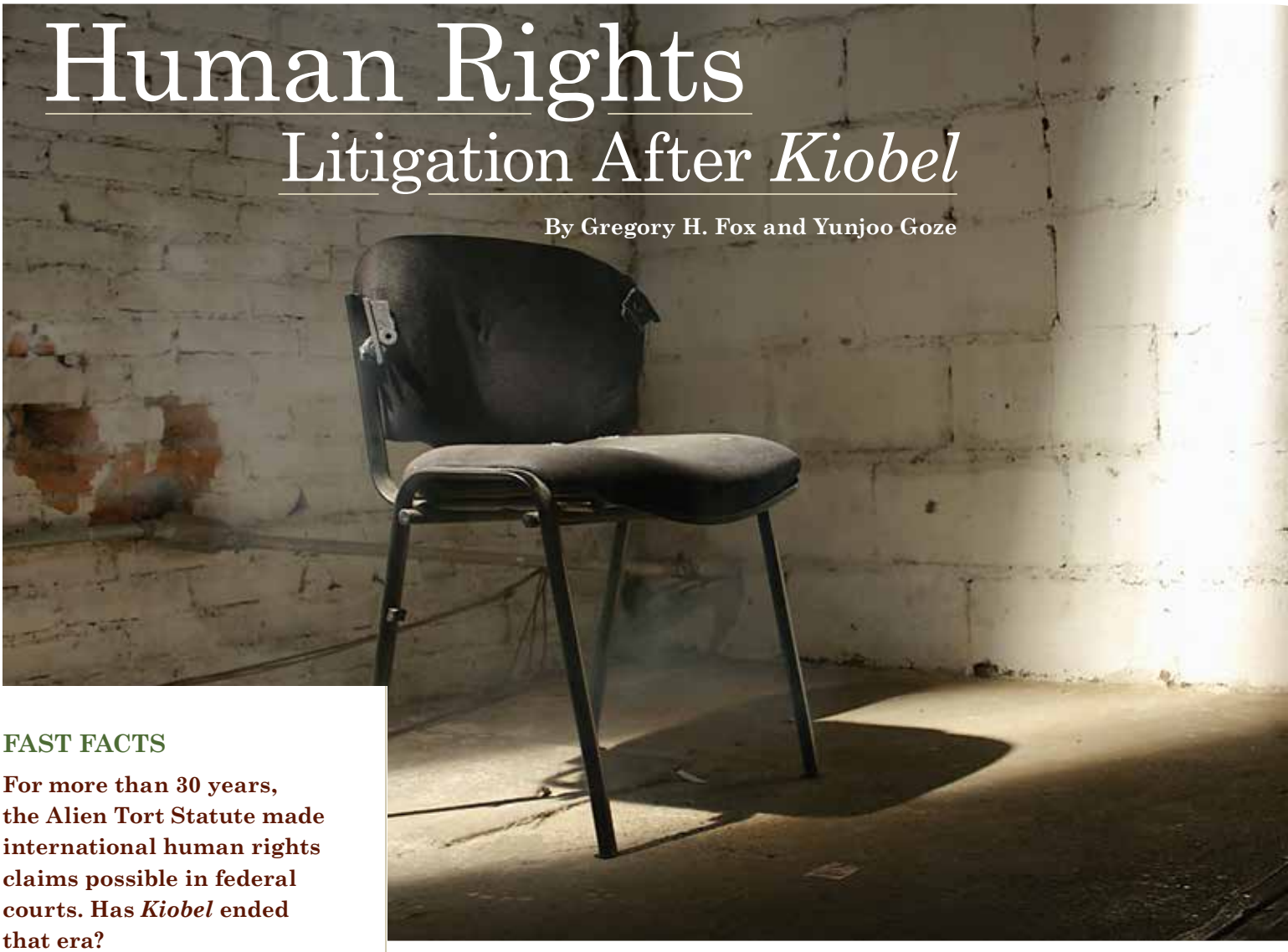
International Human Rights Litigation After *Kiobel*



By Gregory H. Fox and Yunjoo Goze

FAST FACTS

For more than 30 years, the Alien Tort Statute made international human rights claims possible in federal courts. Has *Kiobel* ended that era?

Does the presumption against extraterritoriality apply to a statute that explicitly refers to international law?

***Kiobel* may not have foreclosed international human rights litigations but rather shifted their locus both to different grounds for subject-matter jurisdiction in the federal courts and transnational tort claims in state courts.**

For more than 30 years, the Alien Tort Statute[1] served as the primary vehicle for international human rights claims in United States federal courts. But in its long-awaited decision in *Kiobel v Royal Dutch Petroleum Company*,[2] the Supreme Court may well have brought that era to an end. This article assesses the impact of *Kiobel* on claims by aliens that their internationally protected human rights have been violated. It concludes that *Kiobel* may not have foreclosed human rights actions, but rather shifted their locus both to different grounds for subject-matter jurisdiction in the federal courts and to new territory in the state courts.

Background

The Alien Tort Statute is a part of the founding era, passed as a part of the first Judiciary Act of 1789. The statute vests federal district courts with jurisdiction to hear "any civil action by an alien for a tort only, committed in violation of the law of nations…."[3] Two

critical features of the statute are (1) the plaintiff must be an alien and (2) the claim must allege a violation of international law. Despite its historical pedigree, the statute languished in obscurity until the Second Circuit's landmark 1980 decision in *Filartiga v Pena-Irala*.[4] *Filartiga* involved a claim by a Paraguayan national that a Paraguayan police official had kidnapped and tortured his son to death. All relevant acts in the case occurred in Paraguay. The Second Circuit held that official torture is universally and unambiguously condemned by international law and that the Alien Tort Statute provided subject-matter jurisdiction for the claim.[5]

Filartiga opened the floodgates to almost two decades of human rights claims that followed similar fact patterns: foreign citizens suing officials of their own governments for human rights violations in their home countries.[6] In the mid-1990s, a second generation of Alien Tort Statute cases emerged in which claims were brought against multinational corporations. The plaintiffs alleged that corporations operating in developing countries had conspired with or aided and abetted local governments in mass human rights violations. In *Doe v Unocal Corporation*,[7] for example, Burmese plaintiffs alleged that the California oil company had assisted in human rights abuses, including the procurement of slave labor, during its construction of a pipeline.[8] These corporate claims responded to two problems with the earlier generation of Alien Tort Statute cases against foreign government officials: those officials rarely came to the United States, making personal jurisdiction extremely difficult, and they had few assets in the country. Multinational corporations, by contrast, are ubiquitous within the United States and have substantial assets to satisfy judgments.

This doctrine was developed in the lower federal courts. The Supreme Court issued its first opinion on the Alien Tort Statute in 2004 in *Sosa v Alvarez-Machain*.[9] Alvarez, a Mexican national, was abducted and transported to the United States to stand trial for a murder charge. After he was acquitted, he brought a suit against Sosa, also a Mexican national, who was involved in the abduction. Sosa argued that the Alien Tort Statute is only jurisdictional and does not create a cause of action for violations of international law, such as Alvarez had alleged.[10] The Court agreed that the statute is purely jurisdictional but did not agree that those it covered had no cause of action; that would have rendered the statute "stillborn."[11] *Sosa* held instead that the first Congress understood certain violations of the law of nations to have become part of the common law, which provided a cause of action independently of the Alien Tort Statute.[12] While only a few violations of eighteenth-century international law provided rights of action to individuals—offenses against ambassadors, violation of safe conduct, and piracy[13]—the Court held that violations of contemporary international law would be actionable under the Alien Tort Statute as long as they are "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[14]

Sosa left a number of questions undecided. Among them was "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[15] Given the proliferation of second-generation Alien Tort Statute claims against corporations, this question soon reached the Court in *Kiobel*. *Kiobel* involved claims by Nigerian nationals living in the United States that Royal Dutch Petroleum Company (incorporated in the Netherlands) and Shell Transport and Trading Company (incorporated in England), operating in the Ogoni region of Nigeria, aided and abetted acts of torture and crimes against humanity by the Nigerian government.[16] The Court granted certiorari on the question of corporate liability. After oral argument, however, the justices changed their focus to the question of the statute's extraterritorial application. They requested a second round of briefing on the question "whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States."[17] The Court's opinion, issued on April 17, 2013, focused only on this question, leaving the issue of corporate liability for another day.

The *Kiobel* Opinion

The Supreme Court held that the Alien Tort Statute, like many other federal statutes, was subject to a presumption against extraterritoriality, which provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[18] The presumption is designed to avoid unwarranted judicial interference in matters of foreign policy. Although the Court acknowledged that the presumption is typically applied to conduct-regulating statutes rather than jurisdictional statutes like the Alien Tort Statute, it found the danger of judicial overreach to be greater in the case of the Alien Tort Statute because of the law-making opportunity it afforded to federal courts.[19] The Court found nothing in the text or historical background of the statute that might overcome the presumption.[20]

The Court thus articulated a restrictive territorial test for Alien Tort Statute claims: "[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[21] When the claim is against a corporation, "mere corporate presence" in the United States is not sufficient to rebut the presumption.[22] For the *Kiobel* plaintiffs who alleged acts of foreign corporations in the territory of a foreign state, this test was fatal and the Court dismissed their claims.

All international human rights claims have parallels in state tort law: wrongful death, assault, battery, etc.

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Scholars have already been quite critical of *Kiobel*, focusing in particular on its application of the presumption against extraterritoriality to a jurisdictional statute.[23] Others have argued that a jurisdictional statute explicitly invoking international law is particularly ill-suited to the presumption.[24] But whatever one makes of *Kiobel*'s reasoning, the opinion has significantly restricted the scope of the Alien Tort Statute. The *Filartiga*-type fact pattern of an alien suing an official of his own government for acts committed in their home country seems unlikely to "touch and concern" the United States in the manner contemplated by *Kiobel*. This reading was confirmed by the Second Circuit in late August when it declared flatly, "if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*."[25] On the other hand, there could be a different outcome if some of the relevant conduct occurred in the United States. Whether such conduct might include corporate decisions here to engage in tortious activity abroad remains to be seen.

Two other options remain for Alien Tort Statute plaintiffs. The first would be to bring *Filartiga*-type claims in federal court not under the statute but under 28 USC 1331 providing for federal question jurisdiction.[26] *Sosa* held that federal common law at the time the Alien Tort Statute was enacted incorporated customary international law, which today includes the law of human rights. Human rights claims could thus be said to arise under federal law. Before *Sosa*, federal courts were divided on whether claims grounded in international law presented a federal question under section 1331.[27] The *Sosa* court, although not deciding the issue, noted that while the Alien Tort Statute evidenced a clear congressional intention to encompass international law claims, no such intention is evident in other jurisdictional statutes, including section 1331.[28] Some lower courts have taken *Sosa*'s skepticism to heart and rejected *Filartiga*-type human rights claims under section 1331 while others have not.[29]

The second option would be to file claims in state court.[30] This strategy would effectively abandon the federalization of human rights claims in the post-*Filartiga* period as well as longstanding jurisprudence that foreign-relations questions are matters of federal law.[31] All international human rights claims have parallels in state tort law: wrongful death, assault, battery, etc. Claims arising outside the United States have long been accepted in state courts as "transitory torts."[32] Filing in state courts offers a number of advantages. By pleading ordinary torts plaintiffs could avoid the high threshold of definiteness and universality required by *Sosa*.[33] Corporate liability for aiding and abetting human rights violations—the issue on which the Supreme Court originally granted certiorari in *Kiobel* but ultimately did not decide—is well established in state law.[34] In addition, most state courts do not require the strict federal pleading standards of *Ashcroft v Iqbal*[35] or apply the *forum non conveniens* doctrine with the same force and consistency as federal courts.[36]

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But there are potential pitfalls to state court litigation as well. One is state choice of law rules that, under various theories, may well apply the law of the parties' home country. This is unlikely to favor claims against local government officials. Others include possible removal to federal court, federal foreign affairs preemption, and imposition of a foreign exhaustion requirement.

Conclusion

Even though *Kiobel* left many questions unresolved, it clearly ended the period when foreign human rights plaintiffs could look to the federal courts as a friendly forum as long as personal jurisdiction over their abusers was established. And while *Kiobel* did not directly decide the question of corporate liability under international law, its dictum that mere corporate presence in the United States is not sufficient to overcome the presumption against extraterritoriality would seem to doom many claims against U.S. corporations, let alone foreign companies. The new frontiers of claims under section 1331 or filed in state courts may recapture some of the *Filartiga*-type cases. But they present challenges of their own. ■

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ENDNOTES

1. 28 USC 1350.
2. *Kiobel v Royal Dutch Petroleum Co*, ___ US ___; 133 S Ct 1659; 185 L Ed 2d 671 (2013).
3. 28 USC 1350.
4. *Filartiga v Pena-Irala*, 630 F2d 876 (CA 2, 1980).
5. *Id.* at 880.
6. See Henner, *Human Rights and the Alien Tort Statute: Law, History and Analysis* (Chicago: American Bar Association, 2009).
7. *Doe v Unocal Corp*, 963 F Supp 880 (1997).
8. *Id.* at 884–885 (1997).
9. *Sosa v Alvarez-Machain*, 542 US 692; 124 S Ct 2739; 159 L Ed 2d 718 (2004).
10. *Id.* at 2754.
11. *Id.* at 2755.
12. *Id.* at 2761.
13. *Id.* at 2759.
14. *Id.* at 2761–2762.
15. *Id.* at 2766 n 20.
16. *Kiobel*, n 2 *supra* at 1662–1663.
17. *Id.* at 1662.
18. *Id.* at 1664 (quoting *Morrison v Nat'l Australia Bank, Ltd*, ___ US ___; 130 S Ct 2869, 2878; 177 L Ed 2d 535 (2010)).
19. *Id.*
20. *Id.* at 1665–1666.
21. *Id.* at 1669.
22. *Id.*
23. See, e.g., Sloss, Kiobel *and extraterritoriality: A rule without a rationale*, Maryland J Int'l L (forthcoming 2013), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2264358> (accessed October 8, 2013).
24. See Colangelo, *A unified approach to extraterritoriality*, 97 Va L R 1019 (2011).
25. *Balintulo v Daimler AG*, 2013 WL 4437057, *7 (CA 2, 2013).
26. See Skinner, *Customary international law, federal common law and federal court jurisdiction*, 44 Val U L R 825 (2010).
27. Cases upholding jurisdiction under § 1331 included *Pacheco de Perez v AT&T Co*, 139 F3d 1368 (CA 11, 1998), *Torres v Southern Peru Copper Corp*, 113 F3d 540 (CA 5, 1997), and *Republic of Philippines v Marcos*, 806 F2d 344 (CA 2, 1986. Those rejecting jurisdiction included *Patrickson v Dole Food Co*, 251 F3d 795 (CA 9, 2001) and *In re Tobacco*, 100 F Supp 2d 31 (D DC, 2000).
28. *Sosa*, n 9 *supra* at 731 n 19.
29. See, e.g., *Mohamad v Rajoub*, 394 US App DC 277, 282–283; 634 F3d 604 (2011); *Sinaltrainal v Coca-Cola Co*, 578 F3d 1252, 1264 (CA 11, 2009) (accepting § 1331 jurisdiction).
30. See Childress III, *The Alien Tort Statute, federalism, and the next wave of transnational litigation*, 100 Geo L J 709 (2012).
31. See *Banco National de Cuba v Sabbatino*, 376 US 398, 425–27; 84 S Ct 923; 11 L Ed 2d 804 (1964).
32. Hoffman & Stephens, *International human rights cases under state law and in state courts*, 3 UC Irvine L R 9, 11 (2013).
33. *Id.* at 18.
34. *Id.*
35. *Ashcroft v Iqbal*, 556 US 662; 129 S Ct 1937; 173 L Ed 2d 868 (2009).
36. Alford, *The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIO JURIS (April 17, 2013, 5:48 PM) <http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/> (accessed October 8, 2013).