

INTERNATIONAL HUMAN RIGHTS

U.S. Government Supreme Court Brief Backs Corporate ATS Liability

In 2011, the U.S. Supreme Court granted certiorari to hear the appeal of the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum*,¹ involving whether corporations can be liable for violations of international law under the Alien Tort Statute² (ATS). In *Kiobel*, the Second Circuit ruled that the issue of corporate liability for violations of international human rights law must be determined under customary international law. The court found no norm of customary international law establishing such liability and dismissed the claims of the plaintiffs, who are "residents of Nigeria who claim that Dutch, British, and Nigerian corporations engaged in oil exploration and production aided and abetted the Nigerian government in committing violations of the law of nations."³ Several other courts of appeals have reached a contrary result, ruling that the issue whether corporations can be liable for ATS violations is a matter of domestic and not international law.⁴

The Supreme Court granted certiorari to consider

1. Whether the issue of corporate liability under the Alien Tort Statute (ATS), 28 U.S.C. 1350, is a merits question or a question of subject-matter jurisdiction.
2. Whether a corporation can be held liable in a federal common law action brought under the ATS.⁵

In December 2011, the United States filed an amicus curiae brief supporting the plaintiffs in the case and seeking reversal of the Second Circuit's decision.⁶ The brief was signed, inter alia, by Solicitor General Donald Verelli, Department of State Legal Adviser Harold Koh, and Department of Commerce General Counsel Cameron F. Kerry. It described the question presented and the U.S. interest as follows:

This case presents the question whether a corporation can be held liable in a federal common law action brought under the Alien Tort Statute (ATS), 28 U.S.C. 1350. The United States has an interest in the proper application of the ATS because such actions can have implications for the Nation's foreign and commercial relations and for the enforcement of international law.⁷

The government's brief argues that corporations (or agents acting on their behalf) can violate international human rights norms, just as natural persons can. The brief also stated that "[w]hether corporations should be held accountable for those violations in private tort suits

¹ *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010), *cert. granted* 132 S.Ct. 472 (2011); see John R. Crook, Contemporary Practice of the United States, 105 AJIL 122, 142 (2011).

² 28 U.S.C. §1350.

³ *Kiobel*, 621 F.3d at 117.

⁴ See John R. Crook, Contemporary Practice of the United States, 105 AJIL 775, 799 (2011).

⁵ See John R. Crook, Contemporary Practice of the United States, 106 AJIL 138, 169 (2012).

⁶ Brief for the United States as Amicus Curiae Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum* (Dec. 2011), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_unitedstates.authcheckdam.pdf.

⁷ *Id.* at 1.

under the ATS is a question of federal common law,⁸ not a question of international law. The “Summary of the Argument” from the government’s brief follows:

I. The court of appeals erred in characterizing the question whether a corporation can be held liable in a federal common law action based on the ATS as one of subject-matter jurisdiction. “[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.” *Bell v. Hood*, 327 U.S. 678, 682 (1946). When an alien plaintiff alleges a nonfrivolous claim of a tort in violation of the law of nations—as petitioners did here—a district court has subject-matter jurisdiction under the ATS.

The court of appeals nonetheless had jurisdiction under 28 U.S.C. 1292(b) to decide the issue of corporate liability here. Although that issue was neither raised in nor decided by the district court, it can be regarded as fairly included within the court’s certified order. As a prudential matter, the court should not have decided that issue on appeal. But because this Court has already granted certiorari and the issue of corporate liability will now be fully briefed, it would be appropriate for the Court to decide that question rather than vacate and remand.

II. The merits question before this Court is narrow: whether a corporation can be held liable in a federal common law action based on the ATS. Although there are a number of other issues in the background of this case (*e.g.*, aiding-and-abetting liability, extra-territoriality, etc.), those issues were not decided by the court of appeals here. This Court therefore should address only the corporate-liability issue. On that issue, the court of appeals’ holding is categorical and applies to all suits under the ATS, regardless of the theory of liability, the locus of the acts, the involvement of a foreign sovereign, or the character of the international-law norm at issue.

A. A corporation’s liability in a suit under the ATS does not depend on the existence of a generally accepted and well-defined international law norm of corporate liability for law-of-nations violations. The particular limitation this Court found dispositive in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)—that any claim under the ATS must at least “rest on a norm of international character accepted by the civilized world and defined with” sufficient “specificity,” *id.* at 725—pertains to the international-law norm itself and not to whether (or how) that norm should be enforced in a suit under the ATS. The latter question is a matter to be determined by federal courts cautiously exercising their “residual common law discretion.” *Id.* at 738. International law informs, but does not control, the exercise of that discretion.

At the present time, the United States is not aware of any international-law norm of the sort identified in *Sosa* that distinguishes between natural and juridical persons. Corporations (or agents acting on their behalf) can violate those norms just as natural persons can. Whether corporations should be held accountable for those violations in private tort suits under the ATS is a question of federal common law.

B. Courts may recognize corporate liability in actions under the ATS as a matter of federal common law. The text and history of the ATS itself provide no basis for distinguishing between natural and juridical persons. Corporations have been subject to suit for centuries, and the concept of corporate liability is a well-settled part of our “legal culture.” Pet. App. A8. *Sosa*’s cautionary admonitions provide no reason to depart from the common law on this issue.

International law does not counsel otherwise. Although no international tribunal has been created for the purpose of holding corporations civilly liable for violations of

⁸ *Id.* at 7.

international law, the same is true for natural persons. And while international *criminal* tribunals have, thus far, been limited to the prosecution of natural persons, that appears to be because of matters unique to criminal punishment. Notably, several countries that have incorporated international criminal offenses into their domestic law apply those offenses to corporations.⁹

Shortly after the late February 2012 oral argument in the case, the Supreme Court ordered further proceedings to consider whether the ATS applies to conduct occurring within a foreign territory. The text of the Court order follows:

This case is restored to the calendar for reargument. The parties [are] directed to file supplemental briefs addressing the following question: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts 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." The supplemental brief of petitioners is due on or before Thursday, May 3, 2012. The supplemental brief of respondents is due on or before Monday, June 4, 2012. The reply brief is due on or before Friday, June 29, 2012. The time to file *amicus curiae* briefs is as provided for by Rule 37.3(a). The word limits and cover colors for the briefs should correspond to the provisions of Rule 33.1(g) pertaining to briefs on the merits rather than to the provision pertaining to supplemental briefs.¹⁰

INTERNATIONAL CRIMINAL LAW

U.S. Official Describes U.S. Policy Toward International Criminal Court

In a statement to the Assembly of States Parties to the Statute of the International Criminal Court (ICC) in mid-December 2011, Ambassador-at-Large for War Crimes Issues Stephen J. Rapp described U.S. views on international criminal justice and the ICC. A substantial excerpt follows:

[A]lthough the United States is not a party to the Rome Statute, we are continuing to engage with the ICC and States Parties to the Rome Statute to end impunity for the worst crimes. Over the past several years, we have sent active observer delegations to the [Assembly of States Parties] sessions and the Review Conference in Kampala. We have actively engaged with the [Office of the Prosecutor] and the Registrar to consider specific ways that we can support specific prosecutions already underway, and we have responded positively to a number of informal requests for assistance. We supported the UN Security Council's ICC referral regarding Libya and are working hard to ensure that those charged by the Court there face justice consistent with international standards. From the [Democratic Republic of the Congo] to Cote d'Ivoire, Darfur to Libya, we have worked to strengthen accountability for atrocities because we know, as President Obama has said, that "justice is a critical ingredient for lasting peace."

What are the concrete steps we can take to continue to advance this common cause?

First, at both the international and national levels, we should continue to recognize and promote the important role that justice and reconciliation play in resolving conflicts. . . . [S]ince we last met in New York one year ago, the Security Council made history with its

⁹ *Id.* at 5–8.

¹⁰ *Kiobel*, 182 L.Ed.2d 270, 270–71 (Mar. 5, 2012); see also <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1491.htm>.