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Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries

By Curtis A. Bradley

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Introduction

In a ruling that is likely to result in a significant reduction in international human rights litigation in U.S. courts, the Supreme Court has held that claims will generally not be allowed under the Alien Tort Statute (ATS) if they concern conduct occurring in the territory of a foreign sovereign. The Court in *Kiobel v. Royal Dutch Petroleum Co.* invoked the "presumption against extraterritoriality" and reasoned that "the principles underlying th[is] canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS."[1] The Court concluded that nothing in the text, history, or purposes of the ATS is sufficient to overcome the presumption. This *Insight* describes the background of the decision and the central points addressed by the Court.

Background

First enacted as part of the Judiciary Act of 1789, the ATS provides that "[t]he 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."[2] Few cases were brought under the ATS prior to the Second Circuit's landmark 1980 decision in *Filartiga v. Pena-Irala*, which held that victims of human rights abuses in other countries could use the statute to sue the perpetrators of the abuse in U.S. courts.[3] In that case, two citizens of Paraguay were allowed to sue a former police inspector from Paraguay for his alleged involvement in the torture and murder of a Paraguayan citizen in Paraguay. This suit fell within the terms of the ATS, the court reasoned, because it was brought by aliens, it concerned tortious conduct, and the conduct violated the modern customary international law of human rights.

Since the *Filartiga* decision, numerous suits have been brought under the ATS involving alleged human rights abuses from around the world. At first, most of these suits were brought against current or former foreign government officials. Starting in the late 1990s,

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however, suits were increasingly brought against private corporations, often on the theory that the corporations had "aided and abetted" foreign governments in committing human rights abuses.[4] Courts generally assumed that any ATS suit that could be brought against private individuals could also be brought against corporations. There was some disagreement in the courts, however, over the standard for aiding and abetting liability, and, relatedly, over the materials that should be consulted in determining this standard.[5]

Before *Kiobel*, the Supreme Court's only decision considering the scope of the ATS was its 2004 decision in *Sosa v. Alvarez-Machain*.[6] In that case, a Mexican citizen was suing another Mexican citizen for the latter's involvement in a kidnapping that occurred in Mexico at the behest of the U.S. government. The Court held that a "narrow class of international norms today" could be brought under the ATS, subject to "vigilant doorkeeping" by the lower courts.[7] Reasoning that the Congress that enacted the ATS would have expected it to be available for a modest number of claims under the law of nations, most notably for violations of safe conducts, infringement of the rights of ambassadors, and piracy, the Court held that modern law of nations claims would be allowed under the ATS if they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms."[8] At the same time, the Court emphasized the need for "judicial caution" in recognizing new claims under the ATS in light of fundamental changes in both the common law and international law as well as the foreign relations issues that this litigation can generate.[9]

The *Kiobel* Case

In *Kiobel,* twelve Nigerian citizens who had obtained political asylum in the United States brought suit against Dutch and British oil companies, alleging that, through their Nigerian subsidiary, the companies had aided and abetted human rights violations committed by the Nigerian military in the 1990s. The defendants' Nigerian subsidiary was specifically alleged to have provided transportation to Nigerian forces; allowed their property to be utilized as a staging ground for attacks; provided food for soldiers involved in the attacks; and provided compensation to those soldiers. In directing that the case be dismissed, the U.S. Court of Appeals for the Second Circuit held broadly that private corporations could not be sued under the ATS.[10]

The *Kiobel* decision created a conflict in the circuits over whether ATS suits can be brought against corporations. Perhaps not surprisingly, therefore, the Supreme Court decided to review the case. Subsequently, several circuit courts expressly disagreed with the Second Circuit's decision, thereby deepening the conflict.[11]

During oral argument before the Supreme Court in February 2012, it became apparent that a number of the Justices had questions about an issue that is potentially separate from the issue of corporate liability: the extent to which the ATS should be applied to conduct that occurs outside the United States. Shortly after the argument, the Court issued an order directing the parties to brief the following additional issue: "Whether 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."[12] The parties briefed that issue, and a new oral argument was held in October 2012.

In the meantime, the Supreme Court decided a case involving the Torture Victim Protection Act (TVPA), which was enacted in 1992 and codified as a note to the ATS.[13] In *Mohamad v. Palestinian Authority*, the Court concluded that the TVPA, which provides a cause of action for instances of torture and "extrajudicial killing" under color of foreign law, allows for suit only against natural persons.[14] The Court based its decision on the fact that the TVPA refers to conduct by "individuals" against other "individuals," and it observed that the ATS

does not contain this term and thus "offers no comparative value here regardless of whether corporate entities can be held liable in a federal common-law action brought under that statute."[15]

Numerous *amicus curiae* briefs were filed in *Kiobel*, including by the United Kingdom, The Netherlands, Germany, Argentina, and the European Commission. The Executive Branch also weighed in with multiple *amicus* briefs. During the first round of briefing in the case, on the issue of corporate liability, the Executive Branch sided with the plaintiffs, contending that "[c]ourts may recognize corporate liability in actions under the ATS as a matter of federal common law."[16] The Executive Branch's brief on this issue was signed by both the Justice Department and the State Department. During the second round of briefing, on the issue of extraterritoriality, the Executive Branch sided with the defendants, arguing that courts should not fashion a federal common law cause of action in the circumstances of this case, where "foreign plaintiffs are suing foreign corporate defendants for aiding and abetting a foreign sovereign's treatment of its own citizens in its own territory."[17] This brief was signed only by the Justice Department.

Presumption Against Extraterritoriality

On April 17th, the Supreme Court affirmed the Second Circuit's dismissal of the suit in *Kiobel*. Although all nine Justices agreed on this outcome, they disagreed over the reasoning. A five-Justice majority of the Court, in an opinion authored by Chief Justice Roberts, applied the "presumption against extraterritoriality," pursuant to which U.S. laws are assumed not to apply to conduct abroad.[18] The Court had most recently applied that presumption in *Morrison v. National Australia Bank Ltd.*, in holding that Section 10(b) of the Securities Exchange Act does not provide a cause of action to foreign plaintiffs suing for misconduct in connection with securities traded on foreign exchanges.[19] As the Court stated in that case, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[20] This presumption against extraterritoriality, the Court has explained in another case, "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[21]

The majority in *Kiobel* acknowledged that the ATS is potentially distinguishable from statutes like the Securities Exchange Act, in that the ATS is, as noted in *Sosa*, "strictly jurisdictional."[22] But the majority held that "the principles underlying the [presumption against extraterritoriality] similarly constrain courts considering causes of action that may be brought under the ATS."[23] Indeed, reasoned the majority, "the danger of unwarranted judicial interference in the context of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do."[24]

The majority did not find anything in the text, history, or purposes of the ATS to rebut the presumption. The mere fact that the ATS refers to suits by aliens for torts in violations of international law does not imply an extraterritorial reach, reasoned the Court, since such torts could occur "either within or outside the United States."[25] Nor does the transitory tort doctrine support extraterritorial application of the ATS, said the Court, because that doctrine involves the application of foreign tort law, whereas ATS cases involve the development of causes of action under U.S. law.

As for the historical context of the ATS, the Court noted that the first two of the torts identified in *Sosa* as historically actionable under the ATS—violation of safe conducts and infringement of the rights of ambassadors—have no necessary extraterritorial application. As for piracy, the Court noted that this tort ordinarily occurred on the high seas, not in the territory of a foreign nation, and also that pirates historically may have been regarded as "a category unto themselves."[26] The Court dismissed a 1795 Attorney General opinion, which suggested that an action under the ATS might have been available against U.S.

citizens who participated in an attack on the British colony of Sierra Leone, noting (among other things) that "[t]he opinion hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality."[27]

Finally, the majority rejected the notion that the original purpose of the ATS was to make the United States a forum for adjudicating violations of international law from around the world. The ATS was designed to help the United States avoid foreign relations friction, reasoned the Court, such as by ensuring an avenue of redress for foreign officials injured within this country.[28] The Court expressed concern that applying the ATS to foreign conduct has the potential to exacerbate rather than alleviate friction, and the Court noted that a number of countries had objected in recent years to extraterritorial ATS litigation.

The majority concluded its analysis by noting, somewhat ambiguously:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See *Morrison*, 561 U.S. __ (slip op. at 17-24). Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.[29]

Although this paragraph makes clear that the mere presence of a corporate defendant in the United States is not enough to avoid the application of the presumption against extraterritoriality, it does not otherwise explain what will be required in order for an ATS claim to "touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application."

Concurring Opinions

In addition to joining the majority opinion, Justice Kennedy wrote a one-paragraph concurrence noting that the Court was "leav[ing] open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."[30] Although he did not specifically identify those questions, he did observe that cases might arise that are covered neither by the TVPA nor by the reasoning in the majority opinion, "and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."[31]

Justice Alito also wrote a short additional concurrence, joined by Justice Thomas, expressing the view that "a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations."[32]

Justice Breyer wrote a concurrence that was joined by Justices Ginsburg, Sotomayor, and Kagan. Agreeing with the Court's dismissal of the case but not its reasoning, Breyer argued that, instead of applying the presumption against extraterritoriality, the Court should have limited ATS litigation to three circumstances: when either "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) 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."[33]

In contesting the majority's application of the presumption against extraterritoriality, Justice Breyer argued that the ATS's reference to aliens and international law suggested that it was not limited to domestic matters. He also argued that at least one of the tort claims that historically could have been brought under the ATS—for piracy—would have involved conduct not only outside the United States but also on foreign-flagged vessels that are effectively like foreign territory.

Instead of applying a categorical presumption, Breyer thought it appropriate to look to international jurisdictional norms to help determine the proper reach of the ATS, and he noted that these norms sometimes allow for the exercise of prescriptive jurisdiction over foreign conduct. Justice Breyer would have further limited the reach of the ATS to situations in which "distinct American interests are at issue."[34] One of those interests, he contended, is in "not becoming a safe harbor for violators of the most fundamental international norms."[35] Finally, Breyer argued that his proposed approach was consistent with both the approach of other nations and the analysis in *Sosa*.

Justice Breyer nevertheless agreed that this particular case should be dismissed. Given "the defendants' minimal and indirect American presence," reasoned Breyer, "it would be farfetched to believe . . . that this legal action helps to vindicate a distinct American interest."[36]

Conclusion

The *Kiobel* decision is likely to lead to a significant reduction in international human rights litigation in U.S. courts. To be sure, plaintiffs can still bring claims under the TVPA against individual defendants for torture and extrajudicial killing committed under color of foreign law. In addition, ATS claims can still be brought for torts in violation of international law that occur in the United States, although any such claims will be rare and are likely to face a variety of domestic law obstacles. There may also be situations in which conduct in the United States (such as by a U.S. corporation) is sufficiently connected to foreign human rights violations that it will be actionable under the ATS. This possibility is suggested by the somewhat ambiguous paragraph at the end of the majority opinion and perhaps also by Justice Kennedy's concurrence. Nevertheless, ATS litigation will almost certainly have a much narrower scope going forward. Of course, the presumption against extraterritoriality is only a presumption, and it is open to Congress to amend the ATS to make it expressly extraterritorial if it wishes to do so.

About the Author:

Curtis Bradley is the William Van Alstyne Professor at Duke Law School and a Vice-President of ASIL

Endnotes:

[1] Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, slip op. at 5 (U.S. Sup. Ct. Apr. 17, 2013).

[2] 28 U.S.C. § 1350. For additional discussion of the history of the ATS, see Curtis A. Bradley, International Law in the U.S. Legal System ch. 7 (2013).

[3] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[4] The first corporate ATS case appears to have been Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part and rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

[5] Compare, for example, the separate opinions in Khulumani v. Barclay National Bank Ltd., 504 F.3d 254 (2d Cir. 2007). Compare also Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) ("purpose" standard), with Doe v. Exxon Mobil Corp., 654 F.3d 11, 39

(D.C. Cir. 2011) ("knowledge" standard).

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

[7] *Id.* at 729.

[8] *Id.* at 725.

[9] *Id.*

[10] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).

[11] *See Exxon Mobil Corp., supra* note 5; Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) (en banc).

[12] Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012).

[13] *See* 28 U.S.C. § 1350 note.

[14] 132 S. Ct. 1702 (2012).

[15] *Id.* at 1709.

[16] *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 7, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (Dec. 2011), at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_unitedstates.authcheckdam.pdf.

[17] *See* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 13, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (June 2012), at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_affirmanceamcuusa.authcheckdam.pdf.

[18] *See Kiobel*, *supra* note 1, slip op. at 5.

[19] Morrison v. National Australia Bank Ltd.,130 S. Ct. 2869 (2010).

[20] *Id.* at 2878.

[21] Equal Employment Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244, 248 (1991).

[22] *Kiobel*, *supra* note 1, slip. op. at 5.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 7.

[26] *Id.* at 11.

[27] *Id.* at 12. *Cf.* Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 Am. J. Int'l L. 509 (2012) (suggesting that the 1795 opinion supported some extraterritorial application of the ATS).

[28] *See Kiobel*, *supra* note 1, slip op. at 12-13 (citing Curtis A. Bradley, *The Alien Tort Statute and Article* III, 42 Va. J. Int'l L. 587, 641 (2002)).

[29] *Id.*

[30] *Kiobel*, *supra* note 1 (Kennedy, J., concurring), slip op. at 1.

[31] *Id.*

[32] *Kiobel*, *supra* note 1 (Alito, J., concurring), slip op. at 2.

[33] *Kiobel*, *supra* note 1 (Breyer, J., concurring), slip op. at 7.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 14-15.