Stepping Away From the Abyss? Will the Supreme Court Preclude Extraterritorial Application of the Alien Tort Statute?

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“Globalization” is a concept so widely used today that it has almost become a cliché. For many years, it was viewed as a worthy goal, especially by businesses seeking to take advantage of emerging markets. The idea of the earth as a “global village” has taken on mythic proportions in popular culture; it has been romanticized and, in the views of some people, exaggerated for political and commercial gains. Despite dreams of universal utopia, globalization entails serious risks. As many have learned to their dismay, global opportunities often pose the risk of global liabilities — risks not always anticipated in the glow of entrepreneurial zeal.

Such risks are increasingly apparent in the expansion of liability under the Alien Tort Statute, commonly known as the Alien Tort Claims Act, or ATS. This centuries-old law allows foreign persons to sue in U.S. courts for certain violations of international law. Despite a strong attempt by the U.S. Supreme Court to limit the scope of the act by encouraging lower courts to construe it narrowly, cases against corporations continue to proliferate.

The act’s reach has been advocated to encompass ideas as broad as injuries to farm workers by pesticides in foreign nations, to drug trials involving foreign citizens, and even to the effects of human contributions to climate change through global warming. Policymakers find themselves increasingly occupied with ATS claims “arising from conduct that occurred in other countries and which has no significant connection to the United States — claims that may not be consistent with our own government’s policies for promoting human rights.”

Although this issue of “extraterritorial” application has been inherent in every ATS case that has involved injuries caused by foreign corporations outside the United States, it has evaded review in every instance, and — until recently — it appeared that the proliferation of ATS cases in that particular context might continue.
RECENT DEVELOPMENTS IN KIOBEL

After many years of expansive interpretations of the ATS by the lower courts — a trend directly contrary to the Supreme Court’s admonitions — the pendulum appeared to swing back toward a more conservative application by the 2nd U.S. Circuit Court of Appeals in Kiobel v. Royal Dutch Petroleum Co. Surprisingly, the 2nd Circuit created a major barrier to ATS liability in Kiobel by holding that ATS liability can only be imposed on natural persons and not on corporations. The court based its holding on a historical analysis of how and upon whom liability for violations of the “law of nations” has been imposed:

From the beginning, however, the principle of individual liability for violations of international law has been limited to natural persons — not “juridical” persons such as corporations — because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an “international crime” has rested solely with the individual men and women who have perpetrated it.

Significantly, the court did not address the propriety of entertaining suits by foreign corporations arising from human rights violations that allegedly occurred in other nations — despite the fact that the alleged abuses in Kiobel were by foreign corporations, and they indisputably occurred outside of the United States (in Nigeria) against foreign citizens. Accordingly, the fundamental jurisdictional issue of extraterritorial application of the ATS was bypassed in Kiobel as the 2nd Circuit leaped to decide a merits decision rejecting corporate liability.

After the 2nd Circuit’s ruling, the plaintiffs sought review of the corporate liability holding by the U.S. Supreme Court. After certiorari was granted, the defendants and their amici curiae not only defended the 2nd Circuit’s specific holding, but also argued against the extraterritorial application of the ATS and against “aiding and abetting” liability in general. As a result, the entire palette of defensive issues was placed before the Supreme Court, thereby providing the court with an opportunity to define the scope of ATS liability once and for all. Still, despite the broad opportunities presented by the defendants, it remained questionable whether the Supreme Court would avail itself of this historic opportunity — or merely confine its review to the corporate liability issue.

During oral arguments in the Supreme Court, the perspective began to shift. The justices asked numerous questions that directly addressed whether the ATS could be applied to extraterritorial controversies that involved foreign plaintiffs and foreign defendants. Although the petitioner’s counsel began his argument by insisting that the “narrow issue” before the court was “whether a corporation can ever be held liable” under the ATS, he was quickly interrupted by Justice Anthony Kennedy:

But, counsel, for me, the case turns in large part on this: Page 17 of the red brief says, “International law does not recognize corporate responsibility for the alleged offenses here”; and the — one of the — the amicus brief for Chevron says, “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.” And in reading through your briefs, I was trying to find the best authority you have to refute that proposition, or are you going to say it is irrelevant?
Justice Kennedy then stressed that the issue involved the petitioner’s “whole argument, of course.”

Although Justice Kennedy arguably referred to both of those thoughts as if they were a single “proposition,” they actually involved two quite different notions. First, his inquiry embraced the most apparent issue before the court: namely, that corporate liability for human rights abuses is precluded because the “law of nations” only recognizes liability for individual human perpetrators.

Second, the inquiry flatly challenged the petitioner’s counsel to demonstrate that any other country on the planet permits “universal and extraterritorial jurisdiction” over human rights abuses. Justice Kennedy’s question therefore not only threatened the core of the petitioner’s claim on the merits, but it also raised the fundamental question of whether U.S. courts have jurisdiction over petitioners’ claims.

Justice Kennedy’s thrust provoked a stream of inquiries from other members of the court regarding whether suits framing an extraterritorial controversy could ever be maintained under the ATS in U.S. courts — irrespective of whether the defendant was individual or corporate. Justice Samuel Alito and Chief Justice John Roberts followed with their own probing questions that raised grave doubts regarding the justiciability of the petitioner’s claims:

Justice Alito: Well there’s no particular connection between the events here and the United States. So, I think the question is whether there’s any other country in the world where these plaintiffs could have brought these claims against the respondents.

Chief Justice Roberts: 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?

Justice Alito seemed to strike the central chord of the court’s concern when he questioned whether the purposes of the ATS were served by extraterritorial application:

The Alien Tort Statute was enacted, it seems to be — there seems to be a consensus, to prevent the United States — to prevent international tension, to — and — does this — and this kind of lawsuit only creates international tension. ... Do you really think that the first Congress wanted victims of the French Revolution to be able to sue in — in the court — to sue French defendants in the courts of the United States?

In response to these questions, the petitioner’s counsel attempted to refocus the court on the corporate liability issue — an exercise that essentially admitted that the jurisdictional question had not been briefed adequately:

Well, that — that issue has been raised in a number of the briefs. I would say two things: One is that that doesn’t really go to the question about whether corporations can be categorically excluded from Alien Tort Statute coverage, which is really the issue that — that was decided by the court below and which was the question presented here. Extraterritoriality has to do with a different kind of issue. I would argue that — I mean, we’ve obviously argued that that’s an issue that ought to be briefed on its own.
This acknowledgement by the petitioners seemed to intensify the court’s concern about whether Congress really intended to go against the weight of world opinion, and about whether even the Constitution might forbid a grant of authority to U.S. courts that would have global reach when no part of a lawsuit had any direct connection to the United States.\(^{19}\)

Given the tenor of the arguments and the justices’ questioning regarding the extraterritorial reach of the ATS, as well as the clear impression that the issue had not been briefed fully, the oral arguments closed under a cloud of uncertainty. Plainly, some justices were interested and motivated to consider the issue — and on March 5 the court took the unusual step of ordering supplemental briefing and reargument of the case — designed to address and resolve the specific issue of extraterritorial liability. As a result, the case was carried over until the court’s next term in the fall of 2012.

CONCLUSIONS

If the court ultimately decides the extraterritoriality issue against the petitioners in \textit{Kiobel} and rules that U.S. courts have no jurisdiction over suits by foreign plaintiffs involving injuries caused by foreign defendants outside of America’s borders, one species of ATS litigation arising from acts and omissions outside the United States may be ended. The question remains, however, regarding whether U.S. courts have jurisdiction to hear ATS cases arising from injuries caused by \textit{American} perpetrators in foreign nations.\(^{20}\)

How the court might rule in such a controversy is difficult to project. Although the court has traditionally indulged a “presumption against extraterritoriality” insofar as jurisdictional issues are concerned,\(^{21}\) the specific grant of jurisdiction by the ATS to foreign citizens, coupled with a clear U.S. interest in redressing injuries caused by its own citizens, may swing the balance toward justiciability. If such a situation arises, the issue of whether corporations, as opposed to individuals, can be sued under the ATS will surely arise again — unless the Supreme Court somehow reaches to decide the question in \textit{Kiobel} as a prophylactic measure.

Until and unless these decisions are made, the scope of liability under the ATS will remain in flux. Although the Supreme Court in \textit{Sosa v. Alvarez-Machain}\(^{22}\) counseled against its expansion, the lower courts have not consistently acted with vigilance to do so. Perhaps the \textit{Sosa} court placed too much trust in the lower judiciary’s common-law prowess to determine the existence of new causes of action and to collect, marshal and reliably weigh international authorities and sources to assist in that decision. It may also have placed to much trust in their ability to contain the new causes of action within reasonable limits. Unfortunately, allegations of heinous misconduct have great power — power that may motivate judicial creativity to reach decisions seemingly unsupported by the international sources upon which they profess to rely.

It is tempting to believe, and perhaps true, that our jurisprudence is infected with a kind of “creeping internationalism.” Perhaps some judges believe that global human rights concerns should be elevated to a position of primacy, and perhaps they are willing to emphasize legal “convergence” over formal subscriptions by participating states. Perhaps they are willing to honor declarations by non-governmental organizations as reliable evidence of customary international law. And perhaps they are ready to lower the “high bar” set by \textit{Sosa} to make federal courts more accessible.
to ATS claimants. If that occurs, those who would make the United States the “courthouse for the world” may find jurists willing to vindicate “universal” principles that are clearly defined only after a lawsuit is filed. Under those circumstances, those who seek global advantages in commerce will face undefined and unpredictable risks, and the world will be transformed into a vastly more dangerous place for commerce and trade.

Political avenues are available to avoid or limit these risks, although it may be difficult to travel them in light of the current political gridlock. They include:

- Legislation providing the executive branch with a formal role in ATS litigation.
- Legislation requiring exhaustion of local remedies in the nation where the tortious conduct allegedly occurred as a prerequisite to filing an ATS claim.
- Legislation providing a clear statute of limitations for ATS cases.
- Legislation defining the causes of action that can be litigated under the ATS.

Any one of these reforms would provide clarity and guidance that is sorely lacking in the current situation. Otherwise, we will be continually relegated to the judicial “laboratories” to make increasingly ad hoc decisions on critical issues of international law and liability. Although difficult cases surely inflame and inspire judicial creativity, as well as public sentiment, perhaps we should reconsider how we mind the doors to American justice. The Supreme Court has a clear opportunity to do so in Kiobel — but we must await its decision next term to see whether the entrance will be more closely guarded.

NOTES


4. See Adam Liptak, Class-Action Firms Extend Reach to Global Rights Cases, N.Y. TiMES, June 3, 2007.


10. 621 F.3d 111 (2d Cir. 2010).

11. The 2nd Circuit’s decision conflicts with the decision of at least four other circuits, all of which have interpreted the ATS to permit suits against corporations in U.S. courts for human rights offenses committed extraterritorially. See Fiano v. Firestone Natural Rubber Co., No. 10-3675 (7th Cir. July 11, 2011); Doe et al. v. Exxon Mobil Corp. et al., No. 09-7125 (D.C. Cir. July 8, 2011); Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Sarei v. Rio Tinto, 487 F.3d 1193 (9th Cir. 2007).
12  621 F.3d at 149.
14  Id. at 4.
15  Id. at 7.
16  Id. at 8.
17  Id. at 12.
18  Id. at 8-9.
19  See Denniston, supra note 13.
20  Interestingly, the U.S. solicitor general argued in favor of extraterritorial liability and urged the court to decide that issue in Sosa — where the injury done by U.S. agents unquestionably occurred in a foreign country. Nevertheless, the court did not do so.

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