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2013 Review: US Federal Courts Address Jurisdiction Over Cases Involving Alleged Human Rights Abuses Committed Abroad

The US Supreme Court's 2013 decision in *Kiobel v. Royal Dutch Petroleum Co.*[1] limiting the extraterritorial reach of the Alien Tort Statute ("ATS") dominated the year's news for human rights litigation. In 2014, plaintiffs and defendants will continue to fight in the lower courts to define the scope of the Supreme Court's ruling. In the meantime, a pending Supreme Court decision promises to further address the extraterritorial reach of US law.

Litigation Under the ATS

The ATS provides that the US "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] In 1980 the US Court of Appeals for the Second Circuit ruled in *Filártiga v. Peña-Irala*,[3] a lawsuit brought by two Paraguayan citizens against the former Inspector General of Police of Paraguay for the alleged torture and murder of their family member in Paraguay, that the ATS provides jurisdiction over an alien's human rights claims against another alien involving conduct outside of the United States. Since this ruling, victims of human rights abuses committed abroad have used the statute to bring high stakes and high profile litigation in the United States, often against multinational corporations.

The *Kiobel* Decision

Kiobel involved a lawsuit by twelve Nigerians in US federal court who alleged that Dutch, British, and Nigerian oil companies aided and abetted the Nigerian government in committing human rights violations in connection with its efforts to stop protests against oil drilling in Nigeria. Although the Supreme Court initially agreed to consider only whether corporations can be liable under the ATS (or whether the law is limited to suits against natural persons), it later expanded its inquiry to whether the statute applies to conduct occurring outside the United States at all. In a majority opinion authored by Chief Justice Roberts, the Supreme Court held that courts should apply the "presumption against extraterritorial application" of federal law to the ATS. It further held that petitioners had failed to overcome the presumption where "all the relevant conduct took place outside the United States" and the plaintiffs and defendants were not US persons. Significantly, all nine Justices agreed with the outcome in *Kiobel*, with

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[1] 133 S. Ct. 1659 (2013).
[2] 28 U.S.C. § 1350.
[3] 630 F.2d 876 (2d Cir. 1980).

Justices Kennedy, Alito, and Breyer (the latter concurring only in the judgment) writing separately to express a variety of views on the domestic connections necessary to state a claim under the ATS.

The Court in *Kiobel* left open the possibility that jurisdiction under the ATS could be appropriate for claims that "touch and concern the territory of the United States ... with sufficient force to displace the presumption against extraterritorial application." Significantly for multinational corporations with US branches or subsidiaries, however, the Court held that because "[c]orporations are often present in many countries ... it would reach too far to say that mere corporate presence [in the United States] suffices." The Court did not address the original question whether corporations may be liable under the ATS, leaving in place the split among the Circuit courts that led to the Court's original decision to hear the case, with the US Court of Appeals for the Second Circuit holding that corporations may not be liable, and the US Courts of Appeals for the Seventh, Ninth, and D.C. Circuits holding that they may.

Lower Courts' Reactions to *Kiobel*

Since the *Kiobel* decision, a number of courts have dismissed pending ATS claims and cases on the ground that the extraterritorial nature of the allegations did not permit liability. In *Balintulo v. Daimler AG*,[4] a ten-year-old case brought on behalf of victims of crimes of apartheid in South Africa against multinational corporations that did business in South Africa during apartheid, the US Court of Appeals for the Second Circuit rejected the plaintiffs' argument that "whether the relevant conduct occurred abroad is simply one prong of a multifactor test, and the ATS still reaches extraterritorial conduct when the defendant is an American national." The Second Circuit observed that "the Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States," and concluded that "if all of the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*." For procedural reasons, the Second Circuit remanded the case to the lower court so that the defendants could move to dismiss the pleadings. In a case involving allegations of extrajudicial killings relating to a mining operation in Colombia, *Giraldo v. Drummond Company, Inc.*,[5] the US District Court for the Northern District of Alabama addressed arguments that some of the conduct at issue occurred in the United States and thus "touched and concerned" the United States. The District Court first held that the operative conduct all occurred in Colombia and required judgment against the plaintiffs. The District Court then observed that even if some of the conduct occurred in Alabama (the headquarters of the mining company), "[w]here a complaint alleges activity in both foreign and domestic spheres, an extraterritorial application of a statute arises *only* if the event on which the statute *focuses* did not occur abroad. Of course, the ATS *focuses* on the torts of extrajudicial killings and war crimes (violations of the law of nations), and ... the tort at issue occurred abroad, in Colombia, and *not* in the United States." In *Al-Shamari v. CACI International, Inc.*,[6] a case brought by four Iraqi citizens alleging that they were abused and tortured by a private military contractor during their detention in Abu Ghraib, Iraq, the US District Court for the Eastern District of Virginia first rejected the argument that the prison was "de facto" a territory of the United States, and then addressed plaintiffs' arguments that the conduct "touched and concerned" the United States. According to the District Court, the presumption against extraterritoriality provides a bright-line rule, and the ATS does not provide jurisdiction over claims that "involve tortious conduct occurring exclusively outside the United States."

Only a handful of lower courts have found conduct that touches and concerns the United States with sufficient force to state a claim under the ATS, and all of these cases involved individual defendants—none involved multinational corporations. For example, in *Mwani v. Bin Laden*,[7] the US District Court for the District of Columbia found that a terrorist attack on a US Embassy in Nairobi that "1) was plotted in part within the United States, and 2) was directed at a United States Embassy and its employees" "touched and concerned the United States with sufficient force to displace the presumption against extraterritorial

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[4] 727 F.3d 174 (2d Cir. 2013).
[5] No. 2:09–CV–1041–RDP, 2013 WL 3873960 (N.D. Ala. July 25, 2013).
[6] No. 1:08-cv-827 (GBL/JFA), 2013 WL 3229720 (E.D.V.A. June 25, 2013).
[7] No. 99-125 (JMF), 2013 WL 2325166 (D.D.C. May 29, 2013).

application of the ATS." In *Sexual Minorities Uganda v. Lively*,[8] the US District Court for the District of Massachusetts found that allegations that a US citizen who allegedly led a campaign of persecution against the LGBT community in Uganda were distinguishable from *Kiobel* because the defendant was a US citizen and the alleged acts "took place to a substantial degree within the United States, over many years, with only infrequent actual visits to Uganda." Finally, in *Ahmed v. Magan*,[9] the US District Court for the Southern District of Ohio found that a defendant accused of aiding and abetting the arbitrary detention and cruel, inhuman, and degrading treatment of the plaintiff in Somalia had waived any argument based on *Kiobel* because he did not raise it in a motion to dismiss or for summary judgment. In the most far-reaching statement regarding jurisdiction over conduct outside the United States, the court went on to note that "U.S. residents who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of the courts," and found that because the defendant was a permanent resident of the United States the presumption against extraterritoriality was overcome.

The Question of Corporate Liability

A handful of decisions issued after *Kiobel* have addressed the question of corporate liability under the ATS, suggesting that it remains significant notwithstanding the Supreme Court's restrictive jurisdictional ruling. For example, the US Court of Appeals for the Ninth Circuit issued an order in *Doe v. Nestle*,[10] a case involving alleged child slave labor on cocoa plantations in Mali, that "corporations can face liability for claims under the Alien Tort Statute" based on what it described as "dicta [in *Kiobel*] that corporations may be liable under [the] ATS so long as [the] presumption against extraterritorial application is overcome"—apparently drawing a positive inference from the Supreme Court's statement that "mere corporate presence" is not enough to overcome the presumption. In addition, the import of the Supreme Court's decision not to address the issue of corporate liability in *Kiobel* for the Second Circuit's prior decision rejecting corporate liability is the subject to two pending cases in New York, *In re South African Apartheid Litigation*[11] and *Licci ex rel. Licci v. Lebanese Canadian Bank*.[12]

Cases Going Forward

Cases further defining the reach of *Kiobel* will likely continue in 2014. In the meantime, the US Supreme Court is poised in a further pending case to address additional questions of US courts' jurisdiction in cases involving allegations of human rights abuses committed by corporations outside the United States. On October 15, 2013, the Court heard arguments in *Daimler AG v. Bauman*, a lawsuit brought by workers at an Argentina-based plant operated by Mercedes-Benz, a wholly owned subsidiary of Daimler, for the plant's role in publicizing its employees union status thus making them targets of the Argentine military and police forces in Argentina's "Dirty War." The Court considered "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State."[13] Based on the Justices' questions and reactions during oral argument—which generally expressed skepticism as to the suggestion that corporate presence in a state provides jurisdiction over a foreign affiliate—the Supreme Court appears poised to issue a ruling further limiting the ability of US courts to hear cases involving the foreign conduct of a foreign corporation. If so, this would continue a general trend by the Court to limit the application of US laws abroad, first noted in a 2010 case involving the securities laws[14] and continuing through *Kiobel*.

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[8] No. 12-cv-30051-MAP, 2013 WL 4130756 (D. Mass. August 14, 2013).
[9] No. 2:10-cv-00342, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013).
[10] No. 10–56739, 2013 WL 6670945 (9th Cir. Dec. 19, 2013).
[11] Nos. 02 MDL 1499(SAS), 02 Civ. 4712(SAS), Civ. 6218(SAS), Civ. 1024(SAS), 03 Civ. 4524(SAS), 2013 WL 6813877 (S.D.N.Y. Dec. 26, 2013).
[12] 732 F.3d 161 (2d Cir. 2013), pet reh'g pending.
[13] Petition for a Writ of Certiorari, *Daimler AG v. Bauman*, No. 11-965 (U.S. Feb. 6, 2012).
[14] *Morrison v. National Australian Bank Ltd.*, 130 S. Ct. 2869 (2010).

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