

## LexisNexis® Emerging Issues Analysis

**Jonathan Drimmer and Michael Lieberman on  
Talisman Energy and the Alien Tort Statute: The Continuing  
Threat of Secondary Liability**

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**Introduction.** The Alien Tort Statute, [28 U.S.C. § 1350](#) (ATS), which allows aliens to sue in U.S. federal courts for certain violations of international law, has rapidly grown to become a genuine threat to multinational corporations in their overseas operations. Courts have now had the opportunity to address some 150 cases brought against corporate defendants under the ATS, most of which seek to hold corporations liable based on the acts of third parties – such as government officials – under theories of secondary liability. Yet courts have offered differing interpretations of these theories, creating a confusing patchwork of legal standards and, ultimately, an unpredictable legal landscape.

In an important 2009 decision, *Presbyterian Church of Sudan v. Talisman Energy*, [582 F.3d 244](#) (2d Cir. 2009), the U.S. Court of Appeals for the Second Circuit sought to clarify some of this confusion in determining the *mens rea* standard for certain forms of secondary liability, including aiding and abetting and conspiracy. It held that for a corporation to be liable under the ATS, plaintiffs must show the defendants purposely acted to help the principal commit a human rights violation. A corporation's mere knowledge that its actions contributed to the principal's commission of the offense, held the court, is insufficient.

Commentators widely have claimed, with some merit, that the purpose standard in *Talisman* sets a high bar for proving accessorial ATS violations. Yet the true practical effect of this heightened *mens rea* threshold remains far from clear. While *Talisman* may initially appear to resolve an area of uncertainty in ATS jurisprudence, two subsequent cases, *Abecassis v. Wyatt*, [2010 U.S. Dist. LEXIS 32731](#) (S.D. Tex. Mar. 31, 2010), and *Lev v. Arab Bank, PLC*, [2010 U.S. Dist. LEXIS 16887](#) (E.D.N.Y. Jan 29, 2010), highlight the enduring enigmatic nature of the purpose standard. Together, even in light of *Talisman*, they show that corporate compliance regimes, due diligence, and strict monitoring of overseas operations in sensitive regions remain as important as ever.

**Origins and Development of the Alien Tort Statute.** The ATS is a jurisdictional statute that allows aliens to sue defendants in U.S. court for damages caused by “violations of the law of nations.” Originally passed by the first Congress in 1789, the statute only came to life some 30 years ago, with the seminal decision in *Filartiga v. Pena-Irala*, [630 F.2d 876](#) (2d Cir. 1980). In recognizing that human rights abuses qualified as interna-

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tional law violations for which foreigners could sue in U.S. court under the ATS, the Second Circuit opened the door to a generation of cases seeking redress for a wide range of damages suffered by plaintiffs situated across the globe.

In the past decade and a half, plaintiffs have regularly employed the ATS to file suit against corporate defendants accused of committing, or complicity in committing, wrongs ranging from genocide to forced labor to environmental damage. See, e.g., *Doe v. Unocal Corp.*, [963 F. Supp. 880](#) (C.D. Cal. 1997), *aff'd*, [395 F.3d 932](#) (9th Cir. 2002), *vacated* [395 F.3d 978](#) (9th Cir. 2003) (murder, torture, forced displacement in Burma); *Aguinda v. Texaco, Inc.*, [850 F. Supp. 282](#) (S.D.N.Y. 1994) (environmental damage in Ecuador and Peru). These suits have resulted in settlements and damage awards ranging up to \$80 million, *Licea v. Curacao Drydock Co., Inc.*, [584 F. Supp.2d 1355](#) (S.D. Fla. 2008), while individual defendants have faced damages up to \$140 million. *Mehinovic v. Vuckovic*, [198 F. Supp.2d 1322](#) (N.D. Ga. 2002). The obscure provenance and terse wording of the statute, together with the unfamiliar nature of international law to U.S. courts, have created a confusing medley of interpretations and applications of the ATS.

The Supreme Court waded into the thicket in 2004 with its decision in *Sosa v. Alvarez-Machain*, [542 U.S. 692](#) (2004). *Sosa* upheld the ATS as a vehicle for seeking reparations for damages wrought by human rights violations. At the same time, it cautioned lower courts to limit liability to “violations...of international law...with definite content and acceptance among civilized nations [equivalent to] the historical paradigms familiar when § 1350 was enacted.” *Abecassis*, [2010 U.S. Dist. LEXIS 32731 at 24](#) (quoting *Sosa*, [542 U.S. at 729-730](#)). In other words, the underlying offense for which plaintiffs seek compensation must be universally followed and highly crystallized to serve as a cause of action under the ATS. However, *Sosa* provided little guidance on circumstances in which corporations may be sued for complicity in such offenses.

Because corporate defendants in ATS cases are typically not accused of committing human rights violations themselves, the question of secondary liability – most commonly aiding and abetting – has become the greatest concern for corporate actors. While there has been little controversy to date regarding the *actus reus* standard for ATS liability under an aiding and abetting theory, the question of the required mental state remains contested: Can a corporation be liable if it merely knows that its act will facilitate the commission of an international crime, or must defendants purposely assist the principal in committing it? See Doug Cassell, *Corporate Aiding and Abetting Human Rights Violations: Confusion in the Courts*, 6 NW. UNIV. J. INT’L HUM. R. 304, 308 (2008). In its October 2009 *Talisman* ruling, the Second Circuit gave its view. The *Talisman* Case: Establish-

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ment of the Purpose Standard. In *Talisman*, the Second Circuit affirmed a district court's dismissal of a class action suit brought on behalf of Sudanese plaintiffs alleging that a multinational consortium – including a Talisman subsidiary – assisted the Sudanese military's commission of war crimes, crimes against humanity, and genocide. Such offenses, the district court and others have held, constitute cognizable claims under the ATS. The central question in *Talisman*, however, involved the *mens rea* standard for showing that a defendant aided and abetted or conspired with the principal to commit such offenses.

**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 called Greater Nile Petroleum Operating Company (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 extensive security support from the government.

In exchange, GNPOC provided certain logistical support to government forces operating out of a facility it operated in southern Sudan. It provided this support pursuant to a set of guidelines that distinguished between the government's defense of the petroleum facilities and government military operations against rebel groups, a campaign in which the guidelines sought to prevent GNPOC involvement.

GNPOC maintained two airstrips in its concession area, which government aircraft used for defensive and offensive purposes. The GNPOC and the military had separate fuel balance sheets, but the consortium would sometimes refuel Sudanese military aircraft. GNPOC also built roads linking its oil facilities to military bases, and allowed the Sudanese military to create "buffer zones" establishing secure perimeters surrounding the consortium's oil facilities. Clearing these zones caused Sudanese forces to displace the preexisting resident population.

Throughout this period, the government allegedly committed widespread atrocities, including rape, murder, torture and forced displacement against the local civilian population. The plaintiffs alleged that GNPOC's logistical assistance, and the royalties it paid to the government, aided and abetted Sudan's international human rights violations.

**The Second Circuit's Establishment of the Purpose Standard.** In considering the plaintiffs' claims, the Second Circuit addressed the proper source of law. Drawing upon

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Sosa and Judge Katzmann's concurrence in *Khulumani v. Barclay National Bank Ltd.*, [504 F.3d 254](#) (2d Cir. 2007), involving 10 consolidated class actions against companies who had done business in Apartheid South Africa, the court held that the appropriate definition of secondary liability offenses under the ATS derive from international law. In doing so, the court declined to adopt the domestic knowledge standard found in the Restatement (Second) of Torts § 876(b), which states that aiding and abetting liability arises where a defendant "knows that the other's conduct constitutes a breach of duty and gives substantial assistance and encouragement to the other." The court found such a notion overly broad.

Upon surveying international law sources for the relevant *mens rea* standard necessary for aiding and abetting liability, the court held that the *mens rea* requirement is met 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*, [582 F.3d at 259](#) (emphasis added). The court similarly held that conspiracy liability requires a "criminal intention to participate in a common criminal design," *Id.* [at 260](#), thereby demanding the same *mens rea* as for aiding and abetting.

Thus, for aiding and abetting and conspiracy, the court held that liability exists only where a defendant acts with the purpose of furthering the underlying crime; mere knowledge, it found, was insufficient.

**The Second Circuit Finds Talisman Lacked the Requisite Purpose.** The court then examined the evidence the plaintiffs offered to show that the GNPOC, including Talisman, helped the Sudanese military commit human rights violations against civilians living in rebel-held territory and in the area of oil operations.<sup>1</sup>

Applying its new purpose standard, the Second Circuit observed that none of the actions plaintiff's attributed to Talisman – 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

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1. In doing so, the court assumed without deciding whether corporations (as opposed to individuals) can be liable for such offenses under international law.

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humanity and war crimes generally accompany any natural resources development business or the creation of any industry.” *Id.* at 261. Though the Sudanese government may have committed human rights violations by displacing local populations during the process of creating buffer zones for the consortium, the plaintiffs offered virtually no evidence that Talisman purposely supported these proscribed acts as part of its general cooperation with the government for oil exploration purposes.

The court also noted that much of the support Talisman and GNPOC provided to the Sudanese government, including the development and maintenance of roads and air-strips, served a dual function. Primarily, they were used to bring supplies and personnel to the oil facilities. At the same time, Talisman and GNPOC “had a legitimate need to rely on the military for defense” given rebel attacks on the installation. *Id.* at 262. Giving assistance to the Sudanese military under such circumstances could not be equated with purposely aiding any atrocities committed in the process, found the court.

Because GNPOC’s actions were not “inherently criminal or wrongful,” and plaintiffs did not produce evidence showing that GNPOC purposefully sought to commit human rights violations, plaintiffs could not show that Talisman met the aiding and abetting purpose requirement it articulated.

**Why Purpose Is No Panacea: Assessing the Impact of the Talisman Decision.**

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. Roger Alford, *Second Circuit Adopts Purpose Test for ATS Corporate Liability*, OPINIO JURIS, Oct. 2, 2009, <http://opiniojuris.org/2009/10/02/second-circuit-adopts-purpose-test-for-ats-corporate-liability>. No doubt *Talisman* will hinder some suits from proceeding. Some 30% of all corporate ATS cases to date have been brought in the Second Circuit, 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 that, on its face, does not appear easy to meet. Corporations as a rule act from profit motives, and it seems unlikely that most cases will include internal memos or emails, or employee testimony, detailing corporate plans to contribute to human rights abuses. Yet, there are at least two reasons why the impact of the court’s ruling may be tempered.

**The ATS Remains Fractured While the Knowledge Standard Lives On.** Notwithstanding the Second Circuit’s attempt at clarification, the ATS remains subject to a dizzying array of interpretations across the various circuits. Some courts have found that

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aiding and abetting theories are precluded under the ATS because Congress must specifically authorize such a theory, and has not done so under the act. See *Doe v. Exxon Mobil Corp.*, [393 F. Supp.2d 20, 24](#) (D.D.C. 2005); see also *Central Bank of Denver v. First Interstate Bank of Denver*, [511 U.S. 164, 181-82](#) (1994). Other jurists have asserted that aiding and abetting theories are viable under the ATS, but that they should turn on domestic standards. See, e.g., *Doe v. Unocal*, [395 F.3d 932, 965](#) (9th Cir. 2002) (Reinhardt, J., concurring), *vacated* [395 F.3d 978](#) (9th Cir. 2003). Some courts have simply sidestepped the issue. See, e.g., *Burnett v. Al Baraka Inv. & Dev. Co.*, [274 F. Supp.2d 86, 100](#) (D.D.C. 2003).

In addition, two other major circuits, the Ninth Circuit (which sees 20 percent of corporate ATS cases) and the Eleventh Circuit (10 percent), have not accepted the purpose standard. They agree that the ATS allows for aiding and abetting liability and that international definitions apply. Yet these circuits seem to employ a knowledge standard instead. Under their rulings, plaintiffs must show that defendants knew their conduct would facilitate harm, and need not prove that they intended to achieve the object of the principals' misdeeds. 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).

**The Line Between Purpose and Knowledge is Not Always Clear.** In addition to splits among the circuits with regard to the knowledge standard, the *Talisman* decision itself leaves the exact distinction between knowledge and purpose unresolved. Knowledge generally means the actual or constructive awareness of a crime, while purpose normally requires that the defendant desire the crime to occur. From an evidentiary standpoint, the line between the two can be thin.

Typically, plaintiffs seek to establish purpose inferentially through circumstantial evidence showing that a defendant acted with knowledge of a foreseeable result. As the Second Circuit itself noted in *Talisman*, “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*, [582 F.3d at 264](#).

Commentators have also observed that the concept of purpose itself may be vague. It remains unclear, for instance, whether “purpose” means “sole purpose, primary purpose, or simply purpose as inferred from knowledge of likely consequences.” Chimene Keitner, *Conceptualizing Complicity in Alien Tort Cases*, [60 Hastings L.J. 61, 88](#) (2008).

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Accordingly, if plaintiffs have sufficient evidence to permit a jury to infer a *mens rea* of knowledge, they may also have evidence sufficient to satisfy the purpose test. See Cassell, *supra*, at 312.

That there is a lack of clear differentiation between knowledge and purpose has been born out in two subsequent cases utilizing the *Talisman* purpose standard, *Lev v. Arab Bank* and *Abecassis v. Wyatt*, both of which address the secondary liability of corporate defendants under the ATS. Together they suggest that when no explicit evidence of intent exists, interpretations of the purpose standard may be less of a break from the knowledge standard than has been thought.

**Initial Responses to *Talisman*: The *Lev* and *Abecassis* Cases.** In *Lev v. Arab Bank*, a January 2010 case in the Eastern District of New York, the court examined the latest in a series of ATS cases alleging that the Arab Bank aided and abetted various Palestinian militant organizations in a “campaign of terror, genocide and crimes against humanity” against Israeli civilians. See *Almog v. Arab Bank PLC*, [471 F. Supp.2d 257, 261](#) (E.D.N.Y. 2007). Specifically, the plaintiffs alleged that the Arab Bank was a key part of a formalized system of financing that Palestinian terrorist, including Hamas, used to plan, fund, and carry out suicide bombings and other attacks. According to the plaintiffs, the Arab Bank maintained bank accounts for Hamas and other terrorist organizations through which they could hold funds obtained from the public in support of their terrorist activities. The Arab Bank did so, said the court, despite the illegality of providing such services.

Additionally, the plaintiffs alleged that Arab Bank oversaw the system through which financial benefits were provided to Hamas suicide bombers and imprisoned terrorists by providing their families with “death benefits” to compensate them for the loss of their family members. *Lev*, [2010 U.S. Dist. LEXIS 16887 at 2](#).

In considering the potential liability of the Arab Bank under the ATS, the court factually distinguished *Talisman*, concluding it was reasonable to draw the inference that the Arab Bank was not acting merely as “the indifferent provider of routine banking services,” and may have purposefully aided the terrorist organizations in violation of international law. *Id.* While the Second Circuit noted in *Talisman* that *Talisman* and its consortium were working with the Sudanese government and likely knew about the human rights violations occurring tangential to their operations, in *Lev* the Arab Bank had worked directly with terrorist organizations and knowingly advanced the terrorists’ illegal

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goals; a relationship, the court noted, could be construed to create implied intentional conduct.

Although the court's analysis was brief, it did elaborate on two critical elements of the purpose standard. First, *Lev* followed the Second Circuit's recognition in *Talisman* that a finding of purpose "must often be demonstrated by the circumstances" and "a defendant's intent to aid and abet the principal [can] be inferred from sufficient facts and circumstances." *Id.* Second, it clarified that prior decisions involving Arab Bank, employing a "knowing and intentional participation" standard, were not inconsistent with the instant ruling. "[K]nowing and intentional conduct," the court ruled, "is synonymous with purposeful conduct," a conclusion "implicit in *Talisman* itself." *Id.* Such a characterization, allowing for purpose to be inferred from knowledge and intentional conduct, certainly appears to soften the potential impact *Talisman*'s purpose standard.

The analysis of Arab Bank's actions suggests that the evidence required of plaintiffs in bringing a claim under the ATS may not change dramatically, at least to survive summary judgment and dismissal motions. As the court acknowledged, even under the knowledge standard, it "has never found that the ATS allegations in [successful] related cases have fallen short of purposefulness." *Id.*

Another federal district court reached a different outcome in a March 2010 decision in the Southern District of Texas, *Abecassis v. Wyatt*. Similar to *Lev*, *Abecassis* involved Palestinian terrorist attacks on Israeli civilians. The defendants included Wyatt, a Texas oil trader, and several companies involved in oil purchasing and distribution. The plaintiffs, family members of those wounded and killed in the terrorists attacks, alleged that the defendants purchased oil from Iraq – either directly from Saddam Hussein's government or from third parties who had purchased the oil from Hussein – using payments that included illegal kickbacks to Hussein. According to the plaintiffs, these kickbacks were held in accounts used to make reward payments to the families of Palestinian suicide bombers and others killed while engaging in terrorist activity. Given this financial relationship, the plaintiffs argued that Wyatt and others violated international law by aiding and abetting and conspiring to commit acts of genocide and crimes against humanity.

As in *Lev*, the court in *Abecassis* followed *Talisman*'s determination that international law governed secondary liability, and that the standard for imposing liability required an individual to "purposefully aid and abet a violation of international law." *Abecassis*, [2010 U.S. Dist. LEXIS 32731 at 25](#). The court determined that the defendants' attenuated connections to the terrorist attacks and bombings could not suffice to

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show any level of intent, and held that the plaintiffs could not “come close to alleging facts, either direct or circumstantial, that would establish that any of the defendants *intended* to facilitate or encourage terrorist attacks in Israel.” [Id. at 28](#). Going further, the court in *Abecassis* suggested that such a distanced relationship would also fail to meet a knowledge standard, as there were “no nonconclusory allegations that any defendants knew that kickbacks paid...were being used to fund terrorist attacks in Israel.” [Id. at 25](#).

As in *Talisman*, the court found the *Abecassis* defendants acted to advance legitimate business purposes, taking actions that were solely the result of their efforts to acquire Iraqi oil to sell. While the defendants’ payments to Hussein may have been injudicious, like the royalties GNPOC paid to Sudan, they did not establish that defendants sought to commit human rights violations.

Because the plaintiffs in *Abecassis* failed to allege facts sufficient to meet even the knowledge standard, *Abecassis* avoided parsing a distinction between knowledge and purpose. However, the opinion of the court does appear to parallel much of the commentary set forth in *Lev*, including support for an inferential analysis of purpose and intent. Nor does it explicitly disagree with *Lev*’s assertion that knowing and purposeful conduct may at times function together. Future cases with more persuasive factual allegations may better serve to clarify the court’s stance on these issues.

**Conclusion.** Against the complex backdrop of jurisprudence on the ATS, the Second Circuit settled two major issues. First, it held that international law provides the sole basis for establishing the existence and scope of secondary liability claims. The source of law for discovering the secondary liability standard, at least in the Second Circuit, is now clear. Second, it established the standard for finding such liability in the most pressing category of claims, aiding and abetting cases, settling on a purpose test for the *mens rea* element.

Compared to the knowledge test, the Second Circuit’s adoption of the purpose standard certainly provides some relief for corporations operating in sensitive areas. The requirement that a defendant intentionally facilitate an international law violation, such as torture or extrajudicial execution, on its face would seem to help put most corporations largely out of reach.

Yet at the same time, the court specifically retained the prospect of inferring purpose from circumstances, a formulation that, as *Lev* and *Abecassis* recognize, may involve

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little more than evidence of knowledge plus intentional actions. It is also clear that an inference of intent is all the more likely where plaintiffs can show more than mere acquiescence, but regular engagement with the principal perpetrators, as in *Lev*. Where the linkages between the principal and secondary actors are more direct and the likelihood of knowledge greater, the cases appear to suggest that an inference of intent grows accordingly in strength.

Consequently, the safe harbor *Talisman's* purpose standard seems to provide is far from certain. As courts embark upon the fact-specific inquiries the purpose threshold requires, the difference between it and the knowledge standard may become considerably less distinct.

For companies and in-house counsel, that of course necessitates extra careful planning and closes scrutiny of overseas operations to avoid potential ATS and other human rights lawsuits. Specifically, that includes meaningful stakeholder engagement, a suite of related corporate policies and controls focusing on human rights-related issues and norms, and an effective corporate compliance programs that at a minimum includes training, reporting mechanisms, due diligence of third parties, and investigatory resources related to human rights principles. And it underscores the seemingly apparent fact that human rights lawsuits against companies for overseas operations are not about to dissipate.

**For more information on the impact of the *Talisman* ruling**, see Jonathan Drimmer, "Is Second Circuit Ruling a *Talisman* Against Alien Tort Statute Suits?", Legal Backgrounder, Washington Legal Foundation, Feb. 12, 2010.

**For Alien Tort Statute corporate compliance discussion**, see "Specific Corporate Compliance Challenges: Extractive Industry," in *Corporate Compliance Practice Guide: The Next Generation of Compliance* (Carol Basri, ed.) (Oct. 2009); Jonathan Drimmer, "At Home And Abroad," *Corporate Counsel* (April 2009); Jonathan Drimmer, "Don't Be Dubbed A Human Rights Abuser," *Legal Times*, Oct. 30, 2007; Jonathan Drimmer, "Corporate Exposure Under The Alien Tort Claims Act," *Corporate Counselor*, June 5, 2007.

**For further analysis of the judicial lack of certainty regarding the ATS**, see Jonathan Drimmer, "Courts Mixed On Foreign Claims," *Hart's Oil & Gas*, October, 2006.

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For a general discussion of the ATCA, see Russell Donaldson, "Construction and Application of the Alien Tort Statute," [116 ALR 387](#).

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