Alien Tort Statute: Should We Be Concerned?

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The Alien Tort Statute (ATS) is a relatively obscure, one-sentence statute that was enacted in 1789 by the First Congress as part of the Judiciary Act. Most in the legal community are unaware of the statute's existence. It was rarely invoked until recently, when litigants began relying on the ATS to file lawsuits in U.S. courts alleging human rights abuses in other countries. At first, the cases were limited to foreign officials and governments, but litigants have increasingly attempted to expand the use of the statute to include cases against domestic corporations with operations overseas. Although courts have exercised caution in these cases, decisions construing the ATS have left much uncertainty over the meaning and scope of the statute, leaving the door open for continued litigation.

History of the Alien Tort Statute

In its current form, the statute reads in its entirety: "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." 28 U.S.C. § 1350. The precise history of why the ATS came into existence is unknown. What we do know is that the ATS provides foreign plaintiffs a vehicle for pursuing allegations of tort violations committed abroad. The ATS remained mostly dormant for its first 170 years, providing a basis for jurisdiction in only one case, with almost no attention to its meaning and intended use.

Modern Use of the Alien Tort Statute

Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980), opened the door for using the ATS as a mechanism for international human rights reform. In *Filartiga*, the Second Circuit Court of Appeals held that the ATS allowed Paraguayan citizens to sue a Paraguayan official in the United States for the alleged torture and killing of a family member in Paraguay. This decision sparked human rights organizations to invoke the ATS as a way to address international human rights violations in U.S. courts.

In a new wave of ATS litigation that began in the 1990s, plaintiffs began suing American and multinational corporations under the theory that the defendant corporations encouraged, aided and abetted, or otherwise contributed to abuses committed by a foreign government or its officials. For example, in *In Re South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. 2004), plaintiffs sued dozens of companies doing business in South Africa during apartheid. Plaintiffs argued that the companies indirectly perpetuated apartheid by participating in economic relations with the South African government. The court held that the companies had not engaged in state action, and did not violate the law of nations. In reaching its decision, the court noted the U.S. government's goal of encouraging change via economic investment.

In a case against Coca-Cola, plaintiffs attempted to use the ATS to hold a multinational corporation liable for alleged violations of human rights norms. *Sinaltrainal v. The Coca-Cola Co.*, 256 F.Supp.2d 1345 (S.D. Fl. 2003). After Coca-Cola entered into a bottling agreement with the Sinaltrainal plant in Colombia, a paramilitary group shot and killed the plant's union leader at the plant's door, and threatened to destroy any other union activity at the plant. Plaintiffs alleged that the paramilitary group operated openly at the bottling company, with Coca-Cola's knowledge. Plaintiffs also alleged that the murder was committed in an effort to keep Coca-Cola's costs down and its profits up. The Sinaltrainal worker's union and the estate of the murdered union leader invoked the ATS to sue Coca-Cola (and others) in federal court. They alleged, in part, that Coca-Cola was responsible for the paramilitary group's actions due to the level of control and influence Coca-Cola asserted over daily operations of the bottling company. The court found that the bottling agreement insulated Coca-Cola from suit, and never reached any of the substantive issues.

The expansion of ATS cases, particularly those

brought against corporations, raises significant legal questions. Was the statute meant to confer subject matter jurisdiction only, or to create an affirmative cause of action for violations of international law? What is the definition of an "international law norm"? What "international law norms" should be actionable?

The Supreme Court Speaks

Although relied on in federal court cases in the 1980s and 1990s as a vehicle for filing cases in U.S. courts that involved alleged human rights violations, it was not until 2004, in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that the Supreme Court finally had an opportunity to address the scope and meaning of the ATS. Unfortunately, Sosa left many questions unanswered.

Sosa involved the abduction of a Mexican national (who had allegedly tortured a U.S. Drug Enforcement Agency (DEA) agent) by other Mexican nationals working with the DEA. The Mexican national, Alvarez-Machain, brought a civil suit under the ATS against his captors, as well as the DEA and other entities, seeking damages for human rights violations.

Prior to *Sosa*, federal courts held that the statute provided for subject matter jurisdiction, and created an affirmative cause of action for violations of international law. Contrary to earlier rulings, the Supreme Court unanimously held that the ATS does not create a statutory cause of action for violations of international law. The ATS simply creates federal court jurisdiction. The Supreme Court also agreed that the 1789 Congress would have expected federal courts exercising jurisdiction under the ATS to entertain common law actions against persons committing "violation of safe conducts, infringement of the rights of ambassadors, and piracy." The Court further held that, while there was "no basis to suspect Congress had any examples in mind beyond those . . . three primary offenses," no development since 1789 had "categorically precluded" the courts from recognizing additional offenses as actionable as a matter of federal common law.

The Court, stressing the need for caution in this area, announced two limitations on the judicial recognition of new international law claims. First, the Court instructed 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 [the ATS] was enacted." Second, the Court explained that "the determination [of] whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." The Court's decision in Sosa left open many questions, most significantly, what specific practices of nations will qualify as an "international law norm," and whether the acts of corporations could meet those standards.

Future Trends?

The one-line ATS provides a gateway for a litigant to haul a company into a U.S. court for the alleged violation of international law – even if the company is not U.S.-based, and did not violate a U.S. law, a law in its own country, nor a law in the country in which it does business. Although U.S. courts have limited the applicability of the ATS, the statute remains a vehicle for future litigation.

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