The Alien Tort Statute Plot Thickens

Today, the United States Court of Appeals for the Ninth Circuit issued a mammoth en banc opinion in the case of Sarei v. Rio Tinto. All 166 pages of the court's splintered analysis deserves careful consideration. Here is a short review of the court's conclusions.

First, the Ninth Circuit holds that the Alien Tort Statute may be applied extraterritorially notwithstanding recent Supreme Court caselaw requiring a clear statement of extratteritorial intent. Slip op. at 19337-19339.

Second, the Ninth Circuit holds that there can be corporate liability under the ATS. Slip op. at 19341.

Third, the Ninth Circuit holds that there may be aiding and abetting liability under the ATS. Slip op. at 19342.

Fourth, the Ninth Circuit holds that there is arising under jurisdiction in ATS cases and that courts may develop federal common law in such cases. Slip op. at 19343; id. 19347.

Fifth, the Ninth Circuit holds that prudential exhaustion may be required in ATS cases and that the district court did not abuse its dicretion in refusing to dismiss the case for lack of exhaustion. Slip op. at 19353.

Sixth, the Ninth Circuit holds on the facts of the case that the political question doctrine, international comity, and the act of state doctrine do not require dismissal. Slip op. at 19358.

Seventh, the Ninth Circuit holds that a claim for genocide and war crimes may be pled under the ATS against a corporation when there is purposeful conduct alleged. Slip op. at 19375. The court reserves judgment on whether a lesser standard is applicable given the purposeful allegations in this case. Id.

Eighth, the Ninth Circuit holds that a claim of racial discrimination is not cognizable under the ATS, although a claim of apartheid is cognizable by assumption. Slip op. at 19380.

There are various concurrences and dissents that take up some of these issues. In particular, there is a debate between the judges as to whether a lesser standard than purpose might be pled under the ATS.

These holdings complicate the ATS landscape substantially given other recent appellate decisions. The Supreme Court's cert. grant in *Kiobel* (discussed earlier on this blog) just became much more important to resolving many of these question. It will be especially interesting to see what the Government's position through the Solicitor General's office will be in *Kiobel* given the many citations to Harold Koh's writings on corporate liability relied on by the en banc panel.