

**Using the Alien Tort Claims Act to Introduce  
The Rule of Law to the Global Economy**

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## I. The Context for Assessing the Importance of Using the Courts to Establish a Rule of Law in the Global Economy

A major human rights controversy is brewing in the United States. Outrage is being expressed in all three branches of the American government. And it is the only human rights issue that has the ear of the Bush Administration. The burning issue? Transnational Corporations (TNCs) are up in arms because they are being hauled into court to answer for human rights violations committed in their international operations. They are demanding repeal of the law based on their fundamental right to make profits with absolutely no constraints on their treatment of workers or indigenous people.

Labor and human rights activists<sup>1</sup> in the U.S. are using the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, to sue corporations for human rights violations. This law, passed by the nation's founders in 1789 in the very first Congress, permits federal courts to hear cases brought by "aliens" for violations of the "law of nations." There is general agreement by legal scholars that the ATCA was passed to assure the nations of Europe that the new United States of America would respect and apply the "law of nations," and that foreign nationals could do business with America safe in the certainty that their legal claims for damages would not be subject to the whims of the extremely diffuse state legal systems. Largely dormant for many years, the ATCA was reinvigorated in the 1980's in cases against former military officers from Latin America who were residing in the U.S. and had been involved in torture and extra-judicial killing in their home countries. Several courts agreed that the ATCA applied to these situations, and the prospect of bringing the rule of law to human rights violators was launched. *See Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). There was virtually no dissent, judicially or politically, to opening the U.S. federal courts to foreign victims of human rights violations with the ATCA, and allowing individuals, usually former military officials, to be brought to justice in the U.S. The case against former dictator Ferdinand Marcos, after he fled the Philippines and took up residence in Hawaii, was perhaps the most prominent of these cases. *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir.), *cert. denied*, 115 S. Ct. 934 (1995).

Perhaps a testament of the great potential of the ATCA as a tool for bringing the rule of law to the global economy, once TNCs started getting sued for human rights violations, they banded together in their U.S. based lobbying groups, including the U.S. Council for International Business, the U.S. Chamber of Commerce, and the National Foreign Trade Council, and unleashed an aggressive campaign to immunize TNCs from the reach of the ATCA. This might otherwise be unremarkable since TNCs have never been shy about acting to advance their

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<sup>1</sup> In the interests of full disclosure, the author, as Executive Director and General Counsel of the International Labor Rights Fund, has brought many of the major cases against TNCs for human rights violations under the ATCA. For specific information on these cases, see [www.laborrights.org](http://www.laborrights.org).

interests. However, the objective reality of the TNC position should be cause for grave concern. Based on over 25 years of modern decisions interpreting the ATCA, it is clear that it is limited in its scope to violations of the “law of nations,” which applies only to those who **knowingly commit or assist in genocide, war crimes, slavery, summary execution, torture, unlawful detention and crimes against humanity**. Thus, despite a public embrace by TNCs of codes of conduct, and their espousal of the rhetoric of “corporate responsibility”, the sole instance where there is the prospect of a binding legal standard, that only applies to truly extreme cases, the corporate community is absolutely adamant that something must be done to relieve them from the application of the ATCA.

Naturally, in the current political environment in the U.S., when large TNCs, especially oil companies, requested assistance from the Bush Administration, it was offered enthusiastically. Adding a further cynical edge to the overall situation, the Bush White House has cloaked its opposition to the ATCA in the necessities of the “war on terror.” In an amazing feat of acrobatic dishonesty, Bush asserts that the ATCA cases may offend the foreign governments where the claimed atrocities took place, and these governments might then be reluctant to cooperate with the U.S. in the war on terror. This position was expressly articulated in a letter from the State Department’s Legal Advisor, William H. Taft IV to the judge handling the case against Exxon Mobil for complicity in human rights violations in Aceh, Indonesia, urging dismissal of the case on foreign policy grounds. More recently, the Bush’s Department of Justice has filed a series of briefs in several ATCA cases urging that the historic statute, and decades of consistent interpretation, be tossed aside. According to Bush’s Department of Justice, the ATCA does not provide any person with a specific right to sue. It is merely a general statement of jurisdiction.

Without getting sidetracked into the legal technicalities of the ATCA issues, it is important to discuss what this controversy actually means. At an overall policy level, it is alarming that at this particularly moment in history, with the U.S. engaged in a lonely “war on terror,” it would seem that we need the ATCA more than ever to show the world, once again, that the U.S. respects the law of nations, and that the war on terror has a principled purpose to expand, not contract, respect for the rule of law internationally. Conversely, if multinationals are immunized by the Bush Administration for their role in torture, murder and slavery for profit on unsupported assertions about the effects on foreign relations, the rest of the world will see this for exactly what it is – a double standard. The Bush Administration took the country to war over perceived or potential threats to U.S. citizens, but affirmatively acts to prevent U.S. corporations from facing charges when they commit human rights violations that have, in fact, terrorized real people, who just happen not to be born in the U.S. This is discussed mainly to demonstrate just how much power is behind the resistance to introducing the rule of law to the global economy, and how far we are from having a real, honest, objective debate about it.

Tremendous energy is being put into good faith efforts by some governments, UN agencies, NGOs, and even a handful of companies to construct a regime for introducing some semblance of social standards for TNCs operating in the global economy. Other writers in this

Volume are addressing some of these developments. But if the TNCs are acting aggressively to repeal the ATCA, which only applies to knowing violations of the most heinous and universally condemned human rights violations, we should not allow them to sidetrack us into a parallel track for years of discussions about the terms of “voluntary codes of conduct” or any other non-binding methods of enforcing social standards. How serious can TNCs be about accepting a commitment for a much broader range of issues included in the typical code of conduct when they refuse to be bound by universally accepted human rights standards prohibiting murder, torture and slavery?

To be able to truly discuss the importance and methodology for using the rule of law to require TNCs to respect human rights norms, it is useful to first examine several of the key pending ATCA cases. This will illustrate the scope of the problem with a global economy with no agreed rules. It will also introduce a note of reality into a discussion that cannot be held in the abstract. Today, in the year 2004, nearly 60 years after the Nuremberg Tribunals found that private companies that had knowingly assisted the Nazi regime in using forced labor from concentration camps were themselves liable for the crime, the flagship brands of the global economy are profiting from slavery, torture and murder, and are attempting to assert the non application of international law to their conduct.

## **II. Modern Atrocities – the Reality of the Global Economy**

The following is a brief summary of the key ATCA cases that have been brought by the ILRF against major TNCs for violating fundamental human rights. The facts disclose a reality that simply should not be ignored in seeking to address the issue of how to best address human rights violations in the global economy. The flagship brands of the global economy are knowingly profiting from slavery, child abuse, rape, torture, and of course, more general exploitation of requiring desperate people to endure miserable conditions in sweatshops just to keep their subsistence job and stay alive a while longer. Many more companies simply turn a blind eye towards exploitation and commit the sin of omission – they do nothing, but knowingly benefit.

### **A. Unocal Corporation and Forced Labor in Burma (Myanmar).**

In late 1992, Unocal Corporation entered a joint venture with the Government of Burma and Total, the French oil giant, to build a natural gas pipeline in Burma. Before undertaking the project, Unocal hired outside consultants to conduct a “risk assessment.” The consultants expressly warned Unocal that the government of Burma in virtually all walks of life uses systematic forced labor. Unocal also had access to years of reports by the U.S. Department of State, the International Labor Organization, Amnesty International and Human Rights Watch.

Despite the express warnings the company received, it decided to go forward with the project. Well into the construction process, Unocal hired another outside consultant, John Haseaman, a former military attaché at the U.S. Embassy in Burma, who specifically found that, “[b]ased on my three years of service in Burma, my continuous contacts in the region since then, and my knowledge of the situation there, my conclusion is that egregious human rights violations have occurred, and are occurring now, in southern Burma. The most common are forced relocation without compensation of families from land near/along the pipeline route; forced labor to work on infrastructure projects supporting the pipeline . . . ; and imprisonment and/or execution by the army of those opposing such actions.” See *John Roe III v. Unocal Corporation*, 2002 WL 31063976 \* 7-8 (9<sup>th</sup> Cir. 2002). The company did nothing to alter its practices in response to these explicit warnings.

In 1996, a group of Burmese citizens who were forced to perform labor for the Unocal pipeline filed an ATCA case against the company. They had escaped from the ongoing forced labor requirements into Thailand. Since the case was filed, Unocal has engaged in a public relations campaign that claims falsely that the company is being hauled into court simply for investing in a gas pipeline project in Burma. The three different courts that have reviewed the evidence have all concluded that Unocal knowingly benefited from slave labor. In its initial opinion,<sup>2</sup> the Ninth Circuit Court of Appeals held that plaintiffs’ proffered evidence that Unocal and its co-venturers provided financial and material support to the military security forces *knowing that* these forces were using forced labor. The court further held that there is evidence of Unocal’s “*active participation*” in the forced labor activities. *Unocal Corp.*, 31063976 at \* 36, n. 22. Far from simply being a passive investor, the evidence establishes that Unocal

- hired specific military battalions to perform security services, clear the pipeline route, and build project infrastructure. Villagers forced at gunpoint to work for Unocal’s project performed this work.
- used photos, maps and surveys to show the military where they needed helipads built and facilities secured.
- provided money, food, and equipment to the military forces that were using slave labor.
- made threats to human rights groups that any threats to the pipeline would bring more soldiers and more forced labor.

### **B. Exxon Mobil’s Security Forces in Aceh, Indonesia Tortured and Murdered Villagers Living Near the Company’s Natural Gas Facilities.**

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<sup>2</sup> In June, 2003, the Ninth Circuit Court of Appeals held an en banc review of the Unocal case in order to address the source of law that should be applied in defining the “law of nations” for purposes of the ATCA. It is now holding its final decision until the Supreme court issues its ruling on the ATCA in *Sosa v. Alvarez-Machain*.

The ILRF's case against Exxon Mobil alleges that the company, much like Unocal, hired the Indonesian military to provide security for its natural gas facilities in Aceh, Indonesia. Exxon Mobil did so knowing that these troops, like those responsible for the massacres in East Timor, would likely engage in massive human rights violations against the local population. In fact, the Exxon Mobil troops began a reign of terror in the area, and are responsible for countless atrocities. The company received reports of human rights violations committed by its security forces from local groups, international human rights organizations, the U.S. Department of State, international press, and, surely, from its own employees on the ground. Despite this knowledge, Exxon Mobil

- required the Government of Indonesia to designate one or more specific battalions to provide security for the company.
- paid a regular fee to the security forces, and continues to do so, despite the mounting evidence of atrocities committed by the security forces.
- provided the security forces it hired with equipment, including earth moving equipment that was used to create mass graves.
- provided the security forces with land for barracks that were used as torture centers
- coordinated security needs with the brutal military, and directed these forces according to the company's operations and needs.
- demanded in 2002 that the government increase security, and did so without regard to ongoing human rights violations.

The ILRF represents 11 villagers who suffered human rights violations, including extrajudicial killing, torture, and crimes against humanity. All of them have identified the specific Exxon Mobil forces as responsible for the violations. Several of them were tortured by the security forces inside the Exxon Mobil compound in facilities provided by the company for the use of its security forces. Moreover, all of the claims date from 2001, well after Exxon Mobil had specific knowledge of massive human rights violations by its hired guns, and continued to provide financial and material support to them. Exxon Mobil's motion to dismiss is pending in the U.S. District Court for the District of Columbia. Among the issues before the court is the legal effect of the State Department's letter seeking to immunize from liability Exxon Mobil.

### **C. Coca-Cola's Use of Paramilitary Death Squads in Colombia to Keep Unions Out of its Bottling Plants.**

For years there has been comprehensive reporting from Colombia that trade union leaders are targeted by paramilitaries for murder and other human rights violations. Much of this violence is directed at leaders of unions at multinational firms, including the bottling plants used by the Coca-Cola Company. One union representing workers at Coca-Cola, Sinaltrainal, has sustained heavy losses of leaders who were employed by the company. Since at least 1996,

Sinaltrainal has been writing letters to Coca-Cola demanding that the targeting of trade union leaders at Coca-Cola bottling plants be stopped. No action was taken by the company to prevent the open association between paramilitaries and managers of the Coca-Cola bottling plants in Colombia. The ILRF case against Coca-Cola is on behalf of the trade union and five individual union leaders who were murdered, tortured, and/or unlawfully detained. The allegation is that the paramilitaries were brought into the bottling plants to use violence to exterminate the trade union with the specific consent of the managers of the Coca-Cola bottling plants. In this case, the connection to company officials is quite direct – plant managers brought the paramilitaries into the plants for the specific purpose of terrorizing union members. For example:

- at the Coca-Cola bottling plant in Carepa, Colombia the manager appeared with several paramilitary members before the assembled workers. He warned them to cease their union activities or face retribution from the paramilitaries.
- when the leaders of the union persisted in their representation of workers, the paramilitaries returned and murdered Isidro Gil, the head of the local union, inside the plant.
- the other workers were again gathered by the plant manager and told to resign from the union or face the same fate as Mr. Gil. All of the union members either resigned or fled the area.

The ILRF case raises several other specific instances in which managers from the Coca-Cola bottling plants engaged paramilitaries to torture and kidnap union leaders to discourage their trade union activities. Coca-Cola purports to have a “code of conduct” that upholds fundamental human rights in all of its operations worldwide, but is claiming in the ILRF case that Coca-Cola is not responsible for what happens in its bottling plants in Colombia. Coca-Cola claims to be able to profit from its subsidiaries, but to have absolutely no responsibility to those employed by them.

#### **D. Drummond Company’s Use of Paramilitary Death Squads in Colombia to Murder Leaders of Colombian Mine Workers Union.**

Similar to the situation with Coca-Cola, Drummond Company, an Alabama coal mining company, has aggressively used paramilitary death squads in Colombia in an effort to eliminate the leaders of the Mine Workers Union that represents workers at the company’s coal mine in Colombia. In early 2001, the leaders of the union were engaged in heated negotiations with Drummond over several key issues, including the demand that the company provide better security for workers to protect them from paramilitaries that were based, along with regular military, on Drummond’s property. According to several witnesses, the paramilitaries were operating as a private security force to protect Drummond’s facilities from leftist guerrillas in the area. In the midst of the negotiations, two of the union’s top leaders were pulled off a company bus by paramilitaries who said in front of all of the workers on the bus, “these two have a

problem with Drummond.” One was shot in the head in front of the other workers, while the other was taken away in a car, and his dead body, which showed clear evidence that he had been tortured, was found later that day. For a time, no one would take over the union leadership posts out of fear that they too would be killed. Finally, in September 2001, Gustavo Soler Mora assumed the Presidency. He renewed negotiations with Drummond, and sought again to bargain for better security arrangements for the workers. On October 5, 2001, within weeks of becoming President of the union, he too was pulled off a company bus and murdered by paramilitaries.

The ILRF represents the surviving family members of the three murdered trade union leaders. The case alleges that Drummond’s management in Colombia authorized the paramilitaries to target the union leaders for murder, and provided the death squads with financial and material support, including:

- paramilitaries, along with regular military, were provided land for bases on Drummond’s property.
- funds for security “services” for the paramilitaries are wired in U.S. dollars to Colombia from the parent company in Alabama.
- paramilitaries based on Drummond’s property are provided with fuel, along with other supplies and equipment.
- the manager of Drummond’s Colombian operation repeatedly threatened the union leaders with violence if they persisted in their demands to the company

#### **E. Del Monte’s Use of Torture to Eradicate the Leadership of the Union Representing Workers in the Company’s Banana Plantations in Guatemala.**

Fresh Del Monte Produce (Del Monte) owns and operates several banana plantations in Guatemala. These plantations have long been unionized by SITRABI, one of the most respected and professional unions in Guatemala. In 1999, Del Monte and SITRABI were in negotiations regarding a massive layoff of workers in violation of the collective bargaining agreement. At an impasse that left hundreds of union members out of work, the leaders of SITRABI announced that the remaining workers would stage a walk out the next day. The evening before the planned work stoppage, Del Monte’s local managers organized a group of local thugs and abducted the key leaders of SITRABI. The union leaders were taken to the SITRABI headquarters and tortured with guns and threats of death. 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. The ILRF represents seven of the leaders who allege that high level Del Monte managers were directly responsible for planning and implementing their torture and unlawful detention. Their evidence of participation by Del Monte management employees includes:

- Del Monte issued a threat to civic officials in Guatemala that if SITRABI continued to engage in union activities on the company's plantation, Del Monte would depart from the area.
- a regional Del Monte manager met with the leaders of the gang before they seized the union leaders.
- Del Monte's Director of Security for the Guatemala banana plantations participated in the capture and torture of the SITRABI leaders.
- Del Monte employees and agents prepared resignation letters for the union leaders to sign while guns were pointed at their heads.
- the morning after the union leaders were forced to resign from the company and the union at gunpoint, Del Monte's General Manager for the Guatemala operations took their resignation letters to the Ministry of Labor, where he produced them as evidence that the labor dispute was concluded.

#### **F. Occidental Petroleum's Role in the Santo Domingo Massacre in Colombia.**

There is no dispute that there was an aerial assault on the small town of Santo Domingo, Colombia, which led to the deaths of 19 civilians. In the case filed against Occidental, Plaintiffs allege that on December 13, 1998, the Colombian Air Force ("CAF") -- an official branch of the Colombian military receiving direct funding from Occidental in return for protecting Occidental's pipeline in Cano Limón -- dropped U.S.-made cluster bombs upon Santo Domingo. The attack was apparently intended to kill leftist guerrillas in the area that Occidental believed were attacking its pipeline. However, despite the utter lack of justification for murdering innocent villagers in the process, there is no question that no guerrillas were found in the destroyed village among the dead and wounded. Occidental's role in this is beyond dispute:

§ The CAF, carrying out this raid in US-made Blackhawk helicopters, received the coordinates for the bombing directly from co-defendant AirScan, Inc., which was working in its capacity as a security contractor and agent of Defendant Occidental.

§ AirScan, through three of its U.S.-born employees who were flying a Skymaster plane at the time -- the Skymaster plane having been provided directly by Occidental -- provided aerial surveillance for this mission during the bombing, helped the CAF identify the target for bombing and chose the places for Colombian military troop disembarkment during the mission.

§ The bombing was planned by the CAF and AirScan in Occidental's complex in Cano Limón, Colombia.

### **G. Daimler Benz and the Dirty War in Argentina**

The most recent ILRF case was filed against DaimlerChrysler Corporation, the successor in interest to Daimler Benz, which owns and operates a major manufacturing facility in Argentina. During the “dirty war” in Argentina, Daimler Benz, like many other companies operating there, used the political cover of the campaign against leftists generally to target the leaders of its trade union to be “disappeared.” The evidence is clear that:

- § Daimler Benz managers provided specific names of trade union leaders to the military police in Argentina and these leaders were then “disappeared.”
- § Managers at Daimler Benz spoke publicly in favor of the process of ridding industry of “subversives.”
- § High level managers at Daimler Benz allowed military police forces to be stationed in the Mercedes plant in Argentina to intimidate and terrorize workers.
- § Managers at Daimler Benz provided the military police with personal details about the trade union leaders the company had designated for disappearance, which allowed the police to kidnap the workers at their homes.

The technical details and legal status of these cases are available on the ILRF’s website, [www.laborrights.org](http://www.laborrights.org). There are numerous other cases brought by other organizations, and these represent the tip of the iceberg in terms of modern day atrocities being committed in the name of TNCs seeking to enhance their profit and to maintain absolute control over their operations. In the Maquiladoras of Mexico and Central America you will find the more routine atrocity of the global garment industry running true sweatshops where young women work so hard that within 2-3 years they are used up – and then a fresh batch is brought in. They work 60-80 hours a week, often are not paid overtime, they suffer from stress, repetitive motion disorders, respiratory infections, sexual harassment (rape, not bad jokes). They can’t have a normal family life working these oppressive hours. An entire generation of the global South is being sacrificed for higher profits for global companies. And there is no social safety net – who is going to take care of a generation of disabled, unemployable former factory workers. This is the reality of the global economy.

### **III. Getting Away With Murder (and Torture and Slavery) in the Global Economy**

The most remarkable conclusion to draw from the facts of the various ATCA cases discussed in the preceding section is that absent the ATCA, the TNCs could literally get away

with murder, torture and slavery. This is not mere rhetoric – it is the essence of the global economy. Globalization, simply put, is the process of global commerce in which private companies, chartered in and protected by the laws of the countries of the so-called developed world, and assisted by rules created by global institutions, produce goods in low wage countries with little social regulation and sell the products back to the developed world. In the race to compete in the global economy, corporations from countries with highly evolved social protections have shifted production to countries which they have sought out due to the lack of social protections, yielding cheap, unregulated labor and little or no environmental compliance costs. The working poor are experiencing the global economy and the so-called developed world as exploitation.

This willful end run of the most basic principles of civilized society highlights the vacuum that globalization has created in terms of social norms. Unocal and Total could not even dream of using slave labor in their home countries. They can get away with it in Burma because the host government, one of the most brutal military dictatorships on earth, is a participant in the process and surely will not seek to enforce its law on this issue. On a much broader, but less extreme scale, hundreds of millions of workers in China are prohibited from exercising their rights to associate, organize or bargain collectively. These rights are enshrined in virtually every national legal system, as well as in the major international legal frameworks, including the United Nations' Declaration of Human Rights and the International Labor Organizations' Declaration of Fundamental Principles and Rights at Work. U.S. and European garment, toy and footwear companies now produce most of their products in China, precisely because the workers have no rights, and therefore can be made to work long hours for little pay. Name brands like Nike, Toys R Us and Wal-Mart, know that the workers making their products are laboring under conditions that would violate major labor and environmental laws in their home countries and in any country where they sell their products. They know that if the workers protest their conditions in China, they will be fired, imprisoned or worse. But the price is right, and it has become acceptable in the global economy to do what you can get away with in pursuit of profit. The companies assume that the current system will never make them answer to their distant workers.

The staggering fact is that there is absolutely no internationally applicable law, absent national laws like ATCA, that create a **binding** requirement prohibiting TNCs from violating the fundamental human rights of their workers. For example, the most revered source of international human rights norms is the Universal Declaration of Human Rights, adopted by the UN in 1948. It is a magnificent statement of the fundamental human rights all persons should enjoy. Here are some examples of its key provisions:

**Art. 3** “Everyone has the right to life, liberty and security of person.”

**Art. 4** “No one shall be held in slavery or serfitude; slavery and the slave trade shall be prohibited in all their forms.

**Art. 5** “No one shall be subjected to torture or to cruel, inhumane or degrading treatment

or punishment.”

**Art. 25** “Everyone has the right to a standard of living adequate for the health and well-being of himself, and of his family, including food, clothing, and medical care . . . “

**Art. 26** “Everyone has the right to education. . . .”

These fundamental rights, which we would all agree should be provided to everyone, particularly in situations where TNCs, with the financial resources to ensure provision of these rights are in control, have no enforcement process. The following are the key “enforcement provisions of the Universal Declaration:

**Art. 8** “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

**Art. 28.** “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

That’s it. There is no enforcement mechanism, no penalty. Human rights violations are left to the hopeful mechanism of moral persuasion and damning reports, or to national enforcement processes, which as noted, is not reasonable given that TNCs often locate their offshore operations in places where they can be assured the national laws won’t be enforced with respect to human rights.

Other international organizations likewise are provided with solid standards, but no power to enforce. A text book example involves the International Labor Organization (ILO)’s efforts to get Burma to cease its systematic use of forced labor, which violates ILO Convention No. 29. After years of reports issued by the ILO’s Committee of Experts, the ILO intensified its efforts and created a special Commission of Inquiry was created in 1997 to focus on the forced labor issue. The Commission issued an incredibly thorough documentation of the government’s use of forced labor. The ILO is now exploring under its Article 33 powers what steps it might take to get member governments to assist in putting pressure on the military regime, but without any real enforcement power, the ILO is left with trying to persuade other governments to develop effective pressure on Burma. And this is still one step removed from reaching Unocal and Total, the two companies that are benefiting from forced labor in Burma. The ILO, and the UN for that matter, has authority to raise issues with governments, not private actors.

With no enforceable mechanisms available, human rights activists have largely settled for reporting atrocities, publicizing the endless stream of violations, in hopes that sympathy, or empathy, hostility, something, will energize people to do something. The TNCs offer us only their assurance that they will “voluntarily” comply with their own codes of conduct, which, of

course, they will be responsible for monitoring. As the examples of the ATCA cases and the other well known examples of sweatshops and other extreme exploitation indicate, the global economy remains essentially lawless. Companies are free to participate in human rights violations because they are confident that the host governments will not enforce local laws because the governments are themselves participants in the human rights violations.

#### **IV. An Action Plan to Bring Human Rights to the Global Economy.**

At the dawn of the civil rights movement, in his famous Letter from a Birmingham jail, Dr. Martin Luther King declared: "Freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed." In the context of bringing justice to the global economy, these great words mean in practice that the human rights movement needs leverage. We need real pressure that can hurt the bottom line of the TNCs before we can negotiate for and achieve a meaningful, binding mechanism to require them to comply with fundamental human rights norms. There is a growing, but diffuse, social movement that simply lacks a specific, achievable focus. The social unrest as evidenced by raging protests in Seattle, Washington, Genoa and beyond, as well as the rising number of spontaneous strikes and other protests by workers in the developing world, demonstrate an overall sense that the world is out of balance, that globalization in its present form is not good for people. The people are right, but this diffuse unrest lacks a unifying theme and a specific objective.

Very simply, the clear first step is to use what we have now to create leverage. The ATCA cases are a significant first step. If the plaintiffs prevail in one or more of those cases, the impact would be substantial. First and foremost, a large jury verdict against a company like Unocal (now settled) or Exxon Mobil, and in the U.S. jury verdicts can be huge, would have an immediate deterrent effect on that company, but also all of the other companies engaged in activities that are harming people in the global economy. It will no longer be risk free to use brutal military thugs to act as security forces. It will no longer be highly profitable to murder and torture trade union leaders if the victims can bring legal actions.

A second major consequence of success on the legal front will be that shareholders, whether individuals or institutional investors, will begin to assess whether a specific company's value is susceptible to negative impact from a human rights lawsuit. This will then enlist the investigative skills and resources of fund managers who would suddenly have a fiduciary duty to their clients to include human rights risks in their normal assessments of a TNC's market value.

A third benefit of a successful legal strategy will be to create concrete situations to organize a consumer campaign around. There are lots of campaigns out there, but most of them could easily continue in perpetuity simply because they do not have a specific demand or objective. With a legal case focussed on a specific event, there can be a more focussed campaign with the added leverage of the lawsuit to provide pressure to the TNC to change its practices and adopt a meaningful program to incorporate compliance with human rights norms into its way of doing business. A good example is the global campaign against Coca-Cola. The campaign began following the filing of a lawsuit against Coca-Cola for its role in murdering and torturing trade union leaders at its bottling plants in Colombia. Because Colombia itself is an extreme example of a situation in which trade union leaders are endangered by right wing death squads and the complicity of the government, the campaign quickly appealed a wide spectrum of labor and human rights groups. Trade unions from Ireland to Australia have joined the movement. In addition, student organizations have become active, including United Students Against Sweatshops (USAS). Current information on the campaign is available at [www.stopkillercoke.org](http://www.stopkillercoke.org).

The movement to use the rule of law to require TNCs to respect human rights has already begun with the wave of cases brought under the ATCA. If upheld by the U.S. Supreme Court,<sup>3</sup> the ATCA presents the concrete prospect for enforcing a narrow group of universal rights – slavery, torture, murder, unlawful detention, crimes against humanity, against corporations. This has the potential to change the entire mentality of the global economy – you couldn't get away with murder. Also is a way to begin establishing a culture of respect for the rule of law. Even if the ATCA is somehow limited in its scope, a parallel law, the Torture Victim Protection Act (TVPA) was passed by the U.S. Congress in 1992. While it applies only to torture and extrajudicial killing, it was passed specifically by Congress to affirm that U.S. courts should be open to victims of torture and murder. In addition, it is possible in the U.S. to use the various state courts to bring cases for physical violence, torture, and other crimes. Indeed, Plaintiffs in both the Unocal and Del Monte cases have also filed state court actions in California and Florida, respectively. The major hurdle in these cases is the doctrine of *forum non conveniens* — the Plaintiff must establish that the forum where the injuries occurred is not an adequate forum. In the referenced cases, the courts have already ruled that Burma and Guatemala, due to the dangers of violent reprisals and corruption, are not adequate forums, so the cases can be brought in U.S. state courts.

There are other limitations in any case that is brought in the U.S. courts, regardless of whether the case is in federal and state court. First, the cases can be brought only against defendants over which there is personal 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, Total, was

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held not to be subject to jurisdiction. Second, many of the TNC cases present the issue of corporate identity and liability for subsidiaries. Companies facing possible liability will be much more diligent in doing everything possible to create offshore corporate entities that can be identified as the key actor. So far, however, traditional doctrines of piercing the veil and agency have proven to be effective. From a practical perspective, the more likely the host government is lawless, the less likely that any real assets will be entrusted to a locally based corporation. This is an area that must be addressed at some point with new legislation to reflect the realities of corporate structure in the new field of the global economy.

The other major limitations are simply practical. By definition, the ATCA and other human rights cases involve human rights violations in a country that not only allows such things to happen, but most likely has government involvement in the wrongful acts. This means that the victims are likely to be terrified of making claims, and are not likely to have access to lawyers unless they are discovered by local organizations that also have relationships to lawyers who could bring cases in a safe forum. Further, given the conditions present to lead to human rights violations, it will be extremely difficult for lawyers to gather evidence and interview witnesses. Again, for example, in the Unocal case the lawyers for the plaintiffs were not able to travel to Burma to interview witnesses because they could not get visas, and even if they could, they risked arrest or physical harm given the mission of proving the government's role in human rights violations.

Finally, the costs of bringing international human rights cases, and the time involved, demonstrate that this should be viewed as an extraordinary remedy, not lightly undertaken. The Unocal case took seven years before finally settling for about \$31 million, 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. These are unusually expensive test cases because they require substantial travel, and large expenditures of time to address novel legal issues.

Nonetheless, even with the limitations, a legal strategy presents the sole concrete option for holding TNCs accountable to *binding* standards of human rights norms. For this strategy to succeed, it is essential to have a broad based approach using the legal systems of numerous countries. Reliance on the U.S. courts, in the current political environment, is not a reliable approach. Indeed, lawyers in France have managed to have a criminal case lodged against Total, for its role in using slave labor in Burma. Likewise, in Belgium, a case is pending against Total's parent, ElfTotalFina under a relatively new universal jurisdiction statute. Courts in England have exercised jurisdiction over offshore operations of British TNCs and have established in the Pinochet case the basis for the exercise of universal jurisdiction. What is needed is creative and dedicated lawyers to use these initial prospects to bring cases in these countries and others to hold TNCs accountable.

In conclusion, it is important to come back to the initial objective – finding ways to hold TNCs accountable. Litigation is time consuming and expensive. However, if the legal strategy is successful, then we will have leverage to negotiate for a better, more efficient, and user friendly process to allow workers and indigenous people to assert their legal rights against TNCs, and to gain the daily protection that binding rules of law can provide. There are two creative ideas circulating. The first is to take the momentum and substantive work of the code of conduct movement and establish a process in which the codes of conduct become legally binding. Second is to include a “social clause” in the various trade agreements in force, including the World Trade Organization (WTO). The major reason why these initiatives are not currently moving forward is the fierce resistance of the TNCs, which currently are very conscious of the temporary hiatus they are enjoying from the rule of law. Forcing these TNCs to go to court to defend their profiteering will get them to the negotiating table to work on a longer term solution.

We will eventually prevail simply because the TNC position is indefensible. Indeed, virtually all of the CEOs of the major TNCs insist that their company is the epitome of corporate social responsibility. These leaders claim that their company would never violate human rights and their company is committed to human rights. They cite codes of conduct their companies have proudly issued in a whirlwind of self-congratulatory praise. They list the voluntary programs their companies have joined for self-monitoring their compliance with human rights standards. The really desperate ones cite the schools and hospitals their companies have built in the places where the atrocities committed for profit cannot be denied. So they don't deny that it is necessary and appropriate to have rules to protect human rights – they are just hoping through clever public relations exercises to delay for a while longer the period in which such rules are not binding. A successful legal strategy can change that dynamic.