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In the Supreme Court of the United States

ESTHER KIOBEL, ET AL.,
Petitioners,
v.
ROYAL DUTCH PETROLEUM CO., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE FEDERAL REPUBLIC OF GERMANY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE* THE FEDERAL REPUBLIC OF GERMANY

With the consent of the parties, The Federal Republic of Germany submits this *amicus curiae* brief in support of the Respondents. The letters of consent have been filed with the Clerk of the Court. [1]

The Government of The Federal Republic of Germany is a strong defender of, and committed to, the international rule of law, including the promotion of human rights, and protection against human rights violations.

The Federal Republic of Germany has consistently maintained its opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury on foreign soil. This position is not one that has been lightly adopted by The Federal Republic of Germany. The Federal Republic of Germany believes that overbroad exercises of jurisdiction are contrary to international law and create a substantial risk of jurisdictional conflicts with other countries.

The Federal Republic of Germany is concerned that the failure by some United States courts to take into account limitations on the exercise of their jurisdiction when construing the Alien Tort Statute, 28 U.S.C.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that no counsel for a party authored this brief in whole or in part and that no person or entity other than Amicus, contributed monetarily to the preparation or submission of this brief.

§ 1350 ("ATS"), has resulted in the assertion of subject matter jurisdiction over suits by foreign plaintiffs against foreign corporate defendants for conduct that took place entirely within the territory of a foreign sovereign and lack sufficient nexus to the United States. Such assertions of jurisdiction are likely to interfere with foreign sovereign interests in governing their own territories and subjects and in applying their own laws in cases which have a closer nexus to those countries.

The Federal Republic of Germany files this *amicus* brief to urge this Court to affirm the decision of the Second Circuit Court of Appeals that the issue of civil liability of a foreign corporate defendant is an issue of subject matter jurisdiction and to reaffirm its prior ruling in *Sosa v. Alvarez – Machain*, 542 U.S. 692, 712 (2004) ("*Sosa*"), that the ATS provides jurisdiction for a "very limited category" of claims by alien plaintiffs for injuries suffered outside of the United States. Regardless of whether this Court finds the issue of the liability of a foreign corporate defendant to be an issue of subject matter jurisdiction, The Federal Republic of Germany urges this Court to instruct the lower courts that the power to adjudicate should only be exercised in ATS cases brought by foreign plaintiffs against foreign corporate defendants concerning foreign activities where there is no possibility for the foreign plaintiff to pursue the matter in another jurisdiction with a greater nexus.

SUMMARY OF ARGUMENT

The Second Circuit's majority opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011),

correctly decided that the question of whether a corporate defendant can be sued under the ATS is a question of whether the court has subject matter jurisdiction. The Federal Republic of Germany does not argue that the Second Circuit's conclusion that it did not have subject matter jurisdiction over the corporate defendants was either correct or incorrect. Rather, the thrust of this brief's argument is that the issue is jurisdictional and not merits based. It is settled that the ATS is strictly and only a jurisdictional statute. *Sosa v. Alvarez-Machain*, 542 U.S. at 724 ("the ATS is a jurisdictional statute creating no new causes of action."). This alone distinguishes this case from what Petitioners claim is a conflict with this Court's recent decision in *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010). Petitioners' argument that the question of whether a corporation is a proper defendant concerns the reach of the statute is correct, but when that statute is solely a jurisdictional statute, the reach of the statute is necessarily a question of whether the court has the power to adjudicate the case, that is, whether the court has subject matter jurisdiction. This position is consistent with this Court's jurisprudence holding that in Title 42 U.S.C. § 1983 litigation, where subject matter jurisdiction is provided in a separate statute (28 U.S.C. § 1343), a suit naming a party who is not a "person" pursuant to § 1983 is properly dismissed for lack of subject matter jurisdiction.

Regardless of whether this Court determines that the issue is or is not one of subject matter jurisdiction over a corporate defendant under the ATS, this Court should instruct the lower courts to refrain from hearing such a case and to require that plaintiffs exhaust their local remedies in accordance with the

principle of international comity in cases in which there is no significant nexus to the United States and where an appropriate foreign jurisdiction has an interest that outweighs the interest of the United States.

ARGUMENT

I. THE ISSUE OF CORPORATE CIVIL TORT LIABILITY UNDER THE ALIEN TORT STATUTE IS AN ISSUE OF SUBJECT MATTER JURISDICTION

The Second Circuit correctly characterized the question of potential liability of a corporation under the ATS as question of subject matter jurisdiction. This position is consistent with this Court's holding in *Sosa* that the ATS was intended as jurisdictional "in the sense of addressing the power of the courts to entertain cases concerned with a certain subject." *Sosa v. Alvarez-Machain,* 542 U.S. at 714 ("All Members of the Court agree that § 1350 is only jurisdictional." *Ibid.* at 729.).

A. Determining the Proper Tortfeasor Under The ATS Is An Issue of Subject Matter Jurisdiction

This Court has defined subject matter as "a tribunal's power to hear a case, a matter that can never be forfeited or waived." *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment,* 130 S. Ct. 584, 596 (2009) (citations omitted). The ATS is unquestionably a jurisdictional statute. *Sosa,* 542 U.S. at 729; *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1262 (11th Cir. 2009).

Thus, the courts must look elsewhere to determine what conduct is actionable and what persons or entities are proper defendants under the ATS. That, of course, in the case at bar includes the question whether the alleged act is indeed an act that qualifies as a tort under the ATS, and also whether a corporation can be liable for committing such an act. *Sarei v. Rio Tinto, PLC,* 2011 U.S. App. LEXIS 21515 (9th Cir. 2011) ("The proper inquiry, therefore, should consider separately each violation of international law alleged and which actors may violate it."). Petitioners argue that, in a case where there is a statute that grants subject matter jurisdiction and another source of law as to who may be a tortfeasor, the question of who may be a tortfeasor "is a key element of the merits of a plaintiff's claim; [and] not a question of subject matter jurisdiction." Petitioners' Brief at 13. This argument runs counter to well established jurisprudence in a closely analogous situation.

This Court has encountered such a situation in civil rights litigation where persons who are proper defendants are defined in 42 U.S.C. § 1983 and subject matter jurisdiction is granted in a separate statute, 28 U.S.C. § 1343. In those cases where a named defendant is not a "person" pursuant to § 1983, the case is properly dismissed for want of subject matter jurisdiction and not for failure to state a claim. In other words, the question of whether the defendant is a proper person is a matter of subject matter jurisdiction. *Charlotte v. International Ass'n of Firefighters*, 426 U.S. 283, 285, n.1 (1976) ("As the Court of Appeals noted, insofar as the suit was brought against the city of Charlotte and the Charlotte City Council, the District Court was without jurisdiction under § 1343 since a municipal corporation is not a

'person' within the meaning of § 1983."); *accord*, *Gentile v. Wallen*, 562 F.2d 193, 195 (2d Cir. 1977) (because a "municipality is not a 'person' under § 1983 and is therefore not amenable to suit, . . . [t]he district court therefore lacked jurisdiction under § 1343(3), the jurisdictional counterpart of § 1983."); *Adkins v. Duval County School Board*, 511 F.2d 690, 691 (5th Cir. 1975) (because "county school board is not a 'person' within the meaning of that statute, the district court dismissed the cases for want of subject matter jurisdiction . . . ."). As in § 1983 litigation, the court does not have the power to hear an ATS case unless the court can affirmatively answer the question of whether the named defendant is a person or entity subject to the source of law creating the cause of action. Under the ATS, the Second Circuit therefore was correct when it determined that whether a corporation could be held liable under the ATS is an issue of subject matter jurisdiction.

Petitioners' claim that the Second Circuit's holding in this regard conflicts with the recent cases decided by this Court is misplaced. Those recent cases include: *Arriaza Gonzalez v. Thaler*, 2012 U.S. LEXIS 574 (U.S. Jan. 10, 2012); *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011); and *Reed Elsevier, Inc. v. Muchnick*, *supra*, 130 S. Ct. 1237. In these cases this Court was faced with the issue of distinguishing between jurisdictional rules and procedural "claims processing rules." *Henderson* involved the issue of whether a 120 day filing deadline was a jurisdictional rule or a claims processing rule. *Arriaza Gonzalez* involved the issue of whether obtaining a Certificate of Appealability was a jurisdictional rule or a claims processing rule. *Reed Elsevier* involved the issue of whether registering a copyright is a precondition to filing a copyright

infringement claim. Unlike the ATS, which is solely a jurisdictional statute, these cases all involved statutes which defined actionable claims. Here Congress, in creating a jurisdictional statute, necessarily stated "that a threshold limitation on a statute's scope shall count as jurisdictional," because the scope of the statute is solely and entirely jurisdictional. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006).

The reach of the ATS must be jurisdictional and not a claims processing rule, as the statute does not create any claims. Therefore, without regard to whether the Second Circuit correctly determined the existence of subject matter jurisdiction, it did correctly decide that the issue to be decided was one of subject matter jurisdiction.

B. Determination Of A Proper Tortfeasor Under The ATS As A Merits Question Would Put An Unjustified Burden on the U.S. Legal System And On Foreign Defendants

One rationale that this Court has adopted for strictly construing whether a rule is jurisdictional is that "[j]urisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants." *Henderson v. Shinseki*, 131 S. Ct. at 1202. In ATS litigation, failure to decide this issue at the jurisdictional phase not only places a higher burden on the already strained federal courts in the United States, it also runs afoul of the goal of "just, speedy and inexpensive determination of every action." Fed R. Civ. P. 1.

It is equally true that in ATS litigation foreign defendants may have to engage in lengthy and expensive legal proceedings, including, but not limited to the discovery process, only to find out after having spent hundreds of thousands of dollars in legal fees and numerous valuable work hours that they are not a tortfeasor under the ATS and, thus, the case must be dismissed. "If the district court dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided. Conversely, delaying ruling on a motion to dismiss such a claim until after the parties complete discovery encourages abusive discovery and, if the court ultimately dismisses the claim, imposes unnecessary costs." *Chudasama v. Mazda Motor Corp.,* 123 F.3d 1353, 1368 (11th Cir. 1997). Lastly, it would invite forum shopping by the plaintiffs' bar, which views the U.S. system with its contingency fees, punitive damages and (compared to other legal systems) very broad and cost intensive discovery process as an attractive venue to litigate against corporations, in the hope that corporate defendants can be forced into settlement to avoid out of control legal fees.

Thus, if the determination of who is a proper tortfeasor under the ATS is a matter of subject matter jurisdiction, cases in which plaintiffs use artful pleading techniques to claim the application of ATS to any tort committed by foreign tortfeasors in a foreign country against foreign victims will be weeded out at an early stage and only those cases which are brought legitimately under the ATS will go forward.

C. Regardless Of Whether This Court Finds The Issue Of Who Is A Proper Tortfeasor Under The ATS To Be One Of Subject Matter Jurisdiction, The Exercise Of Such Jurisdiction Should Be Limited

If this Court decides either that the issue before it is not an issue of subject matter jurisdiction, or that it is an issue of subject matter jurisdiction which grants courts jurisdiction in cases involving corporate defendants, this Court should be mindful of the impact a broader application of the ATS has on the sovereignty of other countries that have a strong interest in governing their own subjects and territories, and applying their own laws in cases which have a closer nexus to those countries.

1. Comity Requires U.S. Courts to Consider Other Available Venues

In particular, comity requires this Court to weigh the interest of the United States in opening its courts to civil trials against corporations under the ATS against the interest of a foreign nation in which the tort was committed[2] or the alleged tortfeasor is located. Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist.*,

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[2] The Federal Republic of Germany is, of course, mindful that the atrocious acts that lead truly aggrieved plaintiffs to sue under the ATS are most often committed within jurisdictions without adequate legal protection.

482 U.S. 522, 544 (1987). As a general rule, comity may be exercised where "it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated." *Allstate Life Ins. Co. v. Linter Group, Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993) (citation omitted).

By way of illustration, the interest of The Federal Republic of Germany in having cases that have little or no significant nexus with the United States against German corporations tried in German courts outweighs the interest of the United States in such litigation.[3] An unreasonable extraterritorial application of the ATS could potentially interfere with The Federal Republic of Germany's sovereignty, thus hugely affecting The Federal Republic of Germany's governmental interests in a way that is unacceptable. No such interference should occur between two countries like Germany and the United States, which cooperate so closely in economic and political terms and have the same goals in fighting violations of human rights.

The Federal Republic of Germany has an inherent interest in applying its laws and using its courts in cases in which German defendants are accused of the violation of international customary laws. The United States, on the other hand, cannot claim a larger interest in such cases that do not affect the United

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[3] Recent ATS cases that involve German companies include *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011) and *Khulumani v. Barclay Nat'l Bank Ltd.,* 504 F.3d 254 (2d Cir. 2007).

States. As Justice Stevens emphasized in his concurring opinion in *Morrison v. Nat'l Austl. Bank Ltd.,* 130 S. Ct. 2869, 2892 (2010), "United States courts 'cannot and should not expend resources resolving cases that do not affect Americans.'" (*quoting Morrison v. National Australia Bank Ltd*, 547 F.3d 167, 175 (2d Cir. 2008) ("we are an American court, not the world's court")).

The Federal Republic of Germany's legal system allows plaintiffs to pursue violations of customary international law by German tortfeasors in German courts. The German laws on international jurisdiction, private international law and the substantive law of compensation ensure that victims of those torts that are subject of the ATS can enforce their rights simply and efficiently before the German courts in cases involving those torts. German nationals and nationals of other countries who are the victims of such torts are entitled to file an action. German law does not discriminate on the basis of nationality or the principal place of residence of the victims of torts and German procedural law provides all plaintiffs with the same due process guarantee as United States law.

Section 823 of the German Civil Code provides that a person (persons are natural persons and entities with a legal persona like corporations) shall be held liable for the violation of another person's "life, body,

health, freedom, property or another right." Sec. 823 (1) German Civil Code.[4] German courts have jurisdiction over these cases if the tort is committed in Germany, or if the alleged tortfeasor has his or its domicile in Germany. *See* Sec. 13, 17 and 32 German Code of Civil Procedure. Other European countries have similar provisions in their laws.

Unlike individuals, who can move from country to country and hide, corporations are more easily tied to a particular jurisdiction, *i.e.*, the one in which they are formed (incorporated) and/or the one in which they have their registered office and/or in which they have their principal place of business/center of management. Most international corporations tend to be formed in places like the United States and the European Union whose legal systems provide due process of law, because a corporation that is engaged in international business needs not only a functioning economic infrastructure in the country in which is has its center of management or is incorporated, but also a functioning legal system to accomplish its goals.

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[4] **Section 823**
Liability in damages

(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

It is reasonable to request that United States courts exercise judicial restraint, under the principle of international comity, and take into account the availability of venues with a more significant nexus before applying the ATS to torts committed on foreign soil by foreign tortfeasors that injured foreign victims and have no nexus to the United States. "Not only considerations of the efficiency of our own judicial system but principles of comity and the self-fulfilling consequences of a pronouncement of deficiency in the quality of justice in another state, compel judicious restraint from our courts. . . ." *Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukr.*, 158 F. Supp. 2d 377, 385 (S.D.N.Y. 2001).

While it certainly would be inappropriate to require plaintiffs to exhaust their legal remedies in countries which have a proven record of human rights violations and no due process, it is certainly reasonable and appropriate to require a victim of a tort committed in a third country by a German tortfeasor to go to Germany and utilize the legal system of the Federal Republic of Germany to seek legal satisfaction.[5]

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[5] U.S federal courts have found that the German court system provides impartial tribunals or procedures compatible with the requirements of due process of law. *See Baumgart v. Fairchild Aircraft Corp*., 981 F.2d 824, 835 (5th Cir. 1993); *Dresdner Bank AG v. Haque,* 161 F. Supp. 2d 259, 263 (S.D.N.Y. 2001); *Martin v. Vogler*, 1993 U.S. Dist. LEXIS 15878, at *2-5 (N.D. Ill. Nov. 9, 1993).

2. Exhaustion of Available Legal Remedies Should be Required

The basic principles of international law require that, before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the claimant's or opponent's domestic legal systems, and other available forums, such as international claims tribunals, should be utilized to limit the availability of relief in the federal courts for violations of customary international law under the ATS. *See Sosa* 542 U.S. at 733 n.21.).[6] Where the nexus to the United States is weak, courts should carefully consider the question of exhaustion. *Sarei v. Rio Tinto, PLC,* 550 F.3d 822, 824 (9th Cir. 2008) ("Simply because universal jurisdiction *might* be available, does not mean that we should exercise it.") (emphasis in original).

Thus, a foreign plaintiff who sues a foreign corporation in the United States for acts committed outside the United States without a significant United States nexus should be required to show that the available legal remedies in the country of incorporation or center of management are not available to him. *See Sarei v. Rio Tinto, PLC,* 550 F.3d at 831. ("Lack of a significant U.S. 'nexus' is an important consideration in evaluating whether plaintiffs should be required to exhaust their local

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[6] The Torture Victim Protection Act requires that a plaintiff exhaust adequate and available local remedies. Torture Victim Protection Act § 2(b), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)).

remedies in accordance with the principle of international comity.”).

Furthermore, there should be a strong presumption against allowing courts of the United States to project U.S. law into foreign countries through the *de facto* fashioning of federal common law. This Court has made it clear that there is a presumption that Congress does not intend to extend U.S. law over conduct that occurs in foreign countries, a limitation that “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citation omitted); *see also Morrison v. Nat’l Austl. Bank Ltd.,* 130 S. Ct. at 2881 (“Results of judicial-speculation-made-law--divining what Congress would have wanted if it had thought of the situation before the court--demonstrate the wisdom of the presumption against extraterritoriality”). The same argument applies to the projection of U.S. laws into foreign countries. To rule otherwise would create “serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.” *F. Hoffmann-La Roche Ltd. v. Empagran*, 542 U.S. 155, 165 (2004). While the violation of the law of the nations in the context of ATS litigation is, at first sight, not a commercial activity, cases brought against corporations under the ATS will almost always claim a commercial motive.

3. Cautious And Limited Application Of The ATS Is Warranted

The Federal Republic of Germany urges this Court to continue its cautious application of the ATS, as in

Sosa, where this Court made it clear that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when the ATS was enacted. *Sosa,* 542 U.S. at 719, 732.

To widen the potential application of the ATS by allowing United States courts to use their power to recognize more actions as torts under the ATS and to disregard comity and the exhaustion of foreign legal remedies runs contrary to the "great caution" that this Court has admonished the courts to use in exercising their modest federal common law making authority under the ATS. *Sosa,* 542 U.S. at 728.

CONCLUSION

Congress created a purely jurisdictional statute in enacting the ATS. As such, the Second Circuit was correct in holding that the issue of whether the ATS covers corporate tortfeasors is one of whether the court has subject matter jurisdiction. Even if this Court disagrees, it should instruct lower courts to take into account the availability of forums in other jurisdictions with a greater nexus and require the exhaustion of local remedies in those jurisdictions where appropriate. This Court should be aware that permitting the broad exercise of subject matter jurisdiction by lower courts without a specific nexus would result in a legal and economic climate that would make it more difficult for corporations to engage in international business. This Court, as one of the world's most influential, should take this opportunity to ensure that the ATS is only used as a last resort for

limited causes of action in cases that have no significant nexus to the United States.

Respectfully submitted,

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