

## Liability and Immunity for Human Rights Violations: The Impact of Current Legal Developments on Corporate Responsibility

February 21, 2012 by [Elizabeth Holland](#)



It is likely that the coming year will see a number of legal developments relating to the immunity and liability of corporations, states, and individuals as recognized by U.S. courts. With an increasing number of suits filed against companies for human rights abuses, the question of whether immunity attaches is of great significance.

Courts inside and outside the United States are weighing questions regarding jurisdiction and immunity, and their decisions and arguments will likely be picked up by other courts dealing with issues of corporate responsibility for alleged human rights violations.

What follows is a brief round-up of some of the most anticipated legal developments in the field of corporate responsibility to keep an eye on during 2012. In this overview, we look at three key questions under consideration by U.S. and international courts :

1. **Can corporations, or their executives, be sued for human rights violations?**
2. **Does immunity under the Foreign Sovereign Immunities Act reach to corporations, states, and individuals?**
3. **What does international law say about state immunity?**

### **(1) Can corporations, or their executives, be sued for human rights violations?**

The answer to the question of whether corporations may be sued for human rights violations under the [Alien Tort Statute](#) (ATS) or [Torture Victim Protection Act](#) (TVPA) in the U.S. will have serious consequences in terms of corporate liability. With the [Supreme Court preparing to hear arguments in \*Kiobel v. Royal Dutch Petroleum\*](#) and [Mohamad v. Rajoub](#) on [February 28](#), discussions are ramping up regarding liability and immunity in human rights litigation in U.S. federal courts. Between the two (consolidated) cases the Supreme Court will be looking at three questions:

1. Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time. ([Kiobel v. Royal Dutch Petroleum](#))
2. Whether [corporations are immune from tort liability](#) for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such violations, as [the Eleventh Circuit has explicitly held](#). ([Kiobel v. Royal Dutch Petroleum](#))

3. Whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2(a), permits actions against defendants which are not natural persons ([Mohamad v. Rajoub](#))

All three questions will be of significant consequence in the field of corporate responsibility. [Until now there was a circuit split as to whether corporations may be sued under the ATS.](#)

Notwithstanding the disagreement of whether a corporation may be sued under the ATS, it is clear that an individual corporate executive may be sued pursuant to the statute. Thus, depending on the decision of the Supreme Court there may be an increase in suits filed against individuals rather than corporations. This may lead to the emergence of an additional line of questions regarding individual liability for the actions of a corporation.

Lurking in many of these cases is the question of what exactly comprises the law of nations, which is referenced in the ATS. [Some](#) courts have concluded it is synonymous with customary international law, while [others](#) have rejected such an understanding. A clear definition of what amounts to the law of nations is critical to determining if a claim properly falls within the ATS. Though not one of the questions presented to the Supreme Court, it will be interesting to see whether the Court addresses it in its decision.

## **(2) Does immunity under the Foreign Sovereign Immunities Act reach to corporations, states, and individuals?**

The [Foreign Sovereign Immunities Act](#) (FSIA) is the U.S. statutory framework governing sovereign immunity. The FSIA is the “[sole basis](#)” for gaining jurisdiction over a foreign state in U.S. courts. It codifies the restrictive approach to immunity, recognizing immunity for claims arising from sovereign acts. It also sets out a number of exceptions to immunity, including waiver by the state, commercial or private acts, territorial torts, or state sponsored terrorism. Though the FSIA definition of a state is drafted broadly enough that it could, under certain conditions, include corporations, there would be an exemption to the immunity otherwise afforded if the corporation (acting as an agency or instrumentality of the state) is undertaking commercial or private acts. For more on commercial or private acts exception to immunity, see this [primer](#).

Statutes such as the ATS and TVPA provide the bases for human rights claims. These avenues for litigation, however, often bump against the sovereign immunity recognized by the FSIA. Despite arguments before U.S. courts and in front of the International Court of Justice (ICJ), there is no absolute exception to sovereign immunity based on violations—even of an egregious nature—of international human rights or humanitarian law.

To get around the sovereign immunity hurdle many claims regarding human rights violations are brought against individuals. This resulted in a circuit split on the question of whether the FSIA applied to individual foreign officials. In 2010 the U.S. Supreme Court answered this question in [Samantar v. Yousuf](#). The Court held that the FSIA does not govern whether an individual foreign official is afforded immunity from civil suits before U.S. courts. Rather, foreign official immunity is governed (at least in U.S. courts) by common law.

The Supreme Court remanded the case to the federal district court for determination of whether the petitioner is entitled to foreign official immunity under common law. The Court, however, did

not provide specific guidance as to whether such a determination should be predicated solely on the opinion of the Executive Branch, or that other bases—such as customary international law or practices of other national courts—should be considered (for more on this, see [here](#)). In a recent hearing on a [motion for reconsideration](#) the district court judge indicated that the opinion of the Executive Branch is owed deference, but is not controlling on the question. Thus, we should watch for an answer from the lower court as to what will be the basis for determining immunity. If the court bases its decision on customary international law it will be particularly interesting to see how it articulates the rule, and to what state practice it refers in determining its customary character.

### **(3) What does international law say about state immunity?**

The ICJ looked at a related, but distinct question, regarding immunity: whether or not international law recognizes state immunity to civil suits filed in national courts. On February 3 the Court issued its judgment in [Jurisdictional Immunities of the State \(Germany v. Italy: Greece intervening\)](#). The Court held in favor of Germany, upholding a traditional conception of state immunity under international law. Regarding the primary claim, the Court found Italy had violated its obligation to respect the state immunity of Germany in part by allowing civil cases to be brought against the state in Italian courts. The Court was not swayed by Italy's argument of a *jus cogens* exemption to the principle of state immunity, nor was it convinced by Italy's argument that the acts of armed forces during an armed conflict fall within a territorial tort exemption.

In upholding state immunity as a matter of customary law, the judgment contained a number of interesting statements:

- The Court characterized the current rule regarding state immunity as one of customary international law, rather than comity or grace (¶54, 56).
- The Court described state immunity as a balance struck between the fundamental ordering principles of the sovereign equality of states and the territorial sovereignty of each state. Immunity flows from the former, exceptions to immunity from the latter (¶57).
- The Court explained that, as is the case with state official immunity, jurisdictional immunity in a particular venue does not alter the applicability of the substantive rules governing the wrongfulness of an action (¶100). It pointed out that “whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparations.” (¶100).

Though the judgment of the ICJ—which binds only the parties—is limited in its analysis to the narrow question of whether there is state immunity in regards to the activities of a state's military, engaged in an armed conflict, on the territory of the forum state, its methodology and reasoning may—and likely will—will be picked up in future discussions regarding the broader nature of both foreign official and state immunity. This is especially likely given the Court's clear recognition of state immunity under international law, and its rejection of the argument that there would be a *jus cogens* exception to immunity.

## ***Finally, what should we watch for?***

Looking ahead there are a few issues and questions that could arise in regards to liability for corporations, states, and individuals, including:

- In a recent [blog post](#), Professor Ingrid Wuerth suggests a few possible consequences of the ICJ judgment. The ICJ relied rather heavily on decisions of national courts in its recognition of state immunity as customary international law. Professor Wuerth queries what role national courts, especially those in the U.S., may play in reshaping the contours of state immunity.
- Might the reasoning put forward by the ICJ strengthen arguments that absent an express waiver, customary international law recognizes state immunity for all non-commercial acts? This would be a high bar for any arguments in favor of exceptions to state immunity. To the extent U.S. courts consider customary international law in human rights cases this could be a significant hurdle to establishing any implied or implicit exception to immunity. For more, see this [blog post](#) by Professor Chimène Keitner.
- To round it out, Professor Paul Stephens suggests in a [blog post](#) that the ICJ decision may be used to support an argument that prescriptive jurisdiction—the type exercised by U.S. courts in some human rights litigation—may contravene international law. He suggests that at some point the Supreme Court may well have to decide whether egregious violations of human rights warrant an exception to immunity, or must give way to it. If the Court adopts the former, it may well be in direct disagreement with international law.

Corporations doing business abroad will need to keep an eye on the developments regarding liability and immunity – particularly in U.S. courts where human rights litigation over the past decade has had a significant impact on the field of corporate responsibility. As potential claimants determine who to sue for alleged human rights violations, considerations of liability and immunity will dictate their strategy.

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