

IS SECOND CIRCUIT RULING A “TALISMAN” AGAINST ALIEN TORT STATUTE SUITS?

by

Jonathan C. Drimmer

The Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, which allows aliens to sue in U.S. court for overseas violations of certain international laws, has rapidly grown to become a serious risk for multi-national corporations. Considering the vast threats it poses, the statute’s language is relatively cursory: “[t]he 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. . . .” After the First U.S. Congress passed the ATS as part of the Judiciary Act of 1789, the law lay dormant for almost 200 years. But after a Paraguayan invoked the law in a 1978 suit accusing a former Paraguayan official of torture,¹ plaintiffs filed hundreds of suits under the Act to seek redress for various alleged human rights violations committed across the globe.

Some 140 of these cases have been brought against corporate defendants, the vast majority being filed in the past decade. Typically, corporations are not accused of directly committing the alleged harms. Instead, plaintiffs normally seek to attribute liability to corporations based on the acts of third parties – usually government officials – under theories of secondary liability, most commonly aiding and abetting. However, courts have offered differing interpretations of aiding and abetting liability, creating a confused patchwork of standards and ultimately an unpredictable legal landscape for corporations.

In a recent decision in *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2nd Cir. 2009), the U.S. Court of Appeals for the Second Circuit added to the confusion companies face in construing the *mens rea* defendants must possess to be liable under the theory. In the trial court, the plaintiffs claimed that Talisman, via a consortium in which it had a stake, aided, abetted, and conspired with the Sudanese government’s commitment of war crimes, genocide, and crimes against humanity. *Presbyterian Church of Sudan v. Talisman Energy*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

The Second Circuit upheld the district court dismissal, ruling that aiding and abetting liability attaches only where plaintiffs can show that defendants act with the purpose of facilitating an underlying violation. That high burden will limit the ability of some plaintiffs to bring suit, but ultimately may not have a dramatic effect.

¹*Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980).

Jonathan C. Drimmer is a partner in the Washington office of the law firm Steptoe & Johnson LLP. Mr. Drimmer’s focuses on the extraterritorial application of U.S. laws and is a recognized authority on the Alien Tort Statute.

Background of the Talisman Case. Talisman, a Canadian energy company, became invested in Sudan in 1998 when its subsidiary purchased a company that was part of a consortium with three state-owned oil companies. The consortium, which focused on petroleum development in Southern Sudan, operated through an entity called the Greater Nile Petroleum Operating Company Limited (“GNPOC”).

GNPOC’s exploration and production activities occurred during a fierce civil war that had long engulfed Southern Sudan, with rebel groups fighting each other and the Sudanese Government. In this difficult environment, GNPOC received security support from the government, which tasked some 7,000 personnel from its intelligence, military, and police services to protect GNPOC’s operations.

GNPOC in turn provided logistical support to these government units pursuant to a set of guidelines that distinguished between the government’s defense of the petroleum facilities and government military operations against rebel groups (in which GNPOC wanted no involvement). Under the guidelines, GNPOC agreed to share communications equipment, maintain accommodations for government personnel, repair vehicles, and provide emergency medical treatment. Proscribed activities included allowing the military to fill fuel barrels and use GNPOC vehicles.

The consortium also built certain infrastructure that the government used. GNPOC maintained two airstrips in its concession area, for instance, which, despite Talisman’s expressed unease, government aircraft used for defensive and offensive purposes. Though GNPOC and the military had separate fuel balance sheets, the consortium would refuel Sudanese military aircraft when necessary. GNPOC also built roads linking its oil facilities to military bases. In addition, the Sudanese military created “buffer zones” to establish secure perimeters surrounding the consortium’s oil facilities, which caused Sudanese forces to displace the population living there. Similar displacement occurred following GNPOC’s designation of additional areas for oil exploration. Throughout this period, the government allegedly committed widespread atrocities, including rape, murder, and torture against the local civilian population. The plaintiffs alleged that GNPOC’s activities, and the royalties it paid to the government, aided and abetted Sudan’s international human rights violations.

The Second Circuit’s Definition of the Aiding and Abetting Mens Rea Standard. The central question before the appeals court involved the legal standards for aiding and abetting and conspiracy liability. The Second Circuit, rejecting the plaintiffs’ arguments, ruled that the appropriate definition for secondary liability offenses under the ATS derives from international law. International law creates accessorial liability, held the court, where “the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.” *Talisman*, 544 F.3d at 259. The court similarly held that conspiracy liability requires a “criminal intention to participate in a common criminal design.” *Id.* at 260. Accordingly, for aiding and abetting and conspiracy, the court determined that liability exists only where a defendant acts with the purpose of furthering the underlying crime, as acting with mere knowledge of the underlying misdeed is insufficient.

The Second Circuit Finds Talisman Lacked the Requisite Purpose. Applying those standards, the Second Circuit noted that none of Talisman’s actions cited by the plaintiffs – providing logistical support, building roads, maintaining airstrips and aircraft, identifying areas for future petroleum extraction, allowing the creation of buffer zones, and paying revenues to the Government – were inherently criminal or wrongful. Instead, the court agreed with the district court that “[t]he activities which the plaintiffs identify as assisting the Government in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry.” *Id.* at 261. The allegations, the court noted, amounted to a claim that Talisman should simply not have invested in the country.

Regarding the claim that Talisman built and maintained roads and airstrips knowing the Sudanese military would use them to launch attacks on civilians, the court noted that the roads and airstrips served a dual purpose. Primarily, they were used to bring supplies and personnel to the oil facilities, and Talisman and GNPOC “had a legitimate need to rely on the military for defense” given rebel threats and attacks regardless of its potential dual

use. That does not, the court held, automatically equate with purposely aiding the commission of atrocities. *Id.* at 262.

As for displacing local populations, the court noted that under international law a government may regulate its land and resources and rightfully remove people from land necessary for security or development. Though the Sudanese government may have committed human rights violations in the process, the plaintiffs offered little to show that Talisman purposely supported such proscribed acts. *Id.* at 263-64. The court also rejected the plaintiffs' arguments that royalties GNPOC paid to the Sudanese government were meant to fund human rights abuses, as the plaintiffs offered no clear supporting evidence.

The court concluded its opinion by recognizing the evidence that "southern Sudanese were subjected to attacks by the Government, that those attacks facilitated the oil enterprise, and that the Government's stream of oil revenue enhanced the military capabilities used to persecute its enemies." Yet if knowledge accompanied by such commercial activities as resource development could suffice for liability, "the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts." This was not the role of private plaintiffs, but instead was "properly reserved to governments and multinational organizations." *Id.* at 264. Hence, the claims against Talisman could not stand.

Why Talisman is No Talisman Against ATS Claims. Some have argued that *Talisman's* "purpose" test will have a dramatic impact on corporate ATS cases, even asserting that it heralds "the death knell" for ATS corporate liability claims.² That seems far from clear, however.

No doubt *Talisman* will preclude some suits from proceeding. Some 30% of all corporate ATS cases to date have been brought in the Second Circuit, more than any other, and in most, plaintiffs seek to establish liability at least in part on aiding and abetting grounds. The "purpose" test that now applies throughout that circuit creates a high standard not easily met. Corporations as a rule pursue profit and not oppression, and rare will be the internal memo or employee testimony detailing corporate plans to contribute to cognizable ATS torts. Yet there are at least three reasons why the impact of the court's ruling may be tempered.

1. The Other Circuits. While the *Talisman* court's "purpose" standard sets a high bar for proving accessorial ATS violations, it does so against a fractured legal landscape. A few courts have concluded that corporate defendants in ATS cases cannot be liable under an aiding and abetting theory, citing the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181-82 (1994), which held that aiding and abetting liability should be permitted in civil cases only where Congress expressly authorizes it. *See, e.g., Doe v. Exxon Mobil Corp.*, 393 F. Supp.2d 20, 24 (D.D.C. 2005). Some judges have stated that aiding and abetting liability is permissible, but should be defined by domestic standards, *see, e.g., Doe v. Unocal*, 395 F.2d 932, 965 (9th Cir. 2002) (Reinhardt, J., concurring), *vacated*, 403 F.3d 708 (9th Cir. 2005); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J, concurring), while others have issued rulings without indicating whether domestic or international definitions apply. *See, e.g., Burnett v. Al Baraka Inv. & Dev. Co.*, 274 F. Supp.2d 86, 100 (D.D.C. 2003).

Among other circuit courts that have construed the issue in the ATS context, at least two – the Ninth Circuit (20% of corporate ATS cases) and the Eleventh Circuit (10%), both popular venues for corporate ATS lawsuits – directly disagree with *Talisman*. Though those circuits concur with *Talisman* that aiding and abetting liability is available and that international definitions apply, they permit aiding and abetting liability where defendants are aware that their conduct will facilitate a harm; they do not require a showing of purpose or intent. *See, e.g., Unocal*, 395 F.3d at 947-51; *Barrueto v. Fernandez Larios*, 205 F. Supp.2d 1325, 1333 (S.D. Fla. 2002), *aff'd*, 402 F.3d 1148, 1161 (11th Cir. 2005). Accordingly, while *Talisman* may govern in the Second Circuit, others set the bar lower.

²<http://opiniojuris.org/2009/10/02/second-circuit-adopts-purpose-test-for-ats-corporate-liability/>

2. Other Secondary Liability Theories are Still in Play. Even in the Second Circuit, while plaintiffs commonly rely on aiding and abetting theories, they also rely on such other theories as alter-ego, agency, ratification, joint venture, or *respondeat superior*. Those theories may capture activities that fall short of intentionally facilitating an ATS tort.

Chowdhury v. WorldTel Bangladesh Holding, Ltd., 588 F. Supp. 2d 375 (E.D.N.Y. 2008), underscores that point. The plaintiff, Chowdhury, alleged that a business rival helped orchestrate his arrest and torture by paramilitary police, and sought relief under the ATS. The trial court dismissed Chowdhury’s complaint, ruling in part that he failed to allege sufficient facts to establish liability on aiding and abetting grounds. Chowdhury amended his complaint, claiming that the police had acted as the defendant’s agents, and the defendant ratified Chowdhury’s mistreatment in both failing to prevent and by benefiting from it. The case was tried on these agency and ratification theories, resulting in a multi-million dollar jury verdict – the first plaintiff’s jury verdict in a corporate ATS case.

Another example is *Doe v. Exxon Mobil Corporation*, 573 F. Supp. 2d 16 (D.D.C. 2008), involving the Indonesian government’s provision of security services to Exxon Mobil Oil Indonesia (EMOI). The plaintiffs sought relief, in part, under a *respondeat superior* theory, requiring a showing that the master had the “right to control and direct the servant in the performance and manner [of] the work” to be done, and that the alleged wrongs occurred within the scope of the employment. *Id.* at 24, 27. Because the plaintiffs presented evidence that EMOI paid Indonesian security forces guarding its site, some of which were accused of atrocities, and directed them to secure oil exploration sites, the court allowed the claim to go forward. Thus, notwithstanding the *mens rea* for aiding and abetting, other theories of liability are commonly alleged.

3. The Purpose/Knowledge Distinction is Not Always So Clear. From an evidentiary standpoint, the distinction between knowledge and purpose can be thin. Knowledge generally refers to actual or constructive awareness of a crime. Purpose normally requires that the defendant desire the offense to occur.

Typically, plaintiffs seek to establish purpose inferentially, through circumstantial evidence showing that a defendant acted with knowledge of an anticipatable result. As the *Talisman* court itself noted, “intent must often be demonstrated by the circumstances, and there may well be an [ATS] case in which a genuine issue of fact as to a defendant’s intent to aid and abet the principal could be inferred....” *Talisman*, 544 F.3d at 264. As other commentators also note, it is not fully clear whether “purpose” means “sole purpose, primary purpose, or simply purpose as inferred from knowledge of likely consequences.”³ Accordingly, if plaintiffs have sufficient evidence to permit a jury to infer a *mens rea* of knowledge, they may have sufficient evidence to satisfy the purpose test.

That is particularly true where the allegations involve more than just passive support and the construction of infrastructure for a perceived hostile regime, as in *Talisman*. In *Doe v. Unocal*, for instance, while the court employed a knowledge standard, the underlying accusations – that Unocal made payments to the Burmese military knowing that they would “would assist or encourage the ... Military to subject Plaintiffs to forced labor,” *Unocal*, 395 F.3d at 987 – certainly sounds like it would meet the *Talisman* purpose test. In short, while *Talisman* may help clear the field of cases filed against corporations merely for doing business in countries with repressive governments, in other cases, the practical difference between knowledge and purpose may not be vast.

Conclusion. *Talisman*’s purpose test creates a higher barrier for plaintiffs pursuing ATS suits than the knowledge test in use elsewhere, and it will limit corporate ATS cases to some extent. Yet the holding is confined to the Second Circuit, plaintiffs have found success under other theories of liability, and evidence sufficient to show knowledge can sometimes create an inference of intent. So while *Talisman* will have an impact, corporations are not yet out of the ATS woods.

³Chimene Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 88 (2008).