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Litigation

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Second Circuit Recognizes Claim for Aiding and Abetting Violations of International Law

By **Felix Weinacht**

On October 12, 2007, the Second Circuit in a split opinion partly reversed and remanded a lower court ruling and held that the Alien Tort Claims Act, 28 U.S.C. § 1350 (“ATCA”), recognizes a cause of action for aiding and abetting violations of international law. *Khulumani v. Barclays National Bank Ltd.*, 2007 WL 2985101 (2d Cir. Oct. 12, 2007). This decision is significant in that the plaintiffs’ bar may now seek to assert that ATCA claims can be brought against corporate defendants who simply do business with a repressive government.

Khulumani involves a series of lawsuits brought by victims of South Africa’s former apartheid regime against approximately 50 multinational corporations and hundreds of “corporate Does” that sold goods or materials to the country, or made loans to it. The suits seek, among other relief, more than \$400 billion in damages. The United States

and South African governments both opposed the cases going forward, with the latter informing the court through a declaration that it regarded the proceedings as interfering “with a foreign sovereign’s efforts to address matters in which it has the predominant interest.” *Id.* at *1. In 2004, the Southern District of New York (Sprizzo, J.) dismissed the suits, finding that “[a]lthough it is clear that the actions of the apartheid regime were repugnant..., it is this Court’s job to apply the law” which holds no legal remedies against companies that are alleged to have aided and abetted that regime. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 548 (S.D.N.Y. 2004). The Second Circuit affirmed the district court’s dismissal of claims under the Torture Victim Protection Act. However, it reinstated the claims under the ATCA and vacated the district court’s denial of a motion brought by some plaintiffs to amend their ATCA claims. *Khulumani* at *4.

A 200-year-old statute, the ATCA has come to prominence during the past two decades in litigations against companies on behalf of plaintiffs seeking reparations for injuries suffered under oppressive governments. The statute grants federal courts jurisdiction to hear suits by non-citizens claiming violations of “the law of nations or a treaty of the United States” virtually anywhere in the world, 28 U.S.C. § 1350, but it has been the subject of several court rulings seeking to narrow the scope of its applicability. Most prominently, in 2004 the Supreme Court required that, in order to qualify as “law of nations” under the ATCA, a legal rule must be “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,” such as was the case with, for example, certain crimes against ambassadors in 1789 when the ATCA was enacted. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

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The three members of the *Khulumani* court were split in their opinion. Thus, the *per curiam* opinion stated only the principle that “in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the ATCA,” and referred to the separate concurring opinions of Judges Katzmann and Hall for their “respective rationales” for this holding. *Khulumani* at *2, 4-21, 21-29. Judge Korman, on the other hand, in his dissenting opinion agreed with the district court’s ruling that there does not exist a cause of action for aiding and abetting liability under the ATCA. *See id.* at *29-74.

Although two judges held that aiding and abetting liability exists, they disagreed as to whether the law governing that liability is international or federal. Judge Katzmann held that whether there is aiding and abetting liability is a question of international law and that international law recognizes aiding and abetting liability. *See id.* at *9. Relying on the London Charter establishing the International Military Tribunal at Nuremberg after World War II and other treaties establishing international courts and tribunals, the case law rendered by such courts and tribunals, and international conventions outlawing crimes such as torture, apartheid and terrorism, *see id.* at *10-15, Judge Katzmann concluded that aiding and abetting liability is “sufficiently well-established and universally recognized under international law to

trigger jurisdiction under the ATCA.” *Id.* at *15. Judge Hall held that the “standard by which to assess aiding and abetting liability” is provided by federal common law, *id.* at *23; according to him, while international law may supply the measure for primary liability (for example, for committing the terrorist act itself), accessory liability must be evaluated under federal law. *See id.* at *21. Finally, Judge Korman’s dissent looked to international law again for the relevant standard, but found that at the time the alleged crimes were committed there was no well established and universally recognized international norm providing for the liability of private actors who aid or abet apartheid, *see id.* at *55-58, even less so where it is not the officers or employees of a corporation whose responsibility is at issue, but the corporate entity itself. *See id.* at *58-62.

Significantly, all three judges agreed that *Khulumani* involves questions that may make it inappropriate for judicial adjudication. Indeed, this litigation was specifically cited by the Supreme Court in *Sosa* as an example of a case where “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy,” which may impose a “possible limitation” to the availability of relief in the federal courts. *Sosa*, 542 U.S. at 733 n.21. While the *Khulumani*

dissent thus discussed issues of “deference to the political branches” as another reason why, in its opinion, the district court’s dismissal of the case was correct, *Khulumani* at *32 (citing *Sosa*, 542 U.S. at 733 n.21), the majority acknowledged that, on remand, “prudential principles might operate to limit the availability of relief in the federal courts.” *Id.* at *3 (citing *Sosa*, 542 U.S. at 733 n.21). In this context, the majority emphasized the Second Circuit decisions in *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005), holding that “[j]udicial deference to the Executive Branch on questions of foreign policy has long been established under the prudential doctrine known as the ‘political question’ doctrine,” *id.* at 69, as well as in *Bigio v. Coca-Cola Co.*, 448 F.3d 176 (2d Cir. 2006), where the Court inquired whether “adjudication of [the] case by a United States court would offend amicable working relationships with [a foreign country],” and thus violate “international comity.” *Id.* at 178. The majority specifically instructed that “[o]n remand, the district court will have the opportunity to consider the guidance provided by [Second Circuit precedent] regarding the relevant weight of statements of interest” as submitted by the United States and South Africa in this case. *Khulumani* at *4.

The effect of the Second Circuit’s decision in *Khulumani* is that it may expand the scope

of aiding and abetting liability under the ATCA. In *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994), the concept of civil aiding and abetting liability was described by the Supreme Court as ambiguous and “at best uncertain in application.” *Id.* at 181. In *Khulumani*, the Second Circuit combined this vague concept with that for liability under the ATCA, a narrow theory for which the Supreme Court in *Sosa* required firmly established and well defined legal rules. *See Sosa*, 542 U.S. at 725 (“accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms”). In spite of the dilemma that *Khulumani* causes for the district court judge on remand, the decision however also recognizes the limits of ATCA claims where “prudential principles” recommend that the case not go forward, specifically where the United States or other sovereigns involved in the matter oppose the case.

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