What Are The Implications Of *Kiobel v. Royal Dutch Petroleum?*

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Is the decision a definitive statement against corporate liability under the Alien Tort Statute?

IMAGINE THAT your phone rings one day in the office and on the other end of the line is an anxious general counsel for a multimillion-dollar corporation that you represent. You are informed that the corporation has been sued in U.S. federal court for "violations of the law of nations" based on the corporation's conduct in a foreign nation. And the claims were brought under the Alien Tort Statute (ATS), 28 U.S.C. §1350 (also known as the Alien Tort Claims Act, a statute the general counsel has never heard of.) How do you assess the risk of liability to this corporate client?

This is not a far-fetched scenario. Many corporations in the last decade have faced similar situations: Yahoo!, the global Internet company, was accused by the families of jailed Chinese dissidents of abetting the torture of pro-democracy activists by releasing data that allowed China's government to identify, arrest, and imprison the activists; Coca-Cola faced a lawsuit alleging it collaborated with Colombian paramilitary forces to commit murder and torture; similarly, Chiquita was sued in a case where it admitted paying money to paramilitary groups in Colombia to protect its workers; and Talisman Energy, a Canadian corporation, was sued by current and former Sudanese

residents who alleged they were subjected to assaults by the Sudanese government, all while Talisman was operating in that country.

Although the trend by creative plaintiffs' lawyers to use the ATS in recent years as a popular way of hailing multinational corporations into U.S. courts for torts actually committed by others where the corporations did business, especially for that country's "violations of the law of nations," had cast an ominous shadow, there is potentially good news for the corporate defendant facing an ATS suit in the Second Circuit decision of *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010).

ALIEN TORT STATUTE • The Alien Tort Statute, passed in 1789 as part of the Judiciary Act, is short and simply worded. It provides that "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." 28 U.S.C. §1350. The ATS does not specify who may be liable under its terms and thus leaves open the question of the nature and scope of liability.

Early Application And Scope Of The ATS To Corporations

The ATS, enacted in a time far different than the one we have now, was initially interpreted to provide redress in limited situations involving foreigners, including to remedy piracy and attacks against foreign diplomats traveling to the United States in the post-Revolutionary period. Because of its narrow and obscure initial intent, the ATS remained dormant for many years. But beginning in 1980, with the case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and a series of subsequent decisions pursued by U.S. tort lawyers and human rights organizations, a body of case law developed that allowed foreign plaintiffs to sue corporations in the United States for tortious acts that occur anywhere in the world, provided that the act violates the law of nations (also known as "customary international law"). *Filartiga* established that U.S. courts have jurisdiction over actions brought by aliens for violations of the law of nations that occur outside U.S. borders. That case consequently opened the floodgates to ATS litigation against not only individuals, but also against corporations.

Filartiga itself, however, was a suit brought against an individual. Citizens of Paraguay who had applied for permanent political asylum in the United States sued another Paraguayan citizen in U.S. court for torturing and killing their son in Paraguay in retaliation for their political activities. The U.S. court concluded that deliberate torture perpetrated as part of one's official authority violates norms of international law of human rights, and, thus, whenever an alleged torturer is found within the borders of the United States, the ATS provides federal jurisdiction. *Filartiga*, supra, 630 F.2d at 885.

It appears that it was not until the 1990s that a plaintiff attempted to use ATS to impose liability on a corporate defendant. In *Aguinda v. Texaco*, No. 93 Civ. 7527 (S.D.N.Y. filed Nov. 3, 1993), plaintiffs argued that environmental pollution from three decades of oil exploitation by Texaco violated the rights of Ecuadorian villagers. But that case was never decided by a U.S. court since jurisdiction was subsequently transferred to Ecuador. And in *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), plaintiffs sued a California oil company under the ATS with charges of being complicit in the alleged forced labor, rape, and murder of Burmese citizens committed by the Burmese military government. Although there were rulings by the court pointing toward corporate liability, the parties eventually settled the case and avoided trial.

In 2004, the United States Supreme Court decided an ATS case for the first time. The case of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), was brought by a Mexican national against the U.S. Drug Enforcement Agency (DEA). The DEA had approved a plan to hire Mexican nationals to seize Alvarez —

who had been indicted for murder in a U.S. court — and bring him to the United States for trial. As a result, a group of Mexicans, including Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers. *Id.* at 697-98. The Supreme Court considered the permissible scope of ATS claims and tried to provide some guidance on what types of acts give rise to an ATS claim. In *Sosa,* the Supreme Court circumscribed the availability of private causes of action under the ATS. Although many practitioners —– especially defense attorneys — had hoped the Supreme Court would weigh in definitively on the issue of corporate liability, *Sosa* dealt with claims against an individual rather than against corporations. The *Sosa* Court did not decide — and the Supreme Court has not subsequently decided — whether corporations could be held liable under the ATS.

Given the framework that had been established by ATS cases brought against multinational corporations since *Filartiga,* corporate defendants and their attorneys might have reasoned that they had little to worry about, especially since most cases had failed on procedural or substantive legal grounds to proceed to trial and no case had resulted in liability against a corporate defendant. But there had been no definitive ruling on the exact nature or extent — if any — of corporate liability under the ATS. And many courts had assumed, without deciding, that corporate liability existed under the ATS. At best, it remained an open question of law. This left corporations facing ATS suits on shaky ground. Then on September 17, 2010, the Second Circuit decided *Kiobel v. Royal Dutch Petroleum.*

KIOBEL v. ROYAL DUTCH PETROLEUM • *Kiobel v. Royal Dutch Petroleum* was brought by Nigerian residents of the Ogoni region of Nigeria against Dutch, British, and Nigerian corporations engaged in oil exploration and production. The suit claimed that the corporations aided and abetted the Nigerian government and military in attacking the residents who were protesting the environmental effects of oil exploration. Nigerian military forces were alleged to have destroyed and looted property, forcing residents into exile, subjecting them to torture and detention, and performing extrajudicial killings. The corporations were alleged to have assisted the Nigerian forces by providing transportation, food, and compensation to the soldiers.

Kiobel presented the question: "Does the jurisdiction granted by the ATS extend to civil actions brought against corporations under the law of nations?" 621 F.3d at 117. The short answer from the Second Circuit was "No." But it is also worth taking note of the court's sweeping and lengthy analysis.

First, the court concluded that in ATS suits alleging violations of the law of nations, the scope of liability is determined by customary international law. Second, the court — by exhaustively examining the International Military Tribunal at Nuremberg, other international tribunals, and treatises and academic works — also concluded that because no corporation has ever been subject to any form of liability under the customary international law of human rights, corporate liability is not a discernible norm of customary international law that applies under the ATS. That reasoning effectively wipes out corporate liability under the ATS.

Implications Of *Kiobel*

At first glance, *Kiobel* announces good news for corporations that may be subject to an ATS suit in U.S. courts. The obvious implication of *Kiobel* is that ATS suits against corporations are likely to decrease — certainly in the Second Circuit, but also in other federal courts that adopt the *Kiobel* approach.

A few weeks before *Kiobel* was decided, a federal court in California reached the same conclusion that there is no corporate liability under the ATS. In *Doe v. Nestle,* 2010 WL 3969615 (C.D. Cal. Sept. 8, 2010), citizens of Mali filed a class action

lawsuit against various Nestle entities, Cargill entities, and the Archer Daniels Midland Company for their role in aiding and abetting violations of the law of nations through forced labor on cocoa fields in Cote d'Ivoire. Specifically, the Malians argued that Nestle, Cargill, and Archer Daniels had exclusive contracts with local farms and dictated the terms under which those farms produced cocoa, including the labor conditions for those working on the farms. Some of those farms utilized forced child labor and the corporations provided the farms with money, supplies, and training. *Id.* at *1-3. The court, based on *Sosa* and by conducting an analysis of customary international law similar to the *Kiobel* court, concluded that the "Alien Tort Statute…does not recognize an international law cause of action for corporate violations of international law." *Id.* at *57.

Should *Kiobel* and *Nestle* extend beyond their particular jurisdictions, they might signal the advent of a new line of cases putting the final nails in the coffin for corporate liability under the ATS.

Effects On Corporate Liability

That is the potentially good news. However, the *Kiobel* decision left the door ajar. The court explicitly qualified its opinion as not concluding that corporations were "immune" from liability under the ATS. *Kiobel,* supra, 621 F.3d at 120. The language of the court also suggests it took a more narrow approach — if and when something becomes a norm of customary international law, it conceivably could be the basis for liability under the ATS. What that means is if norms of customary international law evolve in such a way that corporate liability becomes acceptable under the ATS, the protections afforded corporations by *Kiobel* may be irrelevant.

Individual Liability

Even more importantly, the *Kiobel* decision will necessarily lead to plaintiffs' attorneys placing greater focus on individual liability. The *Kiobel* court noted that "[n]othing in this opinion limits or forecloses suits under the ATS against a corporation's employees, managers, officers, directors, or any other person who commits, or purposefully aids and abets, violations of international law." *Id.* at 149. This may lead to cases against individuals who acted on behalf of corporations or foreign governments, such as corporate executives.

The Effect Could Be Short-Lived

It is likely that *Kiobel* will be appealed. It was decided by a three-judge panel rather than the full court. Conceivably, an en banc hearing could reverse the decision, throwing corporate liability into question once again. If that happens, the consequences depend on what the reasoning for the reversal would be. For instance, if the en banc court reverses because it finds customary international law is inconclusive on the question of corporate liability, one could argue that domestic law should govern. In that case, corporate liability would likely exist under the ATS because corporate liability is recognized under U.S. domestic law. Or the full court could reverse based on it entirely disagreeing with the three-judge panel's analysis of customary international law and specifically conclude that there is corporate liability. A decision to reverse and find corporate liability would not be without support, as many other U.S. federal courts have suggested since *Filartiga* that corporate liability under the ATS does exist. *See, e.g, Romero v. Drummond Co., Inc.,* 552 F.3d 1303, 1315 (11th Cir. 2008) ("The text of the Alien Tort Statute provides no express exception for corporations, and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants"); *Khulumani v. Barclay Nat'l Bank Ltd.,* 504 F.3d 254, 282 (2d Cir. 2007) (Katzmann, J., concurring) ("the issue of whether corporations may be held liable under the Alien Tort Statute [is] indistinguishable from the question of whether private individuals may be"); *Al-Quraishi v. Nakhla,* 2010 WL 3001986, at *39-41 (D. Md. July

29, 2010) ("there is broad judicial agreement that the ATS provides for corporate liability"); *In re XE Services Alien Tort Litig.*, 665 F.Supp.2d 569, 588 (E.D. Va. 2009) ("Nothing in the ATS or *Sosa* may plausibly be read to distinguish between private individuals and corporations.")

New Avenues To Corporate Liability

Finally, even if *Kiobel* stands up to a potential appeal and is adopted by other federal courts to become the dominant view on corporate liability under the ATS, corporations could be faced with new and creative methods by plaintiffs' attorneys to still hold corporations doing business abroad to account for human rights and other violations of customary international law in that country. As mentioned previously, this could include pursuing liability of individual corporate executives. But it could also lead to suits against corporations under other federal laws.

CONCLUSION • Although ATS cases brought in U.S. courts against corporations doing business in a foreign country with a volatile environment have risen since the mid-1990s, more recent decisions suggest that corporate exposure to such suits may be limited. However, this is still a developing area of law. There is no well-defined consensus regarding corporate liability for violating the law of nations, so this issue remains open to reasonable debate. Few federal courts, including the Supreme Court, have weighed in on corporate liability under the ATS. And the *Kiobel* decision, although a good starting point, does not mean that ATS suits against corporations are going to magically disappear. Therefore, corporations and their defense attorneys must still be vigilant about the potential of ATS suits.

PRACTICE CHECKLIST FOR
What Are The Implications Of *Kiobel v. Royal Dutch Petroleum*?

Below are some issues arising from the *Kiobel v. Royal Dutch Petroluem* decision for corporations and their attorneys to consider.

- Corporate executives, who might be exposed to individual liability, should educate themselves and consider the potential consequences of their actions in business operations in volatile foreign countries.

- Keep track of developments in the law — both in the United States and abroad — on these issues, especially of developments in the norms of customary international law.

- Consider alternative ways lawsuits could be brought against corporations to hold them to account for violations similar to those that have been brought under the ATS.

- Become familiar with customary international law and ensure corporate and individual conduct are in accordance with those requirements.

- Consider the human rights and environmental records of countries in which business operations are being conducted.

- Implement a system by which oversight and reporting of alleged violations are maintained.

- Become familiar with local tensions and prepare employees and supervisors for potential consequences.

- Scrutinize the background and reputation of potential collaborators, contractors, and partners and closely monitor activities of any third parties you engage for business.