Emerging Issues In Alien Tort Statute Litigation

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On October 17, 2011, the United States Supreme Court granted *certiorari* in *Kiobel v. Royal Dutch Petroleum*,[1] a significant decision by the Court of Appeals for the Second Circuit concerning the Alien Tort Statute ("ATS"),[2] a sweeping, if little-known, statute that permits non-U.S. nationals to sue in U.S. courts for violations of international law.[3] In *Kiobel*, the Second Circuit held that corporations are not subject to suit under the ATS; the ruling, which when issued created a split among the federal circuits on the question of corporate liability under the ATS, has ignited a storm of controversy and comment within the U.S. legal profession concerning the scope and breadth of potential liability under international law that has seldom, if ever, been seen or heard outside the halls of the State Department and law school faculty lounges.

As if prompted by the Second Circuit's decision in *Kiobel*, the federal courts issued a number of significant ATS decisions in 2011. Several of these decisions addressed the question of corporate liability, while others focused on other key jurisdictional issues that U.S. courts had not previously confronted with, such as whether international law contemplates aiding and abetting liability, the applicability of the political question and act of state doctrine, the nature of ATS jurisdiction, and the statute's extraterritorial effect. This article discusses several recent decisions addressing these issues, which evidence a struggle by the U.S. courts to construe the meaning and purpose of this centuries-old statute in the context of the modern day, and which suggest that the Supreme Court, having only decided a single case involving the ATS in the 220 years since its adoption by the First Congress, may need to turn its attention to the statute with greater frequency in coming years.

I. 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."**[4] Judge Jose 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."[5]

While the ATS was adopted during the earliest part of this nation's history by the first U.S. Congress, the statute was seldom invoked in the first 200 years following its adoption. The Supreme Court has addressed the ATS only once, in *Sosa v. Alvarez-*

1. 621 F.3d 111 (2011).
2. 28 U.S.C. § 1350.
3. *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).
4. 28 U.S.C. § 1350.
5. *Kiobel*, 621 F.3d at 116.

Machain,[6] and the Court's opinion in that case provides some valuable historical background concerning the intended 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 the ATS must take account of evolving notions of international law, holding that in 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]."[7] 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."[8] The Court's admonition 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.

As noted above, however, despite cautioning that federal courts should exercise restraint in considering new causes of action under the ATS, the Supreme Court also 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.[9] ATS plaintiffs have predictably seized upon that concept in attempting to expand the standards of international law for which the ATS was traditionally invoked.

Perhaps just as predictably, the federal courts have seen a significant uptick in ATS filings, as plaintiffs have begun 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 easily subjected to personal jurisdiction in the U.S. courts. It seems virtually certain that the framers of the ATS did not contemplate the typical ATS claim of today, and courts have plainly struggled in applying the statute to modern-day claims.

II. Corporate Liability

Given that so many recent ATS claims have involved suits against multinational corporations based on a theory that those corporations, through some measure of cooperation with a state or quasi-state actor, aided and abetted a violation of international law, the question of whether corporations may be held liable under the ATS has dominated the attention of the federal courts and commentators. *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.[10] 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.[11] Two years later, the Second Circuit disagreed, finding in *Kiobel*

6. 542 U.S. 692 (2004).
7. *Kiobel*, 621 F.3d at 125.
8. *Id.*
9. 542 U.S. at 725.
10. *See, e.g., Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 40-58 (D.C. Cir. 2011).
11. *See Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

that courts must "look to international law to determine our jurisdiction over ATS claims against a particular class of defendant, such as corporations,"[12] 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."[13]

A. The Second Circuit Holds No Corporate ATS Liability

In *Kiobel v. Royal Dutch Petroleum Co.*,[14] 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 the 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."[15] 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."[16] 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."[17]

The Court also looked to its own precedents under the ATS,[18] 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."[19] 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,"[20] the Court re-affirmed

12. *Kiobel*, 621 F.3d at 127.
13. *Id*. at 137.
14. 621 F.3d 111 (2d Cir. 2010)
15. *Id.* (citing *Sosa*, 542 U.S. at 712).
16. *Id.* (citing *Sosa*, 542 U.S. at 725).
17. *Id.* at 126 (citing *Sosa*, 542 U.S. at 732 n. 20).
18. *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 repreatedly 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).
19. *Id.* at 126.
20. *Id.* at 140 (citing *Sosa*, 542 U.S. at 728).

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[21] – to be "specific, universal and obligatory" in order to support jurisdiction under the ATS.[22]

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."[23] 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.[24] The Court also cited a number of publications by two "renowned professors of international law"[25] 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, or "corporate liability under any body of law other than the ATS-including the domestic statutes of other States."[26]

1. 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 *Presbyterian 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

21. As used in the international law context, "publicists" are legal commentators.
22. *Id.* at 131 (citing *Sosa*, 542 U.S. at 732).
23. *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).
24. *See* The Rome Statute of the International Criminal Court, art. 25(1), opened for signature July 17, 1998, 37 I.L.M. 1002, 1016.
25. 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).
26. *Id*. at 149.

formulation "attempts to shift to [the majority] the burden of identifying a norm of customary international law that supports our 'rule.'"

B. The D.C. and Seventh Circuits Uphold Corporate Liability Under the ATS

After *Kiobel*, the Court of Appeals for the District of Columbia Circuit and the Seventh Circuit, respectively, handed down decisions upholding civil liability for corporations under the ATS, disagreeing with the Second Circuit's holding in *Kiobel* and deepening the split among the federal appellate courts concerning corporate ATS liability.

1.*Doe v. Exxon Mobil*[27]

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")[28] on allegations that Exxon "took actions both in the United States and at its facility in the Aceh province that resulted in their injuries,"[29] 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."[30] 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[31] against Exxon on the bases that aiding and abetting was not actionable under the ATS, that "sexual violence" was not sufficiently recognized as a violation of the law of nations to be actionable under the ATS, and that Exxon could not be liable for genocide and crimes against humanity because adjudication of such claims impermissibly intruded upon Indonesia's internal affairs.[32] 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."[33]

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

27. 654 F.3d 11 (D.C. Cir. 2011).
28. 28 U.S.C. § 1350 note § 2(a).
29. *Exxon*, 654 F.3d at 15.
30. *Exxon*, 654 F.3d at 16.
31. 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.
32. 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.
33. *Exxon*, 654 F.3d at 40.

certain treaties [the law of nations] creates no civil remedies and no private right of action."[34] 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 ATS for guidance regarding the issue of corporate liability and noted 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 else 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."[35]

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."[36] 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."[37] 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.

2. *Flomo v. Firestone Natural Rubber Co.*[38]

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, it 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

34. *Id*. at 41.
35. *Id.* at 47.
36. *Id*. at 50.
37. *Id.* at 52.
38. 643 F.3d 1013 (7th Cir. 2011).

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 of international law. 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."[39]

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 must 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."[40]

III. Aiding and Abetting Liability

On the issue of aiding and abetting liability under the ATS, the federal circuit courts have reached a much more settled consensus, as each circuit to have addressed the issue has held that aiding and abetting liability is cognizable under the ATS.[41] The recent *Exxon* and *Firestone* decisions both expressly affirmed this developing consensus among the Second, Fifth, Ninth and Eleventh Circuits that aiding and abetting claims are available under the ATS. 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.[42]

Less certain is the proper standard by which aiding and abetting liability should be pleaded, as the courts to have determined an aiding and abetting claim in ATS cases have not consistently applied a single standard.[43] For example, in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[44] the Second Circuit held that a defendant must act with purpose in order to satisfy *mens rea* element of aiding and abetting liability. However, the Eleventh Circuit adopted a lower standard in *Cabello v. Fernandez-Larios*,[45] in which the Court held that mere knowledge of illegality was sufficient to establish

39. *Id*. at 1017.
40. *Id*. at 1019.
41. *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).
42. 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.
43. *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).
44. 582 F.3d at 258-59.

mens rea sufficient to impose liability for aiding and abetting.

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 (and the United States as amicus), who suggested 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."[46]

IV. Extraterritoriality

In *Morrison v. Nat'l Australia Bank Ltd.*,[47] the Supreme Court explained that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none,"[48] 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. The broad impact of *Morrison* has become clear in the year since its decision, as a number of other federal statutes have since been construed to have limited extraterritorial effect.[49]

In *Sarei v. Rio Tinto*,[50] the Court of Appeals for the Ninth Circuit became the first to address the issue of whether *Morrison*'s presumption against the extraterritorial effect of U.S. law should apply to ATS claims in which the plaintiffs are foreign citizens and the conduct at issue took place entirely abroad. 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"), operated mines on Bougainville which destroyed the island's environment, harmed the health of its people, and incited a ten-year civil war, during which thousands of civilians died or were injured. Specifically, Plaintiffs alleged that 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, in exchange for the cooperation and assistance of the PNG government in the construction of the mine, agreed to pay the government 19.1% of the mine's profits, Plaintiffs alleged that the mine thus became "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."[51]

Eventually, local residents began to conduct protests against the mine's operation, and the mine was eventually 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 invest-

45. 402 F.3d 1148, 1158-59 (11th Cir. 2005).
46. *Khulumani*, 504 F.3d at 330 (Korman, J., concurring in part and dissenting in part).
47. 130 S.Ct. 2869 (2010).
48. *Morrison*, 130 S.Ct. at 2878
49. *See, e.g., Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29, 32-33 (2d CIr. 2010) (holding that RICO does not have extraterritorial application under *Morrison*'s extraterritoriality rule); *NewMarket Corp. v. Innospec, Inc.*, No. 3:10CV503, 2011 WL 1988073, at **3-5 (E.D. Va. May 20, 2011) ("In accordance with the holding of *Morrison*, the Court finds that § 2(c) of the Robinson–Patman Act does not apply extraterritorially.").
50. ___ F.3d ____, 2011 WL 5041927 (9th Cir. Oct. 25, 2011).
51. *Id*. at 1121.

ment in PNG if the violence did not stop. According to the Plaintiffs, PNG responded to this threat by sending armed forces to Bougainville to put down the uprising. Plaintiffs asserted that Rio Tinto assisted the PNG military by supplying helicopters and other vehicles, transporting troops to the island, and providing economic assistance. The PNG army mounted an attack on February 14, 1990 in which many civilians were killed. Thereafter, 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.

1. 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]."[52] 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 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, 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.[53]

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.[54] 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.[55] However, a narrower, and therefore controlling, plurality opinion by Judge McKeown stated that only prudential exhaustion principles applied.[56]

52. *Id.* at 1133.

53. 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.

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

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

56. *Rio Tinto IV*, 550 F.3d at 832 n.10.

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.[57] 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.[58]

2. The Court of Appeals' Decision

Following the district court's disposition on the remanded issues, 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. First, the Ninth Circuit held that the Supreme Court's recent decision in *Morrison v. Nat'l Australia Bank Ltd*.[59] did not apply to deprive courts of jurisdiction over ATS claims based on conduct occurring outside the United States.

The Court of Appeals carefully reviewed the legislative history of the ATS, and found that *Morrison*'s extraterritoriality rule was not intended to apply to cases under the ATS, and noting that it was clear 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."[60] 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."[61] [62]

3. Dissent

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.[63]

57. *See Sarei v. Rio Tinto PLC (Rio Tinto V),* 650 F. Supp. 2d 1004, 1032 (C.D. Cal. 2009).
58. *Id.* n.71.
59. ___ U.S. ____, 130 S. Ct. 2869 (2010).
60. *Rio Tinto*, 2011 WL 5041927, at *5.
61. *Id*..

IV. Arising Under Jurisdiction

The *Rio Tinto* case also presented the Ninth Circuit with the question of whether an ATS claim "arises under" federal law such that subject matter jurisdiction would exist in ATS cases where there was no basis for diversity jurisdiction, as was the case in *Rio Tinto*. Judge Ikuta argued in his dissent that the courts lacked subject matter jurisdiction over ATS claims where 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 majority, however, disagreed, focusing on 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*[64]) and federal common law (which only came to be recognized after *Erie*). The Court 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.
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> * * *
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> …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

62. The *Rio Tinto* case also presented several other interesting ATS issues. For example, the Court of Appeals exhaustion was required for some, but not all of Plaintiffs' claims. The Court compared 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," *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008), and 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 also 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. 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," *Rio Tinto*, 2011 WL 5041927, at *15, 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. *Id*.. The Court found that the facts of the case "present no question regarding the actual conduct of United States foreign policy," and noted that, while the Department of State filed a statement of interest in the district court expressing its concern that the case posed a risk to the ongoing peace process in PNG, the U.S. government no longer opposed the case from moving forward. 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. *Id.* at *16.
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,'" *id*. at *16-17 (citations omitted), and 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.
63. *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.
64. 304 U.S. 64 (1938).

"recognized … under federal common law."[65]

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. 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.

V. Conclusions

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."[66]

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,"[67] 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."[68]

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.

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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

65. *Rio Tinto*, 2011 WL 5041927, at *11.
66. *Kiobel*, 621 F.3d at 137.
67. *Exxon*, 654 F.3d at 47.
68. *Flomo*, 643 F.3d at 1019.

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.***"[69] Each of the above recent ATS decisions 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.

By tying the international law standard under the ATS to the "present day law of nations," the Supreme Court in *Sosa* has practically, unwittingly, 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 condition 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 United States.

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*.

69. *Kiobel,* 621 F.3d at 154 (Leval, J., concurring) (emphasis in original).