THE PERILS AND PROMISE OF THE ALIEN TORT STATUTE IN PRACTICE

A Comment on The Alien Tort Statute: An Introduction for Civil Rights Lawyers by Paul Hoffman and Adrienne Quarry

Bama Athreya and Julie Su***

We offer this comment on the preceding article by Paul Hoffman and Adrienne Quarry entitled, "The Alien Tort Statute: An Introduction for Civil Rights Lawyers" ("Article"). We offer our perspective as human rights advocates from organizations that embrace a multi-pronged strategy for social change that includes litigation as one tool. We were involved in two of the cases referenced in the Article, one of which involved the use of the Alien Tort Statute (ATS) and the other of which did not. We offer some explanation for these choices, some perspectives on future application of the ATS, the context in which such cases take place, and their role in achieving broader legal and social reform.

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* Bama Athreya is the Executive Director of the International Labor Rights Forum. Dr. Athreya joined ILRF in early 1998, just after returning from a two-year assignment in Cambodia as the AFL-CIO's Country Representative. While in Cambodia she directed worker education and labor law training programs and conducted extensive research on women workers and child labor. She is a cultural anthropologist and received her Ph.D. from the University of Michigan. She spent three years in Indonesia, first as a State Department official and later as an independent researcher, and wrote her thesis on Indonesia's labor movement. She has also lived and worked in China, Taiwan and India.

** Julie A. Su is the Director of Litigation at the Asian Pacific American Legal Center (APALC) in Los Angeles. She has represented low-wage workers in litigation to end sweatshops since 1994, when she graduated from Harvard Law School and joined APALC as a Skadden Fellow. Su has been widely recognized combining litigation with organizing efforts, cross-racial community building, public education and mobilization, and broad-based policy proposals to effect change. In 2001, she was awarded a MacArthur "Genius" award.

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BUREERONG V. UVAWAS

The Asian Pacific American Legal Center (APALC), founded in 1983, is the largest provider of direct legal services, advocacy, leadership development, and civil rights impact litigation on behalf of the Asian Pacific American community in the United States. In 1995, APALC served as lead counsel in a groundbreaking federal civil rights lawsuit on behalf of eighty Thai garment workers who had been trafficked into the United States and held against their will, forced to work behind barbed wire and under armed guard, in an apartment complex in El Monte, California.[1] The workers endured 18-hour work days sewing for the nation's top manufacturers and retailers. Once freed from the apartment-turned-sweatshop-prison, the workers were taken by the U.S. government and thrown into federal detention. Only after advocacy by a coalition of Los Angeles-based community organizations working together as Sweatshop Watch[2] were the workers finally freed.

The civil lawsuit filed in U.S. District Court, *Bureerong v. Uvawas*,[3] was based on numerous federal and state labor laws and torts, but it did not utilize the ATS. We agree that the cases cited in the Article, in particular *Kadic v. Karadzic*[4] and *Sosa v. Alvarez-Machain*,[5] would today make the ATS a viable cause of action in *Bureerong*.[6] However, APALC and its co-counsel chose not to

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1. *See* George White, *Garment "Slaves" Tell of Hardship,* L.A. TIMES, Aug. 4, 1995, at D1; Kenneth B. Noble, *Workers in Sweatshop Raid Start Leaving Detention Site*, N.Y. TIMES, Aug. 11, 1995, at 6; Christina Nifong, *Raids Reveal Seamy Side of U.S. Garment Making*, CHRISTIAN SCI. MONITOR, Aug. 16, 1995, at 1. While most news stories reported on the seventy-two garment workers who were at the apartment complex on August 2, 1995, an additional eight Thai workers who had escaped from the compound prior to that date joined the case.

2. These lead organizations include the Thai Community Development Center, Koreatown Immigrant Workers Alliance, Coalition for Humane Immigrant Rights of Los Angeles, the union formerly known as the Union of Needletrades Industrial and Textile Employees (UNITE), and the Asian Pacific American Legal Center. Although Sweatshop Watch, an umbrella coalition of statewide garment worker advocacy groups, closed its doors in 2009 in response to changed circumstances in the global garment industry, APALC continues to collaborate with these organizations.

3. Bureerong v. Uvawas, 922 F. Supp. 1459 (C.D. Cal. 1996); 959 F. Supp. 1231 (C.D. Cal. 1997). APALC was privileged to co-counsel this case with the ACLU of Southern California, the Asian Law Caucus, the ACLU Immigrants' Rights Project, and the private law firms of Rothner, Segall, Bahan and Greenstone, Hadsell and Stormer, and Bird, Marella, Boxer, Wolpert, Nessim, Lincenberg and Drooks.

4. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

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

6. Paul Hoffman and Adrienne Quarry, *The Alien Tort Statute: An Introduction for Civil Rights Lawyers*, 2 L.A. PUB. INT. L.J. 130, 143 (2010) ("Though such claims often arise in an

include ATS claims in our lawsuit for a variety of reasons. Chief among them was the desire to focus on areas of overlap between this case and worker exploitation throughout the industry—long hours, low pay, fear and powerlessness of workers, and corporate responsibility for those conditions—rather than on the more extreme facts in this case, such as trafficking and forced labor. Through this strategy, we hoped to extend existing federal law, in particular the Fair Labor Standards Act (FLSA), to combat rampant sweatshop conditions in the garment industry. While the egregious nature of the violations in *Bureerong* made the case newsworthy, we did not want to highlight only the most extreme conditions these workers had endured, but instead to pursue a legal theory that would protect against the more typical abuses workers in subcontracted industries suffer daily.

We were also concerned that the ATS would focus unwanted attention on the "alien" status of the workers, who were already at risk of deportation.[7] Whereas ATS is exclusively reserved for non-citizens, focusing on federal (and California state) statutory protections avoided negatively emphasizing our clients' precarious immigration status while offering us a chance to make law that would apply to all exploited workers.

DOE V. UNOCAL

The International Labor Rights Forum (ILRF) is an advocacy organization dedicated to achieving just and humane treatment for workers worldwide. In *Doe v. Unocal*, ILRF represented Burmese plaintiffs who had been victims of forced labor. The case alleged that California-based oil company Unocal knowingly benefited from forced labor on the Yadana pipeline project in Burma, and established that Unocal could in fact be held directly liable for aiding and abetting the Burmese military in perpetrating forced labor under

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international context, the ATS may also be useful in attacking sweatshops in the United States. Depending on the circumstances, the conditions in sweatshops may constitute slavery-like conditions and may also involve human trafficking.")

7. Indeed, by the time APALC met with the workers while they were still in detention, the United States Immigration and Naturalization Service (INS) had already succeeded in getting them to sign "voluntary departures" admitting to their deportability. It took years of creative advocacy, led by APALC, to find a legal hook for getting the workers legal status. *See* PENDA D. HAIR, ROCKEFELLER FOUNDATION, LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE 49–51 (2001).

the ATS. Through this case, ILRF intended to send a strong message to the business community that it bears not only reputational but also direct legal risk in knowingly benefiting from human rights abuses.

In turning to the ATS, ILRF and its allies sought an alternative that was less politically compromised than domestic laws in Burma and other developing countries, while offering more stringent and targeted sanctions than those available through international law. The Unocal litigation arose out of a concerted effort throughout the 1990s by human rights and labor organizations to raise awareness of human rights abuse in Burma, where weak and politically compromised domestic laws (as in other developing countries) left workers and communities without meaningful access to justice. This campaign included a case lodged with the International Labour Organization (ILO) against Burma for failure to end forced labor.[8] However, neither the highest possible condemnation at the ILO nor the growing worldwide movement to sanction the Burmese government had been sufficient to change the regime's political will.

ILRF's turn to the ATS also recognized the failures of private voluntary mechanisms to regulate corporate behavior towards human rights. Private voluntary systems, such as codes of conduct, have failed entirely to create effective sanctions for company failure to exercise due diligence regarding public company claims to ensure their operations do not violate human rights. Additionally, such systems have without exception failed to create practical "whistleblower" systems that would effectively protect those who expose violations at severe personal risk, such as the Burmese workers on the Unocal project in Burma.

ATS: Assessing the Prospects

APALC and ILRF have for many years sought enforcement tools that would provide a fair hearing to claims of labor rights violations by multinational firms. In recent years, ATS has provided a promising opportunity to redress serious labor abuses such as forced labor and human trafficking. A judgment in favor of plaintiffs in any of these cases would establish a critical legal precedent,

8. Press Release, International Labour Organization, Report of the ILO Commission of Inquiry Reveals Widespread and Systematic Use of Forced Labour in Myanmar (Burma) (Aug. 20, 1998), *available at* http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang—en/WCMS_007995/index.htm.

helping to deter such actions by the corporations responsible and by others worldwide in the future. On this, we agree with the Article's claim that the ATS may prove useful when the basic human rights of plaintiffs in the United States are violated, as well as help expand corporate accountability to workers in other parts of the world.

The ATS may prove more limited, however, in addressing the day-to-day exploitation that is common among low-wage workers both in the U.S. and beyond. The burdensome *Sosa* standard, that "a plaintiff must rely on an international human rights norm accepted by the civilized world and defined with a specificity comparable to the historical examples that the Founders must have had in mind at the time the ATS was enacted"[9] may preclude claims for nonpayment of wages, violations of overtime, retaliation for asserting basic rights, or refusal to recognize the right to organize. Such claims seem especially unlikely to succeed given the *Sosa* court's fear of opening the floodgates to endless ATS claims.[10]

As Hoffman and Quarry note, claims for slavery, forced labor, and conditions of detention for immigrants are likely to trigger ATS protection, in the domestic context as well as elsewhere. However, a litigation strategy based on ATS should acknowledge its limitations in addressing the most common forms of exploitation. We believe that these widespread violations—basic practices that keep workers in crushing poverty—can be addressed through two possible litigation strategies. First, ATS could be made more useful by strategic litigation to bring recognized human rights norms in line with the reality of life for low-wage workers around the world, as well as hold corporations accountable for perpetuating workers' misery. Hoffman and Quarry's Article is an invaluable contribution to this effort to make the ATS more useful for civil rights litigators in areas where it has not yet been used. Second, human rights advocates and civil rights litigators such as APALC and ILRF are utilizing complementary legal theories that expand labor law protections and keep pace with new marketplace realities, including subcontracting, independent contracting, and other methods by which corporations and employers obscure the legal relationship

9. Paul Hoffman and Adrienne Quarry, *supra* note 6, at 137.

10. The court spoke with concern of the "practical consequences" of allowing ATS claims for low-wage workers, given the pervasive abuse they face in the workplace. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

between themselves and workers. The *Bureerong* case discussed herein is an example of this.[11]

However, even successful lawsuits are limited in their reach. While the goal of obtaining wages for workers is laudable—something that ILRF and APALC have pursued through numerous cases and campaigns—and other forms of relief available through lawsuits can improve working conditions in targeted factories or companies, these changes are often temporary or require such intense follow-up and monitoring as to be impractical.

So how to maximize the potential benefits of litigation under the ATS (and alternative theories) for worker justice? In our experience, the specific outcome of a case—a judicial decision, monetary settlement, or commitment by defendant companies to clean up their act—is only one aspect of the potential benefits of civil rights and human rights litigation. First, we have seen in our cases that litigation can be a tool for organizing workers. Litigation forces corporations to the table, and a well-planned lawsuit provides a concrete opportunity for workers to engage, speak out, testify, and confront the corporations who exploit them. Second, and relatedly, litigation can mobilize public awareness. The high-profile Unocal case kept the issues of forced labor in Burma and domestic corporate accountability for overseas abuse before the U.S. public for many years.[12] The *Bureerong* case and numerous other cases filed by APALC on behalf of Asian and Latino garment workers in Los Angeles succeeded in keeping the issue of domestic sweatshops on the public's radar for no less than a decade and helped to spur

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11. The decisions cited in note 5 above have been relied upon hundreds of times by workers seeking a more expansive definition of "employer." APALC also represented a group of Latina garment workers who were paid subminimum wages, worked off the books, and experienced dangerous and dirty conditions of work in nearly a dozen Los Angeles sweatshops in a lawsuit against clothing retailer Forever 21. Castro v. Fashion 21, Inc., No. 01-09487 (U.S. Dist. Ct. Sep. 6, 2001). In that case, we used a state law theory that the systematic use of sweatshops by a company is an unfair and unlawful business practice. Another creative legal theory was used in a lawsuit filed in federal court in California on behalf of UNITE, Global Exchange, Sweatshop Watch, the Asian Law Caucus, and a number of Saipan-based workers in January 1999 against eighteen U.S. clothing companies, using the Racketeer Influenced and Corrupt Organizations Act (RICO). This lawsuit was the first-ever legal attempt to hold U.S. retailers and manufacturers accountable for the mistreatment of garment workers in foreign-owned factories operating on U.S. soil. The case was successful, with all companies except Gap agreeing to a settlement that required ongoing labor monitoring in the Saipan factories.

12. *See, e.g.,* Earthrights.org, "Press Coverage of Doe v. Unocal," http://www.earthrights.org/legal/press-coverage-doe-v-unocal (last visited Apr. 26, 2010) (listing news stories).

legislative change in California and in the U.S. Congress.[13] The filing of a case and the attendant media attention can help shape public dialogue around an issue.

Finally, litigation can shift the balance of power. Since the *Unocal* verdict, several new cases have moved forward in U.S. courts, including cases against Nestle, Archer Daniels Midland, and Cargill for benefiting from trafficked child labor in the Ivory Coast; Coca Cola and Dole for aiding and abetting violence against trade unions in Colombia; and Firestone for use of forced child labor in Liberia. While each may take years for the courts to decide, the cases are already forcing the companies to acknowledge human rights violations and address them publicly, both in the U.S. and in the countries where they occur. Trade unions and other community-based organizations in these countries are using the cases to build campaigns locally and pressuring the companies to alter their practices.[14] Meanwhile, U.S.-based organizations have used the litigation to educate consumers and generate awareness of these abuses among the U.S. public.

The potential for expanded ATS use demonstrates the possibilities for litigation as a tool for social change and improved working conditions around the world; its limitations, however, are a reminder that the true power of litigation is only maximized through combined organizing, public education, policy advocacy, and a concerted effort to build worker power on the ground.

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13. *See, e.g.,* Ian James, *Freed Thai Workers File Lawsuit*, L.A. TIMES, Sep. 6, 1995, at B3; Peter Blumberg, *Making the Industry Sweat*, L.A. DAILY J., Mar. 23, 1999, at 1; Dan Morain, *Bill Advanced to Ensure Garment Workers' Pay*, L.A. TIMES, Sep. 10, 1999, at C2; Sheila Weller, *You Think Your Job is Tough?*, GLAMOUR MAG., Mar. 2005, at 264; Marla Dickerson, *XOXO Sued by Contractor's Unpaid Garment Workers*, L.A. TIMES, Nov. 22, 2000, at C1; Susan McRae, *Garment Workers Will Sue Clothier*, L.A. DAILY J., Dec. 19, 2001, at 2; Teresa Watanabe, *Home of the Freed*, L.A. TIMES, Aug. 14, 2008, at A1. APALC's litigation against Forever 21 and the workers' own brave campaign against the retailer gave the workers an opportunity to articulate their demands, to launch a nationwide speaking tour, to directly engage in negotiations with Forever 21, and to become leaders and spokespersons about sweatshops, corporate accountability, worker organizing, and social change. Three of the workers were the subject of an Emmy-award-winning documentary entitled "Made in L.A." *See* http://www.madeinla.com/ (last visited Apr. 22, 2010).

14. A coalition of Liberian and U.S. labor, environmental, and human rights organizations formed the Stop Firestone Coalition immediately after the filing of John Roe I v. Bridgestone Corp., No. 06-627 (D. Ind. Nov. 17, 2005), organizing and mobilizing consumer support in tandem with grassroots labor and community organizing on and around the Firestone Liberia plantation. *See* www.stopfirestone.org (last visited Apr. 22, 2010).