EARTHRIGHTS INTERNATIONAL

Transnational Litigation Manual

for Human Rights and Environmental Cases in United States Courts

A Resource for Non-Lawyers

Revised Second Edition

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About this Manual and the Revised Second Edition

This manual is intended to serve as an informational and educational tool for individuals and organizations contemplating litigation in United States courts as a remedy for human rights or environmental harms. It is **NOT** intended to serve as a substitute for legal representation.

ATCA and other legal cases of this nature are complex, and ERI does not purport to teach any person or organization how to represent him/her/themselves through this manual. Many of the legal discussions in this manual are simplified, and do not necessarily represent ERI's position, or the position of any of ERI's clients, on any legal issue. Instead, the manual is intended as a general overview of the law and the cases, and to give readers a sense of whether they should consult a lawyer about a possible claim.

This is the Revised Second Edition of this manual; the first edition was published in June 2003 as volume 1 of the EarthRights Legal Manual. Since then, there have been several major developments. Nevertheless, the law is ever-changing, and the information in this manual is also subject to change. When major changes in the law arise, however, we will post updates in our online newsletter and on our website, www.earthrights.org. Readers can subscribe to the newsletter on the website as well.

Please feel free to contact ERI with further questions.

About EarthRights International

EarthRights International (ERI) is a non-government, non-profit organization combining the power of law and the power of people to protect earth rights. Earth rights are those rights that demonstrate the connection between human well-being and a sound environment, and include the right to a healthy environment, the right to speak out and act to protect the environment, and the right to participate in development decisions. ERI is at the forefront of efforts to link the human rights and environmental movements.

By the staff of EarthRights International
Principal author: Marco Simons

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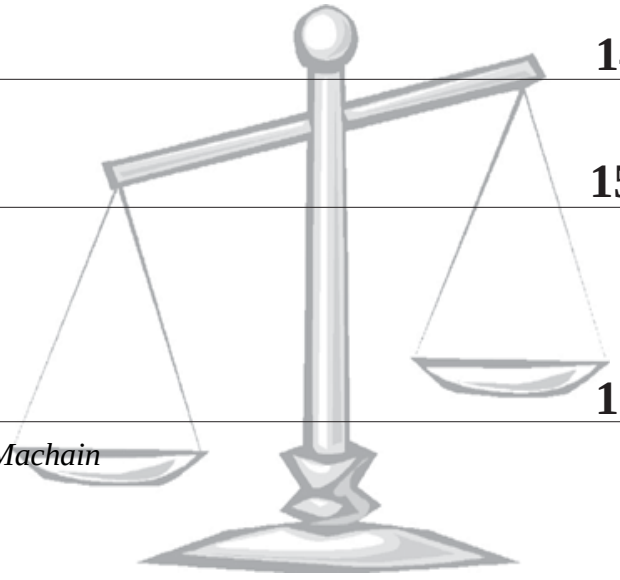

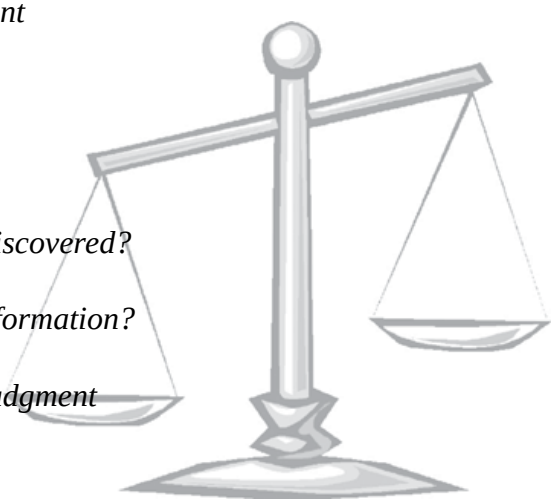

1 Introduction

In recent years, several laws have been used to allow lawsuits in United States courts for human rights violations, and other harms, that occurred in other countries. Such transnational lawsuits have been brought through the concerted efforts of victims, local and international activists, and legal teams. Most recently, several major multinational corporations have been sued in the U.S. for human rights abuses committed around the world.

This guide is directed toward non-lawyers who want to learn more about this type of litigation, and possibly participate in a lawsuit. Although lawyers, especially those unfamiliar with the mechanics of these types of cases, may also benefit from the guide, it is not intended to be a scholarly treatise. Rather, it is a guide for activist organizations, victims, and others who want to know whether they can help bring corporations and others to justice for harms they have caused. It is not intended to substitute for consultation with an experienced attorney.

1.1 Introduction to the Second Edition

When this manual was first issued in 2003, transnational cases, especially against multinational corporations, were still on uncertain ground in the United States, and some scholars considered them to be improper.

In 2004, the U.S. Supreme Court decided *Sosa v. Alvarez-Machain*, the most important human rights case in recent years. This decision, which is discussed more fully in Chapter 3, puts to rest any lingering questions about whether human rights cases can proceed in U.S. courts. Although *Sosa* decided that one of the human rights abuses that had been recognized by some courts—arbitrary detention—was not a violation of international law, it also suggested that nearly every other claim that had been recognized, including torture, summary execution, genocide, war crimes, and crimes against humanity, was an appropriate basis for a lawsuit in the United States.

The following year, in 2005, one of the first major corporate human rights cases, *Doe v. Unocal*, was settled. Although the settlement was confidential, it involved compensation for the victims, a humanitarian relief fund, and a commitment by Unocal to enhance its human rights education. The Unocal settle-

ment sent shockwaves through the business community; *Business Week* magazine, for example, called the settlement "a milestone" that "strengthens a major strategy of human rights groups."[1]

These developments have led to new strategies and arguments by multinational corporations in order to avoid liability for human rights and environmental abuses. For example, in October 2005, business groups supported efforts in the U.S. Congress to amend the Alien Tort Claims Act (ATCA) in a manner that would make it all but impossible to bring further cases, a strategy that failed when human rights, labor, and environmental organizations joined together to oppose the effort.[2] Corporations have also tried out new legal strategies, suggesting, for example, that these cases interfere with U.S. foreign policy.

As more cases are brought and corporations widen the scope of their arguments against transnational litigation, it becomes all the more important that these cases are litigated competently and that all of the relevant considerations are thought through beforehand.

1.2 Preliminary considerations

1.2.1 Is a lawsuit the right tool?

A lawsuit is not an answer to every problem (or even most problems), and is a difficult, complex, and expensive process that generally should be used only as a last resort. Often, people with a dispute should pursue other tactics, such as political pressure, media campaigns, or a negotiated settlement. Even when a lawsuit is filed, it should not replace these other tactics—it is often most effective to use several tools together at once as an overall strategy.

When considering a transnational lawsuit based on abuses that have occurred outside the United States, extra care should be exercised. This guide is designed to help identify which cases might have a chance of succeeding in the present legal environment, as well as the costs, difficulties, and risks inherent in the process of the lawsuit. Two basic risks should be understood at the outset. First, filing a lawsuit that has little legal merit may backfire, both by generating bad publicity for the issues in the case, and by the creation of "bad law" (see Section 1.2). Second, especially in cases where the victims live in countries controlled by authoritarian regimes, a lawsuit may involve a serious risk of harm to persons involved. These risks, in addition to others discussed in this guide, need to be seriously considered before any lawsuit is filed.

Success is not guaranteed in any lawsuit, and especially in complex transnational cases. It is important, therefore, that the response to a particular problem—such as the cooperation of a multinational corporation with a repressive government—does not depend entirely on the legal strategy. Ideally, the lawsuit will be helpful to the overall strategy regardless of whether it is ultimately successful. If it is not frivolous, a lawsuit can raise awareness about the issues involved, and the evidence developed in a lawsuit may be more credible and authoritative than other sources of evidence. These potential benefits, in addition to the possibility of winning the case, should be weighed against the associated risks to determine whether a lawsuit is the right tool for the problem.

1.2.1 Do the victims and the community want to bring a lawsuit?

The victims and affected communities should take the lead in any transnational lawsuit. It is their choice whether they should bring a lawsuit, given the time, effort, costs, and risks that it will require. The victims should make the decision whether to file a case freely and with as much information as possible.

Human rights and environmental advocates, especially Western organizations operating in developing countries, need to be very careful that they do not rush into litigation simply because they think it will benefit a particular community. They must ensure that a lawsuit is really what the victims want, and not simply the only option being suggested to them. Many victims of serious human rights and environmental abuses are poorly educated and unfamiliar with legal systems. They must be given the information necessary to make an informed choice, especially when they may be unaware of other potential options available to them.

1.2.3 The dangers of "bad law"

Lawyers often talk about the risk of a lawsuit creating "bad law," or a bad legal **precedent**. Basically, this refers to the risk that one particular lawsuit will change the law in a way that will make it more difficult, or even impossible, for others to sue in the future.

In the American legal system, much of our law is made by courts and judges, in the way that they interpret our written statutes. Courts generally respect the interpretations and decisions made by other courts; this is referred to as precedent. Thus, when the U.S. Supreme Court interpreted the U.S. Constitution to determine that racial segregation was illegal, all other courts in the U.S. were bound to follow the Supreme Court's ruling.

When lawyers seek to present issues that courts have never, or rarely, decided before, they generally try to find the cases with the most compelling facts and the strongest legal basis. Even though the courts theoretically only consider legal arguments when interpreting the law, they are more likely to make new law if it appears that a great injustice will occur otherwise.

On the other hand, if a case is not very convincing, and the court is not persuaded that the victims have really suffered, the court is more likely to make "bad law"—a new interpretation that is harmful to future lawsuits. Because of the system of legal precedent, such a decision could affect numerous other cases.

Due to these risks, it is not always a good idea to attempt to push the law too far, too fast. Courts generally make new law in small incremental steps, and it is prudent to wait for the most convincing cases before going forward.

1.2.4 The possibility of sanctions

In addition to the dangers discussed above, the courts themselves sometimes impose punishments on lawyers whom they believe have brought baseless lawsuits. Judges have the power to issue **sanctions** against lawyers, which may range from dismissal of a lawsuit to monetary fines or other punishment for the lawyers. Sanctions may also be given for other misconduct by lawyers.

Endnotes

[1] Paul Magnusson, "A Milestone for Human Rights," *Business Week*, Jan. 24, 2005.

[1] *See* Eliza Strickland, "Was DiFi Batting for Big Oil? Human-rights groups delay Sen. Feinstein's surprise bid to gut key protections against corporate abuses abroad," *East Bay Express*, Nov. 9, 2005.

Summary Checklist:

Before You Sue

This checklist briefly summarizes most of the important considerations and requirements for a transnational lawsuit. Each question represents an important legal or practical issue that should be addressed before a lawsuit is filed. Please note, however, that not all of the important legal considerations are addressed in this checklist.

A "yes" answer to each question means that you may have a good case for a lawsuit. Be sure to read the explanation under each question; for some questions, a "no" answer may make it impossible to sue, while for others, it may simply make it more difficult or less desirable.

If you believe that you may have a good case, please continue reading to learn about the types of cases that can be brought. More information about each of the topics in the checklist can be found in the reference that follows. You should then consult a lawyer, who can research additional issues and evaluate your case more fully.

Goals

☑ Will a successful lawsuit accomplish your goals?

A successful lawsuit can provide compensation to the victims, and also establish new legal rules that will help others. But you must determine what your most important goals are, and whether a lawsuit is the best way of accomplishing them. Lawsuits are difficult, costly, and time-consuming, and are not always the best solution to a problem. Negotiations or political settlements may be both easier and less costly, as well as achieve more of the desired goals.

☑ Will a lawsuit be useful even if unsuccessful?

No lawsuit should be brought without a good legal basis. But if you are unsure whether your lawsuit will be successful, it is important to consider whether the lawsuit might be helpful to your cause—such as by bringing media attention and raising awareness—regardless of whether it succeeds.

Plaintiffs

☑ Have the plaintiffs suffered harm from the problem?

A lawsuit requires a person who has suffered some kind of abuse or harm. That person is called the "plaintiff." Simply because someone is doing something illegal is usually not enough to bring a lawsuit; the victims must have suffered in some way—physically, economically, emotionally—from the wrongdoing.

☑ Are the plaintiffs willing to bring a lawsuit?

Or, are the relatives of a deceased individual willing to sue?

The victim of the harm or abuse—the plaintiff—must be willing to sue. Generally, the plaintiff must be the victim, except that if the victim was killed, his or her close relatives might be able to sue. An organization cannot sue to recover money on behalf of the victims unless the victims themselves join the lawsuit. Under some circumstances, an organization can sue if its goal is not to recover money.

Defendants

☑ Was the harm caused by an identifiable defendant?

The "defendant"—the person or organization to be sued—must be responsible for the wrongdoing. You will need to be able to identify the defendant and prove that he or she (or it) is responsible for the harm, usually because the defendant caused the harm or was somehow involved in the act that caused the harm.

☑ Is the defendant an individual or a corporation?

Individuals—including, under some circumstances, government officials—and corporations can usually be sued. The U.S. government can also be sued under some circumstances. Foreign governments can almost never be sued, and foreign heads of state probably cannot be sued in a U.S. court.

☑ If the entity to be sued is an individual:

- *Is he or she a resident of the United States or present in the U.S.?*
- *Has he or she committed a wrong in the U.S.?*
- *Does he or she have major business ties to the U.S. related to the wrongdoing?*

In order for United States courts to have jurisdiction over an individual, he or she generally must either be a resident of the U.S., or be present in the U.S. at the time the lawsuit is filed, and given notice of the lawsuit while present in the U.S. Jurisdiction may also be gained if the individual committed all or part of the wrongful conduct in the U.S., even if he or she is no longer present in or a resident of the U.S. Finally, a

court may have jurisdiction if the individual has significant business connections to the U.S., and those business connections are related to the wrongdoing (for example, a corporate executive whose corporation is headquartered in the U.S. who is being sued for the wrongdoing of the corporation).

☑ If the entity to be sued is a corporation, is it:

- *A U.S. corporation?*
- *A corporation with offices or other major business in the U.S.?*

In order for U.S. courts to have jurisdiction over a corporation, it must either be a U.S. corporation, organized under that U.S. law, or it must be a corporation that has substantial business connections to the U.S., such as sales offices. Information about the corporation's activities may be able to be gathered from the corporations after the lawsuit is filed.

☑ Is the corporation sued the same one that caused the wrongdoing?

As noted above, the defendant must be responsible for the harm. Multinational corporations often have many operating subsidiaries and joint ventures; even if the corporations are part of the same corporate "family," it may be difficult to sue a corporation if a different subsidiary or sister corporation was actually involved in causing the harm. Consider a corporate structure where the parent company is British, with subsidiaries in the United States and in Sudan. If the Sudanese subsidiary destroys the victim's property, a lawsuit may be difficult: unless the Sudanese subsidiary itself has ties to the United States, it may not be able to be sued in U.S. courts, and the U.S. subsidiary probably is not responsible for the wrongdoing. If the British parent company can be sued, however, or if there is evidence that all of the related corporations really operate as one business, a lawsuit may be able to proceed. Information about corporate relationships may be able to be gathered from the corporations after the lawsuit is filed.

Evidence

☑ Is there enough evidence to prove the case?

As in any lawsuit, winning a transnational lawsuit will ultimately require proving the case in front of a judge or a jury. At a minimum, the following things will need to be shown: that the victims suffered harm; the extent of the harm suffered; and that the defendant is responsible for the harm, usually because the defendant was involved in causing the harm. If there is not enough evidence to do this, filing a lawsuit may do more harm than good.

☑ Is the evidence accessible?

Evidence is useless if it cannot be introduced in court. Plaintiffs and witnesses must be willing to testify, and other evidence must be available and not destroyed. Some evidence can be obtained from the defendant after the lawsuit is filed, but this cannot always be relied upon to prove the case.

Other legal problems

☑ If the lawsuit could be filed in another country, does the case have connections to the United States?

Courts often dismiss cases that have little to do with the United States, as long as there is another court in another country that is more appropriate. This is a complex but important legal doctrine known as *forum non conveniens* (inconvenient forum). If there is no other court that could hear the case, however—or if any other possible courts are obviously corrupt or biased—then the U.S. court should not dismiss the lawsuit.

☑ Was the abuse committed recently?

Lawsuits must be filed within a specified time period after the wrongdoing occurred, usually b etween one year and ten years. There are several legal arguments that may be made to extend the time limit, especially if for some reason a lawsuit was impossible during part of the limitations period.

Practical and logistical considerations

☑ Can the plaintiffs be kept safe after a lawsuit is filed? Do they understand the risks involved?

The identity of the plaintiffs, as well as other information about them, cannot always be kept secret after a lawsuit is filed. Lawyers and others considering filing a lawsuit must seriously consider whether the plaintiffs, or their families, will be put in additional danger after the lawsuit is filed, especially if they cannot escape to a safe place.

☑ Is there enough money to fund the lawsuit?

A lawsuit, especially one involving actions in foreign countries, can be very costly. Court fees, international travel, phone calls, costs associated with gathering evidence, the costs of relocating plaintiffs (if necessary), and general maintenance expenses add up very quickly. No lawsuit should be filed unless funding is available, or will be made available.

☑ Are you willing to spend many years working on the lawsuit?

Expect to spend a minimum of three years on any lawsuit, and more likely five to ten years. Unless you are prepared to spend this amount of time working on the case, it could be counterproductive to file a lawsuit. There may also be periods of intense activity followed by months, or even years, when nothing seems to happen.

Make Your Own Checklist

Give yourself a check for every "yes" answer to the questions below to see if you might have a strong case.

Goals

- ❑ **Will a successful lawsuit accomplish your goals?**
- ❑ **Will a lawsuit be useful even if unsuccessful?**

Plaintiffs

- ❑ **Have the plaintiffs suffered harm from the problem?**
- ❑ **Are the plaintiffs willing to bring a lawsuit? Or, are the relatives of a deceased plaintiff willing to sue?**

Defendants

- ❑ **Was the harm caused by an identifiable defendant ?**
- ❑ **Is the defendant an individual or a corporation ?**

If the entity to besued is an individual:

- ❑ *Is he or she a resident of the U.S. or present in the U.S.?*
- ❑ *Has he or she committed a wrong in the U.S.?*
- ❑ *Does he or she have major business ties to the U.S., related to the wrongdoing?*

If the entity to be sued is a corporation, is it:

- ❑ *A U.S. corporation?*
- ❑ *A corporation with offices or other major business in the U.S.?*

- ❑ **Is the corporation to be sued the same one that caused the wrongdoing?**

Evidence

- ❑ **Is there enough evidence to prove the case?**
- ❑ **Is the evidence accessible?**

Other legal problems

- ❑ **If the lawsuit could be filed in court somewhere else, does the case have connections to the United States?**
- ❑ **Was the abuse committed recently?**

Practical and logistical considerations

- ❑ **Can the plaintiffs be kept safe after a lawsuit is filed? Do they understand the risks involved?**
- ❑ **Is there enough money to fund the lawsuit?**
- ❑ **Are you willing to spend many years working on the lawsuit?**

Part I: Legal Issues

Overview: Domestic and international law cases

Part I of this manual discusses the legal requirements of, and obstacles to, transnational litigation. One of the most important issues in transnational cases is the difference between domestic law and international law. **Domestic law**, also known as municipal or state law, includes all the laws passed by national, state, and local governments. **International law** includes treaties and customs observed by the community of nations, including international human rights, environmental, and labor law.

Generally, international law is enforced through international bodies, such as the United Nations, the International Court of Justice, and international criminal tribunals. In the United States, however, there are special laws that allow international law to be enforced through domestic courts. These laws are the **Alien Tort Claims Act** (ATCA, also known as the **Alien Tort Statute**, or ATS) and the **Torture Victim Protection Act** (TVPA), which both allow international law cases in U.S. federal courts.

Suing under international law is often more difficult than suing under domestic law, because the types of wrongful acts recognized in international law are far more limited than those recognized under domestic law. International law does have advantages, however. Victims of abuse may prefer that the courts recognize that they were, for example, victims of torture—an international law category—rather than assault and battery, the applicable category under domestic law. Lawsuits in U.S. courts that apply international law may help to articulate standards in international law, such as the establishment of an international law prohibition on violence against women. And if a court is satisfied that violations of international law are present, the court may be less likely to dismiss a case that involves acts that occurred in other countries. For these and other reasons, many victims and lawyers have chosen to pursue their cases in U.S. courts under international law.

Domestic law cases in the U.S. are much more flexible than international law cases. The difficulties with domestic law do not involve the types of wrongdoings that can be sued for. Instead, lawsuits under domestic law might require applying the law of the place where the wrongdoing occurred; they usually must be filed within a shorter period of time than international law cases; and such lawsuits are likely to be dismissed if they have little connection to the United States and if there is another country where a lawsuit could be brought. Domestic law violations can be raised along with international law violations in cases filed in U.S. federal courts.

2 Domestic Cases

It is impossible to outline all of the possibilities for lawsuits that may be brought under domestic law. Numerous complex issues will need to be evaluated by lawyers. For example, the primary body of law that courts apply in domestic law cases is the law of the state where the case is brought. In some cases, the case can be brought in state court or in federal court, but the court will use state law in either case. State law, however, only applies to actions within that state, including decisions made at corporations in that state; actions elsewhere, including foreign countries, must be evaluated under the law of that place. So, the possibilities for domestic law cases involve not only the different laws of each state in the U.S., but also the different laws of every country around the world, depending on where the wrongdoing occurred.

In general, a strong case under domestic law requires that the defendant has injured the plaintiff, either by intentionally causing harm or by actions that are unintentional but unreasonable. Thus, a defendant corporation could be sued if it intentionally harmed the plaintiff. However, it could also be sued even if it did not intend to harm the plaintiff, but carried on with actions that it knew (or should have known) might harm the plaintiff. This type of unintentional, unreasonable activity is commonly known as **negligence**, and it is the basis for many lawsuits.

2.1 Intentional harms

Typically, a person who intentionally harms another can be held accountable in a lawsuit. **Intentional** means that the person deliberately did something knowing that it would harm another—even if harming someone was not the person's goal. This applies to people who actually committed the harm, people who ordered the harm to be committed, and sometimes to the employer of an employee who committed the harm.

Under some circumstances, however, people have a legal right to harm others. For example, a police officer has the right to arrest and detain someone legitimately suspected of a crime, even if that person is later found to be innocent; a private citizen usually has the right to harm another in self-defense;

a landlord usually has the right to evict someone who fails to pay rent. Anyone committing a harm without such a legal right can be sued.

2.2 Negligence

Negligence has do to with whether the defendant's actions were reasonable. If the defendant carried on with activity that can be considered unreasonable—for example, operating a chemical factory near a populated area when the defendant knows, or should know, that the factory is unsafe—then the defendant is negligent, and will have to pay for the harm caused.

What is, or is not, negligent is not always easy to determine. Generally, however, if the defendant knew of certain risks—or should have known of those risks—and proceeded in his or her actions despite these risks, he or she will be considered negligent. Like intentional harms, this may also apply to the employers and superiors of those who caused the harm.

An example: the DBCP cases

Perhaps the largest, and most successful, example of suing corporations under domestic law for acts committed abroad is a series of cases around the pesticide DBCP. Through the 1960s and 1970s, thousands of banana workers in several countries were exposed to DBCP, which can cause sterility and other health problems. In 1984, 82 Costa Rican banana workers sued Dow Chemical and Shell Oil, the manufacturers of DBCP, in state court in Texas, for their negligence in selling a product that they knew was harmful. After years of litigation, it was settled in 1992 for about $20 million.[1] More lawsuits were later filed by 26,000 plaintiffs from 11 countries against Dow, Shell, and several other companies; they were settled in 1998 for about $45 million.[2] Another case involving Nicaraguan banana workers is ongoing.

Although, by American standards, the amounts of the settlements have not been huge—between $1,000 and $15,000 per plaintiff—these are some of the only cases where the plaintiffs have actually won money, and so they are considered very successful. The plaintiffs had a strong case for several reasons: they had suffered severe harms, such as sterility; the harms that they suffered were clearly linked to the actions of the corporations; the corporations had been aware of the possible dangers of their actions; they were suing United States corporations; and the corporations had taken some actions, such as manufacturing pesticides, in the United States. Cases such as this—where corporations harm people through actions that they should have known were dangerous—may make good cases under domestic law.

[1] "The price of bananas," *The Economist*, Mar. 12, 1994.
[2] Mike Lanchin, "Poisoned Plantations: Ex-workers in Nicaraguan banana fields sue U.S. firms over illnesses linked to toxic fumigant," *San Francisco Chronicle*, Mar. 15, 2001.

3 International Cases

Much of the transnational litigation in the United States has proceeded under international law in federal courts. While this is not necessarily the most important or most effective means for suing corporations, it does allow the victims to show that the perpetrators violated international law.

3.1 The legal standard after *Sosa v. Alvarez-Machain*

In 2004, the U.S. Supreme Court decided an Alien Tort Claims Act (ATCA) case for the first time. The case, *Sosa v. Alvarez-Machain*, involved allegations that a Mexican doctor had been illegally detained and abducted by U.S. agents because they mistakenly thought he had been involved in the killing of another agent. The Supreme Court held that this case could not be brought as an ATCA case, because a brief arbitrary detention was not a well-recognized violation of international law.[1]

The *Sosa* case was recognized as a tremendous victory for the human rights movement, however, because the Supreme Court also ruled that other human rights cases could go forward, as long as there is a violation of an international law norm that is universal, obligatory, and specific or definable. Both before and after the *Sosa* decision, there has been general agreement about the kinds of cases that can be brought, typically involving severe abuses of internationally recognized rights. As the United States Court of Appeals for the Ninth Circuit has stated, "[t]he settled principles of law" governing ATCA cases "remain sound post-*Sosa*."[2]

3.2 State action

State action is a critical issue in many international law cases. Because many international law rules only apply to governments, not to private individuals, many acts (such as torture) are only violations of international law when committed by a **state actor**—a government official or someone acting in partnership with a government official. (As discussed in 5.4.5, suing the government itself is usually impossible.) For example, if a police officer, while on duty, tortures a suspect in order to get information, the police officer

is a state actor—even if the officer is breaking the law by committing torture. If a private citizen kidnaps and tortures someone, he or she will not, ordinarily, be a state actor. There are several ways in which state action can be satisfied. The simplest is if the defendant is actually a government official, such as a police officer[3] or military officer.[4] If the defendant is not actually a government official, but acts like one or claims to be one—for example, if the defendant claims to be the head of a government, and performs some of the functions of a government—he or she may also be considered a state actor.[5] State action may also be satisfied if the government and private parties work together to commit the violation: for example, if a private party commits the violation, but the government is substantially involved in ordering, furthering, or allowing the violation;[6] or, if the government commits the violation, and the private party is substantially involved in furthering the violation.[7]

3.3 Theories of liability

Plaintiffs must also prove that the defendant was connected to the violation of international law. If the defendant actually committed the offense, this is easy. But if the defendant did not pull the trigger, or if the defendant is a corporation, this requirement is more complex.

Several legal concepts can be used to connect the defendant to the violation. Many courts have recognized **aiding and abetting** liability for international law violations. This is a well-established concept in both international and domestic law, and requires showing that the defendant gave substantial assistance or encouragement to the person that committed the violation, and that the defendant knew that the assistance would help the person commit the violation.[8] Courts have also recognized **command responsibility**, in which a superior in an organized armed force may be held liable for international law violations committed by subordinates.[9]

A more general concept is **agency**, in which a defendant may be held liable for the actions of **agents** such as employees and independent contractors.[10] One particular form of agency is a joint venture, in which a partner in a business enterprise is liable for violations committed by other partners for the purpose of furthering the enterprise. Other concepts, such as conspiracy,[11] joint criminal enterprise, recklessness, or alter ego, may also apply in the appropriate case.

3.4 Particular violations

A number of violations of international law have been recognized by U.S. courts; several others have been specifically rejected, and others might make good candidates for new cases.

3.4.1 Torture and summary execution

Torture and summary execution, or extrajudicial killing, are considered violations of international law when committed by a state actor.

The prohibition on torture is one of the most widely recognized rules of international law.[12] The most commonly used legal definition of torture is found in the international Torture Convention.[13] Torture consists of severe mental or physical pain, intentionally inflicted in order to punish, intimidate, coerce, or to obtain a confession, unless the pain arises from lawful punishment.

Extrajudicial killing, or summary execution, is also a widely recognized violation of international law.[14] Extrajudicial killing involves intentionally causing the death of someone unless the execution follows a regular legal proceeding, or is otherwise allowed by international law (as in wartime, for example, or in

self-defense or defense of others). Even if the execution follows a court judgment, it may still be considered "extrajudicial" if the court did not give the victim the rights and safeguards required by international law.

3.4.2 Genocide, war crimes, and crimes against humanity

Genocide,[15] war crimes[16] and crimes against humanity[17] are all considered serious violations of international law, even if committed by private, non-state actors.

The most commonly used definition of genocide is found in the Genocide Convention.[18] Genocide involves attempts to completely or partially destroy a national, ethnic, racial, or religious group. These attempts may involve killings or causing serious physical or mental harm; preventing births or transferring children out of the group; or generally inflicting "conditions of life calculated to bring about" the physical destruction of the group. Theoretically, genocide does not require that anyone be killed. So, for example, forced sterilization of a particular group, if done with the intent to destroy that group, could be genocide.

The term "war crimes" encompasses a variety of violations of the international laws of war, which have been codified in the Geneva Conventions, a set of treaties signed by nearly every nation in the world. The Geneva Conventions specify a set of grave breaches of the laws of war, including, among other things, willful killing of civilians, torture or inhuman treatment (including biological experiments), willful causing of great suffering, deportation, taking hostages, extensive destruction of property not justified by military necessity, and making civilians the object of an attack. Traditionally, under international law, these grave breaches constitute war crimes. Other violations of the laws of war, even if they do not rise to the level of grave breaches, may also form the basis of a lawsuit under international law.

Crimes against humanity includes individual violations committed as part of a **widespread** or **systematic** attack on a civilian population.[19] An attack is widespread if it occurs on a large scale, directed at many intended victims. An attack is systematic if it is sufficiently organized and not random, such as in a pattern of similar crimes. Courts generally agree that the attack can be directed against any civilian population.[20] It is generally recognized that individual violations may include murder, extermination, deportation, unlawful imprisonment, torture, rape, or persecution on political, racial, or religious grounds; one or more of the recent definitions used in international law also includes institutionalized racial, ethnic, or religious discrimination (apartheid), forcible population transfer, forced disappearance, forced prostitution or sexual slavery, forced pregnancy, and other severe forms of sexual violence. Therefore, in order to constitute a crime against humanity, the act must consist of one of these violations, committed as part of a widespread or systematic attack on a civilian population.

3.4.3 Slavery, slave trading and forced labor

Slavery is one of the oldest recognized violations of international law, even when committed by non-state actors, and can form the basis of a lawsuit under international law.[21] Slavery and slave trading may include several different kinds of conduct: obviously, slavery that involves actual ownership of individuals and control of their actions, or the buying or selling of individuals, is a violation of international law. Other slave-like conditions also violate international law; in one case, a court correctly found that paying someone to conscript forced labor would constitute participation in slave trading.[22] If individuals (other than prison inmates) are forced to provide labor, and the defendant participates in or benefits from this practice, a claim of slavery or slave trading may be recognized.

3.4.4 Disappearance, prolonged arbitrary detention, and cruel, inhuman, or degrading treatment

These practices have been recognized as violations of international human rights law only somewhat recently, but courts have allowed lawsuits to proceed on all of them. These are only considered violations of international law, however, if committed by state actors.

Disappearance may involve summary execution, but is a distinct violation of international law. A disappearance includes an abduction by the government, and a refusal to acknowledge either the fact of the abduction or the whereabouts of the individual. Several courts have now allowed lawsuits alleging disappearance.[23]

Arbitrary detention is essentially unlawful detention, lacking the normal legal processes required by international law. The Supreme Court ruled in *Sosa v. Alvarez-Machain* that simple arbitrary detention was not sufficiently well-established as a violation of international law. However, courts have subsequently recognized claims for *prolonged* arbitrary detention.[24] Thus, one court after *Sosa* allowed claims for arbitrary detention where the victim was detained for three days.[25] Other claims for arbitrary detention might be more likely to succeed where there is an unlawful purpose behind the detention. For example, courts have previously recognized arbitrary detention claims where an individual was imprisoned in order to extort money,[26] or as punishment for being a perceived political opponent.[27]

International law clearly prohibits cruel, inhuman, or degrading treatment (CIDT), but it may be difficult to bring a lawsuit based on this violation. Court decisions on CIDT have been mixed, with several cases allowing lawsuits and several others rejecting them. Part of the problem, however, is that it is difficult to define CIDT; in general, CIDT is of the same character, but to a lesser degree, than torture. Most courts have taken the approach that international law must clearly prohibit the conduct described as CIDT; thus, claims for CIDT may succeed where victims suffer severe persecution that does not meet the definition of torture. For example, one court ruled that being forced to watch the torture of a relative, being forced to watch soldiers ransack one's home and threaten one's family, being bombed from the air, and being attacked with a grenade was all CIDT in violation of international law, but that forcing victims into exile was not.[28] Another court rejected CIDT claims based on general claims that persecution caused victims to fear for their lives and flee their homes, but stated that CIDT claims based on sexual abuse could proceed.[29] At the moment, it is difficult to predict whether a CIDT claim will be accepted.

3.4.5 Apartheid or systematic racial discrimination

Systematic discrimination on the basis of race, ethnicity, or nationality, also known as apartheid, is one of the most widely condemned practices under international law, and is considered an international crime. Although it is unclear whether a single act of discrimination would qualify, several courts have accepted that systematic discrimination is an actionable violation of international law if committed by a state actor.

Conduct motivated by racial discrimination might be actionable even if it could not otherwise form the basis of a lawsuit. For example, one court found that if decisions to confiscate land, destroy the local environment, encourage military action, and pay low wages were motivated by racial discrimination, this conduct was a violation of international law as long as state action was present.[30] Another court also implied that the taking of property based on race would qualify as a violation of international law when state action is present.[31] In another case, a court found that simply doing business in apartheid South

Africa and benefiting from systematic racial discrimination was not a violation of international law absent state action.[32]

3.4.6 Serious violations of the rights to life, liberty, security of person, free expression and free association

Acts such as torture, summary execution, and prolonged arbitrary detention violate specific prohibitions under international law, but more generally they may be considered serious violations of the basic rights to life, liberty, and security of person. Although it might not fall under the specific prohibitions against torture and summary execution, other severely abusive conduct, when committed by state actors, may be recognized as violations of international law. For example, if the state intentionally shoots a protestor or burns down his house, it is not summary execution if the state does not intend to kill the person, and it may not be considered torture if the person is not within state custody. But courts may still find that this conduct is prohibited by international law. Thus far, only one court has allowed a case to proceed specifically on the basis of violations of the rights to life, liberty, and security of person, finding that beating and shooting a peaceful protestor violated international law.[33]

While many acts might be said to violate these rights, serious violations are much more likely to be recognized by U.S. courts. For example, sexual violence such as rape, or gender-based persecution, could be considered serious violations of the right to security of person. Although these abuses have been alleged in several cases, no court has explicitly recognized these violations under a separate category, finding that they also constituted other human rights violations (for example, rape has been recognized to be torture). Another category of likely violations is arbitrary forced relocation, in which government agents use force to evict people from their homes in an unlawful manner or for an unlawful purpose.

Often, violations of these rights can also be characterized as other well-recognized violations. For example, sexual violence that is part of a widespread and systematic attack on civilians may be a crime against humanity; violations committed against civilians during the course of conflict may be war crimes; rape or forcible impregnation committed for the purpose of destroying a group may be genocide; and many abuses committed by a state actor may qualify as torture or cruel, inhuman, or degrading treatment. Forced relocation can similarly be characterized as a crime against humanity or a war crime, depending on the context, as well as part of a genocidal campaign against a particular group, or generally as cruel, inhuman, or degrading treatment.

3.4.7 Harm caused by environmental damage

Thus far, courts have generally not allowed international law cases based on harm caused by environmental damage, but there are some circumstances under which environmental claims can be brought.

Courts have generally rejected claims that environmental pollution directly violates human rights such as the right to life and the right to health. Although scholars and international courts believe that environmental degradation or pollution that causes death or health problems violates these fundamental human rights, U.S. courts have rejected claims based on the impacts of environmental degradation, and rejected claims based on the rights to life and health.[34]

There are at least two other ways of challenging environmental abuses. First, victims have a better chance of succeeding if they can make the case that the environmental damage can be characterized as another recognized human rights abuse. Environmental degradation could constitute genocide if it were part of a campaign to destroy a group, or crimes against humanity if it were part of a widespread or

systematic attack on a population, or war crimes if several environmental degradation is used as a weapon of war, or it could constitute discrimination if a state actor afforded less protection to the environment of a particular group. So far, one court has ruled that claims of racially discriminatory environmental damage are actionable when committed by a state actor.[35] Additionally, environmental degradation is often association with basic violations of human rights, such as abuses against environmental advocates, and environmental degradation can be addressed indirectly by challenging these abuses.

The second way of proceeding is to frame the environmental pollution as a violation of international environmental law. So far, U.S. courts have rejected the idea that international law prohibits environmental pollution within a country. But there are at least two areas in which international law may prohibit environmental pollution, even independently of any human impacts: pollution across borders and into the sea. One U.S. court has recognized that pollution of the sea violates international law,[36] and another court is currently considering whether a case can be brought for pollution across international borders.[37]

3.4.8 Violations of international labor rights

A number of transnational labor cases have now been filed, involving primarily abuses against workers and labor leaders but also asserting specific international labor rights. The International Labor Organization (ILO) has the primary responsibility for international labor law, and its treaties recognize four core labor rights: the right to freedom of association, including the right to organize; the right to equal treatment and non-discrimination; the prohibition of forced labor; and the prohibition on child labor.

Thus far, one court has recognized that the rights to organize and to associate into a union are protected by international law, and that violations of these rights that involve state action may be brought as ATCA cases.[38] Another case that involved violations of the right to organize was settled before it reached trial,[39] and the right to freedom of association has also been recognized outside the labor law context.[40] As noted above, discrimination involving state action and forced labor (even by private actors) are also recognized violations of international law. No court has yet considered whether an ATCA case could be based purely on child labor, or whether state action would need to be involved in such a case, but many commentators believe that the worst forms of child labor are essentially forced or slave labor and therefore might fall under the recognized prohibition on forced labor.

Endnotes

[1] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
[1] *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006).
[3] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).
[4] *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); *Trajano v. Marcos (In re Estate of Marcos Human Rights Litigation)*, 978 F.2d 493 (9thCir. 1993).
[5] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).
[6] *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).
[7] *Dennis v. Sparks*, 449 U.S. 24 (1980).
[8] *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7 (E.D.N.Y. 2005).
[9] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995
[10] *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006); *Bowoto v. ChevronTexaco Corp.*, 312 F.Supp.2d 1229 (N.D. Cal. 2004).
[11] *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005).
[12] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

[13] *See* Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, at 197, U.N. Doc A/39/51 (1984), *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm.
[14] *Trajano v. Marcos (In re Estate of Marcos Human Rights Litigation)*, 978 F.2d 493 (9th Cir. 1993); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).
[15] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).
[16] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).
[17] *Estate of Cabello v. Fernandez-Larios*, 2001 U.S. Dist. LEXIS 12643 (S.D. Fla. 2001); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998).
[18] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, *available at* http://www.unhchr.ch/html/menu3/b/p_genoci.htm.
[19] The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) does not require a widespread or systematic attack to consitute a crime against humanity. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48thSess., 3217th mtg., art. 5, U.N. Doc. S/RES/827 (1993).
[20] *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005).
[21] *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997); see also *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).
[22] *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997).
[23] *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass.1995).
[24] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
[25] *Doe v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004);
[26] *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997).
[27] *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1992).
[28] *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).
[29] *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005).
[30] *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006).
[31] *Bigio v. Coca-Cola Corp.*, 239 F.3d 440 (2d. Cir. 2000).
[32] *In re South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. 2004).
[33] *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002).
[34] *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).
[35] *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006).
[36] *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006).
[37] *Arias v. DynCorp.*, No. 01-CV-1908 (D.D.C.).
[38] *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003).
[39] The case was *Manzanarez-Tercero v. C&Y Sportswear, Inc.* (C.D. Cal.). For more information, see http://www.nlcnet.org/sweatingforkohls/history.htm.
[40] *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002).

4 Plaintiffs

Generally, the victims of abuses will be the persons bringing the lawsuit. They are the **plaintiffs**, the parties who sue the defendants.

4.1 Common requirements

4.1.1 Standing

In order to bring a lawsuit, the plaintiff must have **standing** to sue the defendant. This means that the plaintiff must have suffered some harm that the lawsuit is meant to redress. Essentially, the question of standing is about selecting the right plaintiffs and defendants: the plaintiff must have been the person harmed; the defendant must be the person legally responsible for the harmful act.

The kinds of harms that would give a plaintiff standing to sue include physical harm, economic damage, psychological harm, and occasionally more abstract harms as well. In some cases, plaintiffs who have not yet suffered harm, but who will be harmed if the defendant continues with a planned course of action, may sue to get an **injunction**, or order, to stop the defendant from continuing.

In many cases, standing is not a problem; for example, when a victim of torture sues the torturer, the plaintiff obviously has standing. If the victim was killed by the torturer, however, two distinct legal doctrines can be used by surviving plaintiffs to recover on behalf of the deceased victim. First, the administrator of the victim's estate—the person appointed by a court to execute a will, or otherwise take care of the victim's affairs after death—would have standing to sue in a **survival action**. Second, a close relative—a parent, child, spouse, or possibly sibling—of the victim could file a claim for **wrongful death**. In such a lawsuit, the plaintiffs would need to show how the victim's death has affected them personally, because the damages will be based on the harm that they have suffered due to the victim's death, such as emotional trauma, loss of companionship, and disruption of their family. The rules for survival and wrongful death will vary depending on where the lawsuit is filed, and possibly depending on where the death occurred.

In some cases, an organization can be a plaintiff and sue for harms caused to its members. If the individual members do not join the lawsuit as plaintiffs, however, the organization cannot recover money on their behalf, and can only attempt to win an injunction to stop the harmful behavior.

4.1.2 Class actions

Lawsuits can also be brought on behalf of a group of individuals through a **class action**, but certain conditions must be met. Generally, all of the plaintiffs in a class must have similar legal claims; for example, they might all have been harmed in a single accident, or harmed by the same defective product. The plaintiffs who apply for a class action must be fairly typical of members of the class, and they must be able to represent the interests of the class as a whole. If a group of plaintiffs meets these criteria, as well as other technical criteria, it may be **certified** as a class.

A class action has several major consequences. Unlike other lawsuits, each plaintiff does not have legal control over the case. Instead, a few class representatives, and their lawyers, act in the interests of the entire class. Also, individuals may become members of the class automatically unless they choose to "opt out," and if their claims are decided in the class action, they will not be able to file their own lawsuits independently. Under some circumstances—such as when the defendant has a limited amount of money that will not be enough to cover the damages for all of the potential plaintiffs—individuals may be forced to join the class.

Class actions usually involve at least dozens of individuals, and they may involve thousands. They hold the potential for very large monetary judgments. Because of this, lawyers may be more willing to take on a class action; even if each individual's award is relatively small, the lawyer may still be able to recover enough to cover the costs of the lawsuit. The possibility of a huge judgment may also pressure the defendant into settling the case. Dealing with thousands of class members can be difficult, costly, and time-consuming, however, and so a class action is not always desirable.

4.2 Requirements for international law cases

There are no particular requirements about who can be a plaintiff in cases brought under domestic law, as long as they meet the basic standing requirements. For certain cases brought under international law in U.S. courts, however, there are additional requirements.

4.2.1 Alien Tort Claims Act

Under the Alien Tort Claims Act the law under which most international law cases are brought in the U.S., the plaintiff must be an alien—that is, not a citizen of the United States.

4.2.2 Torture Victim Protection Act

Under the Torture Victim Protection Act (TVPA), anyone can be a plaintiff, including U.S. citizens. It is important to note, however, that lawsuits under the TVPA can only be brought for torture or extrajudicial killing, where the torture or extrajudicial killing involved state action by a government other than the U.S. government.

5 Defendants

There are several requirements for suing a particular defendant in transnational cases. In order to sue someone in a U.S. court, the court must be able to establish **personal jurisdiction** over that person. In practice, this means that the court must be able to establish some connection with the defendant; what is required for that connection depends on the type of person being sued. But regardless of personal jurisdiction, certain defendants cannot be sued at all due to certain forms of **immunities from suit**. Finally, some laws, such as the Torture Victim Protection Act, restrict the types of individuals that may be sued.

A lawsuit is begun by **service of process**, which is formally delivering papers to the defendants saying that they are being sued. Different defendants may be served in different ways. With few exceptions, you must be able to serve the defendant within the vicinity of the court where you are suing them.

5.1 Types of defendants

In most cases, any person or entity with a legal capacity—individuals, corporations, associations, governments—can be sued. This applies to most transnational cases as well, including domestic law cases and international law cases brought under the Alien Tort Claims Act.

5.1.1 Torture Victim Protection Act

For the Torture Victim Protection Act (TVPA), the situation is different. The TVPA statute specifies that only *individuals* may be sued. This means that governments cannot be sued under the TVPA. It is unclear whether corporations or other types of groups can be sued; some courts have ruled that corporations can be sued, while others have come to the opposite conclusion. Furthermore, the TVPA requires state action by a foreign nation (not the United States). While this technically doesn't prohibit suit against U.S. government officials, a U.S. government official could only be sued if he acted under the direction of, or in partnership with, a foreign government.

5.2 Personal jurisdiction

The rules for personal jurisdiction are the same in domestic and international law cases. They may, however, differ slightly based on whether a case is filed in federal or state court, and in which state it is filed.

5.2.1 United States residents and corporations

Obtaining personal jurisdiction over a U.S. resident or corporation is typically very easy. Any individual who normally resides in the United States may be sued in a U.S. court, whether or not that person is currently in the United States. Similarly, any corporation chartered in the United States, or headquartered in the United States, may also be sued in a U.S. court.

U.S. residents may be served with process at their place of residence, or by serving them personally. U.S. corporations may be served at their corporate headquarters or principle place of business.

5.2.2 Foreign residents

Suing individuals who reside in foreign countries, regardless of whether they are government officials, is more difficult. The two most common ways of obtaining personal jurisdiction over foreign residents are service of process within the U.S., or business ties to the U.S.

If a foreign resident is present within the United States, and served with process while within the district of the lawsuit, the court has personal jurisdiction over that person (even if the person is only there for a short time, and then leaves the United States). There are several different ways that they may be served, either by giving them the papers personally, giving them to their lawyer or agent, or by leaving them with someone at their current residence in the U.S. This may be difficult if they are in hiding, in the United States for only a short period of time, or if they are traveling under heavy security. Some individuals now anticipate being sued if they set foot in the United States, and service of process may become even more difficult in the future. In the past, plaintiffs and their attorneys have enlisted the help of private investigators to find and serve potential defendants.

Another way that a court might obtain personal jurisdiction over a foreign resident is if the person has extensive business ties to the United States, and specifically to the state or federal district where sued. See the information on foreign corporations, below, for the types of business ties that might be sufficient.

5.2.3 Foreign corporations

Obtaining personal jurisdiction over foreign corporations is often possible, but it can be very difficult. The legal rules for personal jurisdiction over foreign corporations are complex, and the question of whether a particular corporation may be sued might not be resolved until months or years after a lawsuit has begun.

At a minimum, the foreign corporation must have some kind of connection to the United States. That connection must extend beyond the fact that its products are sold in the United States. If the corporation has offices in the U.S., directly exports products to the U.S., has authorized distributors in the U.S., owns U.S. subsidiaries, is owned by a U.S. parent, advertises in the U.S., designs products specifically for the U.S. market, or provides customer service to customers in the U.S., the corporation might have enough of a connection to allow the lawsuit. If a U.S. court can obtain personal jurisdiction over a foreign corporation, it may allow service of process outside the state or federal district (for example, at the corporation's foreign headquarters).

5.2.4 Governments

Obtaining personal jurisdiction over the U.S. or foreign governments is usually not difficult. (Note, however, that the TVPA prohibits suits against governments.) The main problem with suing governments is typically immunities that they possess, discussed below.

5.3 Corporate "families"

One of the most difficult parts of corporate litigation is being able to sue the right corporate entity. There are basically two elements to this: the corporation sued must be the corporation that is responsible for the harm, and it must be subject to personal jurisdiction in the United States. Despite this apparent simplicity, finding the right defendant can be incredibly difficult and complex. Multinational corporations use a complex network of parent companies, holding companies, subsidiaries, and joint ventures in order to shield themselves from lawsuits.

Consider one hypothetical situation. Suppose Big Oil, Inc. is a British corporation, headquartered in London, that owns many other subsidiary corporations, including Big Oil USA and Big Oil Sudan, which operate in the U.S. and Sudan, respectively. Big Oil Sudan has been implicated in serious human rights abuses, and the victims want to sue in U.S. courts.

There are basically three ways that this could be done. First, Big Oil Sudan could be sued directly, if it has any connections to the U.S. This may be unlikely, because Big Oil, Inc. may make sure that Big Oil Sudan has no operations or connections anywhere else. Second, Big Oil USA could be sued. Big Oil USA would be subject to personal jurisdiction in the U.S., but it has no connection to the human rights abuses. Unless a relationship between Big Oil USA and Big Oil Sudan can be shown, Big Oil USA couldn't be sued for Big Oil Sudan's human rights abuses.

The third, and most likely, way of proceeding is to try to sue the British parent company, Big Oil, Inc., in the United States. To obtain personal jurisdiction, the plaintiffs would need to show that Big Oil, Inc. has sufficient connections with the U.S.—which might be possible if it is traded on a U.S. stock exchange and has offices in the United States. (Another possibility is that if Big Oil, Inc. is sufficiently entangled in the operations of Big Oil, USA, they might not be considered separate corporations.) To show that Big Oil, Inc. is responsible for the human rights abuses, the plaintiffs would need to show that it controlled Big Oil Sudan, or that Big Oil Sudan was acting on behalf of Big Oil, Inc., or that Big Oil, Inc. engaged in some activity that contributed to the human rights abuses. These requirements may be difficult to meet.

Certain individuals and governments enjoy immunity from suit, which means they cannot be sued at all unless they allow themselves to be sued by waiving immunity. Needless to say, most defendants do not choose to waive their immunity. These immunities typically affect governments, but may also reach government officials and diplomats.

These immunities are distinct from the question of personal jurisdiction; thus even if a court has personal jurisdiction over a defendant, the defendant will nonetheless be dismissed if it is immune. Generally, these immunities apply to all lawsuits, whether under domestic or international law, and in state or federal court.

5.4 Immunities and other bars to suit

5.4.1 United States government

The United States government generally enjoys **sovereign immunity** from suit, which extends to all federal agencies. The U.S. government has waived its immunity for certain types of cases, but several courts have found that the U.S. government cannot be sued under the Alien Tort Claims Act. Any attempts to do so are likely to fail.

5.4.2 United States government officials

Under certain circumstances, U.S. government officials may be sued for their official actions; this area of law is complex. Certain officials, particularly judges and probably the President, have absolute immunity for any official actions. For most other officials, the analysis depends on whether the official was acting within the **scope of his or her authority** as a government official. This is often difficult to determine, but essentially depends on whether the person simply made a bad or malicious decision that he or she would be otherwise authorized to make—such as a prosecutor deciding to press charges for a minor offense that ordinarily wouldn't be prosecuted, due to hatred of the accused—or, instead, committed an act that would never be authorized—such as a police officer torturing a suspect. In the former scenario, the prosecutor's decision is within the scope of his or her official authority; in the latter scenario, the police officer's act is not. If the act is not within the scope of official authority, the official probably can be sued, whether under international law or domestic law.

If the act is within the scope of official authority, the legal analysis becomes very complex. The official probably cannot be sued under international law or domestic law, but the United States government itself might be able to be sued under domestic law (but not international law).

5.4.3 State governments

Due to the Eleventh Amendment to the U.S. Constitution, U.S. states cannot be sued in federal court. Because international law cases generally proceed in federal court, this means that state governments are effectively immune from lawsuits under international law. They may be sued under their own state law in their own state courts, however. This will depend on the law of each state, which can vary considerably.

5.4.4 State government officials

The analysis for state government officials is similar to federal government officials. Essentially, if their actions are outside the scope of their official authority, they can be sued; otherwise, it will be difficult to sue them, but it may be possible.

5.4.5 Foreign governments

Suing a foreign government is usually impossible. A federal law, the **Foreign Sovereign Immunities Act**, prohibits lawsuits against foreign governments, with a few exceptions. Although none of the exceptions are likely to apply to most cases, it may be possible to sue a foreign government if it is designated by the U.S. State Department as a **state sponsor of terrorism** (currently Cuba, Iran, North Korea, Sudan, and Syria); if the case involves the government acting in a commercial capacity, such as a lawsuit for harm caused by a state-run company; or if the government causes harm in the United States. Otherwise, foreign governments may only be sued if they choose to waive their immunity.

5.4.6 Foreign diplomats and government officials

Typically, foreign diplomats attached to embassies have **diplomatic immunity**, which is an absolute protection from any lawsuit. Other foreign diplomats, including those assigned to the United Nations, the Organization of American States or other regional organizations, or on particular diplomatic missions, may have a more limited immunity; they might not be protected from all lawsuits.

Current foreign heads of state or heads of government, even if they haven't been granted diplomatic immunity, probably also have immunity from lawsuits, although this immunity might be waived by the U.S. State Department. Also, if a head of state or government represents a government that is not recognized by the United States government, with the exception of Taiwan, they probably do not have immunity.

Other foreign government officials, as well as former heads of state or heads of government, probably have a kind of limited immunity based on the Foreign Sovereign Immunities Act. Essentially, this analysis is similar to that of U.S. government officials: if the foreign official was acting within the scope of his or her authority, he or she may be immune from suit. But such immunity would not extend to any acts outside the scope of the official's authority.

5.4.7 Waiving immunity

Although unlikely, it is possible that a defendant who would otherwise be immune from suit will waive his or her immunity. This **waiver** prohibits the defendant from later asserting immunity. The immunity of a defendant might be waived if it is not immediately raised by the defendant as soon as the lawsuit is brought.

5.5 Uncontested lawsuits

Many transnational cases have been **uncontested**; that is, the defendants have not fought the case in court. Usually, this is because the defendant has left the United States and does not want to pay a lawyer to defend him or her. While this may make it more difficult to collect any money from the defendant, it makes a number of aspects of the case much easier.

Several potential legal issues are **waived** if the defendant does not object; this means that the issues are decided in favor of the plaintiffs, and any appellate court cannot reconsider them. For example, the court will not consider whether it has personal jurisdiction over the defendant unless the defendant objects. Also, many objections to admitting evidence may be waived as well; for example, although **hearsay** evidence is normally not allowed (see 8.2.3), the evidence may be used if no one objects.

Ultimately, a defendant may **default** if no defense is raised. This means that the plaintiff wins the case, and a **default judgment** is entered; the judge or jury may then decide how much money the plaintiff is entitled to.

Cases are less likely to be uncontested in the future. No case against a corporation has been uncontested, because corporations have substantial assets that will be subject to a court judgment. Although individuals may default if they have no money or believe it will be difficult to track down their assets, the likelihood of recovering money from a defendant in another country is increasing, and individuals may also be more likely to fight a lawsuit.

6 Legal Obstacles

This section deals with several potential hurdles that may arise even if the defendant has committed a violation of the law that normally allows a lawsuit, and even if the plaintiff has sufficient evidence to prove this in a court. These legal rules are especially a problem for domestic law cases, although they also arise in many cases brought under international law.

6.1 *Forum non conveniens*

The term ***forum non conveniens*** literally means "inconvenient forum"; it is a complex legal question. Basically, this doctrine allows a court to dismiss a lawsuit that it thinks would be more appropriately and conveniently filed somewhere else. Often, the choice is between a court in the U.S. and a court in a foreign country, such as the country where the violation occurred or the country where the defendant resides.

In deciding whether the case should be dismissed for *forum non conveniens*, the judge will consider several factors. First, an adequate alternate forum—a court in some other jurisdiction or country—must exist where the case could be brought. In order to be adequate, a court generally must be part of an independent, functioning judicial system; the courts of a military dictatorship would not meet this test. If there is no adequate court, the judge cannot dismiss the case.

Second, the judge will consider which location better serves public and private interests, including convenience to the defendant and witnesses. The judge will consider what kind of connections the case has to the United States—for example, whether the plaintiffs live in the U.S.; whether the defendants live in the U.S.; whether there are witnesses or other evidence in the U.S.; whether the harms occurred in the U.S.; and whether the defendants committed any acts in the U.S. that related to the harms.

On the basis of these factors, the court will decide where the case is most appropriately heard. *Forum non conveniens* poses the greatest danger in cases where a foreign plaintiff is suing a foreign defendant in U.S. courts for harms that occurred in a foreign country.

6.1.1 Domestic law

Forum non conveniens is a major problem for cases under domestic law. In fact, it may be one of the single biggest problems for such cases, and several domestic law cases have been dismissed due to this doctrine.[1] One of the most important things that the litigation team can do to decrease the likelihood of dismissal is to prepare evidence about why the courts of another country would not be suitable. Evidence of threats, corruption, and bias of the courts is helpful. For example, a *forum non conveniens* challenge was defeated in an environmental case when the plaintiffs provided evidence that the defendant had bribed officials in the foreign country .[2] Also, it may help if the plaintiffs are U.S. residents or citizens.

6.1.2 International law

In contrast to domestic law cases, thus far, *forum non conveniens* has not been much of a problem for international law cases, for at least two reasons. First, this issue is waived by the defendant in an uncontested lawsuit, and many international law cases have been uncontested. Second, U.S. federal courts have developed a preference for hearing international law cases—especially human rights cases—in the United States.[3] In human rights cases, the judge might also be more skeptical about whether a court in another country, such as the country where the human rights abuse occurred, would be an adequate forum for the lawsuit.

6.2 Statute of limitations

Typically, a lawsuit must be brought within a specified period of time after the harm occurs, or is discovered. This time period is known as the **statute of limitations**. With some exceptions, if a lawsuit is not brought within this period after the violation occurs, the case will be dismissed. For some types of harms, such as diseases from environmental contamination, the period may not start until the victim realizes that he or she has been harmed, such as when symptoms of the disease occur.

So far, few transnational cases have been completely barred due to the statute of limitations. This is largely due to the practice of **tolling** the statute of limitations, which is suspending or postponing the time limits for various reasons. Possible reasons for tolling include: the plaintiff was detained; the plaintiff could not sue previously because a hostile government controlled the courts; the plaintiff could not sue previously in the United States because the defendant was not present; or the plaintiff could not sue previously without endangering his or her life or others' lives.

The statute of limitations may pose a problem if the defendant has always been subject to jurisdiction in the United States (for example, if the defendant is a U.S. resident or corporation), and if the plaintiff has not been in danger.

6.2.1 Domestic law

Most domestic law cases must be filed within one to three years after the harm occurred or was discovered. This short period is one reason why some cases are filed as international law cases instead.

6.2.2 International law

The statute of limitations for international law cases is generally longer. The TVPA has a ten-year statute of limitations. Thus, generally, lawsuits must be brought within ten years of the act of torture or extrajudicial killing. Although the ATCA has no specified statute of limitations, most federal courts have "borrowed" the ten-year limitations period from the TVPA.[4]

6.3 Other legal doctrines and issues

In addition to *forum non conveniens* and statute of limitations problems, a few other legal doctrines are occasionally applied in transnational cases. These doctrines are uncommon, but as the courts reject other reasons to dismiss transnational cases, defendants—especially corporations—are using these other arguments as they continue to try to avoid liability.

6.3.1 The act of state doctrine

The **act of state doctrine** is a legal rule that says that U.S. courts will not, in general, determine the legality of official acts of foreign governments committed within their own territory. For example, U.S. courts will not challenge the legality of a foreign government's official decision to take someone's property, even if no compensation is provided.[5] In general, the act of state doctrine has not been applied in human rights cases, for several reasons: first, human rights abuses are typically not "official" acts but instead are denied by foreign governments;[6] second, the doctrine may not preclude cases challenging acts that violate international law;[7] third, in many cases the government whose acts are being challenged is no longer in power.[8] Cases will rarely be dismissed due to this doctrine.

6.3.2 The political question doctrine

The **political question doctrine** is designed to prevent U.S. judges from interfering with the "political" branches of government: the legislature (Congress) and the executive (the President). As such, it most often applies when acts of the U.S. government itself are at issue; the courts will not second-guess the judgment of Congress or the President on political issues. Although some cases involving U.S. actions have been dismissed on this basis,[9] most human rights cases arising out of other countries do not involve "political questions," even if they will have political consequences.[10]

6.3.3 Exhaustion of domestic remedies

Under the TVPA, victims are generally required to try to bring a case in their home country before suing in the United States, a process known as **exhaustion** of domestic remedies. This rule has not been applied in domestic law cases, and courts have generally rejected an exhaustion requirement for ATCA cases.[11] Even if an exhaustion requirement exists, it can typically be met if the victims show that it would have been futile or impossible to try to bring a case in their home country.[12]

Endnotes

[1] For example, another DBCP lawsuit was dismissed due to *forum non conveniens. Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995).
[2] *Castillo v. Newmont Mining Co.*, No. CV-4453 (Colo. Dist. Ct.).
[3] *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).
[4] *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Papa v. U.S.*, 281 F.3d 1004 (9th Cir. 2002).
[5] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).
[6] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).
[7] *Trajano v. Marcos (In re Estate of Marcos Human Rights Litigation)*, 978 F.2d 493 (9th Cir. 1993).
[8] *Trajano v. Marcos (In re Estate of Marcos Human Rights Litigation)*, 978 F.2d 493 (9th Cir. 1993).
[9] *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006).
[10] *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).
[11] *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006).
[12] *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002).

Part II: Practical Issues

Overview: From theory to practice

While Part I of this manual concerned the legal issues involved in bringing a lawsuit, the subject of Part II is equally, if not more, important: practical issues that not only affect whether a case will be successful or not, but in some cases may literally be a matter of life and death.

The best legal theory in the world will not succeed if there is no one to communicate with the plaintiffs or gather evidence, if the plaintiffs cannot be protected from harm, or if the evidence necessary to prove the case is unobtainable, lost, or destroyed. No lawsuit can proceed without lawyers willing to work on it, and without substantial funding to cover the multitude of costs that will arise.

When deciding whether to bring any lawsuit, it is important that everyone involved know what will be required, and what the potential risks are. The legal issues discussed in Part I do require lawyers to plead the case and to answer the defendants' arguments, and they do present risks of creating bad law or sanctions against attorneys. But the issues discussed in Part II explain what will be required of everyone else in the lawsuit, as well as the lawyers. The team must have sufficient time and money to see the lawsuit through to the end. They must be able to prove the facts necessary to win the case; in other words, they must be able to prove that the abuses occurred and that the defendants are responsible for them.

The plaintiffs may face serious risks to themselves and their families, and the same may be true of any witnesses who testify for the plaintiffs. If the plaintiffs are in a different country than the lawyers and especially if they speak a different language, a local contact may be necessary in order to communicate with the plaintiffs. The local contact may also need to assist with gathering evidence to help prove the case. Everyone involved in the case may need to turn over evidence to the defendants.

Thus, in addition to the legal issues, anyone contemplating litigation must be confident that the requirements of a long-term lawsuit can be met, that the risks can be mitigated, and that the evidence necessary to prove the case can be developed.

7 Risks and Requirements

Depending on the lawsuit, there may be dozens of people involved in the litigation: plaintiffs, attorneys, investigators, and witnesses. There are numerous important logistical and other considerations to be considered with each member of the litigation team, including trustworthiness, costs, coordination, risks, and capacity. Commencing a lawsuit without understanding these needs and potential problems can be very dangerous.

7.1 Basic requirements

A lawsuit is a time-consuming, expensive, complex undertaking. Many members of the team will need to be coordinated and funded, and kept in touch with each other. This may be a significant task, given the number of people likely to be involved.

7.1.1 Trust

The most basic requirement for any member of the litigation team is trustworthiness. Keeping information confidential may be essential to the success of the litigation, and it may also be necessary to keep people safe. Most lawyers are accustomed to keeping their work strictly confidential, but many others may not be. All team members—especially the plaintiffs—need to be comfortable with the other members of the litigation team.

7.1.2 Costs and Funding

Litigation is expensive. A lawsuit has many stages, and if at any point the lawsuit is dismissed it must be successfully appealed before it can resume. Even if the plaintiffs win at trial, the defendants may appeal. Although attorneys in such a case probably will not charge any fees up front (see 7.4.1), there are costs associated with a lawsuit that cannot be avoided. Court fees, transcripts of depositions and other proceedings, transportation of witnesses to and from depositions and trial, costs associated with gathering evidence, translation, fees for any expert witnesses, and the administrative costs necessary to coordinate

plaintiffs, investigators, witnesses, and the legal team—from photocopying to conference calls—can add up to an enormous financial burden. For example, a court reporter, who needs to be present at all depositions, can cost up to US$1000 *each day*. Any group considering a transnational lawsuit should be certain that it, and its attorneys, have sufficient funds available to meet the needs of the case, and to see it through to the end.

7.1.3 Coordination and Communication

With all of the people involved in a lawsuit, communication is essential. Not only is this costly in terms of both time and money, but it also requires someone willing to serve a coordinating function. Everyone needs to be kept updated on the legal developments in the case, the gathering of evidence, the safety of the victims, and other matters. This consideration is especially important if the plaintiffs are located in remote communities with limited, if any, access to telephones.

7.1.4 Time

Lawsuits take time, probably more time than anyone expects from the outset. Unless it is uncontested, or dismissed or settled quickly, a typical transnational lawsuit will probably take five to ten years. In fact, as of this date, no transnational lawsuit against a corporation for human rights, environmental, or labor rights violations has proceeded completely through trial and appeals. All such cases have either been settled, dismissed, or are still being litigated. One case was filed in 1984, dismissed, appealed, and finally settled in 1992.[1] Another case was filed in 1993, dismissed, appealed, dismissed again, and the dismissal was finally affirmed in 2002 on *forum non conveniens* grounds.[2]

7.2 Plaintiffs and witnesses

Most lawsuits are initiated by the plaintiffs, seeking some sort of remedy for harm that they have suffered. Victims of human rights or other abuses around the world, however, will almost always be unaware that they might be able to sue the perpetrators in the United States. Thus, activists and attorneys may need to help educate potential plaintiffs about their legal rights, and about the possibility of initiating a lawsuit.

Many of the concerns that affect plaintiffs, such as risks to their safety and restrictions on providing support, also affect witnesses. (See below for more on witnesses.) Witnesses, however, will not typically be as involved in the planning of the lawsuit as plaintiffs.

7.2.1 What will be required of the plaintiffs

Becoming a plaintiff in a transnational lawsuit requires taking on a great deal of responsibility, and, ideally, plaintiffs will be suited to this task. Plaintiffs should be committed to the lawsuit, but they should know that it could take many years before they are able to testify, let alone receive any compensation. They should be aware that they may have to do many things that seem trivial, or tedious, or even incomprehensible, in order to assist their lawsuit. They should have sufficient stability that they can be located when necessary, and, if possible, sufficient flexibility that they can travel when needed.

The general process of the lawsuit should be explained to the plaintiffs. Many plaintiffs will not have any experience with the United States legal system, and it is important to let the plaintiffs know what the lawsuit might do, what it will *not* do (for example, that it is not a criminal prosecution), and what the chances of success are (the chances of ultimately recovering money may be small, and the chances of

gaining an injunction may be even smaller). Good plaintiffs will be comfortable with the possible outcomes, and should not count on the lawsuit to solve their problems.

Ultimately, of course, the plaintiffs are going to testify about what happened to them or their families. Their testimony needs to be strong, and thus they also need to be reliable and credible witnesses as well as responsible plaintiffs (see 8.2).

7.2.2 Providing support to plaintiffs (and witnesses)

Lawyers are constrained by ethical rules that prohibit them from providing monetary or other support to witnesses—including plaintiffs—in exchange for testimony. The lawyers can compensate witnesses for travel costs to and from required functions such as depositions or trial, and for lost wages while participating in these functions. Beyond this degree of support, however, lawyers need to be very careful; plaintiffs and witnesses should know that the lawyers cannot provide other kinds of support.

Other individuals and groups—including local contact organizations—can, however, provide more help to the plaintiffs and witnesses. It is permissible to give a witness support that may be needed to keep him or her safe or healthy so that testifying is possible. For example, giving a witness money to relocate him or herself and his or her family to a safer location, or to support his or her family if the witness needs to abandon his or her livelihood in order to testify, is generally permissible. But it is generally illegal to pay a witness to testify, or to change his or her testimony.

7.2.3 Risks to the plaintiffs (and witnesses)

In all likelihood, the plaintiffs and witnesses—and, in some cases, their families—will face the greatest risks of any member of the lawsuit team. The plaintiffs may or may not be able to accurately assess the risks they face; people who have lived with hardship often underestimate the risks to themselves. Consult as many people as possible to determine the what kind of threats the participants in the lawsuit may encounter.

The plaintiffs need to be given enough information about the lawsuit, and the possible risks to themselves, such that they can make an informed decision about whether they want to be part of the lawsuit. Even if the plaintiffs think the lawsuit is worth the risks, the legal team and local contact group have a duty not to proceed if they think it is likely that the plaintiffs or their families could be killed due to their participation in the lawsuit.

The identities of the plaintiffs and witnesses should be kept secret, even from each other, where possible. They should be instructed not to talk about the lawsuit with anyone. They should understand, however, that while their identities can be kept confidential, they will likely be revealed to some parties—such as the defendant's lawyers—at some stages of the lawsuit.

The plaintiffs and witnesses should also understand that, as noted above, there are limits to the support that can be provided to them. Although the local contact group and legal team will do everything possible to keep them safe, they may not be able, for example, to bring them to the United States or relocate their families.

7.3 The local contact organization

In most international cases, some contact person or organization on the ground in the foreign country will be needed. If the plaintiff or plaintiffs do not live in the country where the harms occurred, a contact group will be needed wherever the plaintiffs are. As with all members of the team, the trustworthiness

of the people involved is critical. The primary responsibilities of these organizations will be to act as a liaison with the plaintiffs and to gather evidence, including plaintiff and witness testimony, for the lawsuit. In some cases, one group might be needed to work with the plaintiffs, while another group might be needed to gather evidence.

A local contact must have some stability, continuity, and longevity, and for this reason organizations are preferable to individuals. International lawsuits will likely last from five to ten years, and could last even longer. Although the local contact will be needed most prior to the lawsuit and in the first few years, the contact must be present throughout the entire process. During at least part of this time, the contact must be prepared to devote all of its resources to the lawsuit.

7.3.1 Necessary skills

Plaintiffs and witnesses often will not speak English, and the legal team on the case probably will not speak their language. The local contact needs to be able to communicate with the lawyers, and have language skills necessary to communicate with plaintiffs and witnesses and to conduct field research to find evidence. The local contact will need to be able to work with the local language as well, which may be different from the plaintiff's language. The local contact will need good interpreters, either on staff or readily available, for the translation of documents and other evidence.

If the plaintiffs cannot come to the United States, the local contact will probably need to be involved in the planning of depositions and testimony, which will involve logistical arrangements such as secure rooms for testimony, audio or visual equipment if needed, interpreters, and travel arrangements for the plaintiffs.

7.3.2 Researching the case and gathering evidence

Prior to the filing of the lawsuit, the local contact will probably need to make contact with the plaintiffs, become familiar with the events of the case, and make a preliminary search for other evidence—including witnesses—to corroborate the plaintiffs. This information will be used by the legal team to draft the complaint, and is necessary to determine what claims may be included.

During the lawsuit, the local contact will be primarily responsible for gathering evidence, including witness testimony and key documents. At times, the local contact group may also need to help research issues of foreign law or the operation of the local court system. In order to conduct this research and investigation, the group will need a firm understanding of what evidence can be used in court and what evidence is considered credible; they will need to work with the legal team. They may also be involved in identifying expert witnesses.

7.3.3 Working with plaintiffs and witnesses

If the plaintiffs cannot come to the United States, the local contact will probably be their primary link to the lawsuit. They must trust the local contact, especially if their lives or the lives of their families are in danger. The local contact must also trust the plaintiffs and witnesses, and be able to determine whether witnesses are telling the truth or not. The local contact must be able to explain the process and progress of the lawsuit to the plaintiffs.

The local contact must be in ready communication with the plaintiffs and witnesses. Ideally, this means that the plaintiffs could be located and contacted within a few hours; at a minimum, this means that they need to be able to be located and contacted within a few days. At times, court deadlines may require

declarations from plaintiffs or witnesses within a few days, and the local contact must be able to produce them. All communications with the plaintiffs and witnesses must be done in a secure manner.

In order not to arouse suspicion, the people who work directly with the plaintiffs should be, at least passably, of the same ethnic group as the plaintiffs or the country of residence. Even if the plaintiffs have fled their home country or have come to the United States, their friends and families may still be in danger, and thus the plaintiffs' identities may still need to be kept confidential.

In working with the plaintiffs and witnesses, the local contact group will need to have an understanding of the social networks of their communities. The lawsuit may create tensions and jealousy, especially if a few plaintiffs stand to gain from it and their neighbors do not. The local contact will need to minimize these tensions, ideally by working through existing social networks and community institutions.

7.3.4 Risks to the local contact

The local contact group probably faces the widest variety of safety and security risks. Perhaps most importantly, the staff of the organization may face safety risks similar to those faced by the plaintiffs and witnesses. Their identities may need to be kept confidential, or they may need to use aliases at times. The local contact group may want to solicit the opinions of other experts about the risks they will face; they should not always assume that they know the situation well enough to assess the risks themselves.

Additionally, the local contact group may face harassment from local authorities or interest groups, especially if the country where they are located is hostile to the lawsuit. Scrutiny by financial authorities, raids by the police, deportation of foreign staff members, or more serious harassment—including criminal prosecution—is possible. Participation in the lawsuit may affect other projects or programs of the organization that are unrelated to the lawsuit. Local contact groups especially need to be aware if any of their staff is not in the country legally. It will be much easier for the local contact group if they, like the plaintiffs and witnesses, can keep their participation in the lawsuit confidential.

Finally, the local contact group may face another form of harassment from the defendants. As discussed below, any documents or other information related to the issues of the lawsuit may be requested by the defendant in the discovery period. If the local contact group is subject to the jurisdiction of the United States, or if it is subject to the jurisdiction of a closely related country (Canada or Western Europe, for example), it could be compelled to disclose all of these documents. Local contact organizations need to think ahead when they are creating, or receiving, any materials whose disclosure might pose a threat to anyone—including maps, interviews, background research for human rights or environmental reports, and video or audio tapes. Routine destruction of sensitive documents is probably a good idea. It is illegal, however, to destroy documents after they have been requested, or because they might be requested. Any destruction of documents should be according to a regular policy.

7.4 Legal team

The role of the legal team is to do the legal work necessary to see the case through, from the point of filing the lawsuit to the final judgment in the case. The process can take years, and, like the plaintiffs, witnesses, and local contacts, the lawyers involved will need to be committed to staying with the case.

7.4.1 The importance of experience

Not every lawyer on the legal team needs to be an experienced litigator. Younger lawyers, especially those who might be closer to the victims and communities involved or have good relationships with the

local contact, are often invaluable. But every lawsuit *must also* have lawyers who are experienced, and who know the legal issues involved.

Often, the best way to avoid making bad law (as discussed in the Introduction) is to solicit the involvement of attorneys who have been working on these kinds of cases for years. If no experienced transnational litigators are interested in a particular case, that may be a sign that the case is too weak or too risky, and should not be brought. In all cases, the advice of senior lawyers who are well-versed in the unique legal issues that arise in transnational cases should be sought.

7.4.2 Pro bono and contingency fees

Lawyers are sometimes able to take cases **pro bono**—essentially, for free. The lawyer or law firm covers the cost of legal research, staff time, and their own expenses. Litigation is expensive, however, so very few people can afford to do large cases pro bono. Lawyers that do take cases pro bono usually either work for non-governmental organizations (NGOs) that get their money from grants and donations, and often have few resources, or work for large law firms that get their money from defending corporations and therefore would not be interested in suing corporations.

Other lawyers who work for smaller firms or are in private practice, often those who usually practice environmental, civil rights, or labor law, may not be able to afford to take on a large case pro bono. The only way they can afford to continue this kind of litigation is by working on a **contingency fee** basis. A contingency fee is a percentage of the money awarded by the court that the lawyer ultimately takes, often between 25%-40%. Of course, if no money is recovered, the lawyer does not get paid, and the lawyer does not ask for any fees from the plaintiffs before the case is finished. Groups of lawyers, including NGOs and private lawyers, often work together to bring major cases.

In transnational cases, unless the plaintiffs are relatively wealthy, lawyers willing to take the case will probably do so on a pro bono or contingency basis. Thus, it is unlikely that the plaintiffs would have to pay the lawyers unless they win the case.

7.4.3 Risks to the legal team

The legal team usually faces the fewest risks to their personal security and safety. Although they may face a small possibility of arrest or deportation if they travel to a country that is hostile to the lawsuit, at almost all times they face fewer risks than either the plaintiffs and witnesses or the local contact group.

The primary risk to the lawyers is that their investments of time and money will not be repaid. As noted above, most lawyers don't have the resources to take on complex cases for free. Lawyers may also face the possibility of sanctions from the judge if they make a mistake; these sanctions often carry fines.

Lawyers also need to be mindful of the support they provide to the plaintiffs and witnesses (see 7.2.2). It may be difficult to refrain from giving help to people in need, but if the lawyers appear to be bribing anyone for his or her testimony, they could face disciplinary action or even criminal charges.

7.5 Protecting sensitive information

In any transnational lawsuit, many pieces of information will need to be kept secret or confidential, such as the identities of plaintiffs and witnesses. Some degree of confidentiality will be surrendered by participating in a lawsuit, however, so other methods may be needed to ensure that sensitive information does not fall into the wrong hands.

7.5.1 Anonymity and pseudonymity

Typically, plaintiffs' and defendants' names are used in the title of a lawsuit. Where the plaintiffs might be in danger, however, their names may be withheld from the title and other publicly available information, and they may take on pseudonyms. The standard convention in American courts is to call such parties John or Jane Doe, Roe, or Moe, and to number them (John Doe I, John Doe II, etc.). Several cases have been filed in this fashion, including *Doe v. Unocal* and *Doe v. Karadzic*; the famous abortion case *Roe v. Wade* also involved the plaintiff proceeding under the pseudonym Jane Roe.

Although the identities behind the pseudonyms may be withheld from the public, they probably cannot be withheld from the defendants, or at least from the defendants' lawyers. The defendant has to be able to defend against the lawsuit, and this generally requires that the defendant or the defendants' lawyers know who the plaintiffs are. Defendants and their lawyers can, however, be restricted in their disclosure of this information.

7.5.2 Protective orders and sealed documents

Whenever sensitive or personal information is requested by the defendants—including the plaintiffs' identities and locations—the plaintiffs, or anyone else from whom information is sought, can request a **protective order** from the judge. In federal court, protective orders are supposed to be given to protect someone "from annoyance, embarrassment, oppression, or undue burden or expense"[3]; most state courts have similar rules. Information that is considered "confidential" but not legally privileged (see 7.5.4) may qualify for a protective order. Protective orders can regulate whether and how the information is disclosed, and what the defendants may do with it.

Ordinarily, any information submitted to the judge—such as the complaint, or any motions, or supporting evidence—is available to the public. The plaintiffs and their attorneys, however, may request that such information be **sealed**, meaning that it cannot be released to the public without a court order. From the very beginning of the lawsuit the plaintiffs can request to file their complaint **under seal**.

7.5.3 Redaction

Even if documents are ordered to be disclosed to the defendants, some portions of the document may be removed or **redacted** before they are handed over. Redaction is only permissible if the judge allows it, and the plaintiffs or whoever is producing documents may request redaction. The reasons for redaction usually include the protection of confidential information, such as identities, that the defendant does not need to know.

7.5.4 Privileged information

The law provides a number of **evidentiary privileges** that can help protect information. Many privileges are very strong and can almost never be broken. Information and documents protected by a privilege are usually very well-protected throughout the lawsuit. Any documents protected by a privilege should be labeled and identify the particular privilege (for example "Privileged, Attorney-Client") so that they are not accidentally given to another party, or to the public. The following privileges are recognized in federal courts and state courts, although some states may allow other privileges as well.

Attorney-client privilege is the most important, and probably the strongest, privilege recognized. Generally, all communications between clients and their attorneys are absolutely protected, and the attorney can *never* divulge them. There are, however, three basic requirements that must be satisfied. First, there must be an attorney-client relationship—the lawyer must be representing the client or giving legal advice,

not simply talking with a friend. Second, the lawyer must have learned of the information from the client, not from anyone else. For example, if the client's brother tells the lawyer that the client committed a crime, that information is not privileged. Third, the information must be confidential, meaning that the client has not told anyone else about the information; if the client does tell someone else, the privilege may be lost. The attorney-client privilege also protects information given to certain people acting on behalf of the attorney, such as a translator, and attorneys working together may share privileged information given by clients without losing the protection of the privilege. The attorney-client privilege will not, however, protect information divulged before any attorneys have joined the case. If you need to rely upon this privilege, make sure you discuss this with the legal team to confirm that the information can be protected.

Several other relationships are privileged in a similar manner as the attorney-client relationship. Communications between a licensed psychiatrist or psychologist and a patient may be protected by the **psychotherapist-patient** privilege, as long as they are made within the course of diagnosis or treatment, and are otherwise confidential. Communications between a parishioner and a member of the clergy may be protected by the **priest-penitent** privilege, but only if they are made for the purpose of spiritual rehabilitation and are otherwise confidential. There is also a limited **spousal** privilege that protects information shared between a married couple; however, this privilege may not prohibit a spouse from testifying if he or she wants to, and may take a different form in different states.

U.S. constitutional law also protects a qualified **journalist's** privilege, which can help a journalist protect his or her sources or confidential background material. This privilege is not absolute, however, and a court can order journalists to disclose confidential information under some circumstances. The courts also have not clarified exactly what kind of information this privilege protects, and who might be considered a journalist. The journalist's privilege should not, therefore, be relied upon to protect critical information.

7.5.5 Work product protection

Similar to evidentiary privileges, the **work product doctrine** protects the research and strategy of attorneys working on a lawsuit. Internal memos, conversations, witness interviews, and other materials prepared primarily for litigation can generally be protected. Like privileged documents, this work product should be clearly labeled "Work Product" so that it is not accidentally disclosed. This doctrine does not, however, provide absolute protection; under some circumstances, a court could order disclosure of information that would normally be protected.

Some materials prepared by non-lawyers may also be protected by the work product doctrine, if they are prepared for the purpose of litigation. It is possible that materials prepared long before the filing of a lawsuit—even before lawyers become involved in a case—could be protected as work product. In order to safeguard such materials, they should be prepared in such a way that makes it obvious that they are intended to be used for litigation, and not used for other purposes. For example, if a statement of a potential witness is to be protected as work product, it should be prepared in the form of a declaration or an affidavit, and information from the statement should not be released as part of a report or press release. If other information from this person is to be used in a public report, it should be recorded in a separate document that does not contain sensitive information and will not be used for litigation. This will increase the chances that the statement will be protected, but there is still no absolute guarantee of protection.

Endnotes

[1] See *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990); "The price of bananas," *The Economist*, Mar. 12, 1994.

[2] *Aguinda v. Texaco*, 303 F.3d 470 (2nd Cir. 2002).

[3] Fed. R. Civ. Proc. R. 26(c).

8 Proving the Case

In any lawsuit, evidence is critically important: you must be able to prove your allegations. Many people think about proving the case as something that happens at the end of the case, when it ultimately goes to trial. But the gathering of evidence may need to occur long before this; in fact, the best time to gather evidence is while the abuses are occurring or shortly thereafter, because that is when witnesses' memories will be fresh, and when the most accurate data can be gathered.

Although lawyers will be involved with most of the evidence, especially evidence obtained after the lawsuit is filed, there are ways that organizations and individuals can begin to gather evidence even without the involvement of lawyers. If you think you may be involved in a lawsuit, knowing what kinds of evidence can be used, and how to gather useful evidence, may help you to prepare long before a legal team joins the case.

8.1 Introduction

8.1.1 What is good evidence?

The types of evidence that may be used in a lawsuit are different and more limited than in most other contexts. Evidence that may be used at trial is considered **admissible** evidence; other evidence, even if not admissible at trial, can sometimes be used at other points in the lawsuit process.

Most evidence in a trial is usually admitted in the form of witness **testimony**, including **expert witness** testimony, in which the witnesses answer questions from the attorneys. Other evidence may be admitted as **exhibits**, including **documentary evidence** and **physical evidence**, but the standard for the admission of these forms of evidence is very high.

Consider what evidence might be needed to show that people working for a corporation burned down a plaintiff's village. Documents obtained from the corporation in discovery might be useful to establish a connection between the corporation and the perpetrators. The plaintiff would need to testify that he or she lived in the village, and ideally witnesses would be able to testify that they saw the perpetrators burning the village. Physical evidence such as photographs, or even burned artifacts gathered from the village,

might be introduced to show the extent of the damage. An expert witness might give his or her opinion about how the fire started, to corroborate other evidence. Ultimately, all the evidence must work together to prove all of the necessary pieces of the lawsuit.

8.1.2 "Circumstantial" evidence

There is a common perception that "circumstantial" evidence—evidence that tends to suggest something, but does not directly prove it—is not "good" evidence. This is not, strictly speaking, true. Instead, all evidence tending to prove or disprove something may be considered, and as long as a jury has a reasonable basis to believe a particular fact, it may consider that fact proven. Cases that are simply too weak for any jury to reasonably believe them may be dismissed by the judge on a summary judgment motion (see Appendix), but all evidence—"circumstantial" as well as "direct"—may be used to make this decision.

8.2 Witnesses

8.2.1 Who can be a witness

Generally, anyone who has any first-hand information about the violations, or other information that is relevant to the case, can be a witness. These witnesses are generally referred to as **lay witnesses**. There is another type of witness, the **expert witness**, who may give opinions and draw conclusions based on specialized knowledge, even if he or she has no first-hand knowledge of the case.

As noted above, plaintiffs can and generally will be witnesses; the defendants will probably also be witnesses. Witnesses other than the plaintiffs or defendants are known as **third-party witnesses**.

8.2.2 What makes a good witness

Good witnesses—including plaintiffs—need to be able to testify convincingly. A good witness will have something important to say that is necessary to the legal case, but, just as importantly, will be able to say it in a confident, authentic manner that suggests truthfulness. When interviewing a potential witness, consider whether you are convinced by her story, or whether you think she is simply giving the answers that she thinks you want to hear—if you're not convinced, then a judge or jury probably won't be, either. Those who interview witnesses should be able to judge character and determine whether they are telling the truth. Some witnesses and plaintiffs will make up things if they believe it will help them to get money or other support.

A good witness will, ideally, have a good memory for detail, but will not make up details. Witnesses should be interviewed several times, and any witness whose story is not substantially consistent should be included only with extreme caution. Not only will the witness's answers need to remain constant at multiple stages of the trial, they will also need to stand up under cross-examination. A witness who is shown to be lying during a trial can be extremely damaging to the case.

Witnesses, especially plaintiffs, who show emotion can be very powerful. Many witnesses, and especially plaintiffs, will have endured horrible violations of themselves, their families, and their homes. Their suffering will need to be conveyed to the judge or jury. Even if he or she is speaking through an interpreter, the emotion of a good witness will be immediately understandable. If the judge or jury feels sympathetic toward the witnesses and plaintiffs, they may be more willing to believe their story.

8.2.3 Lay witnesses

Testimony from witnesses that have directly observed some part of the conduct that makes up the violations in the case, or that have direct knowledge of these violations, usually makes up the bulk of the evidence in the lawsuit. With few exceptions, most witnesses can only testify to facts that they know directly, or to events that they have personally observed; these witnesses are known as **lay witnesses**. Lay witnesses usually must testify to things that they have seen or heard themselves. Eyewitness testimony—testimony by someone who saw something happen—is often considered to be the best, most powerful evidence at trial. Lay witnsesses must have some kind of *direct* knowledge about the facts, and they are generally not allowed to testify about things that someone else has told them. Testimony based on what another person *told* a witness is called **hearsay** and is usually not allowed. The plaintiffs are also witnesses; since the plaintiffs directly experienced the harms that are at the center of the case, their testimony about what happened to them is critical.

8.2.4 Expert witnesses

Unlike other witnesses, **expert witnesses** do not need to have any personal knowledge about the facts of the case in order to testify; rather, they can testify about things within their area of expertise. Expert witnesses must have some area of expertise that gives them knowledge that the average layman would not have. The most common types of expert witnesses are scientists and medical doctors, but anyone that has a particular kind of expertise may be **qualified**, or allowed by the judge to testify, as an expert witness.

Expert witnesses are allowed to testify about the way things are usually done in a particular field. For example, a doctor might testify in a medical malpractice case that most doctors perform a particular medical procedure in a certain way; in another case, a farmer might testify about the usual way crops are planted in a certain area. Expert witnesses can also examine the evidence in a particular case and state conclusions based on their expertise. For example, a ballistics expert might testify that a bullet was probably fired from a particular gun; an expert potter might testify about the temperature at which a particular ceramic was fired.

8.3 Documentary evidence and physical evidence

Evidence other than testimony can be divided into **documentary evidence**, which includes any written materials, and **physical evidence**, which includes any other tangible evidence. These types of evidence are introduced as exhibits. In order to be introduced, exhibits typically must be **authenticated** by a witness. This means that a witness must testify as to what the object or document is. For example, a photograph may be authenticated by the photographer, who would testify as to when and where the photograph was taken. If the person who gathered the evidence, or wrote the document, is unavailable to testify, authentication may be difficult. For this reason, it is a good idea to plan ahead when gathering evidence, to make sure that any witnesses necessary for authentication will be available to testify.

8.4 Foreign law

An unusual, but significant area of evidence that may arise is questions of foreign law. Although the lawsuit will be proceeding in the United States, the judge may sometimes need to make decisions based, in part, on the laws of the country where the violation occurred. This is especially true for domestic law

cases, where the laws of the place where the violation occurred may be critical to the case, but it also comes up in international law cases.

Declarations from experts in the laws of that country, as well as copies of legal codes (and their translations), may be necessary to decide questions of foreign law. Identifying possible local legal experts early on will be very helpful to the legal team and the lawsuit. When the need for a foreign law expert arises, there may not be much time to search for one.

8.5 Declarations

A **declaration** is a signed statement of facts known to the **declarant**, the person signing the declaration. Anyone can prepare a declaration; no attorneys or officials need to be involved. Although declarations usually cannot be introduced as evidence at a trial, they can be useful during pre-trial stages such as summary judgment. A sample declaration is included in Appendix V.

8.5.1 Form

Declarations should begin with the following: "I, [name of declarant], declare as follows:" After this line, the declaration should be divided into paragraphs, and the paragraphs should be numbered for reference. The first few paragraphs typically introduce the declarant and set out relevant identifying information. The rest of the declaration sets out the facts known by the declarant. Generally, the declarant must personally know the things in the declaration; i.e., he or she must have witnessed the events described. It is a good idea to include a general statement about personal knowledge; for example: "I have personal knowledge of the matters stated herein, unless specifically noted otherwise." If the person would be willing to testify, also include the statement: "If called as a witness, I could and would testify competently thereto."

8.5.2 Signing

Declarations must be signed and dated. This means that, if the declaration is prepared outside the United States, the following line must be included: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct." This language is required in federal courts and *must* be included *exactly* as stated; if the declaration is prepared within the United States, the following line should be used instead: "I declare under penalty of perjury that the foregoing is true and correct." If in doubt, use the language for declarations prepared outside the United States. State courts may have slightly different requirements, but if in doubt use the language for federal courts.

Following this line, the declaration must state when the declaration was signed, and, preferably, the location of signing. The following language is typical: "This declaration was executed in [city, state, country] on [date]." This must be followed by the declarant's signature.

8.5.3 Language and interpreters

Declarations should be submitted in English. If there is any doubt about the English fluency of the declarant, the declaration should include a statement of the declarant's English fluency. This should probably be included for any declaration prepared outside the United States, as well as any declaration prepared for an immigrant to the United States. If English is the declarant's native language, a statement to that effect should suffice. Otherwise, the statement should include how many years the declarant has studied English and the institutions at which the declarant studied. If the declarant is not fluent in English, the declaration

must be translated for him or her. In this case, a second declaration must be prepared by the interpreter. This declaration must also include a statement of the interpreter's English fluency, as described above.

8.5.4 Affidavits

This section has focused on declarations, because they are the easiest for non-lawyers to prepare. **Affidavits** are similar in form to declarations, but they must be **sworn**. This means that the **affiant**—the person signing the affidavit—must sign the affidavit before a notary public. Because of this, it is unlikely that many affidavits will be prepared outside the United States, or without the assistance of attorneys. Declarations and affidavits can generally be used for the same purposes, although affidavits may carry slightly more weight.

Appendix I
Torts and Courts

This section contains background information about litigation and the U.S. court system. Much of this information should not be needed to understand the rest of the guide, but it is useful to understand what lawyers are talking about.

I.A Transnational lawsuits

Litigation is the term used by lawyers for court proceedings relating to a lawsuit. In any lawsuit, there are at least two **parties**: a **plaintiff**, who initiates the lawsuit, and a **defendant**, whom the plaintiff alleges has harmed him or her in some way. **Transnational litigation** is the term used for lawsuits where the plaintiff sues the defendant in a country other than where the violations occurred.

I.A.i What is a tort?

A **tort** is the term that lawyers use for a violation of a legal obligation that has caused some sort of harm. Unless a contract is involved, anytime anyone harms or injures someone else without the legal right to do so, that is a tort. All of the harms discussed in this guide, whether under domestic or international law, are torts. Domestic law torts include trespass, assault, wrongful death, theft, and destruction of property; international law torts include human rights abuses such as torture, violations of international environmental law, and violations of international labor rights. Many torts are also crimes, but although a tort is a violation of the law, it need not be criminal. For example, in an automobile accident where one person is at fault, that person has committed a tort, but usually has not committed a crime.

I.A.ii What is a claim?

In a lawsuit, each individual statement of a tort or violation is known as a **claim**. Often, more than one claim will arise from a single incident. For example, consider an incident where the defendant has deliberately rammed his car into the plaintiff's car, damaging the car and injuring the plaintiff. The

damage to the plaintiff's property (the car) would be considered one claim, while the injuries to the plaintiff would be considered a separate claim for assault and battery. Each claim must be a violation of a legal obligation; for example, the violation of the obligation not to damage other people's property while driving, and the violation of the obligation not to injure other people. Each claim must also include some harm that has been caused by this violation.

The parts of a claim that need to be proven are known as the **elements** of a claim. For example, a claim of assault and battery might include three elements: that the defendant intentionally made physical contact with the plaintiff, that the physical contact was unwanted, and that it was harmful to the plaintiff. If each of the elements is proved, then the plaintiff should win.

A claim is also known as a **cause of action**. If the law allows a particular claim to be brought—for example, assault or damage to property—that particular claim is said to be **actionable**. A claim that the courts would not allow—such as a lawsuit for simply insulting another person—would not be considered actionable.

I.B The U.S. courts

The United States court system is largely divided between state and federal courts. Both court systems have **trial courts**, at which evidence and legal issues are first presented, and **appellate courts**, which review the decisions of the trial courts to correct any mistakes that have been made. In both systems, the highest appellate court is the United States Supreme Court. Generally, appellate courts are much more likely to correct a legal interpretation than to consider factual issues.

As noted previously, all lawsuits under international law must be filed in federal court. Lawsuits under domestic law are usually filed in state court, but sometimes can be filed in federal court as well.

I.B.i Fact vs. law

Lawyers—and courts—make a distinction between **findings of fact** and **rulings of law**. This distinction can sometimes be difficult to conceptualize, and is not always clear in every case, but it is very important. Essentially, a finding of fact is a determination of what actually happened. Factual issues are determined by the **finder of fact**, which may be the judge or a jury. Questions of fact include: what did the defendant do? at what time? what were the effects of the defendant's actions? what injuries were caused by the defendant's actions? Rulings of law, on the other hand, are the judge's interpretation of what the law means. Question of law include: does the plaintiff have a valid legal claim? what facts does the plaintiff need in order to prove his or her case? what evidence can be admitted? Most of this guide deals with explaining the law, as it has been interpreted by numerous courts.

I.B.ii Trial courts

The trial courts in the federal system are known as **District Courts**, and each has a geographically-defined **district**. Each state has between one and four districts (for example, the Northern, Eastern, and Southern Districts of New York). Each district has several federal district judges that are randomly assigned to cases, and typically preside over the case from the point at which it is filed until the resolution of the case. In addition to presiding over the trial, the judge will decide numerous legal issues before and during the trial. States have similar trial courts that are often known as Superior Courts.

The factual findings of the trial court are largely final. This means that if the judge, or the jury, finds that, for example, the defendant hit the plaintiff with his car, this finding of fact usually will not be changed. Any rulings of law of the trial court, however, can be changed by an appellate court. For example, if the

judge decided that, based on her interpretation of the law, the plaintiff is not entitled to win despite the defendant's actions, an appellate court could change that decision.

I.B.iii Appellate courts

Almost any ruling of law by the trial court can usually be appealed; findings of fact can also be appealed, but, as noted above, they are very difficult to change. In the federal court system, any plaintiff or defendant has the right to appeal the case to the first appellate court, known as the **Court of Appeals**. The courts of appeals are organized into thirteen **circuits**, and are also known as **circuit courts**. Generally, the circuits are numbered and defined geographically, similar to the district courts (for example, the Second Circuit includes Vermont, Connecticut, and New York). The decisions of each court of appeals are binding precedent for every district court within that circuit.

States often have a similar system of geographically-defined courts of appeals, and may have more than one level of appellate court. Each state also has one high court, usually known as the state Supreme Court.

Decisions of the Courts of Appeals, or of a state Supreme Court, may, in turn, be appealed to the United States Supreme Court. There is no right to an appeal to the Supreme Court, however, and the Supreme Court only accepts a little over a hundred cases per year. The chances that a case will be decided by the Supreme Court are slim, and for most cases another appellate court is the last court that will hear the case.

II Appendix
Steps in a Lawsuit

The following is a description of most of the important steps in litigation, from the beginning of the lawsuit through trial and appeal. It is included herein primarily as a reference, so that people involved in litigation can understand what each step means, and what comes next. Obviously, lawyers need to be involved in all of these steps. This appendix is based primarily on the Federal Rules of Civil Procedure, the rules governing lawsuits in federal courts. Most states have similar rules, but there may be significant differences.

II.A The Complaint

The **complaint** is the document that starts everything. It is the document that states who the plaintiffs and defendants are and what the claims are, and asks for damages or another remedy. Every lawsuit begins with a complaint. At the time of the complaint, the plaintiffs and attorneys should know what the basic facts of the case are, and what each claim will be. They need not, however, present evidence to support each claim at this time.

II.A.i Filing the complaint and serving the defendant

The complaint must be filed before the defendant is served with legal papers; after the complaint starts the lawsuit, the court issues a **summons** to the defendant. The defendant must be served—presented with this summons, and a copy of the complaint—within 120 days.

As noted above, a court can gain personal jurisdiction over an individual foreign defendant if the defendant is served with the summons and complaint while in the United States. In such a case, the plaintiffs might not want to let the defendant know that they are planning to sue him or her. The complaint in such a case might be filed **under seal**, which means that, initially, it is not publicly available. The complaint would then be released after the defendant is served.

II.A.ii Evidence necessary for the complaint

Evidence is typically not included with the complaint itself, but a number of things must be known before the complaint is filed. Essentially, the basic outline of the case should be present before the complaint is filed. Nothing in the complaint needs to be proved, at least not at the time the complaint is filed, and the lawyers and plaintiffs do not need to swear that the allegations in the complaint are true. They do, however, need to have some reason for believing that they are true, or they could face sanctions (see 1.3 on Sanctions).

Complaints can be amended, especially if new evidence surfaces that either adds a new plaintiff, a new defendant, or changes the claims, but it is much easier to add in these possibilities at the outset than to change them later. It is always easier to amend a complaint to delete plaintiffs, defendants, or claims than to add new ones. Therefore, all plaintiffs and defendants should be known at the time of the complaint. The basic facts of the violations should be known, and each legal claim will need to be listed.

II.B Answers and motions to dismiss

After being served with the complaint, the defendant has 20 days to file an **answer**, which presents the defendant's theory of the case. In a typical transnational lawsuit, however, the defendant will file a **motion to dismiss** before the lawsuit proceeds any further, and often before the answer is filed. (A motion to dismiss is also known as a **demurrer** in some states.) Such a motion may be filed for several purposes, but the most important are lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, and *forum non conveniens*. A motion to dismiss may also be filed later in the process, but is often filed very early.

II.B.i Personal jurisdiction

The basic elements of **personal jurisdiction** are discussed above. The plaintiffs will need to show that the court has jurisdiction over the defendants for one or more of the reasons discussed. In some cases, a personal jurisdiction challenge may require additional evidence; if the defendant is a foreign corporation, for example, evidence of the corporation's connections to the United States may be required.

II.B.ii Subject matter jurisdiction

In order to decide a case, the court must have **subject matter jurisdiction** over the claims involved. This means that the court must be legally allowed to hear claims of this type. For example, a small claims court might only have subject matter jurisdiction over cases involving less than $3000 in damages, or a housing court might only have subject matter jurisdiction over disputes between landlords and tenants. Subject matter jurisdiction can be limited by the types of plaintiffs and defendants that can sue, the amount of damages sought, the location of the violations, or the substance of the legal claims involved.

For cases under domestic law, subject matter jurisdiction is usually not a serious problem. State courts, for example, can consider a wide variety of cases.

Subject matter jurisdiction can be a major issue for international law cases, however; federal courts can only consider international law cases when a particular act of Congress allows them to do so. The most relevant statutes are the Alien Tort Claims Act and the Torture Victim Protection Act. If the case does not fall under these acts—for example, if it does not allege a violation of a recognized norm of international law—then it may be dismissed for lack of subject matter jurisdiction.

II.B.iii Venue or *forum non conveniens*

Even if it would otherwise have jurisdiction, a court cannot hear a case if it is the improper **venue**. Venue is a complex legal question involving which court is the proper court to hear a particular case, considering where the defendants reside, where the plaintiffs reside, and where the wrongful acts occurred.

Forum non conveniens is discussed above. Essentially, this doctrine allows a judge to dismiss a case if it is more appropriate for the case to be filed in another court. Defeating a motion to dismiss based on *forum non conveniens* may require gathering evidence to show that a proposed alternative forum, or court, is unsuitable, and to show that the case has strong connections to the United States.

II.C The answer

If the lawsuit is not dismissed completely, or if the defendants choose not to file a motion to dismiss immediately, they must file an answer. (If a defendant does not file an answer, the plaintiff can seek a **default judgment**.) In the answer, the defendants must respond to each allegation in the complaint, admitting or denying each one, and present any defenses. The answer may also include **counterclaims**, which are claims made by the defendant against the plaintiff; such claims would be very unusual in a transnational lawsuit. **Cross-claims**, in which one defendant makes a claim against another defendant, are slightly more likely. For example, if the plaintiffs sue two pesticide manufacturers, one defendant might decide to blame everything on the other one, and file a cross-claim against the other manufacturer.

II.D Discovery

The **discovery** period is perhaps the most important stage of the lawsuit, next to the trial itself. In the discovery phase, both plaintiffs and defendants are entitled to learn almost anything that the other side knows about the case. In some cases, the parties can also get information from other individuals. The term **discover** is used when a party uses the court to get information from any source (it is not used for information found during a party's own investigation), and the party that gives the information is said to **produce** it.

Discovery may last several months or several years, and the schedule for discovery is usually decided by the judge in consultation with lawyers from both sides. It is important to note, however, that the discovery period is limited, and the judge will set a date for the end of discovery. It is usually very difficult to get additional information after the end of the discovery period. And, if information and witnesses are not disclosed to the defendants during the discovery period, the plaintiffs may be prohibited from using them at trial. It is therefore extremely important that all of the evidence and witnesses necessary to prove the case be identified during this critical period.

II.D.i What kind of information may be discovered

The rules of discovery are broad: a party may discover anything that is considered relevant to the subject matter of the lawsuit. Although parties may challenge the relevance of anything requested, judges typically do not look favorably on this sort of withholding unless the information is clearly irrelevant. Hiding information, rather than turning it over to the other party, is a serious ethical violation that can lead to sanctions.

The broad scope of discovery is very useful for most plaintiffs. In some cases, especially where the defendant is a corporation, the defendant's own documents provide critical evidence to prove the claims. Legally, the defendants are usually required to produce such information, no matter how harmful it is to their case.

Discovery can also be used against the plaintiffs, however, and it can be a tool for harassment or intimidation. The plaintiffs and witnesses must give their names and locations, although this information can often be protected. The local contact group may be especially vulnerable, if it has been conducting interviews with victims in order to document various violations. This kind of information, if it is considered relevant to the lawsuit, may be requested by the defendant, even if the group regards it as confidential. Groups located entirely outside the United States, however, may be less vulnerable, as it is much more difficult to take discovery from a foreign individual or organization. Also, as previously noted, information can be protected from discovery in several ways.

II.D.ii Methods of discovery

There are several methods of discovery. Perhaps the simplest is the **interrogatory**, which is a question sent to a party (plaintiff or defendant). Typically, a list of questions will be sent all at once. The party must then answer the interrogatories within 30 days of receiving them. Instead of answering, the party can also choose to include copies of records that provide the answers to the interrogatories. Similar to interrogatories is a **request for admission**, which presents discrete sets of facts and asks the party to admit or deny each one. If the party admits the facts, they are generally considered to be established, and do not have to be proven again.

Parties may also request the production of documents and other objects. Copies must be provided of anything that can be copied—written documents, audio or video tapes, electronic data collections—and the owner must allow the inspection, and in some circumstances the testing, of other objects. Parties also may request to inspect land or a building.

Under some circumstances, the court may allow the physical or mental examination of a party. For example, if a plaintiff claims to have suffered mentally from an episode of torture, the defendant might request a psychological examination to determine whether the plaintiff really has suffered mental injury.

The most wide-ranging method of discovery is the **deposition**. A deposition is similar to testimony at trial; the lawyers ask the questions, and the witness must answer them. The witness is sworn to answer truthfully, and all of the answers are recorded by an authorized court reporter. Generally, all of the plaintiffs, defendants, and witnesses in a case will be deposed at least once before trial.

II.D.iii Who may be required to produce information

Most discovery in a lawsuit happens between the parties—the plaintiffs and defendants. Non-parties, however—including activists, witnesses, NGOs, and the local contact organization—may also be subject to discovery. Through a **subpoena**, an order given by the court, they may be required to give a deposition, or to produce documents. Although the scope of relevant information still extends to anything related to the lawsuit, there are some limitations on the subpoena. Courts generally will not allow subpoenas that will cause undue hardship to non-parties, or will be unnecessarily time-consuming to answer; furthermore, courts may be reluctant to issue subpoenas that require non-parties to travel long distances to testify.

II.E Summary judgment

Usually, at the end of discovery, the defendant will make a motion for **summary judgment**. Essentially, this is an argument by the defendant that, even if all of the plaintiff's evidence is assumed to be true, the plaintiff cannot prove the case. In deciding a motion for summary judgment, the court is not

allowed to disbelieve any of the plaintiff's evidence. If there are any factual disputes between the plaintiff and the defendant, the court must decide whether these differences could affect the outcome of the case.

In rare circumstances—such as when a defendant has not contested the case—the plaintiff might move for summary judgment as well. In this case, the judge must assume that all of the defendant's evidence is true, and determine whether the evidence still proves that the defendant has violated the law.

II.E.i Evidence necessary for summary judgment

Because a summary judgment motion argues that the plaintiffs don't have enough evidence to prove their case, evidence is crucial to defeating the motion. By the end of the discovery period, the litigation team has to have evidence to prove every part of the lawsuit, every element of every claim. Depositions, **affidavits** and **declarations** (see 8.5), as well as information discovered from other parties, can be submitted as evidence.

It is absolutely critical that, by the end of the discovery phase, all potential witness testimony has been documented through depositions, affidavits, or declarations. If witnesses are hard to contact, declarations should be taken at the earliest possible moment, even if lawyers are not available to help prepare them.

Suppose that a witness is prepared to testify that she witnessed a soldier taking orders from a corporate official. Without a declaration or deposition in which the witness states this information, the judge cannot consider it in deciding the summary judgment motion. Thus, any evidence that is necessary to the case must be documented by the end of the discovery period, when a summary judgment motion will probably be made.

II.F Trial

The pre-trial motions and discovery can literally take years, and all of it is in preparation for the most important part of litigation: the trial. Plaintiffs have a right to a jury trial, and in most cases, the plaintiffs will exercise that right by demanding a jury trial in the complaint. Even if the plaintiffs do not want a jury trial, the defendants may demand one as well. Only if all parties agree will the case be tried by a judge. Juries may vary in size from six to twelve members.

Even if the trial is decided by a jury, the judge will still make many decisions during the trial, including whether different pieces of evidence may be admitted and presented to the jury. The judge will also approve the instructions given to the jury, which are read to the jury at the conclusion of the trial, before the jury begins its deliberations.

II.F.i Evidence necessary for trial

Trial consists largely of presenting evidence to the judge or jury. Any evidence not presented at trial cannot be considered. Also, as noted above, evidence that was not disclosed during the discovery period usually also cannot be presented or considered at trial.

The types of evidence that may be introduced at trial are more limited than at previous stages. Physical evidence and documents may be introduced as exhibits, but declarations and affidavits generally cannot be admitted. Instead, statements from witnesses must be in the form of testimony, either from depositions or live at trial. For this reason, if there are witnesses who may not be able to make it to trial for any reason, it is very important that their depositions be taken beforehand.

After the trial, evidence can generally never be introduced again. It is therefore absolutely necessary that any and all evidence necessary for the case is developed by the time of trial.

II.F.ii Burden of proof

In any trial, the plaintiff has the **burden of proof**. This means that it is the plaintiff's responsibility to introduce enough evidence to prove the case. For transnational lawsuits—as well as most other types—the plaintiffs must prove the facts by a **preponderance of the evidence**. This means that the plaintiffs must show that their version of the facts is more likely than not. For example, in a simple case where the only evidence is the plaintiff's testimony that the defendant hit her, and the defendant's testimony denying this, the plaintiff should win if the judge or jury finds her slightly more believable than the defendant. This is a much lower standard than the "beyond a reasonable doubt" standard used in criminal prosecutions.

II.F.iii Judgment

At the end of the trial, the judge or jury will issue a **judgment**, which decides whether the defendants are liable for any of the plaintiffs' claims, and assign damages. The first part of the judgment is the **verdict**, which decides any disputed factual issues. The verdict may be a **general verdict**, deciding whether the defendant has committed the tort, or the court may require **special verdicts**, which are specific factual questions for the jury to answer. For example, in a torture case, the judge might read the definition of torture to the jury and simply ask whether the defendant committed torture; alternatively, the judge might ask the jury a series of questions: did the defendant subject the plaintiff to severe mental or physical pain? was this pain intentionally inflicted? was the purpose of inflicting this pain to punish, intimate, coerce, or obtain a confession from the plaintiff? Based on the answers to these questions, the judge would decide whether the defendant had committed torture. Unless the parties agree otherwise, every verdict issued by a jury must be unanimous.

Judgments typically also include an assignment of a remedy, including monetary **damages**. In some complex cases a separate, mini-trial is necessary to determine how much the damages should be. As noted previously, damages will almost always include **compensatory damages**, which are designed to compensate the plaintiffs for the harm caused to them by the defendants, and may also include **punitive damages**, designed to punish the defendants for their unlawful conduct. Punitive damages may also be assigned in order to cover attorneys' fees.

The remedy may also include an **injunction**, which is a court order that requires the defendant to do something or prohibits the defendant from doing something. For example, in a case involving harm from water pollution, a court might order the defendant to stop polluting the water, and to clean up the pollution that it has caused.

II.G Appeal and remand

Almost any legal issue in a case can usually be appealed. Thus, if a case is dismissed, if the court grants summary judgment, if one or more claims are dismissed, if one or more plaintiffs or defendants are dismissed, if the court rules that pieces of evidence are inadmissible at trial—any of these decisions can be appealed to a higher court. In the federal system, there is a right to an appeal to the Court of Appeals from any District Court.

Findings of fact, however, are almost never successfully appealed. Factual issues are typically decided by a jury. Therefore, if the jury finds that the defendant did in fact torture the plaintiff, that cannot be successfully challenged on appeal unless there was virtually no evidence to support the jury's finding. The defendant could, however, challenge whether that torture was really a violation of international law.

In some cases, both the plaintiffs and defendants will appeal different issues. For example, suppose a plaintiff sues a defendant for torture and arbitrary detention, and the court dismisses the arbitrary detention claim, finding that the ATCA does not allow arbitrary detention claims. The court does not, however, dismiss the torture claim. The plaintiff then wins at trial on the torture claim, and collects a judgment. The plaintiff might appeal the dismissal of the arbitrary detention claim, while the defendant appeals the failure to dismiss the torture claim. The appeals court could affirm or reverse either decision.

If an appeals court reverses a decision and requires further action in the case, it will **remand** the case to the trial court. This means that the case goes back to the trial court for further proceedings. For example, if summary judgment is granted in a case, but that decision is reversed on appeal, the case might be remanded for a trial.

In a complex case, the appeals might take several years or more, as one issue is appealed, the case is remanded, and then a different issue is appealed again. It is entirely possible for a case to be dismissed after a motion to dismiss is granted, appealed, and remanded; be dismissed again after a motion for summary judgment, again be appealed by the plaintiffs, and then remanded again; go to trial before a jury, be won by the plaintiffs, then be appealed by the defendants, then remanded for a new trial; then go to trial yet again, and appealed again by whoever loses the trial. The case is finished only when one of three things happens: 1) the plaintiffs win at trial, and the defendants do not appeal or the appellate courts reject their appeals; 2) the defendants succeed in dismissing the case or win at trial, and the plaintiffs do not appeal or the appellate courts reject their appeals; or 3) the parties settle the case, as discussed below.

II.H Settlement

At any point in this process, the parties can agree on a **settlement**. Essentially, a settlement is any agreement between the parties that ends the lawsuit. Typically, settlements involve a payment of money to the plaintiffs, and no admission of wrongdoing from the defendant. Cases can be settled as soon as the complaint is filed, at any point before trial, during the trial, or even after the judgment, to prevent the necessity and cost of appeals. If a defendant offers to settle a case, the lawyers are obligated to ask their clients—the plaintiffs—whether they want to accept the proposed settlement. Many plaintiffs, however, may want to see the defendants admit their wrongdoing—perhaps even more than they want compensation—and defendants almost never do this. Settlements, therefore, may be rejected by some plaintiffs.

Transnational tort cases against individual defendants generally have not been settled, probably because few of the defendants can be forced to pay a judgment anyway. Several important cases against corporations, however, including the Unocal cases and the Holocaust cases, have settled; corporations are more likely to settle in order to avoid a potentially enormous damage award.

There are many reasons for plaintiffs and defendants to settle. Defendants might think that they will lose a trial, or that the costs of defending the case are too expensive, or that they are facing too much bad publicity over the case. Plaintiffs may see the payment of money as a just result that will deter a corporation from contributing to abuses in the future, they may be able to gain some results through a settlement that they could not gain through litigation (such as an agreement to change the defendant's practices, or compensation for additional victims who are not part of the case), and they may be able to get their compensation more quickly than by waiting through years of litigation and appeals.

Appendix III
Major Transnational Cases

The cases briefly summarized below include landmark and precedent-setting lawsuits on human rights, environmental, and labor rights issues. Most of the cases are international law cases under the Alien Tort Claims Act (ATCA), and most are also human rights cases. This is not a comprehensive list of all such cases. The information is current as of October 2006.

III.A Cases that have concluded

Sosa v. Alvarez-Machain

(542 U.S. 692) (filed in 1993, dismissed by the Supreme Court in 2004)

Case Summary

This case was filed under international law (ATCA) in federal court in California. The plaintiff, a Mexican doctor, was abducted by a Mexican bounty hunter working with U.S. government agents and delivered to authorities in the United States, who wanted him for criminal charges. He was later cleared of the charges, and sued the bounty hunter as well as the U.S. agents.

Outcome and Significance

This was **the first transnational human rights case to reach the Supreme Court**. The Supreme Court ruled that **human rights cases could be brought under the ATCA**, and that violations of modern international law, such as torture and genocide, could be challenged in lawsuits in U.S. courts. Nonetheless, the Supreme Court dismissed the case, because it decided that the particular abuse alleged here—brief arbitrary detention—was not a well-established violation of customary international law.

Filártiga

(*Filártiga v. Peña-Irala*, 630 F.2d 876, 577 F.Supp. 860) (filed in 1979, won in 1984)

Case Summary

This case was filed under international law (ATCA) in federal court in New York. The plaintiffs, two Paraguayan citizens, sued a Paraguayan police official who had tortured and killed a relative of theirs in Paraguay. Personal jurisdiction over the defendant was based on service of process while the defendant was in New York.

Outcome and Significance

This was **the first transnational human rights case** successfully brought under international law in U.S. courts, and the precedent on which all other ATCA human rights cases are based. It was also **the first to recognize torture** under the ATCA. After an initial dismissal, the courts allowed the lawsuit, and the plaintiffs won an award of $10,375,000 after an uncontested trial.

Forti v. Suarez-Mason

(672 F. Supp. 1531, 694 F. Supp. 707) (filed in 1987, won in 1990)

Case Summary

This case was filed under international law (ATCA) in federal court in California. The plaintiffs, who were both Argentinean citizens, had been detained by military authorities in Argentina; one was held handcuffed and blindfolded, without food, for a week, and then continued to be held without charge for four years. One plaintiff's mother disappeared, and the other's brother was tortured to death. They sued an Argentine general, who had authority over the soldiers who committed the abuses, for torture, arbitrary detention, disappearance, and cruel, inhuman or degrading treatment; personal jurisdiction was based on service of process while the defendant was in California.

Outcome and Significance

This was the **first case to recognize disappearance** under the ATCA, but it did not allow the cruel, inhuman or degrading treatment claims. The plaintiffs won an award of $8 million after an uncontested trial.

Paul v. Avril

(812 F. Supp. 207, 901 F. Supp. 330) (filed in 1991, won in 1994)

Case Summary

This case was filed under international law (ATCA) in federal court in Florida. The plaintiffs, Haitian citizens, were subjected to a range of abuses by soldiers and authorities of the military government of Haiti, from beatings to starvation; they sued for torture, arbitrary detention, and cruel, inhuman or degrading treatment. They sued the former president of the military government of Haiti, and the court found that he had no immunity as a head of state because the current Haitian government had waived his immunity. Personal jurisdiction was based on service of process while the defendant was in Florida.

Outcome and Significance

This was **the first case to recognize cruel, inhuman, and degrading treatment** under the ATCA. The six plaintiffs won an award of $41,000,000 after an uncontested trial.

The Karadzic cases

(*Doe v. Karadzic, Kadic v. Karadzic*, 866 F. Supp. 734, 70 F.3d 232) (filed in 1994, won in 2000)

Case Summary

These cases were filed under nternational law (ATCA, Torture Victim Protection Act) in federal court in New York. The plaintiffs, who were Bosnian Croats and Muslims, suffered abuses by Bosnian Serb soldiers due to their ethnicity and religion, including killings, torture, rape, forced impregnation, and detention. They sued Radovan Karadzic, the leader of the Bosnian Serb army, for genocide, war crimes, and torture. Personal jurisdiction was based on service of process while the defendant was in New York.

Outcome and Significance

After the case was initially dismissed, the appeals court found that Karadzic could be held liable for human rights abuses even though he was not a state actor of any recognized state. The court found that **state action was not necessary for war crimes, genocide, or crimes against humanity**, and furthermore found that **Karadzic was acting as a state actor because he acted in partnership with the government of Yugoslavia**, and because the self-proclaimed Bosnian Serb Republic was effectively the government in parts of Bosnia. In *Kadic*, the 11 plaintiffs won an award of $745 million after an uncontested trial; in *Doe*, the 23 plaintiffs won an award of $4.5 billion after an uncontested trial.

Beanal v. Freeport-McMoRan, Inc.

(969 F. Supp. 362, 197 F.3d 161) (filed in 1996; dismissed in 1999)

Case Summary

This case was filed under International law (ATCA and Torture Victim Protection Act) in federal court in Louisiana. The plaintiff, an Indonesian citizen, claimed abuses from security forces for a mining operation in Indonesia, as well as severe environmental damage from the operation of the mine. He sued Freeport-McMoRan, a U.S. mining company, for violations of international environmental law, summary execution, disappearance, arbitrary detention, torture, and cultural genocide for destroying his tribe.

Outcome and Significance

The case was dismissed, primarily due to procedural problems with the plaintiff's complaint. The appeals court also **rejected claims for environmental pollution and cultural genocide**, finding that they were not clear violations of international law.

The Unocal cases

(*Doe v. Unocal Corp., National Coalition Government of the Union of Burma v. Unocal, Inc.*, 2003 WL 359787, 2002 WL 31063976, 963 F. Supp. 880, 176 F.R.D. 329, 27 F. Supp.2d 1174) (filed in 1996, settled in 2005)

Case Summary

These cases were filed under international law (ATCA and Torture Victim Protection Act) in federal court in California, and domestic law in state court in California. The plaintiffs, all Burmese citizens, suffered death, abuse, rape, forced relocation, and forced labor at the hands of military units providing security to a pipeline project in Burma. They sued Unocal, a U.S. oil company, for crimes against humanity, torture, forced labor (as a form of slavery), and arbitrary detention. They also made domestic law claims of wrongful death, false imprisonment, assault, and negligence. The plaintiffs also sued the French corporation

Total and the Burmese state oil company MOGE; Total was dismissed as a defendant due to lack of personal jurisdiction, and MOGE was dismissed as a defendant due to sovereign immunity. The cases were settled in 2005.

Outcome and Significance

This was **the first case to recognize forced labor** as a violation of international law, and resulted in a **landmark settlement** in which the victims were compensated by Unocal. It was also one of the first cases to be brought against a corporation.

The Chentex case

(*Manzanarez-Tercero v. C&Y Sportswear, Inc.*) (filed in 2000, withdrawn and settled in 2001)

Case Summary

This case was filed under international law (ATCA) in federal court in California. Several workers at a Nicaraguan garment factory owned by Chentex, S.A., were fired, assaulted, and detained in retaliation for their attempts to organize a union. The plaintiffs, all Nicaraguan citizens, claimed violations of international labor rights, cruel, inhuman and degrading treatment, and other human rights. The defendants were Chentex, S.A., a Nicaraguan corporation; Nien Hsing Textile Co., the Taiwanese parent company of Chentex; and C&Y Sportswear, Inc., an American subsidiary of Nien Hsing. Personal jurisdiction was based on their contacts with the U.S.

Outcome and Significance

The case was withdrawn after the workers won their case in the Nicaraguan courts and came to an agreement with Chentex; the U.S. case was considered a factor in putting pressure on Chentex to settle.

Flores v. Southern Peru Copper Corp.

(203 F.R.D. 92, 253 F. Supp. 2d 510, 343 F.3d 140, 414 F.3d 233) (filed in 2000, dismissed in 2002)

Case Summary

This case was filed under international law (ATCA) in federal court in New York. The plaintiffs, all Peruvian citizens, sued an American mining company operating in Peru for emitting sulfur dioxide and heavy metals, causing serious and life-threatening health problems. They claimed violations of the right to life, health, and sustainable development.

Outcome and Significance

In determining whether this case could be brought under ATCA, the courts ruled that the **right to life and the right to health were insufficiently definite** to constitute actionable rules of customary international law. The court also found that there was **no international law norm against toxic pollution within a country** (as opposed to pollution across international borders).

Romagoza v. Garcia

(434 F.3d 1254) (filed in 1999, victory upheld in 2005)

Case Summary

This case was filed under international law (ATCA and TVPA) in federal court in Florida. Three victims of torture in El Salvador sued two military officials responsible for the torture.

Outcome and Significance

After a jury verdict in favor of the plaintiffs, the Court of Appeals initially overturned the verdict but then reinstated it and upheld the judgment against the defendants. Because the defendants live in the United States and have assets, this is one of the only cases in which the plaintiffs will actually recover money.

Mehinovic v. Vuckovic

(198 F..Supp.2d 1322) (filed in 1998, won in 2002)

Case Summary

This case was filed under international law (ATCA and TVPA) in federal court in Georgia. Four Bosnians who had suffered abuses during the Bosnia war sued a Bosnian Serb guard who was responsible for torture, cruel treatment, sexual assault, and crimes against humanity. The defendant, Vuckovic, resides in the United States.

Outcome and Significance

The court issued judgment against Vuckovic in the **first published case finding a defendant liable for crimes against humanity**. Althought thecourt ordered damages of $140 million, they probably will not be paid.

Cabello v. Fernandez Larios

(402 F.3d 1148, 291 F.Supp.2d 1360, 205 F.Supp.2d 1325, 157 F.Supp.2d 1345) (filed in 1999, victory upheldin 2005)

Case Summary

This case was filed under international law (ATCA and TVPA) in federal court in Florida. The family of a Chilean murdered by the Pinochet regime filed suit against Fernandez Larios, who had been an operative of the regime who participated in the murder. Fernandez Larios was residing in Florida.

Outcome and Significance

A jury found Fernandez Larios liable for human rights abuses, ordering him to pay $4 million. The Court of Appeals subsequently upheld this verdict, finding that the defendant could be held liable for aiding and abetting human rights abuses or conspiring to commit human rights abuses.

III.B Cases that are still ongoing

The DBCP cases

(*Castro Alfaro v. Dow Chemical Co.*, *Delgado v. Shell Oil Co.*, *Jorge Cacamo v. Shell Oil Co.*, *Rodriguez v. Shell Oil Co.*, *Erazo v. Shell Oil Co.*, *Isae Carcamo v. Shell Oil Co.*, *Valdez v. Shell Oil Co.*, 786 S.W.2d. 674, 818 F. Supp. 1013, 890 F. Supp. 1315, 890 F. Supp. 1324, 932 F. Supp. 177, 950 F. Supp. 187, 231 F.3d 165) (first cases filed in 1984 and settled in 1992; later cases settled 1998; other cases still ongoing)

Case Summary

These cases were brought under domestic law in state court and in federal court in Texas and in other

states. Thousands of agricultural workers from several countries who suffered health problems, including sterility, from exposure to the toxic pesticide DBCP, sued the corporations that used, marketed, and manufactured DBCP, including Shell Oil, Dow Chemical, Occidental Chemical, Standard Fruit, Chiquita, Dole, and Del Monte.

Status and Significance

The different cases have had different histories. The first case was dismissed due to *forum non conveniens*, then later reinstated by the Texas Supreme Court, and then settled. In the next round of cases, the defendants managed to move the cases to federal court, where they were dismissed due to *forum non conveniens*. These cases then settled. The latest round of cases is currently being litigated.

The Bhopal cases

(*In re Union Carbide Corp Gas Plant Disaster, Bi v. Union Carbide Chems. & Plastics Co., Bano v. Union Carbide Corp., Sahu v. Union Carbide Corp.*, 418 F.Supp.2d 407, 2003 WL 1344884, 273 F.3d 120, 601 F. Supp. 1035, 634 F. Supp. 842, 809 F.2d 195, 984 F.2d 582) (first cases filed in 1984, dismissed in 1987; *Bano* filed in 1999m, dismissed in 2006; *Sahu* filed in 2004 and still being litigated)

Case Summary

These cases were brought under domestic law and international law (ATCA) in federal court in New York. Thousands of people were killed, and hundreds of thousands were injured, due to a leak of a deadly gas from a chemical plant in Bhopal, India. The plaintiffs sued for various domestic law claims, including negligence, and recently sued for international law claims of racial discrimination, cruel, inhuman and degrading treatment, violations of the rights to life and health, and violations of international environmental law. The defendants include Union Carbide Corp., the United States corporation that operated the chemical plant, and Warren Anderson, Union Carbide's former CEO.

Status and Significance

The first round of cases against Union Carbide were all dismissed due to *forum non conveniens*; the courts found that they should be litigated in India. The Indian government then settled the case. In the more recent cases, claims of violations of international law in the gas plant disaster were dismissed again, primarily due to the Indian settlement. The domestic law claims have also mostly been dismissed at this point as well, although some pieces of the litigation remain ongoing.

The Marcos cases

(*Trajano v. Marcos*, 978 F.2d 493, *Hilao v. Marcos*, 25 F.3d 1467, 103 F.3d 767, 103 F.3d 789) (filed in 1986)

Case Summary

These cases were filed under international law (ATCA) in federal court in Hawaii. The plaintiffs, who included a class of Filipino citizens abused by the Marcos regime, were subjected to a range of abuses by soldiers and authorities of the government of the Philippines in the 1970s and 1980s, and in several different cases they sued for torture, extrajudicial killing, and arbitrary detention. The defendants were Ferdinand Marcos, the former dictator of the Philippines, who died after the case was filed (the case proceeded against his estate), and Imee Marcos Manotoc, his daughter. Personal jurisdiction was based on service of process on the defendants after they had fled to Hawaii.

Status and Significance

This was the **first human rights class action case**. After many years of litigation, the plaintiffs have won nearly $1.2 billion against Marcos's estate, but parts of the case are still pending. Because Marcos had a large fortune, this is one of the few cases where the plaintiffs may actually recover money. But the Philippine government is also seeking to recover Marcos's money, and legal battles over the money have been ongoing for years.

The Texaco case

(*Aguinda v. Texaco, Inc., Jota v. Texaco, Inc.*, 303 F.3d 470, 850 F. Supp. 282, 945 F. Supp. 625, 175 F.R.D. 50, 157 F.3d 153, 139 F. Supp. 2d 438, 241 F.3d 194, 142 F. Supp. 2d 534) (filed 1993, dismissed in 2002, still being litigated in Ecuador)

Case Summary

These cases were brought under international law (ATCA) and domestic law in federal court in New York. The plaintiffs suffered various harms to their health and environment due to the dumping of toxic chemicals in Ecuador by the U.S. oil company Texaco; they sued Texaco for violations of international environmental law as well as domestic law claims including negligence.

Status and Significance

This case was **dismissed due to *forum non conveniens***, but only after the courts decided that there were no actionable international law claims. The case was then re-filed against Texaco (now Chevron) in Ecuadorian courts, and is still being litigated in Ecuador.

The Holocaust cases

(numerous cases; German claims settled in 1999; Swiss banks claims settled in 2000; French banks claims settled in 2001; Austrian industry claims settled in 2001; some cases still ongoing)

Case Summary

These cases, mostly class actions, were filed under international law (ATCA) and domestic law in numerous courts. Holocaust survivors and their families sued various banks, insurance companies, and industrial corporations for profiting from confiscated property, forced labor, and other abuses by the Nazi regime.

Status and Significance

Nearly all of these cases have now been concluded with historic settlements, including the creation of a $4.5 billion reparations fund in Germany. Most of the settlements were concluded through multinational agreements in which all of the claims against industry in a particular country were resolved through the creation of a national claims process. These are the **largest settlements ever paid in transnational litigation**. Some of the cases, especially against American entities, continue to be litigated.

The Shell cases

(*Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 2002 U.S. Dist. LEXIS 3293; *Kiobel v. Royal Dutch Petroleum Co.*, 2004 U.S. Dist. LEXIS 28813) (*Wiwa* filed in 1996, *Kiobel* filed in 2002)

Case Summary

These cases were brought under international law (ATCA) in federal court in New York. The plaintiffs, all

Nigerians, were arbitrarily detained, shot, beaten, and their relatives were tortured and hanged, by the Nigerian military government. The defendants are Royal Dutch Petroleum and Shell Transport and Trading, which form the Royal Dutch/Shell Group; personal jurisdiction is based on Shell's business contacts in the United States, including an investor relations office. Shell is alleged to have assisted and instigated the abuses against the plaintiffs.

Status and Significance

The case was initially dismissed due to *forum non conveniens*, but the appeals court reinstated the case, articulating a strong **policy of hearing human rights cases in the United States**. Although the district court initially recognized claims under the **rights to liberty and security of person**, the court later reversed this ruling, allowing plaintiffs to proceed only on claims of torture, crimes against humanity, and prolonged arbitrary detention. The case is now pending, and the court's latest ruling is being appealed by both sides.

Jama v. United States Immigration and Naturalization Service

(22 F. Supp. 2d 353) (filed in 1997)

Case Summary

This case was filed under international law (ATCA) in federal court in New Jersey. The plaintiffs were immigrants seeking asylum in the U.S., detained in an Immigration and Naturalization Service (INS) facility, where they suffered physical and mental abuse from the guards. They sued for cruel, inhuman, and degrading treatment. The defendants were the INS, several INS officials who were alleged to be responsible, Esmor, the private corporation that ran the facility, and several Esmor employees. All the defendants were U.S. citizens, corporations, or government agencies.

Status and Significance

This was **one of the first international law cases against U.S. government officials**. The court found that the INS, as a U.S. government agency, could not be sued, but that its officials could be sued; furthermore, Esmor and its employees could be sued as state actors. The case is pending.

Bowoto v. Chevron Corp.

(2006 WL 2455752, 312 F.Supp.2d 1229) (filed in 1999)

Case Summary

This case was brought under international law (ATCA and TVPA) and domestic law in federal court in California. The plaintiffs are Nigerians who suffered torture, beatings, and shootings, or whose family members were killed, by the Nigerian military operating on behalf of Chevron. The plaintiffs allege that Chevron used the Nigerian military to suppress protests against Chevron and punish opposition to its activities.

Status and Significance

The district court in this case initially issued a ruling finding that Chevron **could be held liable for the actions of its subsidiaries** in Nigeria. The court also recently ruled that corporations can be held liable for human rights abuses. The case continues to be litigated.

Sarei v. Rio Tinto PLC

(456 F.3d 1069, 221 F.Supp.2d 1116) (filed in 2000)

Case Summary

This case was brought under international law (ATCA) in federal court in Washington state. The plaintiffs, from Papua New Guinea, sued the U.S. mining company Rio Tinto for international law violations including war crimes, crimes against humanity, racial discrimination, and pollution of the sea.

Status and Significance

After initially being dismissed by the district court under the political question doctrine, the case was reinstated by the federal Court of Appeals in August 2006. Significantly, the Court of Appeals decided that Rio Tinto, a private corporation, could be held liable for abuses committed on its behalf by the Papua New Guinea military, and could also be held liable for racial discrimination in which the government participated.

The Presbyterian Church of Sudan v. Talisman Energy, Inc.

(2006 WL 2602145, 374 F. Supp. 2d 331, 226 F.R.D. 456, 244 F. Supp. 2d 289) (filed in 2001)

Case Summary

This case was brought under international law (ATCA) in federal court in New York. The Sudanese plaintiffs alleged that Talisman Energy aided and abetted or, in the alternative, facilitated and conspired in ethnic cleansing by Islamic Sudanese forces. The specific claims include genocide, war crimes, torture, enslavement, rape, kidnapping, forcible displacement, and extrajudicial killing in violation of international law.

Status and Significance

Although several cases against corporations have proceeded, this was the first case to specifically decide that **corporations can be sued under international law**, and one of the first cases to decide that corporations can be held liable for **aiding and abetting human rights abuses**. In September 2006, however, the district court dismissed the case, finding that the plaintiffs did not show that the parent corporation was responsible for the acts that occurred in Sudan and that, in order to be liable for aiding and abetting abuses, the corporation needed to intend that the abuses occur. The plaintiffs are currently appealing this ruling.

The South Africa cases

(multiple cases consolidated as *In re South African Apartheid Litigation*, 346 F.Supp.2d 538) (filed in 2002 and 2003)

Case Summary

These cases were brought under international law (ATCA) in multiple federal courts, and consolidated in federal court in New York. The South African plaintiffs sued numerous businesses involved with the apartheid regime in South Africa for assisting the government in committing human rights abuses, including torture, extrajudicial execution, and crimes against humanity. Some of the cases were brought as class actions on behalf of all victims of apartheid.

Status and Significance

The district court dismissed these cases in 2004, **rejecting the concept of aiding and abetting liability** and finding that doing business in South Africa was not a violation of international law. The plaintiffs are currently appealing this ruling to the Court of Appeals.

Arias v. DynCorp

(No. 01-CV-1908) (filed in 2001)

Case Summary

This case was brought under international law (ATCA) and domestic law in federal court in Washington, DC. The plaintiffs are Ecuadorian citizens who were harmed by herbicide spraying across the Colombia-Ecuador border as part of the anti-drug efforts of Plan Colombia. They have sued DynCorp, a U.S. corporation that carried out the spraying, for cross-border pollution and various domestic law claims.

Status and Significance

This is the **first case to be brought alleging cross-border pollution**, one of the environmental claims that is firmly established as a violation of international law. A motion to dismiss has been pending before the district court for several years.

Sinaltrainal v. The Coca-Cola Co.

(256 F.Supp.2d 1345) (filed in 2001)

Case Summary

This case was brought under international law (ATCA and TVPA) and domestic law in federal court in Florida. The plaintiffs are a Colombian trade union and the family a union leader who was murdered by paramilitary units on the floor of a Coca-Cola bottling plant in Colombia; they have sued Coca-Cola and several related bottling companies for extrajudicial killing.

Status and Significance

Although several courts have concluded that corporations are not covered by the TVPA, this is the **first case to decide that corporations can be sued under the Torture Victim Protection Act.** The case continues to be litigated.

Castillo v. Newmont Mining Corp.

(No. CV-4453) (filed in 2001)

Case Summary

This case was brought under domestic law in state court in Colorado. The plaintiffs are a class of Peruvians harmed by a chemical spill from the Yanacocha gold mine in Peru, who have sued the mine's operator, the U.S. corporation Newmont Mining.

Status and Significance

Although Newmont argued that this case should be heard in Peru, this case is one of the **first environmental cases under domestic law to defeat a *forum non conveniens* challenge**. The key to keeping the case in the United States was evidence that Newmont had been involved in bribing Peruvian officials.

The Agent Orange case

(*In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7) (filed in 2004)

Case Summary

This case was brought under international law (ATCA) and domestic law in federal court in New York. The plaintiffs are Vietnamese citizens who were harmed by the Agent Orange herbicide during the Vietnam War, and have sued the manufacturers of Agent Orange, including the U.S. corporations Dow Chemical and Monsanto.

Status and Significance

The district court dismissed this case, but made several important rulings. The court found that the manufacturers could not rely on a defense that they were government contractors if their actions violated international law, and that they could be liable for aiding and abetting violations of international law. Nonetheless, the court found that providing Agent Orange to the U.S. government was not a violation of international law. The plaintiffs are appealing to the Court of Appeals.

The Abu Ghraib cases

(*Ibrahim v. Titan Corp.*, *Saleh v. Titan Corp.*, 391 F.Supp.2d 10, 436 F.Supp.2d 55) (filed in 2004)

Case Summary

These cases were brought under international law (ATCA) and domestic law in federal court in Washington, DC. The plaintiffs are Iraqis who were victims of abuses at the American military prison at Abu Ghraib in Iraq, and have sued Titan and CACI, two corporations who contracted with the U.S. government to provide interpreters and other services to the prison.

Status and Significance

This is one of the first cases against a private contractor working for the United States military. The court found that a private contractor is not a state actor for purposes of the ATCA, and therefore cannot be sued for torture. But the court allowed the lawsuits to proceed on the domestic law claims, and they are currently in litigation.

Doe v. Wal-Mart Stores, Inc.

(No. CV 05-7307) (filed in 2005)

Case Summary

This case was brought under domestic law in state court in California. The plaintiffs, from Bangladesh, Indonesia, China, Swaziland, and California, allege that Wal-Mart, a U.S. corporation, contributed to labor rights violations against workers in factories that make products for Wal-Mart stores.

Status and Significance

This is one of the first transnational labor rights cases to be brought under domestic law. A motion to dismiss is currently pending before the court.

IV Appendix

Glossary of Terms

Act of state doctrine: a principle that restricts the ability of U.S. courts to decide the legality of a public, official act of a recognized foreign government committed within its territory

Actionable: referring to claims that are legally recognized

Admissible: describing evidence that may be used to prove a case at trial

Affidavit: a signed, sworn statement of facts personally known to the person signing it, which the person signs in the presence of a notary public

Agency: a relationship in which one person or entity (the agent) acts on behalf of another (the principal)

Agent: a person or entity, such as an employee, independent contractor, or joint venturer, who acts on behalf of another

Aiding and abetting: a form of liability for international law violations which applies to someone who provides substantial assistance or encouragement to another, knowing that these acts would contribute to the commission of an international law violation

Alien: anyone who is not a citizen of the United States

Answer: the document filed by the defendant in response to the complaint

Appellate court: see *Court, appellate*

Attorney-client privilege: see *Privilege, attorney-client*

Authentication: the process by which documents or physical evidence are proven to be genuine, often through witness testimony

Authority, scope of: the legitimate decision-making powers of a government official, but not including illegal acts that are clearly outside such powers

Cause of action: a lawsuit, or an individual claim in a lawsuit

Certification: the process by which a class action is allowed to proceed, in which several requirements must be met

Circuit: the geographical jurisdiction of a federal court of appeals, covering several federal district courts

Circuit court: see *Court of appeals*

Claim: in a lawsuit, a statement of a violation for which a remedy can be granted; **failure to state a claim** is grounds for dismissal of a lawsuit

Class action: a lawsuit in which a few plaintiffs proceed as the representatives of a large class of plaintiffs with similar claims

Color of law: see *State action*

Command responsibility: the liability of a military commander for abuses committed by subordinates, which commanders have the duty to prevent

Compensatory damages: see *Damages, compensatory*

Complaint: the initial document in a lawsuit, identifying the plaintiff and defendant, stating each claim, and asking for a remedy

Contingency fee: a fee charged by a lawyer that is a percentage of the plaintiff's damages recovered, and which is only paid if the plaintiff recovers some money

Continuing violation: a violation, such as disappearance, that continues over a period of time, such that the statute of limitations does not begin to run until the violation ends

Counterclaims: claims made by the defendant against the plaintiff

Court of appeals: a federal appellate court to which any decision of a federal district court can be appealed, and from which appeals may be made to the Supreme Court; also called *circuit courts*

Court, appellate: a court that reviews the decisions of a trial court to correct any mistakes

Court, federal district: a federal trial court in a geographical district

Court, trial: the court at which evidence and legal issues are first presented

Damages: money awarded by the court to the plaintiff to redress an injury, paid by the defendant

Damages, compensatory: damages awarded based on the amount of the injury to the plaintiff

Damages, punitive: damages awarded in addition to compensatory damages in order to punish the defendant for wrongful conduct

Declarant: a person that signs a declaration

Declaration: a signed statement of facts personally known to the declarant; similar to an affidavit except that it is not sworn before a notary public

Default: the failure of the defendant to contest the lawsuit for a specified period of time

Default judgment: see *Judgment, default*

Defendant: the person, organization or corporation that is sued by the plaintiff in a lawsuit

Demonstrative evidence: see *Evidence, physical*

Deposition: a procedure, typically during discovery, in which lawyers for all parties may question witnesses who must answer under oath

Diplomatic immunity: see *Immunity, diplomatic*

Discover: to gain evidence using discovery procedures, such as depositions or interrogatories

Discovery: the period in the lawsuit in which the plaintiffs and defendants gather evidence from each other and from third-party witnesses

Dismiss, motion to: a motion, typically made by a defendant, to dismiss a case or one or more claims, based on several possible grounds

District court: see *Court, federal district*

District: the geographical jurisdiction of a federal district court

Elements: the individual parts of a claim that the plaintiff must prove in order to win

***En banc*:** a meeting of all the judges of an appellate court, typically to rehear a case that had been previously decided by a limited number of judges of that court; the decision of the *en banc* court replaces the previous decision

Evidence, demonstrative: see *Evidence, physical*
Evidence, documentary: any written materials introduced as evidence
Evidence, physical: any tangible evidence, also known as "real evidence" or "demonstrative evidence"
Evidence, real: see *Evidence, physical*
Evidentiary privilege: see *Privilege, evidentiary*
Exhaustion: usually used in reference to exhaustion of domestic remedies, the process of challenging wrongdoing within the country where it occurred before bringing a case in U.S. courts or international triubunals
Exhibit: a piece of evidence, other than testimony, admitted at trial
Expert witness: see *Witness, expert*
Fact, finder of: the judge or jury that determines factual issues
Fact, finding of: a determination by a jury or a judge of whether an event occurred
Federal Reporter: a periodical with the published opinions of the federal courts of appeals, abbreviated **F.**, **F.2d**, or **F.3d**
Federal Supplement: a periodical with the published opinions of the federal district courts, abbreviated **F. Supp.** or **F. Supp.2d**
Finder of fact: see *Fact, finder of*
Finding of fact: see *Fact, finding of*
Foreign Sovereign Immunities Act: a federal law that grants immunity from lawsuits to foreign governments, with a few limited exceptions
***Forum non conveniens*:** a doctrine under which a lawsuit may be dismissed if the court determines that it would be more appropriate or convenient for the lawsuit to be heard in a different court
Grave breaches: major violations of the laws of war, including torture and attacks on civilians, that have traditionally constituted war crimes
Hearsay: testimony given by witnesses of what other people have told them; generally not admissible
Immunity: absolute protection from a lawsuit, such that any suits brought against a defendant who has immunity can be dismissed; immunity can be waived
Immunity, diplomatic: immunity from lawsuits of accredited foreign diplomats
Immunity, sovereign: the immunity from lawsuits of the U.S. government and its agencies; also granted to foreign governments and heads of state by the Foreign Sovereign Immunities Act
Injunction: an order by a court to prevent an action, or to require an action
Intent: in the context of tort law, a person has intent to cause a result if he or she deliberately commits an act knowing that the result will happen
Interrogatory: during discovery, a question sent to a party by another party, which the receiving party must answer
Journalist's privilege: see *Privilege, journalist's*
Judgment: the final determination of the plaintiffs' claims and any counterclaims, including damages
Judgment, default: a judgment entered in favor of the plaintiff after the defendant fails to contest a lawsuit within the required time period
Jurisdiction: generally, the power of a court over a type of case, person, geographic area, or property
Jurisdiction, personal: the power of a court over a particular defendant, based on some connection with the defendant; **lack of personal jurisdiction** is grounds for dismissal of a lawsuit
Jurisdiction, subject matter: the power of a court over the type of claims in the lawsuit and the type of remedy sought; **lack of subject matter jurisdiction** is grounds for dismissal of a lawsuit
Law, ruling of: an interpretation of a legal issue made by a judge

Lay witness: see *Witness, lay*
Litigation: the court proceedings involved in a lawsuit
Motion to dismiss: see *Dismiss, motion to*
Motion for summary judgment: see *Summary judgment, motion for*
Negligence: in the context of tort law, a person is negligent if he or she fails to act as a reasonable person would under the circumstances, and harms someone
Parties: the plaintiffs and defendants involved in a lawsuit
Plaintiff: the person, organization or corporation that initiates a lawsuit by suing the defendant
Political question doctrine: a principle that restricts the ability of U.S. courts to decide issues that are "political" in nature, such as if the Constitution gives the President or Congress authority over them
Prayer for relief: the part of a complaint that requests a remedy, such as damages
Precedent: a previous ruling of law by a court that may bind the legal interpretations of other courts
Priest-penitent privilege: see *Privilege, priest-penitent*
Prima facie case: allegations, or evidence, sufficient such that if they were true, they would establish each element of the claim
Privilege, attorney-client: an evidentiary privilege that protects any confidential information given by a client to an attorney in the course of legal representation
Privilege, evidentiary: a right to prevent the disclosure or introduction of otherwise admissible evidence, usually based on an important relationship
Privilege, journalist's: a qualified evidentiary privilege that protects a journalist's sources or confidential background material
Privilege, priest-penitent: an evidentiary privilege that protects any confidential information given to a member of the clergy for the purpose of confession
Privilege, psychotherapist-patient: an evidentiary privilege that protects any confidential information given by a patient to a psychotherapist for the purpose of diagnosis or treatment
Privilege, spousal: a limited evidentiary privilege that protects an individual from being compelled to testify against his or her spouse
Pro bono case: a case taken by a lawyer for free
Produce: to give evidence sought through discovery procedures
Protective order: a court order to limit the disclosure of information, in order to protect someone from annoyance, embarrassment, oppression, or undue burden or expense
Psychotherapist-patient privilege: see *Privilege, psychotherapist-patient*
Punitive damages: see *Damages, punitive*
Qualification: at trial, the process by which a witness is determined to be an expert in a particular field
Real evidence: see *Evidence, physical*
Redacted: referring to a document in which confidential information has been removed or obscured
Remand: an action by an appellate court to send a case back to the trial court for further proceedings
Remedy: the redress of an injury, or prevention of further injury, that may be ordered by a court
Reply: the plaintiff's answer to any counterclaims made by the defendant, similar in form to the defendant's answer
Request for admission: during discovery, a set of statements sent by one party to another party, which the receiving party must admit or deny
Ruling of law: see *Law, ruling of*
Sanctions: penalties, most commonly fines, imposed by a judge for violating court rules
Scope of authority: see *Authority, scope of*

Sealed: referring to a document that, by court order, may not be released to the public; also known as *under seal*

Service of process: the formal delivery of legal papers to a defendant that begins a lawsuit

Settlement: an agreement between the parties, typically involving a payment of money to the plaintiffs, that ends a lawsuit

Sovereign immunity: see *Immunity, sovereign*

Spousal privilege: see *Privilege, spousal*

Standing: the right of a plaintiff to sue a defendant, usually because the plaintiff has suffered harm and the defendant was involved in causing the harm

State action: an action by a government, by a government official, by a private citizen acting with a government official, or by a private citizen performing the functions of a government; also known as acting **under color of law**

State sponsors of terrorism: governments designated by the U.S. State Department as supporting terrorist organizations, which can be sued more easily than other governments; as of July 2006, this includes Cuba, Iran, North Korea, Sudan, and Syria

Statute of limitations: a time limit for filing a lawsuit, which may be extended by tolling

Subpoena: a court order to testify or to produce documents or other items

Summary judgment, motion for: a motion arguing that there are no disputed facts that would affect the outcome of the case; typically made by a defendant arguing that even if all of the evidence is viewed in the light most favorable to the plaintiff, the plaintiff cannot prove the case; may also be made by a plaintiff arguing that the defendant has admitted to or conceded the allegations

Summons: a court order at the start of a lawsuit directing the defendant to appear and answer the plaintiff's claims

Sworn: referring to a document that has been signed in the presence of a notary public

Systematic: in the context of crimes against humanity, used to describe an attack that is organized or consists of a pattern of similar crimes

Testimony: statements made by a witness under oath, either at trial, in a deposition, or in an affidavit

Third-party witness: see *Witness, third-party*

Tolling: an extension or suspension of the statute of limitations, often because it was impossible for the plaintiff to sue during the limitations period

Tort: a violation of a legal obligation that has caused injury or harm

Transnational tort litigation: lawsuits that are brought in countries other than where the harms occurred, often involving violations of international law (such as human rights law)

Trial court: see *Court, trial*

Uncontested: referring to a lawsuit which the defendant does not answer or fight

Under seal: see *Sealed*

United States Reporter: a periodical with the published opinions of the U.S. Supreme Court, abbreviated **U.S.**

Venue: the proper court for a particular lawsuit; **improper venue** is grounds for dismissal of a lawsuit or transfer to the proper court

Verdict: a determination, usually by a jury, of the factual issues in a case

Verdict, general: a jury's determination of whether the defendant is liable to the plaintiff for each claim

Verdict, special: a jury's determination of individual elements of the claims, from which the judge decides whether the defendant is liable for each claim

Waiver: abandonment of a legal right, such as the right to object to a particular issue, after which any such issues cannot be appealed

Widespread: used in the context of crimes against humanity, on a large scale, affecting many people

Witness: anyone who testifies in a lawsuit

Witness, expert: a witness who testifies based on his or her specialized knowledge or skill to provide information or opinions that would be beyond the knowledge of an ordinary layperson

Witness, lay: a non-expert witness who testifies based on his or her own first-hand information

Witness, third-party: any witness who is not a plaintiff or defendant

Work product doctrine: a doctrine that provides limited protection to documents and other materials prepared for litigation by attorneys or others

V Appendix

Sample Declaration

[note: this declaration is fictional but is based on events in Sierra Leone in 1999]

Declaration of John Doe

I, John Doe, declare as follows:

1. I am a native of Wellington, Sierra Leone. I am 32 years old. I have personal knowledge of the matters stated herein, unless specifically noted otherwise. If called as a witness, I could and would testify competently thereto.
2. My first language is Krio. I studied English for 16 years in school and at Fourah Bay College, and can read and write English fluently.
3. On the night of January 6, 1999, I was living in Freetown with my wife and three children. Because I heard on the radio that the Revolutionary United Front (RUF) rebels were advancing on Freetown, I took my family in our car and began driving away from the city, trying to escape the rebels.
4. At approximately 7pm, we encountered a roadblock, where we stopped. Many armed men were in the road, making it impossible to pass.
5. I could tell that the armed men were RUF rebels because there was a large group of them, they were heavily armed, and they were not wearing the uniforms of the Sierra Leonean Army or ECOMOG.
6. One of the rebels ordered us to get out of the car. We got out of the car and walked with him a short way up the road.
7. Another rebel, who was carrying an AK-47 assault rifle, came up to the rebel who had ordered us out of the car. He asked him, "Why are you wasting time with these civilians?" He then swung the AK-47 around and started firing at us.

8. I saw my wife and my three children get shot and fall. I was only shot in the hand, but it bled a lot and was resting on my chest, so I pretended to be dead. After a few minutes, I heard the rebels walked away.
9. I then heard my wife, who was still alive, call each child's name to see who was still alive. Only one child, my eldest daughter, answered. The other two were dead.
10. After the rebels had moved away and we felt it was safe to escape, we took my eldest daughter and hid in a nearby church. There, we made crude bandages for our wounds. Because there were still many rebels around, we could not go back for the bodies of our dead children.
11. The following night, we were able to escape Freetown. Only then were we able to get medical treatment for our wounds.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

This declaration was executed in Freetown, Sierra Leone, on September 2, 2001.

[SIGNED]

John Doe

EarthRights International combines the power of law and the power of people in defense of human rights and the environment

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