
Settling a Corporate Accountability Lawsuit Without Sacrificing Human Rights: *Wang Xiaoning v. Yahoo!*

by Theresa Harris*

ON NOVEMBER 13, 2007, CHINESE POLITICAL PRISONERS Shi Tao and Wang Xiaoning withdrew their Alien Tort Statute lawsuit against internet service provider Yahoo! Inc. after reaching a private settlement agreement with the company. Theirs was certainly not the first lawsuit brought against a corporation for complicity in human rights abuses. At least 40 such cases have been filed under the Alien Tort Statute and the Torture Victims Protection Act in U.S. courts. Only a few of these lawsuits, however, ended because the defendant corporation reached an agreement with the plaintiffs to settle the case out of court.

While the terms of the settlement agreement in *Wang Xiaoning v. Yahoo!* are confidential, international media has interpreted the settlement as an acknowledgment of the company's moral liability, if not its legal liability. Yahoo! Chief Executive Officer Jerry Yang's personal apology to the plaintiffs' families only a week earlier, during a hearing before the U.S. House of Representatives Committee on Foreign Affairs, reinforced this interpretation. Amnesty International and Reporters Without Borders, along with other human rights and free speech advocates, applauded the settlement as a long-overdue acceptance of corporate social responsibility principles, but expressed apprehension for the future since the settlement has no binding effect on any other internet communications company. Furthermore, these groups pointed out, there is no clear indication that Yahoo! or other internet technology providers will change their business practices to prevent other customers from being arbitrarily arrested in the same way as Shi and Wang.

Settlements in these types of human rights lawsuits are still unusual, but they will likely become more commonplace as case law regarding aiding and abetting liability develops. This means that plaintiffs will more often be faced with the choice of deciding when to accept a settlement offer and when to continue litigating to seek an enforceable court decision. To provide some guidance, this article demonstrates that in a corporate accountability lawsuit, a settlement can achieve many of the same objectives that could be accomplished by a judicial order in favor of the plaintiffs. The following examination of the goals of impact litigation and, in particular, transnational human rights tort lawsuits concludes that settling such a case can bring about many, though not all, of the positive human rights impacts these lawsuits are intended to achieve.



Angela Henderson (www.builtbymom.com)

Two Chinese men filed a suit against Yahoo! in the Northern District of California for aiding and abetting human rights abuses against them by the Chinese government.

WHAT ARE THE CRITERIA FOR SUCCESSFUL IMPACT LITIGATION?

Tort lawsuits serve multiple purposes. The most obvious of these is to compensate victims when another person is liable for their injuries. Tort judgments also ensure that liability for certain types of actions is officially recognized and stated publicly. Judgments may further punish the perpetrator, stop a particular practice that would otherwise cause continued or greater harm, and deter others from committing similar injurious acts.

In addition to these common goals, impact litigation like *Wang Xiaoning v. Yahoo!* often has further ambitions. In impact litigation, civil society groups sue as a way of implementing their social change agendas. These groups often identify an ideal plaintiff, or a class of plaintiffs, with a particular fact pattern for the lawsuit, hoping to eventually receive a judgment that expands or narrows a standing rule of law, overturns a precedent, or establishes new norms.

Impact litigation sometimes occurs within a broader advocacy strategy that includes legislative reforms and influencing public opinion, both of which can be affected by media coverage of ongoing litigation. But litigation has become a key activist tool, particularly when the subject of the lawsuit does not have support in the political bodies. Furthermore, litigation often provides a quicker solution than legislative reforms. Unlike many political compromises, court orders are immediately enforceable.

In recent years, human rights groups have gotten impact litigation cases into U.S. courts via one particular statute — the Alien Tort Statute (ATS), also known as the Alien Tort Claims

* Theresa Harris is the International Justice Project Director at the World Organization for Human Rights USA, a non-profit human rights litigation group based in Washington, DC. She is 2007 J.D. graduate from American University, Washington College of Law.

Act. The language of the ATS and the high profile decisions upholding it have made it the center of human rights litigation in U.S. courts. The statute provides, “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹

Since the landmark case of *Filartiga v. Pena-Irala*,² U.S. courts have acknowledged that a short list of universally recognized human rights norms fall within “the law of nations” incorporated by the ATS. Thus, the ATS gives the district courts jurisdiction over tort claims arising from torture, slavery, crimes against humanity, and other human rights abuses. In 2004, the U.S. Supreme Court affirmed this line of cases in *Sosa v. Alvarez-Machain* while limiting the range of human rights abuses on which plaintiffs may base their claims to *jus cogens* norms.³ Subsequent decisions by the Second, Ninth, and Eleventh Circuits have reinforced this legal theory. Courts have also held that the ATS provides jurisdiction over corporations accused of aiding and abetting *jus cogens* human rights violations.

the U.S. Senate has ratified core human rights treaties with an express understanding that the treaties are not self-executing. Regrettably, and perhaps incorrectly, courts have interpreted this direction from the Senate to mean that individuals cannot base claims for violations solely on the treaties. Persons may only invoke the rights expressed in the treaties, these decisions say, if legislation adopted by Congress to implement the treaties explicitly creates a cause of action. Unless Congress adopts specific implementing legislation, individuals may only enforce enumerated international human rights if a court establishes the abuse as a violation of customary international law in the context of the ATS.

WANG XIAONING v. YAHOO! INC.

In 2002, the Chinese Public Security Bureau arbitrarily detained Wang Xiaoning for writing and publishing articles advocating democratic reforms in China via Yahoo! listservs and his Yahoo! email account. After a secret trial at which no observers were permitted, Wang was convicted of “inciting state subversion” and sentenced to ten years in prison and two

“Yahoo! provided critical evidence proving Wang and Shi’s ‘crimes’ to the Public Security Bureau ... such as registration information for the email addresses, the ISP address of the computer from which emails were sent, the physical location of the computer used to send the email, the contents of the communications, and the persons to whom the emails were addressed.”

Transnational human rights cases that use the ATS to get into court share the same basic goals as general tort litigation. Fundamentally, they seek to provide reparations to the victims of human rights abuses for their suffering. The cases also hold the perpetrators of human rights abuses accountable, as a way of ending impunity. Receiving an official declaration that the acts in question were in fact violations of international law can help the victims recover psychologically and can help with political reforms in the country where the abuses took place. A successful judgment in favor of the plaintiffs can also deter similar violations in the future.

As a type of impact litigation, ATS cases also aim to codify international human rights norms in the laws of the United States. ATS lawsuits seek to further delineate the international rights U.S. courts have already accepted, or to establish that a previously undefined right exists under customary law. These cases have become a particularly important mechanism for enforcing human rights norms in the United States because

additional years without political rights. Despite the Chinese Constitution’s protection for free speech, the appellate court rejected his appeals and upheld the conviction, ordering Wang to serve the full term of his sentence.

Similarly, the Public Security Bureau detained Shi Tao, a journalist and poet, in 2004 after he used his Yahoo! email account to report on heightened government censorship and surveillance leading up to the fifteenth anniversary of the Tiananmen Square protests. Accused of revealing “state secrets” abroad, Shi was also convicted after a closed trial and sentenced to ten years in prison and two additional years without political rights. He appealed on the basis that the information in his report was not classified, and that the Chinese Constitution protects his message. The appellate court denied this argument, and Shi continues to serve his sentence.

In 2005 and 2006, an anonymous source published the court orders in both cases online. Both trial courts’ convictions and sentences stated that Yahoo! Holdings (Hong Kong) provided



Before settling with the Plaintiffs, Yahoo! argued that it had to provide officials with information connecting the men with their electronic correspondence to comply with Chinese law.

critical evidence proving Wang and Shi's "crimes" to the Public Security Bureau. According to the sentencing orders, these revelations by Yahoo!'s subsidiary gave investigators the specific, detailed information they needed to connect the men to their correspondence. The courts cited information such as registration information for the email addresses, the ISP address of the computer from which emails were sent, the physical location of the computer used to send the email, the contents of the communications, and the persons to whom the emails were addressed. Without these confirmations from Yahoo!, the emails' authors would have remained anonymous.

Based on this information from the court orders, Wang, Wang's wife Yu Ling, and Shi filed a tort lawsuit in the Northern District of California, where Yahoo! has its headquarters. Their complaint accused Yahoo! of aiding and abetting serious human rights abuses, including torture, forced labor, and arbitrary and prolonged detention, arising from the plaintiffs' exercise of free speech and free press rights. Because of its complicity in these human rights violations, the plaintiffs argued, Yahoo! was liable for their injuries under the ATS,⁴ the Torture Victim Protection Act,⁵ the Electronic Communications Privacy Act,⁶ the California Unfair Business Practices Act,⁷ and California tort common law.

Wang Xiaoning v. Yahoo! falls squarely within the context of transnational human rights impact litigation. The lawsuit sought unspecified damages to compensate the plaintiffs for their injuries, as well as punitive damages to punish the company for its complicity in these grave human rights abuses. The plaintiffs further asked the court to require the defendant corporations 1) to stop disclosing private user information to the Public Security Bureau; 2) to disclose information about other Chinese internet users who may be in prison or at risk because of Yahoo!'s policy of complicity; and 3) to use Yahoo!'s influence with the Chinese government to help secure Wang and Shi's release from prison.

In response to the complaint, Yahoo! filed a series of motions to dismiss the lawsuit, claiming that the company's employees had no choice but to provide Chinese officials with

the requested information in order to comply with Chinese law. Yahoo! also argued that any communications with Chinese officials were "privileged" actions not subject to challenge in U.S. courts. Yahoo! Hong Kong argued that even if the plaintiffs' arguments were correct, the court in California did not have jurisdiction over Yahoo! Hong Kong's actions because it is a separate foreign subsidiary of its California-based parent company, Yahoo! Inc.

The case also raised a number of novel legal issues that could have set precedents regarding international human rights law. These include: 1) Are corporations liable for aiding and abetting violations of universally recognized human rights? 2) Did Yahoo!'s actions amount to aiding and abetting human rights abuses? 3) Can persons who are presently being arbitrarily detained or "disappeared" bring suit to enforce their rights through a representative, or must they wait until they are released to enforce their personal rights? 4) Is there an international human rights norm protecting freedom of speech? and 5) Having made the decision to do business in a country with a poor human rights record, what are the obligations of transnational corporations, especially U.S.-based companies, to avoid complicity? Unfortunately, these questions will remain unanswered as the settlement has prevented the court from issuing its findings.

The settlement accomplished a number of the plaintiffs' goals and many of the goals of advocates who supported the case. The following section analyzes the achievements and possible failures of the settlement, as they relate to the suit's goals.

SETTLEMENT

In a typical personal injury tort case, where compensation for the victim is the main goal, there is little question that settlement can serve the same purpose as a victory in court. In many cases, compensation through settlement is the preferred result because it saves the parties time, expense, the potential adversarial unpleasantness involved in trial, and the uncertainty of the final verdict by the judge or jury. When the parties can agree on terms to settle the dispute, the case ends more quickly, and all parties are then able to move on. So long as the victim receives satisfactory compensation, settlement meets the same goal a damage award from a court would, regardless of whether the plaintiff is a survivor of medical malpractice or a survivor of torture.

ATS lawsuits, however, seek much more than monetary compensation for the victims. Plaintiffs often want a public declaration of their rights and of the defendant's liability. They may hope that their case will help end impunity and prevent future human rights violations. When offered a settlement, plaintiffs may find it difficult to decide whether such a private agreement can have the far-reaching public impact they would like their lawsuit to have.

As evidenced by the media's assessment of the settlement in the Yahoo! case, a tort settlement can be interpreted as an admission of liability by the defendant. Even when the agreement does not require a public apology, a defendant's decision to "make the problem go away" can imply guilt. This impression often depends on the procedural posture of the case at the time of settlement. If the defendant has just won a major pre-trial victory, such as dismissal of most of plaintiff's causes of action, settlement looks like a win for the defense, with the plaintiff getting what they can while they can. But when the plaintiffs have just

won a decision, or when the court has yet to decide key components of the plaintiff's case, announcement of a settlement sounds like a win for the plaintiffs. Thus, when the timing of the settlement suggests that the plaintiffs received compensation, an otherwise confidential settlement agreement can still establish the defendant's liability in the public's mind.

Even without a court declaration stating the defendant's liability, public opinion following the settlement can prevent others who see themselves as potential defendants from repeating the actions that formed the basis of the plaintiff's case. Suspicions that a predecessor or a competitor has paid to settle a case will influence decisions regarding company policies and practices. To illustrate this phenomenon, there are indications that after the settlement of *Doe I v. Unocal Corp.*,⁸ an ATS lawsuit that alleged complicity in mass atrocities committed by the Burmese military to protect the defendant company's pipeline, other companies in the petroleum industry reevaluated their operations in countries with poor human rights records and adopted new practices.

In this way, a settlement can help develop international customary law because it influences actual practice of government officials and corporations, which, in turn, establishes and reinforces those practices as standard practice. Although this is not as immediately enforceable as an explicit determination by a court, it is still incremental progress toward acceptance of human rights norms.

Similarly, if a settlement changes individual and corporate practices, it helps establish a reasonableness standard, which develops tort law regarding human rights practices. If a corporation should have known that its practices would assist a government in committing grave human rights violations, then the corporation should be liable for that complicity. Again, this standard is not as immediately enforceable as a court order, which is the purpose of human rights impact litigation. When a settlement helps develop the standard according to which reasonable persons and corporations behave, it increases the likelihood that a court will recognize that standard in the future and uphold it as common law.

Settlement, however, does not achieve all of the goals of human rights impact litigation. For example, private agreements do not establish clear precedent for future plaintiffs to build cases upon. Nor do these agreements clarify the muddy legal

issues regarding the applicability of international customary and treaty law in U.S. courts. Furthermore, private settlements fail to have the strong, broad impact of an enforceable standard. A settlement is also unlikely to influence foreign courts' jurisprudence regarding international rights, while a judgment from a U.S. court relying on international standards might do so.

On the other hand, settlements can provide non-governmental organizations (NGOs) and the lawyers who represent them with the funding necessary to continue working towards clearly defined court judgments. Most survivors of human rights abuses cannot afford the complex fact investigation and discovery that these transnational accountability cases usually require. Even on contingency, many NGOs cannot justify the expense of an inherently risky suit to their donors. Settling provides funds to develop future cases that build on the earlier suit's achievements. Settlement can also help public interest groups expand their capacity and continue using impact litigation as an advocacy tool. Furthermore, settling lowers the perceived financial risks of impact litigation, which expands the pool of lawyers willing to represent plaintiffs. With more cases working their way through the courts, the opportunities for good decisions enforcing international human rights norms increase.

CONCLUSION

THE ABOVE ANALYSIS SUGGESTS that in human rights litigation, settlement has the potential to achieve many if not all of the lawsuit's goals, depending on the timing and terms of the agreement. Settling typically provides reparations, a critical need of survivors of human rights abuses, and can indicate liability on the part of the defendant. While this statement of liability may not be as straightforward as the human rights community would like, the assumption that a settling defendant has admitted culpability can encourage other survivors of human rights abuses to bring their own lawsuits to enforce their rights. If they do, they may find that the settled lawsuit paved the way by establishing new norms. And, over time, there may be less need for the suits if settlement deters others from committing the same abuse for which a previous defendant was sued. Settlement may have a more subtle impact than a judicial determination of rights, but the impact is still substantial.

HRB

ENDNOTES: SETTLING A CORPORATE ACCOUNTABILITY LAWSUIT WITHOUT SACRIFICING HUMAN RIGHTS

¹ Alien Tort Statute, 28 U.S.C. § 1350 (2000).

² 630 F.2d 876 (2d Cir. 1980).

³ 542 U.S. 692 (2004).

⁴ 28 U.S.C. § 1350 (2000).

⁵ Pub. L. No. 102-256, 106 Stat. 73 (1992), reprinted in 28 U.S.C. §1350. (2000).

⁶ 18 U.S.C.A. § 3121.

⁷ Cal. Bus. & Prof. Code § 17 200 et seq. (West 1997).

⁸ 403 F.3d 708 (9th Cir. 2005).