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Ninth Circuit Rules on Corporate Liability for International Human Rights Violations

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On Tuesday, October 25, a divided *en banc* US Court of Appeals for the Ninth Circuit waded into the muddy waters surrounding the question of whether corporations can be sued in US courts for violations of international human rights norms under the Alien Tort Statute ("ATS"), and muddied them further. In *Sarei v. Rio Tinto*, No. 02-56256 (9th Cir. October 25, 2011), the court, by a 7 to 3 vote, held that corporations can be held liable under the ATS for certain international law violations, and revived a long-running lawsuit against the UK-based mining multinational for genocide and war crimes, while affirming the dismissal of claims against the company for crimes against humanity and racial discrimination. The court addressed multiple issues regarding the interpretation and application of the ATS, and issued seven concurring and dissenting opinions.

The Ninth Circuit's decision came the week after the US Supreme Court agreed to decide whether corporations can be held liable under the ATS when it agreed to hear *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010), as we reported here. In deciding *Kiobel*, the Supreme Court will likely resolve the split between the Second Circuit, which held in *Kiobel* that corporations cannot be held liable under the ATS, and the Seventh, Eleventh, DC and now Ninth Circuits, which have all held that corporations can be held liable under the ATS.

Until the Ninth Circuit's decision on Tuesday, it appeared that the Supreme Court's answer to the question of whether corporations can be held liable under the ATS would depend on how it answered the underlying question of whether the scope of liability for violations of international law is determined by international law itself or by federal common law. In holding that corporations could not be held liable under the ATS, the Second Circuit looked to international law to define the scope of liability. The Seventh, Eleventh and DC Circuits, by contrast, looked to the federal common law in reaching their conclusion that corporations may be held liable.

The Ninth Circuit has now complicated the issue by agreeing with the Second Circuit that international law determines the scope of liability under the ATS, but disagreeing with the Second Circuit about what international law provides. In contrast to the Second Circuit's decision in *Kiobel*, the Ninth Circuit's Sarei decision concludes that international law does recognize corporate liability, at least with respect to the jus cogens prohibition on genocide and the international humanitarian

law prohibition on war crimes. On that basis, the Ninth Circuit held that corporations can be held liable for genocide and war crimes under the ATS.

The Ninth Circuit sidestepped another controversial issue relating to the ATS by declining to answer the question of what standard is required for aiding and abetting liability under the statute. The court agreed with the Second, Fourth, Eleventh and DC Circuits that plaintiffs may plead a theory of aiding and abetting liability under the ATS and that the standard required for such liability is determined by customary international law. See *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009); *Khulumani v. Barclays Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Aziz et al. v. Alcolac, Inc. et al.*, 1:09-cv-00869-MJG (4th Cir. Sept. 19, 2011); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Aldana v. Del Monte Fresh Produce N.A.*, 416 F.3d 1242, 1248 (11th Cir. 2005); *Doe VIII v. ExxonMobil*, No. 09-7125 (D.C. Cir. July 8, 2011). But it declined to decide whether the aider and abettor must share the same purpose as the principal actor under customary international law, as the Second Circuit held in *Presbyterian Church of Sudan* and the Fourth Circuit held in *Aziz*, or merely must know about the activities of the principal actor, as the DC Circuit held in *Doe III v. ExxonMobil*. The *Sarei* court avoided having to make such a decision because the *Sarei* plaintiffs alleged that the higher purpose standard had been met.

The Ninth Circuit reached a number of other conclusions in *Sarei* that are likely to generate controversy. First, the court held that the ATS may be applied extraterritorially notwithstanding the Supreme Court's recent decision in *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), that statutes must give a clear indication of extraterritorial application. The Ninth Circuit distinguished *Morrison*, finding that, unlike the Securities Exchange Act, which was at issue in *Morrison*, the ATS provides a clear, if implicit, indication of extraterritorial applicability, given that piracy was one of the paradigmatic classes of cases recognized under the ATS when it was enacted.

Second, the court held that US courts have jurisdiction to hear claims under the ATS because those claims "arise under" federal law for purposes of Article III of the Constitution. The court read the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), to permit courts to create federal common law under the ATS, first by determining whether international law norms are sufficiently specific and widely recognized to be cognizable, and then by incorporating norms that meet those criteria into federal common law.

Third, the *Sarei* court confirmed its earlier holding that courts may require plaintiffs to exhaust all domestic remedies overseas prior to bringing ATS cases, particularly when the "nexus" to the United States is weak and the claims do not involve matters of "universal concern."

These holdings by a very splintered Ninth Circuit muddy the ATS waters considerably and make it even more important for the Supreme Court to resolve a number of questions relating to the 220-year-old statute. By granting certiorari in *Kiobel*, the Supreme Court finally has positioned itself to be able to decide whether lawsuits, like that first brought against *Rio Tinto* in 2000 for its alleged role in genocide, war crimes, crimes against humanity and racial discrimination against residents of the island of Bougainville in Papua New Guinea, can be allowed to proceed against corporations.

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