

Joshua L. Dratel (admitted *pro hac vice*)  
Stuart A. White  
JOSHUA L. DRATEL, P.C.  
2 Wall Street, 3rd Floor  
New York, New York 10005  
(212) 732-0707 (telephone)  
(212) 571-3792 (facsimile)

*Attorneys for Defendant  
Tamil Rehabilitation Organization*

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

-----	:	
KARUNAMUNIGE CHAMILA	:	Civil Action No. 2:09-cv-05395
KRISHANTHI, et al.,	:	(DMC)(JAD)
	:	
Plaintiffs,	:	MEMORANDUM OF LAW IN
	:	SUPPORT OF DEFENDANT
v.	:	TAMIL REHABILITATION
	:	ORGANIZATION’S SECOND
RAJAKUMARA RAJARATNAM,	:	MOTION TO DISMISS THE
JESUTHASAN RAJARATNAM,	:	COMPLAINT
and TAMIL REHABILITATION	:	
ORGANIZATION,	:	Motion Date: December 20, 2010
	:	
Defendants.	:	ORAL ARGUMENT REQUESTED
-----	:	

TABLE OF CONTENTS

Table of Contents. . . . . i

Table of Authorities. . . . . ii

INTRODUCTION. . . . . 1

Statement of Facts. . . . . 2

ARGUMENT

POINT I

THE COMPLAINT AGAINST TRO-USA SHOULD  
BE DISMISSED BECAUSE THIS COURT LACKS  
SUBJECT MATTER JURISDICTION OVER TRO-USA . . . . . 3

A. *This Court Lacks Subject Matter Jurisdiction Over TRO-USA  
Because the ATS Does Not Apply to Corporate Defendants.* . . . . . 3

B. *Prior Precedent That Has Simply Assumed Corporate Liability  
Is Distinguishable, and/or Fails to Address the Issue Specifically.* . . . . . 6

CONCLUSION. . . . . 10

TABLE OF AUTHORITIES

CASES

*Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir.1996). . . . . 9,10

*Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242  
(11th Cir.2005) . . . . . 8,9

*Benvenuto v. Connecticut General Life Ins. Co.*, 678 F.Supp. 469  
(D.N.J., 1988) . . . . . 1

*Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).. . . . . 3,10

*Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004) . . . . . 1

*In re Kaiser Group Intern. Inc.*, 399 F.3d 558 (3d Cir. 2005).. . . . . 1

*Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).. . . . . 4,7,10

*Lopez v. Richardson*, 647 F. Supp.2d 1356 (N.D.Ga. 2009). . . . . 6

*Presbyterian Church v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009).. . . . . 4

*Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008). . . . . 8

*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). . . . . 5,6,9

*Viera v. Eli Lilly and Co.*, \_\_\_ F.3d \_\_\_, 2010 WL 3893791  
(S.D. Indiana, Sept. 30, 2010).. . . . . 10

*United States v. Kiobel*, \_\_\_ F.3d \_\_\_, 2010 WL 3611392  
(2d Cir., Sept. 17, 2010). . . . . 1,2,3,4,5,6,7,8,10

STATUTES

28 U.S.C § 1350 . . . . . 1,8

OTHER AUTHORITIES

Rule 7.1(i), L.Civ.R. . . . . 1

*LITE, N.J. FEDERAL PRACTICE RULES, Comment 6(g) to L.Civ.R. 7.1*  
*(GANN)*. . . . . 1

## Introduction

This Memorandum of Law is respectfully submitted on behalf of defendant Tamil Rehabilitation Organization of the United States (hereinafter “TRO-USA”), in support of its second motion to dismiss Charge One of the Complaint.<sup>1</sup> As detailed below, based on a recent Second Circuit decision, *United States v. Kiobel*, \_\_\_ F.3d \_\_\_, 2010 WL 3611392 (2d Cir., Sept. 17, 2010), issued after this Court decided the initial motions to dismiss, and which held that the Alien Tort Statute (28 U.S.C. §1350) does not apply to corporations, Charge One of the Complaint must be dismissed because this Court lacks subject matter jurisdiction over

---

<sup>1</sup> This Second Motion to Dismiss the Complaint is submitted properly as a motion to dismiss and not a motion for reconsideration because this Court’s lack of subject matter jurisdiction over corporations for claims arising under the ATS was not briefed in the motion to dismiss. *See Benvenuto v. Connecticut General Life Ins. Co.*, 678 F.Supp. 469, 471 (D.N.J., 1988); *see also LITE, N.J. FEDERAL PRACTICE RULES, Comment 6(g) to L.Civ.R. 7.1 (GANN)*, at 91 (“[w]here the issues raised in a subsequent motion are sufficiently different from those raised in an earlier motion, even where the remedy sought is the same, it may properly be considered as a new and separate matter and not as an L.Civ.R. 7.1(i) motion”). Thus, this motion is not governed by the requirement that motions for reconsideration “shall be served and filed within 10 business days after the entry of the order or judgment on the original motion by the Judge or Magistrate Judge.” Rule 7.1(i), L.Civ.R. Also, the decision in *Kiobel*, upon which this motion is based, was not issued until after this Court’s decision on the initial motion to dismiss. In addition, TRO-USA’s claim for relief is based upon this Court’s lack of subject matter jurisdiction; and subject matter jurisdiction may be raised “at any time prior to final judgment.” *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 571 (2004); *In re Kaiser Group Intern. Inc.*, 399 F.3d 558, 565 (3d Cir. 2005).

Plaintiffs' ATS claims against TRO-USA, which is a corporation.

### **Statement of Facts**

TRO-USA was incorporated in 1994 under the laws of Maryland. *See* Articles of Incorporation, attached as Exhibit 1 to the March 12, 2010, Declaration of Stuart A. White, Esq., in Support of Defendant TRO-USA's initial Motion To Dismiss (hereinafter "White Declaration").

Charge One of the Complaint alleges that TRO-USA is liable, pursuant to the Alien Tort Statute (hereinafter "ATS"), for the deaths and injuries caused by five specific bombings by the Liberation Tigers of Tamil Eelam (hereinafter "LTTE") that occurred in Sri Lanka in 2007 and 2008. The Complaint alleges that TRO-USA is directly responsible for those bombings because it allegedly functioned as a "front group" for the collection of funds for LTTE. Complaint, at ¶ 53.

Subsequent to this Court's decision on the prior Motion to Dismiss, the Second Circuit decided *Kiobel, et al., v. Royal Dutch Petroleum, et al.*, \_\_\_ F.3d \_\_\_, 2010 WL 3611392 (2d Cir., Sept. 17, 2010), (hereinafter "*Kiobel*"), in which it held that district courts lack subject matter jurisdiction for a claim of liability pursuant to the ATS when the defendant is a corporation. Accordingly, Charge One of the Complaint must be dismissed against TRO-USA, a corporate entity.

## ARGUMENT

### POINT I

#### **THE COMPLAINT AGAINST TRO-USA SHOULD BE DISMISSED BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER TRO-USA**

##### ***A. This Court Lacks Subject Matter Jurisdiction Over TRO-USA Because the ATS Does Not Apply to Corporate Defendants***

The Second Circuit, in *Kiobel*, is the first Court of Appeals to fully analyze corporate liability under the ATS. After lengthy and detailed analysis the Second Circuit held that the ATS does *not* confer subject matter jurisdiction over corporate defendants, because such liability is not a “specific, universal, and obligatory norm of international law.” *Kiobel*, at \*11.

Unlike other courts that have merely assumed that the ATS created corporate liability, the Court in *Kiobel* thoroughly scrutinized the issue. It first considered whether international or domestic law applies in determining liability, and decided international law governs. *Id.*, at \*6.

As the Court in *Kiobel* explained, it examined international law to determine whether the ATS imposes liability on corporations because it had previously reviewed international law principles in determining the scope of ATS liability generally. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (state

officials); *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995) (private individuals); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (aiders and abettors). 2010 WL 3611392, at \*11.

Upon performing that review, the Court in *Kiobel* concluded there was

no principled basis for treating the question of corporate liability any differently. Like the issue of aiding and abetting liability, whether corporations can be liable for alleged violations of the law of nations “is no less significant a decision than whether to recognize a whole new tort in the first place.”

*Id.* (quoting *Presbyterian Church*, 582 F.3d at 259).

The Court in *Kiobel* next considered “what the sources of international law reveal with respect to whether corporations can be subject to liability for violations of customary international law.” *Id.*, at \*6. The Court looked to three sources: (1) the decisions of other international tribunals; (2) international treaties; and (3) the works of scholars and jurists, and determined that “customary law of human rights has not to date recognized liability for corporations that violate its norms.” *Id.*

Those sources led the Court in *Kiobel* to find it significant that “no international tribunal of which [the Court is] aware has *ever* held a corporation liable for a violation of the law of nations.” *Id.*, at \*12. For example, the

Nuremberg Tribunal did not, the International Criminal Tribunal for Yugoslavia has not, the International Tribunal for Rwanda has not, and the International Criminal Court has not. *Id.*, at \*12-\*16.

In fact, the Court in *Kiobel* pointed out that the Nuremberg Tribunal expressly declined to impose corporate liability under international law in the case of the most “nefarious corporate enterprise known to the civilized world[,]” and instead “prosecut[ed] the men who led [the corporation.]” *Id.*, at \*15.

Reviewing international treaties, the Court in *Kiobel* found “no historical evidence of an existing or even nascent norm of customary international law imposing liability on corporations for violations of human rights.” *Id.*, at \*18. Rather, the Court in *Kiobel* noted that, to the contrary, “there is a recent express rejection in major multilateral treaties of a norm of corporate liability in the context of human rights violations.” *Id.*

Equally important to the Court in *Kiobel* were the works of scholars and jurists, which “are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is[,]” *id.*, at \*20 (*quoting Sosa*, 542 U.S. at 734), and which concur that “imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations

of the world in their relations *inter se.*” *Id.*, at \*21.

In addition, the Second Circuit in *Kiobel* emphasized that the works of scholars and jurists establish that “no national court [outside of the United States] and no international judicial tribunal has so far recognized corporate liability, as opposed to individual liability, *in a civil or criminal context*, on the basis of a violation of the law of nations or customary international law.” *Id.*, at \*20 (emphasis and brackets in original).

Those sources compelled the Court in *Kiobel* to conclude that “[b]ecause corporate liability is not recognized as a ‘specific, universal, and obligatory’ norm, it is not a rule of customary international law that we may apply under the ATS.” *Id.*, at \*21 (citing *Sosa*, 542 U.S. at 732).

Here, TRO-USA is a corporation. Thus, pursuant to *Kiobel*, that corporate status eliminates subject matter jurisdiction against TRO-USA for claims arising under the ATS. As a result, Charge One of the Complaint must be dismissed.

**B. *Prior Precedent That Has Simply Assumed Corporate Liability Is Distinguishable, and/or Fails to Address the Issue Specifically***

When TRO-USA filed its motion to dismiss March 12, 2010, no court had yet squarely addressed whether the ATS provides jurisdiction over corporations.

*Kiobel*. On the basis of a district court case, *Lopez v. Richardson*, 647 F. Supp.2d

1356 (N.D.Ga. 2009), TRO-USA moved for dismissal on the ground that the Court lacked personal jurisdiction over the corporation.

However TRO-USA did not raise the issue of subject matter jurisdiction, in the context of corporate liability. Motion to Dismiss at 19. In its decision, this Court ruled that it possessed subject matter jurisdiction over TRO-USA based upon Second and Eleventh Circuit decisions. Order, Civil Action No. 2:09-cv-5395 (DMC-JAD), dated August 26, 2010 at 11.

Yet at that time the Court did not have the benefit of the Second Circuit's analysis in *Kiobel*. Moreover, as detailed below, the decisions upon which this Court based its holding – in contrast with *Kiobel* – are devoid of any meaningful analysis regarding corporate liability under the ATS. Indeed, the cases relied upon by the Court, or which constitute the source of authority for those cases, are either distinguishable because they did not involve a corporate defendant, or should not be controlling because they fail to include any direct analysis of the issue, much less an analysis that is convincing and/or undermines the careful and detailed reasoning in *Kiobel*.

In fact, the decisions upon which this Court relied to find subject matter jurisdiction over TRO-USA can all be traced back to the Second Circuit's decision in *Kadic*, which held only that subject matter jurisdiction for ATS claims exists

over *private individuals*. 70 F.3d at 239-241.

However, in subsequently addressing the specific issue of *corporate* liability in *Kiobel*, the Court concluded that “although international law has sometimes extended the scope of liability for a violation of a given norm to individuals, it has *never* extended the scope of liability to a corporation.” 2010 WL 3611392, at \*3 (emphasis in original).

In contrast to the Second Circuit’s comprehensive analysis in *Kiobel*, the Eleventh Circuit’s decision in *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008), lacked any analysis justifying its assumption that ATS imposed liability upon corporations.

For example, the Court in *Romero* stated merely that

[u]nder the law of this Circuit, the Torture Act allows suits against corporate defendants. We held that a complaint, under the Act, stated a claim against a corporate defendant in *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (11th Cir.2005), and we are bound by that precedent.

*Id.*

Yet in *Aldana*, the precedent that the Court in *Romero* considered itself bound to follow, the discussion did not directly consider whether a corporation could be liable under the ATS, but instead whether torture was actionable. For

instance, the Court in *Aldana* noted that

[t]he statutory texts support this conclusion. Torture is actionable under the Alien Tort Act, but only if the conduct is “committed in violation of the laws of nations.” 28 U.S.C. § 1350 (2005). By contrast, Congress provided an express definition of torture in the Torture Victim Protection Act. These two definitions suggest each statute provides a means to recover for torture as that term separately draws its meaning from each statute.

Precedent also supports this conclusion. In *Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir.1996), we construed the Alien Tort Act as conferring both a forum and a private right of action. Nothing in *Sosa* [*v. Alvarez-Machain*, 542 U.S. 692 (2004)] changes this conclusion; in fact, it confirms it. [542 U.S. at 724,]124 S.Ct. at 2761-62.

416 F.3d at 1250-1251.

TRO-USA does not dispute that torture, committed in violation of the laws of nations, is actionable under the ATS. What TRO-USA disputes, and what *Aldana* failed to analyze, is whether and how *corporations* may be liable for those violations of the law of nations.

The other Eleventh Circuit case upon which *Aldana* expressly relies, *Negewo*, did not even involve a corporate defendant. In fact, the defendants in *Negewo* were *individuals*, and *not* corporations. Accordingly, the issue of corporate liability was not at issue in *Negewo*.

Indeed, the issue in *Negewo* was whether the ATS provided a private right of action, an unremarkable holding TRO-USA does not dispute, and which is also consistent with prior Second Circuit decisions, and with *Kiobel* as well. As the Court in *Negewo* concluded, “the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law. *See, e.g., Kadic*, 70 F.3d at 236; *Filartiga*, 630 F.2d at 887; *Xuncax*, 886 F.Supp. at 179-83.” *Negewo*, 72 F.3d at 848.

That reference to “customary international law” demonstrates that *Kiobel* adopted the right approach and reached the correct conclusion with respect to the entirely separate issue whether ATS imposes liability on corporations. Thus, *Kiobel* constitutes the first decision to analyze corporate liability under the ATS. Since *Kiobel* was decided at least one district court has already followed its holding. *Viera v. Eli Lilly and Co.*, \_\_\_ F.3d \_\_\_, 2010 WL 3893791, at \*2 (S.D. Indiana, Sept. 30, 2010). It is respectfully submitted that *Kiobel* should control here as well.

### **Conclusion**

For all the reasons set forth above, and those set forth in defendants’ preceding motions to dismiss and motions for reconsideration, Defendant TRO-

USA respectfully requests that the Court dismiss Charge One of the Complaint against it, or, in the alternative, certify the legal issue(s) for interlocutory appeal.

Dated: November 23, 2010  
New York, New York

Respectfully submitted,

JOSHUA L. DRATEL, P.C.

By: s/Stuart A. White  
Stuart A. White  
JOSHUA L. DRATEL, P.C.  
2 Wall Street, 3rd Floor  
New York, New York 10005  
(212) 732-0707  
swhite@joshuadratel.com

*Attorneys for Defendant  
Tamil Rehabilitation  
Organization*

– Of Counsel –  
Joshua L. Dratel  
Alice L. Fontier  
Stuart A. White