2012

Panel Proceedings, The Future of Alien Tort Litigation *Kiobel* and Beyond

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THE FUTURE OF ALIEN TORT LITIGATION: *KIOBEL* AND BEYOND

This panel was convened at 9:00 a.m., Saturday, March 31, by its moderator, Chimène Keitner of the University of California, Hastings College of Law, who introduced the panelists: Richard Herz of EarthRights International; Kenneth Keith of the International Court of Justice; Ramon Marks of Arnold & Porter LLP; and Ingrid Wuerth of Vanderbilt University School of Law.

INTRODUCTORY REMARKS BY CHIMÈNE KEITNER*

Kiobel v. Royal Dutch Petroleum,[1] and the Supreme Court's subsequent order for supplemental briefing and reargument, highlight the court's concerns about the international implications of litigation under the Alien Tort Statute. These concerns may be heightened in cases that involve principles of imputed liability, which play a critical role in holding large organizations responsible for the actions of their agents. U.S. courts adjudicating human rights cases have disagreed both over the rules of imputed liability and the source of law for these rules. This roundtable considered these choice-of-law questions in the context of divergent views about the appropriate role of domestic courts in adjudicating human rights and humanitarian law violations.

REMARKS BY KENNETH KEITH†

My task is to provide an international law perspective on this case and its related litigation. I will do that by addressing five issues. I would, as a preliminary, like to emphasize that after many years in the law I worry about over-specialization. Law is law, even if in the international context it may appear to, and in fact may, differ in some respects—some of which are very important. A related preliminary, a more general version of what I have just said, is captured in a saying often attributed to Albert Einstein: make things as simple as possible, but not simpler.

The first issue came into my mind when I noticed that Judge Henry Friendly had had a role in the revival of the legislative provision we are examining. That great judge recalled from his law school days the then-Professor Felix Frankfurter's three rules for the interpretation of statutes. Not the literal rule, the golden rule, and the purposive rule, or some equivalent list. But (1) read the statute, (2) read the statute, and (3) read the statute! [1] So I did.

There is, of course, no such statute as the Alien Tort Statute. The Judiciary Act of 1789, passed by Congress in its first session, is a statute consisting of 35 sections in a form familiar in common-law jurisdictions at that time. It is "an Act to establish the Judicial Courts of the United States." It sets up the district and circuit courts, provides for their sessions, allocates jurisdiction over criminal charges and civil cases and suits,

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[1] Background on the *Kiobel* litigation can be found in two ASIL Insights by Chimène Keitner: Kiobel v. Royal Dutch Petroleum: *Another Round in the Fight Over Corporate Liability Under the Alien Tort Statute*, at http://www.asil.org/insights100930.cfm; and *The Reargument Order in* Kiobel v. Royal Dutch Petroleum *and Its Potential Implications for Transnational Human Rights Cases*, at http://www.asil.org/insights120321.cfm.

† Judge, International Court of Justice.

[1] HENRY J. FRIENDLY, BENCHMARKS: SELECTED PAPERS BY AN EMINENT FEDERAL JUDGE 196, 202 (1967).

regulates procedures, and provides for remedies.[2] Section 9 of the 1789 Act, along with many other provisions, confers jurisdiction on the newly established courts. That jurisdiction is concurrent with that of other courts when "an alien sues for a tort only in violation of the law of nations or a treaty of the United States." It assumes that the law of nations places substantive obligations and recognizes substantive rights that could have been litigated and could continue to be litigated in state courts. The distinction between substantive rights and jurisdiction was recognized just four years later by Chief Justice Marshall in *Marbury v. Madison*[3] when the Supreme Court ruled that Section 13 of the 1789 Act, insofar as it conferred original jurisdiction on the Supreme Court to order *mandamus* against federal officials, was in breach of the Constitution. The three steps in that elegant judgment, to recall a standard invoked by President Caron in his opening address, were as follows:

(1) Did Mr. Marbury have a right to his warrant (issued, as it happened, by Acting Secretary of State Marshall after he had taken up the office of Chief Justice)? Yes.

(2) Did Mr. Marbury have a right to a remedy against Secretary Madison? Yes.

(3) In this Court? No.

You might think that the Court could have gone directly to the third question to resolve the case, as it did nine years later in another elegant judgment by John Marshall in *Schooner Exchange v. McFaddon,*[4] and as the International Court of Justice did last month in the state immunity case between Germany and Italy.[5] The Court there emphasized the essential distinction between the substantive obligations of Germany, which all agreed it had breached in dreadful ways in 1943–1945, and the jurisdiction of Italian courts to rule on those breaches.

My second issue concerns those substantive obligations. I return to the comment I made earlier that the 1789 legislation assumes that wrongs under the law of nations could be the subject of suit in state courts brought by an alien plaintiff. I take it that this is a reflection of the proposition stated just a few years earlier by William Blackstone that the law of nations is adopted in its full extent by the common law and is held to be part of the law of the land. The law of piracy is a primary instance, a crime or a wrong, in terms of one issue raised in the current litigation, because it is usually thought that piracy can be committed only on the high seas. Such acts might be the subject of both criminal prosecution and of civil proceedings. The latter proceedings might be brought on the basis of the arrest of the pirate ship, a non-natural party to the proceeding, to refer to another matter in issue in the current litigation. That the one set of facts might give rise to parallel proceedings, criminal, civil, and indeed disciplinary, with different parties, may be seen again in the Germany/Italy judgment which recalls war crimes convictions of Germany military personnel,[6] in the genocide case in the ICJ

[2] I would mention in that context another splendid publication by the Hudson medalist of yesterday, James Crawford, entitled *Australian Courts of Law.*

[3] 5 U.S. 137 (1803).

[4] 11 U.S. 116 (1812).

[5] Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Judgment, (Feb. 3, 2012), *available at* http://www.icj-cij.org/docket/files/143/16883.pdf.

[6] *Id.* para. 52.

between Bosnia and Serbia (2007),[7] and, to provide a New Zealand reference, in the *Rainbow Warrior* case.[8]

That familiar parallelism and the essential distinction between substantive obligation and jurisdiction make me wonder about all the emphasis in the U.S. litigation on the limits, agreed by treaty, of the *jurisdictions* of international criminal tribunals. Why should those limits be seen as addressing the scope of *substantive* obligations? Does that not involve a serious error of categorization? That is my third issue.

Fourth, I simply raise the question about the extent of civil jurisdiction under international law, an area of law which I have not studied carefully in recent years. I recall the excellent Hague lectures by F.A. Mann,[9] and the concern reflected in legislation enacted in a number of countries in about 1980 in response to what was seen as an overreaching of regulatory power by U.S. federal agencies. (After the session, Peter Trooboff kindly called my attention to the decisions on the extent of civil jurisdiction of the Supreme Court given last year, *Goodyear Dunlop Tires Operation v. Brown* and *J. McIntyre Machinery v. Nicastro,* and his notes in the *National Law Journal* of December 13, 2010 and October 10, 2011). A second jurisdictional question is whether the doctrine of *forum non conveniens* might play a more substantial role.

My fifth and final point relates to the oft-repeated formula in the U.S. litigation about the elements of the test for the existence of rules of the law of nations or of customary international law—specific, universal and obligatory, in the relations of states *inter se.*[10] I comment on the first, specificity, and on the last, the *inter se* element. Is specificity really an essential element of rules of law? What of reasonable care, due diligence, due process, good faith or (thinking of the splendid opening address of Jakob Kellenberger), the principle of humanity, balanced by military necessity, the prohibition on weapons causing indiscriminate effects, or unnecessary suffering and the prohibition on cruel and unusual treatment? Or, to go back to 1789, consider the specificity of the law of piracy, defined at that time simply as "piracy by the law of nations"?[11] And, so far as the requirement of relations between states *inter se* is concerned, what about the prohibition on forced labor? Such a prohibition typically applies to a relationship between an employer, which will often be a corporation, and a worker, even if the prohibition may have its international law origin in treaties ratified by states (although labor conventions, I would note, are adopted by a conference half the members of which represent employers and unions).

I trust I have given you an international law perspective and, in terms of Einstein's direction, have not been too simple.

[7] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, paras. 170–74 (Feb. 26).

[8] *R v Mafart & Prieur,* 74 ILR 241; UN Secretary-General, Ruling on the Rainbow Warrior Affair Between France and New Zealand (July 6, 1986), 19 R.I.A.A. 199 (1986), 26 I.L.M. 1346; Case Concerning the Difference Between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 Between the Two States and Which Related to the Problems Arising from the Rainbow Warrior Affair (N.Z. v. Fr.), 20 R.I.A.A. 216 (1990).

[9] 156 Recueil des Cours 1 (1984), referring to his lectures of 20 years earlier.

[10] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[11] United States v. Smith, 18 U.S. 153 (1820) (showing a divided Supreme Court on the (non) specificity of that definition).