Kiobel v. Royal Dutch Petroleum Co.: Corporate Liability and Extraterritoriality Under the Alien Tort Statute

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Summary

The First Congress enacted the Alien Tort Statute (ATS) against a backdrop of concern about the ability of the United States to carry out its international obligations. Now codified at 28 U.S.C. § 1350, the ATS grants federal district courts jurisdiction over "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." The meaning of this terse provision has confounded judges and scholars for over 200 years, and has prompted three seemingly simple, yet elusive questions: *what* conduct comes within its ambit; *who* may be held liable; and *where* does it apply?

These questions are the focal point of *Kiobel v. Royal Dutch Petroleum Co*., a case pending before the United States Supreme Court. There, a group of Nigerians sued two foreign oil corporations, the Royal Dutch Petroleum Company (Royal Dutch) and the Shell Petroleum Development Company of Nigeria, Ltd. (Shell), for allegedly aiding and abetting the Nigerian government in committing widespread human rights abuses against Nigerian residents. The U.S. Court of Appeals for the Second Circuit was asked whether corporations could be held accountable for human rights violations under the ATS, a question long fermenting in the federal courts. The court ruled that there was not a sufficient norm of customary international law that would permit such liability. The Seventh, Ninth, Eleventh, and District of Columbia Courts of Appeals have each reached the opposite conclusion, although each with differing rationales.

In 2011, the Supreme Court granted the Nigerian plaintiffs' request for review on this question of corporate liability. At oral argument on February 28, 2011, the Justices' questions went beyond mere corporate liability to a more fundamental question: whether the ATS could ever be applied extraterritorially to cover acts committed by a foreign defendant against a foreign plaintiff on foreign soil. The parties re-briefed the Court on this issue, and oral arguments were held on October 1, 2012.

The outcome of the Supreme Court's ruling in *Kiobel* on both the issue of corporate liability and the extraterritorial application of the ATS will have many significant consequences for corporate strategy, human rights litigation, and U.S. foreign policy. Sensing the potential importance of this upcoming decision, some of the largest U.S. corporations filed briefs in support of the corporate defendants. Likewise, human rights groups and plaintiffs' lawyers have submitted briefs backing the Nigerian plaintiffs. The Department of Justice has also weighed in due to its concern with the foreign policy impact of suing foreign entities in U.S. courts for acts committed in the territory of a sovereign nation.

Whatever the outcome, Congress could clarify the scope and content of the ATS—including whether it covers corporations and whether it applies extraterritorially.

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Introduction

The First Congress enacted the Alien Tort Statute (ATS) against a backdrop of concern about the ability of the United States to carry out its international obligations.[1] In its present form, the statute provides that the federal 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] This statute lay dormant for almost 200 years, until a federal court in the 1980s permitted a human rights abuse case to go forward based on the ATS. This led human rights advocates and plaintiffs lawyers to attempt to use the ATS as a vehicle for remedying human rights violations across the globe. In 2004, the U.S. Supreme Court addressed ATS's enigmatic language in *Sosa v. Alvarez-Machain*, ruling that any new cause of action recognized under the ATS for a violation of the law of nations must be a norm of near universal acceptance among the international community.[3] Although *Sosa* answered *what* norms of customary international law were cognizable under the ATS, questions still remained whether ATS provides jurisdiction over tort actions brought against corporations and the extent to which it applies to activities occurring within the territory of a foreign sovereign.

In *Kiobel v. Royal Dutch Petroleum Co.*, a case filed by Nigerian residents against several foreign oil companies for alleged human rights abuses occurring in Nigeria, the U.S. Court of Appeals for the Second Circuit dismissed the claims against the companies, concluding that corporate liability for torts in violation of the law of nations had not reached the level of universality as required under *Sosa*.[4] The Seventh,[5] Ninth,[6] Eleventh,[7] and District of Columbia[8] Courts of Appeals have each reached the opposite conclusion, although each with differing rationales. The Supreme Court accepted review of this question of corporate liability, and subsequently requested re-briefing by the parties as to whether the ATS can apply to torts committed on foreign soil.

Both multi-national corporations and human rights advocates have much at stake with Supreme Court's *Kiobel* ruling. Some argue that a ruling denying corporate liability could derail one of the primary vehicles used by victims to seek restitution for past human rights abuses. There does not appear to be a similar statute in any other legal system in the world. Others suggest that a win for the Nigerian plaintiffs, on the other hand, might cause corporations to rethink their approach to operating in developing nations where they run a higher risk of working with regimes which perpetrate human rights abuses, thus increasing their chances of being subject to large civil damage awards.

[1] Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77 (codified at 28 U.S.C. § 1350). For a thorough treatment of the legislative history and background of the ATS, see CRS Report RL32118, *The Alien Tort Statute: Legislative History and Executive Branch Views*, by Jennifer K. Elsea.

[2] 28 U.S.C. § 1350.

[3] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[4] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010).

[5] Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1019 (2011).

[6] Sarei v. Rio Tinto, 671 F.3d 736, 744 (9th Cir. 2011).

[7] Romero v. Drummond Co., Inc., 552 F.3d 1303, 1309 (11th Cir. 2008).

[8] Doe v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011).

This report will briefly survey the background of the Alien Tort Statute. It will then look at the Second Circuit decision in *Kiobel* and its rationale for denying ATS jurisdiction over tort actions against corporations under the law of nations. Next, it will survey rulings from the Seventh, Ninth, Eleventh, and D.C. Circuits which have reached the opposite conclusion. It will then survey the arguments for and against permitting extraterritorial application of the ATS. Finally, this report will survey possible congressional responses to both the corporate liability and extraterritoriality question.

Background on the Alien Tort Statute

From the moment the American colonies declared independence from Britain—thus, bringing this new nation onto the world stage—it was "bound to receive the law of nations.... "[9] The Founders sought to guarantee to the world that this fledgling nation could uphold this international obligation, but the relatively weak Articles of Confederation hamstrung its ability to act.[10] This was one of the concerns raised by the Framers at the Constitutional Convention. There, Edmund Randolph expressed concern that the Articles of Confederation did not permit the Continental Congress to create punishments for violations of the law of nations, and that only a few states had adequate remedies for attacks on ambassadors.[11] He worried these infractions could plunge the country into war.[12] Powerless, Congress passed a resolution in 1781 imploring the states to provide a remedy.[13] These recommendations closely paralleled William Blackstone's three prototypical violations of the law of nations: "1. Violation of safe conducts; 2. Infringement of the rights of embassadors; and 3. Piracy."[14] It appears, however, that only one state (Connecticut) heeded this call. [15]

The Continental Congress's impotence was brought into sharp relief three years later with an assault on the French representative to America by a "French adventurer."[16] On May 17, 1784, a French citizen Chevalier De Longchamps, known by some to be an "obscure and worthless

[9] Ware v. Hylton, 3 Dall. 199, 281 (1796) (Wilson, J.).

[10] *Sosa*, 542 U.S. at 715-16.

[11] 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 24-25 (Farrand. ed., 1966).

[12] *Id.*

[13] 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-37 (1781). Congress resolved:

> That it be recommended to the legislatures of the several states to provide expeditious, exemplary and adequate punishment:
>
> First. For the violation of safe conducts or passports, expressly granted under the authority of Congress to the subjects of a foreign power in time of war:
>
> Secondly. For the commission of acts of hostility against such as are in amity, league or truce with the United States, or who are within the same, under a general implied safe conduct:
>
> Thirdly. For the infractions of immunities of ambassadors and other public ministers, authorised and received as such by the United States ...: and,
>
> Fourthly. For infractions of treaties and conventions to which the United States are a party.

[14] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769).

Id.

[15] William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 228-29 (1996).

[16] Wiiliam R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations,* 18 CONN. L. REV. 467, 491 (1986).

character,"[17] threatened the head of the French legation, Frances Barbe Marbois.[18] Two days later Longchamps attacked Marbois on a public street in Philadelphia.[19] The international community was outraged by this attack and called upon the Continental Congress to create a civil remedy for future violations of the law of nations.[20] Congress, however, was still powerless to act. It noted that in a federal union, the states remain "distinct and sovereign" and Congress could only play an advisory role.[21]

But soon thereafter, the Constitution, ratified in 1789, vested the U.S. Congress with broad powers to legislate in the realm of international law.[22] The First Congress wasted little time, enacting the ATS as part of the Judiciary Act of 1789.[23] Currently codified at 28 U.S.C. § 1350, the ATS provides, in full: "The 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."[24]

For almost two centuries the ATS went virtually unused. Only two federal district courts invoked their jurisdiction,[25] until the 1980s when the Second Circuit Court of Appeals in *Filartiga v. Pena-Irala* held that torture under color of official authority violated accepted norms of international law and thus permitted a claim by a Paraguayan citizen, against a Paraguayan police official, for torture committed in Paraguay to go forward under the ATS.[26] The Supreme Court later referred to *Filartiga* as "the birth of the modern line" of ATS cases.[27]

In its only case interpreting the ATS, the Supreme Court in *Sosa v. Alvarez-Machain* probed what laws of nation violations were actionable under the ATS.[28] There, Sosa and other Mexican

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[17] *Id.* (citing Letter from Thomas Jefferson to James Madison (May 25, 1784)).

[18] Respublica v. De Longchamps, 1 U.S. 111, 111 (1784).

[19] *Id.*

[20] Casto, *supra* note 16, at 492.

[21] 28 JOURNALS OF THE CONSTITUTIONAL CONVENTION 314 (1785).

[22] *See, e.g.*, U.S. Const. art. I, § 8, cl. 10 ("The Congress shall have Power to ... define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations.... ").

[23] Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77.

[24] 28 U.S.C. § 1350.

[25] Adra v. Clift, 195 F.Supp. 857 (D. Md. 1961); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795).

[26] Filartiga v. Pena-Irala, 630 F.2d 876, 878-89 (2d Cir. 1980).

[27] Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 (2004).

[28] *Id.* at 692. Although the case dealt with conduct that occurred in Mexico, the Court does not seem to have considered the question of the extraterritoriality of the ATS, as it now faces in *Kiobel*. Supporting this proposition are the questions presented to the Court in *Sosa*:

> 1. Whether the ATA [Alien Tort Act], is simply a grant of jurisdiction, or whether, in addition to granting jurisdiction, it provides a cause of action upon which aliens may sue for torts in violation of nations or treaties of the United States.
>
> 2. If the ATA provides a cause of action, whether the actions it authorizes are limited to suits for violations of jus cogens norms of international law.
>
> 3. Whether a detention that last less than 24 hours, results in no physical harm to the detainee, and is undertaken by a private individual under instructions from senior law enforcement officials, constitutes a tort in violation of the law of nations actionable under the ATA.

Questions Presented, *Sosa*, 542 U.S. 692, *available at* http://www.supremecourt.gov/qp/03-00339qp.pdf.

None of these three questions pertain to the locus of the alleged violation, but only to the conduct that is actionable under the ATS—that is, what violations of international law norms will be recognized through (continued...)

nationals were allegedly directed by the Drug Enforcement Agency (DEA) to abduct Alvarez-Machain from Mexico and bring him to the United States to stand trial for the death of a DEA agent. Alvarez-Machain sued Sosa under the ATS for arbitrary arrest and detention. The Court observed that the ATS was a jurisdictional statute, meaning it only provided federal courts the authority to hear a case, and did not confer an express right to sue for international law violations. However, the Court concluded that "the jurisdictional grant is best read as having been enacted on the understanding that common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time[]" the ATS became law.[29] Writing for the Court, Justice Souter cautioned that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted"—piracy, attacks on ambassadors, and violation of safe conducts.[30] At bottom, any new claims under the ATS must be of a norm that is "specific, universal, and obligatory" under customary international law.[31]

Although *Sosa* provides a test for determining *what* conduct is actionable under the ATS, it neither delineates *who* may be sued (e.g., natural persons or corporations) nor *where* the conduct may occur (e.g., domestically or extraterritorially). These questions have been raised in *Kiobel v. Royal Dutch Petroleum Co.*

Kiobel v. Royal Dutch Petroleum Co.

In *Kiobel v. Royal Dutch Petroleum Co.*, 12 Nigerian plaintiffs brought suit on behalf of themselves and a putative class against Shell and Royal Dutch in 2002 under the ATS for alleged human rights violations.[32] The Second Circuit ultimately ruled that the ATS does not provide jurisdiction over tort actions against corporations in violation of the law of nations.[33] This creates a split in the circuit courts as the Seventh, Ninth, Eleventh, and D.C. Circuit Courts of Appeals have imposed liability against corporations under the ATS.

In 1958, Shell began oil explorations in Nigeria.[34] The native Ogoni people protested the environmental effects of these operations, forming the "Movement for Survival of Ogoni People." The *Kiobel* plaintiffs allege that in an effort to suppress this movement, the Nigerian military tortured, detained, and killed many Ogoni people.[35] The federal district court dismissed the plaintiffs' claims for "aiding and abetting property destruction; forced exile; extrajudicial killings; and violations of the rights to life, liberty, and security, and association" as not meeting *Sosa*'s

(...continued)

federal common law causes of action.

[29] *Sosa*, 542 U.S. at 724.

[30] *Id.* at 732.

[31] *Id.* at 733 (quoting *In re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).

[32] Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457 (S.D.N.Y. 2006).

[33] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010).

[34] These facts derive from the Second Circuit Court of Appeals opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010). The panel accepted as true the facts as alleged by the plaintiffs as required by the procedural posture of the case—a motion to dismiss under F.R.C.P. 12(b)(6). This report will base its brief recounting of the facts on this account, as this is the factual record presented to the Supreme Court.

[35] *Kiobel*, 621 F.3d at 123.

particularity requirement.[36] The district court, however, allowed the claims for "aiding and abetting arbitrary arrest and detention; crimes against humanity; and torture or cruel, inhuman, and degrading treatment" to go forward.[37]

On appeal, the Second Circuit Court of Appeals raised the question of corporate liability under the ATS *sua sponte* as a jurisdictional question. It ruled that the plaintiffs' remaining claims must be dismissed because "customary international law of human rights has not to date recognized liability for corporations that violate its norms."[38]

The Second Circuit majority opinion put forth a two-step analytical approach to decide if corporate civil tort liability may lie under the ATS.[39] At the first step, the court examined which law should govern: domestic law or international law. Judge Cabranes, writing for the majority, first noted that the "substantive law that determines our jurisdiction under the ATS is neither the domestic law of the United States nor the domestic law of any other country."[40] Instead, "the ATS requires federal courts to look beyond rules of domestic law—however well-established they may be—to examine the specific and universally accepted rules that the nations of the world treat as binding *in their dealings with one another*."[41] In other words, international law is determinative. This was based on two rationales. First, the court looked to past examples of international tribunals to determine which body of law each applied. The court observed that the most prominent international tribunal, the International Military Tribunal at Nuremburg, had applied rules of international law, not the domestic law of any particular country. Second, the majority interpreted an ambiguous (and highly contentious) footnote from the Supreme Court's decision in *Sosa* as requiring application of international law to determine corporate liability.[42] In *Sosa*, the Supreme Court observed that in addition to determining "whether a norm is sufficiently definite to support a cause of action," that courts should also consider "whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[43] The majority interpreted this phrasing as requiring "*international law* to determine our jurisdiction over ATS claims against a particular class of defendant, such as corporations."[44] International law had been applied by the Second Circuit in prior cases to determine whether state actors,[45] private individuals,[46] and aiders and abettors[47] fell within ATS's ambit. Using this approach to determine whether corporate actors could be held similarly liable was, in the court's eyes, a simple extension of this principle.

[36] *Id.* at 124.

[37] *Id.*

[38] *Id.* at 124-25.

[39] *Id.* at 125.

[40] *Id.* at 118.

[41] *Id.*

[42] *Id.* at 127.

[43] *Id.* at 127 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004) (emphasis added in *Kiobel*)).

[44] *Id.*

[45] Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

[46] Kadic v. Karadzic, 70 F.3d 232, 239-41 (2d. Cir. 1995).

[47] Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258-59 (2d 2009).

Next, the court surveyed sources of international law to determine if corporate liability could be imposed. The Second Circuit first turned to the Nuremburg tribunals.[48] At the end of WWII, the Allied Powers established the Charter of the International Military Tribunal (commonly known as the "London Charter") to prosecute Nazi war criminals for the atrocities and crimes committed during the war.[49] Article 6 of the London Charter declared that the tribunal was established to punish persons "whether as individuals or as members of organizations.... "[50] The *Kiobel* majority offered this as proof that the "single most important source of modern customary international law concerning liability for violations of fundamental human rights" did not permit corporate liability, but was singly focused on the culpability of individual perpetrators.[51] Additionally, at Nuremburg, 24 executives of I.G. Farben, the German chemical concern that facilitated the German war machine, including by supplying the Nazis with the chemical compound used to kill millions in the gas chambers at Auschwitz, were charged as individuals. The corporate entity was neither charged nor indicted. The *Kiobel* court observed that "in declining to impose corporate liability under international law in the case of the most nefarious corporate enterprise known to the civilized world, while prosecuting the men who led I.G. Farben, the military tribunals ... expressly defined liability under the law of nations as liability that could not be divorced from *individual* moral responsibility."[52] The court also offered more recent examples such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, which confined jurisdiction to natural, not juridical, persons.[53]

After reviewing other sources of law, including international treaties, the *Kiobel* court concluded that corporate liability under the ATS was not permissible:

> No corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernible, much less universal, acceptance among nations of the world in their relations, *inter se*, and it cannot not [sic], as a result, form the basis of a suit under the ATS.[54]

The Supreme Court granted review on this issue of corporate liability and heard oral arguments on February 28, 2011.[55] There, the questions went beyond mere corporate liability to whether the

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[48] *Kiobel*, 621 F.3d at 132.

[49] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544.

[50] 59 Stat. at 1547.

[51] *Kiobel*, 621 F.3d at 132-33.

[52] *Id.* at 135 (emphasis in original).

[53] *Id.* at 136.

[54] *Id.* at 148-49.

[55] A threshold issue also briefed by the parties was whether the question of corporate civil tort liability was a merits question or a question of subject matter jurisdiction under the ATS. In its briefs, the Nigerian plaintiffs argue that ATS's applicability is a merits issue, as it addresses the substantive reach of the statute. Brief for Petitioner at 14, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Dec. 14, 2011). They assert that the Second Circuit improperly raised the issue of corporate liability on its own motion, although it had never been raised by the defendants in over a decade of litigation. *Id.* The plaintiffs chiefly cite *Morrison v. Nat'l Austl. Bank Ltd.*, for support. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010). In *Morrison*, the primary issue was the whether § 10(b) of the Securities and Exchange Act could be applied to acts by foreign defendants against foreign plaintiffs committed on foreign stock exchanges. The Court observed that "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case. ... It (continued...)

ATS could ever be applied extraterritorially to cover acts committed by a foreign defendant, against a foreign plaintiff, for acts committed on foreign soil. The Court ordered re-briefing on this issue of extraterritoriality and heard oral arguments on October 1, 2012.

Corporate Liability

The issue of corporate liability has created much variance in ATS jurisprudence and prompted scores of analyses from the legal community.[56] Unlike the Second Circuit ruling in *Kiobel*, which seems to have closed the door to ATS-based cases against corporations for torts committed in violation of the law of nations, the Seventh, Ninth, Eleventh, and District of Columbia Circuit Courts of Appeals have either held or assumed that corporations could be culpable under the ATS (though, within these circuits there is significant divergence in approaches). The principal difference between the Second Circuit ruling and that of the majority of the other circuit courts is a debate on choice of law—whether domestic law or international law is determinative. Additionally, these rulings vary considerably in their interpretation of an important footnote in the Supreme Court's *Sosa* ruling.

Before the federal courts were confronted with corporate civil tort liability under the ATS, they first addressed whether private actors (as opposed to state actors) could be held liable under the ATS. In *Filartiga*, the Second Circuit Court of Appeals held that persons acting under color of official authority could be held liable under the ATS. However, the court did not address whether non-state actors could be culpable. Several years after *Filartiga*, Judge Edwards, in his oft-cited concurrence in *Tel-Oren v. Libyan Arab Republic*, opined that although many law of nations violations might require state action, there "were a handful of crimes to which the law of nations attributes individual responsibility."[57]

(...continued)

presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." *Id.* at 2877. The plaintiffs argue that under *Morrison*, the determination whether a statute prohibits an actor's conduct is a substantive, rather than jurisdictional, question. The plaintiffs further point to *Arbaugh v. Y. & H. Corp*, which states that when a "statute does not rank a statutory limitation as jurisdictional, courts should treat the restriction as nonjurisdictional." *Arbaugh v. Y. & H. Corp*., 543 U.S. 516, 500 (2006). Shell and Royal Dutch counter by pointing out that *Sosa* stated that the ATS "is jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject." Brief for Respondents at 12, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Jan, 27, 2012). The defendants assert that because the question of *what* conduct is actionable under the ATS subsumes the question of *who* may violate the law, this converts the question of corporate liability to one of subject matter jurisdiction. *Id.* at 13. Assuming this question is nonjurisdictional, Shell and Royal posit that the Second Circuit's decision to raise it *sua sponte* was nonetheless within its discretion.

[56] *See, e.g.,* Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 355 (2011) ("Customary, as opposed to treaty-based, international law has never recognized the imposition of direct duties on private corporations. Even if some treaties impose direct liability on corporations in some instances ... such treaties do not support a general, across-the-board rule of imposing direct liability on private corporations for any or all violations of customary international law."); Joel Slawotsky, *The Conundrum of Corporate Liability Under the Alien Tort Statute*, 40 GA. J. INT'L & COMP. L. 175, 218 (2011) ("Substantial support exists for the view that corporations should be liable under the ATS. These reasons include: the dearth of proof that corporate defendants were excluded by the statute's drafters; the *Kiobel* court's misplaced reliance on the *Sosa* footnote; the lack of an enforcement mandate in international law; that corporations are subject to civil law and criminal law; and the blurring of the once sharp public-private distinction."); Susan Farbstein et al., *The Alien Tort Statute and Corporate Liability*, 160 U. PA. L. REV. PENNUMBRA 99 (2011) ("[T]he Supreme Court should reverse the Second Circuit's conclusion that corporate liability does not obtain under the Alien Tort Statute (ATS).").

[57] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring).

Kardic v. Karadzic, another landmark ATS case, confronted this issue of individual liability versus state action.[58] In *Kardic*, Croat and Muslim citizens of the internationally recognized nation of Bosnia-Herzegovina alleged that Radovan Karadzic, President of the self-proclaimed Bosnia-Serb republic, commanded military forces to commit gross human rights violations, including torture, war crimes, genocide, and summary executions. The two groups of plaintiffs brought claims under*, inter alia*, the Alien Tort Statute. The District Court for the Southern District of New York dismissed the claims, holding that "acts committed by non-state actors do not violate the law of nations."[59] Because the court did not considered the Bosnia-Serb military faction a "recognized state," the alleged human rights abuses could not be remedied under the ATS.[60] The Second Circuit reversed, holding that under the ATS the law of nations does not confine its reach to state action, but that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[61] The Second Circuit observed that acts such as genocide and war crimes do not require a state actor for ATS liability. Although the court resolved the issue whether the ATS could reach both state and non-state actors, it still did not address the question of corporate liability.

It appears that the first case dealing with corporate liability under the ATS was *Doe v. Unocal Corp*.[62] In that case, villagers from Myanmar, Burma sued Unocal, an United States energy corporation, under the ATS for alleged human rights abuses that occurred while Unocal helped construct a gas pipeline through the Tenasserim region of Myanmar.[63] One of the threshold questions before the court was whether the alleged torts required Unocal to engage in state action.[64] Relying on Judge Edward's concurrence in *Tel-Oren* and the holding in *Kardic*, the Ninth Circuit held that crimes such as slave trading, genocide, and war crimes do not require state action to find an individual liable.[65] Although the panel held that Unocal, a corporation, could be held liable under the ATS, the court did not explicitly articulate its rationale. Rather, after the court found that both individuals and government entities could be held liable for certain crimes, it assumed *sub silentio* that corporations fell within this umbrella of individual liability.[66] Ultimately, this case ended in settlement.[67]

Romero v. Drummond Co. (11th Circuit)

The Eleventh Circuit in *Romero v. Drummond Co., Inc.* became the first court to explicitly hold that corporations could be held civilly liable for torts in violation of the law of nations.[68] This case arose out of allegations that executives of an American coal mining company, Drummond

[58] Kadic v. Karadzic, 70 F.3d 232, 237 (2d. Cir. 1995).

[59] Doe v. Kardazic, 866 F. Supp. 734, 740 (S.D.N.Y. 1995).

[60] *Kardazic*, 866 F. Supp. at 740-41.

[61] *Kardazic*, 70 F.3d at 239.

[62] Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

[63] *Id.* at 936.

[64] *Id.* at 945.

[65] *Id.* at 945-46.

[66] *Id.* at 946.

[67] *See Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers*, Center for Const. Rights (last visited Jan. 11, 2012), http://ccrjustice.org/newsroom/press-releases/historic-advance-universal-human-rights%3A-unocal-compensate-burmese-villagers.

[68] Romero v. Drummond Co., Inc., 552 F.3d 1303, 1309 (11th Cir. 2008).

Ltd., had paid paramilitary operatives to torture and assassinate leaders of a trade union in Columbia. Drummond contended that the court lacked subject matter jurisdiction because the ATS did not permit suits against corporations.[69] The court rejected this argument on two grounds. First, the court relied on a prior case from the Eleventh Circuit, *Aldana v. Del Monte Fresh Produce, Inc.*, which held that the plaintiff's had stated a claim against a corporate defendant under the ATS.[70] It must be noted, however, that the *Aldana* decision did not directly address the corporate liability question, but was resolved on other grounds. Second, the *Romero* ruling relied on the text of the ATS, which, the panel noted, "provides no express exception for corporations."[71] So, although the Eleventh Circuit permitted a case against a corporation to go forward under the ATS, it failed to expound on its rationale and relied on circuit precedent that did not directly address this issue.

Doe v. Exxon Mobil Corp. (D.C. Circuit)

In *Doe v. Exxon Mobil Corp.*, the District of Columbia Circuit Court of Appeals indicated that corporations could be held liable under ATS for torts in violation of the law of nations, basing its decision on federal common law, rather than international law.[72] In that case, Indonesian villagers sued Exxon Mobil, an American energy corporation, under, *inter alia*, the Alien Tort Statute for alleged murder, torture, and other crimes committed while protecting an oil facility in Indonesia.[73] The D.C. Circuit first reviewed *Sosa*, highlighting that that decision only decided "which conduct-governing norms" may give rise to liability under the ATS, and not whether corporations may be held liable for those offenses.[74] Because the law of nations, the court observed, creates neither civil remedies nor private rights of action, "federal courts must determine the nature of any remedy in lawsuits alleging violations of the law of nations by reference to federal common law rather than customary international law."[75] Determining that domestic law should control only began the inquiry; the court had to determine if that body of law permitted corporate liability.

Because the text and legislative history provided little guidance on this question, the court surveyed the history surrounding the passage of the ATS. Reviewing the concerns harbored by the Founders in the early Continental Congress, including America's perceived inability to uphold its international obligations and the risk of a single citizen abroad embroiling the country in a foreign conflict, the court concluded that the historical record "suggests no reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations , i.e., corporations, to do so."[76]

Beyond the ATS, the court reviewed the theory of corporate liability extant in 1789, and concluded that "the notion that corporations could be held liable for their torts, therefore, would

[69] *Id.* at 1315.

[70] *Id.* at 1315 (citing Aldana v. Del Monte Fresh Produce, Inc., 416 F.3d 1242, 1242 (11th Cir. 2005)).

[71] *Id.* at 1315.

[72] Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011).

[73] *Id.* at 14-15.

[74] *Id.* at 41.

[75] *Id.* at 41-42.

[76] *Id.* at 47.

not have been surprising to the First Congress that enacted the ATS.[77] For instance, as early as 1774, English common law held that corporations were subject to liability in tort.[78] Likewise, state court decisions from this period also supported corporate liability.[79] During this same period, the Supreme Court held in *Trustees of Dartmouth College v. Woodward* that "an aggregate corporation, at common law, is a collection of individuals, united into one collective body, under a special name ... [that] possesses the capacity ... to sue or be sued."[80] The D.C. Circuit concluded that "it appears that the law in 1789 on corporate liability was the same as it is today: 'The general rule of substantive law is that corporations, like individuals, are liable for their torts.'"[81]

Additionally, the D.C. Circuit took to task Exxon's reliance on a footnote from the Supreme Court decision in *Sosa* to prove that individuals and corporations should be treated differently under the ATS. In *Sosa*, when discussing "whether a norm is sufficiently definite to support a cause of action" under the ATS, the Supreme Court observed in footnote 20 that "a related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[82] This footnote has created some consternation in the courts. The D.C. Circuit asserted that footnote 20 was describing whether "certain forms of conduct were violations of international law only when done by a state actor" rather than a private actor, and was not intended to create a dichotomy between natural persons and corporations.[83] It must be remembered that some acts, such as torture, can only be committed by state actors, whereas other acts, such as genocide, permit private liability. Footnote 20, in the D.C. Circuit's view, was merely demonstrating the distinction between state and private actors, rather than between natural and juridical persons.[84] Ultimately, the court permitted the case against Exxon Mobil to go forward.[85]

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[77] *Id.* at 47-48.

[78] Mayor of Lynn v. Turner, (1774) 98 Eng. Rep. 980 (K.B.) (holding corporation liable for failing to keep repaired a stream which ultimately injured a person).

[79] Chestnut Hill & Springhouse Turnpike Co. v. Rutter, 4 Serg. & Rawle 6 (Pa. 1818) (upholding trespass action against corporation); Riddle v. Proprietors of Merrimack River Locks & Canals, 7 Mass. 169, 186 (1810) (upholding tort action against proprietor of a canal, a corporation, for failing to maintain a canal which resulted in damage to a vessel).

[80] Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 667 (1819).

[81] Doe v. Exxon Mobil Corp., 654 F.3d 11, 49 (D.C. Cir. 2011) (quoting White v. Cent. Dispensary & Emergency Hosp., 99 F.2d 355, 358 (D.C. Cir. 1938)).

[82] Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

[83] Doe v. Exxon Mobil Corp., 654 F.3d 11, 50 (D.C. Cir. 2011).

[84] Concurring in *Kiobel*, Judge Deval wrote in support of this interpretation of footnote 20 from *Sosa*:

> Far from implying that natural persons and corporations are treated *differently* for purposes of civil liability under ATS, the intended inference of the footnote is that they are treated *identically*. If the violated norm is one that international law applies only against States, then "*a private actor, such as a corporation or an individual*," who acts independently of a State, can have no liability for violation of the law of nations because there has been no violation of the law of nations. On the other hand, if the conduct is of the type classified as a violation of the norms of international law regardless of whether done by a State or a private actor, then "*a private actor, such as a corporation or an individual*," has violated the law of nations and is subject to liability in a suit under the ATS. The majority's partial quotation out of context, interpreting the Supreme Court as distinguishing between individuals and corporations, misunderstands the meaning of the passage.

Kiobel, 621 F.3d at 165 (Leval, J., concurring) (emphasis in original).

[85] *Exxon Mobil Corp.*, 654 F.3d at 57.

Flomo v. Firestone National Rubber Co. (7th Circuit)

One week after *Exxon Mobil Corp.* was handed down, the Seventh Circuit Court of Appeals joined the majority of courts taking up this issue, holding that corporate liability was possible under the ATS. In *Flomo v. Firestone National Rubber Co.*, twenty-three Liberian children sued Firestone Natural Rubber Company under the ATS for utilizing hazardous child labor on its rubber plantation in Liberia.[86] As in *Exxon Mobil Corp.*, the Seventh Circuit held that domestic law is determinative of corporate liability. "International law imposes substantive obligations," Judge Posner wrote for the Court, "and the individual nations decide how to enforce them."[87] The Seventh Circuit acknowledged that in *Kiobel*, the Second Circuit held that corporations cannot be held liable under the ATS because corporations have never been held civilly responsible under customary international law. However, the Seventh Circuit argued that this "factual premise of the majority opinion in the *Kiobel* case is incorrect."[88] The court noted that after WWII, German corporations such as I.G. Farben were dissolved due to their complicity in the gross human rights atrocities committed by the Nazis. If the corporations could be punished for violating customary international law, as the German corporations had been following WWII, "then *a fortiori* if the board of directors of a corporation directs the corporation's managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation can be civilly liable."[89] Although the Seventh Circuit held that corporate liability was possible, it dismissed the plaintiffs' claims because the claims of child labor violations did not rise to the level of a violation of customary international law as required under *Sosa*.[90]

Sarei v. Rio Tinto, PLC (9th Circuit)

The most recent appellate court decision regarding corporate liability comes from the Ninth Circuit in *Sarei v. Rio Tinto, PLC.*[91] This case arose out of an uprising on the island of Bougainville in Papua New Guinea against operations of the Rio Tinto mining group that resulted in the use of military force and many deaths. Current and former residents of Bougainville sued Rio Tinto under the ATS. Ultimately holding that corporations could be held liable for torts under customary international law, the Ninth Circuit employed an approach to corporate liability not used by any previous court.

First, the court questioned whether there was a statutory bar to corporate liability under the ATS.[92] Unlike the Torture Victim Protection Act in which Congress expressly limited liability to individuals, the panel pointed out that "the ATS contains no such language and has no such legislative history to suggest that corporate liability was excluded and that only liability of natural persons was intended."[93] Further, the court observed that "Congress then could hardly have fathomed the array of international institutions that impose liability on states and non-state actors alike in modern times. That an international tribunal has not yet held a corporation criminally

[86] Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013 (2011).

[87] *Id.* at 1020.

[88] *Id.* at 1017.

[89] *Id.* at 1019.

[90] *Id.* at 1024.

[91] Sarei v. Rio Tinto, 671 F.3d 736, 742 (9th Cir. 2011).

[92] *Id.* at 747.

[93] *Id.* at 748.

liable does not mean that an international tribunal could not or would not hold a corporation criminally liable under customary international law." Based on this, it concluded that "there was no basis for a statutory limitation."[94]

The Ninth Circuit then focused on footnote 20 from the Supreme Court's decision in *Sosa*: "*Sosa* expressly frames the relevant international-law inquiry to be the scope of liability of private actors for a violation of the 'given norm,' i.e. an international-law inquiry specific to each cause of action asserted." This approach is unique among the circuits addressing this issue, and somewhat more nuanced. In *Kiobel*, the Second Circuit held that corporate liability had not reached universal acceptance under customary international law as required under *Sosa*.[95] The District of Columbia and Seventh Circuits would permit corporate liability for any human right violation so long as the norm itself had met *Sosa*'s universality test.[96] The Ninth Circuit in *Sarei*, however, does not apply this all-or-nothing threshold question, but instead probed each cause of action individually to determine which actors (e.g., juridical or natural) may violate it.[97]

The court then moved to this second step of the analysis to look at whether the plaintiffs' claims for genocide and war crimes—the two claims actionable as a tort in violation of the law of nations—could be committed by corporations. As to genocide, the panel observed that Art. IX of the Genocide Convention permits contracting parties to submit disputes to the International Court of Justice relating to allegations of genocide. The ICJ holds that a state may be held responsible for "genocide committed by groups or persons whose actions are attributable to states."[98] Based on this, the court concluded that "[t]his clarity about collective responsibility implies that organizational actors such as corporations or paramilitary groups may commit genocide."[99] Next, the court probed potential corporate liability for war crimes. It observed that international sources of law, in particular, Common Article III of the 1949 Geneva Conventions, focus on the specific identity of the victims of the crime, but not the identity of the perpetrator.[100] Additionally, the court noted that "[t]he universal, obligatory, and specific nature of the *jus cogens* prohibition on war crimes is analogous to the *jus cogens* norm prohibiting genocide in its inclusion of states, individuals, and groups within its prohibition."[101] From this, the court concluded that corporations could be held liable under the ATS for war crimes. Thus, under the Ninth Circuit's approach, liability for both genocide and war crimes could be imposed against corporations.

Various Approaches

Not only are the federal circuit courts split on the issue of corporate civil tort liability under the ATS, but they are also divided in their rationales. The Second Circuit held in *Kiobel* that there was not a sufficient norm of customary international law that would permit such liability. This

[94] *Id.*

[95] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148-49 (2d Cir. 2010).

[96] Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1019 (7th Cir. 2011); Doe v. Exxon Mobil Corp., 654 F.3d 11, 49 (D.C. Cir. 2011).

[97] *Sarei*, 671 F.3d at 784.

[98] *Sarei*, 671 F.3d at 759 (citing Bosnia and Herzegovina v. Serbia, 2007 I.C.J. 91, ¶ 167 (Feb. 26)).

[99] *Id.* at 759-60 ("[The implication that an actor may avoid liability merely by incorporating is inconsistent with the universal and absolute nature of the prohibition against genocide.").

[100] *Id.* at 764-65.

[101] *Id.* at 765.

decision is somewhat unique in the level of abstraction at which it looked at customary international law. It not only held that international law was determinative as to this question, but also focused on whether customary international law permitted corporate liability *specifically* for human rights cases. Finding no support for corporate liability in either international tribunals, such as the Nuremberg Tribunals, or international treaties, it concluded that none could exist. Likewise, the Ninth Circuit concluded that international law is determinative, but posited that each alleged violation of international law must be tested for whether corporate actors may violate it.[102] By contrast, the Seventh and D.C. Circuits both concluded that because domestic law provides the remedy in an ATS action and U.S. law recognizes the concept of corporate liability, that the ATS permits tort suits against corporations for violation of the law of nations.[103]

If the Supreme Court decides that federal common law is determinative of this issue, there is ample support for corporate liability in American jurisprudence. On the other hand, if it holds that international law is determinative, the question then becomes what level of generalization to focus on the question. If the Court takes a broader view of corporate civil tort liability throughout the world, it will find ample examples, as most of world's legal systems impose some form of liability on corporations. However, if it takes a more narrow view, as did the Second Circuit, and requires universal acceptance of corporate liability in specific sources of international law, such as international tribunals or treaties, the imposition of corporate liability seems significantly less probable.

Extraterritoriality

Because the Second Circuit in *Kiobel* dismissed the plaintiffs' claims on the corporate liability question, it declined to address whether the ATS allows courts to recognize a cause of action for violations of the law of nations that occur in the territory of a foreign sovereign. However, after accepting review of this case, the bulk of the questions from the Supreme Court justices at oral argument centered on the extraterritorial application of the ATS. Justice Samuel Alito criticized the case as having "no connection to the United States whatsoever," and Chief Justice John Roberts asked whether allowing the suit might contravene international law.[104] Six days later, the Court issued an order for the parties to re-brief the Court on "whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows a court to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[105] Re-argument was held on October 1, 2012.

Focusing on the nexus with the United States, the Nigerian plaintiffs emphasize that the plaintiffs received political asylum in the United States and were living here when the case was filed, and argued that the oil companies had sufficient contacts with the United States. They next argue that that the text, history, and purpose of the ATS support its extraterritorial reach. They point out that the text of the ATS applies to "*any* civil action" by "an alien," and contains no express territorial limits. Indeed, piracy—a paradigmatic law of nations claim—can occur outside of the United

[102] Sarei v. Rio Tinto, 671 F.3d 736, 748 (9th Cir. 2011).

[103] Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1020 (7th Cir. 2011); Doe v. Exxon Mobil Corp., 654 F.3d 11, 41-42 (D.C. Cir. 2011).

[104] *Id.* at 8, 12.

[105] Docket, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (Mar. 5, 2012), *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1491.htm

States, and attacks on ambassadors and violations of safe conducts, the other two Blackstone paradigms, need not occur on U.S soil.[106] Additionally, the plaintiffs proffer an oft-cited 1795 opinion of Attorney General William Bradford that contemplated the application of the ATS to a French attack, aided by U.S. citizens, in the territory of Sierra Leone as evidencing a longstanding recognition of the ATS's extraterritorial reach.[107]

Moreover, the plaintiffs assert that every circuit court to have addressed the issue has rejected the argument that ATS does not apply extraterritorially. In *Doe v. Exxon Mobil Corp.*, although the issue was apparently not directly before the court, the D.C. Circuit Court of Appeals observed that piracy, one of the paradigmatic law of nation violations, necessarily occurs beyond American borders: "For it appears beyond debate that piracy is contemplated by the ATS, and piracy can occur outside of the territorial bounds of the United States, and, the Supreme Court has held, also within the territorial waters of another nation[.]"[108] Further, the court noted that during consideration of the Torture Victims Protection Act,[109] the Senate Committee on the Judiciary expressed approval of the *Filartiga* case, in which the Second Circuit applied the ATS to acts occurring in Paraguay committed by Paraguayan citizens.[110] Similarly, the Seventh Circuit in *Flomo v. Firestone Nat. Rubber Co., LLC*, rejected an argument that the ATS has no extraterritorial application:

> Courts have been applying the statute extraterritorially (and not just to violations at sea) since the beginning; no court to our knowledge has ever held that it doesn't apply extraterritorially; and *Sosa* was a case of nonmaritime extraterritorial conduct yet no Justice suggested that therefore it couldn't be maintained. Deny extraterritorial application, and the statute would be superfluous, given the ample tort and criminal remedies against, for example, the use of child labor (let alone its worst forms) in this country.[111]

Likewise, the Ninth Circuit in *Sarei v. Rio Tinto* held that the ATS contained no extraterritorial bar.[112] First, citing Ninth Circuit precedent, the panel noted that the text of the ATS contains no express limitation as to the citizenship of the defendant or where the act may occur.[113] Second, the court noted that one of the primary concerns in 1789 was piracy, an act that can occur outside the boundary of the United States.[114] Third, it observed that the context of the ATS—that it was meant

[106] Supplemental Brief for Petitioners at 8, Kiobel v. Royal Dutch Petroleum Co., No. 10-491 (June 6, 2012).

[107] *Id.* at 31.

[108] Doe v. Exxon Mobil Corp., 654 F.3d 11, 21 (D.C. Cir. 2011) (internal citations and quotation marks omitted).

[109] The Torture Victims Protection Act of 1991, P.L. 102-256, § 2(a), 106 Stat. 73, 73 (codified as amended at 28 U.S.C. § 1350 note), permits claims by individuals (or their legal representative) who have been subjected to torture or extrajudicial killings by an individual acting under color of authority of any foreign nation.

[110] *Exxon Mobil Corp.,* 654 F.3d at 24 (quoting S. Rep. 102-249, at 4 (1991) ("The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of Title 28 of the U.S. Code, derived from the Judiciary Act of 1789 (the Alien Tort Claims Act) which permits Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations.' (28 U.S.C. 1350). Section 1350 has other important uses and should not be replaced.... ")).

[111] Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1025 (7th Cir. 2011).

[112] Sarei v. Rio Tinto, 671 F.3d 736, 746 (9th Cir. 2011).

[113] *Id.* at 745 (quoting *In re Estate of Ferdinand Marcos, Human Rights Litig.* , 978 F.2d 493, 500(9th Cir.1992) ("[W]e are constrained by what § 1350 shows on its face: no limitations as to the citizenship of the defendant, or the locus of the injury.").

[114] *Id.*

to provide a remedy for foreign subjects and looks to foreign law to determine what torts fall within its ambit—are additional evidence that it should apply beyond the United States.[115]

Instead of focusing on extraterritoriality, the plaintiffs posit that judicial rules such as the political question doctrine, *forum non conveniens*, and exhaustion of remedies, would serve a gatekeeper function keeping cases with no connection to the United States out of federal courts. The Department of Justice agrees that there should not be a categorical rule excluding the extraterritorial application of the ATS.[116] Instead, it urges a case-by-case approach that looks to the factors outlined in *Sosa* for creating new causes of action, including the modern conception of federal common law; the proper role of the courts in making that law; the assumption that the creation of private rights is better left to legislative judgment; and the potential foreign relations interests of the United States.[117] However, the federal government argues that the Nigerians' case should be dismissed as "the United States cannot be thought responsible in the eyes of the international community for affording a remedy for the company's actions, while the nations directly concerned could."[118]

Shell and Royal Dutch argue that the presumption against the exterritorial application of U.S. law must apply here as the conduct and the injury alleged both occurred in Nigeria. The Supreme Court recently reaffirmed a presumption against extraterritoriality in *Morrison v. Nat'l Austl. Bank Ltd.*, holding that "[i]t is a 'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[119] The plaintiffs counter by arguing that a cause of action under the ATS does not project U.S. law extraterritorially, but rather, rests entirely upon international law. Shell and Royal Dutch disagree, arguing that "as *Sosa* recognized, in cases under ATS jurisdiction, courts apply a civil cause of action under U.S. federal common law to remedy a violation of an international law norm."[120]

If the presumption against extraterritoriality is not triggered, the oil companies argue alternatively that the presumption against construing U.S. law to violate international law—the "*Charming Betsy*" canon—should apply.[121] They argue that the *Charming Betsy* canon prohibits application of U.S. law to "foreign cubed" ATS cases (that is, cases that involve a foreign defendant, foreign plaintiff, and conduct occurring on foreign soil). The defendants argue that foreign cubed cases would require the use of universal jurisdiction, which, Shell and Royal Dutch further argue, foreign governments and tribunals view as a violation of international law.

Finally, Shell and Royal Dutch have made several policy pleas to the Court. They contend that Congress, and not the judiciary, should decide when to extend U.S. human rights law to other nations. Further, they maintain that applying the ATS to foreign conduct risks impacting U.S. commercial interests.

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[115] *Id.*

[116] Supplemental Brief for the United State as Amicus Curiae in Partial Support of Affirmance at 4, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (June 2012).

[117] *Id.* at 3-4.

[118] Supplemental Brief of the United States at 5, *supra* note 116.

[119] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).

[120] Supplemental Brief for Respondents at 7, Kiobel v. Royal Dutch Petroleum Co., No. 10-491 (Aug. 1, 2012).

[121] *Id*. This canon derives its name from *Murray v. Schooner Charming Betsy*, 6 U.S (2 Cranch) 64 (1804).

Congressional Action

Congress is free to clarify, alter, or rescind the ATS as it sees appropriate, considering "it's just a statute."[122] Likewise, the Supreme Court explained in *Sosa* that it "would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations.... " Following *Sosa*, there appears to have been only one legislative proposal to amend the ATS, but this measure remained in committee and was not re-filed in subsequent Congresses.[123] In light of these propositions, Congress could take several actions to clarify the scope and content of the ATS.

As to the jurisdictional question, Congress has the power to set federal jurisdiction (within the bounds of Article III) and to delineate the jurisdictional scope of a statute. It must be remembered that a court's determination of whether a statute is jurisdictional is simply an attempt to determine whether Congress intended it to be so. As the Supreme Court remarked in *Arbaugh Y. & H. Corp.*, "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." [124] Based on this principle, Congress may clarify whether the question as to the status of the defendant under the ATS is intended to be a jurisdictional or a merits-based question.

Congress could also establish whether corporations are appropriate defendants under the ATS. The statute expressly defines the appropriate class of plaintiffs—aliens—but is silent on the appropriate class of defendants. Congress could amend the statute to reach not only natural persons, but also entities "without a heartbeat,"[125] such as corporations. Although beyond the scope of this report, it should be noted that there has been significant debate regarding the economic impact of permitting ATS suits against corporations.[126]

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[122] Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011).

[123] S. 109th Cong. (2005). *See* Daniel Swearingen, *Alien Tort Reform: A Proposal to Revise the Alien Tort Statute*, 48 HOUS. L. REV. 99, 117 (2011).

[124] Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006).

[125] *Flomo*, 643 F.3d at 1017.

[126] Alan O. Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L. J. 2161 (2011).

> In this regard, corporate liability seems particularly unlikely to curtail undesirable behavior in many of the aiding and abetting scenarios that have been litigated under the ATS, yet liability can nevertheless impose substantial costs on firms subject to suit in the United States. Such costs are an economic waste if they do not induce valuable changes in corporate conduct going forward. In extreme cases, corporate liability may simply cause the diversion of business opportunities to firms not subject to suit in the United States or induce costly corporate restructuring to avoid U.S. jurisdiction while accomplishing nothing to reduce misconduct abroad. It thus has the potential to reduce economic welfare from both the national and the global perspectives and to anger foreign sovereigns accused of primary misconduct.

Id. at 2164-65.

Chimene I. Keitner, *Optimizing Liability for Extraterritorial Torts: A Response to Professor Sykes*, 100 GEO. L. J. 2211 (2012).

> [ATS] cases have nonetheless played, and continue to play, an important role in providing symbolic vindication to victims, engaging U.S. courts in the process of articulating and enforcing international norms, and—in the case of individual defendants—deterring human rights violators from entering and remaining in the United States. Cases against corporate defendants may perform the first two of these functions and may also provide increased opportunities for obtaining

(continued...)

Finally, unless Congress includes language to extend the reach of a certain law extraterritorially, the Court will typically presume Congress did not intend to do so. The Supreme Court instructed in *Morrison v. Nat'l Austl. Bank Ltd.* that "[r]ather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects."[127] Congress could clarify the extraterritorial reach of the statute by expressly providing whether the ATS should apply to conduct that occurs on foreign soil.

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(...continued)

> compensation. Although other forms of wealth transfer from corporations to the populations adversely affected by their activities would likely be more efficient than ATS liability, the ideal system has yet to be designed and implemented on a global scale. Tort liability should be compared to the existing alternatives.

Id. at 2216.

[127] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2881 (2010).