

# THE ALIEN TORTS STATUTE AND THE SEARCH FOR ENERGY IN DIFFICULT POLITICAL ENVIRONMENTS

*Edwin L. Gorham\**

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\* Retired from the practice of law. Previously, Senior Vice President and General Counsel, Frontera Resources Corporation; Associate General Counsel and Corporate Counsel, Conoco Inc. A.B., Davidson College; J.D., University of Texas School of Law. Member of the Texas and Oklahoma State Bar Associations.

## I. INTRODUCTION

The need to satisfy the world's ever growing thirst for energy drives both American and foreign energy companies further than ever before to accept risks that would not have been considered acceptable previously. Initially, the risks were primarily technological in nature. Energy companies drilled deeper and deeper onshore at greater risk and cost to unlock reservoirs of petroleum and natural gas previously considered technologically unfeasible or uneconomic. Thereafter, the industry took its exploratory efforts offshore into shallow, and then deeper, waters. Now, the Gulf of Mexico and other mature offshore energy basins are populated by standing and floating platforms, both manned and unmanned, all fully automated, producing thousands of barrels of oil and millions of cubic feet of natural gas each day to meet the world's demand.

The energy industry's willingness to accept risk has not been limited to technological issues, however. As energy reserves become depleted, the difficulty in finding new reserves of energy has increased. Energy explorers have had to expand the scope of their search to places far from the safe political confines of the Gulf of Mexico. This expansion has taken explorers from the North Sea to Eastern Europe, from the tundra of Western Asia to the warm seas of Southeast Asia, from the East Indies to the West Indies, from Patagonia to Mexico, and from Libya to South Africa. This exploration has borne fruit. Millions of barrels of oil and trillions of cubic feet of natural gas have been discovered in basins great and small around the world as a result. Accompanying these discoveries, however, are safety issues for assigned personnel, security issues for onsite assets, political risk for investments, and hazards resulting from working with or for governments deemed by world opinion to be violating international law.

While not exclusively so, most modern concession contracts between host governments and energy companies are referred to as "Production Sharing Contracts." These agreements take many forms. Fundamentally, however, they authorize the energy concessionaire to explore for and produce oil and gas within a specified geographical contract area. Upon discovery and production of energy resources within the contract area, the

host government becomes entitled to receive a portion of the net production after allowing the concessionaire to recover from the sale of produced hydrocarbons some or all of its costs of exploration, production, and operation. The contract often provides that in return for receiving a share of the production, the host government agrees to provide certain services to assist the concessionaire in the operation and maintenance of the contract area. These services include the provision of road and pipeline rights-of-way, water for operations, and, most importantly, security for operations in and around the contract area. This latter obligation on the part of the host government is, to a greater and greater extent, becoming the source of serious risk to the international energy industry.

## II. THE OPERATING ENVIRONMENT

Geology is blind to politics and world strife. While inexplicable and utterly illogical, it has long been believed in the international energy industry that the larger the energy reserve discovered, the larger the political and safety risk to be encountered. Such was the situation in two recent cases discussed hereafter. In *Presbyterian Church of Sudan v. Talisman Energy Inc.*, a Canadian corporation was striving to produce discovered oil pursuant to a production sharing contract whose contract area was located in Darfur.<sup>1</sup> Darfur, positioned in the southwestern region of the Sudan, has been the site of a bloody civil war for over twenty years.<sup>2</sup> The Sudanese government's handling of the civil war has resulted in charges of ethnic cleansing, forcible relocation, torture, and crimes against humanity.<sup>3</sup> *Doe v. Unocal Corp.* involved a claim that Unocal should be held liable "for international human rights violations perpetrated by the Burmese military in furtherance and for the benefit of" a pipeline construction project in which Unocal was a participant.<sup>4</sup> Among the specific charges made against Unocal were complicity with the Burmese military in forced labor,

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1. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

2. *Id.* at 643.

3. *Id.* at 657, 658, 663.

4. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000).

physical violence, and involuntary relocation.<sup>5</sup> Myanmar, formerly Burma, was the host nation for Unocal's production and pipeline transportation of natural gas produced from the Andaman Sea, offshore Myanmar.<sup>6</sup> In both of these cases, a western energy company was charged in a U.S. court with violations of the Alien Tort Statute (ATS) as a result of acts carried out by the military arm of its host government overseas.<sup>7</sup>

### III. THE LAW

The Alien Tort Statute provides: "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."<sup>8</sup> "To state a claim under the [ATS], a plaintiff must allege (1) a claim by an alien, (2) alleging a tort, and (3) a violation of the law of nations (international law)."<sup>9</sup>

### IV. THE CASES

#### A. *The Doe v. Unocal Corp. Case*

The plaintiffs in this case were fifteen villagers from the Tenasserim region of Myanmar.<sup>10</sup> The defendants, at the time their motions for summary judgment were filed, included Unocal Corp., Union Oil Company of California, and two Unocal executives.<sup>11</sup> This Article will refer to the defendants jointly as Unocal. The plaintiffs brought the case under the ATS.<sup>12</sup>

At the time of the litigation, Unocal owned an undivided interest in a production sharing contract covering acreage in the Andaman Sea, offshore Burma.<sup>13</sup> The acreage produced natural

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5. *Id.*

6. *Id.* at 1303.

7. *Id.*; *Talisman*, 453 F. Supp. 2d at 638.

8. Alien Tort Statute, 28 U.S.C. § 1350 (2000).

9. *Unocal*, 110 F. Supp. 2d at 1303.

10. *Id.* at 1295 (The U.S. Government continues to refer to this country as Burma and this Article will do the same).

11. *Id.*

12. *Id.* at 1303.

13. *Id.* at 1296–98.

gas, and it became necessary for the participants in the venture to construct a pipeline across a portion of southern Burma to deliver the gas to market in Thailand.<sup>14</sup> The plaintiffs alleged during the course of the pipeline construction, Unocal committed various torts in violation of international law.<sup>15</sup> The charges against Unocal derived from acts of the Burmese military in providing security and logistical assistance to Unocal in connection with the construction of the pipeline.<sup>16</sup> Among the torts alleged were various human rights violations including forced labor, torture, and involuntary relocation.<sup>17</sup>

Commencing its analysis, the trial court listed what, in its opinion, comprises the elements of a cause of action under the ATS. “To state a claim under the [ATS], a plaintiff must allege (1) a claim by an alien, (2) alleging a tort, and (3) a violation of the law of nations (international law).”<sup>18</sup> Unocal conceded the action was a claim by one or more aliens alleging one or more torts.<sup>19</sup> The case turned on whether Unocal could be charged with a violation of international law. In determining this question, the court followed the Second Circuit’s reasoning in *Kadic v. Karadzic*, quoting from that opinion, “[t]he norms of [international law] are found by consulting juridical writings on public law, considering the general practice of nations, and referring to judicial decisions recognizing and enforcing international law.”<sup>20</sup> Further, the court adopted the Second Circuit’s holding in *Filartiga v. Pena-Irala* with the effect that “[a]ctionable violations of international law must be of a norm that is specific, universal and obligatory.”<sup>21</sup> But then, the court went one step further and held that “[w]hen ascertaining the content of the law of nations, the [c]ourt must interpret international law not as it was in 1789 (the year the [ATS] was

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14. *Id.* at 1297.

15. *Unocal*, 110 F. Supp. 2d at 1298.

16. *Id.*

17. *Id.*

18. *Id.* at 1303.

19. *Id.*

20. *Id.* at 1304 (citing *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995)).

21. *Unocal*, 110 F. Supp. 2d at 1304 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)).

enacted), but as it has evolved and exists among the nations of the world today.”<sup>22</sup>

Unocal argued only violations of international law that rise to the level of a *jus cogen* violation are actionable under the ATS.<sup>23</sup> The court pointed out that common customary international law—the law that rests upon the consent of the states—is not binding upon a state refusing to agree to it.<sup>24</sup> On the other hand, “[*Jus cogen*] norms, norms derived from values taken to be fundamental by the international community, enjoy the highest status within customary international law and are binding on all nations.”<sup>25</sup> Agreeing with Unocal in some respects, the trial court held only *jus cogen* norms are actionable under the ATS.<sup>26</sup> The defendants, however, could take little comfort from this holding because the court went on to state “[i]t is well accepted that torture, murder, genocide and slavery all constitute violations of *jus cogen* norms.”<sup>27</sup>

The question then became: can a private individual be found guilty of a breach of international law in the context of the ATS? Prior to the *Kadic* decision in 1995, the ATS had only been applied to private individuals or companies found to be acting with official authority or under color of such authority.<sup>28</sup> The Second Circuit held in *Kadic* that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”<sup>29</sup> The California district court in *Unocal* relied on *Kadic* to answer the question affirmatively—private companies could be held liable under the ATS for breaches of international law.<sup>30</sup> The

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22. *Id.* at 1304.

23. *See id.*

24. *Id.*

25. *Id.*

26. *See id.*

27. *Unocal*, 110 F. Supp. 2d at 1304. (citing *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995)).

28. *Doe v. Karadzic*, 866 F. Supp. 734, 739–40 (S.D.N.Y. 1994); *see also Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).

29. *Unocal*, 110 F. Supp. at 1305 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995)) (quotations omitted).

30. *Doe v. Karadzic*, 866 F. Supp. 734, 739–40 (S.D.N.Y. 1994); *see also Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).

court went on to quote (from *Kadic*) that “[w]hile crimes such as torture and summary execution are proscribed by international law only when committed by state officials or under color of law, the law of nations has historically been applied to private actors for the crimes of piracy and slave trading, and for certain war crimes.”<sup>31</sup> Although none of the plaintiffs’ factual allegations brought Unocal within the scope of piracy or war crimes, involuntary forced labor was arguably the same as slave trading.

After finding slave trading in the context of international law was indeed equivalent to forced labor, the court had to decide whether Unocal could be made legally responsible for the Burmese military’s forced labor practices. The court, refusing to follow precedent from the Nuremberg Tribunals instituted after World War II, held that “liability requires participation or cooperation in the forced labor practices,”<sup>32</sup> not just knowledge that someone else was committing abuses.<sup>33</sup> A review of the evidence alleged led the court to the conclusion that Unocal neither participated nor cooperated with the Burmese military in securing forced labor to provide infrastructure for the construction of the gas pipeline.<sup>34</sup>

The court then addressed the alternative theory of whether Unocal was acting under color of law and could therefore be held liable for an international law violation.<sup>35</sup> The court deemed the test for determining whether a private party is acting under color of law most relevant to the case at hand was the “joint action test.”<sup>36</sup> The plaintiffs argued Unocal’s participation in the joint venture to build the pipeline constituted joint action with the government.<sup>37</sup> “Under the joint action test, state action is present if a private party is a ‘willful participant in joint action

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31. *Unocal*, 110 F. Supp. 2d at 1304 (quoting *Kadic*, 70 F.3d at 239–40, 243) (citation omitted).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1305.

36. *Id.*

37. *Unocal*, 110 F. Supp. 2d at 1305.

with the State or its agents.”<sup>38</sup> The court went on to say that to be a willful participant in joint action, a private party had to either participate with the military in the charged conduct or have acted to influence the military to carry out the charged conduct.<sup>39</sup> The court then stated:

Here, Plaintiffs present evidence demonstrating that before joining the [pipeline] Project, Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing, and would continue to commit these tortious acts.<sup>40</sup>

Notwithstanding this evidence, the court determined knowledge of a violation or a potential violation of international law was not enough. Unocal and the Burmese military may have had a shared goal to complete the pipeline, but the court stated a mere “shared goal does not establish joint action.”<sup>41</sup> In the court’s assessment, the plaintiffs presented no evidence that Unocal “participated in or influenced” the military’s unlawful conduct.<sup>42</sup> Accordingly, the court granted summary judgment on all of Unocal’s motions.<sup>43</sup>

The extent to which the *Unocal* decision will influence the important points of international law addressed in the case is ambiguous to say the least. The case was appealed to the Ninth Circuit,<sup>44</sup> which reversed the district court’s holdings regarding liability under the ATS.<sup>45</sup> All was not lost, however. On an *en banc* review of the decision to reverse, the Ninth Circuit

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38. *Id.* (quoting *Dennis v. Sparks*, 449 U.S. 24, 27–28 (1980)).

39. *Id.*

40. *Id.* at 1306.

41. *Id.*

42. *Id.*

43. *Unocal*, 110 F. Supp. 2d at 1296.

44. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

45. *Id.* at 946–48.

determined the case should be reheard before the entire court.<sup>46</sup> Alas, the rehearing never occurred. The parties to the case apparently settled the matter,<sup>47</sup> and the Ninth Circuit dismissed the case with prejudice<sup>48</sup> and vacated the district court's opinion discussed above.<sup>49</sup>

Two important observations should be made about the *Unocal* case. First, the case arose and was decided before *Sosa v. Alvarez-Machain*.<sup>50</sup> In *Sosa*, the Supreme Court discussed the interpretation and scope of the ATS and held that the ATS merely granted subject matter jurisdiction to the federal courts and was not an independent cause of action.<sup>51</sup> Despite *Unocal's* holding to the contrary regarding the scope of the ATS, its analysis and application is consistent with *Sosa*. In its analysis of possible violations by Unocal of customary international law, the *Unocal* court, like the *Sosa* Court, considered the current state of the law of nations but demanded that such law be "defined with a specificity comparable to the features of the 18th-century paradigms."<sup>52</sup> In other words, for a violation of customary international law to be subject to recourse by way of the ATS, it must be specific and generally accepted.

Second, *Unocal* analyzed the defendant's possible liability as either a state actor or for actions taken under color of law.<sup>53</sup> The case did not address the possibility that Unocal could have been liable for the acts of the Burmese military based on aiding and abetting or conspiracy claims.<sup>54</sup> Why these legal theories were not argued and addressed in *Unocal* is an open question.

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46. Doe I v. Unocal Corp., 395 F.3d 978, 979 (9th Cir. 2003).

47. Final Settlement Reached in Doe v. Unocal, Mar. 21, 2005, [http://www.earthrights.org/legalfeature/final\\_settlement\\_reached\\_in\\_doe\\_v\\_unocal.html](http://www.earthrights.org/legalfeature/final_settlement_reached_in_doe_v_unocal.html).

48. Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005).

49. Doe I v. Unocal Corp., 395 F.3d 978, 979 (9th Cir. 2003).

50. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

51. *Id.* at 712.

52. *Id.* at 723.

53. *Unocal*, 110 F. Supp. 2d at 1305.

54. *Id.*

B. *The Presbyterian Church of Sudan v. Talisman Energy, Inc. Case*

1. *The Facts*

The *Talisman* case, decided on September 12, 2006, by the U.S. District Court for the Southern District of New York, arose out of the long and bitter civil war that continues to be waged in Darfur, the Sudan.<sup>55</sup> Talisman is a Canadian corporation,<sup>56</sup> which through its subsidiary, Talisman (Greater Nile) B.V. (TGNBV), a Netherlands corporation, became the owner of an undivided twenty-five percent interest in the Exploration and Production Sharing Agreement (EPSA) covering Blocks 1, 2, and 4 located in the Darfur region of the Sudan.<sup>57</sup> Its co-venturers in the Blocks were the China National Petroleum Corporation (CNPC), the state oil company of China, Petronas Carigali Overseas SDN BHD (Petronas), the state oil company of Malaysia, and Sudapet Ltd. (Sudapet), the state oil company of the Sudan.<sup>58</sup>

The participants in Blocks 1, 2, and 4 created Greater Nile Petroleum Operating Company Limited (GNPOC) to operate the Blocks on behalf of the equity participants.<sup>59</sup>

Prior to TGNBV's acquisition of an interest in the EPSA, GNPOC entered into a contractual arrangement with the Sudanese army to provide security for GNPOC operations.<sup>60</sup> GNPOC also had its own force of unarmed security advisors who had daily contact with the Sudanese army.<sup>61</sup>

During the period 1999 to 2003, the [g]overnment was heavily engaged in providing security for the GNPOC concession. The [g]overnment commitment included about 1,000 military and police officers assigned to

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55. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 638 (S.D.N.Y. 2006).

56. *Id.*

57. *Id.* at 641, 643, 646, 686.

58. *Id.* at 646.

59. *Id.*

60. *Id.* at 647.

61. *Talisman*, 453 F. Supp. 2d at 647.

protect the oilfield operations themselves; about 1,300 intelligence officers who worked to gather intelligence in the communities within the concession; and about 5,000 military personnel who were stationed in the concession [area].<sup>62</sup>

These security troops were under the command of Sudan's government.<sup>63</sup>

Prior to making its investment in the Sudan, Talisman did a considerable amount of due diligence to ascertain the extent of the civil war in Darfur, the government's management of that war, and the type of interaction between the petroleum operations and the military.<sup>64</sup> There was evidence that Talisman learned, prior to its investment, that the military was committing violations of international law in the conduct of the civil war, such as "clear[ing]" proposed work areas of inhabitants to create "safety zone[s]."<sup>65</sup>

The relationship between Talisman and TGNBV was structured through a Technical Assistance and Service Agreement (TASA).<sup>66</sup> "Under [this agreement], Talisman provided advice to TGNBV on oil operations in the Sudan, including advice on topics such as security, development, and managing the relationship with the [g]overnment."<sup>67</sup> TGNBV sent Talisman requests for advice, "principally on business and operational issues."<sup>68</sup> Talisman also provided TGNBV with employees through a practice of secondment, or loaning workers.<sup>69</sup> The seconded employees also reported to GNPOC line managers with respect to services performed in support of oilfield operations.<sup>70</sup> TGNBV's staff also included two security advisors who "traveled widely through the GNPOC concession and neighboring areas and were the principal liaison[s] with

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62. *Id.* at 649.

63. *Id.*

64. *Id.* at 647.

65. *Id.* at 647 n.11, 648.

66. *Id.* at 648.

67. *Talisman*, 453 F. Supp. 2d at 648-49.

68. *Id.* at 649.

69. *Id.*

70. *Id.*

[GNPOC's manager of security]."<sup>71</sup> "They prepared periodic reports assessing the danger presented to TGNBV employees working in the . . . concession and the threat to the GNPOC oil operations."<sup>72</sup>

In October 2000, Talisman and TGNBV worked on drafting guidelines for GNPOC's interaction with and support of the military forces in the concession area. The guidelines listed acceptable and unacceptable services and supplies, drawing a distinction between support for the [g]overnment's defense of GNPOC oil exploration activities and any offensive military action.<sup>73</sup>

There was ample evidence before the court that the Sudanese government, in its efforts to protect the oil field operations, conducted a buffer zone strategy of clearing key areas of villagers.<sup>74</sup> In addition, "there were three airstrips [located within the concession], two of which were controlled and maintained by GNPOC."<sup>75</sup> The two GNPOC airstrips were used principally for the purpose of supporting oil field operations but were also used by the Sudanese military to provision troops and for defensive military activities.<sup>76</sup> However, "[f]or at least some period of time, each of these airstrips was also [used] for attacks against rebel forces and, the plaintiffs contend[ed], against civilians[,] including [some] of the plaintiffs."<sup>77</sup>

In April 2001, [the manager of TGNBV] led a GNPOC "brainstorming" session on the question of whether GNPOC should try to develop a plan to explore the area [of the concession] "south of the river" that had not been previously explored . . . . In [the manager's] opinion, something more than half of Block 4 was under [g]overnment control, but the southern portion of the Block was not and TGNBV did not consider it "secure" . . . . Two of the plaintiffs [claimed to have

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71. *Id.*

72. *Id.*

73. *Talisman*, 453 F. Supp. 2d at 649.

74. *Id.* at 650–51.

75. *Id.* at 651.

76. *Id.* at 651–52.

77. *Id.* at 652.

been] displaced [by the government] following April 2001 from homes located in what appear[ed to the court as] “south of the river.”<sup>78</sup>

## 2. *The Law*

The *Talisman* case came before the New York district court on motions for summary judgment. Although the court inexplicably did not state the federal statute upon which it based its decision,<sup>79</sup> a reading of the opinion makes it clear the court believed the plaintiffs’ case was founded upon the Alien Tort Statute.<sup>80</sup>

In their complaint, the plaintiffs claimed:

Talisman violated customary international law relating to genocide, torture, war crimes, crimes against humanity, and the treatment of ethnic and religious minorities and their property, and that Talisman conspired with and aided and abetted its sole co-defendant, the Republic of Sudan, to commit those same violations of customary international law.<sup>81</sup>

The plaintiffs did not contest the summary judgment motions as they related to the claims that Talisman was directly responsible for the enumerated violations of international law.<sup>82</sup> Accordingly, the court rendered summary judgment for Talisman with respect to those claims.<sup>83</sup> Thus, the only claims remaining for consideration were those asserting that Talisman was guilty of aiding and abetting the government of the Sudan in the perpetration of international law violations or in conspiring with the government of the Sudan in the perpetration of the alleged violations.<sup>84</sup>

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78. *Id.* at 656.

79. *See generally Talisman*, 453 F. Supp. 2d at 633 (lacking a description of the statute relied upon).

80. *Talisman*, 453 F. Supp. 2d at 638.

81. *Id.* at 662.

82. *Id.*

83. *Id.*

84. *Id.*

## V. CONSPIRACY UNDER THE ATS

In opposition to the summary judgment motion, the plaintiffs claimed there was a conspiratorial agreement between the Sudanese government and Talisman's predecessor in title to the Blocks "to clear the oil concession and surrounding area of all non-Muslim, African civilians."<sup>85</sup> The plaintiffs further claimed:

Talisman joined the conspiracy to displace residents with knowledge of its goal, and furthered its purpose principally by (a) designating new areas for oil exploration understanding that that would require the [g]overnment to "clear" those areas, (b) paving and upgrading the . . . airstrips with knowledge that [g]overnment helicopters and bombers would use them in launching attacks on civilians, and (c) paying royalties to the [g]overnment with the knowledge that the funds would be used to purchase weaponry.<sup>86</sup>

The plaintiffs argued that "[k]nowing participation in a forcible transfer of population, when part of a widespread or systematic attack directed against a civilian population, is a crime against humanity and a violation of customary international law."<sup>87</sup> Their argument went on to assert that once it joined the conspiracy to displace a population, Talisman became liable "for the acts of all other conspirators taken in furtherance of the conspiracy . . ."<sup>88</sup> The plaintiffs' argument was based upon *Pinkerton v. United States*,<sup>89</sup> which plaintiffs contended was "recognized in international law" by the International Criminal Tribunal for Rwanda.<sup>90</sup> "Under the [*Pinkerton*] doctrine, a 'defendant who does not directly commit a substantive offense may nevertheless be liable if the commission of the offense by a co-conspirator in furtherance of

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85. *Id.* at 663.

86. *Talisman*, 453 F. Supp. 2d at 663.

87. *Id.*

88. *Id.*

89. *Id.*; *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946).

90. *Talisman*, 453 F. Supp. 2d at 663 (citing *Pinkerton*, 328 U.S. at 646-47).

the conspiracy was reasonably foreseeable to the defendant as a consequence of their criminal agreement.”<sup>91</sup>

At the inception of the analysis, the New York district court referred back to the recent Supreme Court case of *Sosa v. Alvarez-Machain*.<sup>92</sup> *Sosa* materially changed the interpretation of the ATS as expressed in *Unocal*.<sup>93</sup> In *Sosa*, the Supreme Court held that the ATS was limited in its application to granting subject matter jurisdiction to the federal district courts for alien tort claims.<sup>94</sup> The ATS was enacted in 1789 with “the understanding that the common law would provide a cause of action for the . . . [limited] number of international law violations with a potential for personal liability at the time.”<sup>95</sup> Relying heavily on *Sosa*, the court in *Talisman* explained:

[A] claim under the “present-day law of nations” may form the basis for an ATS claim only to the extent it rests “on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” that Congress had in mind when it enacted the ATS.<sup>96</sup>

The *Talisman* court acknowledged that “since the prosecution of Nazi war criminals[,] . . . liability can be based on participation in a conspiracy . . . .”<sup>97</sup> The court went on to say, however, that the charge of conspiracy had been applied in only two circumstances—“conspiracy to commit genocide and common plan to wage aggressive war.”<sup>98</sup> The court granted *Talisman*’s motions for summary judgment on all conspiracy counts because “[t]he plaintiffs no longer contend[ed] that

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91. *Id.* at 663 (quoting *United States v. Bruno*, 383 F.3d 65, 89 (2d Cir. 2004)).

92. *Talisman*, 453 F. Supp. 2d at 663; *Sosa*, 542 U.S. at 692.

93. *See supra* Part IV.A.

94. *Sosa*, 542 U.S. at 724.

95. *Id.*

96. *Talisman*, 453 F. Supp. 2d at 663 (quoting *Sosa*, 542 U.S. at 725).

97. *Id.* at 663.

98. *Id.* (quoting *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2784 (2006)).

Talisman conspired with the [g]overnment to commit genocide[, and] they ha[d] never claimed that . . . [Talisman] conspired to commit aggressive war.”<sup>99</sup>

The court’s analysis certainly raises a question for consideration on appeal. Recall that plaintiffs’ complaint alleged a conspiracy between Talisman and the government to displace persons and then went on to state the actions that Talisman carried out to indicate its participation in the conspiracy.<sup>100</sup> For example, Talisman was charged with “paving and upgrading the . . . airstrips with knowledge that [g]overnment helicopters and bombers would use them in launching attacks on civilians.”<sup>101</sup> Surely these facts alone would support a claim, if properly pled, that if a conspiracy existed, it could rise to the level of genocide. It is unclear from the court’s analysis whether the plaintiffs’ claim of conspiracy to commit genocide was rejected because it was not affirmatively pled or whether the court found the facts alleged insufficient to support the claim.

In any case, before leaving the subject of conspiracy, the court in dicta stated that “even if the plaintiffs continued to press a claim that Talisman conspired to commit genocide, they would not be able to rely on the *Pinkerton* doctrine to impose liability on Talisman.”<sup>102</sup> According to the court, “The Anglo-American concept of conspiracy was not part of European legal systems . . . at the time of the Nuremberg tribunals, and has never found acceptance in international law.”<sup>103</sup> The court further stated that although the International Criminal Tribunals for Yugoslavia and Rwanda recognized the concept of conspiracy,<sup>104</sup> neither tribunal supported the application of the *Pinkerton* doctrine—whereby the question of whether a person has joined a conspiracy turns on whether the act of the co-conspirator was reasonably foreseeable.<sup>105</sup> Stated another way, “Talisman could not be held liable under the ATS for the conduct

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99. *Id.* at 665.

100. *Id.*

101. *Id.*

102. *Talisman*, 453 F. Supp. 2d at 665.

103. *Id.* (quoting *Hamdan*, 126 S. Ct. at 2784 (citation omitted)).

104. *Id.* at 665.

105. *Id.*

of a co-conspirator merely because that conduct was foreseeable.”<sup>106</sup> The court did not further explain the requirements of conspiracy without the application of the *Pinkerton* doctrine.

## VI. AIDING AND ABETTING UNDER THE ATS

Citing the Ninth Circuit in *Unocal*,<sup>107</sup> the *Talisman* court held that “there is a ‘settled, core notion of aider and abettor liability in international law’ that requires a plaintiff to show ‘knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime.’”<sup>108</sup> After a discussion of the holdings of various international tribunals with respect to the law of aiding and abetting in the international law context, the court stated the law as it found it to be:

To show that a defendant aided and abetted a violation of international law, an ATS plaintiff must show:

- 1) that the principal violated international law;
- 2) that the defendant knew of the specific violation;
- 3) that the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation;
- 4) that the defendant’s acts had a substantial effect upon the success of the criminal venture; and
- 5) that the defendant was aware that the acts assisted the specific violation.<sup>109</sup>

After stating the applicable law, the court then reviewed the evidence asserted by the plaintiffs. Specifically, the plaintiffs argued that *Talisman* provided “substantial assistance” to the government in committing violations of international law through the following acts: “(1) upgrading the . . . airstrips; (2) designating areas ‘south of the river’ . . . for oil exploration; (3) providing financial assistance to the [g]overnment through the

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106. *Id.*

107. *Doe I v. Unocal Corp.*, 395 F.3d 932, 951 (9th Cir. 2002).

108. *Talisman*, 453 F. Supp. 2d at 666 (quoting *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 340 (S.D.N.Y. 2005)).

109. *Talisman*, 453 F. Supp. 2d at 668.

payment of royalties; [and] (4) giving general logistical support to the Sudanese military . . . .”<sup>110</sup> The court correctly observed, however, that each of these four actions alleged to be “substantial assistance” were in fact acts “generally accompany[ing] any natural resource development business or the creation of any industry.”<sup>111</sup> Clearly, these acts were not criminal:

[D]esignating acreage for exploration is an essential component of any exploration for and development of natural resources. Upgrading airstrips is critical to the safe delivery of supplies for and transport of personnel. Similarly, paying royalties is customary, as is the payment of taxes and duties. Thus, the plaintiffs’ theories of substantial assistance serve essentially as proxies for their contention that Talisman should not have made any investment in the Sudan, knowing as it did that the Government was engaged in the forced eviction of non-Muslim Africans from lands that held promise for the discovery of oil.<sup>112</sup>

#### VII. CAUSATION

Although the court decided Talisman’s motions for summary judgment should be granted, it chose to go further and discuss the remaining legal hurdle that the plaintiffs would have had to cross if the case had gone to trial.<sup>113</sup> “[T]o recover in this lawsuit,” the court stated, “a plaintiff must show that he or she was displaced or injured in an attack by [g]overnment forces and that the attack either targeted civilians or was undertaken to displace civilians.”<sup>114</sup> The court then recounted the evidence offered by the plaintiffs to determine whether there were sufficient allegations to meet the test set forth.<sup>115</sup> It found only three plaintiffs were able to show “they were displaced by

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110. *Id.* at 671–72.

111. *Id.* at 672.

112. *Id.*

113. *Id.* at 677.

114. *Id.*

115. *Talisman*, 453 F. Supp. 2d at 677–79.

[g]overnment attacks to which GNPOC arguably provided assistance . . . .”<sup>116</sup>

It is pertinent to observe that the court’s statement of the law only required the plaintiffs to show there was a causal connection between the Sudanese government’s violation of international law (in this case forcible removal) and the harm suffered by the individual plaintiff.<sup>117</sup> When evaluating the evidence to determine whether a causal connection existed, however, the court went further and searched to determine whether the plaintiffs had shown a causal connection between *Talisman* or its proxy, GNPOC, and the harm suffered by the individual plaintiff.<sup>118</sup> The latter would appear to be better law. Surely, the court did not intend for a defendant to be found liable for the actions of a government if its acts were not causally connected to the damage rendered.

### VIII. CONCLUSIONS

What lessons can be learned by the international energy industry from the holdings in *Unocal* and *Talisman*? First, it seems clear the Alien Tort Statute, despite its venerable history, is alive and well to serve as a vehicle for aliens to seek redress in the federal courts of the United States for wrongs occurring overseas.

Second, the *Talisman* case, if affirmed on appeal, appears to settle the question of whether private individuals and corporations can be held liable for violations of customary international law—a question left unanswered by the Supreme Court in *Sosa*. Clearly, international energy companies could be held liable for violations of international law under the terms of the ATS.

Third, both cases rejected the notion that the mere sharing of a common goal with the government was sufficient to establish liability under the ATS. In other words, the fact that an international operator wants a secure area to conduct energy operations within an overseas concession will not, without more,

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116. *Id.* at 677.

117. *Id.*

118. *Id.* at 677–78.

burden the operator with liability for the government's attempts to secure the region.

Finally, while *Unocal* and *Talisman* took different analytical approaches to determining liability, both looked carefully at the nature of the interaction between the international energy company and the foreign government. Clearly, the nature of that interaction and the degree of influence exercised over the foreign government will be critical in the determination of liability.

#### IX. PRACTICAL PROPOSALS

Perhaps it would be fruitful to consider some actions that international operators may wish to undertake when operating in difficult political environments to avoid potential liability under the Alien Tort Statute. First, serious consideration should be given to the establishment of written guidelines to be implemented and rigorously followed by the overseas staff in its dealings with the government and local military. The guidelines should focus on discouraging local staff from saying or doing things that could be interpreted as encouraging or supporting the foreign government in acts that the international operator should reasonably know are violations of international law. Such guidelines might identify topics not to be discussed between representatives of the concessionaire and the host government, such as how to secure a concession area or what steps the concessionaire thinks the government should take. The guidelines might also include a protocol for meetings with government representatives and procedures for the taking of minutes and other documentation of proceedings. Certainly, the guidelines should include a list of the do's and don'ts with respect to the concessionaire-government interface.

Second, in difficult political environments, it could be advantageous for the participants in a joint concession to create and empower a jointly owned operating company to conduct operations within the concession, creating a veil between the corporate family of the potential defendant and the daily conduct of energy operations. The operating company should be allowed to operate independently and to make its own operating decisions subject to advice from its board of directors.

Third, the local affiliate of the international energy company should make every effort to stay informed of the government's operations relating to the energy concession and, based upon such information, strive to influence the government to refrain from violating international law. All of these actions should be carefully documented to include the dates, contents and attendees of meetings with the government, copies of meeting agendas, and minutes taken.

Next, great care should be taken in preparing communications sent to the parent company. Gossip and asides contained in these messages could be misinterpreted to signal consent or agreement with the action taken, thus implicating not only the local affiliate but also the parent company.

Finally, the local affiliate should arrange for regular and thorough staff training sessions prepared and delivered by approved legal counsel familiar with the ATS and its requirements. The goal of this training would be to sensitize local staff to the requirements of the law of nations and the implications of the ATS for the success or failure of the energy operation. Training on the ATS could also be coupled with regularly scheduled training sessions on the Foreign Corrupt Practices Act.

There is no doubt as to the difficulty of conducting operations in sensitive political environments. Foreign governments can be ingenious and beguiling in their requests for assistance from their concessionaires who are far from home and their senior managements. Without training and guidance, it is all too easy for local operators to fall into the trap of assisting their host government in the perpetration of acts that could be interpreted to violate international law and put the company at risk. There will never be a panacea for the inherent conflict of cultures, mores, and laws inherent in overseas operations. The ATS does, however, expand those risks, and the overseas energy operator will be well advised to remain vigilant to avoid inadvertently becoming enmeshed within its reach.