

## A Primer for the Alien Tort Claims Act

By Ashish S. Joshi and Gabriele Neumann – May 8, 2012

Every U.S. company doing business overseas—especially in developing economies—should be interested in the outcome of two cases that are currently before the Supreme Court of the United States. In *Kiobel v. Royal Dutch Petroleum Co.* and *Mohamed v. Palestinian Authority*, the Supreme Court faces the issue of whether corporations can be sued for violations of international law under U.S. statutes, including the Alien Tort Claims Act. These cases involve tort claims against non-natural persons—oil companies are alleged to have aided and abetted international law violations in Nigeria in *Kiobel*, and the Palestinian Authority is alleged to have committed torture and extrajudicial killing in *Mohamed*.

### A Brief History of the Alien Tort Claims Act

The Alien Tort Claim Act was adopted in 1789 by the first U.S. Congress. In essence, the statute permits suits by aliens in federal courts for certain international-law violations, including human-rights violations. It provides jurisdiction only for those claims alleging violations of “the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The plain text of the statute grants “[t]he district courts . . . 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.” Despite the fact that the legislation of this statute dates back to 1789 (or perhaps because of it—occurring only a few decades after American independence, there are few surviving records to document legislative history from this era), the intent of the drafters cannot be easily ascertained. Congress’s precise intentions in enacting the Alien Tort Claims Act are unknown. See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (“no one seems to know whence it came”).

One theory is that Congress wanted to provide a “means by which the U.S. could fulfill its international obligations to vindicate a very discrete set of damage claims by diplomats and other foreign nationals injured or abused by Americans.” See Rivkin & D. and Casey, L., “Bringing ‘Alien Torts’ to America,” *The Wall Street Journal* (Feb 28, 2012). Whatever the reason for its original adoption, it was little used for nearly two centuries until the 1980s, when activists and plaintiff’s lawyers discovered this powerful weapon in their arsenal and began using the Alien Tort Claims Act as a means of suing foreign nationals, U.S. nationals, and companies in federal court for alleged human-rights abuses and/or violations of international law overseas.

### Corporations: Sitting Ducks for Alleged Violations of International Norms

A pivotal decision that breathed new life into the alien tort litigation was the Second Circuit Court of Appeals decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, the plaintiffs, citizens of Paraguay, brought suit in the Eastern District of New York against another Paraguayan citizen for the wrongful death of the plaintiffs’ son. The plaintiffs alleged that the defendant, a former inspector general of police in Paraguay, had tortured and killed the plaintiffs’ son in retaliation for the plaintiffs’ political beliefs. The plaintiffs initially sued the defendant in Paraguay, but their attorney was imprisoned, threatened with death, and disbarred.

*Id.* at 878–80. Thereafter, the plaintiffs, through their daughter (then living in the United States), sued the defendant (also at that point residing in the United States) for causing the death of their son in violation of “the law of nations.” *Id.* at 880. Finding in favor of the plaintiffs, the Second Circuit held that the Alien Tort Claims Act creates jurisdiction and a cause of action in cases involving international human-rights violations. *Id.* at 887–88.

After *Filartiga*, there has been a steady stream of litigation involving the Alien Tort Claims Act. While *Filartiga* was a cause of action between private individuals, the courts have applied it to corporations as well, beginning with *Doe v. Unocal*, 963 F.Supp. 880 (C.D. Cal. 1997). The act became a way to sue both foreign and domestic persons and corporations, not only for the actions the entities themselves took, but also for actions perpetrated by foreign governments with which those entities conducted business in violation of “the law of nations.”

This type of aiding-and-abetting liability reached its zenith in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), a case that was brought in Manhattan’s federal district court against dozens of U.S. companies that had done business with the South African government during that country’s apartheid years. After the trial court dismissed the case in 2002, the Second Circuit partially reversed that decision, allowing the claims brought under the Alien Tort Claims Act to go forward. The Supreme Court initially agreed to review the case but, later, reversed its decision because too many justices would have had to recuse themselves for owning shares in one or more of the defendant companies. The Second Circuit decision that corporations could be sued under the Alien Tort Claims Act for doing business with the wrong government stands.

In 2010 and 2011, four circuits weighed in on corporate liability under the Alien Tort Claims Act. The most infamous of these is arguably the case of *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010). The plaintiffs in *Kiobel* were Nigerian citizens who sued Royal Dutch Shell and a Nigerian affiliate for human-rights violations that occurred in conjunction with the Nigerian government during the course of Royal Dutch Shell’s operations there. *Id.* at 117. When the defendants moved to dismiss the plaintiffs’ claims, the district court upheld in part and dismissed in part with regards to the specific counts alleged. *Id.* at 124. The Second Circuit Court of Appeals examined the “customary international law” to determine whether corporate liability would be appropriate at all. While American law has long recognized corporate personhood and liability, the Second Circuit determined that the provisions of international law historically had been applied against states or individuals, but not corporations. *Id.* at 119–20. The Second Circuit concluded that the Alien Tort Claims Act does not confer jurisdiction over corporations, as corporate liability is not a part of the “customary international law.” *Id.* at 145.

The other three circuits to confront the issue in the past few years, however, have all ruled differently. In *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), the plaintiffs, a group of Indonesian villagers, sued Exxon Mobil for extrajudicial killing, torture, and prolonged arbitrary detention, among other tort claims, in conjunction with its operations in Indonesia. The D.C. Circuit Court of Appeals examined in depth the history of the Alien Tort Claims Act,

tracing corporate tort liability as a widely judicially accepted principle back to the time of the drafting of the act itself. Thus, the court reasoned, such liability would have been within the intent of the drafters of the statute. *Id.* at 47–8. The court specifically refused to follow the Second Circuit’s analysis in *Kiobel* and held that corporations could be held liable under the act for their actions overseas. *Id.* at 50–7.

In *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011), 23 Liberian children sued Firestone National Rubber Co. for utilizing hazardous child labor in the operation of plantations in Liberia. The Seventh Circuit Court of Appeals rejected the analysis in *Kiobel* as incorrectly decided in its reliance on the dearth of international criminal litigation against corporations. *Id.* at 1017. Although it denied the plaintiffs’ claims, the Seventh Circuit found that corporate civil liability is “common around the world” and determined that there is no reason not to subject corporations to liability under the Alien Tort Claims Act. *Id.* at 1019, 1021.

Recently, the Ninth Circuit Court of Appeals decided *Sarei v. Rio Tinto*, \_\_\_ F.3d \_\_\_, 2011 WL 5041927 (9th Cir. 2011). The plaintiffs in that case were natives of Papua New Guinea who sued the defendant as a result of an incident in the 1980s in which an uprising resulted in the use of military force and multiple deaths. The plaintiffs sought to hold the defendant liable for genocide and war crimes under the Alien Tort Claims Act. Disregarding *Kiobel*, the Ninth Circuit Court of Appeals found that there was no explicit bar to corporate liability in the act itself. *Id.* at \*20.

### The Circuit Split

Many hope that, in *Kiobel* and *Mohamed*, the Supreme Court will bring certainty to the issue of whether private corporations are liable for violating human-rights norms under international law and, therefore, subject to liability under the Alien Tort Claims Act. The Supreme Court has earlier acknowledged that private-party liability for violations of the “law of nations” is exceptional and cannot be lightly assumed. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 719–20 (2004). Traditionally, international law has defined the rights and obligations of sovereigns, and, accordingly, most norms apply to sovereigns alone and not to their citizens. This general rule has historically recognized a narrow exception. One such exception has been for *hostis humani generis* (“enemies of mankind”)—piracy. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984).

Barring piracy, customary international law has traditionally governed only the relations of sovereigns. A survey of international legal literature finds “embarrassingly little evidence of an international consensus (or even of international support) in favor of imposing liability on private corporations for general violations of customary international law.” *See Julian Ku*, “The Curious Case of Corporate Liability Under the Alien Tort Statute,” 51 *Va. J. Int’l L.* 353, 355 (2011). Even the London Charter, which created the International Military Tribunal at Nuremberg, did not confer jurisdiction over private corporations, but only over “persons who . . . as individuals or as members of organizations,” committed certain crimes. *Khulumani*, 504 F.3d at 321–22. The corporate entities did not stand in the dock at the Nuremberg trials after the Second World War. The few entities that were “punished” by dissolution were a result of a political decision by the

victorious Allies. *See Rivkin & Casey*, supra. Another example of absence of corporate liability for violation of international law and/or human rights norms is the international criminal tribunals established by the U.N. Security Council to prosecute war crimes in the former territories of Yugoslavia and Rwanda. Neither tribunal has brought charges against any juristic persons.

Moreover, treaty law generally does not provide direct support for corporate liability. Almost every treaty imposes liability indirectly by formally imposing an obligation on state parties to impose duties or obligations on private parties. “Treaties cannot impose duties on private parties directly because private parties are not competent to make treaties under international law.” *Ku*, supra, at 384. For example, the Convention Against Bribery of Foreign Government Officials does not regulate juristic persons directly, but instead requires that state parties do so.

### **Alien Tort Litigation: The Road Ahead**

Often, corporate defendants simply settle alien tort claims to avoid bad publicity, enormous legal expense, and the uncertain risk of a negative outcome. *See, e.g., “Wiwa v. Shell: The \$15.5 Million Settlement,” Am. Soc. Of Int’l L. Insights*, (Sept. 9, 2009) (“The cost of ongoing litigation and prospect of negative publicity from the trial (regardless of the verdict) probably played a role in the defendants’ willingness to settle on the eve of trial”). Lawsuits brought under the Alien Tort Claims Act alleging violations by corporate defendants of uncertain legal norms in multiple (at times unspecified) instances that occurred in foreign lands and against foreign victims pose a series of difficulties not only to the litigants, but also to the courts. In *Khulumani*, Judge Edward Korman described some of these difficulties:

The portions of the complaints relating to defendants’ alleged conduct focus principally on their trade with South Africa. Thus, car companies are accused of selling cars, computer companies are accused of selling computers, banks are accused of lending money, oil companies are accused of selling oil, and pharmaceutical companies are accused of selling drugs. The theory of the complaints is that in this way defendants facilitated or “aided-and-abetted” apartheid and its associated human rights violations. . . . had they not done so, the apartheid regime would have collapsed, apartheid would have ended sooner, and plaintiffs would not have suffered some or all of their injuries. The causal theory advanced by the . . . plaintiffs is even weaker: “Apartheid would not have occurred in the same way without the participation of defendants.”

*Khulumani*, 504 F.3d at 294 (Korman, J., dissenting).

Car companies sued for aiding and abetting human-rights violations for selling cars and trading with the wrong government? What’s next? Should the Alien Tort Claims Act be used to enforce international environmental norms against multinational companies? *See Pauline Abadie, “A New Story of David and Goliath,” 34 Golden Gate L. Rev. 745 (2004)*. Should the act be used to combat foreign child labor? *See Vanessa Waldref, “The Alien Tort Statute after Sosa: A Viable Tool in the Campaign to End Child Labor?” 31 Berkeley J. Emp. & Lab. L. 160 (2010)*.



These are not far-fetched notions. If the Supreme Court does not bring certainty to corporate liability and restrict it in alien tort litigation, it appears inevitable that U.S. corporations will be sued for these and other novel claims. Corporations may no longer turn a blind eye to possible violations of human rights occurring overseas and/or by foreign affiliates. Although the legal doctrine of corporate personhood is a relatively recent phenomenon and “the law of nations” has only recently been applied to corporations, the stream of cases arising under the act shows no signs of stopping.

It is anticipated that the Supreme Court’s decisions in *Kiobel* and *Mohamed* will bring more certainty to this area of the law. Meanwhile, savvy business litigators must keep abreast of the Alien Tort Claims Act. Indeed, juries have awarded multibillion-dollar verdicts in Alien Tort Claims Act cases. *See, e.g., Doe I v. Karadzic*, No. 93 Civ. 0878, 2001 WL 986545 (S.D. N.Y. Aug. 28, 2001). Should the Supreme Court rule in accordance with the other circuits and overturn *Kiobel*, corporations worldwide could be exposed to liability in U.S. courts for actions that occurred anywhere around the globe and to which they may have no more than passively assented. Indeed, as the *Khulumani* dissent suggests, all they may be guilty of is simply selling their wares in a jurisdiction where the wrong government is in power and the company knew of the alleged wrongs committed by this government. In the world of political instability in underdeveloped nations, and at times in developing economies, this is a bar that is not set particularly high.

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