

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

**IN RE: XE SERVICES ALIEN TORT
LITIGATION**

**No. 1:09-cv-615
No. 1:09-cv-616
No. 1:09-cv-617
No. 1:09-cv-618
No. 1:09-cv-645
(consolidated for pretrial purposes)
(TSE/IDD)**

**SUPPLEMENTAL MEMORANDUM CONCERNING *PRESBYTERIAN CHURCH OF
SUDAN V. TALISMAN ENERGY***

Defendants respectfully submit this memorandum concerning *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016cv (2d Cir. Oct. 2, 2009), in response to the Court's order. *Presbyterian Church* provides strong additional support for dismissal of Plaintiffs' Alien Tort Statute (ATS) claims.

A. *Presbyterian Church* Confirms That Plaintiffs Have Failed To Plead Facts Establishing An Actionable "War Crime."

Two elements of the *Presbyterian Church* decision demonstrate the flaws in Plaintiffs' "war crime" claims.

1. Plaintiffs' principal support for their "war crime" claims is *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). The Second Circuit in *Presbyterian Church* explained its prior decision in *Kadic*, stating that "[a]s to war crimes, *Kadic* applied the definition from Common Article 3 of the Geneva Convention," which imposes obligations on "each Party to the conflict." Slip op. at 34 (internal quotation marks omitted); *see also id.* at 35 ("war crimes" claims under the ATS extend only to "'parties' to a conflict—which includes insurgent military groups") (internal quotation marks omitted).

Presbyterian Church thus makes clear that only state actors—or quasi-state actors such as the insurgent side in a civil war—may qualify as a “Party” to a conflict subject to liability for engaging in war crimes. That is the very same conclusion reached recently by the District of Columbia Circuit in *Saleh v. Titan Corp.*, No. 08-7008, 2009 WL 2902081, at *13 (D.C. Cir. Sept. 11, 2009).¹ Plaintiffs’ untenably broad assertion that any “national of the United States” can be liable for war crimes is unsupported by any authority. *Cf.* Dkt. No. 47, at 35.

Indeed, Plaintiffs’ approach—when combined with the broad category of conduct that can be eligible for classification as a “war crime” (*see Presbyterian Church*, slip op. at 35)—would allow an ATS “war crime” claim against any national of a warring state who commits any serious crime in a war zone. Limiting war crime liability to state actors that are parties to the conflict is essential to avoid that result and to ensure that war crimes claims are limited to misconduct occurring in connection with the hostilities themselves. (The same need to avoid overbroad liability is why state action is required to establish an ATS claim for “extrajudicial killing” or “summary execution.” Dkt. No. 57, at 9-11.) Because Plaintiffs explicitly disavowed any allegation that Defendants were state actors, the war crimes claims must be dismissed.²

2. *Presbyterian Church* confirmed that the “scope of the [ATS’s] jurisdictional grant should be determined by reference to international law,” not domestic law. Slip Op. at 39 (internal quotation marks omitted). Federal courts must “look to international law to derive the elements for any . . . cause of action” under the ATS. *Id.* at 44.

¹ The *Saleh* decision is discussed in Defendants’ Consolidated Post-hearing Reply Brief. Dkt. No. 93, at 8-10. (All docket numbers refer to the docket in No. 09-615.)

² *Presbyterian Church* did not have occasion to address the second prerequisite for a “war crime” claim—that the acts giving rise to the claim were committed in furtherance of hostilities. Plaintiffs also fail to satisfy this requirement. Dkt. No. 38, at 11-12; Dkt. No. 57, at 8-9.

Plaintiffs' contention that this Court could "borrow[] the standard" from the War Crimes Act (18 U.S.C. § 2441)—a domestic criminal statute—to define the "applicable tort standard" for their "war crimes" claim under the ATS (Dkt. No. 47, at 37-38) is flatly inconsistent with *Presbyterian Church's* holding that international law governs the scope of ATS claims. A domestic statute cannot expand "war crimes" claims beyond the "narrow class of international norms" that meet *Sosa's* "demanding standard of definition." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729, 738 n.30 (2004). Plaintiffs' failure to point to cognizable sources of *international law* (slip op. at 29-30 & n.5) that "evinced support for the *specific* customary international law tort" they assert is fatal to their ATS claims. *Mora v. New York*, 524 F.3d 183, 208 (2d Cir.) (emphasis added), *cert. denied*, 129 S. Ct. 397 (2008).

B. *Presbyterian Church* Demonstrates The Insufficiency Of Plaintiffs' ATS Claims Based On Secondary, Vicarious, And Corporate Liability.

The nature of Plaintiffs' ATS claims is not completely clear. At the oral argument on the motions to dismiss, Plaintiffs appeared to take the position that they were asserting claims of direct liability—at least against Mr. Prince—but conceded that there "may be a pleading failure on [their] part" with respect to those allegations. Aug. 28, 2009 Hr'g Tr. at 54; *see also id.* at 41-42. Indeed, the Complaints do not contain allegations of facts supporting a plausible inference that Mr. Prince directly committed a war crime or summary execution, as required by *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Dkt. No. 57, at 4-5, 14-18.

Plaintiffs appeared during the oral argument to disavow any ATS claim based on secondary liability. Aug. 28, 2009 Hr'g Tr. at 39-41. Regardless of whether Plaintiffs' ATS claims against the corporate defendants rest upon secondary or vicarious liability, *Presbyterian Church* makes clear that Plaintiffs may assert such claims only if they can demonstrate a clear international law norm recognizing such liability. Similarly, Plaintiffs may assert an ATS claim

against a corporate entity only if they can point to an international law norm recognizing corporate liability with sufficient clarity and definiteness.

The *Presbyterian Church* plaintiffs argued—as Plaintiffs do here—that domestic law principles may be invoked to determine the scope of ATS liability. Slip op. at 41; cf. Dkt. No. 47, at 42 (“this Court should use well-established federal common law tort principles on liability” to determine “the extent and scope of the persons who may be held liable” under the ATS). The Second Circuit squarely rejected that argument, holding that reliance on “broad and elastic” domestic law liability principles would “violate *Sosa*’s command that we limit liability to violations of . . . international law . . . with . . . definite content and acceptance among civilized nations [equivalent to] the historical paradigms familiar when [28 U.S.C.] § 1350 was enacted.” Slip op. at 41 (internal quotation marks omitted). It concluded that whether the issue is recognition of a primary ATS “tort” (*id.*) or “[r]ecognition of secondary liability” (*id.*), ATS liability is permissible only if supported by international law norms with the same “‘definite content and acceptance among civilized nations’” as piracy, violation of safe conducts, and assaults on ambassadors—the “‘historical paradigms familiar when § 1350 was enacted.’” *Id.* (quoting *Sosa*, 542 U.S. at 732); see slip op. 41.

International law does not recognize corporate liability. Dkt. No. 38, at 7-8; Dkt. No. 57, at 6. Plaintiffs have not pointed to a single international law authority to the contrary.³ The *Presbyterian Church* court, while having no occasion to address the issue, confirmed that it is an open question in the Second Circuit whether the ATS permits the imposition of any liability upon corporations. Slip op. at 48 n.12.

³ Plaintiffs submitted a copy of the *Zyklon B Case* following oral argument (see Dkt. No. 75, Ex. C), but that case involved prosecutions of *individuals* and therefore provides no support for a well-established, clearly-defined international law principle of *corporate* liability.

Even if corporations could be liable under the ATS, *Presbyterian Church* requires Plaintiffs to show a sufficiently-certain international law norm defining the circumstances in which a corporation may be subjected to vicarious liability. Plaintiffs have not even attempted to satisfy that standard.

Finally, to the extent Plaintiffs' claims do rest on secondary liability, Plaintiffs would be required to show a sufficiently definite international norm of accessorial liability. The *Presbyterian Church* court was bound by prior Second Circuit precedent holding that the ATS authorizes aiding and abetting liability. Slip op. at 33, 37 (citing *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam)). The Fourth Circuit has not reached this issue, and Defendants submit that the majority of the sharply-divided *Khulumani* panel reached the wrong result. Dkt. No. 38, at 9-10 & n.8.

But even if such liability did exist, the Second Circuit held in *Presbyterian Church* that “*mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone.” Slip op. at 41. The court found that no “sufficient international consensus . . . exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law.” *Id.* at 41-42 (citations omitted).⁴ Because Plaintiffs have not alleged facts giving rise to a plausible inference that Defendants acted with the purpose of facilitating war crimes or summary execution, the ATS claims must be dismissed.

⁴ The Second Circuit reached the same conclusion regarding claims of “conspiracy.” The court rejected the plaintiffs’ argument that “federal [*i.e.*, domestic] conspiracy law should apply to ATS claims,” reasoning that “*Sosa* required applying international law.” Slip op. at 44 n.11; *cf.* Dkt. No. 47, at 43 n.15. It confirmed that “the only ‘conspiracy’ crimes that have been recognized . . . are conspiracy to commit genocide and common plan to wage aggressive war.” *Id.* at 44 (citation omitted); Dkt. No. 38, at 9. And even “assuming, without deciding, that plaintiffs could assert” a claim of conspiracy as a completed offense using the “concept of a ‘joint criminal enterprise,’” such a theory would “require the same proof of *mens rea* as their claims for aiding and abetting,” or purpose. Slip op. at 45.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 9, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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