STAY CURRENT
A Client Alert from Paul Hastings

PAUL HASTINGS

September 2011

Corporate Liability Under the Alien Tort Statute

BY JAMES E. BERGER & CHARLENE C. SUN

On July 8, 2011 and July 11, 2011, the Courts of Appeals for the District of Columbia Circuit and the Seventh Circuit, respectively, handed down decisions concerning the scope of liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, a federal statute that grants district courts jurisdiction to entertain suits sounding in torts committed in violation of international law.

The implications of the Courts' rulings are significant, and have deepened a split among the federal appellate courts by holding that corporations are subject to civil liability under the ATS on the ground that they "aided and abetted" violations of customary international law undertaken by third parties in the nations where they were operating. By so ruling, the Courts' signaled their disagreement with the Second Circuit's recent ruling in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), which held that corporations could not be held liable under the ATS.[1]

The ATS

The ATS was adopted by the First Congress in 1789 as part of the original Judiciary Act. The statute simply provides that "[t]he district courts shall have original jurisdiction over 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] At the time of its passage, the ATS was thought to cover only three specific offenses against the law of nations: violations of the right of safe passage, interference with ambassadors, and piracy.

The statute was seldom invoked in the first 200 years following its adoption, and while the Supreme Court has only addressed the statute once, its ruling in that case appears to have encouraged plaintiffs to attempt to expand dramatically the standards of international law for which it may be invoked. Specifically, in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court held that in "accepting a cause of action subject to jurisdiction under [the ATS]," a court "should not recognize private claims for violations of any international law with less definite content and acceptance among civilized nations than the historical paradigms familiar when [ATS] was enacted."[3] Despite this, and while cautioning that federal courts should exercise restraint in considering new causes of action under the ATS, the Supreme Court held in *Sosa* that the question of what constitutes customary international law must be determined with reference to the "present day law of nations," a standard that necessarily, if implicitly, recognizes that the international law standards upon which the statute may be invoked will evolve over time.[4]

Corporate Liability

Sosa did not address the categories of defendants who may be held liable under the ATS, and the Courts of Appeals have been left to determine whether customary international law allows for the

imposition of liability against corporations or other non-natural, non-state actors. In addressing this question, the Courts of Appeals have canvassed historical sources and events, ultimately reaching different conclusions on the question.[5] The Eleventh Circuit was the first federal appellate court to directly address the question of corporate liability under the ATS, and found that because the ATS provided no express exception for corporations, corporations were not immune from suit under the statute.[6] Two years later, the Second Circuit disagreed, finding that courts must "look to international law to determine our jurisdiction over ATS claims against a particular class of defendant, such as corporations,"[7] and that "the concept of corporate liability for violations of customary international law has not even begun to 'ripen[ ]' into a universally accepted norm of international law."[8]

Doe v. Exxon Mobil Corp., ___ F.3d _____, 2011 WL 2652384 (D.C. Cir. July 8, 2011)

Exxon involved two actions brought in 2001 and 2007 by a group of Indonesian villagers alleging that Exxon's security force, which was comprised of members of the Indonesian military, committed murder, torture, sexual assault, battery, and false imprisonment while operating in the Aceh province of Indonesia. Plaintiffs based their claims under both the ATS and Torture Victims Protection Act ("TVPA")[9] on allegations that Exxon "took actions both in the United States and at its facility in the Aceh province that resulted in their injuries,"[10] claiming that the actions of the Indonesian military could be attributed to Exxon because they were committed by a unit dedicated only to Exxon's Aceh facility and because Exxon had the authority to 'control and direct[] the soldiers' actions."[11] Plaintiffs argued that Exxon knew that the performance of the security contract would lead to human rights violations by Indonesian soldiers against the residents of Aceh, and thus, by knowingly acting together with the Indonesian security forces and profiting from those acts, Exxon acted under color of Indonesian law.

The District Court, without any discussion of whether Exxon's status as a corporation shielded it from liability under the ATS, dismissed the statutory claims[12] against Exxon on the primary bases that aiding and abetting was not actionable under the ATS and that Exxon could not be liable for genocide and crimes against humanity because the adjudication of such claims would impermissibly intrude upon Indonesia's internal affairs.[13] Plaintiffs appealed the dismissal and Exxon cross-appealed, contending for the first time on appeal that corporations are immune from liability under the ATS. The Court of Appeals nonetheless agreed to hear Exxon's corporate immunity defense, stating that *Exxon* is a case of "exceptional circumstances" regarding "uncertainty in the state of the law" and thus presents an opportunity to address a "novel, important, and recurring question of federal law."[14]

The Court of Appeals began its analysis with a discussion of *Sosa*. Judge Rodgers, writing for the majority, noted that *Sosa* requires that a cause of action brought under the ATS have its source in customary international law. The Court found that there is no doubt that the substantive content of the causes of action brought by the Indonesian villagers has its source in customary international law. Thus, the Court stated that the issue, unlike the issue in *Sosa*, was not whether the substantive cause of action has its source in customary international law, but rather a question about "technical accouterments to [a cause of] action" *i.e.*, the reaction, remedies and/or consequences. The answer to that question, the Court held, is found in federal common law and not customary international law because "outside of certain treaties [the law of nations] creates no civil remedies and no private right of action."[15] Thus, the question for the *Exxon* Court was whether a corporation can be made to pay damages for the conduct of its agents in violation of international law, *i.e.*, a question of corporate agency.

The Court looked to the text of the ATS for guidance regarding the issue of corporate liability and found that the statutory text was only concerned with the identity of the **plaintiffs** (*i.e.*, aliens) and the types of actions that could be brought (*i.e.*, torts). The Court interpreted the ATS' silence on the question of potential defendants as evidence that the ATS did not exclude corporate defendants.

Finding that nothing more could be discerned from the statutory language, the Court turned its analysis to the historical context surrounding the ATS' adoption. In so doing, the Court found that the main concern for the First Congress was the risk that the United States could be drawn into foreign entanglements unless the federal courts had jurisdiction to hear cases brought by aliens. Importantly, the Court held that there was nothing in the historical context to suggest that the First Congress would seek to prohibit natural persons from causing foreign entanglements, yet permit corporations to do so, and found nothing to suggest that "corporate immunity would be inconsistent with the ATS because by [the time the ATS was adopted] corporate liability in tort was an accepted principle of tort law at the time."[16]

The Court concluded its analysis by addressing *Kiobel*, in which the Second Circuit held that "because corporate liability is not recognized as 'specific, universal, and obligatory norm' it is not a rule of customary internal law that we may apply under the ATS."[17] The *Exxon* Court concluded that the Second Circuit misinterpreted *Sosa* by looking to international law to define who may be a defendant; as noted above, the *Exxon* Court concluded, based on the Supreme Court's decision in *Sosa*, that the question of corporate liability was an issue of remedies governed by federal common law rather than a question of international law. The Court also noted that corporate liability is a universal principle and that no domestic jurisdiction exempts corporate entities from liability. Finally, the Court focused on *Kiobel*'s reliance on the Nuremberg trials – a historical source that U.S. courts have consistently relied upon in determining whether a particular case involves a violation of customary international law – for the proposition that the ATS is not properly extended to corporate defendants. Specifically, the Court found that the *Kiobel* court ignored the Allies' decision to dissolve I.G. Farben, the German corporation that was regarded as the "Allies' principal economic enemy," after the conclusion of the war. The Court emphasized that "the Allies determined that I.G. Farben had committed violations of the law of nations and therefore destroyed it."[18] This, the *Exxon* court concluded, provided a clear example and precedent of a judicial body's imposition of liability against a corporate body based upon a violation of customary international law.

In view of the above holdings, the Court reversed the dismissal of the ATS claims at issue in the appeal on grounds that corporate liability is available under the ATS, affirmed the dismissal of appellants' TVPA claims on grounds that corporate liability is not available under the TVPA, and reversed the dismissal of appellants' non-federal tort claims, remanding the cases to the district court for a determination of whether diversity subject matter jurisdiction existed over those claims.

Flomo v. Firestone Natural Rubber Co., LLC, 643 F.3d 1013 (7th Cir. 2011)

Plaintiffs in *Flomo*, a group of twenty-three Liberian children, brought suit under the ATS alleging that Firestone violated customary international law by allowing children to perform hazardous labor on its rubber plantation. Specifically, plaintiffs claimed that while Firestone does not employ any children directly on its rubber plantation, its sets high daily production quotas for its employees, who are well-compensated by local standards, and terminates any employee who fails to meet the quota. As a result, the plaintiffs alleged, the employees would attempt to meet their quotas by either hiring children or bringing their own children with them to work and requiring them to assist in the work. While the Court noted that it was unclear whether Firestone had adopted effective measures for

keeping children from working on the plantation, it found that Firestone did not have a policy regarding the utilization of child labor by their employees until 2005, the year the suit was filed.

Judge Posner, writing for Court, held that Firestone was not liable under the ATS because plaintiffs' allegations did not implicate a standard of customary international law. Irrespective of the sufficiency of the pleadings under the ATS, however, the Court held that Firestone, as well as other corporate entities, may be subject to suits arising out of the ATS.

The Court in *Flomo* took an approach similar to that of the D.C. Circuit in *Exxon*. The Court initiated its discussion by addressing *Sosa* and finding that *Sosa* did not directly address the issue of corporate liability. The Court then turned to *Kiobel* and addressed what it considered to be the Second Circuit's faulty historical analysis. Specifically, the Court pointed to the Nuremberg trials and the decision of the International Military Tribunal to terminate and liquidate I.G. Farben. Conversely, the Court noted that even supposing "no corporation had ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be."[19]

Much like the *Exxon* court, the Seventh Circuit emphasized that corporate tort liability is common around the world. The Seventh Circuit concluded its analysis by pointing out the "absurdities" of requiring that corporate liability be found to be a norm of international law before it can be actionable under the ATS, stating that "[i]f a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the [ATS] could ever be successful, even claims against individuals; only the United States…has a statute that provides a civil remedy for violations of customary international law."[20]

Aiding and Abetting Liability

The *Exxon* and *Firestone* decisions are notable in that they both expressly affirmed a developing consensus[21] among the circuits that aiding and abetting liability is cognizable under the ATS. The Second, Fifth, Ninth and Eleventh Circuits had previously held (either explicitly or implicitly) that aiding and abetting claims are available under the ATS, and while not every circuit appears to have addressed the issue, no federal court at the appellate level has yet to hold that aiding and abetting liability is not permitted under the ATS.[22] Less certain is the proper standard by which aiding and abetting liability may be established, as the courts to consider this issue have not consistently applied a single standard.[23]

When considered in conjunction with the availability of corporate ATS liability in some jurisdictions, the widespread acceptance of aiding and abetting liability under the ATS carries enormous significance for multinational corporations, as echoed by Judge Korman in a partial concurrence/dissent in the Second Circuit's *Khulumani* decision, who suggested (as did the United States as *amicus*) that aiding and abetting liability "will generate tremendous uncertainty for private corporations, who will be reluctant to operate in countries with poor human rights records for fear of incurring legal liability for those regimes' bad acts."[24]

Conclusion

By tying the international law standard under the ATS to the "present day law of nations," the Supreme Court in *Sosa* has practically invited plaintiffs to attempt to stretch customary international law to encompass new categories of tortious conduct. Where the defendant is an ATS case is a foreign government or state entity, such attempts would be less problematic, given that many, if not most, such cases would be subject to dismissal on sovereign immunity, personal jurisdiction, or *forum*

non conveniens grounds. It is almost certainly for this reason that plaintiffs have begun to assert "aiding and abetting" claims against multinational corporations, most of which maintain some presence in the United States (and thus are less likely to be able to win dismissal based on any of the defenses available to foreign states). In a sense, the combination of *Sosa*'s adoption of an evolving standard of customary international law, a rule holding that corporations are proper defendants in ATS cases, and recognition of "aiding and abetting" liability under the ATS has created a "perfect storm" that will almost certainly lead to a continued uptick in ATS filings against corporations in the U.S. courts for events having no conceivable relation to the corporations' primary business activities or to the United States. *Exxon* and *Flomo* illustrate a particularly clear split among the federal appeals courts in their view of the ATS; given the fundamental nature of this split and the large stakes involved in a typical ATS case, it appears clear that the Supreme Court (or Congress) will need to resolve the disagreement among the circuits and adopt a uniform rule concerning the class of defendants who may be liable under the ATS.[25]

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings New York lawyers:

James E. Berger
1.212.318.6450
jamesberger@paulhastings.com

Charlene C. Sun
1.212.318.6703
charlenesun@paulhastings.com

---

[1] By their rulings, the D.C. and Seventh Circuits joined the Eleventh Circuit in holding that corporations are subject to liability under the ATS. *See Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008) (holding that the "ATS places no limit on who can be a defendant, by contrast with who can be a plaintiff, and the phrase 'any civil action' undermines any implied limitations not contained in the text").

[2] 28 U.S.C. § 1530.

[3] *Sosa v. Alvarez–Machain*, 542 U.S. 692, 732 (2004).

[4] *Id*. at 725.

[5] *Exxon*, ___ F.3d ___, at *21.

[6] *See Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

[7] *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111, 127 (2d Cir. 2010).

[8] *Id*. at 137.

[9] 28 U.S.C. § 1350 note § 2(a).

[10] *Id.* at *1.

[11] *Id.* at *2.

[12] The district court dismissed plaintiffs' TVPA claims against Exxon, holding that the TVPA did not provide a cause of action against corporations and that plaintiffs had not established that Exxon had acted under color of the law. The Court of Appeals affirmed.

18 Offices Worldwide Paul Hastings LLP www.paulhastings.com

Stay*Current* is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2011 Paul Hastings LLP.

IRS Circular 230 Disclosure: As required by U.S. Treasury Regulations governing tax practice, you are hereby advised that any written tax advice contained herein or attached was not written or intended to be used (and cannot be used) by any taxpayer for the purpose of avoiding penalties that may be imposed under the U.S. Internal Revenue Code.

[13] The district court allowed discovery to proceed on plaintiffs' tort claims, although it eventually dismissed those claims as well for lack of prudential standing. *See Doe VIII v. Exxon Mobil Corp*., 658 F. Supp. 2d 131 (D.D.C. 2009). Plaintiffs appealed, and the Court of Appeals reversed the district court's dismissal of these claims and remanded for a determination of whether diversity jurisdiction existed over those claims, an issue that the district court had not previously reached.

[14] *Id.* at *20.

[15] Id at *22.

[16] Id at *28.

[17] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir., 2010).

[18] *Exxon,* ___ F.3d ___, at *31.

[19] *Flomo*, ___ F.3d ___, at *3.

[20] *Flomo*, ___ F.3d ___, at *5.

[21] *See, e.g., Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315-16 (11th Cir. 2008) ("[T]he law of this Circuit permits a plaintiff to plead a theory of aiding and abetting liability under the Alien Tort Statute and the Torture Act."); *Khulumani v. Barclay Nat. Bank Ltd*., 504 F.3d 254, 260 (2d Cir. 2007) ("[I]n this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the [ATS]."); *Hilao v. Estate of Marcos*, 103 F.3d 767, 776-77 (9th Cir. 1996); *Carmichael v. United Technologies Corp*., 835 F.2d 109, 113-14 (5th Cir. 1988).

[22] However, the D.C. Circuit Court of Appeals expressed in *Exxon* its doubt as to whether aiding and abetting liability was available under the TVPA. *See Exxon*, 2011 WL 2652394, at *36.

[23] *Compare Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258-59 (2d Cir. 2009) (requiring that defendant act with purpose in order to satisfy mens rea element of aiding and abetting liability), *with Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158-59 (11th Cir. 2005) (identifying knowledge of illegality as sufficient).

[24] *Khulumani*, 504 F.3d at 330 (Korman, J., concurring in part and dissenting in part).

[25] The plaintiffs in *Kiobel* filed a petition for certiorari to the United States Supreme Court in June 2011, in which they seek the Supreme Court's resolution of a perceived split among the circuits concerning corporate liability under the ATS. The Supreme Court's decision on whether or not to grant certiorari in the *Kiobel* case is expected in the near future.