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Jennifer L. Heil

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African Private Security Companies and the Alien Tort Claims Act: Could Multinational Oil and Mining Companies Be Liable?

*Jennifer L. Heil**

I. INTRODUCTION

It is well known that multinational oil and mining companies hold interests and maintain operations in every part of the world. Natural oil and mineral resources abound in the United States, South America, Southeast Asia, the Middle East and Africa, among other locations, and many multinational companies have mineral mining and oil exploration and drilling operations set up in all of these regions. Unfortunately for these companies, while the flow of oil and mineral resources frequently remains stable over long periods of time, some of the countries in which the oil drilling and mining sites are located suffer from volatile political and cultural circumstances and frequently erupt in civil conflict.¹ These companies find themselves in situations in which they must find a way to protect their operations

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¹ Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 92-102 (1998). This section of Zarate's article describes three specific instances of conflict: in Angola, Sierra Leone and Papua New Guinea. All involved conflicts in natural resource-rich regions of those countries.

in these countries and their access to these interests during the civil conflicts or else they will lose their supply of extremely valuable resources.²

During the last two decades, many of these multinational oil and mining companies have turned to outside specialists for assistance in protecting their resources from destruction in these unstable countries.³ Along with the weakened governments of the smaller countries in which they operate, these companies hire specialists in the form of private security forces.⁴ These private security forces aid the governments and the oil and mining companies in two main ways: (1) they attempt to quash civil uprisings, thereby bringing "peace" to the country; and (2) they defend the regions in which the oil and mining operations are located and protect them from destruction that could result from the uprisings.⁵ The services provided by the private security forces therefore clearly support the oil and mining companies' interests in these countries.

This sort of arrangement between small governments, large oil and mining companies and private security forces occurs frequently in Africa.⁶ The African continent is rich in natural resources, yet lacks stability in many of its national governments.⁷ These governments, as well as oil and mining companies with interests in those countries, have benefited from contracts with private security forces, whether merely through the forces' military training of national troops or through the private security forces becoming directly involved in civil conflicts of those countries.⁸ In some cases, the private security forces have helped to restore a democratically-elected government to power in the midst of civil rebellion. They have also

² See CENTER FOR DEFENSE INFORMATION, *Working Outside of South Africa*, available at http://www.cdi.org/ArmsTradeDatabase/CONTROL/Small_Arms/Mercenaries/EO_Working_Outside_of_South_Africa.htm (last visited January 27, 2001). This article describes how SONANGOL, the Angolan Oil Parastatal, approached a private security company in the hopes that it would "provide a security team to protect the on-shore oil facilities in the coastal town of Soyo, Angola [during a civil war in that country] whilst millions of dollars of oil-drilling and related equipment was being recovered." See also Abdel-Fatau Musah, *A Country Under Siege: State Decay and Corporate Military Intervention in Sierra Leone*, in *MERCENARIES* 76, 99-100 (Abdel-Fatau Musah and J. 'Kayode Fayemi eds., 2000). These sections describe how private security firms were hired to protect mines in Sierra Leone.

³ See generally, CENTER FOR DEFENSE INFORMATION, *supra* note 2; Musah, *supra* note 2.

⁴ See generally, CENTER FOR DEFENSE INFORMATION, *supra* note 2; Musah, *supra* note 2.

⁵ See Zarate, *supra* note 1, at 94-96. This section describes how a private security company both stabilized the country and liberated strategic mining areas as part of its intervention in a civil war in Sierra Leone.

⁶ *Id.* at 89; ABDEL-FATAU MUSAH AND J. 'KAYODE FAYEMI, *MERCENARIES* 4-5 (Abdel-Fatau Musah and J. 'Kayode Fayemi eds., 2000).

⁷ See Zarate, *supra* note 1, at 92-102; Musah and Fayemi, *supra* note 6, at 4-5.

⁸ See Zarate, *supra* note 1, at 92-102; Kevin A. O'Brien, *Private Military Companies and African Security 1990-98*, in *MERCENARIES* 43, 50-51 (Abdel-Fatau Musah and J. 'Kayode Fayemi, eds. 2000).

secured resource-rich oil and mining operation areas and returned them to the multinational companies.⁹

While the oil and mining companies and small governments now seem to depend on the support they receive from their contracts with the private security forces, critics are beginning to question the legality of these arrangements. In particular, some scholars are starting to address the possible liability of the multinational oil and mining companies under United States domestic law or general international law for human rights violations.¹⁰ They specifically suggest that the companies may be liable in the United States for the actions of these private security forces under the United States Alien Tort Claims Act ("ATCA").¹¹

This paper focuses specifically on the possible liability under the ATCA of multinational oil and mining companies operating in Africa. First, it will examine the relationships between the multinational oil and mining companies, private security forces and African governments. In doing so, it will describe the actual activities and operations of the private security forces in conjunction with the oil and mining companies. Second, this paper will outline the elements of liability under the ATCA. This will include a discussion of recent cases in which foreign nationals have sued multinational companies in the United States for alleged human rights abuses committed abroad. Finally, this paper will explore whether the oil and mining companies could be liable for the actions of the private security forces in certain situations under the United States ATCA. It will also outline recommendations for the oil and mining companies on how to conduct their relationships with the private security forces so that their likelihood of liability might be reduced.

II. BACKGROUND: PRIVATE SECURITY FORCE ARRANGEMENTS IN AFRICA

While multinational oil and mining companies do not readily acknowledge their connections with private security forces in Africa, these arrangements are well documented.¹² In some cases, a multinational

⁹ See Zarate, *supra* note 1, at 92-102.

¹⁰ Gregory G.A. Tzeuschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359 (1999). Tzeuschler presents an in-depth review of the recent history of the United States Alien Tort Claims Act and the ways in which large transnational corporations may become liable thereunder for various human rights violations sustained in their foreign operations. This comment relies heavily on the arguments Tzeuschler advances in his article.

¹¹ *Id.* at 418.

¹² See Michael Grunberg, *Letters to the Editor: A Sierra Leone Contract*, INT'L HERALD TRIBUNE, Aug. 28, 2001; Abdel-Fatau Musah and J. 'Kayode Fayemi, *Africa in Search of Security: Mercenaries and Conflicts - An Overview*, in MERCENARIES 13, 24-25 (Abdel-Fatau Musah and J. 'Kayode Fayemi eds., 2000).

company essentially contracts with a private security force to provide protection of their oil and mining interests.¹³ In other cases, the private security forces are connected with the multinational oil and mining companies through various corporate ties.¹⁴ In these situations, the companies effectively hire one of their own divisions to protect their oil and mining interests in various African countries. This paper will highlight the involvement of one major private security force through contracts and corporate ties to multinational oil and mining companies in Africa: Executive Outcomes (“EO”).¹⁵

Mr. Eben Barlow founded EO in 1989 as a “limited liability company registered in Great Britain and South Africa.”¹⁶ Barlow was an official in South Africa’s apartheid-era Civil Cooperation Bureau.¹⁷ He has built up the company so that now over 2,000 private soldiers receive their paychecks from EO.¹⁸ The majority of these soldiers hail from the former South African Defense Force or South African Police. Whites dominate the officer ranks of the company, however, the soldiers are approximately seventy percent black.¹⁹ EO’s soldiers specialize in “clandestine warfare, combat air patrols, advanced battle handling and sniper training.”²⁰

A. EO’s Contracts and Connections

EO has signed contracts with various multinational oil and mining companies to provide security for their interests in African countries.²¹ In 1992, for example, EO “signed contracts with oil companies Chevron and Sonangol to protect their installations in Soyo, Angola.”²² In both of these

¹³ See CENTER FOR DEFENSE INFORMATION, *supra* note 2; Musah, *supra* note 2.

¹⁴ See ABDEL-FATAU MUSAH AND J. ‘KAYODE FAYEMI, *MERCENARIES*, xvi (Abdel-Fatau Musah and J. ‘Kayode Fayemi eds., 2000).

¹⁵ See CENTER FOR DEFENSE INFORMATION, *What Is EO?*, available at http://www.cdi.org/ArmsTradeDatabase/CONTROL/Small_Arms/Mercenaries/What_is_EO.txt (last visited February 26, 2001). Here, the Center for Defense Information has compiled a dossier on Executive Outcomes, describing its history of involvement in Africa and its training, military support and combat capabilities.

¹⁶ See Zarate, *supra* note 1, at 93.

¹⁷ See *id.* at 162 n.115. Zarate explains that “the South African military intelligence formed the Civil Cooperation Bureau as a covert assassination and espionage unit to eliminate enemies of the apartheid state.” See also O’Brien, *supra* note 8, at 49-51. This section describes the early history of Executive Outcomes.

¹⁸ See Zarate, *supra* note 1, at 93.

¹⁹ See *id.*

²⁰ Francois Misser and Anver Versi, *Soldier of Fortune*, 12/1/97 AFR. BUS. 814 (1997).

²¹ See generally, CENTER FOR DEFENSE INFORMATION, *supra* note 2.

²² Pierre Glachant, *Mercenaries Changing Face of For-Profit Fighting*, 11/15/97 AGENCE FR.-PRESSE.

situations, the oil companies hired EO to guard their operations during a rebel invasion near the oil sites in Angola.²³

EO has also formed contracts with the governments of several African nations. For example, in September 1994 the government of Angola completed a contract with EO for \$40 million to provide training for the country's military and to help the Angolan army defeat the rebel movement.²⁴ After its success in Angola, EO signed a contract with the government of Sierra Leone to help fight off a rebel movement in that country.²⁵ The government of Sierra Leone paid EO in the form of mining concessions in the country's diamond-rich regions.²⁶ EO was also successful in suppressing the rebel uprising in Sierra Leone, although the country would later fall again to rebel movements.²⁷ Despite claims that it will only work under the approval of legitimate African governments, EO and its partner company, Sandline International, have been rumored to have connections with certain rebel groups.²⁸

EO has benefited greatly from the handsome compensation packages it receives for fulfilling its contracts with oil companies and African governments.²⁹ The entities that reap the most from EO's services, however, are the multinational oil and mining companies that are closely connected to EO through corporate ties.³⁰ These companies both hire EO to protect their

²³ *The Contracts*, 12/1/97 AFR. BUS. 12.

²⁴ Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L. J. 1, 18 (1999). See generally, O'Brien, *supra* note 8, at 51-52; Alex Vines, *Mercenaries, Human Rights and Legality*, in *MERCENARIES* 169, 172-75 (Abdel-Fatau Musah and J. 'Kayode Fayemi eds., 2000).

²⁵ See Zarate, *supra* note 1, at 95-96. See generally, Musah, *supra* note 2, at 88-89; Vines, *supra* note 24, at 175-77; Steve Coll, *The Other War*, THE WASHINGTON POST, Jan. 9, 2000.

²⁶ See Zarate, *supra* note 1, at 96-97. See also Musah and Fayemi, *supra* note 12, at 24; Musah, *supra* note 2, at 91-92.

²⁷ See Zarate, *supra* note 1, at 97. This article explains that Sandline International has rumored ties with Kamjors militias in Sierra Leone. See also Greg Roberts, *Australia Asked to Treat Wounded PNG Mercenaries*, February 28, 1997, available at http://www.cdi.org/ArmsTradeDatabase/CONTROL/Small_Arms/Mercenaries/Australia_asked_to_treat_wounded_PNG_mercenaries.txt (last visited January 27, 2001). Roberts explains in his article that the London-based Sandline International is a subsidiary of Executive Outcomes. See generally, Musah and Fayemi, *supra* note 14, at xvi.

²⁸ See *id.* This article explains that Sandline International has rumored ties with Kamjors militias in Sierra Leone. See also Greg Roberts, *Australia Asked to Treat Wounded PNG Mercenaries* (February 28, 1997), available at http://www.cdi.org/ArmsTradeDatabase/CONTROL/Small_Arms_Mercenaries/Australia_asked_to_treat_wounded_PNG_mercenaries.txt. Roberts explains in his article that the London-based Sandline International is a subsidiary of Executive Outcomes. See generally, Musah and Fayemi, *supra* note 14, at xvi.

²⁹ See *The Contracts*, *supra* note 23; O'Brien, *supra* note 8, at 52; Musah, *supra* note 2, at 91.

³⁰ See Musah, *supra* note 2, at 91-92.

oil and mining interests in African countries and also benefit from EO's government contracts through the assignment of mining concessions.³¹

Eeben Barlow, for example, has close ties with the owners and directors of the Canadian-based Ranger Oil company.³² During its operations in Angola, Ranger Oil provided a guarantee of \$30 million for EO's operation to fight off the rebel movement that was endangering its interests in the Soyo region.³³ Because this also aided the Angolan government, the government then granted major oil concessions to EO, which transferred these over to Ranger Oil, making Ranger Oil's number of facilities in Angola much more numerous.³⁴

Barlow also is closely connected with Anthony Buckingham, who helped to incorporate EO in Great Britain.³⁵ Buckingham is a major owner of Heritage Oil, which also had interests in Angola at the time of the rebel movement.³⁶ Heritage Oil helped Ranger Oil to finance EO's operation in Angola and also benefited from EO's oil concessions in the Soyo region.³⁷

Barlow and Buckingham also hold interests in the Canadian-based DiamondWorks ("DMW").³⁸ DMW holds mining interests in Canada and is involved in several gold projects in China.³⁹ Its most important mining concerns, however, are located in Sierra Leone.⁴⁰ When "anti-government forces overran the diamond fields" in the Kono district of Sierra Leone, DMW may have helped to finance EO's operations to recapture the district.⁴¹ DMW also benefited from the mining concessions granted to EO by the government of Sierra Leone in return for the security and training the EO provided to the government.⁴²

B. EO's Security Activities

As previously mentioned, EO's main contracts with multinational oil and mining companies and African governments have been primarily in

³¹ See Musah and Fayemi, *supra* note 12, at 23-24.

³² See O'Brien, *supra* note 8, at 51.

³³ See *id.*

³⁴ Louis Cauchy, *South African Mercenaries Working for Canadian Interests*, L'AUT'JOURNAL (April 1997), available at <http://burn.ucsd.edu/archives/ats-l/1997.Jun/0040.html>.

³⁵ See *id.*

³⁶ See *id.* See also O'Brien, *supra* note 8, at 64-66.

³⁷ See Cauchy, *supra* note 35; O'Brien, *supra* note 8, at 64-66.

³⁸ See *The Contracts*, *supra* note 23.

³⁹ See Roger Moody, *The Mercenary Miner: Robert Friedland Goes to Asia*, 18 MULTINATIONAL MONITOR (1997).

⁴⁰ See *id.*

⁴¹ See *id.*; Vines, *supra* note 24, at 180-81.

⁴² See Moody, *supra* note 40; Vines, *supra* note 24, at 180-81.

Angola and Sierra Leone.⁴³ As part of these contracts, EO carried out a number of activities in each country.⁴⁴ Throughout its activities, EO strives to maintain an image of professionalism.⁴⁵ It claims that it “merely trains soldiers or engages in defensive pre-emptive strikes” but that it does not engage in battle.⁴⁶ It also claims to attempt to restrain its employees from committing human rights abuses during their stay in a country.⁴⁷ Some sources, however, dispute these claims. They maintain that EO becomes directly involved in combat operations and sometimes kills or injures civilians.⁴⁸

In Angola, beginning in 1994, EO fulfilled its contracts by aiding the Angolan army in defeating UNITA rebels who were waging a civil war against the democratically elected government.⁴⁹ In doing so, EO established infrared capabilities, allowing the soldiers to fight at night, instituted an advanced communication system, improved reconnaissance, introduced fuel air bombs and increased air power capabilities, using helicopter gunships and jet fighters.⁵⁰ EO engaged in defensive strikes alongside Angolan troops, which resulted in approximately twenty deaths of EO soldiers.⁵¹ EO’s involvement in Angola helped the Angolan troops recover critical mining and oil territory, overcome the UNITA rebels and compelled the rebels to sign a peace agreement.⁵²

In 1995, the government of Sierra Leone had been fighting off a rebel movement of the Revolutionary United Front (“RUF”) since 1991 with little success.⁵³ EO at first sent a small group of its employees to train the government’s soldiers.⁵⁴ Soon after, it assumed control over all offensive strikes “while using intelligence reports and sheer firepower to surprise and overpower the RUF’s insurgency. EO launched air assaults against RUF bases with devastating effects ... Some journalists reported that EO’s employees machine-gunned civilians from their helicopters as they pursued rebels.”⁵⁵ As in Angola, EO’s military activities helped the troops of Sierra

⁴³ See Zarate, *supra* note 1, at 94-96; Vines, *supra* note 24, at 172-77.

⁴⁴ See Zarate, *supra* note 1, at 94-96; Vines, *supra* note 24, at 172-77.

⁴⁵ See Zarate, *supra* note 1, at 93.

⁴⁶ See *id.* at 94.

⁴⁷ See *id.* at 96-98.

⁴⁸ See *id.* at 94.

⁴⁹ See *id.* See generally Vines, *supra* note 24, at 172-75.

⁵⁰ See Zarate, *supra* note 1, at 94.

⁵¹ See *id.* at 94-95.

⁵² See *id.*

⁵³ See *id.* at 95-96. See generally Vines, *supra* note 24, at 175-77.

⁵⁴ See Zarate, *supra* note 1, at 96.

⁵⁵ *Id.* See also Vines, *supra* note 24, at 173: “A former EO employee described his work to Human Rights Watch in June 1995:

‘We are professionals. We don’t engage in unnecessary violence. We are specialists in counter-insurgency operations. Most of our work was training, but we also engaged di-

Leone to regain strategic mining areas like the Kono district, defeat the RUF rebels and sign a peace agreement with the RUF.⁵⁶

It is clear from these examples that EO's activities in Africa exceed its claims of merely providing training for government troops and restraining its employees from committing human rights abuses. On the contrary, EO undoubtedly has been directly involved in combat in many situations and has been the subject of reports of alleged human rights violations.⁵⁷ In addition, through EO's contracts with multinational oil and mining companies and African governments, and through its close corporate connections with other multinational oil and mining companies, it is obvious that these parties can be said to be at least partially responsible for EO's activities in African countries. In particular, the multinational oil and mining companies have unmistakably supported all activities undertaken by EO to defend or reclaim major oil regions and mining areas.

III. THE UNITED STATES ALIEN TORT CLAIMS ACT ("ATCA")

The ATCA was originally enacted in 1789. It states simply that, "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."⁵⁸ It was presumably motivated by a desire to insure that claims by an alien against United States citizens or for incidents occurring in the United States were litigated in federal court rather than in state court, so as to prevent the states from mishandling the cases and creating international incidents.⁵⁹ More recently, however, United States courts have interpreted the scope of the ATCA as covering claims for international human rights abuses occurring abroad.⁶⁰ The United States Congress ratified this broader interpretation when it passed the Torture Victim Prevention Act in 1991 ("TVPA").⁶¹ The TVPA provides that: "An individual who, under actual or apparent authority, or color of law, of any foreign nation – (1) subjects an individual to torture...or (2) subjects an individual to extrajudicial

rectly in operations that had direct commercial consequence. Some civilians get hurt in these operations but they were not our target. In the Cafunfo operations we did encounter problems and things went out of control for a short time. That was unusual."

⁵⁶ See Zarate, *supra* note 1, at 96.

⁵⁷ See Malik M. Chaka, *Letter to the Editor of The Washington Times*, March 10, 1997, available at http://www.cdi.org/ArmsTradeDatabase/CONTROL/Small_Arms_Mercenaries/1UNITA_on_EO.txt. Chaka states in his letter that "[t]here is a mountain of evidence from newspapers on four continents that documents the extensive participation of Executive Outcomes mercenaries in combat, both on the ground and in the air, and in human rights violations in Angola."

⁵⁸ Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

⁵⁹ *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000).

⁶⁰ *Id.*

⁶¹ *Id.* at 104-05.

killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death."⁶² The TVPA therefore recognizes that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is consequently a violation of United States law.⁶³

For years, United States courts applied the ATCA only to government officials of the United States or foreign countries. Recently, however, the courts have applied the ATCA to other parties, including United States and foreign companies and private individuals.⁶⁴ While very few cases under the ATCA have been completely resolved using the court system, nevertheless, the courts have been treating cases against parties other than government officials under the ATCA more favorably in their decisions regarding preliminary procedural motions.⁶⁵

A. Examples of Recent ATCA Cases Against Companies

For example, in *Wiwa v. Royal Dutch Petroleum Co.*, Nigerian citizens who emigrated to the United States sued two foreign holding companies under the ATCA for alleged human rights violations.⁶⁶ The plaintiffs in *Wiwa* claimed that, on the urging of the two companies, the Nigerian government imprisoned, tortured and killed their next of kin in violation of the law of nations.⁶⁷ Apparently the two oil companies, Royal Dutch and Shell Transport, were engaged in extensive oil exploration activities on land adjacent to the plaintiffs' homeland. The companies allegedly appropriated land for these activities without adequate compensation, and caused substantial air and water pollution to the plaintiffs' homeland.⁶⁸ The plaintiffs began to organize in political opposition to the companies' activities in the region. During the period of the political organization movements, the Nigerian police and military attacked the local villages in which the people were organizing, arresting the leaders of the movement on several occasions and detaining them for long periods of time. The Nigerian police and military severely beat and shot at several of the leaders, and eventually several of the leaders were killed.⁶⁹ According to the plaintiffs' complaint, even though these activities were carried out by the Nigerian police and military, Shell Transport instigated, planned and facilitated the attacks.⁷⁰ Royal

⁶² Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 App. (2000).

⁶³ See *Wiwa*, 226 F.3d at 105.

⁶⁴ See Tzeutschler, *supra* note 10, at 362.

⁶⁵ See *id.* at 62-363.

⁶⁶ *Wiwa*, *supra* note 59, at 92

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 92-93.

Dutch and Shell Transport also allegedly provided money, weapons and logistical support to the Nigerian military, including the vehicles and ammunition used in the raids on the villages.⁷¹ The defendant companies were able to get a jurisdiction-based dismissal of the case in the district court. The Second Circuit, however, reversed the dismissal, holding that the district court had jurisdiction over the companies, that jurisdiction did not violate the due process clause, and that the forum was not inconvenient for the defendants.⁷²

Jota v. Texaco Inc. provides another example of the United States courts asserting jurisdiction over a company for alleged human rights abuses committed abroad. In *Jota*, the Ecuadorian plaintiffs sued Texaco, alleging that the company polluted rain forests and rivers near their homes during oil exploration activities in Ecuador between 1964 and 1992.⁷³ They alleged that Texaco “improperly dumped large quantities of toxic by-products of the drilling process into the local rivers, ... used other improper means of eliminating toxic substances,...and that the Trans-Ecuadoran Pipeline, constructed by Texaco, has leaked large quantities of petroleum into the environment.”⁷⁴ The plaintiffs claimed that they and their families experienced various physical injuries such as poisoning and formation of precancerous growths, and sought damages under the ATCA.⁷⁵ Again, as in *Wiwa*, the district court dismissed the case on jurisdictional grounds. The Second Circuit reversed, noting that the district court did have jurisdiction over the company, especially in light of the fact that the company was unwilling to submit to jurisdiction in Ecuador for these claims.⁷⁶

The outcomes of these cases illustrate two ideas. First, it shows that the United States is willing to accept claims under the ATCA against companies rather than merely government officials. Second, since the courts did not dismiss the cases based on any substantive issues, this demonstrates that a strong enough claim against the companies exists for these and other similar cases to go forward to a trial on the merits. These ideas will be discussed in more detail later in this paper.

⁷¹ *Id.*

⁷² *Id.* at 92.

⁷³ *Jota v. Texaco Inc.*, 157 F.3d 153, 155 (2d Cir. 1998).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

B. Elements of the ATCA

1. *Violation of the Law of Nations*

As discussed earlier, the ATCA provides for a claim by an alien for a tort that was “committed in violation of the law of nations.”⁷⁷ Although the scope of the “law of nations” is not immediately obvious, the United States Congress and courts have set down several clear definitions of the kind of torts that are covered by the ATCA as part of the law of nations. For example, Congress and the courts have stated that torture, extrajudicial killings, cruel, inhuman or degrading treatment, arbitrary detention, war crimes, physical and cultural destruction of peoples, systematic violations of human rights and environmental harms are to be covered under the ATCA as violations of the law of nations.⁷⁸ This paper will focus mainly on the definitions of torture, extrajudicial killings and war crimes because they are the torts that are most closely related to the possible liability of the multinational oil and mining companies through their involvement with the private security forces in Africa.

Through the passage of the TVPA, Congress specified that acts of torture and extrajudicial killings should automatically be covered under the ATCA.⁷⁹ The TVPA defines torture as:

[A]ny act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purpose as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.⁸⁰

The TVPA defines extrajudicial killing as:

[A] deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing

⁷⁷ Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

⁷⁸ See Tzeutschler, *supra* note 10, at 410-18.

⁷⁹ Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 App. (2000).

⁸⁰ *Id.*

that, under international law, is lawfully carried out under the authority of a foreign nation.⁸¹

In addition to the definitions of torture and extrajudicial killings found in the TVPA, United States courts have also consistently found that torture and extrajudicial killings violate the law of nations.⁸²

The United States courts have also consistently held that war crimes are included under the ATCA as violations of the law of nations. Genocide is one example of a universally-recognized war crime.⁸³ The physical destruction of indigenous peoples or ethnic groups can be considered to be genocide under the Genocide Convention. The Genocide Convention defines genocide as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁸⁴

2. *Enforcing the Law of Nations Upon Companies Rather than State Entities and Officials*

Along with the requirement that a claim under the ATCA be a violation of the law of nations, the ATCA inherently requires that the entity or individual being sued must be bound by the law of nations. Traditionally, the reach of international laws did not extend further than state entities or officials.⁸⁵ As illustrated earlier, however, courts have allowed corporations with activities in foreign countries to be sued under the ATCA. They have done this through primarily two different methods.

First, they acknowledge that certain norms of international law are binding on all parties, from state officials to ordinary citizens, from state entities to private companies, and from for-profit actors to non-profit or-

⁸¹ *Id.*

⁸² See *Filartiga v. Pena-Irala*, 630 F.2d 876, 884-85 (2d Cir. 1980); *Forti I*, 672 F.Supp. 1531, 1542 (N.D. Cal. 1987).

⁸³ See Tzeutschler, *supra* note 10, at 411.

⁸⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277, 280 (1951) [hereinafter "Genocide Convention"].

⁸⁵ See Tzeutschler, *supra* note 10, at 378-88.

ganizations.⁸⁶ These norms are so universal under international law that any party who violates them will become subject under any body that has the right to enforce general international law. Norms that are considered to be universal norms of international law include prohibitions against slavery, slave-trading, piracy and genocide.⁸⁷

Second, the courts have found that some corporations have acted so closely with a state or similar to how a state would act that the corporation could be considered to have engaged in state action, and could therefore be treated as a state under international law.⁸⁸ Situations in which a corporation could be considered as engaging in state action include: "acting alone but fulfilling state functions; acting in close concert with a state, for an isolated event or over the course of a long project; participating in a conflict that seeks to replace an existing or collapsed state; or acting as a state-like authority over some territory."⁸⁹ If a corporation engages in any of these types of situations, and in doing so, commits human rights abuses, that corporation is likely to be found liable if sued under the ATCA. Even if the human rights abuses are committed merely by an employee or agent of the corporation, the corporation may still be liable under the theory of *respondeat superior*.⁹⁰

C. Procedural and Jurisdictional Issues Common to Claims Under the ATCA

Even if plaintiffs can show that a corporation was subject to the law of nations under universal international law norms or through state action, and then show that the corporation violated the universal law norms, the plaintiffs still may have to clear several procedural hurdles common in cases involving claims under the ATCA. The most frequent procedural issues raised by defendants in ATCA cases are *forum non conveniens*, exhaustion of remedies, comity, standing, failure to join an indispensable party, and the issue of being a foreign corporation not registered in the United States.⁹¹

The courts in the United States allow dismissal under the doctrine of *forum non conveniens* only when "an alternative forum is available, because application of the doctrine 'presupposes at least two forums in which the defendant is amenable to process.'⁹² To decide the issue of *forum non conveniens*, a court must determine where the litigation will be the most convenient and will serve the goals of justice.⁹³ When considering a motion to

⁸⁶ See *id.* at 393.

⁸⁷ See *id.*

⁸⁸ See *id.* at 388-89.

⁸⁹ *Id.* at 392-93.

⁹⁰ See *id.* at 393-94.

⁹¹ See *id.* at 396-405.

⁹² *Jota v. Texaco Inc.*, 157 F.3d 153, 158-59 (2d Cir. 1998).

⁹³ *Id.* at 159.

dismiss based on a defendant's *forum non conveniens* claim, a court must be sure that the litigation can be conducted in another place against all named defendants.⁹⁴

A claim related to the doctrine of *forum non conveniens* that defendants sometimes utilize is the assertion that there has not been an exhaustion of remedies in the place where the tort happened. This is particularly true of cases brought under the TVPA in conjunction with the ATCA, since it is a requirement under the TVPA. The TVPA provides: "A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."⁹⁵ This requirement, however, does not strictly require that a plaintiff file a claim in the place where the tort took place. Knowing that this could be a burden on plaintiffs who live in a state with a unreliable court system, the courts merely require the plaintiffs to show either that the court system in their home country would not be an adequate forum for the claim or that the courts in their home country are not "functioning, workable or competent."⁹⁶

Another procedural issue that defendants sometimes draw attention to in ATCA cases is that of comity. International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."⁹⁷ Under the tenets of international comity, United States courts customarily refuse "to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States."⁹⁸ When a court is considering dismissal of a case on the grounds of international comity, it must look to see whether there is an acceptable forum in the objecting country and whether the defendant of the case in the United States is subject to or has consented to jurisdiction in the foreign forum.⁹⁹ It is worthy to note that United States courts will usually only allow dismissal under the doctrine of comity where a foreign nation's interests are so offended by the conduct of the litigation in the United States that dismissal is warranted without regard to the defendant's acquiescence to litigation in a foreign forum.¹⁰⁰

An additional procedural issue that defendants sometimes bring up in ATCA cases is that of standing. In order to bring a claim under the ATCA in the courts of the United States, a plaintiff must have standing. As a rule in tort cases, the plaintiff must have been materially harmed by the viola-

⁹⁴ *Id.*

⁹⁵ Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 App. (2000).

⁹⁶ Tzeutschler, *supra* note 10, at 398-99.

⁹⁷ *Jota v. Texaco Inc.*, 157 F.3d 153, 159-60 (2d Cir. 1998).

⁹⁸ *Id.*

⁹⁹ *Id.* at 160.

¹⁰⁰ *Id.*

tion.¹⁰¹ If the victim is dead, then only the legal representative of the victim may bring the suit.¹⁰² This rule sometimes causes difficulties for foreign plaintiffs, since the United States rule usually restricts the definition of legal representative to immediate family of the deceased, and family structures in some foreign countries are more expansive than those in the United States.¹⁰³ Groups are able to bring a claim for injuries to their group, but only under certain circumstances. Such groups cannot file a suit on behalf of their members unless “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”¹⁰⁴

Yet another procedural concept that defendants sometimes use in cases filed under the ATCA is that of failure to join an indispensable party. Rule 19(a) of the Federal Rules of Civil Procedure provides that the district courts are required to:

join a person who is subject to service of process and the jurisdiction of the court if: (1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.¹⁰⁵

This requirement can sometimes become an obstacle to plaintiffs in cases under the ATCA because if they are suing a corporation that worked closely with a foreign state, and the plaintiff only sued the corporation and not the foreign entity, the defendant corporation may claim that failure to sue the foreign state was failure to join an indispensable party. Though this does not always have an extreme effect on ATCA cases, it may sometimes result in the dismissal of a case if the court determines that a foreign nation is an indispensable party, and that the nation is not subject to jurisdiction under a doctrine like the Foreign Sovereign Immunities Act.¹⁰⁶

¹⁰¹ See Tzeutschler, *supra* note 10, at 399.

¹⁰² See *id.*

¹⁰³ See *id.* at 400.

¹⁰⁴ Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333, 343 (1977).

¹⁰⁵ Fed. R. Civ. P. 19(a).

¹⁰⁶ See *Aquinda v. Texaco, Inc.*, 945 F.Supp. 625, 627 (S.D.N.Y. 1996), vacated sub nom. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir 1998).

One last procedural doctrine that defendants in ATCA cases may use is to claim that they do not fall under jurisdiction in the United States since they are foreign corporations. In this case, a plaintiff would have to show that the foreign corporation had sufficient contacts with the state in which the case was filed.¹⁰⁷ In ATCA cases against individual defendants, a plaintiff merely has to show that the defendant was in the forum state when served with process. In cases against corporations, courts generally use the rule that a corporation must have a presence in a state or must be conducting "continuous and systematic business" in a state for jurisdiction in that state.¹⁰⁸ This can sometimes be very simple for the plaintiff, since many states require a corporation to officially register with the Secretary of State of a state to be able to conduct business there. Registering a business generally submits a corporation to general jurisdiction in that state.¹⁰⁹

IV. ANALYSIS: COULD THE MULTINATIONAL OIL AND MINING COMPANIES BE LIABLE UNDER THE ATCA?

The multinational oil and mining companies that contract with or are closely connected to private security forces such as Executive Outcomes in Africa may be liable under the United States ATCA for the activities of the private security forces. This section of the paper will: (1) examine the activities of the multinational oil and mining companies and the private security companies under the elements of the ATCA; (2) work through possible procedural issues relating to the companies' liability under the ATCA; and (3) present simple recommendations for multinational oil and mining companies working with private security forces in Africa that would like to prevent liability for any of their activities under the ATCA.

A. Elements of the ATCA

1. *Violation of the Law of Nations*

As discussed above, one of the major elements of a claim filed under the United States ATCA is that a tort was committed in violation of the law of nations.¹¹⁰ Two of the torts that United States courts have recognized as being in violation of the law of nations are extrajudicial killings and war crimes, including genocide. In the circumstances described above involving multinational oil and mining companies and EO, there are activities that could support claims of either extrajudicial killings or the war crime of genocide.

¹⁰⁷ See Tzeutschler, *supra* note 10, at 404.

¹⁰⁸ See *id.*; *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1990).

¹⁰⁹ See Tzeutschler, *supra* note 10, at 404.

¹¹⁰ See Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

First, in the situation during the conflict in Sierra Leone during which journalists reported that, while fulfilling contracts with the government of Sierra Leone and several mining companies, EO's soldiers "machine-gunned civilians from their helicopters as they pursued rebels,"¹¹¹ this is clearly an example of extrajudicial killing as defined by the TVPA.¹¹²

In addition, through the participation of EO and the mining and oil companies in the civil conflicts of Angola and Sierra Leone, EO may have destroyed considerable percentages of certain ethnic groups in those countries, leading to a possible claim of genocide. It would be difficult for an alien plaintiff to prove that EO and the mining and oil companies had the requisite intent to destroy the ethnic group under the definition of genocide. If the plaintiff could provide enough evidence on how the killings happened, however, it could be enough to show that the acts were committed with the intent to destroy that group in part, which may be enough to show a violation of the law of nations concerning genocide.

2. Enforcing the Law of Nations Upon Companies Rather than State Entities and Officials

As stated earlier, the second major element of a claim under the ATCA is that a party who is accused of violating the law of nations must also be bound by the law of nations. For a corporation to be bound by the law of nations requires either that the international norm broken by the corporation is so universal that it is binding on all parties or that the corporation acted so closely with a state or similar to how a state would act that the corporation could be considered to have engaged in state action. EO and the multinational oil and mining companies could come under both of these requirements. First, as illustrated above, if an alien plaintiff could prove that EO and the multinational mining and oil companies committed genocide, this would show that they violated a universal norm of international law.

Second, EO and the multinational oil and mining companies with which it contracted in Angola and Sierra Leone undoubtedly engaged in activities that could constitute state action. They participated in many of the situations described earlier as circumstances under which corporations could be considered as engaging in state action. One of those situations was when the company was acting in close concert with a state for an isolated event or over the course of a long project.¹¹³ As discussed earlier, EO and the oil and mining companies worked very closely with the states of Angola and Sierra Leone during civil insurgencies in those countries. Through the concession of resources in those countries to the mining and

¹¹¹ Zarate, *supra* note 1, at 96.

¹¹² See Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 App. (2000).

¹¹³ See Tzeutschler, *supra* note 10, at 392-93.

oil companies, the governments of Angola and Sierra Leone received military power and security provided by EO. These activities are a clear example of EO and the oil and mining companies acting in concert with the Angolan and Sierra Leonean governments both in the isolated events of specific insurgencies and also over the course of the entire civil conflicts in those countries.

Another situation in which corporations can be considered to be engaging in state action is when a company participates in a conflict that seeks to replace an existing or collapsed state.¹¹⁴ In both of the situations of civil conflict in Angola and Sierra Leone, the governments of the two countries were so weakened as to be in a collapsed state. Their militaries could not subdue the civil uprisings in those countries, and it was only the financing of the mining and oil companies and the security provided by EO that helped to rebuild the collapsed state. In addition, as mentioned earlier, EO's partner company, Sandline International, which is affiliated with the same multinational oil and mining companies, has accepted contracts to train militias in Sierra Leone who were planning to overthrow certain leaders in that country. Both of these situations show that EO and the multinational oil and mining companies, in getting involved in the civil conflicts in these countries, engaged in state action.

One other situation in which the activities of corporations can indicate that they are involved in state action is when a corporation acts as a state-like authority over some territory.¹¹⁵ As discussed above, by enlisting EO to provide security for the regions in which their oil and mining installations and operations were located in Angola and Sierra Leone, the oil and mining companies were acting in a state-like manner, taking military and police responsibilities into their own hands. In addition, usually the operation facilities of the oil and mining companies were the only entities located in the remote regions of Angola and Sierra Leone. As a result, EO and the oil and mining companies provided not only jobs for the workers at their facilities, but roads, sanitation, hospitals, schools, housing, and a host of other basic services.¹¹⁶ These basic services are equivalent to the types of services that would normally be provided by a state for its citizens. In this manner, therefore, EO and the oil and mining companies engaged in state action through their activities and operations in Angola and Sierra Leone.

In these three ways, EO and the multinational oil and mining companies have engaged in state action. Since they have engaged in activities that characterized them as state actors, they are consequently bound by the law of nations and can be sued under the United States ATCA. The mining and oil companies may claim that although they were closely affiliated with EO

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See Zarate, *supra* note 1, at 99-100.

and the states of Angola and Sierra Leone, they cannot be held liable for the activities of EO that could be considered to be human rights violations like extrajudicial killings or genocide because they did not actively participate in EO's activities or did not know anything about the circumstances of the alleged human rights violations. An alien plaintiff, however, would easily be able to argue against this claim by utilizing the theory of *respondeat superior* to show that EO acted as an employee or agent of the oil and mining companies, and they should therefore be held responsible for the actions of EO.

B. Procedural Issues and Recommendations for the Oil and Mining Companies

Despite the fact that an alien plaintiff could have strong arguments that EO and the multinational oil and mining companies committed violations under the ATCA, the companies could raise several of the procedural claims discussed above which might be causes for dismissal from a United States court. Since the outcomes of these procedural claims are difficult to determine in the absence of the specific details of an actual case, this paper will not analyze them. It is sufficient to note, however, that, depending on the specific circumstances of the case and the alien plaintiffs who may bring it, these procedural claims are not insurmountable for alien plaintiffs, as evidenced by the favorable outcomes in procedural hearings in similar cases under the ATCA.¹¹⁷ EO and the multinational oil and mining companies should therefore remain aware of their possible liability under the ATCA.

It is possible, however, for the multinational oil and mining companies to proactively shield themselves from possible liability from claims in the United States under the ATCA. Of course, the most obvious way of protecting themselves from liability under the ATCA would be for EO and the multinational oil and mining companies to take steps to ensure that no human rights abuses occur as a result of their security activities in Africa. These steps could include a plan where EO would strictly restrict itself only to training activities with the militaries of African countries. They could also involve a situation in which the multinational oil and mining companies monitor EO's activities to ensure that no human rights abuses occur. The companies might also attempt to restrict their activities so it does not appear that they are working so closely in concert with the governments of African countries. This would make it more difficult for an alien plaintiff to fulfill the state action element of the ATCA.

Short of these steps, however, EO and the multinational oil and mining companies can also attempt to shield themselves from possible liability in the United States by remaining outside the jurisdiction of the United States

¹¹⁷ See *Jota v. Texaco Inc.*, 157 F.3d 153 (2d Cir. 1998); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

courts. This can be done by limiting their contacts with the United States. While this might be difficult or impossible for companies that are headquartered or have large business units in the United States, such as Chevron, it may be a bit easier for companies based outside of the United States, in countries such as South Africa, Canada or Great Britain, such as Heritage Oil and DiamondWorks. However, even a small amount of business is enough to prompt jurisdiction in the United States. As long as a company has a presence in a state or conducts "continuous and systematic business"¹¹⁸ in a state, it will be enough for a United States federal court in that state to have jurisdiction over the company for the purposes of an alien plaintiff's claim under the ATCA. These companies must keep this in mind when planning their business structures with respect to escaping United States jurisdiction.

V. CONCLUSION

The interests that multinational oil and mining companies hold in Africa constitute the essence of their business. It is therefore of paramount concern to these companies to be able to protect their interests, especially in the context of destructive and violent civil uprisings in the countries in which these interests are located. It may therefore seem as though it is the perfect solution for these companies to work in concert with private security forces such as Executive Outcomes and with the governments of the African countries to protect those interests in any way possible. These arrangements, however, can easily lead to claims under the United States ATCA for possible human rights violations. Based on the current trend of United States courts, which are becoming seemingly more open to ATCA claims against domestic and foreign corporations for torts committed overseas, liability for these companies under the ATCA is a very real concern. Consequently, these companies should take steps to ensure that these arrangements will not compromise their standing under international law and prepare themselves accordingly for possible claims in the future under the ATCA.

¹¹⁸ See Tzeutschler, *supra* note 10, at 404; *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1990).