Washington Legal Foundation

May 13, 2016

On the Merits:

DOE I, *et al.*,
individually and on behalf of proposed class members,

Plaintiffs-Appellants,

v.

CISCO SYSTEMS, INC., *et al.*

Defendants-Appellees.

No. 15-16909

U.S. Court of Appeals for the Ninth Circuit

Question Presented: Whether, in dismissing Plaintiffs' claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, the district court properly applied the Supreme Court's "touch and concern" test under *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

Summary of the Case: Plaintiffs brought a putative class action against Cisco Systems, Inc., a leading U.S. network-technology company, and its executives, alleging that Defendants aided and abetted human rights abuses against a group of Falun Gong religious practitioners in China—in violation of the ATS. Specifically, Plaintiffs allege that Defendants played a central role in the design and implementation of China's "Golden Shield" project, a network security system used to persecute dissident Falun Gong believers, including Plaintiffs.

Defendants moved to dismiss the complaint for failure to state a claim. Granting the motion and dismissing the complaint, the district court held that Plaintiffs' claims were barred under the longstanding presumption against extraterritoriality. Relying on *Kiobel*, the district court concluded that Defendants' conduct did not "touch and concern" the territory of the United States with sufficient force to overcome the presumption that U.S. laws should not apply to overseas conduct. The district court also held that Plaintiffs' allegations were not sufficient to establish aiding-and-abetting liability under customary international law.

On the Merits:
Judgment for Defendants-Appellees
John B. Bellinger, III
Arnold & Porter LLP

Plaintiffs contend that Cisco and its executives may be held liable under the ATS for human rights abuses allegedly committed in China by Chinese security forces on the theory that the Chinese government used Cisco's internet security and screening software to identify the Plaintiffs and monitor their activities. In granting Defendants' motion to dismiss, the district court properly held that Plaintiffs' claims are barred by the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*.

In *Kiobel,* the Supreme Court held that the ATS is presumed not to apply to conduct in the territory of another country. "[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." 133 S. Ct. at 1669. "Mere corporate presence" in the U.S. is not sufficient. *Ibid.* Although the lower courts continue to debate the meaning of the Court's "touch and concern" test, Plaintiffs here have not alleged sufficient U.S. conduct or nexus to overcome the Supreme Court's clear mandate.

Plaintiffs argue that their claims "touch and concern" the U.S. because Cisco is a U.S. company. Their *amici* go farther to argue that no U.S. conduct is required because the ATS provides jurisdiction over U.S. defendants. Although this argument was adopted by four members of the Supreme Court in *Kiobel*, it was not accepted by the majority, which concluded that the "claim" itself (not the citizenship of the defendant) must not only touch and concern the U.S., but that it must do so with "sufficient force." *Ibid.* The Court never suggested that a defendant's citizenship has any relevance to the presumption against extraterritoriality; rather the Court stated repeatedly that the ATS bars suits where the "relevant" conduct occurs abroad. *Ibid.* The Second Circuit, after *Kiobel*, has specifically rejected the argument that U.S. citizenship alone is sufficient to confer jurisdiction under the ATS. *See Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013).

The 1795 opinion of Attorney General William Bradford, cited by the dissent, does not show that the ATS was intended to apply to provide jurisdiction for actions of U.S. nationals in other countries. The majority in *Kiobel* discussed the Bradford opinion at length and concluded that it was not only ambiguous, but that it was solely related to actions that violated a treaty between Great Britain and the United States. 133 S. Ct. at 1661-62. The Court could have concluded that the ATS applies to extraterritorial actions of U.S. nationals, but it chose not to do so.

Plaintiffs alternatively argue that the ATS provides jurisdiction because Cisco engaged in relevant conduct in the United States, namely by customizing security software in California to be used by the Chinese government in China. At best, this allegation establishes an indirect connection between neutral commercial activity in the United States and alleged torture committed by a foreign government in its own territory. Therefore, Plaintiffs' claims of torture and abuse principally "touch and concern" China, not the United States.[*]

Plaintiffs assert that the district court erred by requiring that a U.S. company must "plan, direct, or commit" an international law violation in the U.S. to satisfy *Kiobel*'s touch and concern test. Yet the district court established no such requirement. The district court merely listed and distinguished circumstances where other courts had allowed ATS suits to proceed (in cases where the defendants had planned, directed, or committed human rights abuses in the U.S.); it did not hold that these are the only circumstances.

The Fourth Circuit's decision in *Al-Shamari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014), which allowed an ATS suit to proceed against a U.S. defense contractor relating to the torture and abuse of detainees in Abu Ghraib prison in Iraq, is also distinguishable. The alleged acts of torture and abuse in that case were committed by the employees of the U.S. company itself, on a U.S. military facility, and pursuant to a contract between the defendant and the U.S. Government, not (as in this case) by a foreign government in its own territory using neutral technology developed by the defendant. 758 F.3d at 521-24.

It is also far from clear whether Plaintiffs state a viable claim of accessory liability under the ATS. Given the Supreme Court's admonishment that lower courts should exercise "great caution" and "restraint" in

[*] Adjudication of plaintiffs' claims on the merits would implicate the Executive Branch's decision to allow sale of internet security software to China. Because the district court lacks subject matter jurisdiction under the ATS, there is no need to decide whether this case should be dismissed under the political question doctrine.

recognizing new causes of action under the ATS, it is highly unlikely that the ATS permits civil liability for aiding and abetting violations of international law. International law does not provide for civil liability—unlike criminal liability—for accessory violations. Accordingly, the decision below should be affirmed.

Dissenting View:
Rick Herz
EarthRights International

Plaintiffs allege that a U.S. corporation aided and abetted human rights violations from U.S. soil. The district court nonetheless found Plaintiffs' ATS claims to be barred by *Kiobel*, concluding that those claims did not "touch and concern the territory of the United States ... with sufficient force." That was error.

Kiobel held only that where the acts at issue occurred *entirely* outside the United States, a *foreign* defendant's "mere corporate presence" in the United States was insufficient. The Court did not address, let alone question the viability of, claims against U.S. defendants who acted at least in part in the United States. Because *Kiobel*'s holding was so narrow, it is not surprising that lower courts have adopted different approaches to the "touch and concern" test. But aiding and abetting abuses from the United States satisfies even the Second Circuit's interpretation of *Kiobel*, the most stringent of any Circuit. *See Mastafa v. Chevron*, 770 F.3d 170, 185-86 (2d Cir. 2014).[**]

In fact, no U.S. conduct is required, because Defendants are U.S. nationals. This suffices for at least three reasons. *First*, the ATS's original purpose encompasses claims against U.S. nationals no matter where they participate in international law violations. The First Congress enacted the ATS because it was concerned about "the inadequate vindication of the law of nations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 717 (2004). Failure to provide a remedy when a United States citizen violated international law was a breach by the United States of its international duties. *See* William Blackstone, Commentaries on the Laws of England, bk. 4, 67-68 (1791); Curtis Bradley, *Agora:* Kiobel*, Attorney General Bradford's Opinion, and the Alien Tort Statute*, 106 AM. J. INT'L L. 509, 526 & n.112 (2012) (collecting authorities).

Consistent with its purpose, the ATS was understood from its inception to apply where Americans violated international law abroad. Attorney General Bradford officially concluded that victims of an attack on a British colony abetted by U.S. nationals would have an ATS claim against those Americans. "Breach of Neutrality" Opinion, 1 Op. Atty. Gen. 57, 59 (1795); Bradley, *supra*, 106 AM. J. INT'L L. at 510 (concluding Bradford Opinion supports extraterritorial application of ATS to U.S. citizens). Indeed, *Kiobel* distinguished Bradford's Opinion in part by noting that the attack involved U.S. citizens. 133 S. Ct. at 1668. It is no answer to say that *Kiobel* could have but did not hold that the touch and concern test is met where the defendant is a U.S. national; that question was not before the Court.

Second, the First Congress's concern remains critical. The U.S. still bears international responsibility for its nationals' acts outside the United States and failure to provide a remedy may leave the United States in violation of its international obligations. That is why the United States argued in *Kiobel* that while that case lacked sufficient connection to the United States, it was in our national interests to maintain ATS jurisdiction over extraterritorial human rights violations where individual perpetrators would otherwise have "safe haven" here. Suppl. Br. for the U.S. as *Amicus Curiae* in Partial Supp. of Affirmance ("U.S. *Kiobel* Br."), at 4-5, 19-20, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2161290.

[**] Any suggestion that that ATS does not provide for aiding and abetting liability is specious. Both international law and federal common law recognize such liability, and so too has every Circuit that has considered whether there is aiding and abetting liability under the ATS. *See, e.g., Mastafa*, 770 F.3d at 181; *Doe v. Nestlé*, 766 F.3d 1013, 1023 (9th Cir. 2014).

As an example of an appropriate case, the Government cited *Filártiga v. Peña-Irala*, a suit by Paraguayans, against a Paraguayan, for torture committed in Paraguay. U.S. *Kiobel* Br. at 4; *accord Sosa*, 542 U.S. at 725, 731-32 (approving *Filártiga*). The Government emphasized that, given the defendant's U.S. residency, the U.S. could "be perceived as harboring the perpetrator" and thus held responsible by the international community to provide a remedy. *Id*. at 4-5. "[A]llowing suits based on conduct occurring in a foreign country in the circumstances presented in *Filártiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights." *Id.* at 4-5. Our interests are even stronger here, since the defendants are U.S. *nationals*.

Third, Kiobel was based on foreign policy concerns that might arise from haling foreigners into U.S. court without any relationship between the case and the United States. 133 S. Ct. at 1664. No such concerns arise where the defendant is a U.S. national. *Al Shimari*, 758 F.3d at 530. Every nation has the right to regulate and adjudicate its citizens' acts outside its territory. Restatement (Third) of the Foreign Relations Law of the United States, Part 4, Introductory Note and §§ 402(2), 421 (1987). Other States will not complain when the United States fulfills its international obligations by holding its own nationals accountable for internationally-recognized human rights violations.

In short, claims that United States nationals have participated in violations of universally recognized human rights norms abroad manifestly "touch and concern" the United States. A contrary finding risks the United States's contravening its international obligations to provide a remedy. That would conflict with the ATS's original purpose, undermine current U.S. foreign policy and open the United States to international censure, precisely what *Kiobel* sought to avoid.

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