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The Modern Abolitionist Movement

How Lawyers, Litigation, and Legislation Can Combat Trafficking in Persons

By Laurel G. Bellows

> *It ought to concern every person . . . every community . . . every business . . . every nation. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery.*
>
> —President Barack Obama, September 25, 2012

Throughout the history of the United States, the issue of slavery has troubled the minds and hearts of legal professionals. While the last 148 years have been governed by the seemingly simple proposition of the Thirteenth Amendment, that "[n]either slavery nor involuntary servitude . . . shall exist," these concepts have been parsed and examined for years, with experts turning to a host of terms to name this crime: slavery; servitude; peonage; debt bondage; slavery-like practices; practices similar to slavery; contemporary forms of slavery; white slavery; forced labor; sex trafficking, labor trafficking, trafficking in persons; and trafficking in women and children. Whatever the term, the exploitation and abuse of victims in forced labor and the sex trade have sadly continued. But in the modern era, there are new tools for lawyers who wish to take up this cause to bring traffickers to justice and assist their victims.

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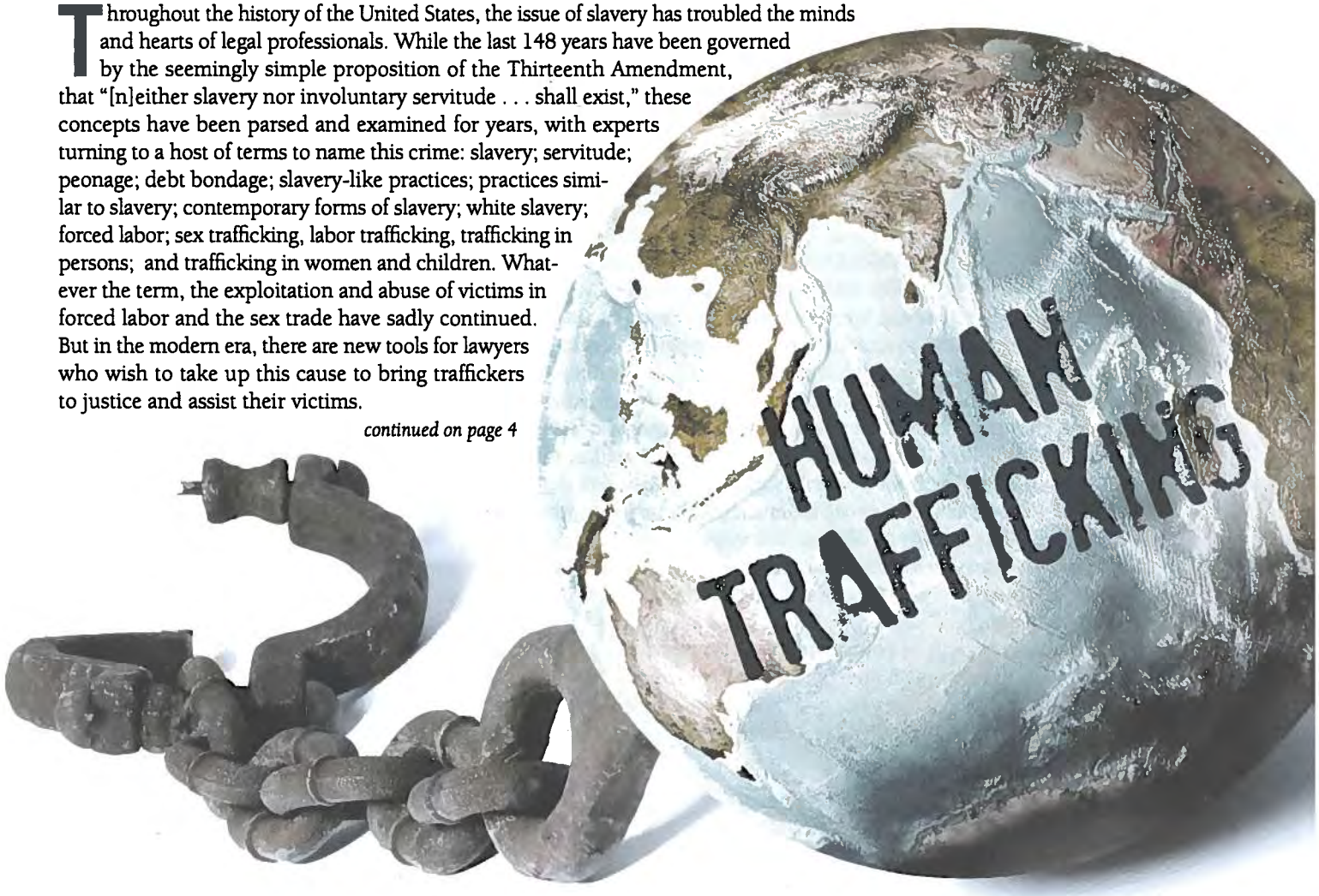

Winner of the 2013 SIL Rona R. Mears Student Writing Competition and Scholarship Award

Kiobel v. Royal Dutch Shell: The Need for a Robust ATS

By Jonathan Markovitz

Editor's Note: *Nigerian plaintiffs originally filed suit against the Royal Dutch Petroleum Company for extrajudicial killing, torture, crimes against humanity, and prolonged arbitrary arrest and detention, among other human rights violations allegedly suffered by the Niger Delta's Ogoni people. The plaintiffs contended that the company collaborated with the Nigerian government to commit these violations in suppression of their lawful protests against oil exploration. In September 2010, in* Kiobel v. Royal Dutch Petroleum Company, *the Second Circuit declined to hold that the violations were actionable under the Alien Tort Statute (ATS); in so doing, it became the only appellate court to refuse to apply the ATS extraterritorially for certain violations of international law. Later, the D.C. Circuit in* Doe v. Exxon *and the Seventh Circuit in* Flomo v. Firestone *explicitly rejected the Second Circuit's reasoning. In 2010 and 2011, the Second Circuit denied petitions for rehearings. The Supreme Court soon granted certiorari, and, on April 17, 2013, the Court affirmed the Second Circuit's decision, determining that "the presumption against extraterritoriality applies to claims under the ATS."* Kiobel v. Royal Dutch Petroleum Company, *133 S. Ct. 1659, 1669 (2013),* available at *www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf. The question for this year's Mears Student Writing Competition, written before the Supreme Court's April 2013 decision, asked students to write as amici curiae for either side. The two winners, R. Ethan Hargraves and Jonathan Markovitz, took opposing positions.*

When the First Congress enacted the Alien Torts Statute (ATS), it intended to assure the international community that, as a new nation, the United States was committed to meeting its obligations under international law. A determination in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 132 (2d Cir. 2010), that the ATS has no extraterritorial reach and does not apply to corporations would render the statute a poor instrument for carrying out this agenda. Such a determination would flout congressional will and turn the United States into a safe haven for the architects of mass murder, slave traders, and other enemies of mankind. Respondents have proposed a draconian solution for a problem that does not exist, as there are alternative methods of disposing of cases that should not be heard in federal courts. Neither precedent nor the law of nations provides any basis for respondents' position, which would have the justices bar the courtroom doors to human rights claims that cannot be adequately adjudicated elsewhere. By choosing to rely upon the ATS, Esther Kiobel and her 11 co-plaintiffs have placed their trust in a judicial system that has the potential to realize the promise envisioned by our Constitution's founding generation. The U.S. Supreme Court should grant the plaintiffs their day in court so as to ensure that their trust is not misguided.

While principles of international law, the text and history of the ATS, and precedent all suggest that the case should be heard on the merits, the Court's ruling should not be limited to reversing the Second Circuit. Instead, the Court should use this case as an opportunity to reaffirm the integrity and force of the ATS. Plaintiffs and their amici present compelling arguments that there are no international law prohibitions against corporate liability for torts in violation of the law of nations and that the ATS was intended to apply extraterritorially without foreclosing the possibility of litigation against corporate defendants. However, the plaintiffs do not go far enough in their defense of a robust ATS. The problem that the Court must guard against is not that there will be too many ATS cases, but too few. The Court should clearly establish that, because the ATS was intended as a vehicle for the United States to meet its obligations under international law, its use should not be easily precluded by reliance upon case-specific doctrines such as *forum non conveniens* and political question.

Corporate Liability

International Law Principles

There is no international law principle exempting corporations from liability for human rights violations. The Second Circuit majority panel in *Kiobel* referenced no such principle. Instead, the majority sought to determine "whether

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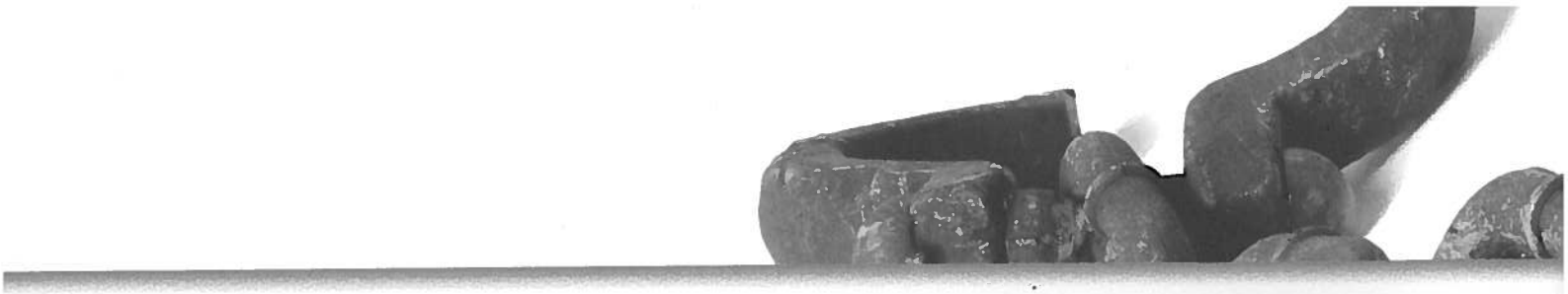

the sources of international law reveal that corporate liability has attained universal acceptance as a rule of customary international law." *Id.* This was the wrong question.

International human rights law does not make sweeping distinctions between state actors and corporations, but instead, distinguishes between "conduct that requires State action to be a violation . . . and conduct that violates international law even when committed without State action," including piracy and genocide. Brief for International Law Scholars in Support of Petitioners at 6, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. , 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491). Because both state and nonstate actors can violate international law norms, the appropriate question is not whether there is a norm of corporate liability, but whether there are any treaties, tribunals, or state practices that would "affirmatively distinguish between juristic and natural individuals in a way that exempts the former from all responsibility for violations of international law." *Id.* at 8. Neither the *Kiobel* majority nor respondents point to any body of international law providing such an exemption.

Any attempt to locate an international law exemption for corporate liability would have proven fruitless, since it is a well-established principle that states are free to use their domestic law to impose corporate liability for violations of international law as they see fit. The United States is not alone in allowing civil actions for corporate violations of customary international law. *See* Anita Ramasastry & Robert C. Thompson, FAFO, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW: A SURVEY OF SIXTEEN COUNTRIES, 2006, *available at* www.fafo.no/pub/rapp/536 (15 surveyed countries "responded that it would be possible to bring civil legal claims . . . against business entities" accused of international law violations). Because international law is shaped by the practices and understandings of the international community, the widespread international acceptance of corporate liability for violations of *jus cogens* indicates corporate liability is compatible with international law requirements.

The Text and History of the ATS

The Supreme Court addressed the history of the ATS in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The Court noted the United States was obligated to accept the law of nations upon declaring its independence and felt it necessary to develop a means of redressing injuries that might impinge upon the sovereignty of a foreign nation. Without such means, the young nation risked alienating foreign powers and creating friction that might rise to the level of war. The "Marbois incident" in 1784 provided stark illustration of the impotence of the federal government in matters of foreign policy, as the Continental Congress could not punish Charles de Longchamps for assaulting the French diplomat Barbé-Marbois in Philadelphia. When France alleged that the assault was a violation of international law and that the United States was obligated to provide a remedy, it was left to state courts to try Longchamps and assuage our ally. *See id.* at 716–17.

The ATS was enacted in response to the Continental Congress's inability to punish violations of the law of nations. Because the ATS was intended as the primary legislative instrument allowing the United States to provide a remedy for violations of the law of nations, it would not have made sense for the statute to unnecessarily exclude any class of defendants. Congressional intent *not* to enact any such limitations can be gleaned from the language of the ATS, which explicitly identifies "aliens" as the only permissible category of plaintiffs while remaining silent about the identity of possible defendants. 28 U.S.C.A. § 1350. Congress clearly knew how to limit potential parties to an ATS action but chose not to provide language in the statute excluding corporations.

A choice not to exclude corporations from the purview of the ATS is consistent with a history of U.S. recognition of corporate tort liability in other contexts. *See* Brief for Petitioners at 26 n.18, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (No. 10-1491). There is no reason to think that Congress would have wanted to make an exception for torts in violation of the law of nations. Certainly, France would have been just as outraged, and just as in need of appeasement, had Marbois been injured by a corporation, rather than by an individual actor. Because corporations were fully capable of violating the law of nations, and because there is no indication that Congress felt the need to shield corporations, there is no basis for reading a corporate liability exception into the statute.

Extraterritoriality

Extraterritorial Reach and International Law

There is no basis for the position that allowing the ATS to reach conduct occurring on the territory of foreign sovereigns would project U.S. law extraterritorially. The ATS does not enforce U.S. substantive law, but instead allows for a domestic remedy for a "narrow class of international norms."

Sosa, 542 U.S. at 729. Identification of ATS-enforceable norms does not entail looking to domestic law. Instead, these norms are "gauged against the current state of international law. . . ." *Id.* at 733. The ATS does no more than provide a mechanism for the United States to meet its obligations to domestically enforce norms that have been agreed upon by the community of nations. In providing such a mechanism, the United States is no different than any number of other countries that exercise jurisdiction over foreign conduct. *See* Supplemental Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of Petitioners at 35, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (No. 10-1491). The widespread acceptance of such mechanisms indicates the legitimacy of extraterritorial jurisdiction for enforcement of *jus cogens* norms.

The U.S. Commitment to Extraterritorial Reach

The ATS could not assure the international community of a U.S. commitment to international law if it could not reach harms committed in other nations. The Marbois incident may have occurred in Philadelphia, but France would almost certainly have expected the United States to provide a remedy for the assault no matter where it occurred, so long as Marbois and Longchamps could both be found in the United States. Similarly, if the ATS did not have extraterritorial reach, it would not have been possible for Attorney General Bradford to provide assurances that British subjects would be able to seek compensation for British settlements that were destroyed by a French fleet with the assistance of at least two American citizens in Sierra Leone in 1795. *See* Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795). Nor could the U.S. State Department have recently referenced the ATS to assure the United Nations that "U.S. law provides statutory rights of action for civil damages for acts of torture occurring *outside* the United States." U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: U.S.A.*, ¶ 277, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000). Recognition of the importance of extraterritorial reach may help explain why Congress has never amended the ATS to prohibit extraterritorial application. Had Congress any objections to the extraterritorial reach of the ATS, it would surely have expressed them at some point over the past several decades. Congressional silence in this matter, coupled with what we know about the drafting and early interpretations of the ATS, indicates that there is no way to reconcile respondents' desire to curb the extraterritorial reach of the ATS with congressional intent.

A Robust ATS

The primary concerns animating Court discourse surrounding the ATS in recent years revolve around the potential for overreach, as members of the Court have worried either that the statute might unduly interfere with executive branch authority over foreign policy or that it will allow for U.S. judicial intervention in matters that are too far-removed from the United States. These concerns are evident, for example, in the *Sosa* Court's willingness to consider a host of limiting principles for future ATS litigation, including a "policy of case-specific deference to the political branches." 542 U.S. at 733 n.21. The centrality of the Court's concerns with judicial overreach can be detected in the *Kiobel* petitioner's briefs, which took great pains to assure the Court that such concerns are already addressed by existing doctrines, including *forum non conveniens* and political question.

The potential difficulty entailed in so vigilantly guarding against judicial overreach is that cases that deserve to be heard may be weeded out and that the United States may therefore shirk its obligations under international law. Too heavy a reliance on *forum non conveniens* may dissuade plaintiffs from pursuing meritorious claims, while too much deference to the executive branch may come at the cost of thwarting the congressional will to provide a remedy for egregious human rights violations.

On its face, *forum non conveniens* appears to be a reasonable method of filtering ATS cases. Theoretically, cases are dismissed only when a more appropriate forum exists. In practice, however, there has been a historical pattern in which "plaintiffs generally did not refile their suits in foreign courts following *forum non conveniens* dismissals; instead, they tended to settle on terms favorable to the defendants or abandon their suits altogether." Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1521 n.18 (2011). Because the doctrine prioritizes the location of evidence and parties, it balances factors in ways that disadvantage plaintiffs in human rights cases where the abuses have occurred overseas. So long as the doctrine fails to ensure that a dismissed case is genuinely likely to be heard in an adequate alternative forum, it will remain the case that, "[i]f in cases of torture in violation of international law our courts exercise their jurisdiction conferred by the [ATS] only for as long as it takes to dismiss the case for forum non conveniens, we will have done little to enforce the standards of the law of nations." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000).

If reliance upon *forum non conveniens* is problematic because of the potentially illusory nature of alternative fora, invocation of the doctrine does at least take as a given the notion that claims ought to be heard on the merits. In contrast, application of the political question doctrine in the ATS context is premised upon the position that deference to the political branches may require the abandonment of any effort to ensure a hearing for human rights violations. Thus, in *Corrie v. Caterpillar*, the Ninth Circuit refused to reach the question of a manufacturer's complicity in violations of international law because assessing such complicity would necessarily entail questioning American foreign policy with respect to Israel. 503 F.3d 974, 982 (9th Cir. 2007). The need to avoid undermining foreign policy decisions was so pronounced that the court determined there was no room for any consideration of human rights violations.

Thus far, relatively few ATS cases have been dismissed on political question grounds. Instead, courts have generally followed the principle that, while deference is due to the views of the executive branch, those views are "but one factor to consider and are not dispositive." *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 281 (S.D.N.Y. 2009). The political question doctrine is, however, a balancing act, and, should the Court build upon *Sosa*'s discussion of the possible need for judicial deference, it would risk tipping the scales away from the need to provide a remedy for human rights violations and towards narrowly defined political needs.

Conclusion

Because international law does not prohibit states from providing domestic remedies that impose tort liability upon corporations for extraterritorial conduct violating *jus cogens* norms, the Second Circuit should be reversed. Beyond ensuring that Esther Kiobel and her co-plaintiffs have their day in court, the Supreme Court should take the opportunity to clearly establish that the need to adjudicate allegations of gross human rights violations cannot be easily set aside as a matter of convenience and ought not be dismissed in favor of political expediency. In so doing, the Court can affirm that the United States remains committed to its obligation to provide a remedy for violations of the law of nations—the very obligation that gave rise to the ATS at the dawn of our nation's founding. ◆