A Quick and Dirty Q&A about the US Supreme Court’s *Kiobel* Decision

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The following is a “quick and dirty” Q&A (lightly edited including for clarity and to correct typos) regarding the Supreme Court’s *Kiobel* decision, which dismissed the Alien Tort Statute (“ATS”) case against Royal Dutch Shell on grounds that the statute did not reach extraterritorial conduct abroad.

The Q&A captures the essence of an exchange which occurred on social media during the first couple of hours after the decision was handed down. While not detailed, nuanced or comprehensive, this interesting exchange advances understanding about certain key aspects of the decision.

The answers are given by law professor Chip Pitts, who has taught the subject of CSR and Business & Human Rights for many years from his base at Stanford Law School, while also teaching it to law and business students at other universities in the West and, in recent years, in China and Korea. His writings include being the author or co-author of law review articles and blog posts on the case, as well as the leading CSR textbook *Corporate Responsibility: A Legal Analysis* (2nd edition forthcoming soon). Pitts participated in the *Kiobel* litigation as a member of the International Law Scholars amicus briefs, and has experience with the issues as a practicing lawyer, first as a partner with Baker & McKenzie then as Chief Legal Officer of Nokia Inc. and founding General Counsel and CEO of start-up technology businesses in Silicon Valley and Austin, Texas. He is a founding member of the Business & Human Rights Resource Centre’s International Advisory Network.

**Chip Pitts**: A terribly unfortunate (and I think clearly erroneous) decision in *Kiobel* today by the conservative majority of this (pro-corporate) US Supreme Court, ignoring decades of jurisprudence (including its own) to seriously gut the Alien Tort Statute remedy for serious human rights violations occurring abroad. The action now moves to state courts, other forums, and the difficult legislative and treaty battleground to have home countries hold their companies accountable for violations in host nations.

**Question**: But in this “unanimous” decision, didn’t all nine judges have the same view? So are all nine judges just pro-corporate?

**Answer**: Definitely not. If you read the decision, the four concurring “liberals” wouldn’t have decided on the extraterritorial ground at all and would have left the door a bit more widely open to ATS lawsuits than the five Justices in the conservative majority, affirming the Second Circuit’s dismissal of the case narrowly and only on the facts of this particular case.

**Question**: But then why didn’t Justice Breyer and the three other “liberals” who didn’t agree with the majority opinion’s full restrictions on extraterritorial application of ATS write a robust dissent?

**Answer**: Because they agreed with the end result (not the conservative majority’s reasoning) on the facts of this particular case, where the conduct took place abroad, with limited US contacts: the company sued was based outside the US, with (in the court’s eyes) insufficient connections to the US to overcome the “presumption against extraterritoriality”, which the five in the conservative majority applied and the four “liberals” thought inapplicable. They probably also thought that the concurrence strategy left more room open for sensible future application of the law to allow remedies where needed and possible. One can imagine this happening even for extraterritorial violations if there’s greater US
connection or US-based conduct, especially since “swing” Justice Kennedy from the conservative majority wrote yet another separate concurrence in which he obscurely noted that many open questions remain, including cases not covered “by the reasoning and holding of today’s case”, and wrote, “the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”

**Question:** Fair enough, but (a) shouldn’t the liberal Justices have said something about the extraterritoriality, saying that the majority is overreaching, and (b) doesn't Mrs Kiobel's US citizenship - after the event - make any difference?

**Answer:** A. The four “liberal” Justices concurring did say something about extraterritoriality (including that the presumption against it was inapplicable here, that the ATS integrally by its own terms has always been about “foreign affairs” and not merely domestic application, and that in fact the ATS has applied extraterritorially since its inception – as indicated e.g. by its intent to cover the international offense of piracy). In contrast to the conservative majority, the concurring “liberals” clearly contemplate that ATS might apply even to extraterritorial conduct if an important American interest is substantively affected (such as the US interest against being a safe harbor for a torturer or other serious human rights violator), and B. Yes perhaps, to enhance the US interest after the fact . . . but not to the conservative majority – and in the first instance it is foreigners who are allowed to sue by the statute.

**Question:** So these original intenders don't believe in **stare decisis**? Or am I being naive and confusing two different points? Original intenders being the Scalia school, of course.

**Answer:** You’re correct; it’s results-oriented and not principled, a long-time problem with Justice Scalia and the “originalist” school. The fact is that the US founders originally viewed the law of nations as part of dynamic and evolving customary/common law. Yet the conservative majority in *Kiobel* especially distorts or ignores the implications of Attorney General Bradford’s 1795 opinion, Alexander Hamilton’s views (which they cite) about justice being in the interests of the US, the long-standing transitory torts doctrine which they diss, etc., not to mention the entire decades-long post-*Filartiga* line of cases in which extraterritorial application was unquestioned until very recently. Lame.

**Question:** There is the problem of costs, isn't there, where companies can afford to mount defence but litigants are hampered? There are two cases – Doe v. Unocal and Wiwa v. Shell – in which companies settled without admitting wrongdoing, and there haven't been known awards against companies in any other case. This does mean a lot more hard work, but it might force other countries to take their “duty to protect” more seriously. Had the ATS really delivered justice, this would have been a problem. But the ATS was often used as a threat to get companies to take responsibilities seriously, with the caveat that if not, there’d be a lawyer suing you and tying up senior management for years.

**Answer:** I strongly disagree. Putting aside my quibble re your mistake about the number of cases in which the ATS has achieved notable awards (at least a couple have been adjudicated in plaintiffs’ favor, and there have been more ATS and ATS-inspired substantial settlements than you acknowledge), ATS has indirectly inspired other human rights enforcement avenues (e.g. contract, administrative, civil, criminal, hybrid, state, regional, international), ranging from citations in the Pinochet case, to European cases, to UN Special Representatives, Special Rapporteurs, and other procedures; defining norms; defining state action requirements; drawing attention to the issues, etc. Moreover, in today's world, pluralistic approaches to meaningful remedies are more important than ever, and this ATS jurisprudence was in both the US and the world’s interest. The substantive and procedural limitations on the ATS, including the Supreme Court’s previously defined high threshold from its *Sosa* decision (only “universal,
specific, and obligatory” international law norms equivalent to the “18th century paradigm” offenses being covered under the ATS, and the many discretionary judicial abstention doctrines – such as “political question” or “foreign affairs” doctrines (separation of powers deference), “case specific” deference to the executive branch, foreign sovereign immunity, standing, exhaustion of remedies, comity, forum non conveniens, etc., by which US judges have great scope to refuse inappropriate cases – have meant that overreach has been seriously constrained. But the ATS has nevertheless played a prudent role and been a hugely positive inspiration and influence to the entire global corporate accountability movement.

Question: But its existence prevented other countries from developing their own jurisprudence. Fine, “go to California,” countries said – that seemed to be the complacent attitude. I agree it will make it harder for people like us to argue that, “look, you have this risk.” But at the same time, it was a manageable risk, and large companies could always afford to spend the $30m a year in legal bills and administrative costs to keep tying down NGOs and victims' lawyers in procedural measures. At the same time, it doesn't make life easier for the folks in Niger Delta – but having an ATS too made little difference. And I assume this still applies to US companies, right? And does it include US-listed? If so, all isn't lost. If a US company can be sued under the Foreign Corrupt Practices Act (FCPA) in the US, surely someone can sue a US company in the US for a harm done? If I take Pfizer medication and develop adverse reaction, surely I can sue Pfizer in the US? Then if I drink contaminated water in the Niger Delta, surely I can sue Shell in the US because it is listed there?

Answer: False, re the impact of the ATS on other countries. ATS inspired many foreign analogues which have provided meaningful remedies already, about which I teach. The facts from this one case alone, involving Shell and the Niger Delta, have spurred significant settlements and court rulings already, under different legal theories and approaches including class actions, in several jurisdictions (including the UK and the Netherlands as well as Nigeria). As a former General Counsel, the ATS helped me encourage compliance and manage risk for the companies I worked for. This is a terrible decision (not even to mention the damage to the rule of law from continued results-oriented decisions from a conservative majority that ignores the facts and the law in the ways pointed out in the "liberal" concurrence and beyond). Yes, there remains some narrower ATS room left to litigate against corporations, including for the US-based corporate defendants you reference, and for torts occurring on US domestic soil, and even for extraterritorial violations which meet the narrowed criteria articulated in this decision, in which the conservative majority was admittedly and unfortunately so hostile to the ATS. “Mere corporate presence” in the US clearly isn't enough for a corporate defendant to be sued under the ATS according to this decision. But more substantial corporate presence and action, such as actual corporate citizenship and operations in the US beyond a “mere office,” implicates completely different issues, especially e.g. if planning of human rights violations occurred on US soil. You are absolutely correct that even a more robust ATS made far too little positive difference to people on the ground in places like the Niger Delta (or the factory workers in the recent fires in Pakistan and Bangladesh, or victims in thousands of other ongoing, utterly unacceptable situations). Which is why a full hard law menu including mechanisms like the ATS is necessary to complement and back up the soft law and ethical and voluntary CSR mechanisms – not only in the interests of human rights victims needing remedies, by the way, but in the interests of corporations (under the “business case”) and the nations which serve as their home and host jurisdictions. For the time being, however, other legal approaches including litigation in US state courts and other fora, and the legislative and the (difficult and long-term) treaty avenue, will probably take on more currency vis-à-vis the ATS (unless and until this Supreme Court changes!).