Hon. Alex Kozinski

When is it America's Concern? The Kiobel Decision and the Future of Alien Tort Statute Litigation in U.S. Courts

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Outline

I. Overview

In a decision issued last year closely watched by the international law community, the U.S. Supreme Court clarified the scope of the Alien Tort Statute (ATS), 28 U.S.C. § 1350, a federal statute that allows non-citizens to bring a tort claim, in certain circumstances, for the violation of international law or a United States treaty. See Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

Adopted by the first U.S. Congress as part of the 1789 Judiciary Act, the ATS remained virtually unknown for over 200 years after its enactment. It rose to prominence over the last two decades when alleged victims of human rights abuses attempted to seek redress in U.S. courts against international organizations subject to the general jurisdiction of U.S. courts. The rise of ATS litigation provoked controversy and resulted in formal complaints from many countries, including Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland and the United Kingdom, which alleged the litigation infringed their national sovereignty. See Doe v. Exxon Mobil Corp., 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), vacated, 527 Fed. App'x 7 (D.C. Cir. 2013).

In this session, I'll discuss the frontier of ATS litigation in U.S. courts. There are three primary limits U.S. courts have enforced in response to the proliferation of ATS litigation: (1) due process limits on personal jurisdiction; (2) the state action requirement; and (3) the presumption against extraterritorial application of U.S. law. These limits attempt to strike a balance between addressing the uncertainty-of-application and infringement-on-sovereignty concerns expressed by other countries, and maintaining our courts as a forum for international law violations that have a significant connection to the United States.

II. Overview of ATS Litigation and Three Primary Limits

A. History of the ATS: French Legion, Dutch Ambassador Cases

B. Causes of the Rise in ATS Human Rights Litigation

1. Globalization and Broad U.S. Personal Jurisdiction

2. Lack of Alternative Fora; Desirability of the U.S. Courts

3. Textual Ambiguity in Reach of the ATS

C. Criticisms of Extraterritorial Application of the ATS

1. Uncertainty and Threat to Consistent Rule of Law

2. Infringement on Sovereignty in Foreign Relations

D. Three Primary Limits: Personal Jurisdiction; State Action; and the Presumption Against Extraterritorial Application

III. General Jurisdiction, the Internet and Due Process

A. General In Personam Jurisdiction in the United States

1. Overview of specific and general jurisdiction: Int'l Shoe Co. v. Washington, 326 U.S. 310, 318–19 (1945).

2. In certain circumstances, a defendant may be subject to personal jurisdiction in a court in the United States even though the actions giving rise to the lawsuit were all conducted outside of the country or state (general jurisdiction).

3. With the advent of globalization, many large foreign corporations may be subject to general jurisdiction in U.S. courts due to their activities in the United States.

4. Many ATS lawsuits against corporations, which arise out of the corporations' foreign activities, are premised on U.S. courts exercising general jurisdiction over those corporations.

5. Globalization and rapid advances in technology have resulted in recent decisions emphasizing the limits to general jurisdiction.

B. General Jurisdiction and the Internet

1. We've rejected arguments that a corporation is subject to general jurisdiction based on its website, even if people in that jurisdiction can interact with the website in the jurisdiction by, for example, purchasing products from it.

2. Mavrix Photo, Inc. v. Brand Tech., Inc., 647 F.3d 1219 (9th Cir. 2011): Defendant was not subject to general jurisdiction in California even though it operated an interactive website that was accessible in California. Id. at 1225–27. The website was insufficient to confer general jurisdiction, which would "permit[] a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world." Id. at 1224.

3. Collegesource, Inc. v. AcademyOne, Inc., 653 F.3d 1066 (9th Cir. 2011): Subjecting defendant to general jurisdiction in California due to its operation of an interactive website accessible from California would result in "the eventual demise of all restrictions on the personal jurisdiction of state courts." Id. at 1076. General would swallow specific here.

4. The Supreme Court has yet to address this question. See Walden v. Fiore, 134 S. Ct. 1115, 1225 n.9 (2014).

C. General Jurisdiction and Corporate Relationships

1. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011): The Supreme Court held that a foreign

subsidiary of a U.S. parent corporation was not subject to general jurisdiction on claims unrelated to activities in the forum. Id. at 2857.

2. Daimler AG v. Bauman, 134 S. Ct. 746 (2014): Argentinians brought an ATS lawsuit against Daimler, a German corporation, arising out of alleged human rights violations by its subsidiary in Argentina. Id. at 751–52. The Supreme Court held that Daimler was not subject to general jurisdiction in California even if its subsidiary, Mercedes-Benz USA LLC, was subject to general jurisdiction in the state, and dismissed the suit for lack of personal jurisdiction. Id. at 760–63.

3. The Supreme Court warned that the Ninth Circuit "paid little heed to the risks to international comity its expansive view of general jurisdiction posed." Id. at 763.

4. Comparing the Ninth Circuit's expansive approach to general jurisdiction to the European Union's default limit on general jurisdiction to the courts of the defendant's domicile, the Court observed that broad "general jurisdiction" in U.S. courts has led to "international friction" and could discourage foreign investment in the United States. Id.

D. Analogous Context: Scope of Commercial Activity Exception to Foreign Sovereign Immunities Act (FSIA)

1. Sachs v. Republic of Austria, 737 F.3d 584 (9th Cir. 2013) (en banc): A U.S. resident bought a Eurail pass on the internet from a third party seller of Eurail passes. She was injured in Austria as she fell trying to board the train. She sued the government-owned railroad in tort in the United States. Id. at 587–88.

2. The majority held that the "commercial activity" exception applied because the railroad "carried on" commercial activity in the United States through an independent agent. Id. at 602–03.

3. I dissented, arguing that the exception didn't apply because plaintiff's tort claim arose from events that transpired entirely in Austria. Her personal injury claims weren't "based upon" commercial activity in the United States. I emphasized that there's usually going to be "some contact" with the United States in these cases. Id. at 611–13 (Kozinski, J., dissenting). That's not always sufficient for a claim to be "based upon" commercial activity in the United States.

4. The majority's broad reading of the exception threatens to swallow the rule. It will almost always be possible to allege some connection to the United States.

5. The defendant's certiorari petition is pending. The Supreme Court requested an amicus brief from the Solicitor General on May 19, 2014, for his input. See OBB Personenverkehr AG v. Sachs, No. 13-1067 (U.S. May 19, 2014).

IV. State Action Requirement

A. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)

1. A U.S. DEA agent was captured in Mexico, tortured and murdered. DEA believed Alvarez assisted in the torture. DEA hired Mexican nationals, including Sosa, to seize Alvarez in Mexico and bring him to the U.S. for trial. Alvarez was acquitted. Id. at 697–98.

2. Alvarez then brought civil charges against the United States under the Federal Tort Claims Act (FTCA), and his captors, including Sosa, under the ATS. Id. at 698–99.

3. The Supreme Court dismissed the FTCA claim, holding that the foreign country exception to the FTCA bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred. Id. at 712. In doing so, the Court rejected the Ninth Circuit's "headquarters"

doctrine—which allowed suits for actions in the United States that had their operative effect abroad—holding that it "threatens to swallow the foreign country exception whole." Id. at 703.

4. The Supreme Court then dismissed the ATS claim, holding that any ATS claim based on the present-day law of nations must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." Id. at 725.

B. The ATS's "state action" requirement is embedded in Sosa's requirement that any international law norm must be specific, universal and obligatory: Private actors aren't liable for violations of the law of nations unless that international norm applies to private individuals, and that application is specific, universal and obligatory.

1. In re Estate of Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992): In this early ATS case, we categorically stated that "[o]nly individuals who have acted under official authority or under color of such authority may violate international law." Id. at 501–02. But in Marcos, we held the state action requirement was satisfied because the defendant, dictator Ferdinand Marcos's daughter, was acting under the color of martial law imposed by Marcos when she ordered the torture of the plaintiff. Id.

2. While Marcos appears to impose a blanket rule, other circuits have allowed ATS claims against individuals not acting under color of official authority in specific circumstances. The Restatement (Third) of Foreign Relations Law also states that individuals may be held liable for offenses against international law, such as piracy, war crimes and genocide. Id. § 404. The Supreme Court hasn't addressed the issue.

3. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995): The Second Circuit held that individuals can be held liable for certain

international law violations—namely piracy, genocide and war crimes such as murder, rape and torture committed in the course of hostilities—even if they didn't act under color of official authority. Id. at 242–43. Thus, ethnic minorities in the former Yugoslavia could maintain an ATS action against Radovan Karadzic, commander of the Bosnian-Serb military forces, for the above acts even if Karadzic wasn't a state actor.

4. Abagninin v. AMVAC Chemical Corp., 545 F.3d 733 (9th Cir. 2008): We dismissed an ATS claim by Ivory Coast nationals against defendants, who used a harmful pesticide on plaintiffs' banana plantation in Ivory Coast, holding that the defendant corporations were not state actors. Id. at 741–42. They were not part of any plan or policy by the Ivory Coast government to commit the crimes alleged. Id.

5. Presbyterian Church of Sudan v. Talisman Energy Inc., 582 F.3d 244 (2d Cir. 2009): Plaintiffs, Sudanese nationals, claimed defendant Talisman aided the Sudanese government in the commission of genocide, war crimes, and crimes against humanity (not that employees of Talisman directly committed them). Id. at 251–52. The Second Circuit held that "aiding and abetting" under customary international law requires purposeful conduct and dismissed the suit because plaintiffs failed to allege that Talisman employees purposefully aided the Sudanese government's atrocities. Id. at 259.

6. Diaz v. Groupo Mexico, Inc., 487 Fed. App'x 366 (9th Cir. 2012): We held there is no "international norm prohibiting extrajudicial killings that are not the result of state action." Id. at 367. Substantial joint activity between the private individual and the state is required to satisfy the state action requirement. On that basis, we dismissed an ATS claim brought by victims of a mine disaster in Mexico, holding that the defendant corporation's actions in operating the mine were not sufficiently tied to state action of the Mexican government to state an ATS claim. Id.

V. Presumption Against Extraterritorial Application

A. Prescriptive Jurisdiction: Prescriptive jurisdiction concerns whether a particular United States law, such as the U.S. securities laws or the ATS, applies to the defendant's conduct. It's a question of statutory interpretation. It's separate from personal jurisdiction.

B. Presumption Against Extraterritorial Application: Our courts presume that the law of the United States is only meant to apply within the territorial jurisdiction of the United States.

1. The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (Aramco).

2. The U.S. Supreme Court has observed that it is rare that a case lacks all contact with the United States. But the Court explained that even a case that has some elements in the United States can still raise the concerns that motivate the presumption. Morrison v. Nat'l Australia Bank, 561 U.S. 247, 266 (2010).

3. The Morrison Court cited with approval amicus briefs of foreign governments and international trade organizations who urged that extraterritorial application of U.S. securities law would interfere with foreign regulations. Id. at 269.

C. The Kiobel Decision and the "Touch and Concern" Standard

1. In Kiobel, a group of Nigerian nationals residing in the United States brought suit against Royal Dutch Petroleum—subject to general jurisdiction in the United States courts—alleging Shell aided and abetting the Nigerian government in committing violations against the law of nations in Nigeria. 133 S. Ct. at 1662–63.

2. The Court dismissed plaintiffs' ATS claims. ATS claims must "touch and concern the territory of the United States," and they "must do so with sufficient force to displace the presumption against extraterritorial application." Id. at 1669.

3. "Indeed, far from avoiding diplomatic strife, providing such a cause of action could have generated it. Recent experience bears this out." Id. at 1669. Similar to the Court's warning in Morrison about the dangerous reciprocal application of other countries' securities laws, the Kiobel Court cautioned that other nations could "hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world." Id.