

Can companies be involved in genocide, war crimes and crimes against humanity?

Traditionally, companies cannot be prosecuted for human rights violations under international criminal law: individuals, not legal entities, are its subject. Consequently, it is generally accepted that corporate officials could face trial for criminal activity committed abroad. But does this imply that corporations cannot be held accountable for human rights abuses committed outside their home country?

International law

No international criminal tribunal yet has jurisdiction to prosecute a company as a legal entity. However, national legal systems often include legal entities, including companies, in the list of potential criminal perpetrators. As various countries take steps to incorporate international criminal law into their national legal systems, business entities could increasingly face the risk of prosecutions for such crimes in national courts.ⁱ

Fairly unusual, however, is national legislation that holds corporations liable for human rights violations committed outside its national jurisdiction. The only exception internationally, is the Alien Tort Claims Act of 1789 (ATCA), which grants jurisdiction to US Federal Courts over "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."ⁱⁱ This statute is notable for allowing United States courts to hear human rights cases brought by foreign citizens for conduct committed outside the United States. This is a unique instrument in international law and in the world, since it gives the United States jurisdiction over civil actions against foreigners for violations of "the law of nations" anywhere in the world.

In the *Kiobel v. Royal Dutch Petroleum Co.* caseⁱⁱⁱ, various U.S. courts ruled that corporate liability is possible under the Alien Tort Statute. In *Sosa v. Alvarez-Machain*^{iv} the U.S. Supreme Court held that the ATCA provides a cause of action for violations of international norms that are as "specific, universal, and obligatory".^v Courts have found torture, cruel, inhuman, or degrading treatment, genocide, war crimes, crimes against humanity, summary execution, prolonged arbitrary detention, and forced disappearance to be actionable under the ATCA.^{vi}

To consider whether corporations indeed can be held accountable for human rights abuses committed abroad, let us take a closer look at the recent case of *Sarei v. Rio Tinto*.

The case

Rio Tinto, a mining company headquartered in London and Melbourne, faces charges of human rights violations in the Panguna mine in Papua New Guinea (PNG). This mine is operated by Bougainville Copper Ltd, with Rio Tinto holding a 54 percent stake. Bougainville Copper Ltd ceased its activities at the mine in 1989 due to violent conflicts with local communities. Bougainville residents revolted against Rio Tinto in 1988 amid human rights and environmental complaints. It is claimed that at Rio Tinto's request, the PNG military put down the revolt, and soon thereafter, imposed a military blockade on Bougainville to secure the mine. Shortly after this incident, a decade-long civil war erupted.

A group of islanders has been suing the company since the year 2000. Based on alleged gross human rights violations related to the mine's activities, the group tries to organize a class action lawsuit on behalf of 10,000 people. The complaint states that Rio Tinto supported and encouraged PNG's blockade that "prevented medicine, clothing and other essential items from reaching the people of Bougainville." The plaintiffs allege that the PNG government, using Rio Tinto helicopters and vehicles, killed about 15,000 people in an effort to put down the revolt. They claim that the blockade caused the death of more than 10,000 Bougainvillean, including more than 2,000 children in the first two years of the ten-year siege.

The allegations in the case *Sarei v. Rio Tinto* include^{vii}:

- complicity in war crimes and genocide committed by the PNG army;

- violation of international law by environmental impacts that harmed the health of the people of Bougainville;
- engagement in racial discrimination against black workers.

The lawsuit has been ongoing for eleven years, and has been heard twice before the US Ninth Circuit Court of Appeals. On October 25, 2011 the Court of Appeals reversed the lower court's dismissal of the case. The court upheld the dismissal of the claims regarding racial discrimination and crimes against humanity, but it reversed on the plaintiffs' claims regarding genocide and war crimes. The case will return to the district court for further proceedings.^{viii}

SNS Asset Management's view point

SNS Asset Management's responsible investment policy is not based on subjective preferences, but on broadly propagated values in a global society established in internationally authoritative documents, such as international treaties, declarations, guidelines or codes. SNS Asset Management's responsible investment policy comprises principles on fundamental human rights, child and forced labour, environmental pollution, corruption, controversial weapons production and trade, and generally accepted ethical principles that apply in a humanitarian society. The ultimate consequence of the violation of these principles is that a company is excluded from investments.^{ix} SNS Asset Management officially excluded Rio Tinto from investments in 2008, for fierce and structural violations of environmental standards and human rights.

As a responsible investor, SNS Asset Management holds the view that corporations should comply with international law and globally accepted norms and values, and that they should be held accountable for their actions, be it at home or abroad. If it is established that a company is responsible for (being accomplice of) serious and structural breaches of fundamental human rights norms, among which genocide, war crimes and crimes against humanity, SNS Asset Management chooses to exclude that company from investment. Since SNS Asset Management considers exclusion of investment as the ultimate remedy and a serious sanction, it is important to base this decision on established facts, not on allegations, and apply the principle of *audi alteram partem* (hear the other side).

Rio Tinto is already on the exclusion list of SNS Asset Management. Therefore, the outcome of the *Sarei v. Rio Tinto* case, highly interesting from the international legal perspective, could further inform SNS Asset Management's divestment decision.

At the same time, the *Kiobel v. Royal Dutch Petroleum Co* case, could be decisive for SNS Asset Management's future investment decisions regarding Shell. In this case, twelve Nigerian nationals sue Royal Dutch Petroleum and two other oil companies for aiding and abetting human rights abuses committed in the Ogoni Region of Nigeria in the early 1990s. The defendants have long been involved in oil exploration and production activities in the Ogoni region. To protest the environmental degradation caused by those activities, Nigerian residents organized the "Movement for Survival of Ogoni People." The plaintiffs allege that the defendants responded by enlisting the Nigerian government to suppress the Ogoni activists. In 1993 and 1994, the Nigerian military was involved in a variety of human rights abuses – shooting, killing, beating, raping, and arresting residents, as well as destroying and looting property – allegedly with the assistance of the defendants. Should involvement in gross human right violations be established in this case, SNS Asset Management will look at the remedial measures, and the actions, policies and management systems Shell has implemented. Only when it is assured that systems are in place to minimize the likelihood of future human rights violations, investment in Shell will be allowed. As long as SNS Asset Management is of the opinion that social and environmental business practices leave room for improvement, it strive to engage the company in a process of constructive dialogue geared toward clear-set short, medium and long-term objectives.

Conclusion

The only example internationally of national legislation that holds corporations liable for human rights violations committed outside its national jurisdiction, is the Alien Tort Claims Act. This law is unique in the world. Yet, its application and precise scope are still being determined by case law. From a legal perspective, this development is of eminent importance, as the Rio Tinto and Shell cases illustrate. Should these companies be held accountable for their actions abroad, this would set precedents against which the corporate behaviour of other corporations would be measured and sanctioned in the future. This could be the dawn of an era of increased corporate responsibility to respect, protect and fulfil human rights in international business operations.

ⁱ ICJ. (2008.) *Corporate Complicity and Legal Accountability. Volume 2 Criminal Law and International Crimes. Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes.* Available at: http://www.icj.org/IMG/Volume_2.pdf, last accessed 5 December 2011. P. 6.

ⁱⁱ Global Policy Forum (2012.) *Alien Tort Claims Act.* Available at: <http://www.globalpolicy.org/international-justice/alien-tort-claims-act-6-30.html>, last accessed 5 December 2011.

ⁱⁱⁱ In this case, twelve Nigerian nationals sue Royal Dutch Petroleum and two other oil companies for aiding and abetting human rights abuses committed in the Ogoni Region of Nigeria in the early 1990s. The plaintiffs allege that the defendants responded by enlisting the Nigerian government to suppress the Ogoni activists. In 2011, the Seventh Circuit Court of Appeals, the Ninth Circuit Court of Appeals, and the D.C. Circuit Court of Appeals all ruled that corporate liability is possible under the Alien Tort Statute. On October 17, 2011, the United States Supreme Court announced that it would hear an appeal in *Kiobel* during its 2011–2012 term. Oral argument was held on February 28, 2012 and a decision is expected before the end of June 2012.

^{iv} A U.S. Drug Enforcement Agency (DEA) special agent was kidnapped and murdered by a Mexican drug cartel in 1985. After an investigation, the DEA concluded that Humberto Álvarez-Macháin had participated in the murder. When the case went back to the district court for trial, Álvarez-Macháin was found not guilty for lack of evidence. Álvarez-Macháin then filed a group of civil suits in federal court against the United States and the Mexican nationals who had captured him under the Federal Tort Claims Act and the Alien Tort Statute. On the Alien Tort Statute claim, the Court unanimously ruled that the ATS did not create a separate ground of suit for violations of the law of nations. Instead, it was intended only to give courts jurisdiction over those violations accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigms. Because Alvarez-Machain's claim did not fall into one of these traditional categories, it was not permitted by the ATS. On the FTCA claim, the Court ruled that the arrest had taken place outside the United States and therefore was exempted from the Act. It rejected Alvarez-Machain's argument that the exemption should not apply because the arrest had been planned in the United States.

^v Carolyn A. D'Amore (2006.) *Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 Akron L. Rev. 593, 596.

^{vi} Pamela J. Stephens (Spring, 2007.) *Spinning Sosa: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. Int'l L.J. 1, 32-33.

^{vii} Business and Human Rights (2012.) Case profile: Rio Tinto lawsuit (re Papua New Guinea). Available at: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/RioTintolawsuitrePapuaNewGuinea>, last accessed 23 February 2012.

^{viii} See: <http://af.reuters.com/article/metalsNews/idAFN1E79O15M20111025?sp=true> and www.business-humanrights.org, last accessed 5 December 2011.

^{ix} SNS Asset Management aims to maximize its impact as an investor. Therefore, it favours voting and engagement (a process of constructive dialogue with a company) over exclusion. For a complete overview of the responsible investment policy and process of SNS Asset Management, see: <http://www.snsam.nl/index.asp?NID=7612>, last accessed 5 December 2011.