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Litigation

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NO LIABILITY FOR VIOLATIONS OF INTERNATIONAL LAW UNLESS AID WAS PURPOSEFUL, SECOND CIRCUIT RULES IN CASE BROUGHT UNDER ALIEN TORT STATUTE

The federal appeals court in New York has raised the bar for foreign plaintiffs attempting to use U.S. courts to hold foreign corporations accountable for human rights violations abroad. Claims that a corporation aided and abetted or conspired with a foreign government no longer can be maintained unless the company acted with the “purpose” of facilitating violations of international law, the U.S. Court of Appeals for the Second Circuit recently ruled in a significant decision captioned *Presbyterian Church of Sudan v. Talisman Energy, Inc.*¹

Talisman involves allegations by the Presbyterian Church of Sudan as well as several Sudanese individuals that Talisman Energy, Inc., a Canadian oil company, helped the Muslim government of Sudan with a brutal campaign of genocide, war crimes and crimes against humanity against non-Muslim Sudanese in exchange for the opportunity to expand the company’s oil exploration in the region. The case was filed in 2001 under the Alien Tort Statute (“ATS”),² a 200-year old law that provides the federal courts with jurisdiction to hear suits by non-citizens claiming violations of “the law of nations” virtually anywhere in the world. The ATS has come to prominence during the past two decades as a basis for plaintiffs to file lawsuits in U.S. federal courts against multinational corporations doing business in countries with oppressive governments.

In 2005, Judge Denise L. Cote of the Manhattan federal district court twice denied Talisman’s motions to dismiss the case, including when the company submitted statements from the State Department and the Canadian government expressing concerns about the litigation.³ Those motions were based on the Supreme Court’s 2004 ruling in *Sosa v. Alvarez-Machain*,⁴ the only time the high court has addressed the ATS and applied a restrictive reading to it. In 2006, Judge Cote granted summary judgment in favor of Talisman on different grounds, holding that the company had not substantially assisted the Sudanese government’s human rights violations and did not have the requisite intent to assist in any violations.⁵

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¹ No. 07-0016-cv, 2009 U.S. App. LEXIS 21688 (2d Cir. Oct. 2, 2009).

² 28 U.S.C. § 1350.

³ See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882(DLC), 2005 WL 2082846 (S.D.N.Y. Aug. 30, 2005). The Canadian government said that it was its policy to promote trade with Sudan as an incentive for Sudan to end the civil war that plagued the country.

⁴ 542 U.S. 692 (2004).

⁵ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

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Affirming Judge Cote's decision, the Second Circuit stated, "we hold that the mens rea standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone."⁶ In an opinion written by Chief Judge Dennis Jacobs, the appeals court stated that although "Plaintiffs have provided evidence that the Government violated customary international law," they "provide[d] no evidence that Talisman acted with the purpose to support the Government's offenses."⁷ Under *Sosa*, wrote Judge Jacobs, "the standard for imposing accessory liability under the ATS must be drawn from international law," and "under international law, a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses."⁸

Purposeful Aid Requires "Practical Assistance"

Judge Jacobs noted that, in *Khulumani v. Barclays Nat'l Bank, Ltd.*,⁹ another Second Circuit panel recognized aiding-and-abetting liability under the ATS, but "fractured as to the standard for pleading such liability."¹⁰ With the issue remaining "live" in the circuit, Judge Jacobs stated that the *Talisman* panel was relying on Judge Katzmman's concurring opinion in *Khulumani*.¹¹ Judge Katzmman had written that adding-and-abetting liability requires that the defendant "provides practical assistance to the principal which has a substantial effect on the perpetration of the crime" and "does so with the purpose of facilitating the commission of that crime."¹² This purpose standard has the "requisite 'acceptance among civilized nations,'" whereas "no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law."¹³ In so clarifying the mens rea standard applicable to claims for aiding and abetting under the ATS, the Second Circuit also addressed an issue of first impression — that an alleged conspiracy to commit violations of international law requires the same proof of purposeful intent as is the case with claims for aiding and abetting such violations.¹⁴

The court found that Talisman's actions did not meet the purpose standard. One example set out by Judge Jacobs was that the company built roads and improved airstrips in the region, "notwithstanding awareness that this infrastructure might be used for attacks on civilians."¹⁵ "But obviously," Judge Jacobs wrote, "there are benign and constructive purposes for these projects and (more to the point) there is no evidence that any of this was done for an improper purpose."¹⁶ The Court also observed that "senior Talisman officials protested to the Government," such as when they learned that the military was using airstrips for air-borne attacks on civilians.¹⁷ "Since, however, the proper test of liability is purpose (not knowledge), all this evidence of knowledge (and protest) cuts against Talisman's liability," Judge Jacobs wrote.¹⁸ Judge Jacobs further noted that there was evidence of attacks by the government on civilians, that those attacks helped the oil business, and that the government's oil revenues, in turn, "enhanced the military capabilities used to persecute its enemies."¹⁹ "But if ATS liability could be established by

6 *Talisman*, 2009 U.S. App. LEXIS 21688, at *40.

7 *Id.* at *53.

8 *Id.* at *6.

9 504 F.3d 254 (2007).

10 *Talisman* at *35. The *Khulumani* decision was the subject of a prior Milbank Client Alert titled "Second Circuit Recognizes Claim for Aiding and Abetting Violations of International Law" (Oct. 24, 2007).

11 *See id.* at *37.

12 *Id.* at *36 (citing *Khulumani* at 277 (Katzmann, J., concurring)).

13 *Id.* at *41 (emphasis in original).

14 *Id.* at *41-44.

15 *Id.* at *48.

16 *Id.* at *48-49.

17 *Id.* at *49.

18 *Id.*

19 *Id.* at *54-55.

knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts,” Judge Jacobs concluded.²⁰

The impact of *Talisman* is that plaintiffs in future ATS cases in the Second Circuit will not prevail against corporate defendants merely by alleging knowledge of the wrongs of host governments in connection with ordinary commercial activity, but instead must show substantial assistance rendered with the purpose of committing crimes against international law. This standard, in conjunction with recent Supreme Court decisions requiring increased plausibility in a plaintiff’s complaint,²¹ will make it more difficult for plaintiffs’ lawyers to subject companies to years of litigation in strike suits brought under the ATS.²²

²⁰ *Id.* at *55.

²¹ See *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The *Iqbal* decision was the subject of a prior Milbank Client Alert titled “*Iqbal* Decision Having Significant Impact on Pleading Standards in Federal Courts” (Aug. 25, 2009).

²² An issue that the Second Circuit did not resolve, but instead reserved for another day, is that of corporate liability under the ATS — whether international law permits claims against corporations at all. *Talisman* had argued that international law does not support imposition of liability on artificial “persons” such as corporations. The Second Circuit did not reach this question. Cf. *Talisman* at *37, n.9.

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