

Reproduced with permission from The United States Law Week, 80 U.S.L.W 603, 11/08/2011. Copyright © 2011 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Alien Tort Statute

The Alien Tort Statute: Supreme Court to Provide Much Needed Guidance



BY JEREMY D. FREY AND FRANK C. RAZZANO

The U.S. Supreme Court has granted certiorari in the Alien Tort Statute¹ case of *Kiobel v. Royal Dutch Petroleum Co.*² to resolve whether a corporation can be a defendant in an ATS case. The same day, the court also granted certiorari in *Mohamad v.*

¹ 28 U.S.C. § 1350 (District courts shall have “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”).

² 621 F.3d 111, 79 U.S.L.W. 1364 (2d Cir. 2010), cert. granted, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 10-1491).

Jeremy D. Frey (freyj@pepperlaw.com) is a partner at Pepper Hamilton LLP in Philadelphia and Princeton, N.J. His practice focuses on white collar criminal defense and civil litigation. He is a former federal prosecutor, and a member of the advisory boards of BNA’s White Collar Crime Report and Criminal Law Reporter.

Frank C. Razzano (razzanof@pepperlaw.com) is a partner at Pepper Hamilton LLP in Washington D.C. His practice focuses on securities litigation, white collar criminal defense and civil litigation. He is a former federal prosecutor, and teaches law at the University of Maryland School of Law.

*Rajoub*³ to decide a similar issue under the Torture Victim Protection Act⁴ of whether that statute permits civil actions against defendants which are not natural persons.

Currently the jurisprudence of these statutes is in chaos, particularly with respect to the ATS.⁵

The ATS

Under the ATS, there is no certainty about who can be a plaintiff, who can be a defendant, and precisely what torts provide a basis for an ATS cause of action. Additionally, lower federal courts have reached no consensus on other basic questions about the statute, including, for example, whether there can be aiding and abetting liability, and if so, what is the required mental state. It is unknown what if any nexus an ATS case must have to the United States, or whether it can be wholly extraterritorial or “foreign-cubed.”⁶ The ATS is a piece of unfinished business despite its ancient lineage in the Judiciary Act of 1789. It is, in short, an exotic in the jurisprudence of nations.

The ATS is “unlike any other in American law and of a kind apparently unknown to any other legal system in the world.”⁷ There is small wonder that determining the reach of the law is so elusive, since the ATS, with its scant text, provided jurisdiction for only one case in the first 170 years of its history.

In 1980, the Second Circuit issued its landmark ruling in *Filartiga v. Pena-Irala*,⁸ which re-imagined the

³ 634 F.3d 604, 79 U.S.L.W. 2266 (D.C. Cir. 2011), cert. granted, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-88).

⁴ 28 U.S.C. § 1350 note (liability for an “individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture . . . or (2) subjects an individual to extrajudicial killing . . .”).

⁵ Razzano, F. and Frey, J., *More on the Alien Tort Statute: John Doe VIII and Flomo Rulings Add to the Chaos*, 80 U.S.L.W. 285.

⁶ Razzano, F. and Frey, J., *Limitations on the Jurisdiction and Reach of the Alien Tort Statute*, 79 U.S.L.W. 2311.

⁷ *Kiobel*, 621 F.3d at 115.

⁸ 630 F. 2d 876 (2d Cir. 1980).

ATS as a basis for federal courts to address human rights abuses occurring anywhere in the world. The legacy of *Filartiga* is a clouded jurisprudence that has occupied the lower federal courts in sweeping historical discourses and uncomfortable adventures in discerning international law norms.

While some applaud *Filartiga*'s warrant for internationalism, others find risible that the First Congress possibly intended to open the federal courts to tort claims against foreign governments, their proxies, and vendors for mistreatment of their own citizens in foreign lands. Many of these ATS suits arise out of violence occurring as a result of foreign political disputes and armed conflicts. As a result, the recent history of the ATS is a lurching and inconsistent search for limiting principles. *Kiobel* will be only the second time in the nation's history that the Supreme Court will offer substantial guidance on the ATS.⁹

Kiobel v. Royal Dutch Petroleum Co.

Kiobel involved ATS claims by Nigerian citizens against Dutch, British, and Nigerian corporate defendants alleging that the defendants aided and abetted violations of the law of nations by the Nigerian government in physically attacking and killing Nigerians who were resisting oil exploration in Nigeria. In a long scholarly opinion, the U.S. Court of Appeals for the Second Circuit held that customary international law governs the court's subject matter jurisdiction and that violations of the law of nations are within the scope of the ATS. 621 F. 3d at 125-45. After reviewing international law and its various sources, the court found that corporate liability "is not recognized as a 'specific, universal and obligatory' norm," and therefore not a "rule of customary international law that we may apply under ATS." *Id.* at 145. The Second Circuit upheld the dismissal of the complaint for lack of subject matter jurisdiction. *Id.* at 149.

The Second Circuit's *Kiobel* opinion is a departure from contrary holdings by the Ninth, Eleventh, and D.C.

⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Circuits.¹⁰ To resolve this circuit split, the Supreme Court granted certiorari to decide both whether the issue of corporate liability is a merits or subject matter jurisdiction issue, and also whether corporations can be proper ATS defendants at all.

Mohamad v. Rajoub

Rajoub involved TVPA claims brought by Azzam Rahim's sons and widow claiming that Rahim had been tortured and killed by the Palestinian Authority and the Palestine Liberation Organization in the West Bank in 1995. The defendants claimed that the TVPA permitted suit only against an individual, or natural person, and not against an organization. The court in *Rajoub* held that the use of "individual" in the statute refers only to a natural person, and an entity is not a proper defendant under the TVPA. In granting certiorari in *Rajoub*, the Supreme Court will resolve this issue, and likely also provide guidance on the relationship between causes of action under the ATS and the related TVPA.

For most, the Supreme Court's grant of certiorari in *Kiobel* and *Rajoub* cannot have come soon enough. The ATS and, to a lesser extent the TVPA, have become potent vehicles for tort suits brought by foreign citizens for injuries in foreign lands against foreign and domestic businesses, including banks, financial services businesses, the mining and extraction industry, government contractors and pharmaceutical companies, among others. The growth of such torts suits is warmly embraced by some as another example of American exceptionalism, while being criticized by others as interfering in the internal affairs of foreign nations and promoting "the use of our courts to extort settlements" from corporate defendants.¹¹

¹⁰ *Sarei v. Rio Tinto*, 80 U.S.L.W. 550 (9th Cir., Oct. 25, 2011); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 78 U.S.L.W. 1089 (11th Cir. 2009); *John Doe VIII v. Exxon Mobil Corp.*, 80 U.S.L.W. 85 (D.C. Cir. July 8, 2011).

¹¹ *Kiobel*, 642 F.3d 268, 271-2 (2d Cir. 2011) (concurring opinion of Chief Justice Dennis Jacobs in denying rehearing en banc).

Claims Against Corporations Under Alien Tort Statute Increasing

According to the U.S. Chamber of Commerce Institute for Legal Reform, as of June 2010:

- Since its enactment in 1789, about 150 ATS cases have been brought against corporations, with about 80 percent of those filed in the past 15 years.
- Since 1994, about eight cases have been filed per year with ATS claims.
- Of the total 150 filed ATS cases, about 50 of them are pending at any given time in federal district and circuit courts.
- ATS cases against corporations have arisen from 60 different countries.
- ATS cases have targeted about 21 different industries—primarily the extractive industry, financial services, food and beverage, manufacturing, and communications/media.
- ATS cases primarily involve allegations focusing on acts by security agents, labor related issues, environmental claims, and suits against companies for providing support to allegedly repressive political regimes and foreign combatants.
- Settlements and judgments have reportedly ranged from \$1.5 million to \$80 million in recent years.

Sorting through the many issues that have been raised by the ATS and the TVPA has become burdensome to litigants and the lower federal courts alike. The task before the Supreme Court in *Kiobel* and *Rajoub* is no trivial undertaking. The justices are presented with a statute with few defining features, a seeming global embrace, and yet one with the most venerable pedigree dating to the nation's founding.

The need to cabin the ATS finds support in the First Congress's original purpose to avoid disruption of our foreign relations.¹² It is way too facile to argue that foreign policy implications do not inhere in ATS suits simply because the international law torts must involve universally condemned conduct. It's not much of a stretch

that the courts of many nations might find actionable under the same principles our recent incursion into Pakistan to kill the terrorist bin Laden based on executive authority.

The point is that interpreting the ATS to assert universal jurisdiction of the federal courts over international law torts—limited only by due process for defendants—invites foreign nations and their courts to return the favor. This is not just bad policy. It promotes disorder among the community of nations. Hopefully, the Supreme Court will seize the opportunity to bring much needed clarity and impose additional limiting principles on the reach and jurisdiction of the ATS and the TVPA.

¹² Razzano, F. and Frey, J., *Limitations on the Jurisdiction and Reach of the Alien Tort Statute*, 79 U.S.L.W. 2311.