

D.C. Circuit Splits with Second... and is supported by Seventh

Boimah Flomo, et al v. Firestone Natural Rubber Co., LLC, an ATS suit concerning hazardous child labor on a plantation in violation of customary international law, was decided last Monday (July 11, 2011). Although the suit failed – the court was not satisfied that she had been given an adequate basis for inferring a violation of customary international law- some of the statements are worth reproducing. I quote:

“The principal issues presented by the appeal are whether a corporation or any other entity that is not a natural person (the defendant is a limited liability company rather than a conventional business corporation) can be liable under the Alien Tort Statute, and, if so, whether the evidence presented by the plaintiffs created a triable issue of whether the defendant has violated *customary international law*.

The issue of corporate liability under the Alien Tort Statute seems to have been left open in an enigmatic footnote in *Sosa*, 542 U.S. at 732 n. 20 (but since it’s a Supreme Court footnote, the parties haggle over its meaning, albeit to no avail). All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable (...). The outlier is the split decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), which indeed held that because corporations have never been prosecuted, whether criminally or civilly, for violating customary international law, there can’t be said to be a principle of customary international law that binds a corporation.

The factual premise of the majority opinion in the *Kiobel* case is incorrect. (...)

And suppose no corporation had ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be. (...)

We have to consider why corporations have rarely been prosecuted criminally or civilly for violating customary international law; maybe there’s a compelling reason. But it seems not (...)

The court is satisfied that corporate liability is possible under the Alien Tort Statute”.