
Supreme Court to Rule on Corporate Liability for International Human Rights Violations

2011-10-21

On Monday, the U.S. Supreme Court agreed to decide whether corporations or political organizations can be sued in United States courts for violations of international human rights norms, such as torture, genocide or forced labor, under two federal statutes. The Court accepted one case dealing with potential corporate liability under the Alien Tort Statute ("ATS"), *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010), and a second case concerning the potential liability of organizations under the Torture Victim Protection Act ("TVPA"), *Mohamad v. Rajoub*, No. 09-7109 (D.C. Cir. March 18, 2011). The two cases probably will be heard in tandem during the Court's February sitting and decided by June 2012.

In disposing of these cases, the Court may put an end to the legal uncertainty that has been mounting for corporations since 2004, when the Court decided that federal courts were authorized to recognize common law claims for certain human rights violations. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Court took its first in-depth look at the ATS, which was adopted by the first Congress in 1789 and gives U.S. district courts original jurisdiction over civil actions by aliens for torts "committed in violation of the law of nations or a treaty of the United States." The Court held that the ATS does not create any causes of action, but rather provides a jurisdictional hook for causes of action under federal common law for a narrow category of international law violations, namely those that were clearly recognized as actionable as common law at the time of the statute's enactment, such as piracy and offenses against ambassadors, and modern-day norms that are equally specific and equally widely recognized among "civilized nations" as carrying personal liability.

Applying *Sosa's* requirement that actionable norms be specific and widely recognized, lower courts have held that ATS claims may be based on slavery; genocide; crimes against humanity; war crimes; torture; human trafficking; cruel, inhuman or degrading treatment; forced labor; summary execution; prolonged arbitrary detention; apartheid; forced disappearance; and non-consensual medical testing.

The Court in *Sosa* identified, but left open, the question of whether corporations could be held liable under federal common law for violations of international law. And since *Sosa*, the number of ATS lawsuits against multi-national corporations with a presence in the U.S. has risen significantly, and

along with it the number of high-profile and costly settlements of human rights claims by corporations.

The Seventh, Eleventh and D.C. Circuits have all expressly held that corporations can, under certain circumstances, be liable under the ATS. See *Flomo v. Firestone*, No. 10-3675 (7th Cir. July 11, 2011); *Sinaltrainal v. Coca-Cola*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Aldana v. Del Monte Fresh Produce, NA, Inc.*, 416 F. 3d 1242 (11th Cir. 2005); *Doe VIII v. ExxonMobil*, No. 09-7125 (D.C. Cir. July 8, 2011). These courts have found that federal common law, rather than customary international law, determines whether the scope of liability for the violation of a given international law norm under the ATS extends to corporations. As corporations can be liable as juridical persons under federal common law, they can be liable for ATS claims, according to this view.

Last year, the Second Circuit directly rejected the proposition that corporations can be held liable for ATS claims. In *Kiobel*, the ATS decision the Supreme Court has just accepted for review, the majority of a three-judge panel held that the scope of liability for violations of international law norms is determined by international law itself, rather than by federal common law. In the *Kiobel* majority's view, international law does not reveal a specific and widely recognized norm of corporate liability for either civil or criminal offenses, and therefore cannot provide a foundation for corporate liability under the ATS.

The plaintiffs-appellants in *Kiobel*—12 Nigerian nationals whose claims against three oil companies were dismissed as a result of the panel majority's decision—filed petitions for panel and *en banc* rehearing. While both petitions were denied, a number of judges chose to write opinions, revealing deep divisions within the court on the issue of corporate liability.

In their successful petition for *certiorari* to the Supreme Court, the *Kiobel* plaintiffs argued that the Second Circuit's decision conflicts with *Sosa* because, among other things, it erroneously treats corporate defendants differently than other private actors, looks to international law for the scope of liability of common law claims based on international norms, and ignores the fact that federal common law has always provided for corporate tort liability. A number of amici filed briefs in support of the petition, including nine preeminent scholars of international law and human rights.

While *Kiobel* will require an inquiry into whether federal common law or international law recognizes corporate liability for international human rights violations, the case that the Supreme Court agreed to hear together with *Kiobel* involves a question of statutory interpretation. In *Mohamad*, the Court has been asked to determine whether liability exists under the TVPA for political entities, in this case the Palestinian Authority and the Palestine Liberation Organization.

The question in *Mohamad* is one of statutory interpretation because, while the TVPA specifically creates a cause of action for acts of torture or extrajudicial killing, it speaks only of actions against "an individual" acting under the authority of a foreign government. The D.C. Circuit held that the word "individual" typically encompasses only natural persons and observed that finding otherwise would mean that the word would have different meanings in the statute when referring to the victim and the perpetrator. In this respect, the D.C. Circuit split from the Eleventh Circuit, which has interpreted the

term "individual" in the TVPA as including corporations. See *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 n.13 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

In accepting *Kiobel* and *Mohamad* for review, the Supreme Court is stepping into a heated domestic and international debate regarding the legal duties of corporations with respect to human rights. The Court's upcoming decisions on the questions of whether corporations can be held liable under the ATS and TVPA may at least provide some clarity both for alleged victims and for corporations seeking to understand their potential legal opportunities and vulnerabilities in U.S. courts.

Authors



David W. Ogden

PARTNER

Chair, Government and
Regulatory Litigation Practice
Group

✉ david.ogden@wilmerhale.com

☎ +1 202 663 6440



Gary Born

PARTNER

Chair, International Arbitration
Practice Group

✉ gary.born@wilmerhale.com

☎ +44 (0)20 7872 1020