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Expert Analysis

Supreme Court Shuts The Door On Alien Tort Statute Claims … Well, Almost

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On April 17, 2013, the U.S. Supreme Court finally decided *Kiobel v. Royal Dutch Petroleum,* 2013 WL 1628935, a case that had been before it for nearly two years. The *Kiobel* case involved the application of the Alien Tort Statute, which allows foreigners to bring civil suits in U.S. courts for torts "committed in violation of the law of nations or a treaty of the United States,"[1] to a lawsuit brought by 12 Nigerians who alleged that Dutch, British and Nigerian oil companies aided the Nigerian government in the torture and execution of Nigerian activists. After two rounds of oral arguments that addressed issues including corporate liability, aiding and abetting liability, piracy, and principles of international comity, the Supreme Court held that the ATS did not provide for jurisdiction because of the presumption against the extraterritorial application of U.S. laws — a presumption that could not be rebutted in this case.

HISTORY OF THE ALIEN TORT STATUTE

The ATS is a 224-year-old statute that has become a favorite tool for plaintiffs seeking to sue large, multinational corporations over their activities in foreign countries. After the ATS sat virtually dormant for its first 200 years of existence, plaintiffs in the 1980s began using it as a vehicle for seeking compensation for alleged human rights abuses at the hands of foreign individuals who, at the time of the suits, were residing in the United States.

This modern era of ATS litigation began with *Filartiga v. Pena-Irala*.[2] In *Filartiga*, the 2nd U.S. Circuit Court of Appeals held that the ATS confers federal jurisdiction for recognized violations of international law — including the deliberate torture committed under color of official authority.[3] Following *Filartiga*, plaintiffs' lawyers began using the ATS, often targeting oppressive dictators or military leaders.[4] In most of these cases, the foreign defendants refused to submit to the jurisdiction of the U.S. federal courts.

Looking for cases with better prospects for collecting judgments, as well as defendants who could pay those judgments, plaintiffs' lawyers shifted their focus in the 1990s to multinational corporations doing business abroad. These "corporate ATS" cases, which target companies that are either based in the United States or have substantial

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assets in the United States, generally allege the companies either facilitated or were complicit in various international torts in connection with their business operations. Because these corporate ATS cases typically involve gruesome accounts of human rights abuses, plaintiffs seek to play up the facts to attack the corporate brands and reputations. Regardless of the prospects of prevailing on the merits, plaintiffs hope to pressure corporate defendants into settling cases and avoid the costs — both monetary and reputational — associated with defending against the claims.

Kiobel marks the first time the Supreme Court has examined the scope of the ATS in the context of claims against a corporate defendant. In fact, the court has addressed only the scope of the ATS in one prior case, *Sosa v. Alvarez-Machain*.[5] In *Sosa*, the Supreme Court held that foreign plaintiffs could assert claims under the ATS for a very limited set of torts that could be found to violate international law, but left it to the lower courts to determine which claims were sufficient to proceed. The court cautioned, however, that "any claim based on the present-day law of nations [should] rest on a norm of international character accepted by the civilized world," and that the norm be defined with adequate "specificity."[6] *Sosa* left the boundaries of actionable conduct far from clear. Further complicating matters, *Sosa* did not involve corporate ATS defendants subject to claims based on theories of secondary liability such as aiding and abetting or conspiracy. This lack of guidance regarding corporate liability under the ATS led to diverse holdings among the circuit courts on issues including the threshold issues of whether corporate liability is even actionable under the ATS and whether the ATS supports jurisdiction with a lack of any real connection to the United States.

BACKGROUND ON *KIOBEL*

The plaintiffs in *Kiobel* are Nigerian nationals who reside in the United States after being granted political asylum. They filed suit in federal court in the U.S. District Court for the Southern District of New York using the ATS as their jurisdictional basis. The plaintiffs alleged the defendant corporations aided and abetted the Nigerian government in committing various human rights abuses (including extrajudicial killings, crimes against humanity, torture and cruel treatment, and arbitrary detention) in violation of customary international law.

Royal Dutch Petroleum is a Dutch company, and Shell Transport & Trading Co. is a British corporation. These two entities formed a joint subsidiary, Shell Petroleum Development Co. of Nigeria Ltd., which was incorporated in Nigeria. The purpose of this joint subsidiary was to engage in oil exploration in the Ogoniland area, where the plaintiffs lived. The plaintiffs began protesting the environmental effects SPDC's activities were having on the Niger Delta region. According to the complaint, the defendant corporations enlisted the assistance of the Nigerian military and police forces to violently suppress the plaintiffs' protests. The plaintiffs claim that the defendants provided food, transportation and compensation to the Nigerian forces and allowed the Nigerian military to use SPDC's property as staging grounds for these attacks.

The District Court dismissed certain of the bases for plaintiffs' international law violations but refused to dismiss with respect to other claimed violations of international law (specifically crimes against humanity, torture and cruel treatment, and arbitrary arrest and detention). The District Court then certified its order for interlocutory appeal. On appeal, the 2nd Circuit dismissed the complaint in its entirety, holding that the ATS did not support jurisdiction against corporate defendants because "[t]he concept of corporate liability (rather than individual liability) for violations of

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customary international law has not achieved universal recognition or acceptance as a norm in relations of states with each other."[7]

AT THE SUPREME COURT

The *Kiobel* plaintiffs filed their petition for *certiorari* June 6, 2011, and asked the court to decide two questions: whether the ATS' reach is a jurisdictional question that can shut down a lawsuit against a corporation at the outset of litigation, and whether corporations are, as the 2nd Circuit held, immune from liability under the ATS. The Supreme Court granted review to decide those two questions Oct. 17, 2011.

The parties' merits briefs focused largely on the issue of corporate liability. In their brief, the petitioners argued that corporate liability "is a function of loss allocation principles that have been the feature of all legal systems in the world as long as corporations have existed." Though cited in the respondents' opposition brief for the opposite proposition, the petitioners also cited *Sosa* as supporting the availability of corporate liability. The petitioners further objected to the 2nd Circuit's use of international law in reaching its holding, arguing that federal courts must look to domestic law to supply the rules governing the litigation of law-of-nations claims. The U.S. Justice Department also filed a brief supporting corporate liability under the ATS and argued that footnote 20 in *Sosa* was not meant to prohibit courts from using their own common-law traditions to determine who can be subject to liability for the violation of international law norms.

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The respondents countered by arguing that not only did international and federal common law foreclose corporate liability, but the judgment could also be affirmed on two alternative grounds: first, that aiding and abetting liability should not be recognized here; second, that the ATS should not extend to conduct within a foreign nation's borders because of diplomatic concerns. On the second, alternative ground, the respondents noted that Congress had not given a clear statement regarding extraterritorial application of the ATS, and that the ATS must, therefore, be interpreted to avoid adverse consequences to U.S. trade and foreign policy.

FIRST ROUND OF ORAL ARGUMENTS AND THE REQUEST FOR SUPPLEMENTAL BRIEFING

The initial oral arguments on the certified questions began with a bang Feb. 28, 2012. Paul Hoffman, the attorney for petitioners, was quickly interrupted by Justice Anthony Kennedy, who moved from the direct issue of corporate ATS liability to summarize a point in the respondents' brief that "no other nation in the world permits its courts to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection." Justice Samuel Alito later returned to this very same principle and asked, "What business does a case like [this] have in the courts of the United States?" The justices' questions foreshadowed the unusual move the Supreme Court would make just six days later. On March 5, 2012, the court restored the case for reargument and directed the parties to file supplemental briefs addressing "[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

The petitioners thereafter filed their supplemental brief June 6, 2012, arguing that the ATS' reach spans the globe. The brief noted that no court has ever imposed a territorial limit on ATS claims and that the Supreme Court should not be the first, as doing so would not only impose upon congressional powers, but would also fly in the face of longstanding U.S. foreign policy in favor of global compliance with human rights protection. This separation-of-powers argument was supplemented

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by petitioners' claim that *Sosa* had already determined the ATS extends to activities outside U.S. borders. The petitioners further argued that because *Sosa* limited ATS claims to only universally recognized international law norms, the usual concern with imposing U.S. legal norms on citizens of other countries is minimal. Furthermore, the petitioners argued that jurisdictional devices such as personal jurisdiction, *forum non conveniens*, the political question doctrine and the principle of comity can be used to further limit the number of ATS cases that do not belong in U.S. courts. Finally, petitioners reminded the court that the accusations in this case are so fundamental that jurisdictional restrictions like those contemplated would be disastrous.

The District Court dismissed certain of the bases for plaintiffs' international law violations, but refused to dismiss with respect to other claimed violations of international law.

The respondents' opposition brief similarly included a separation-of-powers argument; respondents relied on the idea that U.S. law does not apply extraterritorially unless Congress explicitly says so. Given the Supreme Court's practice of refusing to interpret U.S. law in ways that would violate international law, respondents also noted that the court should decide against extraterritorial application because conferring universal civil jurisdiction in U.S. courts over foreign entities sued for these types of violations would violate the law of nations. The respondents further spoke to the ATS' origins and noted that Congress had initially passed the law to address violations of international law occurring on U.S. soil — not abroad. After noting that the Nigerian government itself protests this suit, the respondents reminded the court that even if the ATS reaches overseas, the ATS still does not extend liability to corporations.

Interestingly, the government's brief on the second round switched sides, arguing that, while the Supreme Court should decide these cases on a case-by-case basis and should adopt certain limiting principles, U.S. courts "should not create a cause of action that challenges the actions of a foreign sovereign in its own territory, where the [sued party] is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign's conduct." The parties' briefs were all followed by myriad *amicus* briefs supporting both sides.

THE SUPREME COURT'S DECISION AND ITS IMPACT

Well after the Supreme Court held a focused round of oral arguments on the very first day of its October 2012 term, on April 17 this year the court issued a decision affirming the 2nd Circuit's ruling on the ground that the presumption against extraterritoriality applies to claims brought under the ATS and the facts of the case were insufficient to rebut that presumption. Though the court's affirmation of the 2nd Circuit's decision was unanimous, Justice Stephen Breyer filed a separate opinion concurring only in the judgment, in which Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan joined.

The majority opinion, written by Chief Justice John Roberts and joined by Justices Antonin Scalia, Kennedy, Clarence Thomas and Alito[8] focused first on the simple canon that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[9] This, the court explained, serves the purpose of protecting against international discord. In coming to this conclusion, the court made two points.

First, the court noted that whereas the presumption against extraterritoriality typically applies to determining the application of a statute regulating conduct, the presumption similarly constrains courts considering the application of the ATS, which does not regulate conduct but, rather, is "strictly jurisdictional."

Second, "the danger of unwarranted judicial interference in the conduct of foreign policy" — a key concept underpinning the presumption against extraterritoriality — is far greater in the context of the ATS, given that the statute regards not what Congress has done but what the judiciary may do. These concerns are not lessened by *Sosa*'s

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limitation of ATS actions to only violations of "specific, universal and obligatory" international law norms.

After holding that the presumption against territoriality applies, the majority noted that the ATS does not contain the "clear indication of extraterritoriality" needed to rebut the presumption. Primarily, the court explained, the statutory text fails to support extraterritorial reach, and neither the extension of the ATS to violations of the law of nations, nor the reach of the act to "*any* civil action," suggests otherwise. Moreover, the ATS' provision of jurisdiction over civil actions for torts does not rebut the presumption of extraterritoriality, as the "transitory torts doctrine" that would allow jurisdiction for personal injury occurring abroad is meant to apply only when there is also a sustainable belief that the cause of action was also a cause of action in the foreign jurisdiction.

The court further explained that the historical background of the ATS supports three offenses against the law of nations — violation of safe conducts, infringement of the rights of ambassadors and piracy — none of which are applicable in the present case.

Finally, the court noted, there is no evidence that Congress passed the ATS to "be the *custos morum* of the whole world," and to decide otherwise could trigger a quid pro quo in that other nations would haul U.S. citizens in to their own courts. The majority's opinion ultimately ended with its only definitive statement addressing respondents' position as a corporate entity. The court held that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."

Justice Breyer, alternatively, refused to invoke the presumption against extraterritoriality and instead rested his conclusion that ATS jurisdiction did not exist in this case on his evaluation of three separate conditions under which jurisdiction can be found: "the alleged tort occurs 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 (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."

Justice Breyer addressed the ATS' juris-dictional reach by looking at international jurisdictional norms — and considering these norms together with the ATS' purpose of providing compensation for those injured by today's pirates, as well as *Sosa*'s words of caution against international friction — to arrive at the conclusion that the ATS provides jurisdiction in the three circumstances enumerated above. In the end, Justice Breyer agreed with the majority that it would "reach too far to say" that the "mere corporate presence" indicated in this case is sufficient for courts to assert jurisdiction under the ATS.[10]

The justices' agreement that "mere corporate presence" is insufficient for U.S. courts to assert jurisdiction over corporate ATS claims, as well as the majority's holding that the presumption against extraterritoriality applies to these claims, will certainly operate as a bar for plaintiffs seeking to use the United States venue as relief for activities taking place entirely abroad. Still, although all justices agreed the ATS does not allow courts to recognize a cause of action for violations of the law of nations occurring within a foreign territory in the circumstances alleged in *Kiobel*, the Supreme Court left open the exact extent to which the claims must "touch and concern" the United States in order to displace the presumption against extraterritoriality. According to the majority, the claims must affect the United States "with sufficient force."

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Justice Alito's concurrence finds that in order to displace the presumption, the "*domestic* conduct" must be sufficient to violate an international law norm that itself satisfies the requirements of definiteness and acceptance among civilized nations set out previously in *Sosa*. On the other hand, Justice Breyer, without applying the presumption against territoriality, holds that jurisdiction for claims brought under the ATS could be satisfied so long as the defendant corporations have more than a mere "minimal and indirect American presence." While the *Kiobel* decision is a step forward for corporations defending ATS claims, the Supreme Court, as it did in *Sosa*, once again left the precise reach of the ATS to be addressed by district courts.

NOTES

1 28 U.S.C. § 1350.

2 630 F.2d 876 (2d Cir. 1980).

3 While the appeal was pending, the defendant returned to Paraguay and took no further part in the action. On remand, a default judgment was entered for the plaintiffs in the amount of $10.3 million, which included costs and punitive damages. *Filartiga v. Pena-Irala,* 577 F. Supp. 860 (E.D.N.Y. 1984).

4 *See Hilao v. Estate of Marcos,* 103 F.3d 767 (9th Cir. 1996); *Kadic v. Karadžić,* 70 F.3d 232 (2d Cir. 1995).

5 542 U.S. 692 (2004).

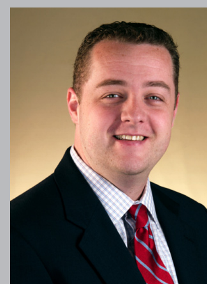
6 *Sosa*, 542 U.S. at 725; *see Filartiga*, 630 F.2d at 881 ("[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.").

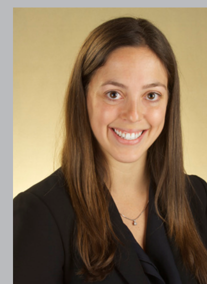
7 *Kiobel et al. v. Royal Dutch Petrol. Co. et al.,* 621 F.3d 111, 149 (2d Cir. 2010).

8 Justice Kennedy filed a separate concurring opinion to note that other cases could arise where the application of the presumption against extraterritorial application "may require some further elaboration and explanation." Justice Alito also filed a separate concurring opinion, in which Justice Thomas joined, to explain the "broader standard" under which he found that this case fell within the scope of the presumption against extraterritoriality and to note that an ATS cause of action will be barred under the presumption against extraterritoriality "unless the domestic conduct is sufficient to violate an international law norm that satisfies Sosa's requirements of definiteness and acceptance among civilized nations."

9 *Kiobel et al. v. Royal Dutch Petrol. Co.,* 569 U.S. ___, slip op. at 4 (2013) (quoting *Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869, 2878 (2010)).

10 Though these two opinions took divergent paths to arrive at the same result, both avoided addressing the initial question certified for review before the Supreme Court — the issue of corporate liability under the ATS.





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