



The Alien Tort Statute: What Is It? Will It Survive The US Supreme Court?

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The Current Buzz

The Alien Tort Statute (ATS, also referred to as the Alien Tort Claims Act or the ATCA), an obscure piece of legislation enacted by the first Congress as part of the Judiciary Act of 1789, has been dusted off and relied on from time to time by foreign nationals. It has surfaced again this year.

On Monday, October 1st, as the leading case argued to the U.S. Supreme Court on its opening day this fall, the Court heard re-argument in *Kiobel v. Royal Dutch Petroleum*, originally argued in February and re-heard last week at the direction of the Court. In February, the Court peppered counsel with questions about whether the ATS could be applied to extraterritorial conduct at all and subsequently required the parties to brief this issue further and return to re-argue this point.

The Letter of the Law

The ATS, in its entirety, states:

"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."

The History of the ATS

The ATS was long thought to have been enacted to permit recovery of damages for piracy at sea. More recently, evidence has come to light that Congress was responding to a need to create a way for foreign diplomats to seek redress for damages that incurred within the U.S., [Click here for Forbes article](#). In 1978, the ATS was used in a case involving the alleged torture and murder of the 17-year-old son of an opponent of the Paraguayan government at the hands of a former police inspector from Paraguay. The acts of terror occurred in Paraguay, but when both the victim's sister and the perpetrator came to the United States, the stage was set. Ms. Filartiga sued in federal district court in New York for compensation and punitive damages for the torture and wrongful death of her brother; the trial court threw the case out on jurisdictional grounds. However the 2nd Circuit held, based on universal tenets found in international law and treaty against torture, that there was standing under the ATS, and the trial court took the case. A pivotal argument in that case revolved around a comparison between piracy as a crime against the "law of nations" and torture as a crime against the "law of nations." The court awarded damages against the police inspector, which damages were never paid because he left the U.S. [Click here for PBS article](#).

In 1995, the 2nd Circuit extended the reach of the ATS beyond defendants acting in a governmental capacity and permitted recovery against a non-governmental person, a Serb politician. Once a common “person” was sued successfully, the way was clear for suits against corporations under the existing doctrine that corporations are “persons” in the eyes of the law. Some 154 cases in which the corporations have been accused of acts deemed to be in violation of the “law of nations” have been brought. Most have been settled, as noted by Brian Quigley, speaking for the U.S. Chamber of Commerce, “These lawsuits come with a massive cost and are designed to leverage reputational damage on the company in order to extract a huge settlement or judgment.” [Click here for Reuters article.](#)

Prior to hearing the *Kiobel v. Royal Dutch Petroleum* case, the U.S. Supreme Court only decided one case, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), involving the ATS. The claim in the Sosa case was for arbitrary arrest and detention, however, not torture (Alvarez, who had been indicted in the US for torture and murder, was kidnapped in Mexico and returned to the U.S. to stand trial, so the ATS issue confronting the Court was his detention, not his prior alleged acts of torture and murder). Reversing the 9th Circuit, the Court held that “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.” Sosa at 738. However, in so ruling, the Court noted that foreign nationals had standing to sue under the ATS for violations of international norms, such as blocking the movement of ships in international waters or denying safe passage for diplomats.

The Kiobel Case

In the *Kiobel* case, Nigerian citizens allege they were violently attacked in Nigeria when they opposed oil drilling in that country. They filed suit under the ATS to seek redress against the Shell Oil Co, a British-Dutch company, which they allege aided and abetted their attackers. The actual attacks were claimed to have occurred at the behest of the Nigerian government; Shell allegedly supplied food, money and transportation to the Nigerian armed forces and permitted its property to be used for the attacks. The victims, who are now living in the U.S., sued Royal Dutch Shell for tort damages. The issue taken up by the Court in this re-argument is whether the ATS can be applied extraterritorially to acts that occurred on foreign soil. In an editorial published on October 8, 2012, the Los Angeles Times opined that, since the law was originally enacted to address piracy on the high seas outside the territorial U.S., it must be applied to the facts in the *Kiobel* case, where the attacks occurred on Nigerian soil. The L.A. Times concluded that to deny coverage of the ATS to the Kiobel case would require an act of Congress, not of the Court. [Click here for L.A. Times article.](#)

Whether the Los Angeles Times opinion is correct or not, commentators agree that the treatment of the issues during oral argument last week indicated that the Court’s decision will likely turn on whether the ATS can be applied extraterritorially.