A European Sister Judgment for Kiobel?

***An analysis of the Versailles Court of Appeal* case AFPS and OLP v. Alstom and Veolia,** by Elise Maes, Research fellow of the Max Planck Institute Luxembourg

On 22 March 2013, the Court of Appeal of Versailles (France) ruled in the case *AFPS and OLP v. Alstom and Veolia* on the civil liability of two French companies for their role in the alleged illegal construction of a light rail system in the occupied West Bank in Israel.

Facts

In 2000, the Israeli company Citypass Limited was established, which consists of four Israeli companies and two French companies (Alstom Transport and Connex, which operated under the name Veolia Transport as of 2006). Citypass signed in 2004 a public service concession contract with the state of Israel to design, manufacture, exploit and maintain a light rail system. Further on, Alstom and Veolia signed additional contracts with Citypass, regulating the specific rights and obligations in the execution of the concession contract. Alstom and Veolia were however not a party to the general concession contract between Citypass and the State of Israel.

The light rail system connects the City of Jerusalem with the West Bank, which is occupied by Israel. The construction of this transportation system was highly criticised by pro-Palestinian movements, who stated that this project abetted the Israeli occupation. One of these pro-Palestinian groups, the AFPS (l'Association France Palestine Solidarité), filed a claim in 2007 against Alstom and Veolia before a French lower court (*tribunal de grande instance de Nanterre*). Later that year the OLP (l'Organisation de Libération de la Palestine) joined the lawsuit voluntarily and became co-plaintiff. The plaintiffs asserted that the state of Israel illegally occupied Palestinian territory and therefore the construction of the light rail, which continues the alleged illegal Jewish colonisation, is in itself illegal and thus violates several international law provisions. The plaintiffs formulated three demands. First of all, they asked to declare the contract void for unlawful

contractual object or purpose. The unlawful contractual object or purpose allegedly lay in the fact that Israel's true motivation in constructing the light rail system was to continue and secure the occupation in the West Bank in violation of several international law provisions, such as the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 (Fourth Geneva Convention) and the Hague Conventions. Secondly, they demanded a prohibition on the further execution of the contract under financial compulsion ("astreinte"), which can be compared to an injunction suit. Finally, they also asked for compensation. The court in Nanterre dismissed the case on 30 May 2011. On 22 March 2013, the Court of Appeal of Versailles confirmed the dismissal.

Corporations not subject to international law

This post will not go into detail about all elements of the substantive claims, but will focus on the justified rejection of civil liability of corporations under international law. The Versailles Court of Appeal rightly stated that the invoked treaties (among which the Fourth Geneva Convention and the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict) only contain obligations for the contracting State parties. More specifically, the Court ruled explicitly that the defendant companies neither signed the mentioned international law provisions, nor were they recipients of obligations that the treaties contain and as a consequence they are not subjects of international law ("*Les societies intimées morales de droit privé qui ne sont pas signataires des conventions invoquée (sic), ni destinataires des obligations qui les contiennent, ne sont pas, en consequence, des sujets de droit international.*").

The decision is interesting for two reasons.

First of all, the decision is noteworthy with regard to its reasoning. One might argue that it is not *because* the corporations did not sign the treaties or *because* they are not recipients of obligations mentioned in the treaties, that they are not subjects of international law. Instead, the generally acknowledged position in international law that corporations are not counted among the subjects of international law could have been the starting point of the Court's reasoning. From this principle that corporations do not have international personality follows then that corporations cannot sign international treaties and international law cannot inflict rights and obligations on them. Although this reasoning is different, the outcome remains the same: international law has no direct effect on

companies.

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Furthermore, what makes this French judgment all the more interesting is that the United States Court of Appeals for the Second Circuit appears to have rendered a "sister judgment" in the case Kiobel v. Royal Dutch Petroleum. Both cases show some differences. Kiobel dealt for instance also with the issue of universal jurisdiction and the Supreme Court in the end decided on those grounds. The cases do however have in common that they depart from facts of extraterritorial conduct of corporations that comprised an alleged breach of international law. The Second Circuit was the first and only appellate court to rule that corporations could not be held liable for violations of international law under the American Alien Tort Claim Acts (ATCA).

Depending on the focus, different conclusions can be drawn from the comparison between both cases.

When it comes to the question whether *corporations are subject to international law*, it cannot be derived from these two judgments that there is a convergence between the United States and the French view on this matter. The Versailles Court referred in its judgment to the American ATCA-case law and decided that it was not relevant for the French case, because the ATCA-case law deals with the application of domestic American law. Indeed, Kiobel dealt with the issue of corporations that had violated international law being civilly liable under *federal common law* (ATCA). The French case on the other hand handled the issue of corporations committing violations of international law and their civil liability under *international law* (the fourth Geneva Convention and the Hague Convention of 1954). Therefore, it cannot be concluded that the Second Circuit's view accords with the Versailles Court's ruling that international law does not create liability for corporations.

On the other hand, when focusing on *civil liability of corporations for violations of international law*, both cases do coincide. In the Second Circuit decision, as well as in the French case, the corporations were not held civilly liable, respectively under domestic law and international law. There seems to be a tendency in the United States and Europe to decline corporate liability for international law breaches (although the Supreme Court in Kiobel did not close the door to all

cases of international law violations committed by corporations, given that the Court did not decide explicitly that corporations are immune from the ATCA). Additionally, the intersection between both cases is interesting because they both illustrate that the legal framework for corporate liability for violations of international law is currently underdeveloped, be it under international law or under the applicable national law. As long as multi- and transnational corporations do not have international personality or there is no sufficient national legal framework that regulates corporate international conduct, companies will keep benefiting from this legal gap. With the volume of international commercial transactions growing every day, actions of private companies become increasingly influential. It appears that international law and national legal systems have not yet adapted to this changed reality.