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## The Reargument Order in *Kiobel v. Royal Dutch Petroleum* and Its Potential Implications for Transnational Human Rights Cases

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### Introduction

On February 28, 2012, the U.S. Supreme Court heard oral arguments in *Kiobel v. Royal Dutch Petroleum* and its companion case, *Mohamad v. Rajoub*.<sup>[1]</sup> *Kiobel* asked (1) whether the question of corporate civil liability under the Alien Tort Statute (“ATS”) is a merits question or a question of subject matter jurisdiction;

and (2) whether corporations may be sued in the same manner as any other private party defendant under the ATS.<sup>[2]</sup> One week later, the Court ordered briefing and reargument on the additional question of “[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, 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.”<sup>[3]</sup> This *Insight* explores the genesis and implications of this reargument order.

### The Origins of ATS Litigation

The Alien Tort Statute is a provision in the 1789 Judiciary Act that gives federal courts jurisdiction over “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.”<sup>[4]</sup> In *Filártiga v. Peña-Irala*, the first modern ATS case, the Second Circuit held that two Paraguayan citizens could sue another Paraguayan citizen for torture that occurred in Paraguay. <sup>[5]</sup> On remand, the district court cited *Banco Nacional de Cuba v. Sabbatino* to support the proposition that “[w]here the principle of international law is as clear and universal as the Court of Appeals has found it to be, there is no reason to suppose that this court’s assumption of jurisdiction would give justifiable offense to Paraguay.”<sup>[6]</sup>

Twenty-four years later, in *Sosa v. Alvarez-Machain*, the Supreme Court considered a claim brought under the ATS by a Mexican citizen against another Mexican citizen for an abduction that occurred in Mexico.<sup>[7]</sup> The Supreme Court noted that “[a]s enacted in 1789, the ATS gave the district courts ‘cognizance’ of certain causes of action, and the term

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bespoke a grant of jurisdiction, not power to mold substantive law.”[8] The Court adopted the view of *amici* professors of federal jurisdiction and legal history that “federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time.”[9] However, the ATS did not grant federal jurisdiction over all international law violations but only a limited category of offenses defined by their high degree of specificity and universal acceptance.[10] The Court held that the abduction in question did not fall within this category.

### The Question of Extraterritoriality

The question of extraterritoriality was present in *Sosa*, since the alleged international law violation took place in Mexico. In describing the narrow category of actionable norms, the Court noted that the drafters of the ATS probably had in mind a “narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs.”[11] The new Constitution had already given the Supreme Court original jurisdiction over “all Cases affecting Ambassadors, other public ministers and Consuls.”[12] The ATS provided another remedial avenue for injured foreigners. For example, when U.S. citizens aided and abetted a French attack on the Sierra Leone Company and British subjects in Sierra Leone, Attorney General William Bradford assured Secretary of State Edmund Randolph that, although the United States lacked criminal jurisdiction over the incident, “the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States” under the ATS.[13]

In *Sosa*, the United States argued that the ATS does not apply to claims based on alleged violations of international law arising in a foreign country.[14] In its view, the presumption against extraterritoriality applies to the ATS; moreover, as Judge Bork emphasized in an earlier ATS case, “those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations.”[15] The *amici* professors of federal jurisdiction and legal history, by contrast, argued in *Sosa* that the First Congress intended the ATS to reach torts that occurred abroad, and cited the Bradford opinion in support.[16] They further argued that “the ATS did not provide for the extraterritorial application of United States law” but rather “provided jurisdiction to adjudicate disputes under a law that was already binding everywhere in the world—the law of nations.”[17] The *Sosa* opinion did not address the extraterritoriality arguments directly, although it did list foreign relations concerns as one reason for restricting the category of international law norms actionable under the ATS to those with the requisite degree of specificity and universal acceptance.[18]

### The First Oral Argument in *Kiobel*

*Kiobel* may be seen as a sequel to *Sosa* in several respects. Attorney Paul Hoffman argued both cases for the individuals bringing ATS claims. Former Deputy Solicitor General Paul Clement, who had argued for the United States in *Sosa*, submitted an *amicus* brief in *Kiobel* along with former State Department Legal Advisor John Bellinger. Their brief, which was submitted on behalf of a group of multinational corporations, took the position that the ATS cannot be used to adjudicate conduct occurring abroad.[19] Barely seconds had elapsed in oral argument when Justice Kennedy asked Hoffman a question based on an *amicus* brief submitted by Professor Jack Goldsmith on behalf of Chevron and several other corporations: “[T]he *amicus* brief for Chevron say[s] ‘No other nation in the world permits its

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court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection.’ And in reading through the briefs, I was trying to find the best authority you have to refute that proposition, or are you going to say that that proposition is irrelevant?”[20]

Much of the subsequent discussion turned on various aspects of ATS jurisdiction that are not unique to cases involving corporate defendants. In this sense, the Court appears to have paid little heed to the United States’s suggestion in its *amicus* brief that “[a]lthough there are a number of other issues in the background of this case (e.g., aiding-and-abetting liability, extraterritoriality, etc.), those issues were not decided by the court of appeals here. This Court therefore should address only the corporate-liability issue.”[21] However, the Court does appear ultimately to have agreed with the United States that it should only decide these additional issues “after full briefing.”[22] Its order for additional briefing and argument specifically indicates that the applicable word limits are those for merits briefs, not supplemental briefs.[23]

If oral argument is any indication, the Justices will be particularly focused on ATS cases that involve non-U.S. plaintiffs, non-U.S. defendants, and non-U.S. conduct. These so-called “foreign cubed” cases, which include both *Filártiga* and *Sosa*, are made possible in part by U.S. rules of personal jurisdiction that permit the assertion of jurisdiction over physically present defendants and over certain other defendants with minimum contacts in the forum.[24] Chief Justice Roberts expressed concern that the exercise of adjudicatory jurisdiction in these cases, even if permitted by U.S. law, might violate international law. As he put it, “If -- if there is no other country where this suit could have been brought, regardless of what American domestic law provides, isn’t it a legitimate concern that allowing the suit itself contravenes international law?”[25] Even if allowing such a suit is not unlawful, some of the Justices clearly believe that it is undesirable. As Justice Alito asked point-blank, “what business does a case like that have in the courts of the United States?”[26]

Justice Ginsberg seemed to believe that Justice Alito’s question had already been answered in *Sosa*: “That sounds very much like *Filartiga*. And I thought that -- that *Sosa* accepted that *Filartiga* would be a viable action under the Tort Claims Act. So, I thought what we were talking about today, the question was, is it only individual defendants or are corporate defendants also liable?”[27] Justice Kennedy also wondered about the relationship between *Filártiga* and *Kiobel*:

But I agree that we can assume that *Filartiga* is a binding and important precedent, for the Second Circuit. But in that case, the only place they could sue was in the United States. He was an individual. He was walking down the streets of New York, and the victim saw him walking down the streets of New York and brought the suit. In this case, the corporations have residences and presence in many other countries where they have much more -- many more contacts than here.[28]

One of the questions for the Justices will be whether abstention doctrines such as *forum non conveniens* are sufficient to address the concern that cases might properly be brought in the United States but more appropriately adjudicated elsewhere, or whether they feel that categorical, *ex ante* bars to certain types of proceedings are warranted. In order to fashion such categorical restrictions on a notoriously terse statute, even judges who are wary of

judge-made law might be compelled to engage in a certain degree of judicial law-making.

## Looking Forward

The *Sosa* court decided that the ATS survived *Erie*, which held that federal courts lack authority to derive “general” common law,<sup>[29]</sup> because there remain “limited enclaves in which federal courts may derive some substantive law in a common law way.”<sup>[30]</sup> From the perspective of the presumption against extraterritoriality, the new question presented in *Kiobel* is whether that process of derivation itself transforms international law into U.S. law in a way that prohibits application of the resulting rules to conduct that occurred abroad, even if the parties are subject to the personal jurisdiction of U.S. courts.<sup>[31]</sup> Barring any further procedural surprises, we should learn the answer to that question by the end of the Court’s next Term in 2013.

## About the Author:

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## Endnotes:

[1] Transcript of Oral Argument, *Kiobel v. Royal Dutch Petroleum Co., et al.* (U.S. Feb. 28, 2012) (No. 10-149), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1491.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf) [hereinafter *Kiobel* Oral Argument Transcript].

[2] *Kiobel v. Royal Dutch Petroleum Co., et al.*, 621 F.3d 11 (2d Cir. Sept. 17, 2010), cert. granted (U.S. Oct. 17, 2011) (No. 10-1491), available at <http://www.supremecourt.gov/qp/10-01491qp.pdf>.

[3] *Kiobel v. Royal Dutch Petroleum Co., et al.*, 621 F.3d 11, order for reargument (U.S. Mar. 5, 2012), available at <http://www.supremecourt.gov/orders/courtorders/030512zr.pdf> [hereinafter Supreme Court Order]

[4] 28 U.S.C. § 1350.

[5] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

[6] *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. Jan. 10, 1984) (citing 276 U.S. 398, 428 (1964)).

[7] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

[8] *Id.* at 713.

[9] *Id.* at 714 (citing Brief for Vikram Amar et al. as Amici Curiae, *Sosa v. Alvarez-Machain*, 2004 WL 419425 (2004)).

[10] *Id.* at 732.

[11] *Id.* at 715.

[12] *Id.* at 717 (quoting U.S. Const. art. III, § 2).

[13] 1 Op. Att’y Gen. 57 (July 6, 1795).

[14] Brief for the United States as Respondent Supporting Petitioner, 2003 U.S. Briefs 339 at \*46-\*50 (Jan. 23, 2004).

[15] *Id.* at \*48-\*49 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring)).

[16] Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents, 2003 U.S. Briefs 339 at \*23-\*25 (Feb. 27, 2004).

[17] *Id.* at \*24.

[18] *Sosa*, 542 U.S. at 727.

[19] Brief of BP America et al. as Amici Curiae Supporting Respondents, *Kiobel v. Royal Dutch Petroleum Co.* (No. 10-1491), *available at* [http://www.chamberlitigation.com/sites/default/files/scotus/files/2012/Kiobel,%20et%20al.%20v.%20Royal%20Dutch%20Petroleum,%20et%20al.%20\(Amicus%20Brief%20-%20BP%20America%20et%20al.\).PDF](http://www.chamberlitigation.com/sites/default/files/scotus/files/2012/Kiobel,%20et%20al.%20v.%20Royal%20Dutch%20Petroleum,%20et%20al.%20(Amicus%20Brief%20-%20BP%20America%20et%20al.).PDF) [hereinafter U.S. Brief].

[20] *Kiobel* Oral Argument Transcript, *supra* note 1, at 3-4.

[21] U.S. Brief, *supra* note 19, at 6.

[22] *Id.* at 14 n.6.

[23] Supreme Court Order, *supra* note 3.

[24] See *Burnham v. Superior Court*, 495 U.S. 604 (1990) (finding that service of process within the jurisdiction satisfies due process).

[25] *Kiobel* Oral Argument Transcript, *supra* note 1, at 8.

[26] *Id.* at 11.

[27] *Id.* at 12-13.

[28] *Id.* at 13-14.

[29] *Sosa*, 542 U.S. at 729 (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)).

[30] *Id.* at 730.

[31] This question is also presented by a pending petition for certiorari in *Rio Tinto v. Sarei*, which asks: "Whether U.S. courts should recognize a federal common law claim under the ATS arising from conduct occurring entirely within the jurisdiction of a foreign sovereign, especially where the claim addresses the foreign sovereign's own conduct on its own soil toward its own citizens." Petition for Writ of Certiorari, *Rio Tinto PLC et al. v. Sarei et al.* (No. 11-649), *available at* [http://www.chamberlitigation.com/sites/default/files/scotus/files/2011/Rio%20Tinto%20v.%20Sarei,%20et%20al.%20\(Petition%20for%20Writ%20of%20Certiorari\).pdf](http://www.chamberlitigation.com/sites/default/files/scotus/files/2011/Rio%20Tinto%20v.%20Sarei,%20et%20al.%20(Petition%20for%20Writ%20of%20Certiorari).pdf).