STAY CURRENT
A Client Alert from Paul Hastings

PAUL HASTINGS

January 2012

Ninth Circuit Addresses Emerging Issues in ATS Litigation

BY JAMES E. BERGER & CHARLENE C. SUN

On October 25, 2011, the United States Court of Appeals for the Ninth Circuit, sitting *en banc*, decided *Sarei v. Rio Tinto, PLC*,[1] the latest in a series of significant federal appellate decisions addressing the scope of jurisdiction and potential liability under the Alien Tort Statute (ATS), which provides that "the district courts shall have original jurisdiction of 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] The ATS was enacted by the First Congress in order to provide U.S. courts with the ability to redress the three chief violations of international law — piracy, violation of safe conducts, and infringement of the rights of ambassadors — that were recognized at the time of its passage. While it went practically unused for the first two hundred years following its enactment, foreign plaintiffs have increasingly sought to use the statute to bring claims in the U.S. courts against multinational corporations, typically based on allegations that those corporations have "aided and abetted" human rights violations committed by foreign governments. The Supreme Court has addressed the statute only once, in its 2004 decision in *Sosa v. Alvarez-Machain*.[3] In *Sosa*, the Supreme Court held that the ATS conferred jurisdiction only over tort claims based on the present-day law of nations that "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 [*i.e.*, the three international law violations described above] that existed at the time of the ATS's enactment. The Court further noted that ATS claims may only be predicated on alleged violations of international law norms that are "specific, universal, and obligatory."[4] While the Supreme Court in *Sosa* plainly intended to limit plaintiffs' ability to access the U.S. courts with innovative international law claims, the Court's recognition of the evolving nature of international law appears instead to have emboldened plaintiffs in seeking to expand the array of "universal" international law violations cognizable under the ATS; given the relative paucity of U.S. case law and the need to rely on secondary sources to define the international law norms raised in ATS claims, the lower courts have struggled with these cases, and the still-small body of jurisprudence is characterized by lengthy opinions and frequent, often spirited, dissents.

The Ninth Circuit's decision in *Rio Tinto* continues this trend. The case produced seven separate opinions (collectively spanning nearly 100 pages) that address a series of fundamental issues surrounding ATS claims and provide a clear illustration of the significant disagreement within the federal judiciary over the purpose and scope of the statute. First, the Ninth Circuit held that the Supreme Court's recent decision in *Morrison v. Nat'l Australia Bank Ltd*.[5] did not apply to deprive courts of jurisdiction over ATS claims based on conduct occurring outside the United States. Second, the Ninth Circuit held in *Rio Tinto* that corporations may be held liable on an aiding and abetting basis

under the ATS for certain claims based on violations of international law.[6] On this issue, the Ninth Circuit adopted the majority view — adopted by all Circuits to date except for the Second — holding that corporations may be sued under the ATS. Third, the Ninth Circuit addressed the exhaustion doctrine, which ATS defendants have long invoked — previously without success — as a basis for claiming that ATS claimants must exhaust their remedies in the courts of the nation where the alleged misconduct occurred prior to bringing their claims to the U.S. Fourth, the Ninth Circuit addressed the applicability of the political question doctrine, the act of state doctrine, and the role of international comity in deciding ATS claims.

In the end, the Ninth Circuit majority allowed certain of the plaintiffs' claims — which alleged that Rio Tinto, a British mining company and its Australian affiliate, had engaged and/or aided and abetted the government of Papua New Guinea in a host of human rights violations stemming from a violent dispute over Rio Tinto's mining operations in that nation — to stand, while holding that others were properly dismissed. The majority's decision led to strident claims by the dissent that the Court's decision constituted "judicial imperialism" and that the majority had, through its decision, "arrogate[d] to ourselves imperial authority over the whole world."[7]

Factual Background

The *Rio Tinto* plaintiffs were current and former residents of the island of Bougainville in Papua New Guinea (PNG) who alleged that Defendants Rio Tinto PLC, a British corporation, and Rio Tinto Limited, an Australian corporation (collectively "Rio Tinto Group" or "Rio Tinto"), constructed and operated a mine in the village of Panguna on Bougainville which produced massive amounts of waste, causing environmental harm and health problems for local residents. Plaintiffs further alleged that Rio Tinto engaged in racial discrimination in its hiring practices, paying black workers significantly lower wages than white workers who Rio Tinto brought in from outside the island. Noting that Rio Tinto agreed to pay the government 19.1% of the mine's profits in exchange for its cooperation, Plaintiffs alleged that the mine was "a major source of income for PNG and provided [an] incentive for the PNG government to overlook any environmental damage or other atrocities Rio [Tinto] committed" and that the government's financial stake "effectively turned the copper mine into a joint venture between PNG and Rio [Tinto] and allowed Rio [Tinto] to operate under color of state law."

Eventually, local residents began to conduct protests against the mine's operation, and the mine was shut down on a temporary basis in order to permit a study of its environmental impacts and associated health risks. Residents rejected the resulting study, however, claiming it downplayed the mine's negative impacts. After the report was issued, critical infrastructure and equipment at the mine was destroyed in a bombing.

Plaintiffs alleged that Rio Tinto, aware of its significant economic influence over the PNG government, threatened to reconsider future investment in PNG if the violence did not stop, and that PNG responded to this threat by sending armed forces to Bougainville to put down the uprising. The PNG army mounted an attack on February 14, 1990, and the struggle to close the mine continued for almost a decade, during which Plaintiffs claim that PNG, at the behest of Rio Tinto, committed atrocious human rights abuses and war crimes, which they alleged resulted in 15,000 civilian deaths.

Procedural History

Plaintiffs brought suit in the U.S. District Court for the Central District of California, alleging that Rio Tinto's actions constituted violations of customary international law. Defendants moved to dismiss the complaint, arguing that the district court lacked subject matter jurisdiction under the ATS and/or that

Plaintiffs failed to state a claim upon which relief could be granted. Alternatively, Defendants contended that the action should be dismissed on *forum non conveniens* grounds, because the Plaintiffs had failed to exhaust local remedies in the PNG courts and raised questions that were nonjusticiable under the act of state and/or political question doctrines, and that the court should abstain under the doctrine of international comity.

The district court first addressed Defendants' argument that Plaintiffs' claims should be barred as they failed to exhaust their local remedies. The court rejected this argument, noting that "[o]n its face, the [ATS] does not require exhaustion of local remedies," and that "no court has imposed an exhaustion requirement in a case brought exclusively under the [ATS]."[8] Second, with respect to the adequacy of Plaintiffs' pleadings, the court found that Plaintiffs had adequately pled their ATS claims of war crimes, crimes against humanity, racial discrimination, and violation of the United Nations Convention on The Law of the Sea ("UNCLOS"); the district court dismissed the Plaintiffs' claims based on environmental degradation, however, on the ground that the claim was not sufficiently specific and universal under *Sosa* to be cognizable under the ATS. The district court also denied Defendants' motion to dismiss on *forum non conveniens* grounds. Finally, the district court held, based upon a Statement of Interest filed by the U.S. Department of State expressing concern that the lawsuit would negatively impact the United States' foreign relations with PNG and the ongoing peace process in that country, that both international comity and the act of state doctrine applied to bar continued adjudication of Plaintiffs' environmental tort and racial discrimination claims, and that all of Plaintiffs' claims were required to be dismissed on the basis of the political question doctrine.[9]

The parties filed cross-appeals to the Ninth Circuit Court of Appeals. Plaintiffs asserted that the district court erred in dismissing all of their claims on grounds of nonjusticiability, while Defendants asserted that the district court erred by holding that exhaustion was not required. The Ninth Circuit agreed with Plaintiffs that the district court erred in dismissing all of the Plaintiffs' claims as presenting nonjusticiable political questions, and in dismissing the Plaintiffs' racial discrimination claim under the act of state doctrine. The Court of Appeals also vacated for reconsideration the district court's dismissal of the Plaintiffs' UNCLOS claim under the act of state doctrine, and its dismissal of the racial discrimination and UNCLOS claims under the international comity doctrine.[10] The three-judge panel majority and dissenting opinions were divided on the issue of exhaustion of local remedies. As a result, that question was addressed by *en banc* panel, a majority of took the view that exhaustion must be considered.[11] However, a narrower, and therefore controlling, plurality opinion by Judge McKeown stated that only prudential exhaustion principles applied.[12]

On remand, the district court held that it would be inappropriate to impose a prudential exhaustion requirement on Plaintiffs' claims for crimes against humanity, war crimes, and racial discrimination.[13] It held the remaining claims required exhaustion, however, and gave Plaintiffs the choice either to withdraw or to submit the following claims to the traditional two-step exhaustion analysis: violation of the rights to health, life, and security of the person; cruel, inhuman, and degrading treatment; international environmental violations; and a consistent pattern of gross human rights violations. Plaintiffs opted to withdraw those claims, reserving the right to file an amended complaint if the matter was remanded.[14]

Following the district court's disposition, the Court of Appeals resumed jurisdiction over the remaining claims, which were limited to Plaintiffs' claims for genocide, crimes against humanity, war crimes, and racial discrimination. Most notably, the Court of Appeals considered a variety of jurisdictional and justiciability issues, which are the focus of this alert.

I. Extraterritoriality of the ATS

The Court of Appeals first addressed Defendants' claim that the extraterritoriality rule set forth in the Supreme Court's decision in *Morrison v. Nat'l Australia Bank Ltd*. should apply to deprive the court of jurisdiction over the case. In *Morrison*, the Supreme Court explained that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none,"[15] and held accordingly that § 10(b) of the Securities Exchange Act of 1934 did not apply to securities transactions conducted by foreign parties in foreign nations and on a foreign exchange. Defendants argued that the presumption against the extraterritorial effect of U.S. law should apply to ATS claims in which the plaintiffs and defendants are foreign citizens and where the conduct at issue took place entirely abroad. The Court of Appeals disagreed, finding that *Morrison*'s extraterritoriality rule was not intended to apply to cases under the ATS, and noting that it was clear from the ATS's legislative history, discussed in *Sosa,* that Congress had specifically intended the ATS to provide U.S. court jurisdiction over foreign conduct. The Court added that "federal courts frequently exercise jurisdiction with regard to matters occurring out of the country, subject to *forum non conveniens* and conflict of laws principles."[16] The Court further distinguished *Morrison* by explaining that the Supreme Court's decision in that case recognized a presumption against extraterritoriality from 1932 onward, but that there was no indication that such a presumption existed and could have been invoked by Congress in 1789, when the ATS was enacted. The Court also rejected the notion that a U.S. court's assertion of jurisdiction under the ATS impinged upon other nations' sovereignty, explaining that "the ATS provides a domestic forum for claims based on conduct that is illegal everywhere, including the place where that conduct took place. It is no infringement on the sovereign authority of other nations, therefore, to adjudicate claims cognizable under the ATS, so long as the requirements for personal jurisdiction are met."[17]

II. Corporate Liability

The Court of Appeals next addressed the issue of corporate liability under the ATS. The Defendants argued, consistent with the Second Circuit's decision *Kiobel v. Royal Dutch Petroleum Co.*,[18] that the ATS bars corporate liability because corporate liability for international law violations has not been recognized under customary international law.[19] The Ninth Circuit majority disagreed, finding that no such absolute bar against corporate ATS liability could be read from the statutory language or purpose of the ATS, and that, under *Sosa*, courts should "consider separately each violation of international law alleged and which actors may violate it."[20] Subsequently, the Court applied a two-step analysis for each of Plaintiffs' remaining claims, determining first whether the asserted claim was based upon a "specific, universal and obligatory" norm under customary international law, and then determining whether the prohibition of the violation of that norm extended to corporations under customary international law. Utilizing this two-step process, the Court held that genocide and war crimes were each cognizable as international law violations under *Sosa*, and that Plaintiffs had adequately alleged those claims. The Court also found, based upon a textual analysis of the various international treaties establishing these international law violations, that corporate liability was contemplated for each such violation. The Court agreed with the district court, however, that the claims of crimes against humanity based on a food and medical blockade and racial discrimination were not cognizable under the ATS, as the prohibition against these acts was not sufficiently specific and universal within the meaning of *Sosa* to give rise to a cause of action under the ATS.

III. Aiding and Abetting Liability

As noted in the introduction, the paradigm ATS claim against a corporate entity alleges that the corporation "aided and abetted" human rights violations committed by a government or quasi-governmental body.[21] The Ninth Circuit approved of and adopted the holdings of the Second, Eleventh, and District of Columbia Circuits in holding that claims for aiding and abetting violations of international law are cognizable under the ATS.

IV. Article III Subject Matter Jurisdiction

Fourth, the majority responded to Judge Ikuta's argument that the courts lacked subject matter over the case because an ATS claim does not "arise under" federal law and because the case was between two aliens, thus eliminating any basis for diversity jurisdiction. Judge Ikuta's dissent was based the Supreme Court's description in *Sosa* of the ATS as being "jurisdictional in nature," and further on the ground that the law of nations is not part of the "Laws of the United States" for purposes of authorizing Article III jurisdiction. The Court, discussing the difference between "general" common law (*i.e.*, the undifferentiated common law applied by courts prior to the Supreme Court's decision in *Erie R.R. Co. v. Tompkins*[22]) and federal common law (which only came to be recognized after *Erie*), noted that the international law standards enforceable under the ATS, while not themselves constituting federal law, become a part of federal common law once they are found to satisfy *Sosa*'s substantive requirements. The Court summarized:

> Thus, it is by now widely recognized that the norms *Sosa* recognizes as actionable under the ATS begin as part of international law – which, without more, would not be considered federal law for Article III purposes – but they become federal common law once recognized to have the particular characteristics required to be enforceable under the ATS.
>
> * * *
>
> …*Sosa* put it this way: "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 § 1350 was enacted." … The clear implication of these instructions is that claims that meet this exacting standard are "recognized … under federal common law."[23]

Based on this finding, the Ninth Circuit held that ATS claims do in fact arise under federal law, obviating any need for diversity between the parties as a prerequisite for federal court jurisdiction.

V. Exhaustion

Fifth, the Court of Appeals considered the district court's exhaustion analysis, finding no error in the district court's holding that exhaustion was required for some, but not all of Plaintiffs' claims. Specifically, the Court of Appeals found that the district court had properly applied the test set forth in the plurality opinion in its previous *en banc* decision, which, comparing the ATS to a conferral of "universal jurisdiction" authorizing a court to remedy certain acts "without regard to the territoriality or nationality of the offenders,"[24] held that prudential exhaustion would be required in any case where the nexus with the United States was weak and the claim was one that was not of "universal concern." The Court of Appeals found that the district court properly applied this test, and rejected Rio Tinto's arguments that exhaustion was required for all the claims.[25]

VI. Political Question / Act of State / Comity

The Court then considered the applicability of the political question and act of state doctrines, as well as whether the case should be dismissed on grounds of international comity.[26] In *Baker v. Carr*,[27] the Supreme Court established six factors courts are to use in determining whether a case presents a nonjusticiable political question: if any one of those factors is inextricable from the case, dismissal is mandatory.[28] Rio Tinto argued that four of the *Baker* factors applied, claiming that (1) the issues presented were demonstrably committed by the text of the Constitution to a coordinate branch; (2) the court could not resolve the case without expressing a lack of due respect to the coordinate branches of government; (3) the case presented an unusual need for unquestioning adherence to a political decision already made; and (4) the case presented the potential for embarrassment from "multifarious pronouncements by various departments on one question."

The court opened its analysis by noting the well-established truism that while "the management of foreign affairs predominantly falls within the sphere of the political branches … it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial competence." Proceeding to the first *Baker* factor, the Court found that the case "in no way calls upon the courts to judge the conduct of foreign relations by the United States government," noting that the United States "was not directly or indirectly involved in any of the events that occurred in PNG" and had not financed the actions of the PNG government.[29]

The court likewise found that none of the remaining three *Baker* factors mandated dismissal. Observing that these factors are "relevant in an ATS case 'if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with governmental interests,'"[30] the court found that the facts of the case "present no question regarding the actual conduct of United States foreign policy," and that thus the only way the *Baker* factors could be implicated was if the court's adjudication implicated the executive's foreign policy interests related to the matters before the court and, more specifically, would jeopardize any action taken by one of the political branches.[31] When the case was first before the district court, the Department of State had made clear that this factor was indeed implicated by filing a statement of interest expressing its concern that the case posed a risk to the ongoing peace process in PNG and could "invalidate acts of reconciliation that had already occurred in the war between PNG and the people of Bougainville." By the time the Court of Appeals heard the case, however, it found that "[t]he political situation has changed significantly" because neither PNG nor the U.S. government opposed the case from moving forward. Concluding that the case "presents exactly the types of questions that courts are well-suited to resolve: whether actions were lawful under specific and obligatory laws, whether the defendants are responsible for such actions, and whether the plaintiffs are entitled to relief," the court found the political question doctrine to be inapplicable.

The court made fast work of Rio Tinto's international comity and act of state arguments. On the issue of comity, the court found that because both comity and the prudential exhaustion requirements are grounded in "the spirit of cooperation and deference to tribunals in other nations," the district court's exhaustion analysis, coupled with PNG's lack of opposition to the lawsuit going forward, was sufficient to satisfy any concerns over international comity.[32] Finally, the court held that the act of state doctrine — which prevents a U.S. court from "inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory" — was inapplicable, since "*jus cogens* norms are exempt from the doctrine since the constitute norms 'from which no derogation is permitted.'"[33]

The Court also found that Plaintiffs' claim of genocide was not barred by the act of state doctrine because international law violations may not be considered acts of state, and therefore reversed the district court's dismissal of that claim. In sum, the Court affirmed the district court's dismissal of the claims for racial discrimination and crimes against humanity, reversed the dismissal of the claims for genocide and war crimes on nonjusticiability grounds, and remanded to the district court for further proceedings on the claims of genocide and war crimes.

The Dissents

Rio Tinto literally splintered the *en banc* Court. The case produced seven separate opinions, five of which dissented in whole or part from the majority opinion. In addition to Judge Ikuta's lengthy dissent arguing that no basis for subject matter jurisdiction existed, Judge Bea filed a dissent restating the view that mandatory exhaustion should be required in ATS cases and further arguing that the district court failed to properly balance the case's nexus with the United States against the universality of the international law principles alleged to have been violated. Perhaps most noteworthy of all was the dissent filed by Judge Kleinfeld, which was joined by Judges Bea and Ikuta. Judge Kleinfeld argued at length that the grant of jurisdiction in the ATS does not extend to "foreign cubed" torts, and concluded his dissent with a section entitled "Injudicious Imperialism," which argued that any involvement by the U.S. courts in the PNG's civil war necessarily undermined the PNG's sovereignty and was "profoundly illegitimate." Judge Kleinfeld's dissent began by stating:

> Our decision makes the Ninth Circuit the best place in the world to bring class actions against deep-pocket private defendants to recover compensatory and punitive damages and attorney's fees for the evils so prevalent all over the world. This claim of supervisory authority over the entire planet is unwise as well as legally incorrect.[34]

Conclusions

Rio Tinto represents the first ATS case to discuss *Morrison*'s holdings concerning extraterritoriality, and the sharp disagreement between the majority and the dissenters concerning whether a U.S. court may adjudicate "foreign cubed" tort claims is almost sure to recur in other circuits. Similarly, the debate between Judge Ikuta and the majority concerning Article III jurisdiction — which had not yet been a staple of prior ATS cases — is also likely to be replayed in future ATS litigation.

The *Rio Tinto* case is also significant in its discussion of corporate liability. The decision represents the fourth rejection of the Second Circuit's holding in *Kiobel,* the only case at the federal appellate level to have held that corporate liability is not cognizable under the ATS. *Kiobel* was predicated on the Second Circuit's finding that courts must "look to international law to determine our jurisdiction over ATS claims against a particular class of defendant, such as corporations," 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."[35]

Although the Ninth Circuit now joins the Seventh, Eleventh, and District of Columbia Circuits in recognizing corporate ATS liability, its analysis of *Sosa*'s requirements differed slightly from those taken by its sister circuits. The Eleventh Circuit was the first federal appellate court to directly address the question of corporate liability under the ATS in *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008), and found that because the ATS provided no express exception for corporations, corporations were not immune from suit under the statute. In *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), the D.C. Circuit identified the issue of corporate ATS liability as a question of remedies (*i.e.* "technical accouterments to [a cause of] action") to be governed by federal

common law, not international law. Thus, after finding 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,"[36] the D.C. Circuit held that corporate liability was an available remedy for all ATS claims. Likewise, the Seventh Circuit in *Flomo* emphasized that corporate tort liability is common around the world and concluded that corporate liability must exist for ATS claims, 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."[37]

In contrast, the Ninth Circuit's holding did not recognize blanket corporate liability for any and all ATS claims; rather, its interpretation imported a portion of the Second Circuit's analysis in *Kiobel* by recognizing that the question of whether liability for an international law violation may extend to corporations **is itself** an issue properly determined by customary international law. Unlike any of the other Courts of Appeals to have examined the issue, however, the Ninth Circuit found that the issue of corporate liability could not be determined without being viewed in context of the particular claim for which liability was sought to be imposed. Thus, the Ninth Circuit recognized that corporate liability might exist for some, but not all violations of international law, and that the determination of whether a corporation could be held liable for a particular offense should be judged by the very same sources of customary international law that established the offense as the violation of a specific, universal, and obligatory norm of international law.

While it is clear that the various Courts of Appeals to have addressed the issue thus far differ widely in their respective interpretations of the requirements of *Sosa*, plaintiffs, defendants, and practitioners are hopeful for authoritative guidance from the Supreme Court in its review of *Kiobel*, for which the Court granted certiorari on October 17, 2011.[38]

✧ ✧ ✧

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

James E. Berger
1.212.318.6450
jamesberger@paulhastings.com

Charlene C. Sun
1.212.318.6703
charlenesun@paulhastings.com

[1] ___ F.3d ____, 2011 WL 5041927 (9th Cir. Oct. 25, 2011).

[2] 28 U.S.C. § 1350.

[3] 542 U.S. 692 (2004).

[4] *Id.* at 732 (citation omitted).

[5] ___ U.S. ____, 130 S. Ct. 2869 (2010).

[6] As we have discussed in prior editions of *Stay Current*, there is a developing split among the federal circuits concerning the cognizability of corporate liability for ATS claims. Through the *Rio Tinto* decision, the Ninth Circuit joins the Seventh, Eleventh, and D.C. Circuits in recognizing corporate ATS liability. The U.S. Supreme Court recently granted certiorari in *Kiobel v. Royal Dutch Petroleum*, in which the Second Circuit adopted a contrary view by holding that corporations could not be held liable under the ATS. *See Kiobel v. Royal Dutch Petroleum Co.*, 132 S.Ct. 472, 79 BNA USLW 3728, 80 BNA USLW 3019, 80 BNA USLW 3234, 80 BNA USLW 3237 (U.S. Oct 17, 2011) (NO. 10-1491, 10A1006).

[7] *Rio Tinto*, 2011 WL 5041927, at *68.

[8] *Id.* at 1133.

[9] The court's dismissal on this ground was made contingent upon the court's receipt of Defendants' written consent to have the action proceed in the Papua New Guinea courts despite the provisions of any potential legal bar to adjudication in that forum that may exist.

[10] *See Sarei v. Rio Tinto, PLC (Rio Tinto III)*, 487 F.3d 1193 (9th Cir. 2007).

[11] *See Sarei v. Rio Tinto, PLC (Rio Tinto IV)*, 550 F.3d 822 (9th Cir. 2008)

[12] *Rio Tinto IV*, 550 F.3d at 832 n.10.

[13] *See Sarei v. Rio Tinto PLC (Rio Tinto V),* 650 F. Supp. 2d 1004, 1032 (C.D. Cal. 2009).

[14] *Id.* n.71.

[15] *Morrison*, 130 S.Ct. at 2878

[16] *Rio Tinto*, 2011 WL 5041927, at *5.

[17] *Id.*

[18] 621 F.3d 111, 125 (2d Cir. 2010).

[19] In holding that corporate liability could exist for war crimes, the Court of Appeals acknowledged that its holding was at odds with the Second Circuit's holding in *Kiobel*. The Court explained that while "the Second Circuit majority looked to whether any international institution had held a corporation liable for war crimes," "the proper inquiry is not whether there is a specific precedent so holding, but whether international law extends its prohibitions to the perpetrators in question." *Id.* at *20.

[20] *Rio Tinto*, 2011 WL 5041927, at *7.

[21] The purpose for pursuing these claims against corporate entities, as opposed to the state or parastatal entity primarily responsible for the misconduct, is clear: While states are entitled to presumptive sovereign immunity from jurisdiction and execution, multinational corporations are not entitled to either, and are typically subject (as a result of their business activities) to personal jurisdiction in the United States.

[22] 304 U.S. 64 (1938).

[23] *Rio Tinto*, 2011 WL 5041927, at *11.

[24] *Rio Tinto IV*, 550 F.3d at 831.

[25] *Rio Tinto*, 2011 WL 5041927, at *13-14.

[26] As noted above, the district court had originally dismissed the case in its entirety on the ground that it presented nonjusticiable political questions; it reached this conclusion based on the submission by the U.S. Department of State stating that the case threatened to interfere with the government's relationship with PNG. Because the previous appeal dealt only with the prudential exhaustion issue, the Ninth Circuit did not consider the propriety of the dismissal on political question grounds in *Rio Tinto IV*.

[27] 362 U.S. 186 (1962).

[28] *Baker*, 362 U.S. at 217; *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007).

[29] *Rio Tinto*, 2011 WL 5041927, at *15.

[30] *Id.* (quoting *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)).

[31] Id.

[32] *Id.* at *16.

[33] *Id.* at *16-17 (citations omitted).

[34] *Rio Tinto*, 2011 WL 5041927, at *68 (Kleinfeld, J., dissenting). Judge Kleinfeld went so far as to invoke the *fatwa* issued by the Ayatollah of Iran against Salman Rushdie, noting that "[i]mposition of Iranian law on Rushdie would violate the most fundamental aspect of our sovereignty – our constitutional right to freedom of speech – but if we can exercise universal jurisdiction over what we imagine violates the law of nations, why not Iran?" *Id.* at *67.

[35] *Kiobel*, 621 F.3d at 137.

[36] *Exxon,* 654 F.3d at 47.

[37] *Flomo*, 643 F.3d at 1019.

[38] The Supreme Court's decision is expected sometime in July 2012.