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Liability of Corporate Actors Under the Alien Tort Statute

Recent Developments from the Second Circuit

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Since 1980, the Alien Tort Statute (ATS) has emerged as an increasingly popular mechanism for foreign claimants to bring suit in U.S. courts for alleged human rights violations committed abroad. While some courts restrict ATS jurisdiction to suits against state actors (see *Saleh v. Titan Corp.*, 580 F.3d 1, 14 (D.C. Cir. 2009)), other courts have permitted ATS claims to proceed against private individuals and corporations, often under theories of secondary liability such as aiding and abetting a foreign government's violation of international law. Although numerous claims against corporate entities have been dismissed on jurisdictional and other grounds, the issue of whether the ATS can impose liability against corporations and other juridical entities rarely has been addressed by the appellate courts. Recent decisions from the Second Circuit, rejecting corporate liability under the ATS and imposing high standards for successful aiding and abetting claims, provide a fresh look at ATS claims involving corporate actors, with potentially broad implications for this area of litigation.

BACKGROUND: THE ATS AND THE SUPREME COURT'S DECISION IN *SOSA*

The ATS grants federal district courts original jurisdiction over "any civil action by an alien for a tort only, committed in violation

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of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006). Enacted as part of the Judiciary Act of 1789, the ATS provided jurisdiction in only one case during its first 170 years. In the 1980s, the statute garnered significant attention following circuit court decisions interpreting its scope to permit claims for human rights abuses under modern standards of international law. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980). Since that time, ATS claims have increased markedly, continuing debate over the statute's proper application in civil suits for human rights violations.

In 2004, the Supreme Court held that the ATS permits federal courts to entertain a "very limited category" of claims based on the present-day law of nations. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004). In so holding, the Court rejected arguments that the ATS, while providing for subject matter jurisdiction, afforded litigants no right to sue under its terms, and that the *Erie* doctrine foreclosed novel ATS claims for human rights abuses under federal common law. *Id.* at 729. However, the *Sosa* decision emphasized that courts must exercise "great caution in adapting the law of nations to private rights." *Id.* at 728. The Court identified a "narrow set" of offences that would have supported claims under the ATS when the statute was enacted by the First Congress: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 715. Guided by these "18th-century paradigms," the Court limited ATS jurisdiction solely to claims of the same "definite content and acceptance among civilized nations" as these historical examples. *Id.* at 725, 732. Applying this framework to a claim for arbitrary detention, the *Sosa* Court concluded that "a single illegal detention of less than a day" did not violate any well-defined norm of customary international law and, therefore, that the ATS did not provide subject matter jurisdiction over the claim. *Id.* at 738.

Following the framework of *Sosa*, courts have examined standards of international

law to determine whether a defendant's alleged tortious conduct violates a well-defined and universally-accepted norm. See, e.g., *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 123 (2nd Cir. 2008) (dismissing ATS claims that did not meet *Sosa's* requirements).

RECENT REJECTION OF CORPORATE LIABILITY UNDER THE ATS

Although it did not involve a corporate defendant, the *Sosa* decision highlighted that courts should consider "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 individual." *Sosa*, 542 U.S. at 732 n.20. In a decision with potentially broad implications, a 2-1 panel of the Second Circuit recently held that the ATS does not extend subject matter jurisdiction to suits against corporations. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2nd Cir. Sept. 17, 2010).

In *Kiobel*, current and former residents of Nigeria filed a class action alleging human rights abuses at the hands of government military forces, which the plaintiffs claimed had violently suppressed and deterred protests against oil exploration in the Ogoni region of Nigeria during 1993 and 1994. The plaintiffs named two holding companies and a Nigerian subsidiary company as defendants, alleging that the corporations aided and abetted violations of international law by providing transportation and other assistance to the Nigerian military forces. *Id.* at 123. Concluding that the ATS extends liability to corporations, the district court denied in part the defendants' motions to dismiss, but certified its order for appeal to the Second Circuit.

Under *Sosa* and its own prior case law, the Second Circuit concluded that the ATS "leaves the question of the nature and scope of liability — who is liable for what — to customary international law." *Id.* at 122. Examining the decisions of international tribunals and other sources of international law, the majority

found no “specific, universal, and obligatory” rule that imposes liability on corporations. *Id.* at 145. Indeed, the court found that “no international tribunal has ever held a corporation liable for a violation of the law of nations.” *Id.* at 120. Noting that certain international agreements to combat bribery and organized crime do permit corporate liability, the court nonetheless held that “a handful of specialized treaties” does not establish a general rule of international law. *Id.* at 139. Moreover, the court found that these few examples have no bearing in cases alleging human rights abuses because major multinational treaties on human rights have expressly rejected the concept of corporate liability. *Id.* Holding that corporate liability for international law violations “has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*,” the majority concluded that the ATS does not provide jurisdiction over claims against corporations. *Id.* at 148-49.

Writing separately, Judge Pierre Leval disagreed with the majority’s analysis of corporate liability under the ATS. International law, he reasoned, only defines the “acts ... that it prohibits” and leaves “the manner of enforcement,” including whether there should be “private civil remedies for violations of international law,” to the decision of each individual nation. *Id.* at 175. Because “the United States has chosen through the ATS to impose civil liability,” Judge Leval would have permitted claims against a private corporation provided that its conduct violated international law. *Id.* In response, the majority noted that holding one party accountable for another’s actions (in this case, the corporation for the acts of its employees or agents) is not a matter of “remedy,” but rather concerns the potential scope of ATS liability, which under *Sosa* is limited to universally accepted norms of international law. *Id.* at 147-48.

Although a motion for rehearing remains pending at the time of this writing, *Kiobel* provides an extensive analysis of corporate liability under international law, and would appear to preclude ATS cases against corporate defendants in the Second Circuit. The decision further creates an apparent split among the appellate courts, in light of the Eleventh Circuit’s 2009 ruling that ATS claims may proceed against corporations. See *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009).

REQUIREMENT OF SPECIFIC INTENT FOR AIDING AND ABETTING CLAIMS

While rejecting ATS actions against corporations, the majority in *Kiobel* highlighted that nothing in its opinion would foreclose ATS claims against natural persons such as “a corporation’s employees, managers, officers,

[and] directors.” *Kiobel*, 621 F.3d at 122. Accordingly, the focus of ATS suits involving corporate actors may shift to allegations against specific individuals within a company. However, ATS claims against corporate officers and employees still must overcome a number of hurdles, particularly in light of decisions that limit secondary liability under the ATS solely to defendants who specifically intend to assist violations of international law. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2nd Cir. 2009).

In *Talisman*, a putative class action comprising thousands of current or former residents of Sudan, the plaintiffs alleged that they were injured or displaced by Sudanese government forces in attacks on communities in the oil-producing regions of the south, where a civil war was ongoing. The plaintiffs claimed that the Sudanese government violated international law by violently clearing the civilian population to create a “buffer zone” around oil facilities. *Id.* at 250. The sole defendant, a Canadian corporation, was alleged to have aided and abetted human rights violations committed by the Sudanese military by providing financing and military equipment through an indirect and partially owned subsidiary. In particular, the plaintiffs alleged that the defendant improved airstrips that were used by the Sudanese military for staging attacks on civilians, paid royalties to the Sudanese government, and provided fuel for

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military aircraft used in bombing missions. *Id.* at 261. Although both the U.S. and Canadian governments expressed concern over the litigation, the district court declined to dismiss the case on political question grounds absent an explicit declaration that the lawsuit interfered with U.S. policy toward the Sudan or Canada. *Id.* at 252. However, the district court granted summary judgment based on the lack of evidence demonstrating that the defendant specifically intended to further human rights abuses.

On appeal, the Second Circuit affirmed the judgment of dismissal. Holding that claims for

aiding and abetting under the ATS are proscribed by universal norms of international law, the court found no consensus among nations to “impos[e] liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law.” *Id.* at 259 (emphasis in original). The court determined that the defendant had a legitimate need to improve access to the region for its business operations and to assist the military in defending oil workers from ongoing attacks by rebel factions involved in the civil conflict. *Id.* at 262. Similarly, the court was unpersuaded that the payment of royalties to the Sudanese government supported a claim for aiding and abetting liability given that there was no indication that the defendant had intended these funds to aid the military’s attacks on the plaintiffs. *Id.* Finally, the court noted that the defendant objected to the military’s use of its fuel and airstrips, revealing a lack of intent to aid the government’s claimed human rights violations. *Id.* at 262-63.

CONCLUSION

The Second Circuit’s recent case law rejects ATS suits against corporations and imposes significant restrictions on claims that corporate officers, directors, or employees assisted violations of international law. Nevertheless, these decisions leave unanswered several “lurking questions” that the *Kiobel* majority expressly declined to address and which could significantly impact ATS claims more generally, including whether the statute applies extraterritorially. See *Kiobel*, 621 F.3d at 117 n.10. In another recent case to highlight this issue, Judge Andrew J. Kleinfeld of the Ninth Circuit, dissenting from a remand order, opined that the court “plainly lacked” jurisdiction over the ATS claims of “Papua New Guineans against a British-Australian company for wrongs committed in Papua New Guinea.” See *Sarei v. Rio Tinto*, 625 F.3d 561, 562-63 (9th Cir. Oct. 26, 2010) (Kleinfeld, J., dissenting), citing *Morrison v. Nat’l Australia Bank Ltd.*, 130 S.Ct. 2869 (2010). While such questions concerning its extraterritorial reach may eventually lead to further restrictions on ATS litigation, the statute remains fertile ground for claims alleging international law violations committed overseas.

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