Pushback:
The Increasing Resistance to the Domestic Relevance of International Law

The View from the United States

Presentation of

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I am grateful to my friend, and the co-Chair with me of the Committee on International Law in Domestic Courts, Prof. Martin Flaherty, for the introduction, and to Dennis Kwok, Netta Barak-Corren, and Erin O'Donnell for their discussions of the relevance of international law in Hong Kong, Israel, and the UK. My role now is to argue that we are seeing the pushback that is the topic of this panel in the courts of the United States, where it is significantly troubling.

In focusing on cases involving the Alien Tort Statute,[1] I do not mean to suggest that they are the only, or even the most important, area in which this pushback may be observed. But the statute, part of the first Judiciary Act, is one of the few in the United States Code that make specific reference to "the law of nations," without indicating in any detail what was intended by those words. Rather, it seemed to anticipate the decision of the Supreme Court in *The Paquete Habana*[2] in 1900, in which Justice Horace Gray famously wrote that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[3] So ATS caselaw provides a particularly apt framework for the issue this panel is addressing.

Despite its antiquity, the ATS had scarcely been invoked until the landmark Second Circuit decision in *Filartiga v. Pena-Irala*[4] in 1980. And the Supreme Court did not accept an ATS case for review until *Sosa v. Alvarez-Machain*,[5] in 2004, 215 years after the provision was signed into law by President George Washington. In *Sosa*, in my view, Justice Souter writing for the Court, read the statute correctly as meaning precisely what it says. But since *Sosa*, in a series of decisions the Court has pursued a different agenda, using the ATS as a weapon to keep international law at bay.

To be sure we are all on the same page, let me quote the ATS in full before I argue that the Supreme Court has gotten it badly wrong. The Alien Tort Statute is a single sentence, which in its modern iteration says that "The district courts shall have original jurisdiction of any civil action by

[1] 28 U.S.C. § 1350.
[2] 175 U.S. 677 (1900).
[3] *Id*., 175 U.S. at 700.
[4] 630 F.2d 876 (2d Cir. 1980).
[5] 542 U.S. 692 (2004).

an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The Second Circuit held in *Filartiga v. Pena-Irala* that certain human rights norms had become part of the law of nations, and that violations of those norms sounding in tort could be actionable in U.S. courts. Over the next several decades, numerous victims of human rights abuses were able successfully to sue their torturers, abductors, or rapists. Of course, like all plaintiffs, they were barred by sovereign immunity from suing foreign states, they had to establish personal jurisdiction over their defendants, and they had to marshal enough evidence to prove entitlement to relief. But many overcame these barriers, and even when they were unable to collect the monetary damages awarded to them, they received the official vindication of a United States District Court, pronouncing that what had been done to them was illegal.

The *Sosa* Court held that the ATS is, by its unambiguous language, a jurisdictional statute. That is, it is not normative: it does not say "thou shalt" or "thou shalt not." It cannot be "violated." It does not purport to create causes of action. It simply opens the federal courthouse doors to certain tort cases involving foreign plaintiffs, which would otherwise be relegated to the several State judiciaries. And it leaves to federal judges the determination of just what is encompassed by "the law of nations." The *Sosa* decision provided guidance on the meaning of that term, declaring that to ground ATS jurisdiction the norm at issue must be "specific, universal, and obligatory"[6]: that is, well-defined and broadly accepted in the international community. But it was to be up to courts to determine which norms qualify and which do not.

However, it troubled some Americans, including some judges, that the ATS asks courts to sort out facts arising in Haiti, Myanmar, Bosnia, and Guatemala. Some professed to see imperialism here: the United States, they argued, had no business passing judgment over events that occurred far away, and often long ago, in contexts drastically unfamiliar to those tasked with resolving them. But this criticism was misplaced. The ATS did not manufacture US jurisdiction over foreign torts committed by defendants present in this country: the notion that the tort follows the tortfeasor was embedded in the common law well before our national independence.

The real problem in the *Filartiga* line of cases was that it framed international law as a source of rights and obligations of individuals. That was, for some, a bridge too far.

In *Kiobel v. Royal Dutch Petroleum Co.*,[7] an ATS case filed in the early 2000s, the plaintiffs claimed that they were survivors of systematic human rights abuses in Nigeria in which certain oil companies were complicit. The Second Circuit dismissed the case on the grounds that a

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[6] *Id*., 542 U.S. at 732, endorsing the formulation of the U.S. Court of Appeals for the Ninth Circuit in *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory.").

[7] 569 U.S. 108 (2013).

corporation – unlike an individual – cannot violate "the law of nations," and therefore torts a multinational enterprise might commit cannot meet the statutory threshold.

This was, on its face, an odd outcome, and certainly not one required to resolve the case before the Court. Yet there had been rumblings in corporate America, even before *Sosa*, that allowing ATS suits against companies could disrupt their overseas operations. It would open the floodgates to frivolous, extortionate litigation claiming that inadequate workers' housing, protective gear, or waste disposal protocols were forbidden by international law, thereby allowing alleged victims to demand money damages. On the other hand, as a purely legal and logical matter, it seems very difficult to concede, on the one hand, that individual human beings may commit actionable human rights violations – accepting that states are not the sole bearers of international obligations – while at the same time denying that multinational corporations may do so.

The Supreme Court granted review on that question. The Court could easily have resolved the case on procedural grounds without pronouncing on the underlying merits. But it did not do that. Instead, the Court asked for re-argument on an issue neither side had raised: whether and under what circumstances ATS cases may be based on alleged violations of the law of nations that occurred outside the United States. And here is where the analysis goes seriously off-track: sufficiently so to suggest the existence of an undisclosed agenda.

The *Kiobel* opinion, authored for a 5-4 majority of the Court by the Chief Justice, focused on what he called "a canon of statutory interpretation known as the presumption against extraterritorial application."[8] Citing the Court's 2010 decision in *Morrison v. National Australia Bank Ltd.,*[9] the Chief defined that "canon" as stating that "when a statute gives no clear indication of an extraterritorial application, it has none."[10]

But *Morrison*, and the other cases on which the Chief Justice relied, involved laws that regulate conduct: declaring actions to be illegal, thereby subjecting perpetrators to potential punishment. The ATS does no such thing. It merely permits certain causes of action to be brought in federal court rather than state court. Although acknowledging that obvious distinction, the *Kiobel* opinion simply announces that "the canon of interpretation similarly constrains courts considering causes of action that may be brought under the ATS."

The decision phrases the question presented as "whether the court has authority to recognize a cause of action under U.S. law to **enforce** a norm of international law."[11] But this question has nothing to do with the ATS. "Enforcement" of the law is carried out by states and their agencies:

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[8] *Id*., 569 U.S. at 115.

[9] 561 U.S. 247 (2010).

[10] *Kiobel, supra*, 569 U.S. at 115.

[11] *Kiobel*, *supra*, 569 U.S. at 119 (emphasis added); *see also id*. at 123 ("there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms").

plaintiffs do not seek to "enforce" the law when they file civil suits, and courts do not engage in "enforcement" when they exercise subject matter jurisdiction over those actions.

The *Kiobel* Court also suggests that allowing courts to hear cases alleging wrongdoing on foreign soil would presumptively trench on the foreign policy prerogatives of the executive branch.[12] That is, I believe, a valid concern in some cases. But even granting that certain ATS actions could be dismissed for that reason, it does not follow that the courts may not entertain any such suits, so long as plaintiffs can satisfy the other requirements imposed on them by statutory and common law. After all, as the Supreme Court taught half a century ago in *Baker v. Carr*, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[13]

The question that the trial court needed to resolve in *Kiobel* was whether the ATS provided a basis of federal subject matter jurisdiction. According to *Sosa*, that required determining whether the tort alleged by the foreign plaintiffs breached a "specific, universal, and obligatory" norm of international law. Perhaps, given the available evidence, they would not have been able to prove that it did. Perhaps they could not have shown that, even if the law of nations was violated, it was the defendants who violated it. Perhaps they could not establish that the District Court had personal jurisdiction over those defendants.

Instead, however, the Supreme Court laid down a requirement that no Congress – not the one that enacted the ATS, and not any since – has ever endorsed: that claims under the statute must "touch and concern" not just the United States, but "the **territory** of the United States, [and] they must do so with sufficient force to displace the presumption against extraterritorial application."[14] The meaning of this judicially-created limitation is unclear: is an ATS defendant's physical presence in the US sufficient, regardless of where the alleged tort occurred? What does it even mean for a tort committed outside the United States to "touch and concern" the territory of this country?

The two more recent Supreme Court decisions following *Kiobel* – *Jesner v. Arab Bank Corporation*[15] in 2018 and *Nestle USA and Cargill v. Doe*[16] in 2021 – do not untangle these uncertainties. *Jesner* declares that foreign corporations may not be ATS defendants – apparently they cannot violate international law, while American ones at least arguably can – and *Nestle* compounds the problem, recognizing that the ATS "does not regulate conduct," but somehow inferring from that the need for an even clearer legislative indication that it was intended to "apply extraterritorially."

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[12] *E.g.*, *id.*, 569 U.S. at 108 ("the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS.").
[13] 369 U.S. 186, 211 (1962).
[14] *Id.*, 569 U.S. at 124.
[15] 584 U.S. __ , 138 S. Ct. 1386 (2018).
[16] 593 U.S. ___, 141 S. Ct. 1931 (2021).

Fortunately, the Court did not accept the suggestion of Nestle that to give rise to ATS jurisdiction, both the tortious conduct and the injury resulting from it must have occurred in this country. Such a holding would have represented the judicial repeal of the Alien Tort Statute, performed by a court every one of whose recent appointees, during her or his confirmation hearings, promised never "to legislate from the bench."

Yet the plight, and the very survival, of the *Filartiga* line of cases is in jeopardy, and the attacks on their underlying premise continue unabated. In my view, the Supreme Court has systematically ignored and devalued one of the most remarkable achievements of the second half of the last century: the emerging recognition that international human rights law is really law. These developments with respect to the ATS, I suggest, illustrate the "pushback" denying that epochal evolution.

When the *Filartiga* case was remanded to the Eastern District of New York, Judge Eugene Nickerson summed up the appellate court's disposition of the case as teaching that international law "does not consist of mere benevolent yearnings never to be given effect."[17]

Before we can achieve the theme of this International Law Weekend – achieving a world "beyond international law" – I submit that we international lawyers must find ways to overcome those who stand in the way of making Judge Nickerson's words real.

[17] 577 F. Supp. 860, 863 (E.D.N.Y. 1984)