in Support of Respondents, at 2, *Kiobel v. Royal Dutch Petroleum*, núm. 10-1491 (U.S. Supreme Court, February 3, 2012). Letnar Čerňič, on the contrary, has mentioned that “Domestic courts may exercise universal jurisdiction for fundamental human rights violations. Most would agree that universal jurisdiction applies only to criminal cases; however, the concept is still undeveloped in the civil law sphere... There is some support for the extension of universal civil jurisdiction in relation to fundamental human rights that would be subject to universal criminal jurisdiction; ...Although civil responsibility is less severe than criminal responsibility, it is superior to no individual or corporate responsibility at all, which remains the standard for most fundamental human rights norms. In this regard, it is argued that claims can be brought against corporations on the basis of civil jurisdictions in a growing number of national legal orders”. See Letnar Čerňič, Jernej, *Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights*, Groningen, Europa Law Publishing, 2010, pp. 158-160.

¹⁴ “Article 75(2). The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”.

diction would necessarily imply the existence of an accompanying civil remedy, or at the very least, it would not prohibit it, but explicitly allow for additional reparations to a criminal sanction.¹⁵

An important question that appears in respect of universal civil jurisdiction is whether States with no traditional connections to the criminal facts would be entitled to hear a claim, and more importantly, to award reparations to the victims of egregious human rights violations.¹⁶ An interesting answer could be found in the developing principle of the responsibility to protect, which entails both a criminal and a civil dimension. The duty of protection of the State imposes *inter alia* the need to ensure that third parties do not infringe on the human rights of others, and when this happens, that the appropriate legal instruments exist to obtain redress for the damages suffered.

The protection of population—or the responsibility to protect—from international crimes, such as genocide, war crimes or crimes against humanity, would not just require that exemplary criminal sanctions be imposed to the perpetrators, but also that a reparation be directly awarded to the victims, which would also serve as a way to deter other persons—either natural or legal—to engage in such type of conduct.¹⁷

Since there are no existing international mechanisms to address corporate responsibility for human rights violations, and only national orders could establish a jurisdictional basis to prosecute or allow for claims for human rights abuses committed outside of its jurisdiction, a case could

¹⁵ “Universal jurisdiction is a permissive customary principle: states are permitted but not required to exercise universal jurisdiction”. Donovan, Donald Francis and Roberts, Anthea, “The Emerging Recognition of Universal Civil Jurisdiction”, *American Journal of International Law*, vol. 100, 2006, p. 143.

¹⁶ Even though universal criminal jurisdiction is well accepted and is considered as an established principle of international law, “plaintiffs and academics have increasingly invoked the concept of universal jurisdiction in considering whether civil remedies may serve as an independent or supplementary means of enforcing international law norms proscribing defined categories of heinous conduct”. *Ibidem*, p. 145.

¹⁷ “Although by tort claims private parties may seek vindication of private interests, judgments in these cases affirm much wider interests manifested in the norms that the community is prepared to enforce. Punishment and compensation represent two distinct, but complementary, ways of condemning past, and deterring future, wrongdoing”. *Ibidem*, p. 154.

be made that the international community¹⁸ as a whole—and in this case, the judicial systems that are deemed best prepared or most effective for enforcing human rights rules— would have the responsibility to protect (or to ensure reparations in favor of) the population from said violations of international law, or at least not to interfere¹⁹ directly in the adjudication of reparations in favor of the victims made by other countries, since it would be in the interest of justice and of the fulfillment of *erga omnes* obligations to protect and ensure redress to the victims.²⁰

The responsibility to protect being incumbent on all States, this principle of international law would support the exercise of extraterritorial jurisdiction—including universal *civil* jurisdiction—in order to guarantee that the access to remedies is at reach of the victims of violations of international human rights law that could amount to international crimes.

III. TOWARDS THE DECEASE OF A HUMAN RIGHTS FORUM?

The Supreme Court of the United States is expected to decide in March 2013 the future of tort actions brought against corporations in the United States judiciary, for actions that took place outside of its jurisdictional

¹⁸ “The first proposition is that states have a responsibility to protect their own populations from mass atrocities...The second proposition of the «responsibility to protect» concept is that bystander states or the «international community» have not simply a right but a collective responsibility to assist host states in protecting their populations and to act to protect these populations in situations where the host state is manifestly failing to do so”. Glanville, Luke, “The Responsibility to Protect Beyond Borders”, *Human Rights Law Review*, vol. 12, núm. 1, 2012, pp. 3 y 4.

¹⁹ Glanville considers, for example, that whenever a population is suffering serious harm as a result of state failure to protect its own citizens, due to unwillingness or incapability of the State to halt it or avert it, the principle of non-intervention yields to the international responsibility to protect, even extraterritorially, and would therefore authorize legal intervention to ensure the corresponding reparations and punishment in a subsidiary basis. *Ibidem*, p. 10.

²⁰ Donovan and Roberts argue that states should permit their courts to hear civil claims for extraterritorial violations of international law whenever the plaintiffs would face a denial of justice, if it is deemed that the judiciary of the country where the situation happened would not be able to enforce the corresponding international norms. See note 15, p. 147. In the same sense, the Italian Court of Cassation found in *Ferrini v. Germany* that universal jurisdiction was applicable to civil proceedings based on international crimes, due to the peremptory nature of the norms proscribing such conduct (*Ferrini v. Federal Republic of Germany*, Cass., sez. un., 6 November, 2003, n. 5044, ss. 9).

scope from a territorial perspective. Some of the Justices in *Kiobel* wondered if the fact that American jurisdiction is the most sought-after forum to bring claims for this type of abuses—or as they pointed out, that they are *the only forum* where such cases are brought to—, without there being a specific guideline deriving from international law that establishes their universal civil jurisdiction, would not be in itself contrary to international law.

Given the arguments exposed *supra*, the principle of the responsibility to protect and the fact that there is a clear indication that universal jurisdiction contains at least a civil element—if it doesn't explicitly support it—to fully enforce judicially the international norms that have been universally recognized and are binding on all States, the Supreme Court should adopt a pioneer position in trying to encourage other jurisdictions to hear these type of claims, without foreclosing the possibility for plaintiffs to try to seek redress within its jurisdiction as a last resort. As stated by Justice Breyer in *Sosa v. Alvarez Machain*,²¹ universal civil jurisdiction would not be more threatening than universal criminal jurisdiction, since both look to prosecute the same type of conducts and award the victims the corresponding reparations.

Some important cases have started appearing around the globe, with one being specifically representative for extraterritorial jurisdiction (universal civil jurisdiction), and another one for the application of international law to corporations.

Regarding universal civil jurisdiction, the case of *Ashraf Ahmad El Hagog Jumaa v. Lybia* is a remarkable example of a human rights claim brought under the jurisdiction of a country other than that where the facts happened, and without the existence of the traditional links to establish jurisdiction. In the case brought in The Netherlands, Mr. El Hagog—a Bulgarian national of Palestinian origin—claimed that he had been tortured by Libyan civil servants to obtain a confession that he and other medical staff had deliberately infected 393 children with HIV, and thus sentenced to jail, from which they were released in 2007 after being granted pardon.

The Dutch civil court that heard the case awarded a compensation of €1 million, a sum that the European Union and several of its member states are demanding of the Libyan authorities to pay. As well, in a communication brought before the Human Rights Committee in 2008, the United Nations treaty-body

²¹ *Sosa v. Alvarez-Machain*, 542 U.S. at 762, 763 (2004).

concluded that the State party is under the obligation to provide the author with an effective remedy, as well as with the appropriate reparation, including compensation.²² This case would therefore prove the possible emergence of universal civil jurisdiction, deriving from both the national courts as from the UN treaty-body. As well, it would imply that probably the reluctance of national courts to hear extraterritorial cases could come to an end—in the interest of justice and the preservation of international preemptory norms and their enforcement—.

In relation to the case in which international law standards (and particularly the human right to health) have been applied to corporations, the case of Chevron stands out as one in which an important transnational corporation has been convicted for damages to the environment,²³ which have had direct effects on the right to health and others of the local communities surrounding Lago Agrio, in Ecuador. This case, a long and complex litigation process that has been standing for almost twenty years, reached a final verdict in which Chevron was condemned to pay \$19 billion dollars²⁴ by a local court in Ecuador.

Using transnational litigation, the corporation tried to obtain an indictment in a federal court of the United States to avoid having their assets seized anywhere in the world, which was granted, but later overturned by the Second U.S. Circuit Court of Appeals in New York, and afterwards rejected by the Supreme Court for consideration.²⁵ Recently, however, the Ecuadorian court authorized the plaintiffs to seize approximately \$200 million worth of assets that belong to Chevron, who will enforce the ruling by receiving \$96.3 million that the Government of Ecuador owes to the corporation, as well as money held in Ecuadorean banks that belong to Chevron, and the licensing fees generated by the company's trademarks in the country. As well, claims have been filed in other countries, such as Canada and Brazil, to try to enforce the Ecuadorean judgment.

This is a clear sign that there is a growing global belief in the need to make corporations around the world accountable for any violation of human rights

²² Human Rights Committee, Communication 1755/2008, 19 March 2012, par. 10.

²³ The damages that are claimed in the lawsuit were illnesses among locals due to the dumping of drilling waste in unlined pits by Texaco between 1964 and 1992, an accusation that Chevron has repeatedly denied after having bought Texaco in 2001.

²⁴ The original sum was of \$9 million dollars, which would double in case the company did not pay in the appropriate time that the Ecuadorian court had given it. In July 2012, however, the sum reached \$19 billions due to the corporation's efforts to avoid enforcement of the judgment.

²⁵ *Chevron Corporation v. Hugo Gerardo Camacho Naranjo, et al.*, núm. 11-1428 (U.S. Supreme Court, May 29, 2012).

or international law that translates into damage to populations or the environment. An opportunity for the American judiciary appeared in *Kiobel*. However, it appears to be that the judicial system of the United States is going through an era of contraction, opposed to the once-enlarging judicial imperialism that characterized it, in a change that seems to lean closer to classic international law and which would normally be applauded were it not for the fact that it may be a regressive measure that can affect the universal implementation and respect for human rights.

