In the
UNITED STATES COURT OF APPEALS
For the Thirteenth Judicial Circuit

No. 10-0715

ZEUDI ARAYA,

Plaintiff-Respondent,

v.

FLUORBURTON CORPORATION, an Evans corporation,

Defendant-Petitioner.

Appeal from the United States District Court
For the Eastern District of Evans.
No. 09-cv—05 --- ***Henry Denzel****, Judge.*

BRYAN MICHAEL, Clerk of the United States Court of Appeals for the Thirteenth Judicial Circuit hereby certifies that the following original documents were duly filed and constitute the entire Record on Appeal in this matter:

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF EVANS

ZEUDI ARAYA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 09 cv 05
	)	Judge
FLUORBURTON CORPORATION, an Evans corporation,	)	Henry Denzel
	)	
Defendants.	)	

COMPLAINT AT LAW

Plaintiff, Zeudi Araya, brings this suit against Defendant, Fluorburton Corporation, pursuant to 28 U.S.C. § 1350, for Fluorburton's participation in the genocide of Plebeians by the Moesian militia. Fluorburton aided and abetted the Moesian milita in its violation of the law of nations.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action under 28 U.S.C. § 1350 (Alien Tort Statute) for violations of the law of nations. Plaintiff's claims seek compensatory damages for violations under this statute.

2. Venue is proper in this district under 28 U.S.C. § 1391(a)(1). Fluorburton is incorporated in the State of Evans, in the United States.

PARTIES

3. Ms. Araya is a citizen of Moesia and currently resides in the Plebeian region of Moesia.

4. Fluorburton is a corporation located at 123 Business Parkway, Evans City, Evans. Defendant is incorporated in the State of Evans. During the relevant times alleged in this Complaint, Fluoburton was engaged in the business of oil exploration and development in Moesia.

STATEMENT OF FACTS

5. Moesia is a country that gained independence in 1991 soon after the Soviet Union's collapsed. Moesia's greatest natural resource is its oil reserves, which prior to the Soviet Union's collapse were largely untapped.

6. The country of Moesia is populated by two ethnic groups, the Praetorians and the Plebeians. The Praetorians are the majority ethnic group and reside in Moesia's cities. The Plebeians, the minority group, reside in Moesia's rural areas. The Praetorians and Plebeians have a centuries-long history of animosity towards one another. During Soviet control over Moesia, these two ethnic groups coexisted in a tense, but peaceful, manner.

7. When the Soviet Union collapsed, civil war raged in Moesia between the Praetorians and Plebeians.

8. The civil war ended in 1995 when the Tribulation Force and its leader, Octavian Carpethea, gained control over the central government, referred to as the "Leader of the Global Community." Carpethea and the Tribulation Force came to power by Pretorians' support.

9. Once in power, Carpethea sought to stabilize the country's economy and gain financial independence by extracting and exporting its oil reserves. These reserves are located in the rural areas populated by the Plebeians.

10. Carpethea entered into a contract with Fluorburton to extract and refine the country's oil reserves. In return for the money paid directly to Carpethia and the Tribulation Force, Carpethea allowed Fluorburton to operate under minimal environmental regulations.

11. Fluorburton transferred its employees from Evans headquarters to Moesia to serve as managers and machine operators at each exploration site. Fluorburton hired only Praetorians to fill the remaining positions.

12. Fluorburton's oil exploration and drilling directly resulted in contaminated water resources, clearcutting of hundreds of acres of old-growth forests, and the laying of large oil pipelines which obstructed the migratory paths of the native elk, a food staple of the Plebeian people.

13. In response to the environmental damage created by Fluorburton's methods of oil exploration, Plebeian residents of the Pleb region formed a group called "Movement for Survival

of Plebeian People" or "MOSOPP." MOSOPP engaged in non-violent protests, such as blocking roads used by Fluorburton vehicles and creating human barriers at drilling sites, to prevent Fluorburton from further desecrating the Pleb region. MOSOPP's president for all times relevant to this Complaint was the Plaintiff, Zeudi Araya.

14. Fluorburton responded to MOSOPP's attempts to preserve the Plebeian lands by collaborating with the Moesian military to attempt to break up MOSOPP and prevent further work stoppages.

15. From 1996 through 2000, Fluorburton aided and abetted Moesian military forces in carrying out heinous crimes against Plebeians in order to further its commercial interests in the area.

16. From 1996 through 2000, Fluorburton supported the genocide of the Plebeian people of the Pleb region as well as destruction of their villages in the following ways:

a) Fluorburton provided supplies for the Moesian militia camps at Fluorburton's drilling sites for days and even weeks. Specifically, Fluorburton provided food, lodging, and other provisions to the military forces during their stays at these camps. The military used these camps as staging grounds for the rampages against the Plebeian villagers and their property,

b) Fluorburton paid these military soldiers for the time they were engaged in the destruction of the Plebian people and villages. Fluorburton concealed these payments by recording them within its employee payroll,

c) Fluorburton provided the vehicles previously used in oil exploration to transport the military forces to Pleb villages to quash the Plebeian resistance by beating, raping, and unlawfully arresting Plebeians,

d) Fluorburton provided the supplies necessary for the Moesian militia to burn down entire Pleb villages, and

e) Fluorburton provided the supplies and money to the Moesian militia knowing that the militia was using these provisions to carry out acts so heinous that they are universally recognized as violations of the law of nations.

17. Many MOSOPP members were forced to leave Moesia and resettle in refugee camps in surrounding countries. These members were certain to be arrested and likely killed by the government military if they return to Moesia.

18. Over 5,000 Plebeian males between the ages of 14 and 55 have been arrested by the Moesian military during these rampages. Most of these Plebeian males have not been seen since their arrests and are presumed dead.

19. Ms. Araya herself was arrested without probable cause and detained by the Moesian military without any charges against her for 6 months in 1999. During her detention, Ms. Araya was placed in solitary confinement under deplorable conditions.

20. The Moesian military would not have had the resources and funding to carry out these large-scale, torturous acts against the Plebeians without Fluorburton's assistance.

21. Ms. Araya was living in the Pleb region during the time Fluorburton aided and abetted the Moesian military in the slaughter, rape, and beating of Plebians. Ms. Araya witnessed numerous rapes, beatings, and arrests of Plebians by military forces from 1996 through 2000. Ms. Araya also witnessed the burning and looting of her village and has knowledge of other Plebeian villages ransacked by the Moesian military.

22. On August 23, 2000, Ms. Araya's entire family; her husband, three children, two brothers, one sister, five nieces, and four nephews, were killed by Moesian military forces during a rampage supported by Fluorburton. Each family member, including her 5 year-old nephew, was gunned down while running into the woods to escape the soldiers.

CLAIMS FOR RELIEF

COUNT I
(*AIDING AND ABETTING EXTRAJUDICIAL KILLINGS*)

23. Ms. Araya incorporates by reference the allegations in paragraphs 1 through 22 as though set forth at length herein.

24. The extrajudicial killings of innocent men, women, and children as described herein are so heinous that they are recognized as violations of customary international law and thus are violations under the Alien Tort Statute.

25. Fluorburton is liable to Ms. Araya for said conduct in that Fluorburton aided and abetted the Moesian military in carrying out the extrajudicial killings.

COUNT II
(*AIDING AND ABETTING CRIMES AGAINST HUMANITY*)

26. Plaintiff incorporates by reference the allegations in paragraphs 1 through 22 as though set forth at length herein.

27. The acts described herein against Ms. Araya and other Plebeians constitute crimes against humanity, in violation of customary international law, which prohibits inhumane acts as part of a systematic attack against any civilian population.

28. The crimes against humanity as described herein are violations of the Alien Tort Statute.

29. Fluorburton is liable to Ms. Araya for said conduct because Fluorburton aided and abetted the Moesian military in bringing about the crimes against humanity against Ms. Araya, her family, and other Plebeians in the Pleb region.

COUNT III
(*AIDING AND ABETTING FORCED EXILE*)

30. Plaintiff incorporates by reference the allegations in paragraphs 1 through 22 as though set forth at length herein.

31. The acts described herein establish that Fluorburton aided and abetted the forced exile of Plebeian males. The exile of a group of individuals from their own lands, based solely on their ethnicity, is universally recognized as a violation of the law of nations.

32. Moreover, forced exile against an ethnic group violates the Alien Tort Statute.

33. Fluorburton is liable to Ms. Araya for said conduct because Fluorburton aided and abetted the Moesian military in carrying out the forced exile of men of Plebeian ethnicity.

COUNT IV
(*AIDING AND ABETTING VIOLATIONS OF THE RIGHT TO LIFE, LIBERTY, SECURITY, AND ASSOCIATION*)

34. Plaintiff incorporates by reference the allegations in paragraphs 1 through 22 as though set forth at length herein.

35. The acts described herein against Ms. Araya constitute violations of the right to life, liberty, security, and association. Not only are these rights universally recognized as basic

rights of citizens of every nation, but a violation of these rights is a violation of the Alien Tort Statute.

36. Fluorburton is liable to Ms. Araya for said conduct because Fluorburton aided and abetted the Moesian military in the violation of her right to life, liberty, security, and association.

COUNT V
(*AIDING AND ABETTING TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT*)

37. Ms. Araya incorporates by reference the allegations in paragraphs 1 through 22 as though set forth at length herein.

38. The beating, raping, and killing of innocent women, children, and men due only to their ethnicity constitutes cruel, inhuman, or degrading treatment in violation of the Alien Tort Statute .

39. Fluorburton is liable to Ms. Araya said conduct because it aided and abetted the Moesian military in carrying out acts against the Plebeians, which amounted to torture or cruel, inhuman, or degrading treatment.

COUNT VI
(*AIDING AND ABETTING ARBITRARY ARREST AND DETENTION*)

40. Plaintiff incorporates by reference the allegations in paragraphs 1 through 22 as though set forth at length herein.

41. The widespread arrest of Plebeians without probable cause and the resulting detention of those civilians amounts to arbitrary arrest and detention.

42. Arbitrary arrest and detention is a universally recognized violation of the law of nations.

43. The acts herein constitute violations of Ms. Araya's rights under the Alien Tort Statute.

44. Fluorburton is liable for said conduct in that it aided and abetted the Moesian military in conducting arbitrary arrests and detentions.

COUNT VII
(*AIDING AND ABETTING PROPERTY DESTRUCTION*)

45. Plaintiff incorporates by reference the allegations in paragraphs 1 through 22 as though set forth at length herein.

46. The destruction of Plebeian property within the Pleb villages by Moesian military for the purpose of destroying the Plebeian resistance to Fluorburton's oil extraction and development was unlawful and in violation of the law of nations.

47. The acts herein constitute violations of the Alien Tort Statute.

48. Fluorburton is liable for said conduct in that it aided and abetted the Moesian military regime in bringing about the illegal destruction of Plebeian property rights.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, Zeudi Araya, prays this Court to grant her compensatory damages in the amount of $50,000,000.00. In addition, Ms. Araya requests that this Court allow the Plaintiff costs, expenses and attorneys' fees, and also grant such alternative relief as may seem to the Court, just, proper, and equitable.

Respectfully submitted,
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF EVANS

ZEUDI ARAYA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 09 cv 05
	)	Judge
FLUORBURTON CORPORATION, an Evans corporation,	)	Henry Denzel
	)	
Defendants.	)	

DEFENDANT'S MOTION TO DISMISS

NOW COMES the Defendant, Fluorburton Corporation, by and through its attorneys, Wyant & Wheeler, and seeks dismissal of this Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a cause of action. In support thereof, the Defendant states as follows:

INTRODUCTION

The Plaintiff brings her action solely under the Alien Tort Statute, 28 U.S.C. § 1350. This Complaint fails to state a cause of action for the following reasons: 1) the statute does not provide a private right of action, 2) the statute applies to state actors, not corporations, 3) the claims do not violate the law of nations.

Statute Does not Provide a Private Right of Action

The Alien Tort Statute was enacted for the limited purpose of establishing jurisdiction to an alien against a state actor. The statute states, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The application of a statute is based on the plain reading of the statute, its purpose, and its history. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 350 (1981). A plain reading of the statute establishes that it grants subject matter jurisdiction -- not a cause of action -- to an alien. The United States Supreme Court held that the Alien Tort Statute is a jurisdictional statute, not a private right of action. *Sosa v. Alvarez-*

Machain, 542 U.S. 692, 732 n.20 (2004). Plaintiff's Complaint cannot withstand a motion to dismiss because every count is based on the Alien Tort Statute.

Even if the Statute Created a Cause of Action, Plaintiff Cannot seek Redress under the Statute

Even if this Court interpreted the Alien Tort Statute to create a private cause of action, Plaintiff's Complaint fails because the actionable offenses are not those intended by the First Congress when enacting the statute. The Alien Tort Statute was enacted to address violations of the law of nations; that is, actions that affected state relations. *Sosa*, *supra*, 542 U.S. at 715. The common law actions derived from the law of nations that are actionable under this statute are limited to offenses against ambassadors, violations of safe conduct, and piracy. *Id*. at 719. The United States Supreme Court held that the intent of the First Congress, which enacted the statute, was limited in scope to the aforementioned violations, particularly offenses against ambassadors. *Id.* at 719. In this case, Plaintiff seeks relief under the statute for actions far beyond the scope of these three common law offenses. Assuming that the Alien Tort Statute was to be interpreted as creating a cause of action, the statute was not enacted to cover the torts alleged by Plaintiff. Therefore, this Court should grant Defendant's motion to dismiss all counts of the Complaint.

Statute Does Not Extend to Corporations

Even if this Court were to find that the Alien Tort Statute created a cause of action, and that Plaintiff's claims fell within the scope of the statute, the statute does not allow for redress from a corporation. *Sosa*, *supra*, 542 U.S. at 733 n.21. Actionable offenses under the statute are those that are violations of the law of nations. The law of nations are unwritten, yet universally recognized, guides to conduct and cooperation among nations for the security and longevity of each nation individually and their relations with one another. Corporations are not bound by the law of nations nor share the interests of nations. Where a country may limit its actions against another country for the greater goal of peace and trade relations, a corporation is not motivated by such goals. Therefore, the statute does not extend to defendants other than state actors.

Moreover, to find that Fluorburton is liable under the statute is to suggest that corporations are bound by a moral code of conduct. A corporation is not a human being residing in a community and accountable for its actions to other community members. Rather, a corporation is created out of law, its purpose is to further a commercial enterprise, and it is bound by domestic and international laws enacted to address commercial activity. To hold Fluorburton liable for moral indiscretions is to upend the market economy upon which all countries rely for their economic survival.

WHEREFORE, for the reasons stated above, the Defendant, Fluorburton Corporation, respectfully requests this Court to dismiss the Plaintiff's Complaint in its entirety, and any additional relief this Court deems appropriate. In the alternative, defendant requests that this Court immediately certify all issues raised by this motion to dismiss for immediate appeal under 28 U.S.C. §1292(b).

Respectfully submitted,

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UNITED STATES COURT
FOR THE EASTERN DISTRICT OF EVANS

ZEUDI ARAYA,	)	
	)	
Plaintiff	)	
	)	
vs.	)	No. 09 cv 05
	)	Judge Henry Denzel
FLUORBURTON CORPORATION, an	)	
Evans corporation,	)	
	)	
Defendant.	)	

ORDER

This cause comes on motion to dismiss by defendant, Fluorburton Corp., for failure to state a claim for relief under the Alien Tort Statute (or "ATS.") For the reasons stated below, the Court finds that Counts II, V, and VI state a cause of action under the ATS ; and I, III, IV, and VII fail to state a claim under the ATS. The court grants the motion to dismiss as to Counts I, III, IV, and VII and denies the motion as to the remaining Counts. This Court recognizes that a substantial difference of opinion exists as to whether a cause of action for corporate liability exists under the ATS, and certifies a question for immediate appeal under 28 U.S.C. § 1292(b).

Plaintiff Zeudi Araya is a citizen of Moesia. She brought this action under the ATS, 28 U.S.C. § 1350, against defendant, Fluorburton Corp., an Evans corporation. She alleges that Fluorburton aided and abetted the Moesian military in committing violations of the law of nations while protecting Fluorburton's interests. She seeks to recover, as Administratix of their Estates, for the deaths of her husband, children, brothers, sister, nieces, and nephew. She further alleges that the Moesian forces subjected her people, the Plebians, to forced exile; murder; violations of the right to life, liberty, security, and association; arbitrary arrest and detention; crimes against humanity; torture; and cruel, inhuman, or degrading treatment. She further seeks to recover for property destroyed and looted by Moesia's military forces.

The complaint alleges that from 1996 through 2000, Fluorburton engaged in oil exploration and development in an area populated by an ethnic minority, the Plebeians. The Plebeians staged peaceful protests against the oil exploration activities and the resulting environmental impact in the region. Fluorburton enlisted the aid of Moesia's military to respond to the Plebian protests. The complaint alleges that Fluorburton aided and abetted Moesian military forces in committing crimes under international law, including: 1) providing transportation to Moesian forces; 2) allowing Fluorburton camps and exploration areas to be used as staging areas for attacks; 3) providing food and supplies for the military forces involved in the attacks; and 4) compensating the soldiers.

PLAINTIFF HAS STATED A CAUSE OF ACTION UNDER THE ATS.

Our Supreme Court of the United States has held that a claim by an alien seeking redress for violations of the law of nations may be brought in the United States district courts pursuant to the ATS. *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004). The statute provides, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Although the statute by its literal terms is only jurisdictional, the jurisdiction enables federal courts to hear claims in a very limited category defined by the law of nations and recognized as common law. *Id*. at 712. The Supreme Court held, however, that the plaintiff therein had no remedy under the ATS based on allegations that he was abducted by Mexican nationals hired by the United States Drug Enforcement Agency and was then transported to the United States. Once in the United States, the plaintiff was arrested, indicted, and ultimately tried to an acquittal. The Court rejected the plaintiff's claim that his arrest and detention in Mexico violated universally recognized norms of international common law.

Sosa holds that the law of nations extends beyond the rights and duties of nations in their relations with each other to include a "body of judge-made law regulating the conduct of individuals situated outside domestic borders and consequently carrying an international savor." *Id*. at 715. Some, but very few, torts in violation of the law of nations are understood to be within the common law. *Id*. at 720. Any claim based on the present-day law of nations must rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the 18th century paradigms of piracy, offenses against ambassadors, and violations of safe conduct. The limit of the statute's reach is defined by a handful of heinous acts, each of which violates definable, universal, and obligatory norms. *Id.* at 732. One example is torture. *Id*. The opinion also refers to the Restatement (Third) of Foreign Relations Law of the United States, which describes "prolonged arbitrary detention" as a violation of "customary international human rights law." The Supreme Court found nothing in international human rights law proscribing a single illegal detention, followed by a transfer of custody of lawful authorities and a prompt arraignment (and a trial resulting in acquittal.) Thus, *Sosa* recognizes a narrow scope of liability based on criminal acts universally recognized as heinous.

Regarding what acts are universally recognized as heinous, the case, *Doe v. Unocal Corp*., 395 F.3d 932 (9th Cir. 2002) (opinion vacated on motion of appellant), describes rape, murder, and torture as *jus cogens* violations of the law of nations. *Id*. at 945. *Filatartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), also found that torture violates universally accepted norms of international human rights laws. The *Unocal* Court, moreover, concludes that a corporation's acts of aiding and abetting criminal actions taken by foreign military officials breach standards of international human rights law. *Id*. at 949. The Eleventh Circuit has held that aiding and abetting liability is possible under the ATS. *Romero v. Drummond Co., Inc*. 552 F.3d 1301 (11th Cir. 2008). The *mens rea* required for aiding and abetting is actual or constructive knowledge that the accomplice's actions will assist the perpetrator in the commission of the crime. *Id.* at 950. Although *Unocal* has no precedential value, this Court relies on the authorities cited therein as bases for its conclusion that certain acts, including torture, murder, and aiding and abetting criminal acts, constitute modern-day international human rights violations. As on this analysis, the Court holds that Counts II, V, and VI state a cause of action; the remaining Counts – Counts I, III, IV, and VII do not, and the Court dismisses them.

CORPORATE LIABILITY IS POSSIBLE UNDER THE ATS.

The Court rejects Fluorburton's argument that there is no corporate liability under the ATS. The plain language of the statute grants jurisdiction, and under *Sosa*, a remedy for "any civil action by an alien for a tort only …." The language of the statute provides no insulation to corporations for acts in violation of the law of nations, but instead, expressly allows "any civil action," which would presumably include any action against a corporation. At the hearing on the motion to dismiss, Fluorburton argued that footnote 20 in *Sosa* questions whether any liability by a corporation is possible. Footnote 20 does not question corporate liability, but, rather merely frames an issue not reached under the facts of the case: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an actor." Nothing in the footnote suggests any prohibition on corporate liability.

The Supreme Court of the United States recognizes a corporation as a person, with attendant rights and liabilities. *See Citizens United v. Federal Election Commission*, 558 U.S. 1 (2010). International law has also recognized corporate liability for violations of norms of international conduct. The conclusion that corporate liability exists under international law is evidenced by the dissolution of a German corporation and the disposal of its assets by the Nuremberg international military tribunal. Control Council Law No. 9, P*roviding for Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof (Nov. 30, 1945).*

Fluorburton argues that only natural persons may be liable, submitting that moral responsibility for egregious human rights violations rests solely with the individual committing the crime. This Court disagrees that a corporation has no moral or ethical responsibility for its acts. Moreover, the profits of a crime do not rest solely with the individual committing the crime; the profits can rest solely and safely with a corporation who committed the crime or aided and abetted in the crime. To distinguish between an individual and a corporation, which is a formal legal association of individuals, is an artificial distinction undermining the purpose of a remedy for violation of the law of nations. This court is to construe a statute in such a way as to avoid absurd results and thwarting the obvious purpose of a statute. "Nothing is better settled, than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Johnson v. U.S.*, 529 U.S. 694, 707 (2000).

To protect a corporation's assets from being available for redress for injuries and death caused by the corporation's knowing aid toward egregious violations of international human rights law, for the sole reason that the defendant corporation is an artificial entity, would thwart the purpose of the statute and would be an absurd, unjust result.

Nevertheless, the Court recognizes that there is a substantial difference opinion as to whether a corporation can be liable under the ATS, and that the resolution of that question will materially advance this litigation's resolution. Accordingly, the Court certifies the follow question for immediate appeal to the United States Court of Appeals for the Thirteenth Circuit: "whether corporate liability is a viable claim under the Alien Tort Statute?"

ENTERED this 15th day of March, 2010.

_____

Denzel, D.J.

In the
UNITED STATES COURT OF APPEALS
For the Thirteenth Judicial Circuit

No. 10-0715

ZEUDI ARAYA,

Plaintiff-Respondent,

v.

FLUORBURTON CORPORATION, an Evans corporation,

Defendant-Petitioner.

Appeal from the United States District Court
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No. 09-cv—05 --- ***Henry Denzel****, Judge.*

ORDER

Per Curiam

The petition for leave to appeal under 28 U.S.C. §1292(b) is granted.

Entered:

April 11, 2010

In the
UNITED STATES COURT OF APPEALS
For the Thirteenth Judicial Circuit

No. 10-0715

ZEUDI ARAYA,

Plaintiff-Respondent,

v.

FLUORBURTON CORPORATION, an Evans corporation,

Defendant-Petitioner.

Appeal from the United States District Court
For the Eastern District of Evans.
No. 09-cv—05 --- ***Henry Denzel****, Judge.*

ARGUED SEPTEMBER 11, 2010 – DECIDED OCTOBER 5, 2010

Before Garnett, Chief Judge, Tate, and Hanks, Circuit Judges.

Per Curiam

We today weigh in on an issue that could have a profound effect on corporate responsibility for international human rights violations under the so-called ATS, or "Alien Tort Statute," which reads in its entirety, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The District Court held that a corporation can be held civilly liable for international law violations under the ATS. However, the court certified its entire order for interlocutory appeal under 28 U.S.C. § 1292(b). We reverse.

In addition, in light of Chief Judge Garnett's order denying respondent Zeudi Araya's motion for his recusal alleging a "probability of bias," we find no violation of her due process rights under *Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S.Ct. 2252 (2009).

I

A. Background.

Moesia is an oil-rich nation located in the former Soviet Union. After breaking ties from its former Russian masters when the Soviet Union collapsed, Moesia plunged into a period of civil war from 1991 to 1995, which resulted in Octavian Carpethea ascending to power as the country's "Leader of the Global Community." Carpethea and his ruling party, the Tribulation Force, are backed by the country's ethnic majority, the Praetorians, which live primarily in Moesia's cities. The countryside is populated by the country's ethnic minority, the Plebeians.

After four years of civil war, Carpethea sought to stabilize the country's economy and establish its financial independence. To that end, he enlisted the assistance of Fluorburton corporation, which is incorporated in the United States, in the State of Evans, to engage in oil exploration and development in the Pleb region of Moesia. In response to Fluorburton's activities, Plebeian residents of Moesia's Pleb region organized a group named "MOSOPP," or "Movement for Survival of Plebeian People," to protest the environmental effects of Fluorburton's oil exploration in the region. Through peaceful protests, MOSOPP was able to slow or curtail Fluorburton's efforts to exploit the Pleb region.

In response, Fluorburton enlisted the aid of the Moesian government to clear out the Plebeian resistance. Plaintiff's complaint alleged that throughout 1996 through 2000, Moesian military forces shot and killed Plebeian residents and attacked Plebeian villages – beating, raping, and arresting residents and destroying or looting property – with Fluorburton's assistance. The complaint alleged that Fluorburton: (1) provided transportation to Moesian forces; (2) allowed Fluorburton camps and exploration areas to be used as staging grounds for attacks; (3) provided food and supplies for soldiers involved in the attacks; and (4) compensated those soldiers.

B. Litigation.

Plaintiff Zeudi Araya is a Moesian citizen and president of MOSOPP. As the result of Moesian troops' raid of her village, Araya's entire family – husband, children, brothers and sister, and nieces and nephews – were slaughtered. Araya commenced this lawsuit by filing a complaint against Fluorburton Corporation in the United States District Court for the District of Evans. Her complaint alleged that defendant aided or abetted, or was otherwise complicit in violations of the laws of nations by the Moesian government.

The District Court dismissed plaintiff's claims for aiding and abetting property destruction, forced exile, extrajudicial killing, and violations of the rights

to life, liberty, security, and association, reasoning that customary international law did not define those terms with the requisite particularity required to qualify as a "law of nations" under § 1350. The District Court denied the defendant's motion to dismiss with respect to the remaining claims of aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture or cruel, inhuman, or degrading treatment, but certified its order for an immediate appeal.

II.

Passed by the first Congress in 1789, the ATS lay largely dormant for over 170 years. Judge Friendly called it a "legal Lohengrin" – "no one seems to know whence it came." *IIT v. Vencap, Ltd.,* 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd.,* ___ U.S. ___, 130 S. Ct. 2869 (2010). Then, in 1980, the Second Circuit gave the statute new life in when it held that the ATS provides jurisdiction over: (1) tort actions; (2) brought by aliens (only); (3) for violations of the law of nations -- also called "CIL" or "customary international law" -- including, as a general matter, war crimes and crimes against humanity--crimes in which the perpetrator can be called "*hostis humani generis*, an enemy of all mankind." *Filartiga v. Pena-Irala,* 630 F.2d 876, 890 (2d Cir. 1980).

At first blush, the ATS does not appear to do anything more than provide a basis of subject matter jurisdiction for independent Congressional enactments that provide substantive redress. Once again, we repeat that the statute in its entirely provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. However, the United States Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), rejected that position. *Sosa* held that the ATS is a jurisdictional statute only; it creates no cause of action, Justice Souter explained, because its drafters understood that "the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Sosa*, 542 U.S. at 724. At the time of its adoption, the ATS "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Id.* at 712. These included "three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy"--each a rule "binding individuals for the benefit of other individuals[, which] overlapped with the norms of state relationships." *Id.* at 715 (citing 4 W. Blackstone, *Commentaries on the Laws of England* 68 (1769)).

The Supreme Court did not, however, limit the jurisdiction of the federal courts under the ATS to those three offenses recognized by the law of nations in 1789. Instead, the Court held that federal courts may recognize claims "based on the present-day law of nations" provided that the claims rest on "norm[s] of international character accepted by the civilized world and defined with a specificity

comparable to the features of the 18th-century paradigms [the Court had] recognized." *Id.* at 725. The Supreme Court cautioned that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732-33 (footnote omitted). The Court also observed that "a related consideration is whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual." *Id.* at 732 n.20 (emphasis added).

Prior to *Sosa*, some courts suggested that corporations could be held liable under the ATS for aiding and abetting foreign governments' human rights abuses. *See Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002). This would be an appealing proposition for the victims of such abuses, for at least three reasons. First, international businesses would more than likely be subject to personal jurisdiction in the United States. Second, unless an individual human rights violator has squirreled away his country's assets, it is likely that a private corporation would have more assets than individual defendants. Third, unlike foreign governments, private corporations are not protected by sovereign immunity. Nevertheless, we believe that *Sosa* directs that we not impose ATS liability to corporations without further Congressional authority.

In *Sosa*, the Court repeatedly emphasized that in order to adhere to the ATS's limited nature and federal courts' separation of powers constraints, only a "modest number" of claims could be brought under the ATS without further congressional authorization. *Sosa*, 542 U.S. at 724. The Court further counseled the lower courts to exercise "great caution" in recognizing new claims, and emphasized that "innovative" interpretations should be left to Congress. *Id.* at 726-27.

Finally, the Court made two specific references to corporate ATS litigation, neither of which appears to support aiding and abetting liability. As previously noted, the Court stated in a footnote that in considering whether a norm is sufficiently definite to support a cause of action under the ATS, "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n. 20. The Court also referred at length in another footnote to a pending ATS case brought against corporations that had done business with South Africa during the apartheid regime and wrote that there was a "strong argument" that courts should defer to the executive branch's view that this litigation would interfere with United States foreign relations. *Id.* at 733 n. 21. We recognize that any attempt to glean the Supreme Court's intent from its footnotes – or predict how the Court will rule in future cases based on those footnotes -- is fraught with danger. *Compare Ross v. Bernhard*, 396 U.S. 531, 538 n. 10 (1970); *with In re U.S. Financial Sec. Litigation*, 609 F.2d 411, 424-26 (9th Cir. 1979). Nevertheless, in light of the Court's directive to move cautiously in this regard, we conclude that corporate aiding and abetting

liability is improper under the ATS, and should instead be addressed in the first instance by the political branches. For this reason, we disagree with the district court that the ATS authorizes corporate liability, and reverse.

II.

We next turn to Araya's motion for the recusal of Chief Judge Garnett. After this Court granted Fluorburton's petition for leave to appeal, Araya filed a motion under 28 U.S.C. § 455 seeking Chief Judge Garnett's recusal from hearing her appeal. The motion panel of this Court referred the motion for recusal to Chief Judge Garnett, who then denied it. In light of Chief Judge Garnett's denial of the motion for his recusal, we hold that there was no due process violation under *Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S. Ct. 2252 (2009); *see State v. Allen*, 778 N.W.2d 863, 913-19 (Wis. 2010) (opinion of Roggensack, J.). Furthermore, even if this Court as a whole had the authority to address the motion, we would find no due process violation.

III

In conclusion, we hold that the district court erred in holding that the ATS allows a claim to proceed against a corporate defendant. Accordingly, we REVERSE and REMAND for further proceedings. Further, we hold that the Court has no authority to question Chief Judge Garnett's denial of the motion for his recusal, and therefore find no violation of Araya's rights under the Due Process Clause of the United States Constitution.

REVERSED AND REMANDED.

Garnett, Chief Judge, concurs.

I fully concur in the Court's per curiam opinion. I write separately to explain why the Due Process Clause does not require my recusal in this matter.

Araya stated in her motion that my "past interactions with MOSOPP representatives create a probability of bias." Araya premises her motion on stale facts from years past that fall far short of raising any objective probability of bias under the Due Process Clause.

As Araya states in her motion, before being appointed to serve on this Court, I held the State Department position of Undersecretary for Natural Resource Exploration and Development from 1996 to 2006. One of my many obligations in this position was to head a commission, which came to be known as the Garnett Commission, to assess United States foreign policy implications of private oil exploration efforts in Asia. In 2002, there were some public exchanges between a MOSOPP representative and me on a cable news program with regard to a report

prepared collectively by the Garnett Commission. These exchanges were not with Araya personally, and pertained only to the Garnett Commission's report. The MOSOPP charges regarding Fluorburton were not within the scope of the Garnett Commission's assignment and were not addressed in the report. Before concurring in the Court's opinion today, I have never taken a public position on them. I further note that the Garnett Commission was only one small aspect of my responsibilities as Undersecretary.

I note preliminarily that charges of judicial bias are almost always resolved by reference to the common law, judicial codes, or legislation rather than the Due Process Clause. "[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute,* 333 U.S. 683, 702 (1948). Furthermore, the Due Process Clause incorporated the common law rule that, while a judge's "direct, personal, substantial, pecuniary interest" in the outcome of a controversy raises a due process concern, a judge's alleged bias or prejudice does not. Those charges are controlled by statutes and judicial codes, not the Constitution. *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 820 (1986). Araya has raised no issue of any "direct, personal, substantial, pecuniary interest" on my behalf in the outcome of this dispute. Araya complains that I must be biased or prejudiced against her (a point that is unsupported by the facts), but nothing more. This is not a constitutional charge.

Araya cites *Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S. Ct. 2252 (2009), but the extreme facts of *Caperton* differ markedly from those presented here. *Caperton* involved an appeal from a $50 million jury verdict for the plaintiff in a West Virginia state court. After the verdict but before the appeal, the CEO of the defendant contributed $3 million to the election campaign of a state supreme court justice running for retention. That justice ultimately cast the deciding majority vote to reverse the judgment. Under these extreme facts, the United States Supreme Court reversed, holding that "The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" ___ U.S. at ___, 129 S. Ct. at 2262. The Court emphasized repeatedly that it viewed the facts before it as an "extraordinary situation" and "extreme by any measure." ___ U.S. at ___, 129 S. Ct. at 2265.

The facts of the present case pale in comparison to the extreme circumstances the Supreme Court faced in *Caperton*. I am a federal judge serving a life appointment. This case presents no issues of judicial campaign donations. Furthermore, the events underlying Araya's motion occurred eight years before Fluorburton filed its petition for leave to appeal to this Court, and four years before I was appointed to my present position. I have no bias one way or the other with regard to the parties or issues in this appeal and, objectively, the facts show no potential for bias under *Caperton*.

A true Copy:
Teste:

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Clerk, United States Court of Appeals
for the Thirteenth Judicial Circuit

Hanks, Circuit Judge, dissents.

I.

I cannot agree with the majority's conclusion that the Alien Tort Statute requires the dismissal of the plaintiff's complaint in its entirety. The majority adopts a hands-off approach, refusing to implement Congressionally granted jurisdiction only because Congress has refrained from explicitly endorsing the precise action that is at issue here. Some would praise this as judicial restraint. I regard it as an abdication of responsibility—or even worse, a judicial version of the abhorrent contention that we are "just following orders." The breadth of the statute is in its brevity, and I believe we do a grave disservice to the notion of international law by finding it too narrow to include corporate liability. I therefore dissent.

I am most persuaded by the Supreme Court's directive that we are to consider the "practical consequences" of recognizing an offense as actionable under the ATS. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). I am fully aware of the practical consequences of holding private corporations liable for human-rights violations, and recognize that they are likely to be dire indeed—for the corporations themselves, that is, including their shareholders—but that is no reason to absolve corporations of those consequences. The consequences of such absolution will be even more dire, in ways the ATS was intended to prevent.

Of course, international business concerns will be adversely affected by the exposure to liability for human-rights violations, but unlike the majority, I do not regard this as a reason to pardon such violations; quite the contrary, it is the chief reason for such exposure. It is a reality of contemporary international relations, and certainly of modern warfare, that many of the tasks traditionally undertaken by state actors are now assigned to independent contractors. The deterrent effect of such liability is a compelling reason to impose such liability, not to immunize international actors from it. Putting corporate entities on notice of potential liability also carries the collateral effect of making it more difficult for the United States, and in particular its political branches, to outsource activities that run afoul of internationally recognized standards of decency and democratic ideals. While the case at bar involves a corporation acting on its own initiative and not in contractual obligation to the United States or its military, I discern no meaningful difference as to the issue before us—and I am deeply concerned that the majority overlooks the impact that its decision will have on such contractual relationships.

The practices at issue in this case are antithetical to the founding and governing principles of this nation, and it is fundamental to our ideals that such things are repugnant to us. Murder; torture; indefinite and unjustified detention—these are consistently understood to be contrary not just to Americans, but to the ideals of the civilized world. It is not enough to sniff that

international law has not specifically codified the prohibition of these despicable activities—a questionable proposition in the first place, as the district court cogently observed. Even if such things were not recognized as being at odds with the norms of international law, it is elemental to our very being as a nation that they ought to be. We should have the courage to say so, rather than enable our political branches to hide behind a fig leaf of implausible deniability

The ATS expressly gives the district courts the authority to entertain tort claims that arise out of violations of the law of nations. That is just what the plaintiff alleges in this case when she claims that the corporate defendant gave aid and comfort to her government's commission of atrocities that culminated in the murder of her family. To coyly dismiss these claims as insufficiently recognized to qualify as international law is to mock the role of the judiciary. There is nothing innovative about the notion that arbitrary arrest and detention are at odds with the norms of the civilization. There is nothing novel about the idea that torture is wrong. There is nothing creative about calling inhuman treatment inhumane. At best, the majority is overly technical in requiring specific Congressional authorization before the district courts may hear claims for such human-rights violations. Congress has already given them the authority they need. It is right there in the ATS. We are derelict in our judicial duties in refusing to exercise that authority.

I believe that international law clearly prohibits the very conduct the plaintiff alleges, but to me it would make no difference if the prohibition were less obvious. It is too easy to scoff that a judicial standard is definable only by the anemic declaration that "I know it when I see it." But sometimes we do know something when we see it; and when we do, we should not pretend we don't—even if circumstances like these might make it hard to articulate a precedential legal standard. We need not stand idly by while awaiting further Congressional authorization that might never come, and we should not wait for the civilized world to formally codify an understanding of international law that is evident to all its members. To put it most succinctly, we should not endorse a lower standard in the international community than we demand of our own nation. The plaintiff's claims are perfectly valid under an interpretation of the ATS that is meaningfully broad without being unnecessarily restrictive. The district court was correct in recognizing them as such. We should affirm that ruling. I dissent from the majority's contrary conclusion.

II.

I further dissent from that aspect of the Court's decision that refuses to require the Chief Judge to recuse himself, for three reasons.

First, the Chief Judge's concurrence ignores the holding, importance, and guidance of our Supreme Court's recent opinion in *Caperton v. A.T. Massey Coal Co., Inc*., ___ U.S. ___, 129 S.Ct. 2252 (2009). The Court in *Caperton* first noted that generally, judicial disqualification issues do not rise to the constitutional level, and relied upon its prior decision in *Tumey v. Ohio*, 273 U.S. 510 (1927). In *Tumey*, the Court found that the Due Process clause required judges to recuse themselves when they have "a direct, personal, substantial, pecuniary interest" in a case. *Tumey*, 273 U.S. at 523. In *Caperton*, however, the Court expanded judicial disqualification to require recusal when the facts were such that, when viewed objectively, the probability of actual

bias on the part of the judge rose to a constitutional level. *Caperton*, 129 S.Ct. at 2265. The Chief Judge's concurrence ignores the fact that Caperton expanded the instances in which a judge should recuse from a case, and instead tries to limit *Caperton's* holding to its "extreme facts" and a case involving judicial campaign donations. Although the *Caperton* majority did characterize the facts before it as "extreme," it did not explicitly limit its holding to judicial campaign donations. Therefore, I believe that the Chief Judge's decision runs afoul of *Caperton*.

Second, the Chief Judge should have recused himself because under *Caperton*, the facts here – when viewed objectively – show a probability of actual bias on his part, which rises to an unconstitutional level. Although the concurring opinion characterizes Araya's factual predicate for her motion as "stale" and "from years past," I do not believe that they are too far in the distant past to remove the possible taint of his partiality. The Chief Judge left his position as Undersecretary for Natural Resources Exploration and Development in the State Department and was appointed to this court in 2006, a mere five years ago, certainly not sufficient to dissipate the sting of his dealings with MOSOPP. The Garnett Commission's report, which received considerable press coverage and sparked the debate between the then-Undersecretary and the MOSOPP group was issued in 2002, merely nine years ago. I find that when the facts giving rise to a recusal motion are less than ten years old, as they are here, recusal is even more warranted because there has not been enough time for the fallout from the prior conflict to have abated. I acknowledge the Chief Judge's position that the Garnett Commission's report did not address MOSOPP's charges regarding Fluorburton and that he has never taken a position regarding those charges; nevertheless, these facts do little to counter the probability of bias presented here. Moreover, I think the Chief Judge glosses over his televised exchanged with the MOSOPP representative, by merely characterizing it as having been broadcast on a "cable news program." In fact, this was not just any "cable news program," but rather CNN's Anderson Cooper 360, which is watched by millions of people. Local press reported that the fallout from that broadcast threatened the Chief Judge's appointment to this Court. I am troubled that the Chief Judge brushes off this exchange with the MOSOPP representative, when he was appointed only by a cloture vote of 60 votes in the Senate. The Chief Judge should have recused himself from this case because the probability of actual bias was constitutionally intolerable.

Finally, the Chief Judge should not have ruled on Araya's recusal motion, and should have recused himself from the motion because it questioned his partiality. *See State v. Allen*, 778 N.W.2d 863 (Wis. 2010). As stated in *Allen*, it makes little sense for a judge whose impartiality has been challenged to provide the only and final word as to whether he (or she) is in fact impartial. *Allen*, 778 N.W.2d at 882.

Accordingly, I dissent.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 10-1776

ZEUDI ARAYA,

Petitioner,

v.

FLUORBURTON CORPORATION, an Evans corporation,

Respondent.

Certiorari to the United States Court of Appeals
for the Thirteenth Judicial Circuit.

December 1, 2010

The petition for a writ of certiorari is GRANTED.

The parties are directed to restrict their briefing and argument to the following issues (and any subsidiary issues):

1. Whether a cause of action for corporate liability exists under the Alien Tort Statute?

2. Whether the Thirteenth Circuit Court of Appeals violated petitioner's Due Process rights in not granting her motion to recuse Chief Judge Garnett?

A true Copy:
Teste:

_____
Clerk, United States Supreme Court