Supreme Court bars US lawsuits against overseas human rights abuses

By John Burton
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Last week, the Supreme Court overturned decades of precedent, ruling unanimously in *Kiobel v. Royal Dutch Petroleum Co.*, that foreign citizens subjected to human rights abuses in foreign countries cannot sue foreign corporations and individuals in United States courts. The ruling slams one of the few available courthouse doors on people seeking financial compensation for extrajudicial killings and torture.

The plaintiffs, all of whom now live in the United States, are from Ogoniland, a petroleum-rich region of the River Niger delta in Nigeria. Between 1992 and 1995, Ogoni demonstrations against pollution and environmental degradation caused by Shell Oil exploration and production were violently suppressed by the Nigerian government. The plaintiffs filed suit in federal district court in New York City against Royal Dutch Petroleum Company and Shell Transport and Trading Company, which are holding companies incorporated in The Netherlands and England, along with their jointly owned subsidiary, Shell Petroleum Company of Nigeria.

The lawsuit alleges the oil companies enlisted Nigerian military and police forces to attack and loot Ogoni villages—beating, raping and killing their residents by providing the government forces with food, transportation, money and staging areas for their raids.

The plaintiffs based their lawsuit on the Alien Tort Statute (ATS), a provision of the Judiciary Act of 1789, enacted by the first United States Congress to combat piracy. The law states, simply, that US "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." A "tort" is a wrong committed by one party against another that causes injury to that person or to property.

Extrajudicial killings, torture, arbitrary arrest and detention, forced exile and property destruction are all crimes against humanity under the law of nations.

The Second Circuit Court of Appeals dismissed the Ogonis' case solely on the supposed ground that the law of nations does not recognize corporate responsibility for torts, only claims against individuals. The Supreme Court agreed to review that decision during its October 2011 term. At the oral argument, however, justices questioned why a US court was hearing a dispute between foreign nationals and foreign corporations arising from foreign events.

The Supreme Court took the unusual step of not deciding the case on the issue presented, but instead postponed the case to the October 2012 term for further briefing and argument on the jurisdictional issue.

Chief Justice John G. Roberts, Jr., wrote the majority opinion, joined by the other four right-wing justices. Despite the obvious intent of the ATS to give US courts jurisdiction over disputes arising from conduct outside US borders, the Supreme Court for the first time ever applied a judge-made doctrine called the "presumption against extraterritoriality" to the ATS.

The "presumption against extraterritoriality" is a rule of statutory interpretation intended to prevent conflicts between the laws of different nations. In the case on which Roberts relies, *Morrison v. National Australian Bank*, for example, involved the question of which nation's securities laws governed Florida mortgage transactions by an Australian bank.

Under the ATS, there can be no such conflict among the laws of different nations because the human-right violations it covers derive from international laws and treaties. Roberts dismisses the importance of court access to enforce those rights by claiming there to be "no indication that the ATS was passed to make the

United States a uniquely hospitable forum for the enforcement of international norms."

Conservative "swing" justice Anthony M. Kennedy wrote a separate concurring opinion stressing the narrow reach of Roberts' opinion, noting that "cases may arise with allegations of serious violations of international law principles protecting persons" where "the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."

Justice Stephen G. Breyer wrote a separate concurring opinion, joined by the other three moderate justices, agreeing with Roberts' conclusion, but not his reasoning. Breyer would extend ATS jurisdiction to cases where the alleged abuses occurred on "American soil," "the defendant is an American national" or "the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor... for a torturer or other common enemy of mankind."

Breyer, however, refused to extend his "safe harbor" logic to Shell Oil, which despite gas stations around the country and shares traded on the New York Stock Exchange, has only a "minimal and indirect American presence."

This latest ruling from the Supreme Court is part and parcel of its accelerating efforts to dismantle all vestiges of the protection of human rights. Driving the Supreme Court's latest ruling is concern that US corporations and individuals might someday find themselves in the dock of some foreign court, facing charges of extra-judicial killings and torture.