New York District Court Dismisses Major Rights Suit on Apartheid

*By Christopher Wang**

In *In re South African Apartheid Litig.*[1], the district court for the Southern District of New York (Sprizzo, J.) recently considered whether multinational corporations that did business in apartheid South Africa violated international law, and therefore could be held subject to suit under the Alien Tort Claims Act (ATCA),[2] and other jurisdictional provisions.

The human-rights abuses of the South African apartheid regime have been well-documented. Under this system, established in 1948 upon the rise to power of the National Party, the white minority, which accounted for fourteen percent of the population, completely ruled over the country and controlled all aspects of life. By law, black Africans were relegated to certain lands called "bantustans," which were characterized by disease, malnourishment, and lack of basic amenities, and could gain access to urban areas only by carrying a passbook that contained information as to the person's identity, ethnic group, and employer. Once employment was terminated, it would be noted on the passbook and the individual would be sent back to life on the bantustan until called upon again to serve the white economy. As a result of this exploitation, the white minority earned on average four times as much income and suffered far less from diseases and lack of resources. The apartheid regime enforced this gross disparity by brutally cracking down on African demonstrations and resistance movements.

Defendants in the suit at bar are multinational corporations that did business in South Africa during the apartheid period. Defendants both benefited from the cheap labor that the apartheid system provided and supplied resources to the South African government or to entities controlled by the government. Many of those resources were used by the apartheid regime to further its policies of oppression and persecution of the African majority. Defendants whose sites of operations were deemed key points under the National Key Points Act of 1980 were required to provide high levels of security to protect against civil unrest and African uprisings, and the owners of those sites were required to provide storage facilities for arms and to cooperate with the South African Defense Force to provide local defense of the area. Following several United Nations resolutions denouncing the South African government's apartheid policy, many defendants publicly withdrew from South Africa while maintaining profitable entities within the country that continued to provide goods and services that assisted the regime.

Three different sets of plaintiffs brought actions in eight federal district courts in mid- to late 2002 on behalf of individuals who lived in South Africa between 1948 and the present and who suffered damages as a result of the crimes of apartheid. Plaintiffs sought equitable, injunctive, and monetary relief from defendants, alleging, *inter alia*, that violations of international law -- including forced labor, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes, and racial discrimination -- rendered defendants subject to suit in United States federal district court under the ATCA and other jurisdictional provisions. Specifically, plaintiffs alleged that (1) defendants engaged in state action by acting under color of law in perpetrating these international law violations; (2) defendants aided and abetted the apartheid regime in the commission of these violations; and (3) defendants' business activities alone are sufficient to make out an international law violation. The actions were transferred to the district court by the Judicial Panel on Multidistrict Litigation. Defendants brought Rule 12(b)(1) and 12(b)(6) motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, respectively.

The district court granted defendants' motion to dismiss for lack of subject matter jurisdiction under the ATCA upon finding that the various complaints did not sufficiently allege that defendants violated international law. In so holding, the court first described the scope of the ATCA. The ATCA provides that "[t]he 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." [3] Recently, in *Sosa v. Alvarez-Machain*,[4] the Supreme Court set forth the following considerations for courts to use in determining whether conduct should be found to be encompassed by the ATCA: (1) the claim must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized"; (2) courts should be averse to innovating without legislative guidance, particularly when making the decision to "[e]xercise a jurisdiction that remained largely in shadow for much of the prior two centuries"; (3) courts should be wary of creating private rights of action from international norms because of the collateral consequence such a decision would have; (4) courts must consider that ATCA suits can impinge on the discretion of the legislative and executive branches of this country as well as those of other nations; and (5) courts must be mindful of the absence of a "congressional mandate to seek out and define new and debatable violations of the law of nations." [5] Applying these standards, the district court concluded that "it is clear that none of the theories pleaded by plaintiffs support jurisdiction under the ATCA."[6]

First, with regard to plaintiffs' state-action theory, the court observed that Second Circuit case law requires that state action under the ATCA involve a private individual "act[ing] together with state officials or with significant state aid."[7] In this case, however, plaintiffs at most allege that by engaging in business with the South African regime, defendants benefited from the unlawful state action of the apartheid government.[8] The court rejected the plaintiffs' reliance on *Wiwa v. Royal Dutch Petroleum Co.*,[9] a case that found state action where defendants actively cooperated with Nigerian officials in the suppression of a group that was in

opposition to the defendants' activities in the region, as inapplicable because such activities were not present in this case.[10] Instead, plaintiffs at most "allege that defendants followed the National Key Points Act and made the necessary preparations to defend their premises from uprisings," an action that "alone does not constitute the joint action with the apartheid regime to commit the slew of international law violations that are complained of."[11] Because the court found no state action, it declined to consider "whether the actions of the apartheid regime violated the law of nations so as to support jurisdiction under the ATCA."[12]

Second, the court considered plaintiffs' argument that aiding and abetting international law violations or doing business in apartheid South Africa constituted conduct actionable under the ATCA pursuant to *Sosa*. In rejecting this argument, the court first noted that Second Circuit case law requires a showing that defendants violated a legal obligation, not simply a moral or political one, and that plaintiffs' citations failed to show that aiding and abetting international law violations "is itself an international law violation that is universally accepted as a legal obligation."[13] The court found support for its finding in the Supreme Court's opinion in *Central Bank v. Denver v. First Interstate Bank of Denver*,[14] in which the Court held that aider and abettor liability in civil cases should not be inferred where Congress did not explicitly provide it. Noting that "*Central Bank* applies with special force here," the court concluded that "the ATCA presently does not provide for aider and abettor liability, and this Court will not write it into the statute," consistent with *Sosa*'s admonition that "Congress should be deferred to with respect to innovative interpretations of that statute" and with its mandate that courts "engage in 'vigilant doorkeepking.'"[15] The court also observed that "allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe . . . would not be consistent with the 'restrained conception' of new international law violations that the Supreme Court has mandated for the lower federal courts."[16]

Finally, the court considered the theory that defendants violated the law of nations by doing business in apartheid South Africa. In support of this theory, plaintiffs cited several treaties and a number of General Assembly and Security Council declarations and resolutions.[17] In holding these citations inapplicable, the court concluded that several of them are not self-executing, and thus created no private liability in United States courts, while others "simply do not create binding international law."[18] The court found the only possible ground of liability to be a series of non-binding General Assembly resolutions condemning defendants' business activities in South Africa, but concluded that "the opinions expressed by these resolutions never matured into customary international law actionable under the ATCA."[19] Moreover, imposing ATCA liability for doing business in South Africa would pose a host of negative collateral consequences for international commerce, "expand precipitously the jurisdiction of the federal courts [contrary to] the 'extraordinary care and restraint' that [courts] must exercise in recognizing new violations of customary international law," and be inconsistent with the policy of Congress and many world powers to encourage business investment in apartheid South Africa as a means of bringing about change.[20] Accordingly, because the court found no subject matter jurisdiction under the ATCA, it dismissed all claims thereunder.[21]

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Footnotes

[1]*In re South African Apartheid Litig.*, 2004 WL 2722204 (S.D.N.Y. Nov. 29, 2004).

[2]28 U.S.C. § 1350.

[3]28 U.S.C. § 1350.

[4]Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004).

[5]*Id.* at 2761-63, 2766 n.1.

[6] 2004 WL 2722204, at *6.

[7]2004 WL 2722204, at *6.

[8]*Ibid.*

[9]Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

[10]*Id.* at *7.

[11]*Ibid.*

[12] *Ibid.*

[13]2004 WL 2722204, at *7-*8.

[14]Central Bank v. Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994).

[15]2004 WL 2722204, at *8.

[16]*Id.* at *9.

[17]2004 WL 2722204, at *9.

[18]*Id.* at *9-*10.

[19]*Id.* at *11.

[20]*Ibid.*

[21] The court also dismissed claims brought under the Torture Victim Protection Act of 1991 (TVPA) for many of the same reasons it dismissed claims brought under the ATCA, and dismissed claims brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) because plaintiffs failed to demonstrate that Congress intended RICO to apply extraterritorially to the conduct at issue or to show a racketeering enterprise. 2004 WL 2722204, at *12-*14.