

# The Key Human Rights Challenge: Developing Enforcement Mechanisms

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## I. THE CURRENT REALITY OF RIGHTS WITHOUT REMEDIES

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury . . . . It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded . . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.<sup>1</sup>

If there is any consolation to the failure to reach a breakthrough agreement at the United Nations World Conference Against Racism in Durban, South Africa, it is that any new standard would have joined a stack of well-intentioned human rights conventions and resolutions that remain basically unenforceable. A fundamental inequity is at work when commercial interests and property rights are protected by enforceable agreements,<sup>2</sup> while adherence to internationally recognized human rights norms remains largely voluntary. The rage expressed by protestors in Seattle, Quebec, Genoa, and Washington, D.C., may reflect a diffuse array of objectives, but there is unity in the sense that the rights of human beings have been purposefully ignored to make it easier for multinational corporations (MNCs) to maximize profits. This inequity can only be explained by the great disparity of power between commercially oriented governments and their allies in the business community and the relatively unorganized groups that advocate for workers and other social interests. Any hopes for a remedy to human rights

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1. *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (citing BLACKSTONE COMMENTARIES 23).

2. *See* Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Dec. 15, 1993, Annex I C, 33 I.L.M. 1; The North American Free Trade Agreement, Dec. 8-17, 1992, U.S.-Can.-Mex., ch. 17, pt. IV, 32 I.L.M. 289.

violations are generally left to the sometimes-influential but ultimately unenforceable mechanisms of moral persuasion and damning reports.

Burma is the poster child for this reality. The United Nations (U.N.) has sent a succession of special rapporteurs to the country, and a series of strongly worded U.N. resolutions has demanded that the current military regime stop murdering, torturing, imprisoning, and enslaving the population.<sup>3</sup> Likewise, the International Labour Organization's (ILO) Committee of Experts has issued numerous annual reports documenting in great detail the Burmese regime's violations of the fundamental conventions on freedom of association and forced labor.<sup>4</sup> The ILO created a special Commission of Inquiry to focus on the forced labor issue, and the Commission subsequently issued an incredibly thorough documentation of the Burmese government's use of forced labor.<sup>5</sup> The ILO is now exploring what steps it might take pursuant to its Article 33 powers in order to get member governments to assist in putting pressure on the military regime.<sup>6</sup> However, without any real enforcement power, the ILO is left trying to persuade countries that have already turned a blind eye to the atrocities in Burma, including France and Japan, to overturn their longstanding refusal to consider economic boycotts based on human rights issues.

Despite all of the international reporting and pronouncements, Burma, a charter member of the World Trade Organization, is still open for business. If the current human rights mechanisms cannot force a political pariah such as Burma to refrain from systematic human rights violations, then there is no chance that currently available tools will result in human rights enforcement in places like China, Vietnam, or Indonesia—WTO membership or not.

Another shortcoming of the contemporary regime is that most human rights instruments focus on the conduct of governments and assume that they will adequately enforce national criminal and civil laws against private actors. Multinational corporations seeking to enforce commercial rights enjoy the tremendous advantage of being able to opt out of national legal sys-

3. See, e.g., *Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives, Situation of Human Rights in Myanmar, Report of the Secretary-General*, U.N. GAOR, 15th Sess., Agenda Item 112 (c), U.N. Doc. A/50/782 (1995) (on file with ILRF).

4. See, e.g., *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILO, 82d Sess., Report III, pt. 4A, (1995), at 107–09.

5. *Report of the Commission of Inquiry: Forced Labour in Myanmar (Burma)*, ILO (July 2, 1998) (on file with ILRF), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm>. Before this report was released, the United States government imposed sanctions against Burma, but left a significant exception for current investments and did not address exports from Burma to the United States sourced from non-U.S. investors. This allowed the Unocal Corporation to continue participating in the "Yadana Project," a gas pipeline that was constructed in Burma in a joint venture with the military regime, and Total, the French oil company.

6. Constitution of the International Labour Organization, June 28, 1919, art. 33, 49 STAT. 2712, 15 U.N.T.S. 35. Article 33 refers to the Constitution of the International Labour Organization. The provision gives the ILO's Governing Body the ability to "recommend to the [ILO] Conference such action as it may deem wise and expedient to secure compliance therewith."

tems that are corrupt, unreliable, or non-functioning. For example, an oil company forming a joint venture with the government of Burma can require the government to agree that all disputes be resolved using the English legal system, applying the substantive law of England. Meanwhile, Burmese victims of human rights violations perpetrated by the company's security forces would be left without recourse under national law, since it would be futile—if not dangerous—to complain to a government whose military engages routinely in similar abuses.

I have sat through a few too many academic discussions about ideal normative standards, and I have interviewed too many victims of human rights abuses, only to feel the frustration, if not the embarrassment, of explaining that their stories will be told to the world in reports. Working as the general counsel of the International Labor Rights Fund (ILRF) since 1989 and as executive director since September 2001, my personal obsession has become finding ways to enforce human rights norms. I believe that developing a clear mechanism, short of war, to enforce internationally accepted norms is the breakthrough issue for the future of human rights. It is sadly ironic that it took a war in Afghanistan to cause the United States to "discover" that women have been suffering unspeakable abuses at the hands of the Taliban for over a decade. We need a process that would allow victims to seek outside assistance without requiring an armed invasion.

Unfortunately, it seems that many human rights activists have accepted, or settled for, the distorted paradigm that limits their tools to reporting atrocities and debating new standards that can be the subject of yet more reports. A continual focus on refining standards, knowing that there is no effective enforcement mechanism, demonstrates a cynical detachment from reality. The Universal Declaration of Human Rights is well-crafted and comprehensive. It has also been on the books since 1948, and we are a far cry from realizing its objectives because its signatories can and do ignore its provisions at will.

A significant event in the effort to develop effective enforcement mechanisms occurred in 1986, when Congressman Donald Pease, one of the ILRF's founding board members, managed to gain passage of worker rights conditionality in the Generalized System of Preferences Act (GSP).<sup>7</sup> This created a process whereby "beneficiary developing countries" received duty-free access to the United States market in exchange for meeting specific conditions, including respect for "internationally recognized worker rights."<sup>8</sup> Compliance with the standard was based on a process through which "any person" could petition the United States Trade Representative to terminate the trade benefits of a beneficiary country that failed to comply with the standards established in the Act. The ILRF was at the forefront in the initial utilization of this process and filed numerous petitions seeking to withdraw

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7. 19 U.S.C. §§ 2461–2466 (1986).

8. *Id.* § 2462(c)(7).

benefits from countries that failed to recognize worker rights. Very early on, however, the Reagan Administration, followed by both the Bush and Clinton Administrations, politicized the process. For example, the Reagan Administration terminated the benefits of Nicaragua's Sandinista government for failure to respect the rights to associate and organize, but refused to remove El Salvador and Guatemala even though both governments permitted death squads to assassinate trade union leaders.<sup>9</sup> Taking hypocrisy to new heights, the Reagan Administration ruled that the murders of trade union leaders in El Salvador and Guatemala were based on their political activities, not their trade union activities, and that therefore the standards established by the GSP Act had not been violated.<sup>10</sup>

Having made a good faith effort to use the GSP process for several years, the ILRF ultimately initiated litigation against the Bush Administration in 1990 to challenge the arbitrary application of the GSP statute and the overall non-enforcement of the worker rights provision. The case, *ILRF v. Bush*,<sup>11</sup> was ultimately dismissed by the District Court. The Court of Appeals for the District of Columbia, in an extremely divided opinion, affirmed.<sup>12</sup>

Lacking a viable tool to enforce labor rights directly, the ILRF continued to use traditional methods of research, reporting, policy development and persuasion to advance the rights and interests of workers. At the time, I was generally aware that others had begun to use the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, to enforce internationally recognized norms against individuals who were responsible for human rights violations. The language of the ATCA, dating back to 1789, provides: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>13</sup> Beginning with *Filartiga v. Pena-Irala*,<sup>14</sup> the long-dormant ATCA increasingly presented the prospect of enforcing international human rights standards through the United States federal courts.

9. Interview with Holly Burkhalter in Washington, D.C., (August 1989). Ms. Burkhalter, Director of the Washington office of Human Rights Watch (HRW) at the time, was responsible for the GSP petition filed by HRW.

10. *Id.*

11. 752 F. Supp. 495 (D. D.C. 1990).

12. 954 F.2d 745 (D.C. Cir. 1992).

13. 28 U.S.C. § 1350 (1982). Long dormant, with no legislative history, the ATCA has encouraged speculation about its origin, but courts have generally declined to engage speculative limitations of the scope of the statute based on some specific and narrow origin, and have instead sought to determine what specific human rights norms are within "the law of nations." See, e.g., Anne-Marie Burely, *The Alien Tort Claims Statute and Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); Nat'l Coalition Gov't of the Union of Burma (NCGUB) v. Unocal, Inc., 176 F.R.D. 329, 344 (C.D. Cal. 1997).

14. 630 F.2d 876 (2nd Cir. 1980). In *Filartiga*, a torture claim was brought against a former official of the government of Paraguay. The Second Circuit Court of Appeal's landmark decision created a very effective tool for enforcing human rights norms. Applying the plain language of the ATCA, the court held that an alien could sue in U.S. federal court for a "tort" that violates the "law of nations." *Id.* at 887. The court had no trouble finding that torture violated the law of nations, and avoided the necessity of ruling on whether a private party could be liable since the defendant had been a state actor when the violations occurred. *Id.* at 889-90.

The story of what happened next can only be described as serendipity. The General Secretary of the Federation of Trade Unions of Burma (FTUB), U Maung Maung, had escaped Burma and was living in Thailand following his participation in the pro-democracy uprising of 1988. He enjoyed reading *Reader's Digest* because his parents had exposed him to the magazine when he was a child as a way to learn English. In 1994, he read an article about a lawsuit in the United States filed by a couple whose dog had died after being overanesthetized by a veterinarian. Apparently, the couple had been successful in their case. At the time, U Maung Maung was also aware of reports from new Burmese refugees pouring into Thailand that they were escaping from forced labor on a major project by a United States company, Unocal. Unocal, the name by which the Unocal Corporation and Union Oil Company of California are collectively known, was building a natural gas pipeline across the Tenasserim area of Burma and into Thailand.<sup>15</sup> U Maung Maung was both amused and angered that the United States legal system provided a remedy for the accidental death of a dog but inexplicably allowed Unocal to use forced labor to build a billion dollar pipeline in Burma. He relayed his reactions to a law student from Georgetown, Douglas Steele, who was interning for John Osolnick, a trade union activist who was advising the FTUB. U Maung Maung asked whether there wasn't some legal theory that could be used to stop Unocal from using forced labor on its pipeline project in Burma. Doug went back to Georgetown, did some research, and connected with John Bonifaz, a recent graduate of Harvard Law School. They developed a plan to bring a test case under the ATCA against Unocal for violations of the "law of nations." They approached me about serving as lead counsel and having the ILRF bring the case, and I ultimately agreed.

In September 1996, the ILRF filed a complaint against Unocal, launching the first effort to sue a corporation for human rights violations under the ATCA. Based on our optimism following extensive briefing of the legal issues in the Unocal case, we have filed four additional ATCA cases, with several more in the pipeline. The ILRF views its ATCA litigation as an integral part of a larger movement to enforce human rights norms. Indeed, each of the ILRF cases was initiated as a result of a request from an outside organization working to enforce human rights norms that felt that an ATCA case would assist its ongoing efforts. The ILRF receives many such requests and conducts assessments of the specific facts and law in each case to determine which claims are viable, both from a legal perspective and with an eye toward an overall goal of contributing to a sustainable and comprehensive effort to promote human rights.

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15. The pipeline, known as the "Yadana Project," was constructed in Burma by a joint venture between the military regime, Unocal, and the French oil company Total. There is substantial evidence that forced labor was used to clear the right of way and construct the infrastructure for the project. In addition, the military security forces assigned to the project forced villagers to serve as porters. See, e.g., *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1298 (C.D. Cal. 2000).

## II. PENDING CASES UNDER THE ATCA—AN EMERGING TOOL TO ENFORCE INTERNATIONAL HUMAN RIGHTS NORMS

Cases under the ATCA, such as those brought by the ILRF, are significant in that they serve to develop jurisprudence focused on *enforcing* international human rights norms. Since the Second Circuit's ruling in *Filartiga*, the ATCA has been used with increasing frequency to reach direct perpetrators of human rights abuses. In addition, beginning with the *Unocal* case, numerous cases have been brought against corporate defendants that have aided and abetted, or otherwise participated in, human rights violations as part of business operations in partnership with repressive governments. In this respect, the ATCA offers to provide a significant new aspect to human rights law and enforcement efforts by holding private actors accountable for violations.

Each of the five ATCA cases that the ILRF is currently working on raises key issues relevant to the emerging jurisprudence in this area. Rather than providing a comprehensive analysis of the cases, the following discussion will highlight the central questions raised by these ongoing litigation efforts.<sup>16</sup>

### A. *Unocal Corporation and Forced Labor in Burma*

The suit filed by the ILRF against Unocal in 1996 charged the company with knowingly using forced labor to construct a natural gas pipeline across the Tenasserim region of Burma.<sup>17</sup> There is little question that thousands of Burmese villagers were impressed to perform labor for the benefit of Unocal's pipeline project.<sup>18</sup> It is also documented that Unocal executives knew that the Burmese military regime was using forced labor on the pipeline.<sup>19</sup> Indeed, in its consideration of Unocal's motion for summary judgment, the District Court found that "[t]he evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefited from the practice."<sup>20</sup>

The Unocal case highlights some of the central difficulties in establishing the liability of MNCs for human rights abuses committed abroad. Unocal argued that, to the extent that forced labor or any other human rights viola-

16. For complete copies of the complaints and other relevant documents relating to the ILRF's cases, see <http://www.laborrights.org>.

17. The initial plaintiffs were the National Coalition Government for the Union of Burma (NCGUB), the Federation of Trade Unions of Burma (FTUB), and four refugees from Burma who were among the thousands of villagers who had been forced to work on Unocal's pipeline. A second case on behalf of a second group of villagers was filed shortly thereafter. Both cases survived Unocal's motions to dismiss. See *NCGUB v. Unocal, Inc.*, 176 F.R.D. 329, 344 (C.D. Cal. 1997). *John Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

18. See, e.g., *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1298 (C.D. Cal. 2000).

19. See, e.g., Appellants' Opening Brief at 7-13, *John Roe III v. Unocal Corp.*, No. 00-56628 (9th Cir. filed Feb. 22, 2001), available at <http://www.laborrights.org>.

20. *John Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000).

tions occurred in conjunction with the pipeline project, the perpetrators were soldiers of the Burmese military, not employees of Unocal.<sup>21</sup> The company asserted that as a "passive investor" in the pipeline, totally removed from decisions or activities related to forced labor, it could not be held liable.<sup>22</sup> In short, because it was motivated by profit, not malevolence, Unocal argued that it should not bear any financial responsibility for the undisputed abuses suffered by plaintiffs. However, there is no question that Unocal was a willing participant in a joint venture that included the notorious military regime in Burma, and that the company delegated pipeline security to the military government. Thus, plaintiffs argued that Unocal was jointly and severally liable for the acts of its co-venturer, the military regime, or alternatively, that the military security forces were acting as an agent for Unocal.<sup>23</sup>

Judge Ronald Lew of the Central District of California ultimately granted a summary judgment motion filed by Unocal and held that the ATCA required direct participation by Unocal in the wrongful acts in order to establish liability.<sup>24</sup> Judge Lew further held that in order for Unocal to have been the proximate cause of the injuries, it would have to have had control over the military regime.<sup>25</sup> Plaintiffs have appealed the ruling to the Court of Appeals for the Ninth Circuit, arguing that there was sufficient evidence of Unocal's participation with and control over the military security forces to raise material questions of fact and avoid summary judgment.<sup>26</sup> Moreover, plaintiffs argue that the District Court erred in requiring evidence of participation and control, and that Unocal's conduct was more than sufficient to create liability based on an aiding and abetting theory.<sup>27</sup> The case was argued on December 3, 2001, and we are now awaiting a ruling.<sup>28</sup>

The Unocal case raises many questions about the ability of corporations to disassociate themselves from the direct consequences of their investment choices. It is also significant to note that one of the biggest challenges in bringing the case was developing sufficient evidence of conditions inside Burma, given that any witnesses critical of the military faced certain retali-

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21. See, e.g., Appellees' Answering Brief at 10, 12-18, *John Roe III v. Unocal Corp.*, No. 00-56628 (9th Cir. filed May 7, 2001) (on file with ILRF).

22. *Id.* at 31.

23. Appellants' Opening Brief at 17-34, *John Roe III v. Unocal Corp.*, No. 00-56628 (9th Cir. filed Feb. 22, 2001), available at <http://www.laborrights.org>.

24. *John Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1308-10 (C.D. Cal. 2000).

25. *Id.* at 1307-08.

26. The case numbers on appeal in the 9th Circuit are 00-56603 (Doe) and 00-56628 (Roe).

27. See Appellants' Opening Brief at 7-13, *John Roe III v. Unocal Corp.*, No. 00-56628 (9th Cir. filed Feb. 22, 2001), available at <http://www.laborrights.org>.

28. In the meantime, plaintiffs re-filed state law claims in the California Superior Court for the County of Los Angeles. In a ruling dated August 20, 2001, Judge Victoria Chaney ruled in response to Unocal's motion to dismiss that collateral estoppel and federal preemption did not act to bar the claims, which are based on California state law with very different legal elements on issues of liability and causation. *John Roe III v. Unocal Corp.*, No. BC237679 (Cal. Super. Ct., County of L.A., filed August 20, 2001) (on file with ILRF). Judge Chaney set a trial for the state law claims beginning September 26, 2002.

tion. Human rights reports produced by the International Labour Organization, Amnesty International, and Human Rights Watch have been the best sources of information on the pervasive use of forced labor on public and private projects in Burma. This point is emphasized to discourage an either/or approach to human rights advocacy. Rather, a multifaceted strategy is required to bring about sustainable progress in enforcement.

*B. Exxon Mobil and Genocide, Murder, and Torture in Aceh, Indonesia*

Media reports dating back several years have reported on the activities of Exxon Mobil Corporation and its predecessor companies, Mobil Oil Corporation and Mobil Oil Indonesia (hereinafter collectively referred to as "Exxon Mobil") in Aceh, Indonesia.<sup>29</sup> Exxon Mobil hired one or more military units of the Indonesian national army, known as the Tentara Nasional Indonesia ("TNI"), to provide "security" for its gas extraction and liquification project in Aceh.<sup>30</sup> These troops were engaged in an ongoing campaign of systematic torture, murder, rape, and acts of genocide against the local population of Achanese people.<sup>31</sup>

Exxon Mobil never used its considerable power over its security force to demand that human rights violations against the local population be stopped. However, in March 2001, when the civil conflict raging between Achanese separatists and the government threatened Exxon Mobil's expatriate staff, the company immediately shut down the operation and demanded more security and a "guarantee" of safety for its employees.<sup>32</sup> Never did Exxon Mobil include a demand that new security procedures provide for the safety of local villagers.<sup>33</sup> A demand for more security was certain to bring more troops and more human rights violations, apparently an acceptable consequence for Exxon Mobil. In early July 2001, Exxon Mobil announced that it was satisfied with the new security arrangements and would reopen the facility.<sup>34</sup>

On June 20, 2001, in response to the activities of Exxon Mobil's security force in Indonesia, the ILRF filed an ATCA claim against the company on behalf of 11 villagers from Aceh who were victims of human rights abuses by Exxon Mobil's TNI Unit 113.<sup>35</sup> The central theory of the case is that Exxon Mobil knowingly employed military troops to protect its operations

29. See, e.g., Michael Shari, *Indonesia: What did Mobil Know?*, BUS. WK., Dec. 28, 1998. For further discussion of the military occupation of Aceh, see *Indonesia: The War in Aceh*, HUMAN RIGHTS WATCH, Vol. 13, No. 4 (C), Aug. 2001.

30. Complaint ¶¶ 37–49, *John Doe v. Exxon Mobil*, No. 1:01CV01357 (D. D.C. filed June 20, 2001), available at <http://www.laborrights.org>.

31. *Id.* ¶¶ 48–58.

32. *Id.* ¶¶ 45.

33. See, e.g., Mark Mitchell, *Who Knew?*, TIME ASIA, Aug. 13, 2001, at 3.

34. *Id.* at 4.

35. *John Doe v. Exxon Mobil*, No. 1:01CV01357 (D. D.C. filed June 20, 2001). ILRF's co-counsel in the case are Michael Hausfeld, Agnieszka Fryszman, and Lesli Esposito of Cohen, Milstein, Hausfeld, & Toll of Washington, D.C.



and that the company aided and abetted human rights violations through financial and other material support to the security forces.<sup>36</sup> In addition, plaintiffs argue that the security forces are either employees or agents of Exxon Mobil, creating liability based on respondeat superior or vicarious liability.<sup>37</sup>

Like Unocal, Exxon Mobil's primary defense appears to be that the company did not specifically intend that human rights violations be committed, and that therefore the company cannot be liable.<sup>38</sup> A key issue is whether ATCA litigation can change the mentality that allows a corporation doing business with known human rights violators to accept the benefits of abuses while successfully avoiding any liability for their perpetration. Exxon Mobil and Unocal are simply revisiting a well-established concept of liability. The Nuremberg Tribunal definitively established the principle that, absent a true necessity defense (the literal "gun to the head" requiring compliance), private defendants can be held liable for knowingly benefiting from slave labor.<sup>39</sup> Nuremberg established that economic interests are not a defense to human rights violations, and it is crucial to developing a rule of law under the ATCA that courts not turn back the clock and allow for such a defense to stand. If the Nuremberg principle is applied to the ATCA, then there will be a clear rule, based on the law of nations, that knowingly aiding and abetting human rights violations is sufficient to establish liability. Multinational firms would then be required to ensure that they were not knowingly participating in human rights violations—a standard with which it should be fairly easy to comply.

### *C. Coca-Cola and Death Squads in Colombia*

Colombia is a human rights basket case due to the lawless activities of right-wing paramilitary and leftist guerrilla groups. For years there has been comprehensive public reporting on systematic abuses in the country, including the specific targeting of trade union leaders and members for murder and other violence.<sup>40</sup> Much of the violence is directed at union leaders

36. Complaint ¶¶ 37–49, *Exxon Mobil*.

37. *Id.* ¶ 61.

38. Defendant's Memorandum in Support of Motion to Dismiss at 19–20, *Exxon Mobil* (on file with ILRF).

39. Many of the private defendants in the Nuremberg cases were charged with using slave labor procured by the Nazi regime. They argued that although their companies benefited from the slave labor, the companies were required to use it, and in many cases did not affirmatively intend to use slaves. Those who opportunistically increased production and profits based on the availability of slave labor were uniformly convicted. See *United States v. Flick*, 6 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (1952).

40. See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—COLOMBIA*, at 34, (Feb. 2001), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/whaf>. For the past ten years, Colombia has led the world in the number of murders of trade unionists. More than 52 trade union leaders have been killed so far this year, 129 were killed in the year 2000, and in the last ten years, over 1500 have been murdered. A much larger number have been subjected to torture, including regular threats of death, unlawful detention, and kid-

working for multinational corporations, including the Coca-Cola Company. One union representing workers at Coca-Cola, Sinaltrainal, has sustained heavy losses of leaders and members.<sup>41</sup> Since at least 1996, Sinaltrainal has been writing letters to Coca-Cola and the United States Embassy in Bogota demanding that the targeting of trade union leaders be stopped.<sup>42</sup> Neither institution has replied. Meanwhile, the Colombian government has failed to take any action to find and arrest the paramilitary commanders, who in some cases were specifically identified by victims or other witnesses.<sup>43</sup>

Having no other options and facing ongoing violence, Sinaltrainal requested that the ILRF and the United Steelworkers of America file an ATCA case against Coca-Cola and its Colombian bottlers. A case was filed in the Federal District Court for the Southern District of Florida on July 21, 2001, seeking to hold Coca-Cola and two of its Colombian bottlers liable for using paramilitaries to engage in anti-union violence.<sup>44</sup>

Like the cases against Unocal and Exxon, the case against Coca-Cola raises grave concerns about the extent to which corporations can be held liable for the acts of their subsidiaries and agents. There is overwhelming evidence in this case, in the form of eyewitness testimonials and records from official investigations by the Colombian government, that a trade union leader named Isidro Gil was murdered inside the Coca-Cola bottling plant in Carpepa by paramilitaries who had been invited in by the plant's manager.<sup>45</sup> The day after Mr. Gil was killed, the same paramilitary forces returned to the plant to further undermine any union activity. They collected resignation letters from the remaining union members after threatening that those who refused to resign would meet the same fate as Mr. Gil.<sup>46</sup>

Coca-Cola's defense to the charges is not that the murder and terrorism did not occur at its bottling plants. Rather, the company argues that it cannot be held liable in a United States federal court for what happened in Colombia.<sup>47</sup> Coca-Cola also argues that it does not "own," and therefore does not control, the Colombian bottling plants.<sup>48</sup> Again, the case presents a cru-

napping. See International Confederation of Free Trade Unions (ICFTU), *Colombia: Appalling Human Rights Situation of Colombian Trade Unionists Continues* (Mar. 3, 2001); ICFTU, *Colombia: An Appalling Death Toll—With No Sign of Improvement* (Dec. 21, 2001) available at <http://www.icftu.org>

41. Complaint ¶¶ 93–96, *Sinaltrainal v. Coca-Cola*, No. 01-03208-CIV (S.D. Fla. filed July 21, 2001), available at <http://www.laborrights.org>.

42. *Id.* Exhibit B.

43. Interview with Javier Correa, President of Sinaltrainal, in Bogota, Colombia (Apr. 17, 2001).

44. *Sinaltrainal v. Coca-Cola*, No. 01-03208-CIV (S.D. Fla. filed July 21, 2001). Plaintiffs are Sinaltrainal, and five individuals who have been murdered, tortured, and/or unlawfully detained. ILRF Co-counsel is Daniel Kovalik, associate counsel of the United Steelworkers of America.

45. *Id.* ¶¶ 44–51.

46. *Id.* ¶¶ 51–52.

47. Defendants' Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction at 2–4, *Sinaltrainal* (on file with ILRF).

48. Defendants' Joint Motion to Dismiss for Lack of Personal Jurisdiction and to Quash Service of Process at 17–20, *Sinaltrainal* (on file with ILRF). Plaintiffs allege that although Coca-Cola's bottling agreements with the Colombian bottlers give Coca-Cola the ability to control all aspects of the business relationship, the company has failed to exercise this control to protect workers from violence. Complaint

cial opportunity to develop a standard under which a MNC cannot profit from human rights violations while limiting liability to a local entity that is a mere facilitator for the parent company's operations.

Another significant feature of the Coca-Cola litigation is that it has served to focus a broader campaign seeking to persuade the company to accept responsibility for violence in its bottling plants, wholly apart from any potential legal liability under the ATCA.<sup>49</sup> The campaign is using factual information developed from the investigations connected to the litigation, as well as traditional human rights reports, to support specific demands that Coca-Cola respond to the violence in Colombia. The campaign asks the company to publicly denounce the violence in Colombia, to make clear to the paramilitaries that such violence is not in Coca-Cola's interest, to cease all formal or informal working relationships between paramilitary forces and managers of the bottling plants, to agree to a specific provision that prohibits Coca-Cola bottling plants from participating in violent activities, and to permit trade unions representing Coca-Cola workers to monitor compliance with the provision. The major participants in the campaign in the United States are the International Brotherhood of Teamsters, the United Steelworkers of America, the United Food and Commercial Workers Union, the United States Labor Education Project, and the ILRF. In addition, the Canadian Labour Congress, and its major affiliate, the Canadian Auto Workers, have joined. The campaign provides a promising model of cooperation to change corporate behavior that supports or tolerates human rights abuses. The weakness of most campaigns is that they lack teeth—they do not have real leverage except for the often remote possibility of media interest. Using litigation in tandem with a campaign could provide this necessary element.

#### *D. Del Monte and Death Squads in Guatemala*

In August 2001, the ILRF filed an ATCA suit against Fresh Del Monte Produce—one of the world's largest producers of fresh fruit products—on behalf of five former union leaders who were tortured and detained in Guatemala.<sup>50</sup> This case raises notably different issues than the cases filed against Unocal, Exxon Mobil, and Coca-Cola. There is little question of the potential for direct legal liability because Del Monte is structured to ensure that the parent retains control and ownership of its local operations.<sup>51</sup>

The underlying facts of the case stem from a dispute between Del Monte and SITRABI, one of the most respected unions in Guatemala. Del Monte owns and operates several Guatemalan banana plantations through a wholly

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¶ 24, *Sinaltrainal*. In other words, Coca-Cola can determine what color uniforms the workers must wear, but it claims to lack the ability to order the bottler not to allow the workers to be killed by paramilitaries.

49. Specific information about the campaign is available at <http://www.cokewatch.org>.

50. *Villeda Aldana v. Fresh Del Monte Produce*, No. 01-3399-CIV (S.D. Fla. filed Aug. 30, 2001).

51. See Complaint ¶¶ 50–52, *Villeda Aldana*, available at <http://www.laborrights.org>.

owned subsidiary.<sup>52</sup> These plantations have long been unionized by SITRABI. In 1999, Del Monte and SITRABI were in tense negotiations regarding a massive layoff of workers in violation of the collective bargaining agreement. When the negotiations reached an impasse that left hundreds of union members out of work, the leaders of SITRABI announced that the remaining workers would walk out the next day. The evening before the planned work stoppage, Del Monte employees organized a private security squad and abducted five key leaders of SITRABI.<sup>53</sup> The union leaders were taken to their own headquarters and tortured with guns and threats of death.<sup>54</sup> After enduring the torture for several hours, the union leaders agreed to call off the work stoppage, resign from the union, and leave the area.<sup>55</sup> Two of the leaders were forced with guns to their heads to make an announcement on the plantation radio system that the work stoppage was canceled.<sup>56</sup> Then, they signed personalized resignation letters that had been prepared by Del Monte employees. Eventually, after further torture, they were told they could leave, but were assured that they would be killed if they ever returned to the plantation area.<sup>57</sup>

The five SITRABI leaders escaped to Guatemala City and filed criminal charges against their attackers. The United States embassy encouraged this suit as a test case of the post-peace accords justice system in Guatemala.<sup>58</sup> Regrettably, the legal system reverted to form, and the attackers were found guilty of lesser crimes. They were permitted to walk out of court after paying nominal fines.<sup>59</sup> All parties concerned were convinced that the five union leaders would be killed in retaliation for bringing charges against Del Monte's security team. The embassy arranged for work visas and the five leaders and their families relocated to the United States.<sup>60</sup> Del Monte bought the plane tickets.<sup>61</sup> Shortly thereafter, the ILRF filed its ATCA case.

The Del Monte case has the potential to bring about significant developments in ATCA jurisprudence. It raises the question of whether otherwise actionable violence also violates the law of nations because it was done for the purpose of suppressing trade union rights. The plaintiffs seek to hold Del Monte liable for violations of the fundamental right of freedom of association and the right to organize and bargain collectively, rights that are central to trade unionism.<sup>62</sup> This is a question of first impression under the

52. *Id.* ¶ 20.

53. *Id.* ¶ 22.

54. *Id.* ¶¶ 27–34.

55. *Id.* ¶¶ 43–45.

56. *Id.* ¶¶ 37–39.

57. *Id.* ¶¶ 43.

58. *Id.* ¶ 48.

59. Interview with Angel Enrique Villeda Aldana, plaintiff in *Villeda Aldana v. Fresh Del Monte Produce*, in Los Angeles, California (July 18, 2001).

60. Complaint ¶ 48, *Villeda Aldana*, available at <http://www.laborrights.org>.

61. *Id.* ¶ 47.

62. *Id.* ¶¶ 62–65.

ATCA, but there is universal agreement on the parameters of the rights to associate and bargain collectively.<sup>63</sup> A ruling for plaintiffs on this issue would be a significant breakthrough for trade unionists.

### *E. DynCorp's Air Strikes Against Ecuadorian Farmers*

On September 11, 2001, shortly before the federal courts closed in response to the terrorist attacks in New York and Washington, D.C., an ATCA suit was filed by ILRF against the DynCorp Corporation on behalf of at least 10,000 Ecuadorian plaintiffs.<sup>64</sup> The plaintiffs are suffering serious health effects as a result of the company's spraying of a toxic herbicide on their communities as part of a larger operation to eradicate coca plants in Colombia.<sup>65</sup> The suit charges the company with murder, wrongful death, crimes against humanity, and numerous property crimes and raises claims under United States Torture Victim Act and international human rights law, in addition to the ATCA. The litigation was initiated by a group of villagers who have suffered serious harm to their physical well-being and environmental surroundings and a couple whose child died after exposure to the chemicals.

This case is dramatically different from the other ATCA cases in a number of key respects. DynCorp's spraying of harmful fumigants is a direct result of a contract between the company and the United States government.<sup>66</sup> The company's actions are part of the government's controversial "Plan Colombia," part of the "war on drugs," and the target area of the plan is clearly Colombia.<sup>67</sup> The case does not raise traditional concerns about labor rights in the global economy. Rather, it presents an extremely important opportunity to question whether a country's objectives, however well meaning, can ever justify violating the human rights of innocent civilians. It asks whether government and corporate resources can ever be rightfully directed against non-combatant civilians.

## III. IMPLICATIONS OF THE ATCA CASES AND NEXT STEPS

The ATCA cases brought by the ILRF and others highlight the crisis of enforcement of human rights standards. Absent the prospect of a viable case under the ATCA, there is little recourse for many victims of human rights violations by multinational corporations and related actors. Currently,

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63. See, e.g., Freedom of Association and Protection of the Right to Organise Convention, July 24, 1950, ILO No. 87; Right to Organise and Collective Bargaining Convention, July 18, 1951, ILO No. 98.

64. *Arias v. DynCorp*, No. 1:01CV01908 (D.D.C. filed Sept. 11, 2001). Co-counsel in the case are Cristobal and John Bonifaz.

65. Complaint ¶¶ 9–21, *Arias v. DynCorp* available at <http://www.laborrights.org>.

66. *Id.* ¶¶ 26–28.

67. "Plan Colombia" is inherently flawed. There are serious, well-documented concerns that the spraying of fumigants is harmful to humans and livestock, and that it kills legitimate food crops in the area, such as corn and yucca. *Id.* ¶¶ 9–21.

American companies can participate in or aid human rights abuses in other countries confident that the host governments will not enforce local laws. Often, the host governments themselves are participants in the abuses. This frames the reality of the global economy. Governments that continue to commit or overlook human rights abuses and the private investors willing to work with them are the beneficiaries of a global economic system that trusts no one on economic matters, yet trusts governments to comply voluntarily with human rights standards.

If it is possible to tap just a part of the optimism that allowed Thurgood Marshall and the NAACP Legal Defense Fund to use the courts to end legal segregation, we have the potential to greatly advance human rights law by using the ATCA aggressively. The major legal issues that need to be addressed in an ATCA case have largely been resolved in ways that provide the space necessary to pursue the most blatant human rights violations and that provide the foundation to refine the law through further test cases.

The following is a brief summary of the key legal issues that need to be addressed and refined in ATCA litigation. This is not intended to be an exhaustive, scholarly discussion of all possible issues. Rather, the objective is to highlight the real challenges we face in future litigation and to encourage careful thought on how to constructively advance the law.

#### A. Defining the "Law of Nations"

Many of the initial questions about how courts might treat the concept of "the law of nations" in their treatment of cases brought under a reinvigorated ATCA have been answered, or at least clarified, in recent years. First and foremost, there is general agreement that the "law of nations" is an evolving concept that reflects international law and norms. As the Second Circuit noted in *Kadic v. Karadžić*, courts must interpret international law under the ATCA as "it has evolved and exists among the nations of the world today."<sup>68</sup> In *Tel-Oren v. Libyan Arab Republic*, Judge Edwards famously concurred, in a very divided decision, that the "'law of nations' is not stagnant and should be construed as it exists today among the nations of the world."<sup>69</sup>

There was for a time a raging debate over what types of international law norms were actionable under the ATCA. Defendants naturally sought to limit the list to *jus cogens* violations,<sup>70</sup> which require the highest degree of universality. Courts have now accepted that, first of all, any violation of cus-

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68. *Kadic v. Karadžić*, 70 F.3d 232, 238 (2nd Cir. 1995). See also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

69. *Tel-Oren*, 726 F.2d at 777. See also *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D. D.C. 1998) (discussing importance of evolving standards of international law).

70. See, e.g., Appellees' Answering Brief at 34-39, *John Roe III v. Unocal Corp.*, (9th Cir. filed May 2001) (No. 00-56628) (on file with ILRF).

tomary international law could be actionable under the ATCA.<sup>71</sup> Second, whatever label is applied to the type of standard, the key question is whether there is an objective norm against which conduct can be measured. Currently, there is support for recognition of genocide,<sup>72</sup> torture,<sup>73</sup> extrajudicial killing,<sup>74</sup> unlawful detention,<sup>75</sup> forced labor,<sup>76</sup> and sexual assault<sup>77</sup> as actionable violations of the law of nations under the ATCA.

Further development of the "law of nations" depends upon comprehensive efforts to build international consensus for new standards. This process will become much more useful, and will probably encounter more organized resistance, if it becomes clear that such standards will serve as additional grounds for bringing ATCA cases. Likewise, as litigation of international law issues under the ATCA becomes more common, traditional human rights reporting focused on developing links between human rights violations and potential defendants will become an extremely valuable part of the enforcement process. The often thorough and well-documented human rights reporting that is occurring today will finally have a specific context for assisting in the enforcement of human rights norms.

### B. Liability of Private Parties

Corporate defendants in ATCA cases have argued that only governments can be liable under international law, and that if it is possible to hold private parties liable, there must be "state action."<sup>78</sup> A few courts have dealt with this by parsing the question and holding that for a limited category of *jus cogens* norms, no state action is required, but for all other actionable international law violations under the ATCA, state action must be established.<sup>79</sup> This pragmatic and limiting construct has no basis in the statutory language of the ATCA, which creates a cause of action for violations of the "law of nations."

Clearly there must be some requirement of universality to overcome fair concerns about unilateralism. If U.S. courts are going to adjudicate violations of international law, the actionable legal norms must be well established. Ideally, the norms should be accepted in the country where the viola-

71. See, e.g., *Alvarez-Machain v. U.S.*, 266 F.3d 1045 (9th Cir. 2001) (arbitrary detention and kidnapping are actionable under the ATCA as violations of customary international law, regardless of whether they are also *jus cogens* norms).

72. See, e.g., *Kadic*, 70 F.3d at 242.

73. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), cert. denied, 519 U.S. 830 (1996).

74. See, e.g., *Kadic*, 70 F.3d at 240-41, 243-44 (noting that when Congress passed the TVPA, it codified the ATCA's application to extrajudicial killing and torture).

75. See, e.g., *Alvarez-Machain*, 266 F.3d at 1052.

76. See, e.g., *NCGUB v. Unocal, Inc.*, 176 F.R.D. 329, 348-49 (C.D. Cal. 1997).

77. See, e.g., *Kadic*, 70 F.3d at 242-43.

78. Appellees' Answering Brief at 11-21, *John Roe III v. Unocal Corp.*, No. 00-56628 (9th Cir. filed May 7, 2001) (on file with ILRF).

79. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

tion arose. But even with this requirement, there are many international norms that reach the level of customary international law.<sup>80</sup> It is prudent to proceed slowly in the effort to expand the list of norms that are actionable under the ATCA, but from the perspectives of statutory construction and international law jurisprudence, there is no principled reason why violations of well-accepted standards should not be actionable under the ATCA.

As to the "state action" requirement, there is likewise no statutory basis in the ATCA for placing such a restriction on holding a private person liable. The origin of the ATCA "state action" requirement began with the modern resurrection of the ATCA in *Filartiga v. Pena-Irala*.<sup>81</sup> Notably, the court in *Filartiga* was not presented with the need to develop an ATCA-specific state action analysis because the defendant was a former agent of the government of Paraguay, and was unquestionably a state actor.<sup>82</sup> In *Tél-Oren v. Libyan Arab Republic*,<sup>83</sup> a splintered panel agreed that there was not a cause of action under the ATCA for torture committed by private parties. Judge Edwards' concurrence acknowledged the historical basis for allowing private liability in cases of piracy and slave trading, but he did not agree that the same basis existed for adding non-official torture to the list of private wrongs actionable under the ATCA.<sup>84</sup> He did end on a rather encouraging note, however, stating that "the trend in international law is toward a more expansive allocation of rights and obligations to entities other than states."<sup>85</sup>

In *Kadic v. Karadžić*,<sup>86</sup> the Second Circuit clarified that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."<sup>87</sup> The court ultimately held that, in addition to piracy and slave trading, genocide and war crimes were also actionable regardless of state action.<sup>88</sup> The court declined to add torture to the list.<sup>89</sup> Thus began the effort by courts to develop a legal construct for determining when a private actor engages in "state action" by virtue of some form of relationship to the state. Lacking other models, the *Kadic* court grafted the state action analysis of 42 U.S.C. § 1983 onto the ATCA,<sup>90</sup> and with it, all of the uncertainty surrounding that jurisprudence.<sup>91</sup>

80. See *supra* notes 72–77.

81. 630 F.2d 876 (2d Cir. 1980).

82. *Id.* at 889–90.

83. 726 F.2d 774 (D.C. Cir. 1984).

84. *Id.* at 794–95.

85. *Id.* at 795.

86. 70 F.3d 232 (2d Cir. 1995).

87. *Id.* at 239.

88. *Id.* at 240.

89. *Id.*

90. *Id.* at 245.

91. Courts struggling to apply the relatively new international law concepts that arise from the ATCA have routinely criticized the lack of clarity of 42 U.S.C. § 1983 state action cases. See *NGCUB v. Unocal, Inc.*, 176 F.R.D. 329, 345–46 (C.D. Cal. 1997).



An overly rigorous application of § 1983 analysis, which itself was supposed to be simply a tool for analysis of private-state relations under the evolving federal common law of ATCA jurisprudence, has now become the most significant barrier to liability. As the discussion below on standard of liability indicates, the best approach would be to use the Nuremberg line of cases to establish both the standard of liability and, when necessary, a relationship with state actors. If state action is required, then the question should simply be whether the party who perpetrated the human rights violations, and who the private party aided and abetted, was a state actor. Otherwise, as has been noted by at least one court, “[n]o logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law.”<sup>92</sup> A private party who knowingly aids and abets a state actor should not be absolved from liability under well-developed international law merely because of the irrelevant requirements of § 1983.

Even *Kadic*'s blessing of the application of § 1983 analysis to ATCA cases does not necessarily require a rigid application of concepts not relevant to the ATCA. The legislative history of the Torture Victim Protection Act reveals an understanding that § 1983 constructs should be applied to the “state action” requirement, but also noted specifically that “[t]he legislation is limited to lawsuits against persons who ordered, abetted or assisted in the torture . . . . Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.”<sup>93</sup>

Based on this clear statement that would allow for liability for a private party who aided and abetted a state actor, it seems that the role for § 1983 cases is in identifying who is a state actor. A private defendant need not himself be classified as a state actor provided he aided and abetted someone who is, based on the four tests available.<sup>94</sup> This is distinct from applying § 1983 to establish both the relationship and the standard of liability. An alternate finding renders the legislative history of the Torture Victim Protection Act meaningless.

### *C. The Standard of Liability*

Whether the case is one in which a private party can be liable regardless of state action or whether, based on the analysis above, § 1983 analysis must be applied to establish state action, the applicable standard of liability will be a major issue in determining whether the ATCA can successfully contrib-

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92. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D. N.J. 1999).

93. S. REP. NO. 102-249, at 8-9 (1991).

94. See *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) for the four recognized tests: public function, state compulsion, nexus, and joint action.

ute to the protection of human rights. Managers and other decision-makers for the MNC defendants will almost never pull the trigger or wield the machete themselves. The dirty work is done by paid security forces, as in Unocal and Exxon Mobil, or by vigilante squads, as in Coca-Cola and Del Monte. In all of these cases, the plaintiffs seek to prove that corporations directed the activities of the security forces and knew that human rights violations would and did occur in the process of the corporate "security" activities. The challenging legal question is how much participation or assistance must the MNC defendant provide to its hired guns in order to be legally responsible for the resulting harms. In what I can only hope will become known infamously as the "Unocal defense," Unocal argued to the Ninth Circuit that it was a "passive investor" in the Yadana Project, and that the atrocities that occurred in the construction of the pipeline were committed by Unocal's co-venturer and/or agent, the military regime.<sup>95</sup> Unocal merely profited from the wrongful acts and found the whole dirty business quite unpleasant.

Unocal's position is morally repugnant; responsible companies ought at least to refrain from doing business with the most brutal governments. In this case, the company voluntarily created a joint venture with the pariah military regime in Burma, yet blames any human rights violations on its lawless business partner. There was no gun to Unocal's head when the company entered into a business enterprise with the regime. Under the Nuremberg line of cases, Unocal has no "necessity" defense,<sup>96</sup> and should be liable for knowingly aiding and abetting the direct perpetrators of the violence.

It is absolutely essential to the development of the ATCA that the principle of aiding and abetting liability from the Nuremberg cases be firmly established. Otherwise, companies will be free to enter into business relationships with rogue governments and provide support to activities that violate human rights while avoiding liability. As long as a company keeps an artificial wall between the harmful acts that facilitate a business activity and the business activity itself, there will be complete immunity. This dangerous distinction evokes images of the mafia don hiring hit men through intermediaries under instructions to "make the problem go away," and then claiming not to know they were going to kill the guy. If you are Unocal, Exxon Mobil, or Coca-Cola, the situation is virtually identical. You cannot hire known killers to be your enforcers and then claim surprise or moral innocence when the enforcers do what they have always done. From a policy perspective, the ATCA needs to create the incentive for companies to ensure that security arrangements or other business dealings with known human rights violators do not result in violations.

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95. Appellees' Answering Brief at 21–25, *John Roe III v. Unocal Corp.*, No. 00-56628 (9th Cir. filed May 7, 2001) (on file with ILRF).

96. *United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952).

#### D. Corporate Parent/Subsidiary Liability

The law of corporations also presents a major potential barrier to establishing liability under the ATCA. In the Unocal case, for example, the company continues to assert that even if plaintiffs prove the company's complicity in the wrongful acts, liability attaches only to the Myanmar Gas Transportation Corporation (MGTC), a Bermuda corporation created by Unocal and its co-venturers to construct the gas pipeline in Burma.<sup>97</sup> Further, Unocal's interest in MGTC is held by Unocal Myanmar Offshore Company Ltd.(UMOC), another Bermuda-based subsidiary.<sup>98</sup> The plaintiffs should be able to pierce the various corporate veils based on traditional grounds that both MGTC and UMOC are severely undercapitalized and are mere instrumentalities of the parent company.<sup>99</sup> However, plaintiffs' victory in Unocal could simply provide an instruction course to companies on how best to meet the bare minimum requirements necessary to create a non-pierceable offshore corporation in the future. There are natural limits on how much capital the parent companies will put at risk in adequately capitalizing offshore companies in high risk environments, but it is conceivable that sufficient legal capitalization will fall far short of the assets needed to address liability for systematic human rights violations. Courts developing a federal common law under the ATCA<sup>100</sup> will need to be particularly sensitive to the corporate law questions. Notions of corporate separateness were developed at a time when the issue was entirely one of domestic jurisdiction—e.g., concerns about holding a parent company liable in California were ameliorated by the fact that a New York subsidiary was adequately capitalized. However, in dealing with offshore companies set up to avoid, rather than shift, liability, a different analysis should be applied. Parent companies should be liable based on factors showing that decisions to invest were made by the parent, initial capital was provided by the parent, and profits would be returned to the parent. If the parent company's lawyers are then able to create the illusion of separateness to offer plausible deniability to the parent, this should not cut off liability.

There are many other legal issues that may arise in an ATCA case, including the act of state doctrine,<sup>101</sup> forum non-conveniens,<sup>102</sup> and indispen-

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97. Appellees' Answering Brief at 48–58, *John Roe III v. Unocal Corp.*, No. 00-56628 (9th Cir. filed May 7, 2001) (on file with ILRF).

98. *Id.* at 59–60.

99. Appellants' Reply Brief at 21–26, *John Roe III v. Unocal Corp.*, No. 00-56628 (9th Cir. filed Aug. 17, 2001) (on file with ILRF).

100. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996) (holding that "[t]he Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law")

101. *NCGUB v. Unocal, Inc.*, 176 F.R.D. 329, 345–46 (C.D. Cal. 1997).

102. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000), *cert. denied*, 121 S.Ct. 1402 (2001).

sable parties.<sup>103</sup> However, these issues are not particularly unique to ATCA issues, and thus I do not deal with them here.

#### IV. LIMITATIONS OF THE ATCA AND THE CASE FOR UNIVERSALLY APPLICABLE ENFORCEMENT MECHANISMS

The ATCA will no doubt prove to be a useful tool for enforcing human rights norms, but this approach has major limitations and should not be viewed as an ultimate solution to the non-enforcement issue. First and foremost, the ATCA is limited to cases that can be brought in the U.S. federal courts against defendants over which there is federal jurisdiction. Thus, in the Unocal case, there was jurisdiction over the Unocal defendants because they are incorporated in the U.S. and have a principal place of business in the country. However, Unocal's joint venture partner, the French oil giant Total, was held not to be subject to federal jurisdiction.<sup>104</sup>

A second limitation to ATCA litigation is the necessarily narrow scope of the "law of nations." While the law of nations is evolving and expanding, we are far from international consensus on many issues crucial to human rights concerns such as a living wage, minimum health and safety standards, maximum hours, and sexual harassment. The ATCA presents the potential to address claims involving intentional physical or mental harm, but is not likely to reach less extreme but much more common claims, including abominable working conditions.

The other major limitations are simply practical. By definition, ATCA cases involve human rights violations in countries that allow such things to happen; in most cases, the government itself is involved in the wrongful acts. Victims in these cases are often terrified of making claims, and are not likely to have access to lawyers unless they are discovered by local organizations with U.S. connections. Further, given the conditions that often lead to human rights violations, it is often extremely difficult for lawyers to gather evidence and interview witnesses in the places where violations have occurred. In the Unocal case, for example, the plaintiffs' lawyers were not able to travel to Burma to interview witnesses because they could not get visas. Even if they could have traveled to Burma, they would have risked arrest or physical harm. Finally, the costs and time involved in bringing an ATCA case require that it be viewed as an extraordinary remedy, not lightly undertaken. The Unocal case is in its sixth year, and attorneys for plaintiffs have donated millions of dollars in legal fees to date, in addition to spending several hundreds of thousands of dollars in costs.<sup>105</sup> These are unusually expen-

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103. See, e.g., *NCGUB*, 176 F.R.D. at 357-58.

104. *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1190 (C.D. Cal. 1999), *aff'd*, 248 F.3d 915 (9th Cir. 2001).

105. A major source of funding for costs has been the Open Society Institute's Burma Project, which has supported the case from the outset because it presents a unique opportunity to enforce human rights in Burma.

sive test cases because they require substantial travel and large expenditures of time to address novel legal issues.

Recognizing the limitations of the ATCA, the ILRF continues to seek a more universal remedy to address human rights violations in the global economy. A major goal of our organization is to promote the creation of a procedure to enforce human rights on equal footing with property rights in the World Trade Organization and other regional trade agreements. Victims of human rights violations should not have to clear more hurdles and accept more limited access to remedies than the owners of intellectual property. The ILRF has developed a model provision for human rights to be added to existing and future trade agreements and is working with human rights organizations around the world to develop support for this approach. A series of papers have been published as part of the ILRF's *Workers in the Global Economy Project*.<sup>106</sup>

At this point in time, the ATCA, despite its limitations, remains the only current vehicle for direct enforcement of human rights norms. Until human rights are given the same priority as property rights, incidents of torture, murder, kidnapping and sexual assault will continue to be shocking, but routine, consequences of a lawless global economy. If the ILRF and other organizations are successful in getting large judgments against corporations using ATCA litigation, other companies will be deterred from violating human rights out of a fear of substantial legal liability. Successful litigation might also provide an incentive for some companies to join the dialogue about alternatives to litigation, including adoption of a social clause to add enforceable human rights norms to trade agreements.

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106. The project was funded by the Ford Foundation. The papers are available at <http://www.laborrights.org>.