CLEARY GOTTLIEB Alert Memo

SEPTEMBER 21, 2010

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Second Circuit Rules Corporations Not Liable Under Alien Torts Statute

The Alien Torts Statute ("ATS") provides jurisdiction in United States federal courts for claims brought by aliens alleging a tort committed in violation of the laws of nations. In recent years, plaintiffs have invoked the statute against corporations for alleged complicity in human rights violations in other countries. On September 17, 2010, the Second Circuit, in *Kiobel v. Royal Dutch Shell*, 06-4800 ("*Kiobel*"), became the first appellate court to hold that the ATS may not be used to impose liability on corporations. The decision may mark a sea change in the development of law under the ATS and brings the Second Circuit in conflict with the Eleventh Circuit, which has held that corporations can be held liable under the ATS, *see Sinaltrainal v. Coca-Cola* Co., 578 F.3d 1252, 1263 (11th Cir. 2009), making it likely the Supreme Court will ultimately decide this important issue.

While the Second Circuit takes pains to explain that its decision will not foreclose all lawsuits alleging human rights violations abroad, the practical effect of the decision, if it stands, is likely to make such cases significantly less likely to succeed. If the decision is followed by other circuits or the Supreme Court, it may have the effect of significantly reducing corporate exposure under the ATS.

Background

The Alien Torts Statute

The ATS was enacted in 1789 and virtually ignored for 190 years. The Second Circuit revived the little-noticed statute in 1980 in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which held that the ATS provided foreigners with the right to claim damages for violations of customary international law as it has evolved over time. *Filartiga* resulted in a multi-million dollar judgment against a Paraguayan police official who had tortured the plaintiff's decedent. After *Filartiga*, many plaintiffs filed lawsuits for alleged human rights violations in other countries. The "first wave" of these lawsuits targeted government officials responsible for torture or other human rights abuses.

In 2004, the Supreme Court for the first time considered the ATS, upholding in principle the jurisdiction of the federal courts but cautioning courts to exercise restraint in interpreting the scope of legally cognizable norms under the ATS. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004). The *Sosa* Court noted that at the time the ATS was

enacted in 1789, violations of international law were limited to piracy, violations of safe conducts and offences against ambassadors, and directed courts to be cautious about expanding that definition beyond offences equivalent in universality and specificity to these 18th century paradigms. *Sosa*, 542 U.S. at 729 (requiring "vigilant doorkeeping" in recognizing new international norms). The Court held that, to be enforceable under the ATS, norms of international law must be "specific, universal, and obligatory." *Id.* Courts have recognized that such norms include war crimes, extrajudicial killings, crimes against humanity and torture. *See, e.g., Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1316 (11th Cir. 2008).

Plaintiffs both before and after *Sosa* have pressed in what can be considered a second "wave" of ATS litigation to expand the reach of the ATS to apply to corporations allegedly complicit in human rights violations. These lawsuits have accused corporations of supporting apartheid in South Africa, assassinations of union officials in Colombia, and forceful relocation in Burma, among other alleged activities. Most courts, including the Second Circuit, have held that aiding and abetting and other forms of secondary liability are cognizable under the ATS. *See, e.g. Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258-59 (2d Cir. 2009). The issue of *corporate* liability under these standards, however, has remained controversial, with the Second Circuit now determining in *Kiobel* that no such liability exists.

The* Kiobel *Case

The plaintiffs in *Kiobel* are Nigerians who accused several Royal Dutch Shell companies of aiding and abetting torture and murder in Nigeria during the 1990s. They alleged that the Nigerian government, at the prompting of Shell's Nigerian subsidiary, in 1993 and 1994 resorted to violence to put down a regional movement protesting Shell's oil exploration and production in the country. According to the plaintiffs, military forces killed residents of the region and attacked local villages. The only defendants in *Kiobel* were the corporations themselves – neither the alleged torturers or murderers nor any Shell employees were named as defendants. The plaintiffs accused the corporate defendants, among other things, of providing transportation to the Nigerian forces, allowing Shell property to be used as a staging ground for attacks, and providing food and compensation to the Nigerian soldiers.

The Shell defendants moved to dismiss all claims on various grounds. The district court granted the motion as to some claims but not others, and certified the decision for immediate interlocutory appeal. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 464-65, 467 (S.D.N.Y. 2006).

Corporate Liability Under the Alien Torts Statute

The Second Circuit's majority and concurring[1] opinions place in stark relief the competing interpretations of the ATS. Judge Cabranes, writing for himself and Chief Judge Jacobs, held that corporate liability would be allowed only if plaintiffs could show that corporate liability for human rights claims is well-established and defined with reasonable particularity under customary international law. *Kiobel*, slip op. at 43. Judge Leval's separate opinion on this point acknowledged that corporate liability is not a well-established norm of customary international law. *Kiobel*, concurring opinion at 6. However, he argued that the relevant question of customary international law for the ATS analysis was not the *scope* of civil liability, but whether the alleged act – e.g., torture – constituted a violation of customary international law. Once that is established, Judge Leval took the view that the question of how courts may remedy the violation, including the issue of corporate responsibility, should be left to U.S. domestic law.

The majority opinion recognizes that corporate liability is common under United States law, but then explains:

> By conferring subject matter jurisdiction over a limited number of offenses defined by *international law*, the ATS requires federal courts to look beyond the rules of domestic law – however well established they may be – to examine the specific and universally accepted rules that the nations of the world treat as binding *in their dealings with one another*.

Id. at 6 (emphasis in original). The court explained that the Nuremburg Tribunal and subsequent post-World War II war crimes tribunals, the font of modern international human rights law, took great care to emphasize that the subjects of its jurisdiction were individuals. *Id.* at 16-18. They in fact did not prosecute corporations, even the notorious IG Farben, although under the Nuremburg principles individuals connected with IG Farben and other corporations were found criminally liable. *See id.*

Next, the court examined the Supreme Court's *Sosa* decision, which requires that actionable norms be well-established and particular. The Second Circuit explained that *Sosa* requires an examination of international law to determine whether to "'extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue.'" *Id.* at 20 (quoting *Sosa*, 542 U.S. at 760). The *Kiobel* majority pointed out that the Second Circuit had recently held that the ATS provides for aiding and abetting liability by looking to *international*, rather than *domestic*, law. *See Kiobel*, slip op. at 21-24 (citing *Presbyterian Church*, 582 F.3d at 256).

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[1] Judge Leval strongly disagreed with the majority's conclusion that corporate defendants may not be held liable under the ATS, but concurred in the judgment on the sole grounds that plaintiffs had failed to state a claim under *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

Having located the relevant inquiry firmly in the realm of international law, the majority then analyzed whether corporate liability is a specific, universal, and obligatory norm of international law. The majority notes determined that "no international tribunal has ever held a corporation liable for a violation of the law of nations," *id.* at 11, based on a canvassing of four sources: international tribunals, international customs, "the general principles of law recognized by civilized nations," and judicial decisions and scholarly works. *See id.* at 26-40.

The majority did not address the Eleventh Circuit decisions holding that the ATS applies to corporations. These decisions hold that the ATS applies to corporations but have never explained their reasoning, instead simply citing previous Eleventh Circuit decisions. *See, e.g.*, *Romero*, 552 F.3d at 1315 ("[W]e are bound by that precedent") (citing *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1315 (11th Cir. 2005)).

The Future of Corporate Liability

The circuit split created by *Kiobel* suggests the possibility of Supreme Court review. Unless and until that occurs, the immediate effect of the decision on not-yet filed cases is likely to be forum shopping, as plaintiffs seek to avoid the Second Circuit.

The majority opinion was careful to emphasize that it has not eliminated all redress for the victims of alleged corporate violations of international law, noting that the opinion does not prohibit ATS suits against individuals who commit or aid and abet violations of customary international law, including corporate employees. *Kiobel*, slip op. at 11. The court also noted that plaintiffs may still bring suits against corporations under other bodies of law, such the domestic law of the various states. *Id.* at 11-12. Finally, the court observed that "nothing in this opinion limits or forecloses legislative action by Congress." *Id.* at 11. Nonetheless, *Kiobel* marks a decisive rejection of the idea that liability can be imposed on corporations themselves for alleged violations of customary international law, and if upheld will mark a major setback for plaintiffs who have tried to expand the scope of such claims in recent years against corporations that do business in countries where human rights violations occur or are claimed.

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