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The blame game

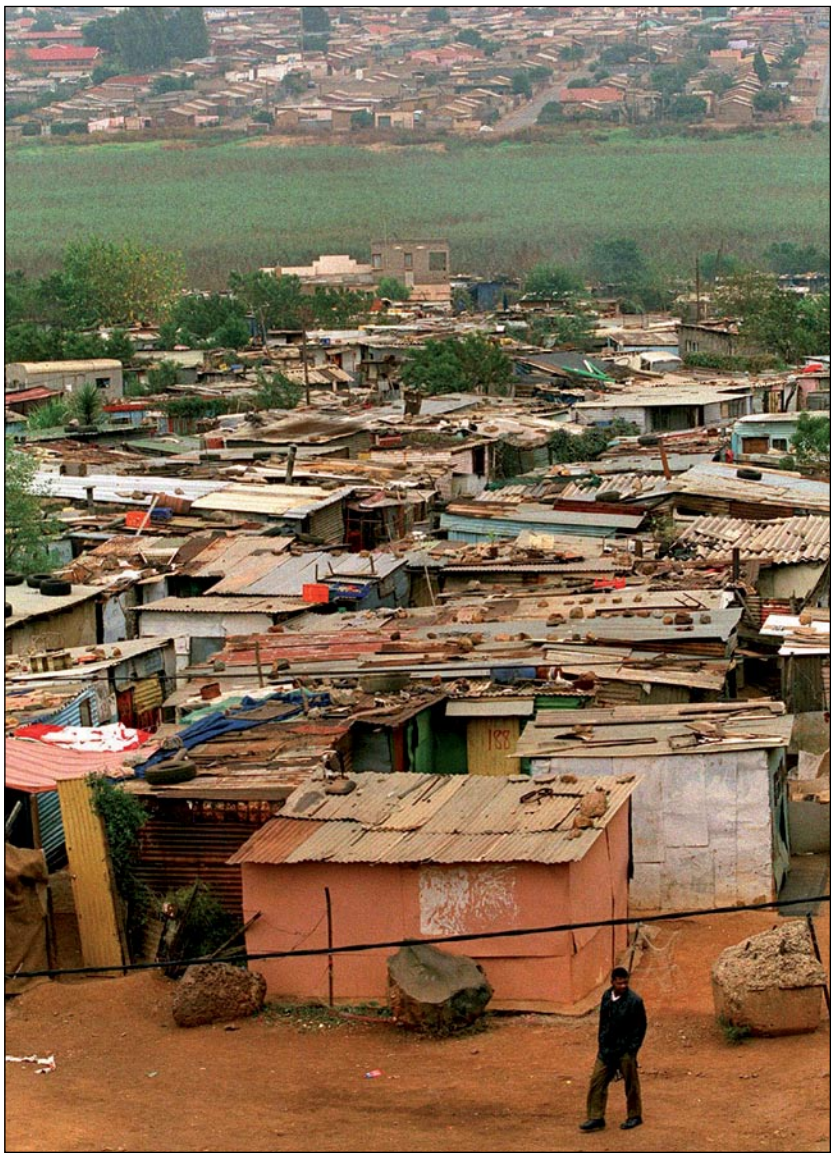
Lawsuits alleging corporate liability for international human rights abuses are on the increase in the US courts, reports Lee Dunst

In May this year, the US Supreme Court issued an order in a high-profile lawsuit alleging complicity by more than 50 international corporations in aiding and abetting the former government of South Africa in perpetuating the system of apartheid. The Supreme Court's order allowing this controversial case to proceed under an obscure US statute increases the possibility that other non-US plaintiffs will look to the US courts to seek redress against major corporations for their alleged role in violations of international law.

The South Africa apartheid lawsuit was filed in the US courts under the Alien Tort Claims Act (also referred to as the Alien Tort Statute or Alien Tort Act), a statute more than 200 years old which provides US courts with jurisdiction over "any civil action by an alien for a tort, only committed in violation of the laws of nations or a treaty of the US". The Act was originally targeted at discrete international law violations such as piracy at sea and infringement of the rights of ambassadors, and essentially laid dormant since the Act became law in 1789.

However, the Act was revived in recent years as various non-US plaintiffs filed lawsuits in US courts seeking damages against state actors and some individuals for violations of international law occurring outside the US, including human rights violations such as genocide, torture and other war crimes. In the 1980s and 1990s, most of these lawsuits were filed by individual plaintiffs against foreign governments or government officials alleging human rights violations occurring outside the US.

This began to change in the late 1990s and early 2000s, as various plaintiffs sought to dramatically expand the scope of the Act by seeking damages from international corporations for their alleged role in violations of international law committed outside the US. The private plaintiffs' legal theory for this expanded liability has been allegations of corporations conspiring with or aiding and abetting non-US governments perpetrating the alleged international law violations. In recent



years, at least 40 cases have been filed under the Act against corporations for their alleged role in human rights violations occurring in numerous countries, including Argentina, China, Colombia, Nigeria, Papua New Guinea, South Africa and Sudan.

While there has been a recent explosion in the number of cases filed under the Act against corporations, it is important to note that most of these cases have been dismissed by the US courts. In fact, most US courts have been vigilant in enforcing a strict gatekeeping function in dismissing many of these cases at the outset on jurisdictional grounds, such as lack of personal jurisdiction in the US or the so-called *forum non conveniens* theory, which usually involves the existence of an adequate non-US forum to litigate the case. Further, many US courts are willing to invoke 'prudential' concerns to dismiss these cases, such as:

- international comity (US court abstention);
- the act of state doctrine (deference to legitimate public acts by a government within its territory); and
- political question doctrine (deference to the US government regarding foreign relations).

By relying on these various defences in US courts, many corporations have been successful in obtaining the dismissal of these lawsuits, including, for example, DaimlerChrysler (dismissal due to lack of personal jurisdiction of a lawsuit alleging complicity in Argentina's so-called 'dirty war' in the 1970s in connection with a strike at a Mercedes-Benz plant in Argentina, despite a decision by German prosecutors to drop their criminal probe into the matter) and Rio Tinto (dismissal on prudential grounds of a lawsuit alleging that the Papau New Guinea government acted at the company's behest to suppress local opposition to the company's mining operations).

However, the ultimate failure of most lawsuits filed against corporations under the Act has not come easy. Many of these cases have lingered for many years in the US courts and have gone through many rounds of motion practice and amended pleadings before they are ultimately dismissed. For example, various lawsuits against Royal Dutch Shell alleging liability for alleged human rights violations committed by the Nigerian government in connection with the company's oil drilling operations have been pending in the US courts since 1996. Thus, while many corporations have been successful in securing dismissal of cases under the Act, it has sometimes taken many years and extensive legal resources to do so.

PLAINTIFFS PURPORTING TO REPRESENT 'ALL PERSONS LIVING IN SOUTH AFRICA BETWEEN 1948 AND 1994' CLAIMED INJURY FROM THAT NATION'S SYSTEM OF APARTHEID AND SOUGHT MORE THAN $400BN IN DAMAGES FROM MORE THAN 50 WELL-KNOWN INTERNATIONAL CORPORATIONS

Unfortunately for corporations, the recent US Supreme Court order in the South Africa apartheid litigation did not change the playing field for defendants seeking to end the explosion of lawsuits filed under the Act. In this case, plaintiffs purporting to represent "all persons living in South Africa between 1948 and 1994" claimed injury from that nation's system of apartheid and sought more than $400bn in damages from more than 50 well-known international corporations. However, the complaint included no specific allegations of any actual misconduct by any of these companies, other than the fact that they engaged in trade in South Africa and, according to the plaintiffs, apartheid would not have occurred in the same way in South Africa without the commercial activity of the corporate defendants.

Presented with such a flimsy legal theory, the federal trial court in New York dismissed the South Africa lawsuit for failure to state a claim under the Act. However, in 2007, a sharply-divided federal appellate court reversed that decision and reinstated the claim that these corporations allegedly were liable for aiding and abetting the South African government in perpetuating apartheid. The dissenting judge on the appellate court criticised this ruling and, recognising the lack of substance to the allegations against the defendants, noted, "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." Subsequently, the defendants sought review of the case by the US Supreme Court.

However, in a May 2008 order, the US Supreme Court declined to review the case due to a lack of quorum, because four of the nine justices on the US Supreme Court recused themselves from the case because they owned stock in the multiple corporate defendants. As a result, there were not enough justices to address the appeal (the US Supreme Court requires at least six justices for a quorum) and, therefore, the controversial appellate court decision was affirmed and the lawsuit was permitted to go forward at this time. Accordingly, the South Africa apartheid lawsuit has returned to the federal trial court where the plaintiffs are expected to file an amended complaint and the defendants intend to again seek dismissal on prudential grounds. As a result, the case will continue through another round of pleadings and court rulings and ultimately will not be resolved in the immediate future.

The South Africa apartheid litigation in the US courts has been sharply criticised. Both the US and South African governments have opposed the lawsuit as impacting diplomatic relations and interfering in the internal affairs of South Africa. In fact, the President of South Africa has lashed out at the US lawsuit as an act of "judicial imperialism". Unfortunately, the recent US Supreme Court order did not end the case and simply sent it back to the lower courts for potentially years of additional litigation.

Thus, while some US courts have expressed a willingness to enforce a strict gatekeeping approach to lawsuits filed against corporations under the Alien Tort Claims Act, the current state of the law still requires corporations to endure extensive motion practice and possibly years of litigation before a case is ultimately dismissed. There had been some hope that the US Supreme Court would step in and sharply limit the ability of private plaintiffs to seek redress from corporations under unsubstantiated and unwarranted theories for alleged international law violations. Unfortunately, the US Supreme Court did not do so in the South Africa apartheid litigation.

As a result, it seems likely that cases against corporations under the Act will continue to be filed in the US courts and expensive litigation will continue until such time as the appellate courts in the US (and eventually the US Supreme Court) step into the breach and impose limits on the explosion of such litigation and the unwarranted expansion of potential liability against corporations. ■

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