SMU | Dedman School of Law

SMU Law Review

Volume 71 | Issue 2 Article 10

January 2018

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Recommended Citation
Alicia Pitts, Note, *Extraterritoriality and the Alien Tort Statute— Narrow Application Preserves Crucial Boundaries*, 71 SMU L. Rev. 607 (2018)
https://scholar.smu.edu/smulr/vol71/iss2/10

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EXTRATERRITORIALITY AND THE ALIEN TORT STATUTE—NARROW APPLICATION PRESERVES CRUCIAL BOUNDARIES

*Alicia Pitts**

IN *Adhikari v. Kellogg Brown & Root, Inc.*, the Fifth Circuit issued the latest edition in a series of circuit court decisions that adopted a restrictive "location of the conduct" formulation for the test used to evaluate the Alien Tort Statute's (ATS) extraterritorial application.[1] The ATS, which grants district courts original jurisdiction in "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,"[2] was passed in 1789.[3] Despite centuries of disuse after its passing, over the past few decades the ATS has become an exceedingly popular means by which noncitizen parties seek compensation for wrongs committed outside of U.S. borders.[4] Since 2010, the Supreme Court has issued several opinions outlining a two-step framework to be applied by courts facing claimants alleging extraterritorial applications of U.S. law.[5] The first step, which asks whether the statute rebuts the presumption against extraterritoriality by giving a "clear indication of an extraterritorial application," was answered in the negative by *Kiobel v. Royal Dutch Petroleum Co.*, thus establishing an unswerving "presumption against extraterritoriality" for all ATS cases.[6] But uncertainty regarding the second step, which asks "whether the case involves a domestic application of the statute . . . by looking to the statute's 'focus,'" has led to a major circuit split over what the statute's "focus" should be.[7] The Fifth Circuit was correct when it joined the Second and Eleventh Circuits in adopting a restrictive, territory-centric test because a narrow formulation of the ATS's jurisdictional grant will preserve the legislative intent

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1. Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 192–97 (5th Cir. 2017).
2. 28 U.S.C. § 1350 (2012).
3. Sosa v. Alvarez-Machain, 542 U.S. 692, 712–13 (2004).
4. Cortelyou C. Kenney, *Measuring Transnational Human Rights*, 84 FORDHAM L. REV. 1053, 1054–56 (2015).
5. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2099–2101 (2016); Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 117–24 (2013); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 263–70 (2010).
6. *Kiobel*, 569 U.S. at 115, 124 (quoting *Morrison*, 561 U.S. at 265).
7. *See RJR Nabisco*, 136 S. Ct. at 2101.

behind the ATS, promote the core principles anchoring relevant Supreme Court precedent, respect boundaries between foreign sovereigns, and uphold constitutional delegations of foreign affairs powers.

The plaintiffs in *Adhikari*, all Nepali citizens, included a man named Buddi Gurung and the "surviving family members of eleven deceased men."[8] A Nepal-based recruiting company hired these plaintiffs in 2004 for "a hotel-related job in Jordan."[9] After each family incurred "significant debt in order to pay recruitment fees" to the Nepal-based company, the deceased were passed along through a series of transfers into the hands of Daoud & Partners, a Jordanian corporation who subcontracted with Kellogg Brown & Root (KBR), a "U.S. military contractor . . . provid[ing] staff to operate the [United States'] Al Asad Air Base ('Al Asad') . . . north of Ramadi, Iraq."[10] In Jordan, the deceased were locked into a compound, threatened, and had their passports confiscated.[11] "[They] were also [informed] for the first time that they [would be] sent . . . to work [at] Al Asad," rather than at a hotel, for less than their promised wages.[12]

In August 2004, while being "transported . . . into Iraq in an unprotected automobile caravan," the deceased "were captured by Iraqi insurgents."[13] The Iraqi insurgents "posted online videos of the [d]eceased in which the [d]eceased said that they had been 'trapped,' . . . 'deceived,' and . . . 'forced . . . to go to Iraq.'"[14] The insurgents subsequently executed the men and posted the execution video online.[15] "Plaintiff Gurung," who "travelled in the same automobile caravan as the [d]eceased" but was not captured, "arrived at Al Asad," where he worked "as a 'warehouse loader/unloader' for approximately fifteen months."[16] Gurung claimed that he was prohibited from leaving Al Asad "until his work in Iraq was complete."[17]

Plaintiffs sued Daoud and KBR in 2008, alleging negligence and violations of the Trafficking Victims Protection Reauthorization Act (TVPRA) and the ATS.[18] The TVPRA and ATS claims stated that the defendants engaged in human trafficking, a violation of international law actionable under the ATS, by "willfully and purposefully form[ing] an enterprise with the goal of procuring cheap labor and increasing profits."[19] Although Daoud settled with the plaintiffs, KBR chose to proceed

8. Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 190 (5th Cir. 2017).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 190–91.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 188–91.
19. *Id.* at 190.

to trial.[20] The United States District Court for the Southern District of Texas granted KBR's motion to dismiss the negligence claim, concluding that it was "barred by the statute of limitations." The TVPRA and ATS claims, however, were allowed to continue.[21] In August 2013, relying on the Supreme Court's intervening decision in *Kiobel*,[22] the district court dismissed plaintiffs' ATS claims against KBR because "all relevant conduct by Daoud and KBR occurred outside of the United States."[23] The plaintiffs appealed after the denial of their motion for rehearing on the ATS ruling.[24]

On appeal, the Fifth Circuit affirmed the district court's ATS dismissal, concluding that the plaintiffs had failed the two-part extraterritoriality test.[25] In doing so, the Fifth Circuit adopted a narrow construction of the focus step in the ATS framework, opting to "examin[e] the conduct alleged to constitute violations of the law of nations and the location of that conduct" in determining whether the ATS's focus inquiry is met.[26] In declining to adopt the broader formulations of step two applied by other circuit courts, the Fifth Circuit relied primarily on *RJR Nabisco, Inc. v. European Community*, a recent Supreme Court decision applying the presumption against extraterritoriality to the Racketeer Influenced and Corrupt Organizations Act.[27] The *Adhikari* court held that, in the domestic application step, "[i]f we conclude that the record is devoid of any domestic activity relevant to Plaintiffs' claims, our analysis is complete: as in *Kiobel*, the presumption against extraterritoriality bars the action."[28] Finally, the court signaled its most dramatic departure from other circuits by stating that the illegal conduct underlying the ATS claim should not be "conduct occurring in the territory of a *foreign sovereign*"[29] and, instead, must "'occur[ ] in the United States' rather than 'in a foreign country.'"[30]

The controversy surrounding the domestic application step centers on language from *Kiobel* and *Morrison v. National Australian Bank Ltd*.[31] In *Kiobel*, the Court noted that "a statutory claim might sometimes 'touch and concern' the territory of the United States . . . with sufficient force to displace the presumption."[32] In *Morrison*, the Court stated that, with regard to domestic application, courts should evaluate the "territorial event" or "relationship" that was the "'focus' of congressional concern"

20. *Id.*
21. *Id.* at 191.
22. Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 117–24 (2013) (holding that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption").
23. *Adhikari*, 845 F.3d at 191.
24. *Id.*
25. *Id.* at 199.
26. *Id.* at 195.
27. *See id.* (citing RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016)).
28. *Id.*
29. *Id.* at 196 (quoting Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 115 (2013)).
30. *Id.* (quoting *RJR Nabisco*, 136 S. Ct. at 2101).
31. *Id.* at 194–95.
32. *Kiobel*, 569 U.S. at 131.

in enacting the statute.[33] The Eleventh Circuit combined these tests, asking "whether 'the claim' and 'relevant conduct' are sufficiently 'focused' in the United States to warrant displacement and permit jurisdiction."[34] The court, accordingly, dismissed the plaintiffs' complaint, which alleged an American company's knowledge and financial support for extrajudicial killings committed in Colombia by Colombian nationals.[35] In contrast, the Ninth Circuit explicitly rejected the *Morrison* focus inquiry's application to ATS claims, instead choosing to apply a liberal construction of the touch-and-concern standard.[36] In facts analogous to *Adhikari*, where the American defendant's involvement in the international law violation boiled down to "awareness," the court granted plaintiffs leave to amend their complaint to allege that "*some* of the activity underlying their ATS claim took place in the United States."[37] By adopting a territory-centric approach for ATS cases, the Fifth Circuit joined the Second and Eleventh Circuits in restricting the availability of ATS claims for wrongs that occur primarily in foreign territories.[38]

The *Adhikari* court's analysis addressed several allegations of "domestic conduct," declaring each insufficient to establish a permissible domestic application of the ATS.[39] Looking first to the allegations of human trafficking, the court held that, with regard to the deceased's family members, since the "recruitment, transportation, and alleged detention [of the deceased] . . . all occurred in Nepal, Jordan, and Iraq," the conduct was insufficient as an ATS basis—"even assuming . . . [the trafficking could] be imputed to KBR," an American company.[40] Second, the court, relying again on *Kiobel*, denied plaintiff Gurung's argument that his work at Al Asad, an American military base, satisfied the domestic application since Al Asad was merely *temporarily* controlled by the United States and thus did not constitute "de facto" American territory.[41] Finally, the court refused to accept either KBR's alleged "aware[ness] of allegations of human trafficking at [its] worksites" or its payments to Daoud through New York banks as a basis for the ATS claim, reasoning that these U.S.-based payments did not constitute the tortious conduct at the focus of the ATS.[42]

One dissenting judge, however, argued for a broader application of the ATS in *Adhikari*, contending that the majority essentially foreclosed any

33. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010).

34. *Adhikari*, 845 F.3d at 194–95 (quoting Doe v. Drummond Co., 782 F.3d 576, 590 (11th Cir. 2015)).

35. Baloco v. Drummond, 767 F.3d 1229, 1233, 1235–39 (11th Cir. 2014).

36. Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1028 (9th Cir. 2014).

37. *Id.* at 1028–29 (emphasis added).

38. *Adhikari*, 845 F.3d at 195 (noting that its approach "largely comports" with the Second Circuit's test).

39. *Id.* at 195–98.

40. *Id.* at 195–97.

41. *Id.* (citing Rasul v. Bush, 542 U.S. 466, 480–82 (2004); Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010)).

42. *Id.* at 197–98.

possible extraterritorial application with its restrictive test.[43] First, Judge Graves noted that neither Supreme Court case addressing the ATS's extraterritorial application had reached the second step; thus, the focus inquiry was unguided when considering cases with "potentially relevant conduct both [inside] and outside the United States."[44] Accordingly, relying on *Kiobel* and *Sosa v. Alvarez-Machain*, Judge Graves stated that "the identity of the defendant, the nature of the defendant's liability (*direct or indirect*), the type of violation alleged, and any significant connections the alleged violation has to the United States" should guide the focus inquiry in ATS cases.[45] Further, Graves argued that U.S. citizenship of a corporate defendant should be relevant in ATS suits because foreign policy concerns counsel in favor of remedying international law violations abroad to avoid "implicat[ing] the United States in diplomatic conflicts."[46] Finally, he noted that the transnational nature of human trafficking, coupled with the United States' political commitment to eradicating the crime, support careful consideration of extraterritorial application in this case.[47]

Despite the controversial and often sensitive nature of ATS claims, the Fifth Circuit correctly interpreted the domestic application test because the ATS should not grant jurisdiction to claimants alleging tortious conduct occurring in foreign territory. When the ATS was passed by the First Congress in 1789, only three offenses against the law of nations were recognized: violation of safe conducts; infringement of the rights of ambassadors; and piracy, which, by its maritime nature, carries no territorial connections.[48] Moreover, the notorious international law violations both directly preceding and immediately following the ATS's enactment involved purely domestic events.[49] Significant to appreciating the legislature's intent in enacting the ATS is the acknowledgment that the United States was a young nation in 1789.[50] Presuming that the new leaders of this "fledgling" nation intended the ATS to surpass its newly-established borders and provide a forum to remedy extraterritorial tortious conduct would be illogical.[51] Consequently, a restrictive, territorially focused domestic application test, like that in *Adhikari*, is the only sort of test appropriate to effect the legislature's intent.

Further, the Fifth Circuit's restrictive test limiting ATS claims to tortious domestic conduct rightly implements the intense judicial restraint

43. *Id.* at 207–08 (Graves, J., concurring in part, dissenting in part).
44. *Id.* at 208–09 (citing Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 124–25 (2013); Sosa v. Alvarez-Machain, 542 U.S. 692, 737–38 (2004) (holding plaintiff had not alleged an actionable violation of international law)).
45. *Id.* at 209.
46. *Id.* at 210. It should be noted here that controversy exists over whether corporations can even be liable for violations of international law. The Supreme Court will consider this question next term in *Jesner v. Arab Bank, PLC*, 137 S. Ct. 1432 (2017).
47. *Adhikari*, 845 F.3d at 211 (Graves, J., concurring in part, dissenting in part).
48. *Sosa*, 542 U.S. at 724–25.
49. *See Kiobel*, 569 U.S. at 117–18.
50. *See id.* at 123.
51. *Id.*

anchoring the Supreme Court's ATS precedent. In *Sosa*, for example, the Court was careful to limit ATS jurisdiction to "only . . . alleged violations of international law norms that are 'specific, universal, and obligatory,'" despite the undeniable growth in international jurisprudence since the ATS's enactment in 1789.[52] Likewise, in *Kiobel*, the Court noted that each recognition of a federal cause of action for a violation of international law carries "significant foreign policy implications"; thus, courts must exercise "great caution" when considering ATS cases.[53] The Fifth Circuit, by requiring that the allegedly tortious conduct occur within U.S. territory, guarantees mechanical, evenhanded evaluation of ATS cases and respects the Court's call to restraint.

Finally, the Fifth Circuit's restrictive view respects both constitutional allocations of the foreign affairs power and international territorial boundaries. The Constitution explicitly confers authority over foreign affairs onto the legislative and executive branches.[54] The ATS, a congressionally enacted law with obvious foreign affairs consequences, should not be expanded by flexible, unmoored *judicial* application. The Court has often said that "United States law governs domestically but does not rule the world."[55] If, since the ATS's enactment centuries ago, neither Congress nor the President saw fit to broaden its reach to include extraterritorial conduct, why should the judiciary, whose province does not include foreign affairs matters, adopt loose tests saying otherwise? In fact, *Kiobel* noted that seven sovereign nations, including important U.S. allies Canada and the United Kingdom, objected to the extraterritorial application of the ATS.[56] Judicial tests allowing extraterritorial application of the ATS without tortious domestic conduct would prompt serious foreign policy consequences and impermissibly invade on the legislative and executive realms. The Fifth Circuit's decision preserves the boundaries between not only our branches of government but between our nation and peer nations as well.

Unlike the territory-centric focus inquiry, the application of which boasts considerable support from Supreme Court precedent, legislative history, and constitutional principles, champions of the Ninth Circuit's expansive touch-and-concern inquiry base their positions on unstable ground. These advocates primarily argue that because U.S. corporations should not "escape liability [for extraterritorial conduct] under the ATS," broad domestic application inquiry is correct.[57] However, while the question of corporate liability carries obvious importance to the availability of ATS remedies, the extraterritorial application of the ATS is a discrete

52. *Id.* at 117 (quoting *Sosa*, 542 U.S. at 732).

53. *Id.*

54. U.S. CONST. art. I, § 8; *id.* art. XI, § 2.

55. *Kiobel*, 569 U.S. at 115 (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

56. *Id.* at 124.

57. *See, e.g.*, Michael L. Jones, *Domesticating the Alien Tort Statute*, 84 GEO. WASH. L. REV. ARGUENDO 95, 110–15 (2016).

legal issue entirely unrelated to the extraterritoriality debate.[58] In fact, the mere existence of corporate liability under the ATS is an unclear concept to be decided by the Supreme Court next term.[59] Thus, corporate liability for international law violations, as an unresolved, isolated issue, forms little to no basis for broad domestic application supporters.

In summary, *Adhikari* provides a workable, evenhanded test that preserves the ATS's integrity and shelters the United States from immense foreign policy consequences. By limiting the ATS to encompass only tortious *domestic* conduct, the court respected centuries of precedent and protected the boundaries set by our Constitution. While a restrictive test may, sadly, refuse remedies to some injured parties lacking proof of tortious conduct on American territory, the political branches, not the Judicial Branch, must be responsible for opening the courts to additional causes of action. Although Congress has not amended or supplemented the ATS since its enactment over 200 years ago, perhaps our increasingly globalized world and the ATS's rise to prominence should signal that now is the time. Until that day, however, the judiciary should proceed with caution, understanding the consequences that may follow should it act alone to effect such a dramatic change in centuries-old U.S. law.

58. *See Kiobel*, 569 U.S. at 114.
59. *See* Jesner v. Arab Bank, PLC, 137 S. Ct. 1432 (2017).