

## In This Issue:

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## The Continued Viability of the Alien Tort Claims Act and the Torture Victim Protection Act

By Eric A. Savage and Michael G. Congiu

The U.S. Court of Appeals for the Eleventh Circuit recently endorsed the notion that multinational corporations may be held liable for violations of the Alien Tort Claims Act (ATCA) and Torture Victim Protection Act (TVPA). Although the action did not result in a finding against the employer, the decision made clear that multinational employers, and particularly those with operations in politically troubled areas, need to be aware that these claims are no longer a theoretical possibility, but a genuine source of potential liability.

The ATCA is a federal statute that provides federal court jurisdiction for claims by foreign nationals who allege violations of international law and wish to press their claims in American courts. The TVPA is an amendment to the ATCA passed in 1992 that expressly created causes of action for torture or extrajudicial killing.

The case before the Eleventh Circuit, *Juan Aquas Romero v Drummond Co., Inc.*, No. 07-14090 (11th Cir.) (“*Drummond*”), has a long and interesting history, and was the very first ATCA case to proceed to trial.<sup>1</sup> The plaintiffs alleged that Alabama-based mining company Drummond Company, Inc. (“Drummond”) was complicit in the murders of three union leaders at a Drummond-owned coal mine in Colombia. After the plaintiffs survived a motion to dismiss, and later a motion for summary judgment, the parties went to trial in July 2007, to determine whether Drummond aided and abetted the murders by Colombian paramilitaries, allegedly in violation of the ATCA. After four hours of deliberation, the jury returned a verdict for Drummond as to all counts, and the parties appealed to the Eleventh Circuit on a variety of legal and evidentiary issues.

### The ATCA and the TVPA

The distinction between the ATCA and the TVPA is essential to an understanding of the *Drummond* decision. The ATCA was enacted by the first Congress in 1789 as part of the Federal Judiciary Act, and provides original jurisdiction to the federal district courts for any civil action: (1) brought by an alien; (2) claiming damages sounding only in tort; and (3) resulting from a violation of international law.<sup>2</sup> The ATCA was not utilized

until 1980, when two Paraguayan nationals successfully sued a former Paraguayan official for damages under the ATCA arising from the torture and murder of their son in Paraguay.<sup>3</sup> Since that time, the ATCA has been utilized with little success as a means of holding multinational corporations liable for alleged human rights abuses related to their international operations.

The TVPA, on the other hand, was enacted to supplement the ATCA by providing express causes of action for torture or extrajudicial killing committed by individuals acting under actual or apparent authority, or under “color of law.” The Drummond court succinctly summed up the ATCA and TVPA’s relationship as follows:

The two related statutes that pertain to this appeal perform complementary but distinct roles. The [ATCA] is jurisdictional and does not create an independent cause of action. [citations omitted]. In contrast, the [TVPA] provides a cause of action for torture and extrajudicial killing but does not grant jurisdiction. [citations omitted]. Federal courts are empowered to entertain complaints under the [TVPA] when either the [ATCA] or the federal question statute, 28 U.S.C. § 1331, provides jurisdiction.

Although the TVPA expressly created a private right of action for torture and extrajudicial killing, the statute appears to cover a much narrower set of potential claims than those available under the ATCA, due in large part to the U.S. Supreme Court’s decision in *Sosa v. Alvarez-Machain*.<sup>4</sup> In *Sosa*, the Court held that the ATCA, although jurisdictional in nature, provides for private actions for violations of international law. Although the Court cautioned that all claims brought under the ATCA must allege violations of international norms that are “specific, universal and obligatory,” this warning has not stopped the plaintiffs’ bar from attempting to expand the scope of actionable ATCA claims.<sup>5</sup>

Further, not only is the universe of potential claims available under the ATCA greater than those available under the TVPA, claims brought under the ATCA need not involve state action. By contrast, the TVPA has an express state-action requirement. Thus, acts such as genocide, war crimes, slavery, and forced labor – the most egregious violations of internationally held norms – may succeed under the ATCA even in the absence of state action.

As discussed below, the *Drummond* court assessed a variety of issues involving both the TVPA and ATCA, shedding light on both corporate liability and the complicated evidentiary issues involved in this context.

## The *Drummond* Appeal

### The Legal Issues

In its cross-appeal, Drummond made several arguments that, although foreclosed by Eleventh Circuit precedent, were made with the express intention of preserving the issues for Supreme Court review.

Drummond first argued that the TVPA and the ATCA do not provide a cause of action against corporate defendants. Although recognizing the split in the Circuits on the issue of TVPA liability for corporate defendants, the court concluded that it was bound by Eleventh Circuit precedent supporting such liability. Drummond also argued that the TVPA and ATCA do not provide for “aiding and abetting” liability, and finally, that the TVPA provides the sole basis upon which to bring claims for torture or extrajudicial killing – the two claims expressly contained within the TVPA. Again, the *Drummond* court quickly disposed of these arguments as having been expressly rejected by Eleventh Circuit precedent.

Among other issues, the plaintiffs appealed the district court’s ruling that they had failed to prove the existence of state action to support their TVPA claims for extrajudicial killing. In rejecting plaintiffs’ argument, the Drummond court explained that state action under the TVPA must involve “a symbiotic relationship between a private actor and the government that involves the torture or killing alleged in the complaint,” and added that this relationship may be established through evidence of the active participation of even a single government official. The court held that the state action evidence presented by plaintiffs either did not directly involve the murders at issue, or was otherwise inadmissible.

## Evidentiary Issues

Plaintiffs also appealed a host of decisions to exclude the testimony of five witnesses whose testimony they claimed constituted the proverbial “smoking gun” establishing that Drummond had hired paramilitary forces to murder the union leaders. The district court’s reasoning for excluding this testimony ranged from the plaintiffs’ failure to disclose the witnesses until, in one case, the last day of trial, to refusing a continuance for plaintiffs to complete the letters rogatory process to secure the testimony of a Columbian national. The record suggests strongly that the district court acted reasonably in refusing to admit the testimony of these five witnesses, mostly because it appears the plaintiffs were provided with ample opportunity to present evidence that appeared at best unreliable and at worst inadmissible or irretrievable. Nonetheless, it is very possible that the result could have been different had these individuals testified.

## Looking Forward

The significance of the evidentiary issues in this case cannot be understated. First, it appears that the result may have been different had plaintiffs been able to properly marshal their witnesses and evidence. Second, the case highlights the sometimes inherent logistical difficulties of gathering evidence to support ATCA or TVPA claims. The Drummond case is a lesson in litigating a case where the majority of significant evidence and key witnesses exist in places where the rule of law is weak or political and/or ethnic conflict is the norm, and formidable barriers in language and culture exist. Obtaining discovery in these circumstances, often from reluctant or uncooperative witnesses, is difficult at best.

The plaintiffs’ bar will undoubtedly learn from this decision, and tailor its strategies in future cases accordingly. The defense bar will use the decision to take plaintiffs to task for any evidentiary irregularities in future ATCA or TVPA cases. Litigating these cases is fundamentally difficult, and with this being the first ATCA case to go to trial, the *Drummond* decision will serve to educate counsel on both sides in future cases.

Moving beyond the evidentiary issues, the *Drummond* case should be seen as an indication of the ATCA and TVPA’s continued vitality as sources of liability for multinational corporations. Not only did the court endorse the notion that the TVPA applies to corporate defendants, the court held that plaintiffs can bring claims for extrajudicial killing or torture under both the TVPA and ATCA, thus creating the potential that such claims could proceed in the absence of state action under the ATCA. Even more, the Drummond court held that “aiding and abetting” liability – the indirect liability that is often attributed to corporate defendants in this context – is cognizable under both the ATCA and TVPA. Although these conclusions are hardly indisputable, and may be tested by the Supreme Court in the near future, the *Drummond* decision signifies that corporate defendants with foreign operations must continue to be vigilant about the entities and/or regimes with which they associate.

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<sup>1</sup> For more information on the issues raised and significance of the *Drummond* trial on ATCA jurisprudence, see the authors’ article on the topic: *Corporate Liability for Human Rights Abuses Goes on Trial*.

<sup>2</sup> 28 U.S.C. § 1350 (2000).

<sup>3</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>4</sup> 542 U.S. 692 (2004).

<sup>5</sup> *Id.* at 732.