



US FEDERAL COURTS RELY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT IN CIVIL CASES

By Duane W. Krohnke, Adjunct Professor, University of Minnesota Law School

In 2002, various South Africans commenced two lawsuits for money damages in U.S. federal court against various corporations for allegedly aiding and abetting apartheid and other wrongs in South Africa. The suits were brought under the U.S. Alien Tort Statute (ATS). That statute which was enacted by the First Congress in 1789 allows lawsuits in U.S. federal courts by aliens “for a tort only, committed in violation of the law of nations or a treaty of the United States.” (28 U.S.C. § 1350.)

These still pending cases have produced several significant decisions regarding international human rights law, the importance of the Rome Statute for the International Criminal Court (ICC) and the meaning of the Alien Tort Statute.

US Court of Appeals for the Second Circuit Decisions

In 2007, in Khulumani v. Barclay Nat'l Bank, 504 F.3d 254 (2d Cir. 2007), the U.S. Court of Appeals for the Second Circuit, 2 to 1, permitted class actions under the Alien Tort Statute by the South Africans against 50 corporations, including Citigroup, General Electric, E.I. DuPont de Nemours and IBM, for allegedly aiding and abetting apartheid discrimination. The illegality of apartheid under “the law of nations” or customary international law was assumed. The issue before the court instead was whether corporations could be held liable for such alleged aiding and abetting, and the court held they could be.

In reaching this conclusion, Judge Robert A. Katzmann, concurring Circuit Judge, relied, in part, upon the ICC’s Rome Statute because at that time it had been signed by 139 countries and ratified by 105, including most of the world’s mature democracies, and it thus constituted “an authoritative expression of the legal views of a great number of States.” The U.S.’s not being a party to the ICC was not significant for Judge Katzmann because its non-ratification had nothing to do with the definition of aiding and abetting.

In particular, Judge Katzmann relied upon the Rome Statute’s Article 25(3)(c), which provides that a person shall be criminally responsible if he or she for “the purpose of facilitating the commission of such a crime [within the ICC’s jurisdiction], aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.” This provision was particularly important for Judge Katzmann because it articulated “the *mens rea* [or mental element] required for aiding and abetting liability.”

Another member of the three-judge panel in Khulumani, District Judge Edward R. Korman, concurring in part and dissenting in part, also referred to Article 25(3)(c) of the Rome Statute and agreed that it reflected “an international consensus on the issue of the appropriate standard for determining liability for aiding and abetting.” He also noted that the U.S. Government’s amicus curiae brief for the court endorsed Article 25(3)(c)’s articulation of the elements of aiding and abetting liability under international law.

Judge Korman, however, dissented on the issue of corporate liability for such an offense when he concluded that corporations were not so liable. Important for him were the ICC’s Rome Statute providing only for





jurisdiction over “natural persons” and that Statute’s negotiators having rejected a proposal to bring corporations within the ICC’s jurisdiction. But Judge Korman’s view on this issue was outweighed by the views of the other two judges on the panel with Judge Katzmann merely saying that the parties had not raised the issue, which thus did not have to be reached by the court, an unsurprising result as the court repeatedly had not treated corporate liability as raising any unique problems.

The Second Circuit’s stressing the overwhelming international consensus behind the Rome Statute is a harbinger of other U.S. courts’ reliance upon that Statute for expression of such a consensus on other important issues of international criminal law.

On November 27, 2007, the Second Circuit, 2 to 1, denied the defendants’ motion to stay the issuance of a mandate to the district court pending a petition for a writ of certiorari to the U.S. Supreme Court. (Khulumani v. Barclay Nat’l Bank, 509 F.3d 148 (2d Cir. 2007).) The per curium order of Circuit Judges Katzmann and Hall held that the district court in the first instance on remand was to decide whether the case should be dismissed under various prudential doctrines and that any cert petition would be premature. (*Id.* at 152-53.) District Judge Korman, dissenting, concluded that a certiorari petition would present substantial federal questions of judicial interference with U.S. foreign relations and that the Supreme Court’s dictum in Sosa v. Alvarez-Machain, 542 U.S. 699, 733, n.21 (2004), already had indicated its interest in those issues in this very case. (In addition, Judge Korman also concluded that there was good cause for staying the mandate: this case presented a continuing insult to the government of South Africa and to U.S. relations with that country. (*Id.* at 153-58.))

United States Supreme Court Decision

On May 12, 2008, the Supreme Court affirmed the Second Circuit’s decision, pursuant to Supreme Court Rule 4(2) and 28 U.S.C. § 2109. As four justices (Chief Justice Roberts and Justices Kennedy, Breyer and Alito) had recused¹ themselves, the Court did not have the quorum of six Justices as required by its Rule 4(2). Therefore, the Court issued an Order stating “a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of the Court [here June 30, 2009], the judgment is affirmed under 28 U.S.C. §2109, which provides that under these circumstances the Court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided Court.” (American Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008).)

United States District Court Proceedings

After the Supreme Court’s order, the cases were remanded to the United States District Court in New York City for further proceedings, and already that court has issued five published decisions.

¹ The recusals undoubtedly were due to the four Justices’ ownership of stock in some of the corporate defendants. After this embarrassing lack of a quorum, it was reported that some of the Justices were selling their holdings of individual company stocks. (Editorial, *Court Without a Quorum*, N.Y. Times, May 18, 2008; *Supreme Court justices sold stock last year* (June 6, 2008), <http://www.azcentral.com/business/consumer/articles/2008/06/06/20080606biz-ScotusStock-06.html>).





On April 8, 2009, that court granted in part and denied in part the defendants' new motion to dismiss the complaints for alleged failure to state a claim upon which relief may be granted. (In re South African Apartheid Litigation, 617 F. Supp. 2d 228 (SDNY 2009).)

Acting within the legitimate restraints of Supreme Court and Second Circuit precedents, the district court held that corporations could be sued for aiding and abetting "torts in violation of the law of nations" under the Alien Tort Statute. (*Id.* at 254-55, 257-62.) After careful analysis, the court upheld the sufficiency of the following such claims and allowed the litigation of such claims to proceed:

- Alleged aiding and abetting torture and cruel, inhuman or degrading treatment (CIDT) and apartheid by Daimler A.G., General Motors Corporation (GM) and Ford Motor Company's providing information about anti-apartheid activists to the South African Security Forces, facilitating their arrests, providing information for use by interrogators and participating in interrogations. (*Id.* at 264, 296.)
- Alleged aiding and abetting extrajudicial killing and apartheid by Daimler, GM and Ford's selling heavy trucks, armored personnel carriers and other specialized vehicles to the South African Defense Forces and the police unit charged with investigating anti-apartheid groups with defendants' knowledge of the latter's use of the vehicles in attacking protesting civilians and activists. (*Id.* at 264-65, 266-67, 296.)
- Alleged aiding and abetting arbitrary denationalization and apartheid by International Business Machines Corporation's (IBM) and Fujitsu Ltd.'s sale of computer hardware, software and support to the South African government with knowledge of the latter's use of same to register individuals, strip them of their citizenship, segregate them within South Africa, produce identity documents and effectuate denationalization. (*Id.* at 265, 268, 296.)²
- Alleged aiding and abetting extrajudicial killing and apartheid by Rheinmetall Group A.G.'s selling armaments and related equipment and expertise to the South African government with knowledge that they would be used for extrajudicial killings to sustain apartheid. (*Id.* at 269-70, 296.)

The court, however, rejected many other aiding and abetting claims and dismissed three multinational bank defendants altogether. These legally insufficient claims were the following:

- The multinational banks' making loans to the South African government and buying its defense forces bonds. (*Id.* at 269.)
- Barclays Bank's racially discriminatory employment practices. (*Id.* at 266.)
- IBM and Fujitsu's sale of computer hardware, software and support for the government's use in the individual registration system as alleged aiding and abetting of CIDT. (*Id.* at 265.)
- IBM's sale of other computer hardware, software and support to the government and armaments manufacturers as alleged aiding and abetting of violations of the law of nations. (*Id.* at 268-69.)
- The automotive defendants' sale of general purpose vehicles as alleged aiding and abetting of any violation of the law of nations. (*Id.* at 267.)

² Fujitsu subsequently was dismissed for insufficient allegations of an agency relationship with a subsidiary. (In re South African Apartheid Litigation, 633 F. Supp. 2d 117 (S.D.N.Y. 2009).)





- The automotive defendants' sale of military vehicles as alleged aiding and abetting of torture, prolonged unlawful detention and CIDT. (*Id.* at 267.)
- Rheinmetall Group A.G.'s selling armaments and related equipment and expertise to the South African government as alleged aiding and abetting of torture, prolonged unlawful detention and CIDT. (*Id.* at 270.)

In reaching these conclusions, the district court first made an extensive analysis of the legal issue of aiding and abetting under the authorities relied upon by the Second Circuit: judgments of the Nuremberg Tribunal and the International Criminal Tribunal for the Former Yugoslavia and the Rome Statute. (*Id.* at 257-63.) This analysis had two parts: the defendant's act (*actus reus*) and state of mind (*mens rea*).

- The *actus reus* analysis was straightforward: this requires "practical assistance, encouragement or moral support which has a *substantial effect* on the perpetration of the crime." (Emphasis in original.) The quality of the assistance was critical; money and building materials, for example, were fungible and not the requisite assistance whereas goods specifically designed to kill or cause injury were. Thus, providing the means by which a violation of law is carried out would be sufficient *actus reus* as stated in Article 25(c) of the Rome Statute. (*Id.* at 257-59.)
- The *mens rea* requirement, held the court, meant that the defendant has to "know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations." This conclusion, said the court, was supported by Article 25(c) of the Rome Statute's saying that the defendant's actions were done "*for the purpose of* facilitating the commission of such a crime" and Article 30(3)'s definition of knowledge. These provisions, in the court's opinion, did not require the defendant to share the primary actor's purpose, but rather to be aware that his actions will substantially assist the commission of crimes in violation of the law of nations. Such a construction of the Rome Statute was consistent with its being a codification of existing international law unless a deviation is express. (*Id.* at 259-62.)³

In addition, the district court relied upon the Rome Statute and ICC decisions in concluding that certain wrongs were not international norms. First, private racial discrimination, held the court, is not a universally accepted international prohibition that would impose direct liability on a non-state actor. Important in that regard was the ICC's Rome Statute's definition of the crime of apartheid in Article 7(2)(h) without any mention of non-state actors. To construe that Article to cover such a situation would be too strained, said the court. (*Id.* at 249-52.) Second, in accordance with ICC decisions, conspiracy was held not to be a tort cognizable under the ATS (*id.* at 263).

The court also made other important conclusions of law regarding international norms for ATS claims: (a) events occurring outside the U.S. were cognizable under the ATS (*id.* at 246-47); (b) apartheid, extrajudicial killing, torture, prolonged unlawful detention and CIDT are all violations of international law cognizable under ATS (*id.* at 247-48); (c) so too arbitrary denationalization by a state actor was a tort in violation of the law of

³ Given the different opinions in Khulumani, the case itself did not establish a binding precedent on the standard for aiding and abetting a human rights violation, but subsequently the Second Circuit endorsed Judge Katzmann's formulation of same as the law of that Circuit. (Presbyterian Church of Sudan v. Talisman Energy, Inc., 2009 WL 3151804, at 12 (2d Cir. Oct. 2, 2009).)





nations (*id.* at 252-53); (d) a defendant is liable solely with respect to international norms in effect at the time of the alleged tort (*id.* at 248); (d) U.S. federal common law principles of piercing the corporate veil and agency to hold a parent corporation responsible for a subsidiary's actions are applicable in a case against corporations under the ATS, but there were insufficient allegations to allow such a claim to go forward except for agency claims against Daimler, GM and Ford (*id.* at 270-73); (e) ATS claims were subject to a 10-year statute of limitations borrowed from the U.S. Torture Victims Protection Act, but the bar of the statute was subject to the doctrine of equitable and *American Pipe* tolling, which applied here (*id.* at 286-93); and (f) an organization (Khulumani Support Group) that was formed to counteract the specific harms alleged caused by the defendants did not have standing to sue (*id.* at 293-96). Finally the district court rejected the defendants' arguments that the prudential doctrines of political question and comity called for dismissal of the cases. (*Id.* at 276-86.) This was so even though the governments of the U.S. and South Africa both advised the court that the litigation interfered with their relations. (*Id.* at 276-78.) However, the South African Truth and Reconciliation Commission (TRC) and its Chairman, Archbishop Desmond Tutu, had advised the court that the litigation would not impede or be inconsistent with its process or goals. (*Id.* at 240, 276, 278-80.) According to the court, the litigation would not contradict U.S. foreign policy or seriously interfere with important U.S. governmental interests or interfere with the TRC process. (*Id.* at 285.)⁴

Finally the district court rejected the defendants' arguments that the prudential doctrines of political question and comity called for dismissal of the cases. (*Id.* at 25-31.) This was so even though the governments of the U.S. and South Africa both advised the court that the litigation interfered with their relations. (*Id.* at 25-26.) However, the South African Truth and Reconciliation Commission (TRC) and its Chairman, Archbishop Desmond Tutu, had advised the court that the litigation would not impede or be inconsistent with its process or goals. (*Id.* at 1, 27-28.) According to the court, the litigation would not contradict U.S. foreign policy or seriously interfere with important U.S. governmental interests or interfere with the TRC process. (*Id.* at 30-31.)

Additional US Court of Appeals for the Second Circuit Proceedings

Sometime after June 25, 2009, defendants filed a petition for writ of mandamus and a request for permission for interlocutory appeal with the Second Circuit seeking to raise the propriety of the district court's refusal to dismiss the case on the grounds of comity and political question. Plaintiffs asked that the appeal be dismissed

⁴ On May 27, 2009, the district court denied defendants' motion for rehearing on the dismissal motion. (*In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 297-302 (SDNY 2009).) That same day, May 27, 2009, the district court also denied defendants' petition for permission to take an interlocutory appeal (before final judgment in the district court), but the Second Circuit subsequently granted that permission. (*In re South African Apartheid Litigation*, 624 F. Supp. 2d 336 (SDNY 2009); *id.*, 2009 WL 3364035 (S.D.N.Y. Oct. 19, 2009) (certain defendants appealed to Second Circuit and filed petition for writ of mandamus, and on September 10, 2009 the Circuit Court stayed proceedings in district court pending appeal).) One of the proposed appellate issues was case-specific deference to the request of the U.S. Department of State and the Government of South Africa for dismissal of the case. According to the district court, there was no conflict between the case and the South African Truth and Reconciliation Commission because the remaining corporate defendants had not participated in the TRC proceedings, as its Commissioners had advised the court. (*Id.* at 341 n.19.) In addition, the court's partial grant of the dismissal motion resulted in no conflict between the case and U.S. foreign policy. (*Id.* at 342 n.27.)





on the ground that the appellate court did not have jurisdiction. The Second Circuit deferred argument on all of these issues to a hearing on January 20, 2010, coupled with a stay of further proceedings in the district court.⁵

In the meantime, on September 1, 2009, the South African Government advised the district court that after the court's narrowing of the complaints in its previously discussed April 8, 2009, decision, the Government "is now of the view that this Court is an appropriate forum to hear the remaining claims." The Government also indicated its willingness to assist the parties in settling the cases.⁶

We now await the decision of the Second Circuit on the issues raised by this appeal.

We also await the Second Circuit's action on a petition for rehearing in Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258 (2d Cir. 2009), *pet. for rehearing & rehearing en banc* (2d Cir. Oct. 2009). International law scholars in amici briefs in support of the petition have raised interesting questions about the ICC's Rome Statute's provisions regarding accessory liability.⁷ If the petition is granted, then the Second Circuit should have additional comments on this subject.

Further Proceedings

If the cases ever return to the district court, the plaintiffs and the remaining defendants would be engaged in pretrial discovery (production of documents, answering interrogatories and deposing witnesses). This probably would culminate in defense motions for summary judgment and, if there are genuine issues of material fact, a trial.

Whatever the result in any such further proceedings in the district court, there probably would be another appeal, this time on the merits, to the Second Circuit followed by requests for the Supreme Court to review the case.

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⁵ In re South African Apartheid Litigation, 2009 WL 3364035 (S.D.N.Y. Oct. 19, 2009); author's telephone conversation with Steig Olson, plaintiffs' attorney (Oct. 26, 2009).

⁶ Hausfeld LLP, Press Release: South African Government Withdraws Opposition To Apartheid Lawsuits Pending in U.S. Federal Court, Sept. 3, 2009, http://www.hausfeldllp.com/pages/press_releases/272/south-african-government-withdraws-opposition-to-apartheid-lawsuits-pending-in-u.s.-federal-court; letter from Minister, Justice and Constitutional Development, Republic of South Africa to The Honorable Judge Shira A. Scheindlin, http://www.hausfeldllp.com/content_images/file/09_01_09%20SA%20Ministry%20of%20Justice%20Ltr%20to%20Judge%20Scheinlin.PDF.

⁷ BRIEF OF AMICUS CURIAE PROFESSOR DOUGLASS CASSEL IN SUPPORT OF REHEARING OR REHEARING EN BANC, Presbyterian Church of Sudan v. Talisman Energy, Inc. (2d Cir. Oct. 28, 2009); BRIEF OF AMICUS CURIAE INTERNATIONAL LAW SCHOLARS IN SUPPORT OF REHEARING OR REHEARING EN BANC, Presbyterian Church of Sudan v. Talisman Energy, Inc. (2d Cir. Oct. 27, 2009).

