REARGUMENT IN *KIOBEL*: THE END OF THE ALIEN TORT STATUTE AS WE KNOW IT?

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Since the Second Circuit's historic decision in *Filártiga v. Peña-Irala* in 1980,[1] human rights lawyers and their clients have brought suit against individuals and corporations pursuant to the Alien Tort Statute[2] ("ATS") for a narrow class of extraterritorial human rights abuses that violate customary international law.[3] Since then, ATS suits have become an important legal tool for advocates, working in conjunction with social movements, to pursue a broader agenda of human rights and corporate accountability.[4] However, the Supreme Court's decision in March to order reargument in *Kiobel v. Royal Dutch Petroleum*[5] may signal the end of the ATS as we know it.

The story of *Kiobel* begins in the Niger Delta. Starting in 1990, the Movement for the Survival of the Ogoni People ("MOSOP") formed to resist the environmental degradation of their land by the Royal Dutch Petroleum Company ("Shell") and to demand a greater share of oil revenue for the region.[6] For the next five years, MOSOP carried out a campaign of non-violent resistance to challenge Shell, which the Nigerian military brutally suppressed, alleg-

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1 *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

2 28 U.S.C. § 1350 (2012). Also commonly referred to as the Alien Tort Claims Act.

3 *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 257 (2d Cir. 2009) (recognizing crimes against humanity to be actionable under the ATS); Kadic v. Karadzic, 70 F.3d 232, 242–43 (2d Cir. 1995) (genocide and war crimes); *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) (torture and extrajudicial executions).

4 *See* Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 LAW & SOC'Y REV. 271, 291 (2009); Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 488 (2011).

5 Order Restoring Case for Reargument, 132 S. Ct. 1738 (2012) (restoring case for reargument on extraterritorial application of the ATS).

6 Claude E. Welch Jr., *The Ogoni and Self-Determination: Increasing Violence in Nigeria*, J. MOD. AFR. STUD., Dec. 1995, at 635, 640–41, 640 n.14.

edly at the company's behest.[7] International condemnation of the crackdown reached a peak in 1995 when a Nigerian special tribunal executed nine leaders of MOSOP including internationally renowned author Ken Saro-Wiwa.[8] In 2002, after receiving asylum in the United States, twelve Ogoni plaintiffs sued Shell and its Nigerian subsidiaries for aiding and abetting the Nigerian military in acts of arbitrary arrest and detention, torture, and extrajudicial execution.[9]

In 2010, the Second Circuit stunned the human rights community when it held that corporations categorically cannot be sued under the ATS and dismissed the case.[10] Up to that point, corporations had been sued numerous times under the statute with no court considering it improper to do so. The only other appellate court that had addressed the issue head-on was the Eleventh Circuit, which held that corporations could be sued.[11] Since the Second Circuit's decision, the Seventh,[12] Ninth,[13] and D.C.[14] Circuits have all held that corporations can be sued under the ATS. The stage was set for a showdown in the Supreme Court, an invitation the Court accepted by granting certiorari in *Kiobel*.[15]

The Court heard oral argument on February 28, 2012 and, in the eyes of several commentators, it did not go well for the plaintiffs.[16] The plaintiffs' lawyer, veteran ATS litigator Paul Hoffman,

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7 HUMAN RIGHTS WATCH, THE OGONI CRISIS: A CASE-STUDY OF MILITARY REPRESSION IN SOUTHEASTERN NIGERIA (1995), *available at* http://www.hrw.org/reports/1995/Nigeria.htm. On October 29, 1990, a Shell manager wrote to Nigerian Military authorities to request mobile police to defend its installations. After village youths carried out a protest on Shell's premises on October 30,

> [Shell] made a written report to the military governor of Rivers State, a copy of which was sent to the Commissioner of Police. On October 31, mobile police attacked peaceful demonstrators with teargas and gunfire. The mobile police returned at 5:00 a.m. the next day . . . . Some eighty people were killed, and 495 houses either destroyed or badly damaged.

Id.

8 *See* Welch, *supra* note 6, at 635.

9 *See Legal Reference:* Kiobel v. Royal Dutch Petroleum (Shell), TOO BIG TO PUNISH?, http://toobigtopunish.org/content/legal-reference-kiobel-v-royal-dutch-petroleum-shell (last visited Dec. 26, 2012).

10 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145 (2d Cir. 2010).

11 *See* Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008); Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242 (11th Cir. 2005).

12 *See* Flomo v. Firestone Nat'l Rubber Co., 643 F.3d 1014, 1025 (7th Cir. 2011).

13 *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011).

14 *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 41 (D.C. Cir. 2011).

15 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011) (No. 10-1491).

16 *See, e.g.*, Lyle Denniston, *Argument Recap: Downhill, from the Start*, SCOTUS BLOG

struggled to keep the Court's attention on the issue that his clients' petition had presented: corporate liability. The Court's conservative wing monopolized Mr. Hoffman's time with other questions. Perhaps most troubling, Justice Kennedy, frequently the swing vote on the Court, opened questioning almost immediately by demanding an explanation for the fact that no other country in the world possessed a statutory analogue to the ATS.[17] In a related but distinct question Justice Alito raised the issue of the ATS's extraterritorial application: "What business does a case like [this] have in the courts of the United States? . . . There's no connection to the United States whatsoever. The Alien Tort Statute was enacted, it seems to be . . . to prevent international tension . . . and . . . this kind of a lawsuit only creates international tension."[18] From the perspective of the plaintiffs and human rights lawyers who use the ATS, these questions were frustrating for two reasons: first they were answered, at least indirectly, by the Supreme Court's only other ATS decision, *Sosa v. Alvarez-Machain*,[19] and second, they raised issues that had not been briefed by the parties.

This left the argument on the actual question presented almost entirely to the defendants who were challenged forcefully and consistently by Justices Ginsburg, Breyer, and Kagan. This portion of the argument did much more to reveal the central choice on the corporate liability question: does international law determine who may be held liable under the ATS, as urged by the defendants? Or does domestic federal common law govern, as urged by the plaintiffs?

This issue is not clear-cut. The ATS is one sentence long and lacks any statutory guidance. *Sosa* is a garbled and ambiguous opinion, so colorable arguments have been possible for both sides. Nonetheless, the reading of *Sosa* that comports most faithfully with

(Feb. 28, 2012, 3:05 PM), http://www.scotusblog.com/?p=139919; Mike Sacks, *Corporate Immunity Looks Likely: Supreme Court Seems Ready to Side with Shell in Human Rights Suit*, THE HUFFINGTON POST (Feb. 28, 2012, 5:13 PM), http://www.huffingtonpost.com/2012/02/28/corporate-immunity-supreme-court-shell-kiobel-human-rights_n_1306825.html.

17 Transcript of Oral Argument at 3–4, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011) (No. 10-1491) [hereinafter *Kiobel* Oral Argument I] (argued February 28, 2012).

18 *Id.* at 11–12.

19 *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). In *Sosa*, the Court held that a Mexican national's claim of illegal detention in Mexico for less than one day by former Mexican police did not allege a sufficiently specific and universal violation of customary international law so as to create a cause of action under the ATS. *Id.* at 738. The Court, however, did not question the extraterritorial application of the ATS. *Id.* at 692.

international law is to refer to international law for the substantive violations—i.e., the definitions of prohibited conduct—and then apply domestic legal standards to deal with problems of corporate liability, aiding and abetting, exhaustion, damages, etc., along the way.[20]

This conclusion is consistent with the fact that there is no international tort system that can provide the necessary standards. The Draft Articles of State Responsibility define broadly what count as international wrongful acts and remedies for them, but they only apply to states and the remedies and standards are expected to be negotiated between the states as a diplomatic exercise unless they consent to adjudication, for example by the International Court of Justice or some other body.

The defendants in *Kiobel* made much of the lack of corporate liability in international criminal tribunals, but those are, of course, criminal, not civil, statutes and the tribunals' jurisdictions are highly curtailed geographically, temporally, and substantively so, at best, they could provide analogies.[21]

In any event, *Sosa* should provide the answers here. While one can say that there are no international standards that explicitly impose civil liability on corporations, one can just as easily observe that there are none that explicitly impose civil liability on natural persons. And yet *Sosa* let such human civil liability stand. Therefore it appears that the Court has already recognized that international law is not going to provide the standards, only the violations.

As to the statute's application to conduct that occurs in other sovereign nations, the *Sosa* Court blessed the ATS as good law in a case where a Mexican national harmed a Mexican national in Mexico. *Sosa* also signaled the Court's approval of the Second Circuit's interpretation of the ATS in *Filártiga*, where a Paraguayan national had harmed a Paraguayan national in Paraguay. In *Kiobel*, the equation runs: a Nigerian company harming Nigerian nationals in Nige-

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20 *See* Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1931–32 (2010) (noting that after *Sosa*, courts and commentators have generally assumed that the federal common law governs some ancillary issues in ATS suits); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) ("As a result, the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws.").

21 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 141 (2d Cir. 2010). It would be astonishing if the conservative justices on the U.S. Supreme Court decide a case based on principles expounded in the Rome Statute.

ria. The application of the statute to extraterritorial conduct is identical in each case.

When Mr. Hoffman attempted to answer these questions by pointing to the *Sosa* and *Filártiga* precedents, Kennedy responded, "But in [*Filártiga*], 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."[22] It is unclear, however, how answers to that concern would address the issue of corporate liability. As Mr. Hoffman pointed out, such questions are addressed through doctrines of personal jurisdiction and forum non conveniens though he was unprepared to follow through on these assertions in detail.

But Mr. Hoffman and the plaintiffs' team received an unexpected opportunity to properly prepare for these questions when the Court restored *Kiobel* to its calendar for reargument on "[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."[23] This allowed plaintiffs to fully brief the issue of extraterritoriality.[24] Given Justice Kennedy's concerns this was surely a welcome chance.

On the other hand, reargument also significantly raised the stakes for the human rights community because by taking on extraterritoriality, the Court called into question the foundation of the ATS' jurisprudence and utility for practitioners. Every modern ATS lawsuit to date has addressed conduct that took place outside of the United States. While some cases have arguably contained a nexus to the U.S.,[25] this is the exception rather than the rule. Rejecting the same extraterritoriality argument in *Flomo v. Firestone*, Judge Posner noted the obvious:

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22 *Kiobel* Oral Argument I, *supra* note 17, at 13–14.

23 Order Restoring Case for Reargument, 132 S.Ct. 1738 (2012) (restoring case for reargument on extraterritorial application of the ATS).

24 *Compare* Doe v. Exxon Mobil Co., 654 F.3d 11, 20–28 (D.C. Cir. 2011) (finding application to extraterritorial conduct), *and* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 744–47, 780–82 (9th Cir. 2011) (same), *with Exxon*, 654 F.3d at 72, 74–80 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (finding no application to extraterritorial conduct), *and Sarei*, 671 F.3d at 808–11 (Kleinfeld, J., dissenting) (same). The only circuits to consider the issue have held that the ATS *can* be applied to extraterritorial conduct though not without forceful dissents.

25 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004). In *Sosa*, for example, the plaintiff, Dr. Humberto Alvarez-Machain, was abducted to the United States at the behest of the Drug Enforcement Agency ("DEA") to stand trial for the torture and murder of a DEA agent. Dr. Alvarez-Machain was acquitted at trial. *Id.*

> Courts have been applying [the ATS] extraterritorially (and not just to violations at sea) since the beginning; no court to our knowledge has ever held that it doesn't apply extraterritorially; and *Sosa* was a case of nonmaritime extraterritorial conduct yet no Justice suggested that therefore it couldn't be maintained. Deny extraterritorial application, and the statute would be superfluous, given the ample tort and criminal remedies . . . in this country.[26]

If the *Kiobel* plaintiffs lose on extraterritoriality, it will effectively end the ATS as we know it, both as against corporate defendants and individuals who have violated the law of nations abroad.

The plaintiffs' position in their briefs rested primarily on three arguments. First, that the history, purpose, and text of the ATS, as expounded by the *Sosa* Court, lead to the conclusion that Congress intended for actions occurring outside the territory of the United States to be cognizable under the statute.[27] Second, that the ATS grants jurisdiction for actions in tort and the common law has long recognized a doctrine of transitory torts; that is, entertaining actions in a particular jurisdiction even if the conduct occurred in another (including a foreign one).[28] Third, that there is an important distinction between the application of substantive American law to foreign conduct, and making American courts an available forum for suits based on foreign conduct.[29]

At oral argument, the plaintiffs put forward a simple, elegant position: the Supreme Court need not adopt a restrictive rule on the ATS's extraterritorial application because the lower courts already have numerous doctrines available to dismiss ATS cases that should not be heard in a federal court. These range from the pedestrian, such as personal jurisdiction, to the more exotic, such as the political question and foreign affairs doctrines. These doctrines are already at the disposal of lower federal courts, they already have been developed by a great deal of Supreme Court precedent, and they can be further adjusted in the future by the Courts of Appeals and the Supreme Court. Thus, plaintiffs urged, the Court should simply do nothing.

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26 Flomo v. Firestone Nat'l Rubber Co., 643 F.3d 1014, 1025 (7th Cir. 2011).

27 *See* Petitioners' Supplemental Opening Brief at 12, Kiobel v. Royal Dutch Petroleum, 132 S. Ct. 472 (2012) (No. 10-1491), 2012 WL 2096960.

28 *See id.* at 27.

29 *See id.* at 37. *See* Restatement (Third) of Foreign Relations Law § 401(a)–(b) (1987). The Restatement (Third) of Foreign Relations Law characterizes this as the distinction between *jurisdiction to prescribe* on one hand and *jurisdiction to adjudicate* on the other. *Id.* The *Kiobel* plaintiffs urged the Court to recognize the ATS as an example of the latter. Petitioners' Supplemental Opening Brief, *supra* note 27, at 37–41.

This line of argument had traction with the Court, though it was unclear if there was consensus. Justices Kennedy and Alito continued to question the basic concept of the "foreign-cubed lawsuit" asking, as they had in the first argument, what business a case like *Kiobel* had in the United States.[30] This time Mr. Hoffman was prepared with a simple response: forum non conveniens or personal jurisdiction might have answered this question but it was never raised in the litigation.[31] The fact that it had not been addressed in *Kiobel* specifically was not grounds for believing that it would never or could never keep an ATS case out of federal court. Peppered with several other questions such as the applicability of exhaustion of local remedies Mr. Hoffman resorted to this basic position, which, given the lack of a record from the courts below, was a difficult one to assail.

Kathleen Sullivan, arguing once again for the defendant oil companies, adopted a straightforward, broad position that the ATS never governs conduct outside the territorial United States ever, not even piracy on the high seas.[32] Piracy had been held up in legal scholarship and previous decisions as the quintessential violation of the laws of nations actionable under the ATS. Ms. Sullivan's bold stance on piracy bewildered even the conservative wing of the Court, including Justice Scalia and Chief Justice Roberts, who remarked with some disbelief, "I thought that was the most clear violation of an international norm. The one thing that the civilized countries would agree on is that you . . . capture pirates."[33]

As it became clear that adopting the defendants' position would require the Court to overturn its precedent in *Sosa*, the Justices seemed even more disconcerted.[34] This provoked a flurry of questions from Justices Ginsburg, Kennedy, and Sotomayor, and Chief Justice Roberts, none of whom seemed especially comfortable with the defendants' broad position.[35]

After Ms. Sullivan concluded, Solicitor General Donald Ver-

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30 Transcript of Oral Argument at 6, 16, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011) (No. 10-1491) [hereinafter *Kiobel* Oral Argument II] (argued Oct. 1, 2012).

31 *Id.* at 16.

32 *See* Supplemental Brief for Respondents at 33, Kiobel v. Royal Dutch Petroleum, 132 S. Ct. 472 (2012) (No. 10-1491), 2012 WL 3127285.

33 *Kiobel* Oral Argument II, *supra* note 30, at 25.

34 *Id.* at 38. The position, as Justice Ginsberg implied in oral argument, also clearly requires that other important cases such as *Filártiga* and *Marcos* be overturned. These cases, though not Supreme Court precedent, were cited several times in the *Sosa* opinion. *Id.*

35 *Id.* at 36–39.

rilli, Jr. stood to argue in support of the defendants.[36] However, the United States did not adopt the defendants' austere position; rather, it requested that the Court permit some categories of cases but prohibit others.[37]

The problem the Court seemed to have with this approach—a problem Verrilli struggled to answer to the Justices' satisfaction—was how these categories were to be determined. The answer seemed to be that the Court (or the lower courts) would engage in a "weighing of interests" to determine if a case should be heard.[38] What exactly those interests are was not clear from General Verrilli's argument, though they appeared to include, at least, the effect the case might have on foreign relations, the risk of reciprocal treatment of American defendants by other nations, and the level of connection between the conduct and the United States.[39] This response, however, seemed to leave the Court unsatisfied with Justice Alito noting candidly, "[F]rom your brief I really don't understand how you would decide. Would it depend—what would it depend on?"[40]

The difficulties with—and indeed the differences between—the positions adopted by the defendants and the United States appeared to cast the plaintiffs' approach in a favorable light. Standing to give his rebuttal, Mr. Hoffman spoke without interruption for several minutes, setting out a topical hypothetical of an Iranian corporation assisting the Assad government in Syria to loop the corporate liability question back into the Court's mind.[41] He closed with a clear statement of the plaintiffs' position on extraterritoriality, "that . . . the framework that this Court established in *Sosa* . . . was correct, and that [it] doesn't need a radical re-evaluation as suggested by the Respondents and the United States."[42]

Ultimately, while the Court seemed reluctant to overturn *Filártiga* and *Sosa* on the extraterritoriality issue, the second round of

36 *See id.* at 41. *But see Kiobel* Oral Argument I, *supra* note 17, at 15. This came as a second twist in the litigation since the United States had sided with the plaintiffs in the corporate liability argument just months earlier. *Id.*

37 *See* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 13, Kiobel v. Royal Dutch Petroleum, 132 S. Ct. 472 (2012) (No. 10-1491), 2012 WL 2161290 ("[R]ecognizing an extraterritorial cause of action under the ATS in certain circumstances would be consistent with *Sosa*."); *see also* Kiobel Oral Argument II, *supra* note 30, at 47-48.

38 Kiobel Oral Argument II, *supra* note 30, at 48-49.

39 *Id.* at 45.

40 *Id.* at 46.

41 *Id.* at 52–54.

42 *Id.* at 57.

oral argument did little to clarify where the Court will come out on the original question of corporate liability under the ATS. Indeed it is this issue that must give the parties pause, since the connection between the two questions is not clear.

To be sure, the Court is positioned to deal a blow to the international human rights community if it were to side with the defendants on either issue. As Judge Posner pointed out, limiting the ATS to conduct occurring in the United States would render it a dead letter. A less restrictive ruling might require cases to present some form of nexus to the United States. This would leave open the possibility of further suits but would add another roadblock in litigation. Eliminating corporate liability would remove an important tool from human rights plaintiffs' kit and render meaningful recovery—already a rarity in ATS litigation—nearly impossible.

If the issues presented by the two *Kiobel* arguments are resolved in favor of the plaintiffs, the Court also has an opportunity to clarify how other issues in ATS litigation should be addressed. Human rights activists and the corporate defense bar will look carefully to the foundation the Court uses for its decisions: international law, federal common law, or some other option. Several live issues, such as aiding and abetting liability and punitive damages, are being argued in the lower courts and *Kiobel* presents a chance for the Court to clarify how they should be resolved.[43]

Whatever the result of the arguments, there is little doubt that the *Kiobel* decision will be a watershed in this area of law. How it will affect the strategy and success of human rights activists in the quest for accountability remains to be seen, but it is clear that both sides of this struggle will be reading the Court's opinion very closely for answers.

[43] Indeed, the Court may have this in mind since it declined to take any action on a petition for certiorari petition from an ATS appeal out of the Ninth Circuit that presented questions regarding standards for aiding and abetting liability and requirements for exhaustion of local remedies. *See* Petition for Writ of Certiorari, Rio Tinto, PLC v. Sarei, __ U.S. __ (No 11-649); *see also* Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011). The record of proceedings and orders for the case available on the Supreme Court website suggests there is movement, although certiorari has yet to be granted or denied. *See 11-649*, SUPREME COURT OF THE U.S., http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-649.htm (last visited Mar. 1, 2013).