International Comity: Governmental Statements of Interest in Private International Litigation

The ongoing case of *Khulumani v. Barclay National Bank* presents interesting questions concerning the nexus of the public and private in international law. In *Khulumani*, a large class of South African plaintiffs assert that several multinational corporations (including Daimler, Ford, General Motors, and IBM) aided and abetted apartheid crimes (including torture, extrajudicial killing, and arbitrary denationalization) in violation of international law, which plaintiffs argue violates the Alien Tort Statute (ATS). *See* 28 U.S.C. § 1350. After significant motions practice in the district court, which led to a dismissal on the ground that aiding and abetting liability is not sufficiently established under international law to state a violation of the ATS, the Second Circuit, in a *per curiam* opinion filed with three lengthy concurring opinions with diverging approaches as to the appropriate ATS analysis, held that a plaintiff may plead such a theory under the ATS and thus remanded the case for further consideration. *Khulumani v. Barclay Nat. Bank Ltd*., 504 F.3d 254 (2d Cir. 2007) (per curiam). After an unsuccessful attempt to have the Supreme Court review that judgment, due to the inability of the Court to constitute a quorum on account of financial conflicts, the case was returned to the district court. On remand, defendants once again filed a motion to dismiss, and among other grounds argued that international comity required dismissal of the complaint.

The defendants argued that the South African Government and the Executive Branch of the United States had "expressed their support for dismissal of the case in various formal statements of interest and other pronouncements, including amicus briefs, resolutions, press releases, and even floor statements in the South African Parliament." *Khulumani*, 617 F. Supp. 2d at 285. On account of these statements, the defendants urged the court to dismiss the case. The district court held that international comity did not require dismissal because there was "an absence of conflict between this litigation and the [Truth and Reconciliation Commission] process." *Id*. The court reached this conclusion in a case where

both the US and South African governments asserted "the potential for this lawsuit to deter further investment in South Africa." *Id*. Indeed, the US government's position was clear. As it told the Second Circuit, "[i]t would be extraordinary to give U.S. law an extraterritorial effect in [these] circumstances to regulate [the] conduct of a foreign state over its citizens, and all the more so for a federal court to do so as a matter of common law-making power. Yet plaintiffs would have this Court do exactly that by rendering private defendants liable for the sovereign acts of the apartheid government in South Africa." Brief of the United States of America Amicus Curiae Supporting Defendant-Appellees, at 21, *Khulumani v. Barclay Nat. Bank, Ltd*., 504 F.3d 245 (2d Cir. 2007). Notwithstanding these arguments, the district court refused to dismiss the case on comity grounds, and also refused to resolicit governmental views on the matter. That opinion is available here.

This case recently took an interesting turn. Notwithstanding the fact that the Government of South Africa has argued since 2003 that this case should not be heard in a US court and notwithstanding the fact that the district court refused to resolicit governmental views on the matter, the Government of South Africa on September 1, 2009 filed a letter with the district court reversing its opposition to the lawsuit. The letter from South Africa's Minister of Justice and Constitutional Development asserted that the U.S. court is "an appropriate forum" to hear claims by South African citizens that the corporations aided and abetted "very serious crimes, such as torture [and] extrajudicial killing committed in violation of international law by the apartheid regime." The South African government also offered its counsel to facilitate a possible resolution of the cases between the corporate defendants and the South African victims. A copy of the letter is available here. To be clear, the letter reverses the South African government's 2003 position that the lawsuits, in their original form, should be dismissed because the government believed the lawsuits might interfere with South Africa's ability to address its apartheid past and might discourage economic investment in the country.

This recent submission raises several important questions. *First*, will the United States now reverse its position in light of this filing and encourage the court to go forward with the case? Any movement on the part of the US will provide interesting signals as to how the Obama Administration views ATS suits. *Second*, and perhaps more profoundly, should this submission even matter at all? Put

another way, should governmental statements of interest encourage a court to decide one way or another in cases implicating sovereign interests? *Third*, are we seeing the demise of the public/private distinction in US views towards international law? The divide between public and private international law may be dissolving somewhat in the wake of cases, especially in the US, which seek to remedy wrongs committed by public actors or those who work in concert with public actors through private theories of liability. Such cases threaten to enmesh US courts in complex areas of international relations. One way out of that problem is through recourse to the doctrine of international comity, which encourages US courts to take account of foreign and domestic sovereignty interests in their applications of law. However, comity has never been particularly well defined and is perhaps a questionable ground for a court to go about balancing various public, private, and governmental interests in determining legal questions.

The US government's response to these developments, if any, will provide important clues as to where private international law litigation especially concerning public activities may be going in the Obama Administration. The district courts response, if any, to these developments will also tell us how international comity may work in private international litigation.