D.C. Circuit Splits with Second Circuit to Expand the Reach of the Alien Tort Statute

In *John Doe VIII* v. *Exxon Mobil Corp.*,[1] the D.C. Circuit held, *inter alia*, that aliens may obtain civil redress in U.S. courts against corporations alleged to have aided and abetted conduct violative of the law of nations, even if such conduct occurs on foreign soil.

I. Background and Procedural History

In 2001, a group of Indonesian villagers filed suit against Exxon Mobil Corporation and several of its subsidiaries ("Exxon"), alleging that the security forces at Exxon's Aceh gas extraction and processing facility committed murder, torture, and false imprisonment, in addition to several other egregious offenses. The plaintiff-appellants alleged violations of the Alien Tort Statute ("ATS") and the Torture Victim Protection Act ("TVPA") as well as various common law torts.

The district court dismissed plaintiff-appellants' statutory claims holding, inter alia, that aiding and abetting was not actionable under the ATS, and noting that adjudication of the claims would "be an impermissible intrusion in Indonesia's internal affairs."[2] The common law tort claims were eventually dismissed for lack of prudential standing.[3] The plaintiff-appellants then challenged the dismissal of their complaints, and Exxon cross-appealed, contending that it had corporate immunity from ATS liability.

II. The D.C. Circuit's Decision

The D.C. Circuit affirmed the dismissal of appellants' TVPA claims, but reversed the dismissal of both the ATS claims and the non-federal tort claims and remanded the case to the district court.[4] In reaching its disposition, the D.C. Circuit held, *inter alia*, that (a) defendants can be liable for aiding and abetting under the ATS, (b) extraterritoriality poses no bar to the ATS's application, and (c) corporations are not immune from ATS liability. The decision expands the coverage of the ATS, directly conflicts with a recent Second Circuit case[5] on the issues of extraterritoriality and corporate immunity, and applies a different standard of liability to aiding and abetting allegations than does the Second Circuit.

A. Aiding and Abetting Liability Under the ATS

The ATS provides in full: "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."[6] Because the ATS provides district courts jurisdiction over claims alleging torts "committed in violation of the law of nations,"

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1 *John Doe VIII* v. *Exxon Mobil Corp*. ("Doe VIII Opinion"), No. 09-7125 (D.C. Cir. July 8, 2011), *available at* http://www.cadc.uscourts.gov/internet/opinions.nsf/567B411C56CD7A6F852578C700513FC8/$file/09-7125-1317431.pdf.

2 *Doe I* v. *Exxon Mobil Corp*., 393 F. Supp. 2d 20, 24-27 (D.D.C. 2005).

3 *Doe VIII v. Exxon Mobil Corp.*, 658 F. Supp. 2d 131 (D.D.C. 2009).

4 Doe VIII Opinion at 4, 112.

5 *Kiobel* v. *Royal Dutch Petroleum Co*., 621 F.3d 111 (2d Cir. 2010), *reh'g en banc denied*, 2011 WL 338048 (Feb. 4, 2011).

6 28 U.S.C. § 1350.

the court looked to the law of nations to determine whether the ATS reaches parties who aid and abet violations of customary international norms.[7] The D.C. Circuit conducted a review of customary international law, concluding that aiding and abetting liability is indeed recognized under international law, and therefore is reached by the ATS.[8] On this point, the D.C. Circuit is in agreement with the Second[9] and Eleventh Circuits.[10]

While in agreement with the Second Circuit over the existence of aiding and abetting liability under the ATS, the D.C. Circuit adopted a different intent requirement for ATS aiding and abetting violations. The Second Circuit has adopted a "purposeful" standard of intent, extending liability only where the perpetrator acted with the purpose of committing the alleged violation of the law of nations.[11] The D.C. Circuit rejected the utilization of a purpose standard, noting that the source upon which the Second Circuit relied was a treaty, and not a source of customary international law,[12] and further recognizing that even the treaty relied upon by the Second Circuit requires "no more than 'knowledge.'"[13]

The D.C. Circuit instead set forth a "knowledge" standard of intent.[14] Because the ATS addresses violations of the law of nations, the D.C. Circuit looked to customary international law to discern the standard under which aiding and abetting conduct is viewed with sufficient opprobrium by the international community to qualify as conduct in violation of the law of nations.[15] The D.C. Circuit held that customary international law counsels for the adoption of a knowledge requirement for aiding and abetting claims.[16]

B. ATS Liability for Conduct Occurring in Foreign Nations

In determining whether the ATS has an extraterritorial reach, the D.C. Circuit acknowledged the Supreme Court's recent restatement of the presumption against extraterritoriality: "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[17] Nonetheless, the ATS was deemed to overcome the *Morrison* presumption because it has an "obvious extraterritorial reach."[18] Further, the D.C. Circuit noted that the ATS was not being applied extraterritorially, insofar as it is only a jurisdictional statute. The ATS "would apply extraterritorially only if Congress were to establish U.S. district courts in foreign countries."[19]

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7 Doe VIII Opinion at 29.

8 *Id.* at 32–35.

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

10 *See Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252, 1258 n.5 (11th Cir. 2009).

11 *See Presbyterian Church of Sudan*, 582 F.3d at 259.

12 Doe VIII Opinion at 42.

13 *Id.* at 46.

14 *Id.* at 41–42.

15 *See id.* at 38–41.

16 Thus, for aiding and abetting liability to obtain in the D.C. Circuit, "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation." Doe VIII Opinion at 41 (quoting *Halberstam* v. *Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

17 Doe VIII Opinion at 13 (quoting *Morrison* v. *National Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010)).

18 *Id.* at 16.

19 *Id.* at 18.

The only question, then, was whether the common law causes of action recognized by federal courts in ATS actions extend to harm to aliens occurring abroad.[20] The D.C. Circuit undertook a review of the historical context of the ATS, concluding that U.S. courts were originally understood to have jurisdiction over violations of international law occurring beyond domestic borders, on the open seas.[21] It also concluded, however, that the historical record is ambiguous as to whether such jurisdiction was understood to extend to violations occurring on foreign soil.[22] Nonetheless, the D.C. Circuit held that extraterritoriality was no bar to appellant's aiding and abetting claims, even to the extent such violations are alleged to have occurred in Indonesia,[23] citing, inter alia, the tendency of modern ATS litigation to focus on wrongs committed in the territory of foreign nations. [24]

In response to the dissent's expression of disbelief that the First Congress was interested in protecting "a Frenchman injured in London,"[25] the court noted that Congress indeed has an interest in prescribing standards of conduct for American citizens, wherever their location.[26] The D.C. Circuit's holding on extraterritoriality again creates direct conflict with the Second Circuit, which held that the ATS was not originally understood to grant federal courts jurisdiction over violations of international law occurring on foreign soil.[27]

C. Corporate Liability Under the ATS

In rejecting Exxon's claim of corporate immunity under the ATS, the D.C. Circuit once again broke ranks with the Second Circuit. In *Kiobel* v. *Royal Dutch Petroleum Co.*, the Second Circuit held that corporate liability does not exist under the ATS.[28] The D.C. Circuit noted that the Second Circuit improperly looked to customary international law, as opposed to federal common law, in determining the existence of corporate immunity under the ATS.[29] The difference in approach of the two Circuits stems from what the D.C. Circuit referred to as the Second Circuit's conflation of international norms of conduct, violations of which are remediable under the ATS, and the rules for remediation of such violations.[30] The former are determined by looking to customary international law,[31] while the latter, corporate liability/immunity included, are to be governed by federal common law.[32] As the D.C. Circuit noted, this dichotomy seems sensible: "[C]ustomary international law provides rules for

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20 *Id.* at 19.

21 *Id.* at 23.

22 Doe VIII Opinion at 23–24.

23 *Id.* at 25.

24 *Id.* at 24.

25 *Id.* at 124 (Kavanaugh, J., dissenting in part).

26 *Id.* at 27 (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282–83 (1952)).

27 *Kiobel*, 621 F.3d at 142 n.44.

28 *Id.* at 145.

29 *See* Doe VIII Opinion at 53–55, 70.

30 *Id.* at 53.

31 *Id.* at 54.

32 *Id.* at 55 ("[F]ederal courts must determine the nature of any remedy in lawsuits alleging violation of the law of nations by reference to federal common law rather than customary international law.").

determining whether international disapprobation attaches to certain types of conduct . . . [but] one could not expect . . . states . . . to produce detailed rules of procedure and evidence . . . ."[33]

The D.C. Circuit then elaborated on the "key distinction" between norms of conduct and remedies, taking aim at what it characterized as a "misread" of footnote 20 in *Sosa* on the part of the Second Circuit. The footnote instructs that international law is to be consulted in determining whether given conduct is reached by the ATS only when engaged in by state actors, or is reached by the ATS when engaged in by state and private actors alike.[34] Customary international law is a proper recourse for this determination because it classifies whether given conduct is reached by the ATS: whether the conduct, when engaged in by a certain actor, violates the "law of nations." This is a question of norms. The private vs. state actor dichotomy was distinguished from the corporate vs. individual actor dichotomy by the D.C. Circuit, which deemed the latter dichotomy an illusory one.[35]

The question of corporate liability, the D.C. Circuit concluded, is not a question of norms, but a "technical accoutrement" to the ATS cause of action for a violation of a given norm.[36] That is, the question of corporate liability asks not whether a given norm of international law has been violated, but rather, *assuming* a norm has been violated, asks who can be held responsible. For an answer to this latter inquiry, the D.C. Circuit turned to the federal common law. This is because "international law generally leaves all aspects of the issue of civil liability to individual nations, there is no rule or custom of international law to award civil damages in any form or context, either as to natural persons or as to juridical ones."[37] After reviewing the text and historical context of the ATS, the D.C. Circuit concluded that corporate liability exists under the ATS.[38] In a final scold of the Second Circuit, the D.C. Circuit noted that *Kiobel*'s determination of corporate immunity under the ATS is misguided, *even if* international law is the source consulted for determination of corporate liability.[39]

III. The Dissent

Judge Kavanaugh issued a partial dissent, indicating his belief that the district court's dismissal of appellants' ATS claims[40] should have been affirmed. The dissent specifically would have applied the presumption against extraterritoriality to preclude ATS application to conduct that allegedly occurred in a foreign nation.[41] Citing *Morrison*'s command that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," the dissent noted that nothing in the text of the ATS suggests an extraterritorial reach.[42] Further, the

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33 *Id.* at 57.

34 *See* Doe VIII Opinion at 71–72 (citing *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004)).

35 *See id.* at 72 (noting that there is nothing to suggest that *Sosa* considered relevant a "dichotomy between a natural and a juridical person").

36 *See id.* at 71–73.

37 *Id.* at 81 (quoting *Kiobel*, 621 F.3d at 152–53 (Leval, J., concurring)).

38 *Id.* at 84 ("[U]nder established principles of agency law, corporations can be held liable in ATS lawsuits for torts committed by their agents.").

39 *See* Doe VIII Opinion at 74–81.

40 *Doe I* v. *Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24–27 (D.D.C. 2005).

41 Doe VIII Opinion at 114 (Kavanaugh, J., dissenting in part).

42 *Id.* at 121–122.

dissent found the background of the ATS to provide "affirmative evidence" against an extraterritorial reach. On this point, the dissent reached the "same conclusion" as the Second Circuit.[43]

The dissent also agreed with the Second Circuit's holding in *Kiobel* that corporations enjoy immunity under the ATS.[44] The dissent noted that the D.C. Circuit's opinion produces the "inconceivable" result that "[a] defendant who would not be liable in an international tribunal for violation of a particular customary international law norm nonetheless may be liable in a U.S. court in an ATS suit for violation of that customary international law norm."[45]

IV. Significance of the Decision

The D.C. Circuit's decision creates a split between the Second and D.C. Circuits on the reach of the ATS. Pursuant to the decision, corporations do not enjoy immunity under the ATS, and the ATS extends to reach even the aiding and abetting of conduct in violation of the law of nations occurring on foreign soil. The decision may prompt a rehearing *en banc*, but it is perhaps more likely that the Supreme Court will decide the issue. The plaintiff-appellants from *Kiobel* have already filed a petition for a writ of certiorari.[46]

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.

43 *Id.* at 131 (citing *Kiobel*, 621 F.3d at 142 n. 44).

44 *Id.* at 137–138 (citing *Kiobel*, 621 F.3d at 120).

45 *Id.* at 139–40 (citing *Kiobel*, 621 F.3d at 122).

46 *Kiobel* v. *Royal Dutch Petroleum*, No. 10-1491 (petition filed June 6, 2011).