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Have Alien Tort Statute Claims Run Their Course?

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In a decision having significant implications for application of the Alien Tort Statute (ATS), the U.S. Supreme Court recently denied certiorari in Ntsebeza v. Ford Motor Co. (15-1020) (Justice Sotomayor did not participate in the decision). The denial leaves in place a Second Circuit decision that reaffirmed the limited scope of actions under the statute.


William E. Thomson

In affirming the district court's denial of the plaintiffs' motion for leave to amend, the Second Circuit precluded the plaintiffs from seeking relief based on claims that the defendants, U.S.-based multinational companies, aided and abetted violations of international law by the South African apartheid regime.[1]


Anne M. Champion

The Second Circuit reaffirmed several key limitations on the ATS: (1) to overcome the presumption against extraterritoriality, an ATS plaintiff must allege relevant domestic conduct that violates international law; (2) absent extraordinary circumstances, courts will not attribute the conduct of foreign subsidiaries to U.S. parent companies for purposes of rebutting the presumption against extraterritoriality; (3) to allege aiding and abetting under the ATS, a plaintiff must plausibly allege that the defendant acted with the purpose of facilitating a violation of international law; and (4) contrary to the district court's reading, the Supreme Court's decision in Kiobel did not overturn Second Circuit precedent holding that corporations are immune from tort liability under the ATS.

Background


Dylan Mefford

The plaintiffs first filed complaints in 2002, alleging that the defendants — a number of multinational companies including Ford andIBM — aided and abetted violations of international law by the South African government against South African citizens during apartheid. The cases were consolidated in the Southern District of New York and, as the Second Circuit noted, endured a "long and complicated procedural history" that "involves rulings from all three levels of the federal judiciary."[2]

As relevant here, the district court, on April 8, 2009, held that the plaintiffs could proceed on an agency liability theory against defendants Ford and IBM based on alleged misconduct by the companies' subsidiaries. The companies sought a writ of mandamus in the Second Circuit. While the case was pending, the Second Circuit, on Sept. 17, 2010, decided Kiobel v.

Royal Dutch Petroleum Co. (Kiobel I), holding that corporations are immune from tort liability under the ATS.[4] The Supreme Court granted certiorari and, on April 17, 2013, affirmed the Second Circuit's decision but expressly declined to address whether corporations are immune from suit under the ATS (Kiobel II).[4]

Rather, the Supreme Court held that "the presumption against extraterritoriality applies to claims under the ATS"[5] and thus the ATS does not apply to "conduct in the territory of another sovereign."[6] The Second Circuit requested supplemental briefing on the impact of the Supreme Court's decision. On Aug. 21, 2013, the Second Circuit denied the companies' request for a writ of mandamus, but noted that on remand the companies could seek judgment on the pleadings. The court also rejected plaintiffs' theories of vicarious liability based on the alleged conduct of the companies' South African subsidiaries, and concluded that Kiobel II "forecloses the plaintiffs' claims because the plaintiffs have failed to allege that any relevant conduct occurred in the United States." (Balintulo I)[7]

On remand, the companies moved for judgment in their favor. The district court ordered the parties to brief whether, following Kiobel II, corporations can be held liable under the ATS. On April 17, 2014, the district court held that corporations may be liable under the ATS.[8] Accordingly, the district court permitted the plaintiffs to move for leave to amend to add allegations sufficient to overcome the presumption against extraterritoriality.[9]

The District Court's Decision

In permitting the plaintiffs to move for leave to amend their allegations against Ford and IBM, the district court (Judge Shira Scheindlein) required the plaintiffs to plead "that those defendants engaged in actions that 'touch and concern' the United States with sufficient force to overcome the presumption against the extraterritorial reach of the ATS."[10] On Aug. 28, 2014, the district court denied the plaintiffs' motion for leave to amend, holding that the proposed amendments were futile because the "relevant conduct" alleged "all occurred abroad" and because the plaintiffs' theory of liability, based on the conduct of the defendants' subsidiaries, was foreclosed by the Second Circuit's decision in Balintulo I.[11]

Examining the Supreme Court's decision in Kiobel — including Justice Samuel Alito's concurrence requiring that conduct in the U.S. itself be "sufficient to violate an international law norm"[12] — and the Second Circuit's decision in Balintulo I, the district court concluded: "In sum, Balintulo requires plaintiffs to plead 'relevant conduct within the United States' that itself "give rise to a violation of customary international law" — in other words, the position adopted by Justice Alito."[13]

Applying this standard rendered the plaintiffs' proposed amendments futile: "Even if accepted as true, the 'relevant conduct' alleged in the plaintiffs' proposed amended complaints all occurred abroad. Thus, under the law of the Supreme Court and of the Second Circuit, the claims do not touch and concern the territory of the United States 'with sufficient force to displace the presumption against extraterritorial application,' and would not survive a motion to dismiss."[14]

In permitting the plaintiffs to move for leave to amend to rebut the presumption against extraterritoriality, the district court permitted the plaintiffs also to add allegations sufficient to satisfy the mens rea requirement for aiding and abetting.[15] As discussed infra, Second Circuit precedent requires a plaintiff alleging aiding and abetting under the ATS to plead that the defendant acted with the purpose of facilitating the alleged violation of international law. Because the district court held the plaintiffs could not plead sufficient facts to rebut the presumption against extraterritoriality, it did not

reach the question of whether the plaintiffs could satisfy the mens rea standard for aiding and abetting.

The Second Circuit's Decision and the Petition for Certiorari

As discussed in more detail below, the Second Circuit affirmed, and the plaintiffs petitioned for a writ of certiorari. In their petition to the Supreme Court, the plaintiffs presented three questions: (1) whether the mens rea standard for aiding and abetting requires the specific intent of sharing the purpose of the principal or whether it is intent (or purpose) to facilitate with knowledge of the result; (2) whether aiding and abetting from the U.S. by U.S. nationals is sufficient to establish jurisdiction under the Supreme Court's decision in Kiobel or whether violations must occur wholly within the U.S., as expressed in Justice Alito's concurrence in that decision; and (3) whether corporations are immune from tort liability under the ATS.

Ford and IBM argued: (1) there was no need to review the mens rea standard as there was no circuit split as to the mens rea required for an ATS aiding and abetting claim as no circuit had adopted the plaintiffs' proposed knowledge standard and, in any event, the plaintiffs' allegations could not satisfy even that lower bar, rendering the standard in this case immaterial; (2) there similarly was no need to review the extraterritoriality question because every circuit requires plaintiffs to allege some relevant domestic conduct to rebut the presumption against extraterritoriality, no circuit holds that domestic corporate supervision suffices, and the court below found allegations of relevant domestic conduct as IBM but rejected those allegations on other grounds; (3) whether corporations are immune from tort liability under the ATS did not affect the lower court's decision.

On June 20, 2016, the Supreme Court denied the petition for certiorari, leaving in place the Second Circuit's decision. That decision reaffirmed Second Circuit precedent on the important issues of extraterritoriality, the mens rea standard for aiding and abetting, and corporate liability under the ATS.

The Presumption Against Extraterritoriality

As noted, the district court denied the motion for leave to amend on the grounds that amendment would be futile because the plaintiffs failed plausibly to allege sufficient facts to overcome the presumption against extraterritoriality. Because the district court denied the motion for futility, the Second Circuit reviewed the decision de novo.[16]

The court summarized the proposed amended allegations: "[P]laintiffs allege that defendant Ford (1) provided specialized vehicles to the South African police and security forces to enable these forces to enforce apartheid, and (2) shared information with the South African regime about anti-apartheid and union activists, thereby facilitating the suppression of anti-apartheid activity."[17] The plaintiffs alleged IBM "(1) designed specific technologies that were essential for racial separation under apartheid and the denationalization of black South Africans; (2) bid on, and executed, contracts in South Africa with unlawful purposes such as 'denationalization' of black South Africans; and (3) provided training, support and expertise to the South African government in using IBM's specialized technologies."[18]

The court began its analysis by considering whether the proposed amended allegations were sufficient to overcome the presumption against extraterritoriality. Concluding that they were not, the court did not need to reach the other predicates under the ATS, including whether the complaint plead a violation of the law of nations; whether customary international law recognizes the liability of the defendants; and whether the theory of liability alleged is recognized by customary international law.[19] As noted below, however, though it was not necessary to reach the issue, the court did reaffirm Second Circuit

precedent holding that corporations are immune from liability under the ATS.

The court noted that the Supreme Court's decision in Kiobel provided little guidance as to the proper analysis where an ATS claim rests, in part, on alleged domestic conduct, because there, "all the relevant conduct took place outside the United States."[20] Because the plaintiffs here alleged relevant domestic conduct, the court drew on its prior decision in Mastafa, which in turn drew on the Supreme Court's decisions in Morrison and Kiobel, to conclude that "the 'focus' of the ATS inquiry is on the nature and location of the conduct constituting the alleged offenses under the law of nations," here, the alleged aiding and abetting of the South African government's violations of international law.[21]

Upon identifying the nature and location of the "relevant conduct," the court would conduct a two-step analysis: (1) determine whether the "'relevant conduct' sufficiently 'touches and concerns' the United States so as to displace the presumption against extraterritoriality"[22]; and (2) determine whether "that same conduct states a claim for a violation of the law of nations or aiding and abetting another's violation of the law of nations."[23] Because, here, the plaintiffs alleged the defendants aided and abetted violations of international law, the second step of the analysis required a determination of whether the allegations satisfied the aiding and abetting requirements, including the mens rea standard, discussed below.[24]

The plaintiffs asserted the following conduct was sufficient to displace the ATS's presumption against extraterritoriality: "(1) Ford provided specialized vehicles to the South African security forces that enabled these forces to violently suppress opposition to apartheid; and (2) Ford was responsible for aiding and abetting the suppression of its own workforce in South Africa."[25] And "(1) IBM employees trained employees of the South African government on how to use their hardware and software to create identity documents — 'the very means by which black South Africans were deprived of their South African nationality'; (2) IBM bid on contracts in South Africa with unlawful purposes such as denationalizing black South Africans; and (3) IBM designed specific technologies that were essential for racial separation under apartheid and the denationalization of black South Africans."[26]

Noting its holding in Balintulo I that plaintiffs failed to establish a jurisdictional nexus between the alleged domestic conduct and the human rights abuses in South Africa, the court held the plaintiffs' amended allegations also failed to establish the requisite nexus as plaintiffs did not allege plausibly that Ford and IBM themselves engaged in relevant domestic conduct to overcome the presumption against extraterritoriality.[27]

Corporate Separateness

Central to the plaintiffs' claims was their position that the companies controlled their subsidiaries from the United States and that such control created liability under the ATS, imputing to the U.S.-based parents the conduct of their South African subsidiaries. The plaintiffs' ability to overcome the presumption against extraterritoriality thus depended, in significant part, on overcoming corporate separateness.

As to Ford, the plaintiffs only alleged "relevant conduct" that occurred in South Africa. The plaintiffs alleged Ford's South African subsidiary provided specialized vehicles and information about anti-apartheid activists to the South African government, facilitating the government's enforcement of apartheid. Because the alleged "relevant conduct" occurred in South Africa, the plaintiffs would be unable to satisfy the first step of the jurisdictional analysis — showing domestic "relevant conduct" — unless they could impute to Ford the conduct of its South African subsidiary.

Having rejected previously, in Balintulo I, the plaintiffs' arguments that the companies' control of their South African subsidiaries created vicarious liability,[28] the Second Circuit rejected also the argument that the same control rendered the companies directly liable for the conduct of their subsidiaries, a theory incompatible with bedrock principles of corporate separateness: "holding Ford to be directly responsible for the actions of its South African subsidiary, as the plaintiffs would have us do, would ignore well-settled principles of corporate law, which treat parent corporations and their subsidiaries as legally distinct entities. While courts occasionally 'pierce the corporate veil' and ignore a subsidiary's separate legal status, they will do so only in extraordinary circumstances, such as where the corporate parent excessively dominates its 'subsidiary in such a way as to make it a mere instrumentality of the parent.'"[29]

Finding that the plaintiffs failed to offer any allegations that would form a basis to pierce the corporate veil, the Second Circuit emphasized that "[a]llegations of general corporate supervision are insufficient to rebut the presumption against territoriality and establish aiding and abetting liability under the ATS."[20]

The court's upholding of corporate separateness also supported its conclusions as to the plaintiffs' allegations against IBM. The court held that the plaintiffs first allegation — that the company had trained South African government employees to use IBM hardware and software to create identification materials — failed to rebut the presumption against extraterritoriality because it was IBM's South African subsidiary, not IBM itself, that was alleged to have conducted the training, and all the "relevant conduct" occurred in South Africa.[31] The plaintiffs' second allegation against IBM — that it bid on contracts meant to further the denationalization of South African blacks — failed also because the only allegations as to IBM itself, as opposed to its South African subsidiary, involved a contract that IBM bid on and lost, and therefore could not state a violation of international law.[32]

Considering the plaintiffs' final allegation, the court found that plaintiffs rebutted the presumption against extraterritoriality by alleging that IBM, in the U.S., developed hardware and software to create an identification system used by a local South African government for racial classification in furtherance of apartheid.

Aiding and Abetting Requires Purpose

Having excluded nearly all the plaintiffs' allegations for failure to satisfy the first step in the jurisdictional inquiry, the court considered whether the sole remaining allegation as to IBM — the only allegation of domestic "relevant conduct" — could state a claim for aiding and abetting a violation of international law.

Articulating the legal standard, the Second Circuit affirmed that, in alleging aiding and abetting under the ATS, a plaintiff must satisfy the more stringent purpose standard and that mere knowledge is insufficient: "a plaintiff stating a claim under an aiding and abetting theory must demonstrate that the defendant '(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.'"[33] "The mens rea standard for accessorial liability in ATS actions is 'purpose rather than knowledge alone.'"[34] "Knowledge of or complicity in the perpetration of a crime — without evidence that a defendant purposefully facilitated the commission of that crime — is thus insufficient to establish a claim of aiding and abetting liability under the ATS."[35]

Applying this standard, the court held that the plaintiffs failed plausibly to allege that IBM acted with the requisite purpose: "the plaintiffs do not — and cannot — plausibly allege that by developing hardware and software to collect innocuous population data, IBM's purpose was to denationalize black South Africans and further the aims of a brutal regime. This absence of a connection between IBM's "relevant conduct" and the alleged human rights abuses of the South African government means that the plaintiffs, even if allowed to amend their complaint, will be unable to state a valid ATS claim against IBM."[36]

While the decision merely reaffirms Second Circuit precedent on the purpose requirement, the standard has significant implications for ATS claims against corporations. Most ATS claims against corporations rest on a theory of aiding and abetting liability, with allegations that the corporations, in the course of their businesses, provided material support to foreign governments or other actors engaged in violations of international law. As reflected in the court's discussion of IBM, it is difficult to imagine a corporation acting with the purpose of facilitating violations of international law. A corporation may sell products or services to actors engaged in violations of international law, but any such sales, even if they were made with knowledge or awareness of those violations in certain circumstances, would be motivated at most by the corporation's purpose of maximizing profits, not the purpose of facilitating violations of international law.

Thus, even setting aside the hurdle of corporate liability, discussed below, it will be difficult for plaintiffs to bring ATS claims against corporations successfully under a purpose standard.

Corporations Are Immune from Tort Liability Under the ATS

Though not necessary to the holding, it is significant that the Second Circuit reaffirmed its precedent that corporations are immune from tort liability under the ATS, noting that the plaintiffs' claims failed as well because "they cannot establish jurisdiction under the ATS for claims against corporations."[37]

Following the Supreme Court's decision in Kiobel II, the plaintiffs sought leave to amend their complaint to rebut the presumption against extraterritoriality and maintained that the Supreme Court's decision implicitly overturned the Second Circuit's decision in Kiobel I finding no corporate liability under the ATS.[38] The district court ordered the parties to brief the issue of corporate liability and, finding the issue was open in the Second Circuit following Kiobel II, held that corporations may be liable under the ATS.[39] The district court interpreted the Supreme Court's decision as overturning Second Circuit precedent on the issue, established in Kiobel I.[40]

But the Second Circuit disagreed, noting: "[T]he Supreme Court's decision in Kiobel II explicitly did not reach the corporate liability issue and did not modify the precedent of this circuit that "corporate liability is not recognized as a 'specific, universal and obligatory norm' ... [and] is not a rule of customary international law that we may apply under the ATS."[41] Noting the district court's "obvious error," the Second Circuit emphasized: "There is no authority for the proposition that when the Supreme Court affirms a judgment on a different ground than an appellate court it thereby overturns the holding that the Supreme Court has chosen not to address. To hold otherwise would undermine basic principles of stare decisis and institutional regularity."[42]

In reaffirming that the statute does not reach corporations, the Second Circuit decision undermines significantly ATS claims and may deter potential suits seeking corporate liability. Since the decision, the Second Circuit has continued to adhere to its precedent that corporations are immune from tort liability under the ATS, with that precedent proving critical in a recent case. Following denial of rehearing en

banc on the issue earlier this year in another case,[43] the Second Circuit affirmed the dismissal of ATS claims against a Lebanese bank accused of aiding and abetting Hezbollah terrorist attacks in Israel through the making of wire transfers using a New York correspondent bank account. Though the court held the plaintiffs rebutted the presumption against extraterritoriality and established the requisite mens rea of purpose for aiding and abetting, it concluded that Second Circuit precedent rendering corporations immune from tort liability under the ATS was fatal to the claims against the Lebanese bank, a corporation.[44]

Conclusion

Many commentators described the Supreme Court's decision in Kiobel as the "death knell" for ATS claims.[45] While some lower court decisions appear to have granted ATS plaintiffs at least a temporary reprieve, the Supreme Court's denial of certiorari in Ntsebeza v. Ford Motor Co., by leaving in place the Second Circuit's decision, may renew the sense, at least in the Second Circuit, that ATS claims against corporations have run their course.

Any one of the three considerations from the decision — the presumption against extraterritoriality (bolstered by corporate separateness), the purpose standard for aiding and abetting, or corporate immunity — alone would be devastating for potential ATS plaintiffs. Together, they are likely to defeat any ATS case, save the rare instance where plaintiffs proceed against the noncorporate actors who committed directly the alleged violation of international law.

While it remains to be seen what a future Supreme Court, or the other courts of appeal, will do in this area, the Second Circuit's decision means ATS plaintiffs in that important jurisdiction may be limited to suing those who actually committed, or intended to commit, the alleged violations of international law, even if those offenders lack the deep pockets of U.S.-based multinational corporations.

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[1] Balintulo v. Ford Motor Co., 796 F.3d 160 (2d Cir. 2015) (Balintulo II).

[2] Id. at 163.

[3] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (Kiobel I).

[4] Kiobel v. Royal Dutch Petroleum Co., —— U.S. ——, 133 S.Ct. 1659, 1663, 185 L.Ed.2d 671 (2013) (Kiobel II).

[5] Id. at 1669.

[6] Balintulo v. Daimler AG, 727 F.3d 174, 188 (2d Cir. 2013) (Balintulo I) (citing Kiobel II, 133 S.Ct. at 1669).

[7] Balintulo I, 727 F.3d at 189.

[8] In re South African Apartheid Litig., 15 F.Supp.3d 454 (S.D.N.Y. 2014).

[9] Id. at 465.

[10] Id.

[11] In re South African Apartheid Litig., 56 F.Supp.3d 331, 338 (S.D.N.Y. 2014).

[12] Kiobel II, 133 S.Ct. at 1670 (Alito, J., concurring).

[13] In re South African Apartheid Litig., 56 F.Supp.3d at 337 (quoting Balintulo I, 727 F.3d at 192).

[14] In re South African Apartheid Litig., 56 F.Supp.3d at 338-39 (quoting Kiobel II, 133 S.Ct. at 1669).

[15] In re South African Apartheid Litig., 15 F.Supp.3d at 465.

[16] Balintulo II, 796 F.3d at 164 (citing Hutchison v. Deutsche Bank Sec. Inc., 647 F.3d 479, 490 (2d Cir.2011)).

[17] Balintulo II, 796 F.3d at 165 (citations omitted).

[18] Id. (citations omitted).

[19] Id. at 165-66 (citing Mastafa v. Chevron Corp., 770 F.3d 170, 179 (2d Cir. 2014)).

[20] Balintulo II, 796 F.3d at 166 (quoting Kiobel II, 133 S.Ct. at 1669).

[21] Balintulo II, 796 F.3d at 166 (quoting Mastafa, 770 F.3d at 185–86).

[22] Balintulo II, 796 F.3d at 167 (quoting Mastafa, 770 F.3d at 186).

[23] Balintulo II, 796 F.3d at 167 (quoting Mastafa, 770 F.3d at 186).

[24] Balintulo II, 796 F.3d at 167.

[25] Id. (citations omitted).

[26] Id. (citations omitted).

[27] Id. at 167-68 (citing Balintulo I, 727 F.3d at 192).

[28] Balintulo I, 727 F.3d at 192 (holding that because the complaint alleged only actions taken within South Africa by the defendants' South African subsidiaries and because these "putative agents did not commit any relevant conduct within the United States giving rise to a violation of customary international law — that is, because the asserted violation[s] of the law of nations occurr[ed] outside the United States — the defendants cannot be vicariously liable for that conduct under the ATS") (internal quotation marks and citation omitted).

[29] Balintulo II, 796 F.3d at 168 (quoting New York State Elec. & Gas Corp. v. FirstEnergy Corp., 766 F.3d 212, 224 (2d Cir.2014)).

[30] Balintulo II, 796 F.3d at 168.

[31] Id. at 169.

[32] Id.

[33] Id. at 167 (quoting Presbyterian Church of Sudan v. Talisman Energy Inc., 582 F.3d 244, 259 (2d Cir.2009)).

[34] Balintulo II, 796 F.3d at 167 (quoting Presbyterian Church of Sudan, 582 F.3d at 259).

[35] Balintulo II, 796 F.3d at 167 (citing Mastafa, 770 F.3d at 192; Presbyterian Church of Sudan, 582 F.3d at 263).

[36] Balintulo II, 796 F.3d at 170.

[37] Balintulo II, 796 F.3d at 166 n.28.

[38] In re South African Apartheid Litig., 15 F. Supp. 3d at 456-57.

[39] Id. at 457-65.

[40] Id. at 460-61.

[41] Balintulo II, 796 F.3d at 166 n.28 (quoting Kiobel I, 621 F.3d at 145) (internal citation omitted).

[42] Balintulo II, 796 F.3d at 166 n.28.

[43] In re Arab Bank, PLC Alien Tort Statute Litig., No. 13-3605 (2d Cir. May 9, 2016) (denying rehearing en banc by a vote of 4-3).

[44] Licci et al. v. Lebanese Canadian Bank SAL, No. 15-1580, 2016 WL 4470977 (2d Cir. Aug. 24, 2016).

[45] See, e.g., Matteo M. Winkler, What Remains of the Alien Tort Statute After Kiobel?, 39 N.C. J. INT'L L. & COM. REG. 171, 172 (2013); see also Roger Alford, Kiobel Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation, OPINIO JURIS (Apr. 17, 2013, 5:48 PM), available at http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/ (last accessed September 9, 2016).
