

RECENT SECOND CIRCUIT DECISION HOLDS THAT CORPORATIONS ARE NOT SUBJECT TO JURISDICTION UNDER THE ALIEN TORT STATUTE

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To Our Clients and Friends:

Last Friday, a divided panel of the United States Court of Appeals for the Second Circuit, addressing a key open issue regarding the scope of the Alien Tort Statute, held that the ATS does not provide jurisdiction for claims against corporations. Over the past three decades, actions under the ATS for a host of claims have been brought against corporations alleging violations of international law, particularly human rights norms, including torture, genocide and use of slave labor. Last week's decision in *Kiobel v. Royal Dutch Petroleum*, 06-4800, 06-4876 (2nd Cir. September 17, 2010) settles within the Second Circuit the issue of corporate liability under the ATS, and creates a split among the courts of appeal on that point. The resolution of this threshold question is likely to have a significant effect on litigation of alleged human rights violations.

Enacted in 1789, the ATS gives federal courts jurisdiction over civil actions brought by foreign citizens for torts "committed in violation of the law of nations or a treaty of the United States." The Supreme Court, in its first decision addressing the statute, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), held that while the ATS is purely jurisdictional, and therefore does not itself create any causes of action, federal common law authorizes causes of action for certain, narrowly defined violations of international law. The Court further held that the acts giving rise to jurisdiction under the ATS were limited to violations of the "specific, universal and obligatory" norms of contemporary international law; although not limited by the state of international law as it existed in 1789, ATS jurisdiction would not attach to violations of contemporary norms which had "less definite content and acceptance" than did the law of nations when the ATS was enacted.

In *Kiobel*, members of the Ogoni people of Nigeria alleged that the oil company defendants aided or abetted violations of international law by the Nigerian government by providing direct, physical support to the Nigerian military and police for operations against the Ogoni. The District Court dismissed some claims on the ground that the alleged acts did not violate recognized norms of international law, but let stand plaintiffs' claims regarding arbitrary arrest and detention, crimes against humanity, and torture. On interlocutory appeal, the majority dismissed the remaining claims for lack of jurisdiction.

The Second Circuit held that, in the absence of a treaty, the scope of jurisdiction granted by the ATS must be construed by reference to customary international law. After concluding that no rule of customary international law extends liability to corporations, the court held the ATS cannot provide jurisdiction for claims against corporations, despite the general rule of U.S. domestic law that corporations are liable for torts to the same extent as natural persons. The majority opinion notes that while the ruling forecloses ATS claims against corporations, the ruling would not bar ATS actions against “individual perpetrators of violations of customary international law – including the employees, managers, officers, and directors of a corporation...” Slip Op. at 11. In a separate opinion that concurs in the result, but interprets the ATS to provide jurisdiction over corporate defendants, Judge Leval argues that in the absence of a rule of customary international law addressing corporate liability, the availability of civil damages against corporate defendants in the ATS context should be determined by reference to domestic law.

One likely immediate result of *Kiobel* will be an increase in ATS claims filed in district courts outside the Second Circuit, including particularly the Eleventh Circuit, which has taken the opposite position and held that corporations are subject to ATS jurisdiction. In addition, it is possible that new or amended ATS claims will name as defendants both corporations and individual employees and officers.

Even after *Kiobel*, there remain several important, but unsettled, questions about the ATS. In particular, the Supreme Court and courts of appeals have not definitively addressed whether, as district courts have generally held, the statute applies to actions that occur in the territory of foreign states; whether plaintiffs are required under international law to exhaust domestic, and possibly international, remedies before bringing claims in federal court under the ATS; and the extent to which courts should defer to the views of the Executive Branch in deciding whether to hear a case over which it has jurisdiction.

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