THE EXPANDING SCOPE OF LIABILITY UNDER THE ALIEN TORT CLAIMS ACT - MULTINATIONAL CORPORATIONS BEWARE

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Summary

Until recently, the Alien Tort Claims Act, 28 U.S.C. §1350, (the "ATCA") was a relatively obscure statute with little relevance to private corporations. However, recent decisions from federal courts in California and New York have significantly expanded the scope of potential liability, which is likely to lead to increased litigation against multi-national corporations and scrutiny of their operations outside the United States.

On its face, the statute is simple and straight-forward: "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."[1] It was enacted as part of the Judiciary Act of 1789, (the "Act"), but little is known about the legislative history or the drafter's intent.[2] It was largely ignored for almost 200 years.

A History of Expanding Interpretation

The first significant case under the statute was *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which involved wrongful death claims by Paraguayan citizens based on alleged kidnapping, torture, and murder of an opposition leader in Paraguay. The plaintiffs were able to secure service on a former police official who allegedly had been directly involved in the torture of the victim. The *Filartiga* decision is significant for several reasons. First, it defined the sources of "the law of nations" (works of jurists, general usage and practice of nations, or judicial decisions recognizing or enforcing that law). Second, it established that the law of nations is an evolving concept that must be interpreted as it exists today, rather than as it existed in 1789 when the Act was passed. Third, in consulting the law of nations, primarily United Nations declarations and conventions, the court concluded that official torture is now prohibited by the law of nations. And fourth, it found that the ATCA covers claims between private individuals even if they occurred entirely outside the territorial jurisdiction of the United States.[3]

The ACTA became better known after the *Filartiga* decision, and was invoked whenever victims could secure service over individuals who had committed torture or other atrocities while acting on behalf of a foreign regime. A notable example was the high-profile litigation against the family of the late Ferdinand Marcos, where plaintiffs were able to freeze assets in the United States in connection with ATCA claims for violations of international law in the Philippines. See *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 25 F.3d 493, 1467 (9th Cir. 1994). In that case, the Ninth Circuit Court of Appeals stated,

"We thus join the Second Circuit in concluding that the Alien Tort Act, 28 U.S.C. §1350, creates a cause of action for violation of specific, universal and obligatory international human rights standards which 'confer fundamental rights upon all people vis-à-vis their own governments.' *Filartiga*, 630 F.2d at 885-87."[4]

However, the opportunities to find and serve defendants within the jurisdiction of the United States, particularly defendants with any significant assets, were still relatively rare. Then in 1995, the Second Circuit expanded the scope of the ATCA in two significant respects.[5] The court found that the ATCA covered claims against non-governmental actors, and it found that it applied beyond official torture to a broader scope of wrongful acts.[6] That case involved claims of genocide, war crimes, torture, and summary execution by Rodovan Karadzic, the president of the self-proclaimed Republica Srpska, a Bosnian Serb entity not recognized by other states. The Second Circuit rejected the argument that the law of nations was limited to violations by governmental entities, noting that acts such as piracy had historically been considered violations of international law even though pirates were not acting under any pretense of governmental authority.[7] Pirates were considered *hostis humani genris* (enemies of mankind).[8] The court noted that over time, slave traders grew to achieve a similar status, as have highjackers in more modern times.[9] These are crimes of universal concern, and although jurisdiction had traditionally been invoked in the criminal law context, nothing prevented the application of civil remedies such as tort actions under the ATCA predicated on the same wrongful acts.[10] Nor did the fact that *Filartiga* only dealt with official torture, mean that the same principles of "evolving standards" could not be applied to other atrocities such as genocide, (acts intended to destroy, in whole or in part, a national, ethnical, racial, or religious group), war crimes (as defined in the four Geneva Conventions), and unofficial torture and summary execution.[11]

Recent decisions from other circuits have also recognized ATCA claims for similar conduct. See *Cabello Barreeto v. Fernandez Larios*, 205 F. Supp.2d 1325 (S.D. Fla. 2002) (survivors of Chilean official sued former Chilean military officer for extrajudicial killing, torture, and crimes against humanity; statute of limitations tolled during concealment of victim's body and cause of death; military officer in position

of higher authority who authorized, tolerated, or knowingly ignored acts is liable for aiding and abetting). Nevertheless, the fact remained that many human rights violators did not come within the jurisdiction of United States courts, and even when they did, they often had no assets.

Corporate Liability for "Aiding and Abetting"

Recently, however, the ATCA has leaped from relative obscurity onto the national stage, and promises to become an increasingly significant legal concern for international business. Several courts have found corporations liable under the ATCA for "aiding and abetting" violations of international law based on what would have customarily been considered relatively innocent circumstances - the companies themselves did not commit or have any specific knowledge of the alleged wrongdoing by government forces. Two very recent decisions amply illustrate this new breed of ATCA litigation.

In *Doe I v. Unocal*,[12] residents of Myanmar (formerly Burma) sued the Myanmar government, Unocal, and Total for human rights violations in connection with construction of a gas pipeline through the Tenasserim region. The Plaintiffs' theory against the oil companies was that they had "aided and abetted" the Myanmar military's perpetration of forced labor, murder, and rape of people in the path of the pipeline development. Plaintiffs asserted that the operator of the joint venture, the Myanmar state oil company, entered into an agreement with the government to provide soldiers to guard survey teams, build helipads, and clear roads. The court found that the complaint sufficiently alleged violations of the ATCA by Unocal, a nonoperator.[13] Ironically, the Myanmar government and the state-owned oil company were dismissed pursuant to the Foreign Sovereign Immunities Act, and Total was dismissed for lack of personal jurisdiction. The court did not discuss how Unocal could be held liable for the acts of its subsidiary, which was the party to the joint venture.

The *Unocal* court defined the standard for "aiding and abetting" as "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime." *Id.* at *11. The defendant need not have actually caused or been essential to the underlying conduct; it just had to make a "significant difference."[14] The court noted that international human rights law has developed largely in the context of criminal prosecutions, but that the standards are similar in domestic tort law and could be applied to ATCA defendants. Accordingly, the court borrowed from statutes and decisions by the International Criminal Tribunal for the former Yugoslavia and for Rwanda, where the tribunals defined the *actus reus* and *mens rea* necessary for prosecution of war criminals.[15] The requisite *actus reus* is "assisting" and "making a significant difference," but not necessarily doing or causing the violations themselves.[16] The necessary *mens rea* is actual or constructive awareness that the accomplice's acts would assist the perpetrator, although there is no requirement for any positive intent to commit the crime or even awareness of the precise crime the perpetrator intends to commit.[17] The Court noted with approval one tribunal's summary of the standard as "knowing practical assistance, encouragement, or moral support, which has a substantial effect on the perpetration of the crime"[18] The court found an analogy in the Restatement (Second) of Torts § 876 (1979), which imposes liability on one who "knows that the other's conduct constitutes a breach of duty and *gives substantial assistance or encouragement* to the other . . .." (emphasis in original).[19] The court concluded by summarizing the standard for ATCA cases as follows:

"Accordingly, we may impose aiding and abetting liability for knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime, leaving the question whether such liability should also be imposed for moral support which has the required substantial effect to another day."[20]

Applying the standard to the Myanmar facts, the court found that Unocal could be held liable based on the alleged agreement between the Myanmar government and its state-owned oil company, because Unocal's foreign affiliate was a party to the joint venture.[21] Plaintiffs had sufficiently plead that Unocal's acts provided practical assistance or encouragement that had a substantial effect on the crime of forced labor used to construct the infrastructure along the pipeline.[22] The assistance included hiring the military to provide security in exchange for money or food, and use of photos, surveys, and maps during meetings to show where the facilities and security were needed.[23] The requisite mental state was established by evidence of Unocal's knowledge of a history of human rights abuses by the Myanmar government and knowledge that forced labor was being used.[24] The court noted that Unocal had used a consultant who had identified the regimes propensity to commit human rights abuses. The court also held that Unocal could be liable for murder and rape that took place in connection with the forced labor, but not torture.[25]

The standard for aiding and abetting is so amorphous, that this case has sent a chilling message to the international business community. The Ninth Circuit has agreed to hear the case en banc,[26] so it remains to be seen whether the decision will stand.

On the heels of *Unocal* came a similar opinion from the Southern District of New York, holding that a Canadian company could be sued in the U.S. for human rights activities of a host country, also in connection with oil and gas exploration activities.[27] In *Presbyterian Church of Sudan v. Talisman Energy*, a class action was filed on behalf of cur-

rent and former residents of the Republic of Sudan, alleging that the company had aided and abetted acts of torture, enslavement, war crimes, and genocide. Applying similar concepts of vicarious liability, the court found that the plaintiffs had alleged sufficient facts to sustain a claim.[28] Specifically, plaintiffs claimed that, either directly or as a successor in interest, Talisman knew of ethnic cleansing, supplied vehicles, and provided basic utilities and infrastructure such as roads and an airfield. According to the court, the exploration and extraction activities in Sudan fueled the war on civilians. The court denied motions for dismissal on grounds of comity and *forum non conveniens*, and the Act of State and Political Question doctrines.

Suits based on aiding and abetting theories have recently been filed against a number of other companies involved in oil and gas exploration activities, including Occidental Petroleum (massacre in Santo Domingo, Colombia), ExxonMobil (Indonesia), ChevronTexaco (Nigeria), and Royal Dutch Shell (Nigeria).[29] Other industries have been targeted as well: Coca Cola (Columbian bottling plant), Rio Tinto (mines in Papua New Guinea), Drummond Company (mines in Columbia),[30] Pfizer (experimental drugs tested in Nigeria), clothing retailers including Nordstrom, the Gap, etc. (sweatshops in North Marshall Islands and elsewhere). Twenty banks and corporations were recently sued in New York by plaintiffs seeking reparations for apartheid in South Africa prior to 1994.[31]

These decisions, if upheld, have far-reaching implications for companies doing business around the globe. Although there are some limiting principles articulated in the cases, the potential liability for the acts of others, including foreign governments, is enormous. Aside from the adverse publicity and cost of defense, damages under the ATCA are potentially significant. Although most cases against large corporations have not yet progressed to the point of actual judgment, there are precedents for large awards in cases filed against government actors (although it is unknown whether any were collectible):

§ *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 259, 267-68 (S.D.N.Y. 2002) (court awarded $2.5 million compensatory; $5M punitive damages for members of opposition party plus $1M/$5M for torture of each plaintiff prior to death in connection with torture and extrajudicial killings in Zimbabwe under ATCA and Torture Victim Protection Act).

§ *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (awarded compensatory damages including $10M compensatory and $25M in punitive damages to each victim for torture, cruel and inhumane treatment, arbitrary detention, violations of the law of war, and crimes against humanity under ATCA and TVPA (also tort claims under Ga. law)).

§ *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. April 9, 1996) (compensatory damages including $500,000 in pain and suffering and $1,000,000 in punitive damages for each victim).

§ *Xuncax v. Gramajo*, 886 F. Supp. 2d. 162 (D. Mass. 1995) ($3,000,000 to one victim; but declining to award punitive damages because actions took place prior to enactment of Torture Victim Protection Act).

§ *Romagoza v. Garcia*, No. 99-8364CIV (S.D. Fla. July 23, 2002) (jury awarded $56.6 million ($14.6 million in compensatory damages; $40 million in punitive damages) against two former Salvadoran generals)

The Future of the ATCA and Implications for Multinational Corporations

For some time now the ATCA has been an important tool in the arsenal of human rights lawyers, but it has now begun to attract the interest of class action and other plaintiff's lawyers in the United States. The D.C. Circuit has been somewhat more hostile to a broad reading of the ATCA, and a number of other Circuits and the United States Supreme Court have yet to weigh in on the issue. It is possible that the scope of the Act will be narrowed through further interpretation or even legislation. However, in the meantime, the statute is gaining notoriety, and we are likely to see significantly more litigation in this area with the potential for large actual and punitive damage awards. Companies with international operations will be well-advised to carefully examine their agreements and relationships with a view toward this new potential exposure.

Endnotes

[1]28 U.S.C. §1350.

[2]*See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 n. 10 (2d Cir. 2000). Judge Friendly proclaimed that "[t]his old and little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act ..., no one seems to know whence it came." *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). However, at least one scholar has postulated that it has its roots in admiralty law. *Al Odah v. United States*, 321 F.3d 1134, 1148 (D. C. Cir. 2003) (Randolf, C.J., concurring) (*citing* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995)).

[3]In 1992, Congress re-affirmed the Filartiga court's view of national policy regarding torture when it passed the Torture Victims Protection Act, Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73. (now codified at 28 U.S.C. §1350 Note). That statute specifically provided a remedy for victims of "torture" and "extrajudicial killings" committed by individuals acting "under actual or apparent authority, or color of law, of any foreign nation."

[4]Id. at 1475.

[5]*Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

[6]Id. at 244.

[7]*Id.* at 239-40.

[8]*See* BRIG MALEK ADHEL v. U.S. 43 U.S. (2 How.) 210, 232, 11 L.Ed. 239 (1844).

[9]*Id.* at 239.

[10]*Id.* at 240.

[11]*Id.* at 240 (*citing* The Restatement (Third) of the Foreign Relations Law of the United States (1986), pt. II, introductory note, and §§ 402, 404, 702).

[12]__ F.3d __, 2002 WL 31063976 (9th Cir. 9/18/02) (opinion withdrawn pending rehearing en banc)

[13]The alleged violation, forced labor, is a modern variant of slavery, and therefore the law of nations attributes individual liability, and no state action is required. *Id.* at *10-11.

[14]*Id.*

[15]Id. at *12.

[16]Id.

[17]Id.

[18]Id. at 13 *(quoting Prosecutor v. Furundzija*, IT-95-17/1 T (Dec. 10, 1998).

[19]Id.

[20]Id. at *13.

[21]Id.

[22]Id.

[23]Id.

[24]Id.

[25]Id at *14.

[26]*John Doe I. v. Unocal Corp.*, __ F.3d __, 2003 WL 359787 (9th Cir. (Feb. 14, 2003))

[27]*Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

[28]Although it did reject a claim for confiscation of property without just compensation because that was not sufficiently universal to be considered international law.

[29]*Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88 (2d Cir. 2000).

[30]*Estate of Valmore Lacarno Rodriquez v. Drummond Company*, __ F. Supp.2d __, 2003 WL 1889330 (N.D. Ala. 4/4/03).

[31]World War II and Holocaust victims have also sought recovery against corporations that allegedly conspired with the Nazis or Japanese, but courts have dismissed them either on the basis that they were barred by peace treaties or limitations. *See Iwanowa v. Ford Motor Company*, 67 F. Supp.2d 424 (D. N.J. 1999) (barring claims of forced labor in factory during World War II; statute of limitations under ATCA had run on claims against parent corporation; postwar treaty and agreement tolled ten-year statute of limitations on ATCA claims against subsidiary until 1991, but were dismissed because individual claims had been resolved as part of reparations discussions between governments); *Mitsubishi Materials Corporation v. Superior Court*, 106 Cal. App. 4th 39, 130 Cal. Rptr. 2d 734 (2/6/03) (rejecting claims by surviving POW's from World War II under California Second World War Slave Labor Victim statute passed to facilitate claims against Japanese companies who benefited by their labor during World War II – barred by 1951 peace treaty).

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