

# U.S. Supreme Court Hears Arguments About Corporate Liability Under the Alien Tort Statute and the Torture Victim Protection Act

On February 28, 2012, the U.S. Supreme Court heard arguments in *Kiobel v. Royal Dutch Petroleum Co.* and *Mohamad v. Palestinian Authority*, two much-anticipated cases in which the Court will consider whether corporations can be sued in U.S. courts for alleged complicity in human rights violations committed abroad. The statutes at issue are the Alien Tort Statute (“ATS”), a 223-year-old law that permits non-U.S. citizens to bring civil lawsuits in U.S. courts for violations of the law of nations, and its contemporary counterpart, the Torture Victim Protection Act of 1991 (“TVPA”), which creates a private right of action for U.S. and non-U.S. citizens for torture and extrajudicial killing committed by “[a]n individual” acting under color of foreign law. 28 U.S.C. § 1350 & note.

During the arguments, the Justices pressed the advocates regarding a number of aspects of ATS and TVPA liability, including not only the doctrinal question of corporate liability presented by the petitions, but also broader questions as to the appropriate role of U.S. federal courts as enforcers of international law norms, whether civil enforcement in U.S. courts over conduct occurring abroad may itself violate international law, and the significance of the distinction between liability of individuals, of corporations as employers of those individuals, and of corporations directly. The Supreme Court will issue decisions by the end of its current Term in June 2012.

## Background

The first Congress passed the ATS in 1789, but the statute lay dormant for nearly 200 years, providing jurisdiction in only two cases until a 1980 decision by the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a suit brought by two Paraguayan citizens against the former Inspector General of Police in Paraguay for the alleged torture and murder of their family member in Paraguay. The Second Circuit concluded that whenever an alleged torturer is found and served with process within the borders of the United States (where the former Inspector General then resided), the ATS provides jurisdiction over an alien’s human rights claims.

Since *Filartiga*, plaintiffs have extended their focus beyond foreign officials such as Pena-Irala to lawsuits against corporations for allegedly assisting foreign officials in human rights violations, and have extended their claims beyond torture to a wide variety of alleged violations of customary international law. Frequently, plaintiffs also assert claims for torture or extrajudicial killing under the TVPA, a supplemental statute to the ATS. In 2004, the Supreme Court addressed for the first time the scope of ATS liability for alleged violations of customary international law in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), concluding that a claim based on customary

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international law must be sufficiently “specific, universal, and obligatory” to support a federal remedy, but leaving unresolved whether corporations can be liable under the statute. The Court has not previously addressed the TVPA.

## Corporate Liability Under the ATS and the TVPA

Federal appellate courts have divided recently over whether corporations can be liable under the ATS and the TVPA. The Second Circuit was the first to address head-on the question of corporate liability under the ATS in its decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), holding that corporations are not liable under the statute.

*Kiobel* involved a lawsuit by 12 Nigerian residents who allege that Dutch, British, and Nigerian oil companies aided and abetted the Nigerian government in its efforts to stop protests against oil drilling in the Ogoni region of the Niger Delta, including through torture and murder. In considering whether the court had subject matter jurisdiction over the corporate defendants, the Second Circuit first determined that international—and not domestic—law governs whether corporations are liable. The court then concluded that international law does not recognize a customary international law norm of corporate liability because “no international tribunal has ever held a corporation liable for a violation of the law of nations.” *Id.* at 120.

Since *Kiobel*, the Seventh, Ninth, and D.C. Circuits held that corporations can be liable under the ATS, creating a Circuit split that led to the Supreme Court’s review. *Sarei v. Rio Tinto, PLC*, Nos. 02–56256, 02–56390, 09–56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) (*en banc*); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011). In *Sarei*, the Ninth Circuit rejected the argument that the ATS bars corporate liability, and concluded that the appropriate inquiry is whether international law permits corporate liability for a particular violation of customary international law, which the court concluded it did for genocide and war crimes. The D.C. and Seventh Circuits similarly upheld corporate liability in *Exxon* and *Flomo*, but each held that U.S. federal common law controls, concluding that the Second Circuit’s determination that international law governs corporate liability conflates a cause of action with the remedy.

Federal courts also have divided over the question whether corporations and other non-natural persons can be liable under the TVPA. The Eleventh Circuit held in 2005 that a complaint under the TVPA stated a claim against a corporate defendant in *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005), in contrast to a number of federal district court decisions denying corporate liability under the statute. In 2011, the D.C. Circuit rejected corporate liability under the TVPA in *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011), on the ground that the text of the TVPA, which uses the word “individual” five times in the same sentence—four times to refer to the victim, and once to refer to the perpetrator—only could mean that natural persons could be sued as perpetrators.

The Supreme Court granted petitions for writs of certiorari in *Kiobel* and *Mohamad* to resolve these questions. Interest in these cases has been substantial, as demonstrated by the more than thirty “friend of the court,” or *amicus*, briefs filed in support of petitioners and respondents. The U.S. Solicitor General filed briefs arguing that the Court “may recognize corporate liability in actions under the ATS as a matter of federal common law,” but that the plain language and legislative history of the TVPA demonstrate that corporations cannot be liable under that statute.

## Oral Arguments

The Supreme Court heard arguments in both cases on February 28, 2012. The advocates in *Kiobel* fundamentally divided on whether liability is defined by the identity of the actor, including “whether the perpetrator is a human being or a corporation or another kind of entity,” or by the act—i.e., allegations of crimes against humanity, torture, prolonged arbitrary detention, and extrajudicial executions. Under petitioners’ view, if an act violates international human rights norms, any actor (including corporations) can be liable. Under respondents’ view, the identity of the defendant is determinative, and no international tribunal has imposed civil liability against a corporation for violations of international human rights law.

Some of the Justices, relying on international law, appeared unpersuaded that any actor can be liable for the alleged human rights violations. Only moments into petitioners’ argument, Justice Kennedy (considered to be a key vote in this case) interjected, asking for petitioners’ best authority to refute the argument that “international law does not recognize corporate responsibility for the alleged offenses [at issue] here.” Later, Chief Justice Roberts emphasized that under international law “it is critically pertinent . . . who’s undertaking the conduct that is alleged to violate international norms.” When petitioners could not point to another country that has a similar law permitting the exercise of civil jurisdiction over alleged extraterritorial human rights abuses

to which the nation has no connection, the Chief Justice questioned whether allowing such a suit within the United States itself contravenes international law.

Other Justices questioned whether the absence of authority under international law expressly supporting corporate liability was significant. Justice Kagan stated that most sources of international law “prohibit certain acts” without regard to the actor, and that no express indication of which actors may be liable is required. She appeared to take the view that the mere fact that a corporation previously has not been found liable does not mean that corporations never can be liable. Justice Breyer, noting that Congress originally passed the statute to allow lawsuits for piracy, appeared to see no reason why a hypothetical corporation, “Pirates, Inc.,” could not be liable under the ATS for acts of piracy committed by its employees.

In addition, certain Justices grappled with the basis for finding corporations liable for the acts of their employees, including which law governs that question. For example, Justices Sotomayor, Kagan, and Ginsburg each inquired whether the question was one of vicarious liability, a recognized domestic law principle whereby a principal is responsible for the acts of its agents, or one of direct corporate liability.

Of particular concern to some of the Justices was the application of a U.S. statute to circumstances in which the parties are foreign and the conduct occurred abroad. Justice Alito noted that “there’s no particular connection between the events here and the United States” and asked, “what business does a case like that have in the courts of the United States?” Justice Alito also asked the advocates to consider the purpose of the statute, which was to prevent international tension, and stated that “this kind of lawsuit only creates international tension.” Justice Kennedy stated that under the view presented by the government a U.S. corporation accused of committing human rights violations in the United States could be sued in any country in the world. Counsel for petitioners attempted to draw the Court away from this issue as something that “ought to be briefed on its own” because it was not a part of the questions presented to the Court. But the extraterritorial sweep of the statute is likely to remain a significant factor in the Court’s decision.

The Supreme Court next heard arguments in *Mohamad* to consider corporate liability under the TVPA. Counsel for petitioners appeared to face an uphill battle, attempting to cast doubt on the statute’s use of the word “individual,” focusing instead on the general purpose of tort statutes to provide “compensation, deterrence and accountability.” He reasoned that Congress used the word “individual” to exclude states, and not to exclude corporations. Counsel for respondents countered with the textual argument that “the statute is . . . clear on its face, . . . ‘individual’ carries its ordinary meaning, and the surrounding statutory text confirm that Congress was using ‘individual’ in its ordinary sense.”

Although the Justices engaged in a brisk dialogue, they appeared skeptical of the overall position that a statute that provides for liability of “individuals” could apply to corporations, with Justice Breyer stating early in the argument that petitioners “are on a weak wicket.” Justice Sotomayor noted that Congress used the word “person” elsewhere in the statute, indicating that Congress could have used that word in the liability provision had they chosen to do so. And Justice Roberts noted that Congress used “individual” within the statute to refer to the victim of the torture or extrajudicial killing, which could not include an entity. Justice Kagan offered an assist to the petitioners, questioning under what circumstances the Court should resort to “background norms” to determine Congressional intent “rather than the words in the statute that they passed.”

## Conclusion

The arguments in *Kiobel* and *Mohamad* reveal potential divisions on the Supreme Court regarding the question of corporate liability under the ATS and the TVPA. Although questioning at oral argument is a limited predictor of outcome, the Court appears poised to decide that the TVPA does not impose liability on corporations. A decision regarding the ATS is more difficult to predict, and could rest on any number of the grounds articulated during argument and in the myriad of briefs. Decisions are expected by the end of June 2012.

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