

# Alien Tort Statute and Torture Victim Protection Act Year-in-Review<sup>1</sup>

Just yesterday, the U.S. Supreme Court heard arguments that could change future rulings regarding the liability multinational corporations face in the United States under the Alien Tort Statute ("ATS"), a 223-year-old law that permits non-U.S. citizens to bring civil lawsuits in U.S. courts for violations of the law of nations, and its contemporary counterpart, the Torture Victim Protection Act of 1991 ("TVPA"), which creates a private right of action for U.S. and non-U.S. citizens for torture committed by "[a]n individual" acting under color of foreign law. During the last decade, lawsuits against corporations under the ATS and the TVPA have become increasingly high profile and high stakes, bringing not only significant litigation concerns but also reputational risks. These suits often involve allegations that a corporation supported human rights violations by doing business in a country where those violations occurred, or by providing monetary or material support to that country's officials.

Before these cases, the U.S. Supreme Court has only addressed substantively the ATS in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), concluding that an ATS claim must rest on a norm of customary international law that is sufficiently "specific, universal, and obligatory" to support a federal remedy, but leaving unresolved whether corporations can be liable under the statute. The Supreme Court heard arguments on February 28, 2012, in *Kiobel v. Royal Dutch Petroleum Co.* (ATS) and *Mohamad v. Palestinian Authority* (TVPA) to consider the question of corporate liability. These and other cases

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guarantee that 2012 will be a landmark year in ATS and TVPA jurisprudence. Clifford Chance US LLP has published an ATS and TVPA 2011 Year-in-Review, which provides a summary and analysis of significant ATS and TVPA decisions in 2011, as well as the related topic of instituting human rights due diligence programs to mitigate risk. We will review the highlights of the report in this article. The full report is available on the [Clifford Chance website](#).

## Corporate Liability

The foremost question to be decided in ATS and TVPA litigation in 2012 is whether corporations can be liable under these statutes. The Second Circuit held in 2010 in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), that international—and not domestic—law governs this question and does not recognize corporate liability under the ATS. In 2011, the D.C., Seventh, and Ninth Circuits disagreed, holding that corporations can be liable under the ATS. *Doe v. Exxon Mobil*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo v. Firestone*, 643 F.3d 1013 (7th Cir. 2011); *Sarei v. Rio Tinto*, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) (*en banc*). The Supreme Court will resolve this split in authority in 2012.

With regard to the TVPA, the Eleventh Circuit was the first federal appellate court to hold that a complaint under the TVPA stated a claim against a corporate defendant in *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 (11th Cir. 2005). In 2011, the Fourth and D.C. Circuits disagreed, holding that corporations cannot be sued under the TVPA based on the plain language of the statute, which applies to an “individual” and not a “person.” *Aziz v. Alcolac*, 658 F.3d 388 (4th Cir. 2011); *Exxon*, 654 F.3d 11.

## Aiding and Abetting Liability

The requisite *mens rea* for aiding and abetting claims is another significant issue appearing in cases in 2011. The Second Circuit held in 2009 that liability for aiding and abetting human rights violations committed by others under the ATS requires (1) practical assistance having a substantial effect on the perpetration of the crime, and (2) the provision of such assistance with the purpose of facilitating the crime. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). In 2011, the Fourth Circuit adopted the Second Circuit’s purpose standard in *Aziz*, while the D.C. Circuit held in *Exxon* that mere knowledge is required. The Ninth Circuit declined to address the issue in *Sarei* because it concluded that plaintiffs had met the more exacting purpose standard, but one concurring opinion advocated for a knowledge standard.

The standard for aiding and abetting liability likely will continue to divide the courts until the Supreme Court weighs in. The Court declined to consider the question in *Talisman* in 2010. Now that a Circuit split has emerged, Supreme Court consideration appears more likely. If the Supreme Court accepts one of these cases and adopts *Talisman*’s purpose standard, plaintiffs will have more difficulty pleading and proving aiding and abetting claims. Moreover, the Supreme Court’s decision in *Kiobel* could affect how federal courts determine the standard in the future; in particular, whether courts look to federal common law or international law.

## Human Rights Due Diligence

The courts are not the only forum in which corporations may be confronted with allegations of supporting or failing to prevent human rights abuses. The year 2011 saw a convergence of international “soft law” standards and the introduction of new avenues of accountability in the area of business and human rights that will ensure that human rights issues are a focus of risk management, even apart from litigation risk.

In June 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights (“Guiding Principles”), developed by Professor John Ruggie, Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises, which state that corporations have a “responsibility to respect” human rights that “exists over and above compliance with national laws and regulations protecting human rights.”<sup>2</sup> In addition, in May 2011, the thirty-four member states of the Organization for Economic Co-operation and Development (“OECD”),

along with several other adhering member governments from outside the OECD, agreed to revise the OECD Guidelines for Multinational Enterprises (“OECD Guidelines”) to include a new chapter addressing human rights, which allows interested parties to make complaints against corporations to National Contact Points.<sup>3</sup> The Guiding Principles and the OECD Guidelines provide a framework for best practice in the area of business and human rights and state useful criteria for designing due diligence programs that should mitigate corporate exposure to allegations of complicity in human rights violations.

## Conclusion

The Supreme Court’s decisions in *Kiobel* and *Mohamad* will have broad implications for corporations. Decisions upholding liability for non-persons, including corporations, under the ATS and the TVPA would likely increase the wave of lawsuits against corporations for human rights abuses. But even if the Supreme Court concludes that non-persons cannot be liable under one or both of the statutes, corporations will still face litigation and reputational risks as plaintiffs pursue individual corporate defendants. It would be prudent for corporations to consider implementing appropriate policies and developing a due diligence program to identify risks and eliminate them before they occur.

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<sup>1</sup> This article was first published in similar form in Corporate Compliance Insights.

<sup>2</sup> Special Representative of the UN Secretary General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

<sup>3</sup> OECD, *OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context* (2011), available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

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