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Brittany Prelogar, Laura Ardito and Jeanne Cook on

Kiobel v. Royal Dutch Petroleum: U.S. Supreme Court Considers Corporate Liability under Alien Tort Statute for Extraterritorial Human Rights Claims

2012 Emerging Issues 6295

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Introduction

At issue in *Kiobel v. Royal Dutch Petroleum, Co.,* currently pending before the U.S. Supreme Court, is whether corporations can be held liable under the Alien Tort Statute ("ATS"), a provision that permits aliens to file lawsuits in U.S. federal courts for violations of customary international law. 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491). During oral argument on February 28, 2012, several Justices focused their questioning on a separate issue concerning the statute's extraterritorial reach, and the Court has since instructed the parties to submit an additional round of briefing on this issue later this year. The Supreme Court's consideration of these issues is drawing intense interest from corporations, governments, academics, trade associations, and human rights advocates, which have filed more than 35 *amicus curiae* briefs in *Kiobel* to date. The Court's decision, now anticipated next term, will be significant for multinational companies, which have been named as defendants in more than 180 ATS cases.

Background on the ATS

The ATS was enacted by the First Congress in 1789. It permits foreign plaintiffs to file civil tort actions in U.S. federal courts for violations of the "law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006). The ATS was rarely used to bring human rights-related claims before 1980, when Paraguayan citizens successfully used the statute to bring a claim in New York against a Paraguayan police official for torture and murder committed in Paraguay. *See Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). Since then, plaintiffs have increasingly used the ATS as a vehicle for asserting claims against foreign officials and multinational companies for alleged human rights violations, with cases producing damage awards in some instances exceeding $100 million. *See Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322 (N.D. Ga. 2002) ($140 million); *Mushikiwabo v. Barayagwiza,* 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. Apr. 8, 1996) ($103 million).

The Supreme Court previously interpreted the ATS in *Sosa v. Alvarez-Machain*, in which it limited ATS claims to a narrow set of violations of international law norms that

are "specific, universal, and obligatory." 542 U.S. 692, 732, 748 (2004) (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)). In other words, to support a cause of action under the ATS, international law norms must be accepted universally and "defined with a specificity" comparable to the offenses the ATS was designed to redress at the time it was enacted, specifically piracy, violations of safe passage, and assaults on ambassadors. 542 U.S. at 725. In addition, *Sosa* instructed the lower courts to consider the "practical consequences" of allowing the cause of action to be litigated in federal court. *Id.* at 732.

In a footnote, the Court in *Sosa* raised but did not specifically address the issue of corporate liability. It stated that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.* at 732 n.20. *Kiobel* marks the first time the issue of corporate liability under the ATS is squarely before the Court.

Overview of Arguments in *Kiobel*

Kiobel was filed in 2002 in the U.S. District Court for the Southern District of New York by Nigerian citizens from the Ogoni region of Nigeria against Dutch and British holding companies that were operating in the region through their Nigerian subsidiary. *Kiobel v. Royal Dutch Petroleum Co.*, No. 1:02-cv-07618 (S.D.N.Y. filed Sep. 20, 2002) (the Nigerian subsidiary was dismissed from the case for lack of personal jurisdiction). Petitioners alleged that respondents aided and abetted human rights abuses committed by the Nigerian government, including torture, crimes against humanity, and arbitrary arrest and detention. The District Court granted in part and denied in part respondents' motion to dismiss petitioners' claims, and certified an order on its own initiative for interlocutory appeal to the Second Circuit Court of Appeals. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d. 457 (S.D.N.Y. 2006).

A divided Second Circuit issued its opinion on September 17, 2010. The appeals court held that corporate liability does not exist under the ATS because, under *Sosa*, corporate liability is not a "specific, universal, and obligatory" norm of international law. 621 F.3d 111 (2d Cir. 2010). Since then, the Seventh Circuit, Ninth Circuit, and D.C. Circuit have each issued decisions finding that corporations are proper defendants under the ATS. *See Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Sarei v. Rio Tinto*, PLC, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) (en banc); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

Likely due to this circuit split, the U.S. Supreme Court granted *certiorari* on October 17, 2011. Although the parties and *amici* focused on the central issue of corporate liability, they did not confine their arguments to the issues decided by the Second Circuit. Other issues of note addressed by the parties and/or *amici* include whether the question of corporate liability is an issue of subject matter jurisdiction, whether U.S. courts may properly exercise extraterritorial jurisdiction in ATS cases lacking a factual nexus to the United States, and whether aiding and abetting liability exists under the ATS.

Corporate Liability

The core issue presented to the Court in *Kiobel* is whether corporations can be liable under the ATS. Petitioners argued that the Second Circuit erred by immunizing corporations from ATS liability. In support of this position, petitioners argued that nothing in the "text, history or purpose" of the ATS suggests that the First Congress meant to exclude corporate liability; that *Sosa* does not require a customary international law norm of corporate liability, and in fact holds that causes of action under the ATS derive from federal common law; that international law leaves the means by which international law norms are implemented to domestic legal systems; and that general principles of law accepted in all legal systems recognize corporate tort liability. *See* Brief for Petitioners 35–39, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Dec. 14, 2011) ("Pet. Br."). The United States' *amicus* brief echoed these arguments. Brief for the United States 8–31, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Dec. 21, 2011) ("U.S. Br.").

Respondents countered that the ATS does not extend liability to corporations because the question of which perpetrators are liable is a matter of international law, and petitioners did not meet their burden of showing that there is a treaty or norm of international law holding corporations responsible for the human rights violations alleged. Brief of Respondents 17–26, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Jan. 27, 2012) ("Resp. Br."). Even if such a norm existed, respondents continued, the Court should not recognize corporate ATS liability as a matter of federal common law under *Sosa* due to the practical consequences of imposing corporate liability, including potential diplomatic friction and frivolous lawsuits. *Id.* at 45-47.

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Subject Matter Jurisdiction Versus Merits Question

Although the issue of corporate liability under the ATS was neither briefed by the parties in the Second Circuit nor certified for appeal by the District Court, the Second Circuit treated the question of corporate liability as a matter of subject matter jurisdiction, which can be raised at any time during litigation. *Kiobel v. Royal Dutch Petroleum,* 621 F.3d 111(2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *reh'g en banc denied*, 642 F.3d 379 (2d Cir. 2011). Petitioners argued that the issue of corporate liability was instead a merits-based question that had been waived by respondents and, therefore, improperly decided by the Second Circuit. *See* Petition for Writ of Certiorari 13 ("Writ Pet."), Petitioners' Reply Brief, at 5 (Pet. Reply Br."), *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Jun. 6, 2011, Feb. 21, 2012). In support of this contention, petitioners argued that subject matter jurisdiction concerns only a court's "power to hear a case." Writ Pet. 13 (citing *Morrison v. Nat'l; Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (internal quotations omitted)). In contrast, questions concerning the substantive reach of a statute, including "whether a defendant is subject to suit under a given cause of action," go to the merits of the dispute. *Id.* at 14–15; *see also* Pet. Br. 12–18.

Respondents, on the other hand, argued that the Second Circuit correctly treated the issue of corporate liability as a question of subject matter jurisdiction because the ATS is a jurisdictional statute. Resp. Br. 12. As a result, respondents continue, all elements of the ATS are jurisdictional, including whether there exists an international norm of corporate liability under the ATS. *Id.*

Even if the Supreme Court determines that the issue of corporate liability is not a question of subject matter jurisdiction, the Court could hold that it is a "threshold question" that was "fairly included" within the district court's certified order to the Second Circuit and thus properly considered. U.S. Br. 9–11 (internal citations omitted). The Supreme Court Justices did not focus during oral argument on whether the Second Circuit properly reached the issue of corporate liability, and it appears unlikely that this will serve as the basis for the Court's decision.

Extraterritoriality

As an alternative ground for affirming the Second Circuit decision, respondents argued that federal statutes like the ATS cannot be applied extraterritoriality without a clear statement by Congress. *See* Resp. Br. 10–11. Similarly, a number of *amicus* briefs, including one filed by the Governments of the United Kingdom and the Netherlands,

urged the Court to address the "broader and more fundamental" issue of U.S. courts' assertion of extraterritorial jurisdiction in ATS cases like *Kiobel* that lack a sufficient factual nexus to the United States. *See* Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amicus Curiae in Support of the Respondents, at 33, *Kiobel v. Royal Dutch Petroleum* Co., No. 10-1491 (U.S. Feb. 3, 2012).

At oral argument, the Supreme Court Justices focused much of their questioning on the extraterritorial application of the ATS. Justice Kennedy, often considered the "swing" vote on the Court, opened questioning by quoting an *amicus* brief that stated, "No other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection." Transcript of Oral Argument at 3:24–4:2, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 28, 2012) ("Tr."), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx. Justice Alito pointedly asked, "[W]hat business does a case like that have in the courts of the United States?" *Id*. at 11:22–23. Petitioners' counsel suggested that the issue of extraterritoriality "ought to be briefed on its own." *Id*. at 9:3–4.

In fact, less than a week after oral argument, the Supreme Court restored *Kiobel* to its calendar for re-argument to address "[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." Order in Pending Case, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Mar. 5, 2012), *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1491.htm. A ruling limiting the extraterritorial reach of the ATS could narrow the statute's application even in cases against non-corporate defendants, and could potentially have implications beyond the ATS.

Aiding and Abetting Liability

As a second alternative ground for affirming the Second Circuit's opinion, respondents urged the Supreme Court to hold that aiding and abetting liability is not available under the ATS for two reasons. First, respondents argued that under *Sosa*, the only universal norm of aiding and abetting liability under international law requires that a defendant purposely—and not just with knowledge or even recklessness—facilitate the alleged human rights abuse. *See* Resp. Br. 50. Citing the Second and Fourth Circuits in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2nd Cir.

2009) and *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399-400 (4th Cir. 2011), respondents noted that the Rome Statute of the International Criminal Court supports a *mens rea* standard of "purpose", and argued that this standard was not satisfied in petitioners' pleadings. *Id.* at 50. Respondents further submitted that, because the circuit courts had split over the required *mens rea* standard for aiding and abetting liability under the ATS, it would be appropriate for the Court to rule on this issue. *Id.* at 49 (citing *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011) (holding that aiding and abetting liability under the ATS requires a "knowledge" *mens rea* as established by the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Nuremberg tribunals).

Second, even if there were a showing of purpose, respondents argued that aiding and abetting should not be recognized under what they called *Sosa*'s second step, which requires the Court to consider the "practical consequences" of recognizing a cause of action. Not only does the statute itself not explicitly extend liability to aiders and abettors, respondents argued, but such an extension increases the likelihood of diplomatic friction. This is because courts would be invited to determine that corporations have aided and abetted foreign states' violations of international law in their own territory. *Id.* at 52.

Petitioners acknowledged that the Second Circuit has interpreted international law to require a *mens rea* standard of "purpose" for aiding and abetting liability, but argued that this would merely require petitioners to amend their complaint on remand. Pet. Reply Br. 24–25. Petitioners noted that the circuit courts "agree that aiding and abetting liability is available in some circumstances" under the ATS, and thus urged the Court not to reach this issue. *Id.*

Companion Case

On the same day the Supreme Court heard oral argument in *Kiobel*, the Court also heard oral argument in *Mohamad v. Palestinian Authority*, 634 F.3d 604 (D.C. Cir. 2011*), cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-88), in which it considered a similar issue: whether torture victims can sue private entities under the Torture Victims Protection Act ("TVPA"). The TVPA, enacted in 1992 as a note to the ATS, states in part that "[a]n individual who . . . subjects an individual to torture [or] extrajudicial killing" while under "actual or apparent authority, or color of law, of any foreign nation" shall be liable under the statute. 28 U.S.C. § 1350 note § 2(a). At issue

in *Mohamad* is whether the word "individual" is confined to natural persons only. If so, entities such as corporations would not face liability under the TVPA.

The respondents in *Kiobel* pointed to the TVPA as additional evidence that an international norm of corporate liability does not exist under the ATS for the human rights offenses alleged in *Kiobel.* First, they argued, those alleged offenses arise from conventions that deal with individual and not corporate liability. Tr. at 28:7–29:8. Second, when Congress implemented those conventions in the TVPA, Congress explicitly limited TVPA liability to "individuals." *Id*. at 29:3–29:8.

When the *Kiobel* respondents asserted during oral argument that the TVPA limits liability to natural persons, Justice Ginsberg noted that, unlike the TVPA, the ATS does not use the words "individual" or "person." *Id.* at 29:13–29:15. Both Justices Kagan and Sotomayor stated that the TVPA was meant to supplement, and not supplant, the ATS, although Justice Sotomayor also noted the incongruity in allowing aliens to bring suits against corporations under the ATS but disallowing American citizens to bring suits against corporations under the TVPA. *Id.* at 47:25–48: 7; 52:9–52:15.

Implications

Because the ATS has been a significant avenue for plaintiffs asserting human rights-related claims against multinational companies over the last fifteen years, the decision in *Kiobel* will draw intense interest. Regardless of the outcome, however, corporate human rights-related litigation will likely continue in various forms. As respondents' counsel stated at oral argument in *Kiobel*, individual corporate officers would remain liable under the ATS, and corporate defendants would remain subject to suit under state laws in the United States and under various domestic enactments of international human rights law around the world. It is unlikely, therefore, that the outcome in *Kiobel* will significantly dissipate pressures on corporations from consumers, personnel, investors, and other stakeholders to operate ethically and ensure respect for human rights throughout their operations.

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