

To: Our Clients and Friends

November 11, 2011

## Supreme Court to Determine Whether Corporations Are Liable in U.S. Courts for Human Rights Violations Committed Abroad

The U.S. Supreme Court may soon decide the extent to which corporations may be sued for alleged human rights violations which arise in connection with their business activities outside the U.S. The Court has granted certiorari petitions in two cases brought against corporations for alleged human rights violations committed abroad. In each case, the claims were dismissed by a Court of Appeals on the ground that corporations are immune from such suits. The cases will be argued in tandem, even though different statutes apply. In *Kiobel v. Royal Dutch Petroleum*,<sup>1</sup> the Supreme Court will review a Second Circuit decision holding that corporations are immune from suit under the Alien Tort Statute ("ATS").<sup>2</sup> In *Mohamad v. Rajoub*,<sup>3</sup> the Supreme Court will review a D.C. Circuit opinion holding that corporations are immune from suit under the Torture Victim Protection Act ("TVPA").<sup>4</sup>

### The ATS and *Kiobel*

The ATS, initially drafted by Congress in 1789, states 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."<sup>5</sup> Although the statute was rarely applied in its first two hundred years, the last twenty years have seen substantial ATS litigation including lawsuits alleging human rights violations brought by individuals in China, Colombia, Myanmar, and Nigeria against companies such as Chevron, Coca Cola, Firestone, Royal Dutch Petroleum, Yahoo!, and Unocal.

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<sup>1</sup> 621 F.3d 111 (2010).

<sup>2</sup> 28 U.S.C. § 1350.

<sup>3</sup> 634 F.3d 604 (2011).

<sup>4</sup> 28 U.S.C. §1350, note § 2(a).

<sup>5</sup> 28 U.S.C. § 1350.

In *Kiobel*, a proposed class of Nigerian plaintiffs filed an ATS claim against Royal Dutch Petroleum and Shell Transport and Trading Company alleging that the corporations aided and abetted the Nigerian government's crimes against humanity and torture by providing transportation to Nigerian forces, allowing their property to be utilized as a staging ground for attacks, and paying the soldiers.<sup>6</sup> The Second Circuit held that corporations are immune from such suits because "the law of nations," which provides causes of action available under the ATS, does not provide for civil actions against corporations.<sup>7</sup>

The Second Circuit explained that the Supreme Court had held that the ATS is a jurisdictional statute that does not create new causes of action, permitting only claims that rest on "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to features of" customary international law in the late 1800's when the ATS was enacted.<sup>8</sup> The Second Circuit reviewed international law, *Sosa*, and its own precedent, and found that "that international law, and not domestic law, determined the scope of liability for violations of customary international law under the ATS."<sup>9</sup> Upon review of various sources of customary international law, the majority in *Kiobel* concluded that "[n]o corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights" and, thus, "corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations inter se[.]"<sup>10</sup> Accordingly, the court held that corporate liability cannot form the basis of a tort action under the ATS.

#### TVPA and *Mohamad v. Rajoub*

"The TVPA was enacted in 1992 in order to create 'a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.'" <sup>11</sup> Unlike the ATS, which is silent as to who may be subject to the statute's reach, the text of the TVPA explicitly limits its applicability to "individuals." In *Mohamad v. Rajoub*, the D.C. Circuit dismissed the plaintiffs' claims against the Palestinian Liberation Organization, holding that the word 'individual' in the statute does not encompass corporations and juridical entities and holding that corporations are therefore immune from suit under the TVPA.<sup>12</sup> The court explained that since the statute did not define the word 'individuals' it would give the word its ordinary legal meaning, which is "natural persons and not corporations or other organizations." The court further noted that the word person, as opposed to the word individual, would normally include within its definition corporations and organizations.<sup>13</sup>

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<sup>6</sup> 621 F.3d at 124.

<sup>7</sup> *Id.* at 131-133.

<sup>8</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

<sup>9</sup> 621 F.3d at 126.

<sup>10</sup> 621 F.3d at 148.

<sup>11</sup> *Mohamad v. Rajoub*, 634 F.3d 604, 607 (D.C. Cir. 2011) (citing Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note)).

<sup>12</sup> *Id.* at 607-609.

<sup>13</sup> *Id.* at 607.

## Conflicting Case Law Regarding Corporate Liability

Before the Second Circuit issued *Kiobel*, the Eleventh Circuit had consistently held that the ATS “grants jurisdiction from complaints of torture against corporate defendants” though the Eleventh Circuit opinions do not examine this issue in depth.<sup>14</sup> After *Kiobel*, the D.C. Circuit, Seventh Circuit, and Ninth Circuit issued opinions adopting the Eleventh Circuit’s view that corporations are not immune from suit under the ATS. Those three opinions, however, disagree about the scope of corporate liability and whether that determination turns on domestic law or international law.

The D.C. Circuit cited over a dozen cases brought against corporations in which other federal courts ruled that the cases could or could not proceed without ever indicating that corporations enjoyed immunity under the statute,<sup>15</sup> and the court held that federal common law determines the question of corporate liability.<sup>16</sup> The court based its decision in part on its finding that “international law generally leaves all aspects of the issue of civil liability to individual nations[.]”<sup>17</sup> In dissent, Judge Kavanaugh noted the irony that under the court’s holding and prior D.C. Circuit case law, corporations are not liable for human rights violations brought by U.S. citizens under the TVPA but are liable for the very same actions brought by foreign citizens under the ATS.<sup>18</sup>

The Seventh Circuit, in an opinion by Judge Posner, held that there is no blanket immunity exempting corporations from liability under the ATS.<sup>19</sup> Judge Posner noted that such immunity would render an individual pirate liable under the ATS but exempt a pirate corporation, such as the Pirates of the Indian Ocean, Inc., a corporation headquartered in Somalia.<sup>20</sup> The opinion did not specify whether corporate liability turned on domestic or international law, but implied that federal law would dictate.<sup>21</sup>

Just one week after the Supreme Court granted certiorari in *Kiobel*, the Ninth Circuit issued an *en-banc* opinion holding that corporations can be liable under the ATS to the extent that the norm of customary international law allegedly violated is one that recognizes corporate liability.<sup>22</sup> The Ninth Circuit noted and rejected the *Kiobel* Court’s holding that “international law as a whole” does not recognize the doctrine of corporate liability and that the ATS therefore does not apply to corporations.<sup>23</sup> Instead, the Ninth Circuit held that there is no principle of international law that

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<sup>14</sup> *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir.2008) (citing *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1242 (11th Cir. 2005)); see also *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009).

<sup>15</sup> *John Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 57 n.47, n.48 (D.C. Cir. 2011).

<sup>16</sup> *Id.* at 41-43, 49-51.

<sup>17</sup> *Id.* at 55 (quoting *Kiobel*, 621 F.3d at 152-53 (Leval, J. Concurring)).

<sup>18</sup> *Id.* at 73 (Kavanaugh, J., dissenting).

<sup>19</sup> *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011).

<sup>20</sup> *Id.* at 1017.

<sup>21</sup> 643 F.3d 1013, 1020-1021 (analogizing the determination of the scope of corporate liability in this particular case to the determination of domestic municipality liability for constitutional torts).

<sup>22</sup> *Sarei v. Rio Tinto, PLC*, No. 09-56381, 2011 WL 5041927, at \*6-7 (9th Cir. 2011).

<sup>23</sup> *Id.* at \*6.

corporations are immune from suit for crimes such as genocide, slavery, war crimes, and piracy.<sup>24</sup> The court analyzed corporate liability regarding genocide and war crimes - the only specific claims of the lawsuit that it found to otherwise state claims for violations of customary international law - and held that international law recognizes corporate liability for each claim.<sup>25</sup>

Although the TVPA, unlike the ATS, contains language that arguably indicates Congress's intent to limit application of the statute to natural persons, the Eleventh Circuit has ruled that corporations are not immune from suit under the TVPA.<sup>26</sup> This view has some support in the TVPA's legislative history. The Senate Judiciary Committee Report states that the TVPA is designed to permit suits "against *persons* who ordered, abetted, or assisted in torture."<sup>27</sup> The Supreme Court noted in *Clinton v. New York*, that although "person" generally has a broader meaning than the word "individual," there are certain instances where Congress uses the words interchangeably.<sup>28</sup> Given the Senate Judiciary Committee Report's use of the word "persons" rather than 'individual,' there is an argument that this is one such instance in which Congress used the two words interchangeably. The Ninth Circuit, however, held that the legislative history indicated that Congress intentionally rejected corporate liability under the TVPA.<sup>29</sup> Moreover, since the statute's plain text arguably answers the inquiry, this Supreme Court may end its analysis with that text and decline to examine the statute's legislative history.

#### Other Unresolved Issues in ATS Case Law Not Before the Supreme Court

The Supreme Court will soon resolve the question of whether corporations are liable for human rights violations under these statutes, but two crucial issues will remain unresolved about the meaning of the ATS because the issues are not before the Court. First, there is uncertainty about whether the ATS applies to acts committed outside the United States. In *John Doe VIII*, the D.C. Circuit rejected Exxon's argument that the ATS does not reach extraterritorial conduct, partially because the statute has an "obvious" extraterritorial reach.<sup>30</sup> Although the Second Circuit in *Kiobel* stated that it need not address the issue, it nevertheless stated that "[w]ere we to take up that issue ... we very well could conclude that the ATS does not apply extraterritorially, and we would dismiss this and the vast majority of recent ATS suits[.]"<sup>31</sup> Second, the two circuits differ in the standard they apply to aiding and abetting liability. The D.C. Circuit held that the appropriate standard of intent for aiding and

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*2, 4.

<sup>26</sup> See *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1359 (S.D. Fla. 2003) (holding corporation may be sued under TVPA), *aff'd* in relevant part, 578 F.3d 1252, 1264 n.13 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (TVPA "allows suits against corporate defendants").

<sup>27</sup> S. Rep. No. 249, 102<sup>nd</sup> Cong., 1<sup>st</sup> Sess. (1991) (emphasis added).

<sup>28</sup> *Clinton v. New York*, 524 U.S. 417, 428 and n.13 (1998).

<sup>29</sup> *Bovoto v. Chevron*, 621 F.3d 1116 (2010).

<sup>30</sup> 654 F.3d. at 22.

<sup>31</sup> 621 F.3d at 142, n.44.

abetting liability is “knowledge,”<sup>32</sup> while the Second Circuit ruled in another recent case that the standard for aiding and abetting liability is “purpose.”<sup>33</sup>

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<sup>32</sup> 654 F.3d at 39.

<sup>33</sup> See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258–59 (2d Cir. 2009).