

in this issue:

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An ongoing trial in the Northern District of Alabama may provide some needed guidance on the extent of corporations' liability for the conduct of foreign subsidiaries under the centuries-old Alien Tort Claims Act. The case, *Estate of Rodriguez v. Drummond Company, Inc.*, is set to determine whether Alabama mining company Drummond, Ltd. can be held liable under the Alien Tort Claims Act for the murders of three union leaders at its facility in Colombia.

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Corporate Liability for Human Rights Abuses Goes on Trial

By Eric A. Savage and Michael G. Congiu

The extent of corporate liability for alleged human rights abuses committed abroad under the Alien Tort Claims Act is currently being tested in the Northern District of Alabama. The plaintiffs in *Estate of Rodriguez v. Drummond Company, Inc.*, No. CV-02-0665-W (N.D. Ala. 2002), allege that Alabama-based mining company Drummond Ltd. ("Drummond") was complicit in the murders of three union leaders at a Drummond-owned coal mine in Colombia. After surviving first a motion to dismiss, and later a motion for summary judgment, the parties began trial on July 9, 2007, to determine whether Drummond aided and abetted the murders of three union leaders by Colombian paramilitaries. As discussed more fully below, the case presents a unique opportunity to test the extent of corporate liability under the Alien Tort Claims Act (ATCA), a federal statute originally passed in 1789, which provides a private right of action to aliens for violations of international law. Significantly, the *Drummond* case is the very first ATCA case to proceed to trial.

ATCA Background

First enacted as part of the Federal Judiciary Act, the ATCA provides original jurisdiction to the federal district courts for any civil action: (1) brought by an alien; (2) claiming damages sounding only in tort; and (3) resulting from a violation of international law.¹ Although the ATCA's original purpose is somewhat unclear, the conventional belief is that the statute was enacted to open the newly created federal court system to foreign nationals. The ATCA was not utilized

until approximately twenty-five years ago, when two Paraguayan nationals successfully utilized the ATCA to sue a former Paraguayan official for damages arising from the torture and murder of their son in Paraguay.²

Since then, similar cases have been brought against foreign officials alleging war crimes, genocide, murder, and other human rights abuses, but this trend has been controversial. There has been debate whether the ATCA provides relief for claims beyond those contemplated at the time of the statute's passage; namely: piracy, offenses against foreign ambassadors, and violations of safe conducts. There has also been significant debate whether ATCA claims, which typically involve evidence and witnesses residing in foreign countries, belong in American courts.

In June 2004, in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the United States Supreme Court confirmed that the ATCA provided a statutory right of action for aliens beyond those originally contemplated in 1789. The Court held that actionable violations under the ATCA must "rest on a norm of international character accepted by the civilized world," and must be "defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." Significantly, the *Sosa* Court expressly left open the question of private liability under the ATCA.

Hence, the issue of corporate liability under the ATCA remains almost completely unresolved. One of the most significant

¹ 28 U.S.C. § 1350 (2000).

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

hurdles to establishing corporate liability under the ATCA is the statute's state action requirement, which requires some measure of state-sponsored conduct. However, the state action requirement does have some exceptions. For example, acts such as genocide, war crimes, slavery, and forced labor may be alleged against private actors because their commission provokes a universal concern. Although the state action requirement and its exceptions have caused some to believe that private actors such as corporations are insulated from ATCA liability in the absence of the most egregious human rights abuses, case law suggests that corporations cannot rely exclusively on the state action requirement to insulate themselves from ATCA liability.

One of the most significant cases involving the extent of corporate liability under the ATCA is *John Doe I v. Unocal Corp.*, 395 F.3d 932, 954 (9th Cir. 2002). In that case, Myanmar villagers brought suit against Unocal for its alleged complicity in human rights abuses in connection with Unocal's pipeline project in Myanmar. The villagers brought suit under the ATCA, as well as under the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging that a Unocal subsidiary hired, directed, and was complicit in the Myanmar military's use of forced labor, murder, rape and torture in connection with Unocal's pipeline project.

The threshold issue in *Doe*, as in any other ATCA case, was whether the plaintiffs had sufficiently alleged a violation of international law. On this issue, the Ninth Circuit Court of Appeals held not only that forced labor constituted a violation of international law, but that forced labor is a modern variant of slavery that supports ATCA liability even in the absence of state action. In addition to recognizing a new violation of international law not subject to the state action requirement, the *Doe* court also held that plaintiffs' allegations of torture, rape and murder were actionable under the ATCA without the requirement of state action because they occurred "in furtherance of" a forced labor program. Accordingly, the Ninth Circuit held that there were genuine issues of material fact with respect to plaintiffs' allegations of forced labor, murder and rape, and the case was remanded to the district

court.

The *Doe* court also prescribed a standard for the district court to assess Unocal's conduct. Because Unocal's involvement in the alleged abuses was largely indirect – which is often typical of corporate involvement in ATCA cases – the Ninth Circuit adopted the international criminal law standard of "aiding and abetting." Although *Doe* was approved for rehearing in light of the Supreme Court's decision in *Sosa v. Alvarez-Machain* discussed above, the case was settled prior to rehearing and the judgment of the district court was vacated. The *Doe* case then, ultimately, was a missed opportunity for the Ninth Circuit to evaluate Unocal's conduct under this new standard and the Supreme Court's recent endorsement of the ATCA.

Since *Doe*, other federal courts have grappled with corporate liability under the ATCA, most notably in *Aldana v. Del Monte Fresh Produce N.A. Inc.*, 416 F.3d 1242 (11th Cir. 2005). In that case, the Eleventh Circuit held that the physical restraint and repeated death threats directed at union leaders in Guatemala by armed security forces constituted torture actionable under the ATCA. Significantly, the Eleventh Circuit denied to rehear the case *en banc* in June of 2006, and the Supreme Court denied certiorari in November, 2006. Both *Doe* and *Aldana* help to frame the potential significance of the *Drummond* decision for multinational employers.

The *Drummond* Case

Initially filed in 2002, the estates of murdered union leaders alleged that Drummond's management in Colombia hired paramilitary and military personnel to target union leaders for murder, and provided the death squads with financial and other support to eliminate the union from the Drummond plant.

The complaint alleged that during collective bargaining negotiations, two of the union's top leaders were pulled off a Drummond company bus by paramilitaries. The complaint alleged that the paramilitaries then shot one of the union leaders in the head, proclaiming that "these two have a problem with Drummond" to the remaining workers on the bus. The other leader was found dead later that day. Seven months later, a union president was pulled off a public bus only to be found

dead two days later showing signs of torture and gun shot wounds. Among other claims, plaintiffs asserted torture and extrajudicial killing claims under the ATCA.

The Defendants filed a motion to dismiss in 2004. The court not only denied defendants' motions as to the majority of plaintiffs' allegations, but also made some rather significant holdings.³ First, the court held that the paramilitaries had acted in violation of the laws of war so as obviate the need for state action. The court held that the murders constituted "war crimes" in connection with Colombia's long-standing civil war because the union leaders were not soldiers or otherwise active participants in the civil war. This holding reflects the relative ease with which the state-action requirement can be circumvented. Second, and perhaps even more significant, the court held that the denial of the fundamental right to associate and organize may be actionable under the ATCA as a violation of "universally recognized" international law. This holding reflects the reality that the universe of ATCA violations is expanding and that it may, at some point, be extended to cover union avoidance measures taken by multinational employers.

Plaintiffs later agreed to a voluntarily dismissal of their ATCA claims based on the denial of their rights to organize, and the court later granted defendants summary judgment with respect to several other plaintiffs' claims. Nonetheless, the issues of whether the union leaders' murders were "war crimes," as well as whether Drummond "aided and abetted" the murders are both currently on trial. This reality, in addition to the media attention that the trial has generated, reflects the *Drummond* court's unique opportunity to shed light on these issues. It appears as if the *Drummond* court may well pick up where the *Doe* court left off with respect to delineating the extent of ATCA corporate liability.

Looking Forward

The *Drummond* case presents a significant opportunity to clarify the extent to which corporations may be liable for human rights abuses committed abroad. It will be fascinating to watch how some of the complex legal issues inherent to ATCA cases will be dealt with during trial. It should also be interesting to see

³ See 256 F. Supp. 2d 1250.

how the court responds to post-trial motions, which will almost certainly follow.

The case should be watched closely by multinational employers with operations in the developing world to help shape company policy with entities chosen to administer foreign operations, as well as to shape policies regarding the degree of control or supervision a company should maintain over its foreign operations. The *Drummond* case, at the very least, highlights the potential perils of delegating control of foreign operations to foreign entities.

A related issue that may arise as ATCA jurisprudence develops may be whether employers operating in countries requiring its own military forces or particular contractors for security may be insulated from ATCA liability for conduct undertaken by those security forces. The extraterritorial application of federal antidiscrimination laws suggests that corporations required by law to enlist certain security forces would be protected from ATCA liability. Nevertheless, the resolution of this and the myriad other issues presented by the ATCA are far into the future.

It is clear that multinational employers should seek to avoid utilizing the services of entities or regimes with records of human rights violations. It is much less clear to what extent, if any, a corporation may be held liable for human rights abuses committed by associated entities or regimes. The *Drummond* case may provide multinational employers with some needed guidance on these issues.

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