Alien Tort Statute Case Update: In Re South African Apartheid Litigation

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Significance of the case

A District Court judge for the Southern District of New York last week denied in part and granted in part a motion to dismiss in the seminal Alien Tort Statute ("ATS") case, *In Re South African Apartheid Litigation*. The *In Re Apartheid* case is particularly significant because it helps to clarify how courts may analyze liability in ATS cases for companies conducting business in countries with poor human rights records. The ruling required that companies have "knowledge" that they are assisting a crime, rather than "intent." Knowledge is easier to demonstrate in court. The court also noted that merely conducting business in a pariah country or providing fungible goods or financing is not likely to generate aiding and abetting liability under the ATS. Rather, the court looked for goods that were specifically tailored for the government and used to help commit a crime. The court seemed to be searching for a tight causal nexus between the goods supplied and the particular harm suffered. The court also concluded that conspiracy liability is not available under the ATS.

Case history

The apartheid case began as over a dozen distinct cases against multiple corporate defendants. The District Court dismissed the cases in 2004, stating that aiding and abetting liability is not a theory available under the ATS. The Second Circuit reinstated the ATS claims and remanded the case in a *per curiam* opinion, accompanied by two concurring opinions and one opinion concurring in part and dissenting in part. In 2008, the U.S. Supreme Court declared that it could not intervene in this case because four of the nine justices had to recuse themselves due to conflicts of interest. Only two of the initial cases, *Ntsebeza v. Daimler A.G.* and *Khulumani v. Barclays National Bank*, remain in the litigation. They were filed in 2002. The plaintiffs dropped a large number of the original defendants from the cases.

The *Ntsebeza* and *Khulumani* cases involve claims against Daimler A.G., Ford Motor Company, General Motors, International Business Machines Corporation ("IBM"), Fujitsu Ltd., Barclays Bank, Union Bank of Switzerland ("UBS"), and Rheinmetall Group A.G. The district court dismissed all of the claims of direct liability against the plaintiffs. The court allowed the claims against Daimler, Ford, and General Motors for aiding and abetting apartheid, torture, extrajudicial killing, and cruel, inhuman, degrading treatment to proceed. The charges against IBM for aiding and abetting arbitrary denationalization and apartheid survived as well. The plaintiffs have leave to amend the claims against Fujitsu. The claims against Barclays Bank and UBS were dismissed.

Conspiracy under the ATS

The court ruled that conspiracy is not a form of liability that has been universally accepted by the community of developed nations, and therefore did not recognize conspiracy as a distinct tort to be applied pursuant to ATS jurisdiction. This contrasts with the approach taken in other ATS cases such as *Bowoto v. Chevron*. Conspiracy is relatively easy to demonstrate in court. This ruling may make it harder for plaintiffs to show that a company is legally implicated in the international crimes committed by host governments.

Aiding and abetting under the ATS

The decision is an important contribution to the debate regarding what standard should be used for the mental aspect -- *mens rea* -- of aiding and abetting in ATS cases. Courts have disagreed on what constitutes the customary international law standard for aiding and abetting. Some look to the International Criminal Court's ("ICC") Rome Statute, which read on its face requires intent. Other courts have claimed that the international customary law standard is "knowledge." The district court used a knowledge standard for the *In Re Apartheid* case. The opinion moves the weight of ATS jurisprudence back towards an aiding and abetting standard requiring knowledge rather than specific intent. It generally is easier to show a company had knowledge than to show it intended to contribute to a crime.

The *In Re Apartheid* decision also has implications for the action -- *actus reus* -- required in aiding and abetting claims under the ATS. The customary international law standard is "substantial effect" on the perpetration of the crime, but the meaning of that term has not been clear. The court stated that "It is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law." The court's decision suggests that providing a highly fungible good, such as a general loan or raw materials, is unlikely to be considered to have a substantial effect. Rather, the item provided needs to have a closer causal connection to or be used to commit the principle crime. Put differently, the court appeared to be looking for items that are tailored to directly support the crime.

For example, the sale of specialized military vehicles to the government was considered to be assistance with substantial effect, but the provision of "fungible" ordinary commercial trucks was not. IBM's sale of computers specifically designed to register individuals, strip them of citizenship, and segregate them geographically met the *actus reus* requirements for aiding and abetting of arbitrary denationalization and apartheid. The computers, however, did not provide assistance with substantial effect for aiding and abetting liability for cruel, inhuman, and degrading treatment ("CIDT"): "computers were not an essential element of CIDT or the means by which it was carried out."

The court's reasoning begins to provide a way of differentiating between aiding and abetting and simply conducting business in a country. It remains to be seen whether other courts will adopt this line of reasoning.

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