Kiobel: Getting Exhaustion Right

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If Alien Tort Statute suits to redress human rights violations committed abroad are upheld in *Kiobel*, the Supreme Court is likely to require that plaintiffs first exhaust their foreign and international remedies (or show good cause for not doing so). If so, it is important that the Supreme Court get right the contours of the exhaustion doctrine under international law. The Court should require exhaustion *only* in ATS cases brought *exclusively* under universal jurisdiction, and *not* in ATS suits against US companies. Even in purely universal jurisdiction cases, the Court should respect exceptions to exhaustion recognized by international law.

An exhaustion requirement seems likely. In the *Kiobel* oral argument on the extraterritorial reach of the ATS, (http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf) three Justices likely to support extraterritorial reach -- Ginsburg, Kagan and Sotomayor -- asked questions sympathetic to an exhaustion requirement (Tss. at 8, 13-15). In response, Paul Hoffman, plaintiffs' counsel, appeared open to an exhaustion requirement (Tss. at 13-14). No Justice or counsel spoke against an exhaustion requirement; even two Justices generally hostile to the plaintiffs – Alito and Scalia – seemed friendly to an exhaustion requirement (in the event extraterritorial ATS suits are allowed) (Tss. at 15, 31).

The most substantial brief on the exhaustion issue, favorably cited by Justice Sotomayor (Tss. at 12-13), is the *amicus* brief of the European Commission on behalf of the European Union (http://www.sdshhlaw.com/pdfs/European%20Commission%20on%20Behalf%20of%20the%20European%20Union%20(Revised).pdf). The EU brief is generally excellent. It correctly limits an exhaustion requirement to ATS cases whose exclusive jurisdictional basis under international law is universal jurisdiction (part A below).

However, its articulation of the exceptions to exhaustion in universal jurisdiction cases is imprecise (Part B below). There is a resulting risk that the Court may saddle plaintiffs with a vague and overbroad exhaustion requirement. This would undermine the very purpose of universal civil jurisdiction – to ensure that grave international crimes do not go unredressed.

A. Exhaustion *Only* in Exclusively Universal Jurisdiction Cases

The EU brief rightly argues that under the *Charming Betsy* doctrine (*Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)), the ATS should be construed in harmony with international law. The EU also rightly argues that international law generally permits states to exercise prescriptive jurisdiction in five situations. Two of those jurisdictional bases are not applicable in *Kiobel*. The most common basis -- territorial jurisdiction -- is by definition not at issue in extraterritorial tort cases. Another basis -- passive personality (where the victim is a

citizen of the prescribing State) -- can never be the basis of an ATS suit, which by statutory definition can be brought only by aliens.

The remaining three international law bases of jurisdiction, as correctly noted by the EU brief, are (1) *personality jurisdiction* (where the tortfeasor is a US citizen or company), (2) *effects jurisdiction* (where the tort threatens US national security or government functions), and (3) *universal jurisdiction* (where the tort amounts to an international crime so heinous -- *e.g.*, genocide, torture, crimes against humanity -- that international law permits all States to exercise jurisdiction, even if they have no territorial, citizenship or other link to the crime).

The EU brief correctly suggests an exhaustion rule only in the third category – ATS cases brought exclusively under universal jurisdiction. Exhaustion of foreign remedies is not only a rule for access to international courts, but is required by some national courts prior to their exercise of universal jurisdiction. (See, for example, Article 23.4 of Spain's *Ley Orgánica del Poder Judicial,* as amended in 2009 (http://www.boe.es/buscar/act.php?id=BOE-A-1985-12666&tn=0&p=20110923#aveintitres)). The EU does *not* propose that exhaustion of foreign and international remedies be required in ATS suits against US companies.

The EU distinction makes eminent sense. In extraterritorial tort cases where US jurisdiction is based solely on universal jurisdiction, the US has only the same jurisdictional basis as every other State to remedy the human rights violation. By comparison, the foreign State where the violation occurred (the territorial State), and the home State of a foreign corporate tortfeasor (exercising personality-based jurisdiction), have not only the same interests as the US in redressing heinous violations, but additional jurisdictional bases. In purely universal jurisdiction ATS cases, then, the territorial and home States have stronger jurisdictional claims than does the US. It therefore makes sense to require plaintiffs to exhaust remedies in those States (if any, and subject to the exceptions set forth below), before the aliens may sue in the US.

In contrast, where the ATS suit is brought against a US company, the comparative jurisdictional claims are different. The US has not only a universal jurisdiction interest in repressing heinous violations committed abroad; it also has the right to exercise personality jurisdiction over the US company. The US need not defer to the territorial or any other State. In ATS cases against US companies, then, exhaustion of foreign remedies should *not* be required.

The EU follows the same policy. When European companies are sued for human rights violations committed abroad, both the Brussels I Regulation (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:NOT) and the 2007 Lugano Convention (http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16029_en.htm) privilege jurisdiction in their home countries, not the territorial State. There is no EU requirement to exhaust foreign remedies.

The Supreme Court should thus require exhaustion of foreign remedies only in cases whose jurisdictional basis under international law is exclusively universal jurisdiction.

B. Exceptions to Exhaustion Even in Universal Jurisdiction Cases

The EU brief supports exceptions to exhaustion where foreign remedies are "futile" (p. 4) or "unavailable" (p. 30) or where the foreign forum is "unwilling or unable" to provide relief (p. 26). While these formulations are correct, they should be more precise and comprehensive.

Five exceptions to exhaustion under generally recognized principles of international law were set forth by the Inter-American Court of Human Rights in its landmark 1988 Judgment in *Velásquez-Rodríguez v. Honduras* (http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.doc). (The first three are taken textually from the American Convention on Human Rights.) The exceptions are as follows:

- Due Process Violations: Where "the domestic legislation of the state concerned does not afford due process of law for the protection of the right … allegedly … violated."
- Inaccessibility: Where "the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them."
- Delay: Where "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."
- Inadequacy: The foreign remedy must be suited to the purpose – in the case of ATS suits, moral vindication and monetary reparation for human rights violations. For example, a foreign remedy that allows for a presumptive declaration of death, and hence rights of inheritance for family members, is not an adequate remedy in lieu of a tort suit under the ATS.
- Ineffectiveness: The foreign remedy must be "capable of producing the result for which it was designed. Procedural requirements can make the remedy … ineffective: [or] if it is powerless to compel the authorities; [or] if it presents a danger to those who invoke it; or if it is not impartially applied."

Citing the Rome Statute of the International Criminal Court, adopted a decade after the *Velásquez* ruling, the EU brief proposes a further exception: where the foreign jurisdiction is "unwilling or unable" to provide relief. Since this exception may in some cases be broader than the *Velásquez* exceptions, it should be recognized as well.

At least two further points should also be addressed.

First, as Paul Hoffman rightly contended in the oral argument (Tss. 52-53), where an alien plaintiff has been driven into exile by human rights violations committed in a foreign State, it may be procedurally or practically difficult for the plaintiff to sue in that State (and inequitable to

insist that he do so). In such cases US courts should deem the foreign forum practically inaccessible or ineffective for such a plaintiff, so that the foreign remedies need not be exhausted.

Second, where (as in many States) civil relief is made contingent on a criminal conviction of the alleged tortfeasor, the foreign civil remedy may be deemed inadequate or ineffective. For example, some foreign jurisdictions do not permit criminal prosecutions of corporations. In such countries, where the civil remedy is contingent on the criminal case, the inability to convict the corporation abroad should not bar alien plaintiffs from filing an ATS suit against it in US courts.

Similarly, ATS suits should be allowed where the proof, while sufficient to meet a US tort standard of preponderance of the evidence, falls short of the criminal standard of proof beyond a reasonable doubt. Civil suits under the ATS should not then be barred by the evidentiary failure of a criminal prosecution in the foreign forum.

If the Court in *Kiobel* imposes an exhaustion rule, both its scope and its exceptions should be made consistent with international law. The Court can thereby minimize subsequent confusion and needless litigation in the lower courts and – most important – help to ensure that victims of heinous human rights violations are not left without effective remedies.