

Corporate Social Responsibility

SARAH ALTSCHULLER, DAN FELDMAN, AND LARA BLECHER*

I. Introduction

The field of corporate social responsibility (CSR) comprises a wide array of diverse issue areas, standards, initiatives, and both hard and soft law mechanisms, all of which seek to define the nature of corporate responsibility and accountability for human rights, labor rights, and environmental issues. This report will not attempt to be a comprehensive overview of all of the developments that took place in this broad field in 2007 but rather will focus on litigation in both U.S. and international courts, as well as other key efforts to impose or set standards for corporate behavior in the area of human rights and labor rights.

II. Litigation in U.S. Courts

A. LITIGATION UNDER THE ALIEN TORT CLAIMS ACT

The Alien Tort Claims Act (ATCA)¹ remains the primary statutory tool for proponents seeking to enforce international human rights law against companies in U.S. courtrooms. The statute states simply that “[t]he 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.”² In the landmark 2004 case *Sosa v. Alvarez-Machain*,³ the U.S. Supreme Court touched upon the potential scope of corporate liability under the ATCA. Notably, *Sosa* did not involve allegations of corporate liability but was the Court’s first opportunity to address the scope and nature of the ATCA.⁴ *Sosa* did not provide a

* Sarah Altschuller is an associate in the Corporate Social Responsibility practice of Foley Hoag LLP. She is also Vice-Chair of the Corporate Social Responsibility Committee of the ABA’s Section on International Law and Practice. Dan Feldman is a partner within Foley Hoag LLP’s Corporate Social Responsibility Practice. Lara Blecher is a senior research associate at Cal Safety Compliance Corporation (CSCC).

1. 28 U.S.C. § 1350 (2007).

2. *Id.*

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

4. In the decision, the Supreme Court found that the ATCA was only a jurisdictional statute and that it did not provide a cause of action for plaintiffs seeking to bring actions in tort on the basis of violations of

definitive answer as to whether corporations could be held liable pursuant to the statute; rather, in a single footnote to a statement regarding the need to determine whether international legal norms are “sufficiently definite to support a cause of action,” the Court stated that “[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”⁵ The year 2007 marked a significant time in the determination of answers to the important legal questions that remain with regard to the scope of potential corporate liability under the ATCA.

1. *Khulumani v. Barclay National Bank, Ltd.*

In perhaps the most high profile decision of the year, on October 12, 2007, the Second Circuit Court of Appeals issued its opinion in *Khulumani v. Barclay National Bank, Ltd.*,⁶ a consolidated case brought on behalf of South African plaintiffs who alleged that they, or their family members, were the victims of human rights abuses during the apartheid regime. The defendants in the litigation included more than fifty corporations who operated in South Africa during the time of apartheid.⁷ The plaintiffs alleged that the defendants “aided and abetted” apartheid and its associated human rights violations by operating in South Africa.⁸ The per curiam opinion vacated an earlier decision by the District Court for the Southern District of New York to dismiss the plaintiffs’ claims.⁹ In its decision, the Second Circuit endorsed the theory of aiding and abetting liability under the ATCA, a notable determination due to ongoing controversy regarding the viability and definition of this form of indirect liability under the ATCA.¹⁰

The panel was split in its decision, with two judges issuing concurring opinions finding that plaintiffs could bring claims of aiding and abetting liability under the ATCA, while disagreeing on the legal source of the appropriate “test” for aiding and abetting liability.¹¹ One judge looked to federal common law¹² and the other looked to an international legal standard set forth in the Rome Statute of the International Criminal Court by which a defendant must have provided assistance for the purpose of facilitating a crime in order to be found liable for aiding and abetting that crime, and specifically concluded that:

[A] defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission that crime.¹³

international law. The Court also found that the statute allowed federal courts to recognize causes of action for certain types of international law violations. Causes of action could be found in tort for violations of international legal norms with no “less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.” *Id.* at 732.

5. *Id.* at 732, n.20.

6. *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam).

7. *Id.* at 258.

8. *Id.* at 259.

9. *Id.* at 264.

10. *Id.* at 260.

11. *Id.* at 264, 284.

12. *Id.* at 284 et seq. (Hall, J., concurring).

13. *Id.* at 277 (Katzman, J., concurring).

The third member of the panel did not agree that the plaintiffs could bring claims for aiding and abetting under the ATCA but did state that if such liability were to be found, the most appropriate standard was the one set forward in the Rome Statute.¹⁴ With one vote from the majority opinion and one vote from the dissent, the majority of the panel found that the elements set forth by the Rome Statute should define aiding and abetting liability.¹⁵ This is a significant endorsement of a specific standard for aiding and abetting liability by a federal appellate court. It remains to be seen whether this standard will be endorsed by other appellate decisions, but, post-*Sosa*, this is a clear endorsement of a specific international law standard for aiding and abetting liability.¹⁶

2. *Rodriguez v. Drummond Co.*

In 2007, for the first time, an ATCA case against a corporation proceeded to trial. The case, *Estate of Rodriguez v. Drummond Company*,¹⁷ involves the murders of three Colombian trade union leaders who had worked for Drummond's Colombian coal mine operations. In two separate incidents in 2001, the three leaders of the Sintramienergetica labor union were pulled off buses chartered by Drummond and killed by paramilitary groups.¹⁸ Plaintiffs went to trial in the District Court for the Northern District of Alabama against Drummond's Colombian subsidiary on the basis of claims for wrongful death under the ATCA and the Court allowed the plaintiffs to proceed under a theory of aiding and abetting liability.¹⁹ In late July 2007, the jury found in favor of Drummond.²⁰ Plaintiffs have appealed the verdict.²¹ The case is important because it is the first corporate ATCA case to go to trial, after years of litigation in more than forty such cases.

3. *Sarei v. Rio Tinto*

On October 11, 2007, the Ninth Circuit held a rehearing en banc in *Sarei v. Rio Tinto, PLC*, a case originally filed in 2000 involving claims by current and former residents of the

14. *Id.* at 292 (Korman, J., concurring in part and dissenting in part).

15. *Id.* at 277, 333.

16. Another significant decision on aiding and abetting liability under the ATCA is currently on appeal to the Second Circuit. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006), the District Court held that "[a]iding and abetting liability is a specifically defined norm of international character that is properly applied as the law of nations for purposes of the [ATCA]." The court also held that in order to demonstrate that a defendant had aided and abetted a violation of international law, a plaintiff must show:

1) [T]hat 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. *Id.*

The District Court in the Talisman litigation looked to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia in establishing this aiding and abetting standard. *Id.* at 667.

17. *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

18. *Id.*

19. *Id.*

20. *See In re Romero v. Drummond Co.*, No. CV-03-BE-0575-W (N.D. Ala. 2007) (Jury verdict form).

21. *See In re Romero v. Drummond Co.*, No. CV-03-BE-0575-N (N.D. Ala. 2007) (Plaintiffs' notice of appeal).

island of Bougainville, Papua New Guinea, who alleged they were the victims of numerous violations of international law as the result of the mining operations of Rio Tinto PLC.²² The rehearing was granted after the circuit issued a superseding opinion in April 2007,²³ withdrawing an earlier opinion issued in August 2006.²⁴ The April 2007 opinion, now also withdrawn by the decision to rehear the case en banc,²⁵ had represented a significant statement in the ongoing debate within the federal judiciary as to the proper jurisdictional showing necessary for plaintiffs to bring actionable claims under the ATCA.²⁶ While most post-*Sosa* opinions have sought to determine whether plaintiffs' claims implicate the "specific, universal and obligatory" norms of international law, the Ninth Circuit's now withdrawn April 2007 opinion found that this analysis was unnecessary, finding that the necessary jurisdictional showing for ATCA claims is the same as the showing necessary for claims asserting federal question jurisdiction.²⁷ The court also stated that "the district court had subject matter jurisdiction under the ATCA so long as plaintiffs alleged a nonfrivolous claim by an alien for a tort in violation of international law."²⁸ Additionally, the circuit court found that the "legal question of whether plaintiffs have properly invoked a federal court's power to recognize actionable international law torts under the ATCA 'must be decided after and not before the court has assumed jurisdiction over the controversy.'"²⁹ In other key findings, the court found that the ATCA does not require plaintiffs to exhaust local remedies in foreign courts,³⁰ and that a Statement of Interest submitted by the U.S. Department of State raising concerns about the litigation's impact on the conduct of foreign relations did not render the case non-justiciable pursuant to the political question doctrine.³¹ Whether these holdings survive the Ninth Circuit's rehearing en banc remains to be seen.

4. *Bowoto v. Chevron*

Bowoto v. Chevron, a case originally filed in 1999, involves allegations by Nigerian plaintiffs that Chevron Corporation was complicit in abuses committed by the Nigerian military and police in two separate incidents in 1998 and 1999.³² On August 14, 2007, the District Court for the Northern District of California ruled that plaintiffs had put forward sufficient evidence to survive summary judgment on their claims that Chevron, through its Nigerian subsidiary, knew that security forces would commit the alleged torts and

22. *See Sarei v. Rio Tinto, PLC*, 499 F.3d 923 (9th Cir. 2007) (mem.) (the order to rehear case en banc).

23. *Sarei v. Rio Tinto PLC*, 487 F.3d 1193 (9th Cir. 2007).

24. *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069 (9th Cir. 2006).

25. *Sarei*, 499 F.3d at 923 (mem.).

26. *See generally Sarei*, 487 F.3d at 1197-1246.

27. *See id.*

28. *Id.* at 1201.

29. *Id.* at 1201 n.5 (internal citations omitted).

30. *Id.* at 1214.

31. *Id.* at 1205 ("[I]t is our responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding.")

32. *See Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2007 WL 2349336 (N.D. Cal. 2007).

agreed to the attacks.³³ The court allowed plaintiffs to proceed on aiding and abetting, conspiracy, and agency theories of liability.³⁴ The case is expected to go to trial in 2008.

Notably, the *Bowoto* case involves companion litigation brought in California state court, involving claims brought under the California Business & Professions Code § 17200.³⁵ The state case is expected to go to trial in August 2008.³⁶

5. *Arias v. DynCorp*

In a decision on May 21, 2007, in *Arias v. DynCorp*, the District Court for the District of Columbia found that plaintiffs had presented a justiciable question of law under the ATCA in a case involving allegations that DynCorp, pursuant to a contract with the U.S. Government, sprayed fumigants in the border areas of Ecuador while trying to eradicate cocaine and heroin crops growing in Colombia.³⁷ Plaintiffs are Ecuadorian nationals who allege that they suffered severe harm to their health and their livelihoods as a result of contamination from the fumigation.³⁸ They assert that “defendants knew or acted in willful disregard of the fact that winds would carry the toxic spray to area inhabited by plaintiffs[.]”³⁹ Defendants had argued that plaintiffs’ ATCA claims should be dismissed in part because Congress had authorized the aerial fumigations and that therefore defendants’ actions could not have violated customary international law.⁴⁰ The court found that, even if defendant’s actions were authorized by Congress, “plaintiffs have alleged a conflict between any such congressional authorization and international law” and Congress had not clearly sought to abrogate international law through its authorization.⁴¹ After the ruling, the case was consolidated for case management and discovery purposes, with another case filed against DynCorp by Ecuadorian plaintiffs, *Quinteros v. DynCorp*.⁴²

6. *Corrie v. Caterpillar; Saleh v. Titan; Athan v. Blackwater*

Notably, the DynCorp litigation is not the only case involving allegations of human rights abuses against a company where the question of U.S. government authorization or policy-making has arisen as a possible defense. In *Corrie v. Caterpillar, Inc.*, plaintiffs filed suit against Caterpillar in part on the basis that the company had aided and abetted violations of international law by providing bulldozers to the Israeli Defense Forces to demolish homes in the Palestinian territories.⁴³ Plaintiffs’ daughter had been killed by one of the bulldozers used by the Israeli Defense Forces.⁴⁴ On September 17, 2007, the Ninth Circuit Court of Appeals affirmed a decision by the district court that the case presented

33. *Id.*

34. *Id.* at *15-18.

35. *Bowoto v. Chevron Corp.*, No. 03-417580 (Cal. Super. Ct. filed Feb. 20, 2003).

36. *Id.*

37. *Arias v. DynCorp*, 517 F. Supp. 2d 221 (D.D.C. 2007).

38. *Id.*

39. *Id.* at 224.

40. *Id.*

41. *Id.* at 227.

42. *Quinteros v. DynCorp*, No. 1:2007-cv-01042 (D.D.C. filed June 12, 2007).

43. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007).

44. *Id.*

non-justiciable political questions.⁴⁵ Stating that “[t]he decisive factor here is that Caterpillar’s sales to Israel were paid for by the United States[,]” the court found that “[i]t is difficult to see how we could impose liability on Caterpillar without at least implicitly deciding the propriety of the United States’ decision to pay for the bulldozers.”⁴⁶

It is likely that similar questions will arise in two cases emerging from the war in Iraq. In *Saleh v. Titan Corp.*,⁴⁷ plaintiffs are Iraqi nationals who allege that they, or their family members, were tortured in military prisons in Iraq. Defendants are U.S. government contractors who provided interrogators and interpreters to the U.S. military.⁴⁸ In a ruling on November 6, 2007, the District Court for the District of Columbia granted summary judgment for one defendant, Titan Corporation, and denied summary judgment for the other, CACI.⁴⁹ Both companies had asserted the fact that they operated as government contractors as an affirmative defense.⁵⁰ The court found that Titan’s employee “performed their duties under the exclusive operational control of the military” and that therefore plaintiffs’ claims must be dismissed.⁵¹ But the court found that because “a reasonable trier of fact could conclude that CACI retained significant authority to manage its employees,” plaintiffs’ claims against CACI could go forward.⁵²

In *Atban v. Blackwater*, a case filed in the District Court for the District of Columbia on October 11, 2007, plaintiffs allege that they, or their family members, were killed or injured by employees of Blackwater USA, a private security firm, in an incident in Baghdad on September 16, 2007.⁵³ The case involves two claims under the ATCA, charging the company with extrajudicial killing and war crimes.⁵⁴ Litigation in this case will likely involve further exploration of the scope of the government contractor defense.

7. *Chiquita Brands International*

In March 2007, Chiquita Brands International admitted publicly that it had provided payments to the United Self-Defense Forces of Colombia (AUC), a paramilitary group.⁵⁵ At the time of the admission, the company agreed to pay a \$25 million fine for providing funds to an organization on the United States’ list of terrorist organizations and to cooperate in an investigation by the U.S. Department of Justice.⁵⁶ The payments were allegedly made to ensure the protection of Chiquita employees and banana plantations in

45. *Id.*

46. *Id.* at 982.

47. See *Ibrahim v. Titan Corp.*, No. 05-1165, 2007 WL 3274784 (D.D.C. 2007) (consolidated with *Saleh v. Titan* for discovery purposes). Defendants in this case are Titan Corporation and CACI Premier Technologies, Inc., and its parent company, CACI International, Inc. At the time of the 2007 rule, the case only involved common law tort claims. Federal claims, including claims brought under the ATCA, were dismissed from the case in 2006. *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57-59 (D.D.C. 2006).

48. *Ibrahim v. Titan Corp.*, No. 05-1165, 2007 WL 3274784 (D.D.C. 2007).

49. *Id.*

50. *Id.* at *1.

51. *Id.* at *9.

52. *Id.*

53. *Atban v. Blackwater USA*, No. 1:07-cv-01831 (D.D.C. filed Oct. 11, 2007).

54. *Id.*

55. *Colombia May Extradite Chiquita Officials*, N.Y. TIMES, Mar. 19, 2007, available at <http://query.nytimes.com/gst/fullpage.html?res=9C02E1D91630F93AA25750C0A9619C8B63>.

56. *Id.*

Colombia.⁵⁷ Since this admission, at least three suits have been filed against the company under the ATCA,⁵⁸ generally alleging that the company provided material support to a terrorist organization, and that the company knew, or should have known, that providing such support would lead to the deaths of the decedents.

8. *Xiaoning v. Yahoo! Inc.*

An ATCA case filed against Yahoo! Inc. came to a high profile settlement on November 13, 2007.⁵⁹ On April 18, 2007, plaintiffs filed suit in *Xiaoning v. Yahoo! Inc.*, alleging that the company knowingly took actions that led to plaintiffs' arbitrary arrest, detention, and torture by revealing identifying user information to authorities of the People's Republic of China.⁶⁰ Plaintiffs alleged that Yahoo! had been informed by various human rights organizations that providing Chinese authorities with the identity of the individuals associated with specific email accounts could place those individuals at risk of significant harm.⁶¹ Chinese authorities sought information regarding individuals accused of anti-government speech.⁶² On November 13, the parties filed a joint stipulation of dismissal, following an agreement to settle the case.⁶³ No details as to settlement provisions have been made public, other than that Yahoo! agreed to pay for the plaintiffs' litigation costs, to provide support to the plaintiffs and their families, and to create a fund to support other political dissidents and their families.⁶⁴ Shortly before the settlement, on November 6, 2007, the House Committee on Foreign Affairs held a hearing on whether Yahoo! provided false information to Congress regarding its provision of information to Chinese authorities.⁶⁵

B. LITIGATION UNDER STATE TORT LAW

1. *Doe v. Exxon Mobil Corp.*

The ATCA does not provide the only authority in U.S. courts for corporate liability for human rights abuses committed outside the United States. In a case indicating that state tort law could provide the basis for corporate activities abroad, in January 2007, the Court of Appeals for the D.C. Circuit declined to hear Exxon Mobil's interlocutory appeal of a March 2006 decision by the D.C. District Court that allowed Acehese villagers to pro-

57. *Id.*

58. See, e.g., *Carrizosa v. Chiquita Brands Int'l*, No. 0:07-cv-60821 (S.D. Fla. filed June 13, 2007); *Doe v. Chiquita Brands Int'l*, No. 2:07-cv-03406 (D.N.J. filed July 19, 2007); *Does v. Chiquita Brands Int'l*, No. 1:07-cv-10300-HB (S.D.N.Y. filed Nov. 14, 2007).

59. See Verne Kopytoff, *Yahoo Settles with Jailed Chinese Journalists*, SAN FRAN. CHRON., Nov. 14, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/11/14/BUN4TBJNV.DTL&hw=yahoo+settles+with+jailed&sn=001&sc=1000>.

60. Complaint, *Xiaoning v. Yahoo! Inc.*, No. 4:07-cv-02151-CW, 2007 WL 1511131 (N.D. Cal. filed Apr. 18, 2007).

61. *Id.*

62. See Miguel Helft, *Chinese Political Prisoner Sues in U.S. Court, Saying Yahoo Helped Identify Dissidents*, N.Y. TIMES, Apr. 19, 2007, available at <http://www.nytimes.com/2007/04/19/technology/19yahoo.html?fta=y>.

63. See Kopytoff, *supra* note 59.

64. *Id.*

65. See *Yahoo Criticized in Case of Jailed Dissident*, N.Y. TIMES, Nov. 7, 2007, available at <http://www.nytimes.com/2007/11/07/technology/07yahoo.html>.

ceed with their lawsuit against the company on the basis of atrocities allegedly committed by security forces from the Indonesian military.⁶⁶ Originally filed in 2001, plaintiffs in *Doe v. Exxon Mobil Corp.* alleged that Exxon Mobil provided material support to and directed security forces from the Indonesian military in the process of securing its natural gas extraction and processing facility in Aceh.⁶⁷ The plaintiffs originally included claims under the ATCA and the Torture Victim Protection Act, but these claims were dismissed by the district court in October 2005.⁶⁸ The district court allowed the plaintiffs to amend their original complaint, however, and proceed under D.C. tort law.⁶⁹ Trial has been set for June 2008.⁷⁰ Notably, the district court had solicited an opinion from the State Department in this case, and the Office of the Legal Advisor had filed a letter in July 2002 indicating that the litigation “would [in fact] ‘risk a potentially serious adverse impact on significant interests of the United States.’”⁷¹ The circuit court agreed with the district court that discovery could be conducted in a way that would avoid this concern and that the State Department letter should be read as a word of caution but not as a request to dismiss the case.⁷²

2. *Carijano v. Occidental Petroleum*

In *Carijano*, Peruvian plaintiffs allege that Occidental Petroleum’s operations in the Peruvian Amazon resulted in severe contamination of the land and rivers in the region.⁷³ Occidental Petroleum began operating in the region in 1971 but sold its holdings to an Argentinean company in 2000 and has since ceased all operations in the region.⁷⁴ Plaintiffs allege that, as a result of the pollution, they have suffered adverse health effects, including widespread lead and cadmium poisoning, as well as a negative impact on their livelihoods due to damage to the local soil and waterways.⁷⁵ This suit is of note because rather than seeking redress through the ATCA, the plaintiffs’ initial complaint largely consists of state common law tort claims, including negligence, battery, wrongful death, and trespass, but also includes claims under California’s Business & Professions Code.⁷⁶

3. *Doe v. Wal-Mart Stores*

On March 30, 2007, the District Court for the Central District of California granted Wal-Mart’s motion to dismiss in this case, which involved allegations that Wal-Mart breached its supply contracts with various suppliers by failing to ensure that each of its

66. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007).

67. *Id.* at 346.

68. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005).

69. *Id.*

70. Cohen, Milstein, Hausfeld & Toll, P.L.L.C., http://www.cmht.com/cases_exxonmobilaceh.php (website of law firm that represents plaintiffs) (last visited Feb. 7, 2008).

71. *Doe*, 473 F.3d at 354.

72. *Id.*

73. Complaint, *Carijano v. Occidental Petroleum*, No. BC-370828, 2007 WL 1453031, ¶ 1 (Cal. Super. Ct. filed May 10, 2007).

74. *Id.* ¶¶ 38-39.

75. *Id.* ¶¶ 52-72.

76. *Id.* This case was originally filed in California state court in May 2007 but was removed to the federal court. See *Carijano v. Occidental Petroleum Corp.*, No. 2:2007-cv-05068 (C.D. Cal. filed Aug. 3, 2007), available at http://dockets.justia.com/docket/court-cacdce/case_no-2:2007cv05068/case_id-393668/.

suppliers complied with the company's Code of Conduct and by failing to adequately monitor working conditions in its suppliers' factories.⁷⁷ Plaintiffs included workers in garment factories located in China, Bangladesh, Indonesia, Swaziland, and Nicaragua.⁷⁸ The court held that the plaintiffs, as third party beneficiaries to the contract between Wal-Mart and Wal-Mart's suppliers, could only enforce the obligations created in the contract against their employers and not against Wal-Mart itself.⁷⁹ The court also found that plaintiffs could not properly plead claims of negligence on the basis that Wal-Mart was negligent in its contracting with its suppliers.⁸⁰ As the court stated, "[t]he duty Plaintiffs seek to enforce would be a duty of a retailer to be reasonably careful when contracting with suppliers to prevent international labor violations by those suppliers."⁸¹ The court held that this claim went "well beyond the recognized limits of liability."⁸² Plaintiffs have appealed the dismissal to the Ninth Circuit Court of Appeals.⁸³

III. Litigation in International Courts

A. CHILEAN INDIGENOUS COMMUNITY PETITION TO IACHR

In February 2007, the Pepiukelen indigenous community in Chile submitted a petition to the Inter-American Commission on Human Rights (IACHR) alleging that the Government of Chile violated the Pepiukelen community's human rights by failing to protect the community and its ancestral land from industrial development associated with the salmon fishing industry.⁸⁴ One of the most controversial industrial developments is owned by AgroSuper Holdings, Inc. ("AgroSuper"), the largest meat and fresh products producers in Chile.⁸⁵ The community had initially tried challenging the development in the Chilean court system, but its claims were dismissed by the Chilean Supreme Court in early 2007.⁸⁶ The IACHR petition cites to rights within the Inter-American Convention on Human Rights and the U.N.'s Declaration of the Rights of Indigenous People.⁸⁷ In August 2007, the IACHR sent a letter to the Government of Chile, asking that it provide details as to "measures taken by authorities to protect members of the Pepiukelen Community."⁸⁸ In September 2007, Chile responded, stating that the land in question was not indigenous,

77. Order Granting Motion to Dismiss, *Doe v. Wal-Mart Stores, Inc.*, No. CV-05-7307-AG (N.D. Cal. Mar. 30, 2007), available at http://www.iradvocates.org/walmart_decision.pdf. This case was originally filed in September 2005 in the Los Angeles Superior Court. It was later removed to federal court. The original complaint is available at <http://www.iradvocates.org/WalMartComplaint091305.pdf>.

78. *Id.* at 3.

79. *Id.* at 5-7.

80. *Id.* at 8-9.

81. *Id.* at 8.

82. *Id.* at 9.

83. See International Rights Advocate, Human Rights Litigation Programs, U.S. Courts, Wal-mart, <http://www.iradvocates.org/index.htm> (stating that a notice of appeal had been filed and that briefing would be completed by December 2007).

84. Ben Witte, *The Pepiukelen's Last Stand Against Chile's Salmon Farmers*, SANTIAGO TIMES, Nov. 13, 2007, available at <http://www.santiagotimes.cl/santiagotimes/content/view/12237/1>.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

that AgroSuper had legitimately acquired its holdings, and that the community's claims regarding the environmental impacts of the development were unfounded.⁸⁹

B. ANVIL MINING—TRIAL IN THE CONGO

On June 28, 2007, a military court in the Democratic Republic of Congo acquitted three former employees of Anvil Mining Ltd. (Anvil), an Australian-Canadian mining company, of complicity in war crimes.⁹⁰ The charges stemmed from an incident in October 2004 when the Congolese military launched an attack on the village of Kilwa.⁹¹ Seventy-three civilians were killed in the attack, which occurred shortly after local residents began a protest that caused Anvil to suspend operations at its Dikulilushi mine.⁹² Anvil has publicly stated that it provided air transport, vehicles, and other material support to the Congolese military at the time of the attack.⁹³ In October 2006, a military court indicted the three former Anvil employees for complicity with war crimes, as well as nine Congolese soldiers for war crimes.⁹⁴ Trial began in December 2006, and the verdict was reached in June, acquitting the former employees and the soldiers.⁹⁵ After the verdict, Louise Arbour, the U.N. High Commissioner for Human Rights, criticized the decision, stating "I am concerned at the court's conclusions that the events in Kilwa were the accidental results of fighting, despite the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations."⁹⁶

IV. International Legal Developments

A. EUROPEAN PARLIAMENT RESOLUTION ON CORPORATE SOCIAL RESPONSIBILITY

On March 13, 2007, the European Parliament adopted a resolution on CSR.⁹⁷ The resolution contains sixty-eight separate statements on the role of CSR within the European Union.⁹⁸ Key statements include that the European Parliament "believes that CSR policies should be promoted on their own merits and should represent neither a substitute for appropriate regulation in relevant fields, nor a covert approach to introducing such legislation."⁹⁹ The resolution also states that Parliament "[b]elieves that the credibility of

89. *Id.*

90. GLOBAL WITNESS, OIL AND MINING IN VIOLENT PLACES—WHY VOLUNTARY CODES FOR COMPANIES DON'T GUARANTEE HUMAN RIGHTS 7 (2007), available at http://www.globalwitness.org/media_library_detail.php/580/en/oil_and_mining_in_violent_places.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Joe Bavier, *U.N. Denounces Congo's Anvil War Crimes Verdict*, REUTERS, July 4, 2007, available at <http://www.reuters.com/article/latestCrisis/idUSL04826124>.

97. Resolution on Corporate Social Responsibility: A New Partnership, EUR. PARL. DOC. P_6TA(2007)0062, available at <http://www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2007-0062&language=EN>.

98. *Id.*

99. *Id.* ¶ 4.

voluntary CSR initiatives is further dependent on a commitment to incorporate existing internationally agreed standards and principles, and on a multi-stakeholder approach . . . as well as on the application of independent monitoring and verification.”¹⁰⁰

B. CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT IN THE UNITED KINGDOM

On July 20, 2007, the British Parliament passed the Corporate Manslaughter and Corporate Homicide Act (the “Act”).¹⁰¹ The legislation makes it easier to convict companies guilty of negligent corporate behavior that results in death.¹⁰² The Act defines corporate manslaughter as a situation where an organization owes a duty of reasonable care for a person’s safety but carries out its activities in such a way that it has committed a gross breach of this duty thus causing death.¹⁰³ This gross breach must have been attributable primarily to senior management, defined as those people who play a significant role in the management of the whole or a substantial part of the organization’s activities.¹⁰⁴ The sanctions for violation of this Act include fines and remedial orders.¹⁰⁵ Provision is also made for the court to issue a “publicity order,” requiring the organization to publicize information regarding the conviction.¹⁰⁶ The Act will come into force upon an order of the Secretary of State.¹⁰⁷

C. CSR LEGISLATION IN INDONESIA

In July 2007, Indonesia passed new corporate legislation that mandates that any company operating in any business field related to natural resources institute corporate social and environmental responsibility programs.¹⁰⁸ The legislation imposes sanctions on those companies that do not comply¹⁰⁹ but does not define CSR.¹¹⁰ The legislation also refers to ancillary regulations that will specify the amount of funding businesses will have to devote to CSR; however, it is unclear when these regulations are likely to be devised and implemented.¹¹¹

100. *Id.* ¶ 6.

101. Corporate Manslaughter & Corporate Homicide Act, 2007, 54 Eliz. 2, c. 19 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070019_en.pdf.

102. *Id.*

103. *Id.* §§ 1, 3.

104. *Id.* § 1.

105. *Id.* § 9.

106. *Id.* § 10.

107. *Id.* § 27.

108. Erin Lyon, *CSR Law in Indonesia*, CSR ASIA WEEKLY, July 25, 2007, at 1-3, *available at* <http://www.csr-asia.com/upload/csrasiaweeklyvol3week30.pdf>.

109. *Id.* at 2.

110. *Id.* at 3.

111. *Id.* at 2.

V. The Work of the U.N. Special Representative on the Issue of Human Rights and Transnational Corporations

On March 28, 2007, John Ruggie, Special Representative of the U.N. Secretary-General on the issue of human rights and transnational corporations, presented a long awaited report to the U.N. Human Rights Council.¹¹² The report, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, was the culmination of two years of work by Ruggie under a mandate from former U.N. Secretary General Kofi Annan and the U.N. Commission on Human Rights (now the Human Rights Council).¹¹³ In the report, Ruggie set out five “clusters” of standards and practice that govern corporate responsibility and accountability: “1) [t]he state’s duty to protect; 2) [c]orporate responsibility and accountability for international crimes; 3) [c]orporate responsibility for other human rights violations under international law; 4) [s]oft law mechanisms; [and] 5) [s]elf-regulation.”¹¹⁴ Ruggie also noted that companies are increasingly recognized as having “the capacity to bear some rights and duties under international law.”¹¹⁵ Indeed, Ruggie stated that the “most consequential legal development” in the “business and human rights constellation” is “the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards.”¹¹⁶ Ruggie is scheduled to deliver his final recommendations to the U.N. Human Rights Council in spring 2008.¹¹⁷

112. The Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises—Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/4/035 (Feb 9, 2007), available at <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>.

113. See *id.* at Summary.

114. *Id.* ¶ 6.

115. *Id.* ¶ 20.

116. *Id.* ¶ 84.

117. See *id.* ¶ 88.