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Second Circuit Holds Corporations Not Liable Under Alien Tort Statute

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On September 17, 2010, the Court of Appeals for the Second Circuit issued a major and long-awaited ruling under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, a statute that permits non-U.S. nationals to sue in U.S. courts for violations of international law. Specifically, the Court of Appeals in *Kiobel v. Royal Dutch Petroleum Co.*, __ F.3d __, No. 06 Civ. 4876, 2010 WL 3611392 (2d Cir. Sept. 17, 2010) held, by a 2-1 majority, that corporations are not subject to civil liability under the ATS. The case is extremely significant: while the ATS was adopted by the first U.S. Congress in 1789 as part of the original Judiciary Act, the past three decades have seen a huge increase in the number of claims seeking compensation for torts committed abroad. Many of these cases have been brought as class actions against corporations on the grounds that those corporations "aided and abetted" human rights abuses and political repression in the nations where they were operating. Despite the increase in the number of ATS claims in recent years, the Second Circuit had not been directly presented with the issue of corporate liability in any of its prior decisions. Thus, *Kiobel* has resolved an important question under the ATS, while simultaneously creating a circuit split that may well result in the issue going to the U.S. Supreme Court.

The ATS

The ATS was adopted in 1789 as part of the original Judiciary Act. It provides simply 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."[1] Judge Cabranes, at the outset of his opinion in *Kiobel*, described the ATS as "a jurisdictional provision unlike any other in American law and of a kind unknown to any other legal system in the world," while also recalling former Second Circuit Judge Friendly's description of the ATS as a "legal Lohengrin" as to which "no one seems to know whence it came."[2]

The Supreme Court has only addressed the ATS once, in *Sosa v. Alvarez-Machain*,[3] and the Court's opinion in that case provides some valuable historical background concerning the scope of the statute. The Court noted that, at the time of its adoption, the ATS was thought to cover three specific offenses against the law of nations: violation of the right of safe passage, infringement of the rights of ambassadors, and piracy. The Supreme Court made clear in *Sosa*, however, that for purposes of ascertaining whether jurisdiction exists under the ATS, courts should look to the "present day law of nations" and that jurisdiction under the ATS will be found where the rule of

international law at issue reflects "norms of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms [i.e., the three violations initially thought of as implicating the ATS]."[4] The Court added that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."[5] The Court's admonition here is unsurprising, and reflects the Supreme Court's caution – which is apparent in virtually every lower court decision rendered in *Sosa*'s wake – about throwing open the doors of the American court system to foreign plaintiffs seeking redress for harms committed abroad by foreign actors.

In recent years, the federal courts have seen a significant uptick in ATS filings, and plaintiffs began to assert claims against multinational corporations, who (unlike states) cannot claim sovereign immunity, who (unlike individuals) are perceived as being able to satisfy substantial money judgments, and who (unlike both states and individuals) may, as a result of their widespread presence and business activities, be subject to personal jurisdiction in the U.S. courts. Specifically, numerous corporations operating in countries affected by political repression or violent armed conflicts were sued under the ATS on the theory that, through their cooperation with governments alleged to have engaged in human rights violations, they aided and abetted those violations.

Kiobel

This was precisely the paradigm under which the *Kiobel* plaintiffs proceeded. Plaintiffs were Nigerian residents who brought a class-action lawsuit claiming that Defendants, who were Dutch, British and Nigerian corporations engaged in oil exploration and production in Nigeria, had aided and abetted the Nigerian government in committing human rights abuses directed toward Plaintiffs. While the district court dismissed several of Plaintiffs' claims, their claims regarding aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture survived Defendants' motion to dismiss. Due to importance of the issues presented, the district court certified its order to the Court of Appeals for immediate interlocutory appeal.

The Court of Appeals, through a panel comprised of Judges Cabranes and Leval and Chief Judge Jacobs, began its analysis by considering whether international or domestic law should govern the question of the scope of liability under the ATS. The Court found that both Second Circuit and Supreme Court precedent required that federal courts look to international law to determine the scope of ATS liability. Citing the Supreme Court's decision in *Sosa*, the Court noted that the ATS is strictly a jurisdictional statute that "enable[s] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."[6] The Court noted the holding from *Sosa* that this category was not to be limited to the three violations of the law of nations that were widely recognized as universally cognizable at the time the statute was drafted, but rather, was intended to encompass claims "based on the present-day law of nations."[7] The Court of Appeals also relied upon *Sosa*'s observation that "a related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual."[8]

The Court also looked to its own precedents under the ATS,[9] in which it had conducted thorough analyses of present-day international law, and undertook an independent analysis of international

law, specifically the judgments of the International Military Tribunal at Nuremberg, from which it concluded that "the subjects of international law are determined by international law, and not individual States."[10] Thus, based on *Sosa*, Second Circuit precedent, and international law, the Court of Appeals concluded that international law, and not domestic law, should govern the scope of liability for violations of customary international law under the ATS.

Having resolved this threshold issue, the Court continued to the main issue before it, namely whether international law provided for the imposition of liability against corporate entities. Emphasizing that "the purpose of the ATS was not to encourage United States courts to create new norms of customary international law unilaterally,"[11] the Court re-affirmed that a rule of customary international law must be found – based on various sources, including international conventions recognized by contesting states, international custom as evidenced by general practice accepted as law, general principles of law recognized by civilized nations, and judicial decisions and the teaching of the most highly qualified publicists[12] – to be "specific, universal and obligatory" in order to support jurisdiction under the ATS.[13]

The Court then canvassed these sources of law in search of a basis for the imposition of civil liability against corporate entities for violations of international law. The Court first looked to decisions of international tribunals established for the purpose of imposing liability on those who violate international law, such as the International Military Tribunal at Nuremberg (IMT), which was established by the London Charter and authorized to impose punishment on war criminals of the European Axis following World War II. While the Court found that the London Charter did grant the IMT authority to declare certain organizations "criminal," it found that such a declaration did not result in the organization itself being punished or having liability assessed against it. The declaration merely facilitated the prosecution of ***individuals*** who were members of the organization. The Court also looked to the charters establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which both expressly confined the tribunals' jurisdiction to "natural persons."[14] Lastly, the Court looked to the recent Rome Statute creating the International Criminal Court (ICC), whose drafters had rejected a proposal to extend jurisdiction to corporations and had limited the ICC's jurisdiction to natural persons only.[15]

In addition, the Court found that no influential treaties had established corporate liability as a norm of customary international law. While noting that one district court in the Southern District of New York had remarked on a number of international treaties that regarded corporate liability as a norm of customary international law in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), the Court of Appeals held that the district court in that case had erroneously overvalued the importance of those treaties, particularly since those treaties covered specialized subject matter and had not influenced the international community to such degree that a general consensus that corporations should be held civilly liable for international law violations could be discerned.

Lastly, the Court cited a number of publications by two "renowned professors of international law"[16] which supported the proposition that customary international law did not recognize corporate liability in either the criminal or civil context.

In conclusion, the Court noted that, while federal courts lack jurisdiction over corporate entities under the ATS, nothing in the Court's opinion should be read to limit or foreclose ATS suits against a corporation's employees, managers, officers, directors, or any other person who commits or aids and abets a violation of international law.

Concurrence

Judge Pierre Leval wrote a separate concurrence in which he agreed that the Plaintiffs' complaint was required to be dismissed (due to its failure to sufficiently plead a cause of action for aiding and abetting under the Second Circuit's ruling in *Presbytarian Church of Sudan*), but strongly disagreed with the majority's reasoning and conclusions regarding corporate liability. Judge Leval noted that there was no authority in international law for the proposition that corporations could not be held liable for the types of egregious conduct that typically give rise to ATS cases, and that in the absence of a rule of international law ***barring*** the imposition of liability against corporations, the generally-applicable rules of U.S. law permitting the imposition of liability against corporations should be recognized in ATS cases. Judge Leval essentially characterized the question of whether corporate entities could be held liable under the ATS as an issue of remedy, rather than one pertaining to the scope of substantive liability that could be imposed. The majority, in an equally strongly-worded response set forth in Part III of its opinion (entitled simply "The Concurring Opinion"), rejected this analysis, stating that Judge Leval's formulation "attempts to shift to [the majority] the burden of identifying a norm of customary international law that supports our 'rule.'"

Conclusions

In the three decades since courts have begun to address issues under the ATS in earnest, the question of what constitutes "customary international law" has proved unusually confounding. Judge Leval, perhaps unwittingly, may have identified the reason for this with his observation that "[r]ules of international law are not, like rocks, mountains, and oceans, unexplained natural phenomena found on the surface of the earth. The rules of international law have been created by a collective human agency representing the nations of the world ***with a purpose to serve desired objectives***."[17] The unusually acrimonious debate played out between the majority and the concurrence in *Kiobel* illustrates the difficulty that U.S. courts have experienced in determining the proper jurisdictional scope of the ATS, as well as the competing policy concerns about the extent to which the U.S. court system should hold itself out as a forum for cases that generally focus on human rights abuses and political oppression that lack any clear connection to the United States. *Kiobel* has already sparked significant controversy. In addition, as noted above, the Second Circuit's decision conflicts directly with the U.S. Court of Appeals for the Eleventh Circuit's ruling in *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008) (holding that because the text of the Alien Tort Statute provides no express exception for corporations, the statute grants jurisdiction from complaints of torture against corporate defendants), making it likely that ATS plaintiffs will, to the extent they can obtain jurisdiction, commence actions against corporate defendants in courts outside the Second Circuit (and most likely in the Eleventh Circuit), and that the U.S. Supreme Court will eventually have to resolve the issue.

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[1] 28 U.S.C. § 1350.
[2] *Kiobel*__ F.3d __, 2010 WL 3611392, at *1.
[3] 542 U.S. 692 (2004).
[4] *Kiobel*__ F.3d __, 2010 WL 3611392, at *7.
[5] *Id.*
[6] *Id.* (citing *Sosa*, 542 U.S. at 712).
[7] *Id.* (citing *Sosa*, 542 U.S. at 725).
[8] *Id.* at 3 (citing *Sosa*, 542 U.S. at 732 n. 20).
[9] *See, e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258-59 (2d Cir. 2009) (looking to international law to determine circumstances in which aiders and abettors could be liable for violations of the customary international law of human rights); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Katzmann, J., concurring) ("We have repeatedly emphasised that the scope of the [ATS's] jurisdictional grant should be determined by reference to international law."); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (looking to international law to determine whether certain conduct violated law of nation when committed by non-state actors); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (looking to international law to determine court's jurisdiction and to delineate type of defendant who could be sued).
[10] *Id.* at 8.
[11] *Id.* at 20 (citing *Sosa*, 542 U.S. at 728).
[12] As used in the international law context, "publicists" are legal commentators.
[13] *Id.* at 11 (citing *Sosa*, 542 U.S. at 732).
[14] *See* International Criminal Tribunal for the Former Yugoslavia Statute, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), adopting The Secretary-General, Report Pursuant to Paragraph 2 of Security Council Resolution 808 ("Report of the Secretary-General), art. 6, U.N. Doc. S/25704 (May 3, 1993) ("The International Tribunal shall have jurisdiction over natural persons . . ."); Statute of the International Tribunal for Rwanda, art. 5, S.C.Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (same).
[15] *See* The Rome Statute of the International Criminal Court, art. 25(1), opened for signature July 17, 1998, 37 I.L.M. 1002, 1016.
[16] The Court cited the Declarations of Professor James Crawford and Professor Christopher Greenwald, submitted in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882 (S.D.N.Y. July 10, 2002).
[17] *Kiobel*__ F.3d __, 2010 WL 3611392, at *29 (Leval, J., concurring) (emphasis in original).