Human Rights Litigation Against Multinational Energy Corporations under the Alien Tort Statute

By **Sara E. Kropf**

In the late 1990s, a large energy company's subsidiary joined a consortium of government-owned oil companies responsible for developing an oil concession in Sudan. Because at the time a civil war raged there, the consortium worked closely with the Sudanese government to protect the safety of its physical operations and employees. In 2001, several Sudanese citizens brought suit against the energy company in a New York federal district court, claiming that government forces that protected the consortium's assets had forcibly displaced or injured them. The citizens claimed that the company had aided and abetted these human rights violations through several seemingly innocuous activities for energy companies exploring resources overseas, e.g., building roads, upgrading airstrips, and paying royalties to the Sudanese government. The U.S. Court of Appeals for the Second Circuit affirmed the grant of summary judgment in the energy company's favor, but not until the company had been forced to battle the plaintiffs through eight years of discovery and intensive motions practice.[1]

Although the alleged conduct occurred overseas and the plaintiffs were foreign citizens, the federal district court obtained jurisdiction over the case under a little-known statute, the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The ATS allows aliens to sue corporations in U.S. courts for human rights violations occurring abroad. Although the facts of these cases have little or no link to the United States, they have been filed regularly against American energy companies, such as ExxonMobil, Chevron, and Shell, since the 1990s.

What follows is an overview of how this statute has been used to accuse energy companies of human rights abuses, such as murder, torture, and rape. There is a brief history of the ATS, an analysis of the legal standards for bringing a viable ATS claim, including how the use of theories of indirect liability are used to attribute foreign government wrongdoing to U.S. corporations, and an explanation of why energy companies are frequently the target of these lawsuits. Finally, you'll find practical pointers about litigating these unique cases.

Legal Standards

The legal requirements for an ATS claim are deceptively simple. There must be (1) an alien (2) suing for a tort (3) committed in violation of the law of nations. Even though *Sosa v. Alvarez-Machain*[2] purported to "clarify the scope" of the

History of the ATS: A Rise from Obscurity

Enacted in 1789 as part of the first Judiciary Act, the Alien Tort Statute (ATS) is only one sentence long: The district courts shall have original jurisdiction of 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.

There is little specific legislative history to guide courts in interpreting the statute. As Judge Friendly put it, "no one seems to know whence it came."[i] It remained dormant for nearly 200 years until the Second Circuit decided a landmark case in 1980, *Filartiga v. Pena-Irala*.[ii] In *Filartiga*, Paraguayan citizens used the ATS to sue a former Paraguayan police officer for torturing their relative to death in Paraguay. The court refused to dismiss the claim even though the case had no nexus to the United States. It held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights," and that the court had jurisdiction even though the parties were foreign citizens.[iii]

Although the proverbial floodgates did not open immediately after *Filartiga* was decided, cases under the ATS increased in the 1990s. Notably, foreign plaintiffs began to target U.S. corporations doing business overseas rather than foreign officials as in the *Filartiga* case. A few key cases in the mid-1990s set the stage for the current spate of lawsuits. In 1993, a group of foreign plaintiffs sued Texaco, claiming that they were injured by pollution caused by the company in South America.[iv] The case was dismissed without reaching the merits of the ATS claims. The turning point for cases against U.S. corporations, though, was likely when a California federal court ruled in *Doe v. Unocal Corp.* that the company and some of its executives could be held liable for the murder, rape, forced relocation, and slave labor imposed on Burmese villagers by that country's military during the construction of Unocal's pipeline there.[v] The *Unocal* case ended in a 2005 settlement, which included an estimated $30–60 million payment by the company to the plaintiffs. Once plaintiffs' lawyers realized just how high the stakes could be—and that courts would let these cases proceed beyond a motion to dismiss—the number of lawsuits under the ATS increased dramatically.

The ATS has been used by plaintiffs in over 100 cases against corporate defendants, with over 60 of them being filed in the last decade.[vi] The largest percentage of lawsuits have been against energy companies, and the stakes are high. Some of these lawsuits have resulted in large judgments (though not against corporations) ranging from $54 million to nearly $2 billion.[vii] As the lawsuits have multiplied over the last few years, lower courts have struggled to define the limits of the 33-word statute and, in particular, how to define "a violation of the law of nations." *(continued on page 2)*

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ATS, lower federal courts do not always agree as to what is a "violation of the law of nations" and whether (and how) corporations may be held liable for it. A court must evaluate two parts of this element of an ATS claim: (1) the type of wrongdoing at issue, and (2) whether the wrongdoer is a state actor.

First, the court must evaluate whether, under *Sosa*, the type of alleged wrongdoing at issue violates "specific, universal and obligatory" international norms so as to provide a cause of action under the statute. Most courts agree that extrajudicial killing (i.e., murder), rape, genocide, slavery, and torture are violations of international law that fit into this category. Other wrongdoings, such as "cruel, inhuman, and degrading treatment" or "crimes against humanity," are less established as international law violations.

For energy companies, one key emerging area under the ATS is claims for environmental abuses. In these cases, the plaintiffs allege that an energy company has polluted the environment, causing injury to the local citizens. In a long-running case against Texaco (now Chevron), for example, the plaintiffs brought suit in 1993 against the company for pollution in Ecuador and Peru. The company agreed to be sued in Ecuador in return for the dismissal of the ATS suit here and now faces a possible $27 billion judgment by the courts there. Courts have not widely accepted environmental claims as actionable under the ATS, though a few cases have left the door open for these kinds of claims, including

- *Beanal v. Freeport-McMoRan Copper & Gold* (5th Cir. 1999). Plaintiffs claimed that Freeport-McMoRan, a mining company, engaged in "cultural genocide" through "egregious human rights and environmental violations," which led to the displacement of several Indonesian tribal communities. The Fifth Circuit affirmed the dismissal of the case, concluding that "cultural genocide" as a result of environmental abuses is not a well-settled violation of international law sufficient to state a claim under the ATS.

- *Flores v. Southern Peru Copper Corp.* (2d Cir. 2003). Plaintiffs alleged that pollution from the company's mining operations caused severe lung disease, violating their "right to life" and "right to health." Affirming the dismissal of the case, the Second Circuit held that (1) the right to life and the right to health were not sufficiently definite to constitute an international law norm; and (2) plaintiffs were not able to demonstrate any established norm of international law against intra-national pollution. The court explicitly left the door open to claims of international pollution.

History of the ATS: A Rise from Obscurity *(continued)*

In 2004, the U.S. Supreme Court decided *Sosa v. Alvarez-Machain*.[viii] In *Sosa*, the Court held that the ATS is not only jurisdictional but also creates substantive causes of action for a limited group of international law violations. Perhaps most important, the Court concluded that this limited universe of international law violations was not static and could change over time to accommodate evolving international standards. At the same time, it reduced the reach of the ATS, explaining that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." In short, the international law norms being violated must be "specific, universal and obligatory." The *Sosa* Court made clear that lower courts should exercise "judicial caution" and engage in "vigilant doorkeeping" to limit expansion of the category of wrongs actionable under the statute.

The *Sosa* decision did highlight the unresolved question of whether "international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." The defendant in *Sosa* was an individual—not a corporation. Since the facts of the *Sosa* case did not present the issue, the Court did not answer the question, and it has not heard an ATS case since then. This term, however, the Supreme Court is considering granting certiorari in *Pfizer v. Abdullahi*, which squarely presents the issue of the scope of corporate liability under the ATS.[ix] The complaint in *Pfizer* alleged that the company did not obtain informed consent for clinical drug testing on children in Nigeria.

Endnotes

i. IIT v. Vencap, Ltd., 519 F. 2d 1001, 1015 (2d Cir. 1975).
ii. Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir. 1980).
iii. *Id.* at 878.
iv. Aguinda v. Texaco, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).
v. Doe v. Unocal, 176 F.R.D. 329 (C.D. Cal. 1997).
vi. Jonathan Drimmer, *Five Tips to Avoid the Human Rights Litigation Trap*, Corporate Counsel, March 26, 2009.
vii. *See, e.g.*, Arce v. Garcia, 434 F. 3d 1254, 1256 (11th Cir. 2006) ($54 million); Hilao v. Estate of Marcos, 393 F. 3d 987 (9th Cir. 2004) (class action trial resulting in compensatory damages of over $766 million, and $1.2 billion in exemplary damages); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) ($140 million); Mushikiwabo v. Barayagwiza, No. 94-civ-3627 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) ($103 million); Kadic v. Karadzic, 70 F. 3d 232 (2d Cir. 1995) (default judgment of $745 million).
viii. 542 U.S. 692 (2004).
ix. Pfizer, Inc. v. Abdullahi, 562 F. 3d 163 (2d Cir. 2009), petition for cert. filed (U.S. July 8, 2009) (No. 09-34).

- *Sarei v. Rio Tinto* (9th Cir. 2008). Plaintiffs, residents of an island off Papua New Guinea, claimed that Rio Tinto's mining operations had ruined the environment around the mine as well as polluted a local bay that was a major food source. Although the district court concluded that the plaintiffs did not establish a violation of "specific, universal and obligatory norm of international law," it did find that plaintiffs had stated a claim for a violation of the UN Convention on the Law of the Sea for the discharge into the bay. Nonetheless, the lower court dismissed these claims on various prudential grounds such as the political question doctrine. (The Ninth Circuit did not deal with the environmental claims.)

Plaintiffs have not had much luck with environmental claims. The size of the possible judgment against Chevron in Ecuador, however, may give them a good enough reason to file future cases under the ATS. Even if the alleged wrongdoing is appropriately "specific, universal and obligatory" to satisfy *Sosa*, the court must also analyze the second part of the "violation of the law of nations" element, i.e., whether the wrongdoer is a state actor. The ATS includes a state action requirement because the law of nations is the standard by which states regulate their dealings with each other and is not the standard to which private actors are held. As a result, only state actors can usually be held liable for violations of it. Thus, when a corporation is named as a defendant in a case, it would seem logical that the corporation cannot be held liable under the ATS as a matter of law because it is a private actor. Nonetheless, plaintiffs have discovered ways to avoid the ATS's state action requirement when they sue a corporation.

The most common method to impose liability on corporations is reliance on a theory of indirect liability. In these cases, there is no allegation that the corporate defendant directly committed the alleged wrongdoing. Rather, the claim is made that the state actor committed the wrongful act. The claim is then made that the relationship between the corporation and the state actor permits the state actor's wrongdoing to be attributed to the corporation and thus satisfies the ATS's state action requirement. The three chief indirect theories of liability are aiding and abetting, conspiracy, and agency.

The aiding and abetting theory is used most often by plaintiffs. Plaintiffs must prove that the company provided "knowing and substantial assistance" to the state actors who committed the wrongdoing. Some courts, notably the Second Circuit, have elevated the standard to require plaintiffs also to prove that the company intended to assist in the specific wrongdoing.[3]

In the conspiracy theory, the plaintiffs must prove that there was a knowing agreement between the company and the state actor to commit a wrongful act, the company joined the conspiracy intending to accomplish that act, and the member who committed the wrongdoing did so in furtherance of the conspiracy.

According to the agency theory, plaintiffs must prove that the state actors were acting on behalf of and under the control of the company and that the state actor acted within the scope of the relationship between them. For example, in the Chevron case that went to trial in California in 2008, a group of Nigerian protestors attempted to take over an offshore drilling platform. Chevron asked the Nigerian security forces to help remove the protestors, whom they considered to be dangerous. In doing so, the security forces killed some of the protestors and allegedly tortured others. The plaintiffs sought damages from Chevron for the security force's wrongdoing. The court allowed the claims to go to trial on this theory. Regardless of whether the conduct of the Nigerian security forces was wrongful, Chevron won at trial because there was insufficient evidence that it had any intent to harm the protestors and that it acted to protect its employees.

The exact contours of these theories of indirect liability remain in flux as courts grapple with legal issues, such as whether to apply international or domestic standards. One unsettled question is whether simply doing business with a foreign government that has committed human rights abuses in the past is sufficient to attribute any of the government's future human rights abuses to the company. Some courts have concluded that it is sufficient to impose liability for the plaintiffs to establish that the company should have known of the wrongdoing or that it was foreseeable. Other courts have held that actual—and not just constructive—knowledge is required. At a minimum, these theories provide plaintiffs with effective tools to impose liability on corporations for international law violations and create substantial uncertainty for these companies doing business abroad.

A second way to avoid the state action requirement is to plead a type of wrongdoing that is considered an exception to the state action requirement. These types of wrongdoing include genocide, slavery, or war crimes.[4] As the Second Circuit explained in *Kadic v. Karadzic*, "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[5] War crimes are those wrongs (such as murder or torture) committed against innocent citizens in furtherance of a domestic civil conflict. There are a few cases against corporations that allege complicity in war crimes in places such as Colombia and Sudan. For example, in one of the two cases to go to trial against a corporation under the ATS, *Romero v. Drummond Co.*, the plaintiffs

sued a coal mining company for allegedly hiring paramilitaries in Colombia to kill three of the company's union leaders. The theory was that Drummond had aided and abetted paramilitaries in committing a war crime. Even though paramilitaries were not state actors (and the group, in fact, was officially outlawed by the state), the plaintiffs did not have to prove state action because the murders were committed in furtherance of the civil hostilities between the right-wing paramilitaries and the leftist guerilla groups. Ultimately, like Chevron, the company was found not liable at trial. The next hot spot for ATS lawsuits against energy companies based on war crimes may be Iraq as the nation works to calm civil hostilities and energy companies seek to extract resources there.

Energy Companies as Targets

Unquestionably, plaintiffs have set their sights on energy companies, targeting this industry more than any other. Major exploration and gathering companies—including ExxonMobil, Chevron, Texaco, Unocal, Shell, and Occidental Petroleum—have all been sued with varying degrees of success. Mining companies have also been hit hard with lawsuits filed against Rio Tinto, Southern Peru Copper Company, Drummond Company, Freeport-McMoRan Copper & Gold, and others. Two of the three cases under the ATS against corporations to go to trial were against energy companies. Both energy companies, Drummond Co. and Chevron, were successful at trial, but only after years of litigation. The case against Royal Dutch Shell, based on its Nigerian operations, settled on the eve of trial in the spring of 2009 for $15.5 million.

Energy companies are popular defendants for obvious reasons. They have deep pockets and are often perceived to be unsympathetic defendants, particularly compared to plaintiffs in these cases who are frequently poor and uneducated. Moreover, energy companies have no choice but to do business in parts of the world where there is a lot of conflict. These developing areas may have governments with questionable human rights records. Energy companies are often required by law to rely on the local government to protect their operations and employees, creating a clear link between the corporation and the state actor. For example, the situation faced by Chevron when it took steps to protect its assets and employees off the Nigerian coast is not uncommon. Energy companies may be forced to weigh the need to protect their assets and employees against the risk of asking local law enforcement for help, which may result in violence attributable to the company. Either choice exposes the company to considerable risk.

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Litigating ATS Cases

ATS cases have several unique characteristics, making them a particular challenge for corporate defendants. The allegations often read more like a criminal indictment than a civil complaint. The plaintiffs are not other companies complaining of economic harm but rather individual victims of physical violence. The real drivers of these cases, however, are plaintiffs' firms, international labor rights groupss, and interest groups such as the Center for Constitutional Rights, Earth Rights International, and Amazon Watch.

Many ATS cases are decided on complex motions to dismiss. Defendants must take advantage of this motion—and the high-pleading standards applied to it—to avoid lengthy litigation. The Supreme Court's recent decision in *Ashcroft v. Iqbal*, which requires that a complaint state a "plausible" claim for relief to survive a motion to dismiss, has already led to dismissals of ATS cases.[6] Several federal courts have also held that there is a heightened pleading standard for ATS cases, requiring plaintiffs to allege facts to establish a violation of a specific international law violation and not allowing them to rely on vague and conclusory allegations. Despite these pleading barriers, plaintiffs have become considerably more sophisticated. The rapidly developing case law in this area provides plaintiffs with a road map for successfully pleading an ATS cause of action.

Part of the early motions stage may include turning to the U.S. government to weigh in on the foreign policy implications in the case. The district court may ask the federal government to file a statement of interest in a case, explaining whether a decision by the judicial branch could undermine any foreign policy goals established by the executive branch.

If a case does survive a motion to dismiss, corporations face complicated and expensive discovery. First, the company may be required to produce several documents and receive almost nothing in return. Plaintiffs are often poor individuals living in rural areas; these are rarely the types of cases where a defendant can win by finding a document produced by the plaintiffs that will undermine their case. Many of the relevant documents may be possessed by the foreign government or military, creating substantial obstacles to discovering them. Parties may have to use the cumbersome and time-consuming letter rogatory process,

which does not guarantee that the documents will ever be produced and can cause substantial delay. Discovery may be particularly lengthy and expensive where the documents are located in a foreign country, requiring extensive travel and translation to gather and understand them. Likewise, travel and translation may also be necessary for depositions of witnesses located overseas.

All of these costs quickly add up for a corporation that does not win on a motion to dismiss. Such high costs may suggest that companies may be more likely to settle cases early. Indeed, some cases, such as the one filed against Yahoo! in 2007, have settled quickly. However, many companies treat this as "bet-the-company litigation," refusing to take the risk that they will ultimately be adjudged a human rights abuser.

There are a few practical considerations for in-house and outside counsel defending these cases. First, consider the public relations effect. Given the troubling allegations by sympathetic defendants against multinational corporations in these cases, they are a perfect vehicle for a public relations campaign against a company. Indeed, some cases have spawned their own websites where those opposed to the company explain their position.[7] In response to the plaintiffs' public relations campaign, counsel should initially consider seeking a wide-ranging protective order to preserve the confidentiality of sensitive information, such as documents that describe a company's security measures and deposition testimony about them. The protective order should require filings to be made under seal if they disclose such information. Another possible measure (though harder to obtain) would be to obtain a protective order preventing the parties from making public statements about the case. Companies may also need to take steps to publicize their side of the story, either by devoting space on their websites to explaining the company's position on the lawsuit or issuing regular press releases about major case developments.[8]

Counsel should also think creatively about discovery. Investigating these cases may take more than simply sifting through documents. It may be necessary to hire investigators who are located in, or are familiar with, the country where the wrongdoing occurred to find out what really happened and to help you prove your defense.

Finally, be prepared for difficult settlement negotiations if the case reaches that stage. Both sides—the plaintiffs who are convinced that a large corporation trampled on innocent citizens' human rights and the defendants who are sure that they are being unfairly accused of someone else's wrongdoing—tend to get entrenched in their positions in these cases. Complicating this situation, the two sides may have divergent views on whether to make a settlement public. Because plaintiffs' lawyers frequently view these cases as "issue litigation," they will likely want any settlement to be public to bring attention to these issues. Companies naturally wish to keep the settlement terms quiet so as to avoid any appearance that they have admitted wrongdoing.

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Conclusion

Although courts have heightened some legal standards for ATS cases in the past few years, there is little doubt that these cases will continue to be filed. Because most energy companies have no choice but to extract natural resources in areas overseas with troubled human rights records, energy companies will continue to be targets. There are steps that companies can take to reduce the risk of these lawsuits, including making sure compliance plans cover human rights issues and drafting contracts to address these issues. Unless an energy company is willing to eliminate all overseas operations, the risk will always be there. ■

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Endnotes

1. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F. 3d 244 (2d Cir. 2009).

2. 542 U.S. 692 (2004).

3. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F. 3d 244 (2d Cir. 2009).

4. Kadic v. Karadzic, 70 F. 3d 232, 242 (2d Cir. 1995).

5. *Id.*

6. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). The Eleventh Circuit in Sinaltrainal v. Coca-Cola Co., 578 F. 3d 1252 (11th Cir. 2009), relied on *Iqbal* in affirming the dismissal of the ATS claims against Coca-Cola.

7. *See, e.g.*, www.chevrontoxico.com and www.killercoke.org.

8. *See, e.g.*, www.chevron.com/Ecuador.

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