

IN FOCUS  
**TACKLING CORPORATE ACCOUNTABILITY**

*Synopsis from IHRFG Telebriefing, May 3, 2011*

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IHRFG recently held a telebriefing to update funders on the status of the Alien Tort Statute and other mechanisms for achieving corporate accountability. Below is a summary of that discussion.

**Introduction**

***Ellen Dorsey, Executive Director, Wallace Global Fund***

Human rights advocates are increasingly challenging the concentrated power of corporations, from advocating for new international standards of accountability, pressuring governments to regulate corporations, and targeting companies directly for the economic, environmental and social impacts of their practices. While corporations have unprecedented and unfettered global power, the current public awareness of corporate abuses wrought by the economic meltdown presents new opportunities to build public support for accountability. Advocates are using many new creative strategies and tools in their corporate campaigns. The Alien Tort Statute is one such legal mechanism, available in the United States to sue corporations for their environmental and human rights impacts abroad.



**What is the Alien Tort Statute (ATS), how has it been shaped over the years, and what is the outlook for the future?**

***Paul Hoffman, Lead Counsel, *Kiobel v. Royal Dutch Petroleum Co.* and *Sosa v. Alvarez-Machain****

The Alien Tort Statute (ATS) was enacted as part of the Judiciary Act of 1789. The Statute grants the U.S. district courts jurisdiction over any civil action by an “alien” for a wrongful act (tort) committed in violation of international law or a treaty of the United States. In the 1990s, ATS litigators began focusing on cases involving corporations and their accountability. In *Doe v. Unocal*, the Burmese government sponsored a development project that funded a U.S. energy company to construct a gas pipeline through Burma to bring natural gas to markets in Thailand. Burmese residents brought a suit against the company in a U.S. federal court. The joint venture with the military regime resulted in massive human

rights violations, including forced relocation, forced labor, rape, torture, and murder. Counsel for the plaintiffs included EarthRights International, Paul Hoffman, and the Center for Constitutional Rights. Issues of corporate complicity were first raised in this case. A key topic of the debate was whether the ATS is supported by common or international law. Another issue was how to prosecute corporations with ATS charges. This case was settled out of court in 2004, with Unocal compensating the plaintiffs to develop programs to improve living conditions and health care, to provide education, and to protect the people's rights in the pipeline region.

Initially, in ATS cases, plaintiffs had to prove that the corporation specifically intended to commit human rights violations. In *Kiobel v. Royal Dutch Petroleum Co.*, the 2nd Circuit Court of Appeals found that "corporate liability is not a discernible -- much less universally recognized -- norm of customary international law that we may apply pursuant to ATS." The Court's decision was also based on the fact that, prior to these suits, no corporation had ever been subject to any form of liability (whether civil or criminal) under the customary international law of human rights.

The *Kiobel* decision by the 2nd Circuit Court of Appeals could set a precedent for the dismissal of other cases. However when President Barack Obama appoints a new judge to the 2nd Circuit, he/she could overturn *Kiobel*. There are more cases working their way through the circuit courts which provide some optimism for overturning the *Kiobel* decision in the future.

#### **In addition to litigation, what are other options for promoting corporate accountability?**

##### ***Marco Simons, Legal Director, EarthRights International***

If the *Kiobel* decision is not overturned, there are other options to bring cases. Most cases in the field are litigated with a number of different claims in addition to ATS. *Kiobel* would not put an end to this type of litigation, but it would make it harder to achieve justice. Advocates are also looking to countries such as Britain for strategies where litigation has been successful. They are also supporting local litigation efforts in countries where abuses take place. Overall, they are working to identify additional forums where corporations can be brought to justice.

Advocates such as EarthRights International (ERI) are considering legislative responses and other strategies in addition to litigation. ERI is involved in the International Corporate Accountability Roundtable (ICAR), an effort to coordinate and advance the activities of U.S. human rights organizations to advocate for corporate accountability. ICAR may push for amendments to the ATS or other new legislation if necessary. In addition, civil society organizations in the United States have successfully advocated for legally-mandated extractive sector reporting regarding payments to governments through the passage of Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. This is an important step forward for human rights.

With regard to international mechanisms for creating accountability and justice, the international human rights system is generally patchy. For example, the jurisdiction of the International Criminal Court through the Rome Statute applies to certain human beings, but not to corporations. Corporations may be added to the Rome Statute in the future.

John Ruggie, the UN Secretary General's Special Representative on Business and Human Rights, has released the *Guiding Principles on Business and Human Rights*. We should invest in expanding this effort to create and adopt norms in international law for accountability and clear mechanisms for punishment and enforcement. An international treaty has been suggested that would obligate States to provide avenues for corporate accountability or international tribunals to hear these sorts of claims.

### **What role can funders play in these efforts?**

***Lesley Carson, Program Director, International Human Rights, Wellspring Advisors***

It is important to note that funders and grantmakers look for the most effective levers to move the field forward; litigation is not the only option and does not exist in a vacuum, disconnected from other strategies. We need to continue to support litigation; the application of international human rights law to corporations can and should be tested and expanded through the courts. At the same time, funders can support corporate accountability efforts in several other ways, which include:

- Work within, build, and improve regional Organisation for Economic Co-operation and Development (OECD) and UN mechanisms to better handle these cases;
- Support grassroots movements in which locals advocate on behalf of their communities and respond when abuses are happening, while simultaneously an outspoken constituency in consumer and headquarter countries demands respect for human rights by corporations;
- Support traditional documentation and reporting on these issues;
- Support public outreach and campaigning;
- Support efforts to align national laws regulating corporations with human rights at the national level;
- Support NGOs that are engaging with and providing technical assistance to good faith efforts by corporations on promising voluntary initiatives;
- Provide flexible funding to civil society groups that are creative and innovative, that are nimble and respond in various ways as the field evolves;
- Collaborate with other funders in this area to make sure that resources are going where most needed, and;
- Support the nascent effort to develop a binding international treaty on corporations and human rights.

### **Additional Notes for Funders**

***Ellen Dorsey, Executive Director, Wallace Global Fund***

Funders should align their organization's investment strategies with their grantmaking strategies. How they reap and invest assets has an impact on keeping corporations accountable. In addition, funders who support multiple issue areas should be aware of a significant gap in grantmaking for corporate responsibility across the civic engagement and human rights fields. Therefore, funders can integrate corporate responsibility into other areas of their grantmaking.

**For more information or to learn more:**

- Listen to the audio recording of the telebriefing: <https://cc.readytalk.com/play?id=8fhvw2>.
- Visit the Business and Human Rights Resource Center: <http://www.business-humanrights.org/>.
- Visit the website of EarthRights International: <http://www.earthrights.org/>.
- Contact Lesley Carson with regard to IHRFG's Economic, Social, and Cultural Rights Working Group: [lcarson@wellspringadvisors.com](mailto:lcarson@wellspringadvisors.com).
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