

Separating Fact from Fiction in the Debate over Application of The Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations

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THE ALIEN TORT Claims Act (“ATCA”)¹ was passed by the first Congress in 1789 and provides federal courts with jurisdiction over violations of the “law of nations.” Largely dormant for many years, the ATCA was revived in *Filartiga v. Pena-Irala*,² a 1980 decision from the Court of Appeals for the Second Circuit. There, a former police official from Paraguay who was residing in the United States was found subject to suit by one of his former prisoners, whom he had tortured. Several subsequent courts agreed that the ATCA was available for “modern” human rights cases, and the legal process for bringing the rule of law to human rights violators was launched.³ To make clear that Congress agreed with this development, the Torture Victim Protection Act (“TVPA”) was passed with wide bipartisan support in 1992.⁴ It applies only to torture and extrajudicial killing, and the committee reports in both the Senate and House expressly stated that the ATCA remains a viable and distinct avenue for addressing other violations of the law of nations.⁵

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1. 28 U.S.C. § 1350 (1993).

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

3. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 240–41 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); *Filartiga*, 630 F.2d at 887; *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994), cert. denied, 532 U.S. 941 (1995); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996).

4. See 28 U.S.C. § 1350, note 2 (Supp. 2002).

5. See H.R. REP. NO. 102-367(I), at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84 (explaining that the Torture Victim Protection Act (“TVPA”) was passed to codify *Filartiga*, and that the Alien Tort Trade Claims Act (“ATCA”) should be viewed as a parallel remedy that can also accommodate future evolution of customary international law); see also S. REP. NO. 102-249, at 4–5 (1991).

I. Introduction—Framing the Debate

There was virtually no dissent, judicially or politically, to opening the federal courts to foreign victims of human rights violations with the ATCA and TVPA, and allowing individuals, usually former military officials, to be brought to justice in the United States.⁶ The case against former dictator Ferdinand Marcos, after he fled the Philippines and took up residence in Hawaii, was perhaps the most prominent.⁷

In 1996, beginning with a case filed by the International Labor Rights Fund (“ILRF”) against Unocal Corporation for using slave labor to construct a natural gas pipeline in Burma, a series of cases have been brought under the ATCA and TVPA alleging that corporations have knowingly participated in human rights violations.⁸ The prospect of facing scrutiny for human rights violations, and possibly having to pay large damage awards, has alarmed the international business community, which has declared war on the ATCA. *Business Week* reported that on November 18, 2002, business groups met to plot a strategy to repeal the ATCA or otherwise limit its application to corporations.⁹ Among the groups participating are USA Engage and the National Foreign Trade Council (“NFTC”), two lobbying groups representing multinational corporations.¹⁰ These groups are using their resources and access to lobby the Bush Administration and Congress for relief from the reach of the ATCA, and are seeking either a legislative rescue from ATCA cases, or a political bailout through intervention by the Justice Department seeking dismissal of the cases on “foreign policy” grounds.¹¹

6. In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 800 (D.C. Cir. 1984), Judge Bork took issue with whether the ATCA provided a right of action, and argued that it was simply a limited grant of jurisdiction. In passing the TVPA, Congress expressly rejected Judge Bork’s position. See *supra* note 5; see also *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (holding “[t]he interpretation of international law in [*Kadic*] in 1995 is far more timely than the interpretations set forth in *Tel-Oren*, which examined international law as it stood almost 15 years ago”); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 22 n.5 (D.D.C. 2000). Thus, Judge Bork’s position has been uniformly rejected.

7. See *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 532 U.S. 941 (1995).

8. A summary of the ILRF’s cases is in section III, *infra*.

9. See Paul Magnusson, *Making a Federal Case out of Overseas Abuses*, *Bus. Wk.* Nov. 25, 2002, at 78.

10. On file at the ILRF is the program agenda for a November 14, 2002 meeting on the ATCA convened by USA Engage and National Foreign Trade Council (“NFTC”).

11. See Magnusson, *supra* note 9, at 78.

Recently, Exxon Mobil, the United States oil giant, and Rio Tinto, a British mining company, managed to get the State Department's Legal Advisor, William H. Taft IV, to intervene with the courts and request that pending ATCA cases be dismissed on foreign policy grounds.¹² Reaction against the Bush Administration's enthusiastic intervention in pending cases, which is nothing less than an attempt by the executive branch to nullify the ATCA, has been strong. Fifty members of Congress sent a letter to Secretary of State Colin Powell expressing concern over the State Department's intervention in the Exxon Mobil case.¹³ In a brief filed with the court, the ILRF argued that the Bush Administration was blatantly violating the separation of powers doctrine by seeking to prevent the enforcement of a statute that was passed by Congress and signed into law by the President.¹⁴ This position was supported by the Declaration of Harold Koh, who was Assistant Secretary of State for Democracy, Human Rights and Labor in the Clinton Administration, and is now Professor of Law at Yale Law School. Professor Koh cited extensive case law to support his conclusion that "numerous federal courts have already adjudicated claims similar to those presented [in the Exxon case], making clear that such claims are subject to judicially manageable standards and do not require policy determinations that properly fall within non-judicial discretion."¹⁵

The business community's attack on the ATCA cannot withstand objective legal analysis mainly because the ATCA case law prior to the first cases being brought against corporations is well reasoned, strongly supported by precedent, and nearly unanimous in holding that the ATCA does allow claims for violations of the law of nations to

12. The Exxon Mobil letter is on file with the ILRF, and is posted at www.laborrights.org. See Letter from William H. Taft, IV, Legal Advisor, Department of State, to Louis F. Oberorfer, District Court Judge, United States District Court for the District of Columbia (July 29, 2002), available at www.laborrights.org (last visited Mar. 11, 2003) (on file with author at ILRF) [hereinafter "Taft Letter"]. The Exxon Mobil court has yet to rule on whether the letter has any legal effect, or is simply an advisory opinion. The Rio Tinto letter preceded the Exxon Mobile letter, and the court there dismissed the case based upon the State Department's arguments. See *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1179-83 (C.D. Cal. 2002).

13. Letter from Congressional members, to Honorable Colin Powell, Secretary of State, United States Department of State (Oct. 8, 2002), available at www.laborrights.org (last visited Mar. 11, 2003) (on file with author at ILRF).

14. Supplemental Opposition to Motion to Dismiss, available at www.laborrights.org (on file with author at ILRF). ILRF's co-counsel in the case are Michael Hausfeld and Agnieszka M. Fryszman of Cohen, Milstein, Hausfeld & Toll in Washington, D.C.

15. Aff. of Harold H. Koh, *In re John Doe I v. Exxon Mobile Corp.* ¶ 26 (Aug. 28, 2002) available at www.laborrights.org (on file with author at ILRF) [hereinafter "Koh Affidavit"].

be brought by aliens in federal court. To take on the ATCA directly would require repudiation of the many post-*Filartiga* cases, or would require courts to somehow conclude that corporations, but not individuals, are immune from ATCA liability. Since neither position can be supported on the merits, the business community has resorted to a series of misleading fictions about the scope and application of the ATCA. The remainder of this paper will examine and rebut the major arguments made by the business community as it seeks to undo the accumulated precedent of the historic ATCA.

II. Separating Fact from Fiction in the ATCA Debate

FICTION 1: The broad scope of “international law” will make it impossible for well-intentioned companies to know what conduct might subject them to liability.

FACT: The ATCA applies only to violations of the law of nations, which the federal courts have interpreted narrowly to cover only genocide, war crimes, extrajudicial killing, slavery, torture, unlawful detention, and crimes against humanity.

This is a short list.¹⁶ Each of these crimes meets the high standard of constituting customary international law, which requires a substantial degree of specificity and international consensus.¹⁷ Those who oppose the application of the ATCA to corporations attempt to create the impression that the list of possible violations is not clear, and the uncertainty might result in an inadvertent violation by a company that simply could not predict what the law requires. This is simply false. As the summary of the current ILRF cases against corporations that follows this section demonstrates, well accepted case law is very strict in limiting the reach of the ATCA to allegations of genocide,¹⁸ war crimes,¹⁹ extrajudicial killing,²⁰ slavery,²¹ torture,²² unlawful deten-

16. Judge Edwards' concurrence in *Tel-Oren* noted that the “law of nations” is not stagnant and should be construed as it exists today among the nations of the world.” *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984); see also *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) *cert. denied*, 518 U.S. 1005 (1996) (stating courts must interpret international law under the ATCA as “it has evolved and exists among the nations of the world today”). However, both of these courts also noted that the standard requires universal consensus by the community of nations. Thus, it will require extraordinary conditions to add to the list of violations of the “law of nations.”

17. See, e.g., *Kadic*, 70 F.3d at 240–41; *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996).

18. See, e.g., *Kadic*, 70 F.3d at 240–41.

19. See, e.g., *id.*; *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998).

tion,²³ and crimes against humanity.²⁴ Indeed, section 702 of the Restatement (Third) of Foreign Relations Law adopts this list of the “international law of human rights,” adding only “systematic racial discrimination” to the finite list consistently cited by federal courts in ATCA cases. Thus, in order to face even the *prospect* of a lawsuit under the ATCA, a corporation would have to be directly implicated in violations of fundamental human rights that are clearly defined under international law and constitute extreme derogation of the standards set by the international community. This limitation should alleviate any concern over the potential ATCA liability of companies. Indeed, because most companies are responsible actors, the list of companies that are engaged in business practices that might expose them to liability under the ATCA is a short one.

To emphasize the very limited list of human rights violations that constitute the law of nations, it is significant to note that, for example, in *Flores v. So. Peru Copper Corp.*,²⁵ the court dismissed claims under the ATCA for personal injuries resulting from environmental torts. After reviewing the strict standards applicable to identifying international

20. 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); *Estate of Winston Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001) (finding subject matter jurisdiction under the ATCA and TVPA for the extrajudicial killing of plaintiff in Chile by a member of the Chilean military).

21. See, e.g., *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1307–08 (C.D. CA 2000) (citing *Kadic*, 70 F.3d at 234); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); *NCGUB v. Unocal Corp.*, 176 F.R.D. 329, 348 (C.D. Cal. 1997); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 443 (D.C. N.J. 1999).

22. Torture is universally acknowledged to be a violation of “the law of nations.” See, e.g., *Abebe-Jira*, 72 F.3d at 847–48; *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995). The TVPA specifically defines “torture” to include “mental pain or suffering” resulting from “the threat of imminent death.” 28 U.S.C. § 1350, Historical and Statutory Notes § 3(b)(1)–(2)(C) (1993). The definition of “torture” under the TVPA is the same as under the Torture Convention. See S. REP. NO. 102–249, 1991 WL 258662, at *6. When the Senate ratified the Torture Convention in 1990, the Senate Report made clear that “torture” was consistent with the definition of cruel and unusual punishment of the Eighth Amendment to the U.S. Constitution. See also 136 CONG. REC. S17486-01, 1991 WL 168442.

23. See, e.g., *Abebe-Jira*, 72 F.3d at 844; *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998).

24. See, e.g., *Kadic*, 70 F.3d at 240–44; *Xuncax*, 886 F. Supp. at 187 (holding that defendant’s act of bombing plaintiffs through aerial attacks constituted cruel, inhuman or degrading treatment in violation of international law under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, at *29 (S.D.N.Y. 2002) (defining crimes against humanity as, *inter alia*, “torture . . . [and] inhumane acts . . . intentionally causing great suffering or serious injury to body or mental or physical health”).

25. *Flores v. So. Peru Copper Corp.*, 2002 WL 1587224 at *9–10 (S.D. N.Y. 2002).

human rights violations, the court held that environmental claims do not “violate ‘well-established, universally recognized norms of international law.’”²⁶

The hypocrisy of those in the international business community who oppose the ATCA by asserting a fear of uncertain international standards is reinforced by the fact that virtually all of the companies that are currently involved in ATCA litigation have joined one or more “voluntary” initiatives. In this context, they make a commitment to respect a range of human rights far broader than the scope of the law of nations, in many cases by issuing a detailed “code of conduct.” The companies profess compliance with these purely voluntary initiatives with great fanfare and publicity. However, they do so knowing that none of the initiatives have an enforcement mechanism. For example, many multinational firms have embraced the United Nation’s Global Compact (“Global Compact”) in which the companies pledge to “support and respect the protection of internationally proclaimed human rights.”²⁷ However, there is not a word about enforcement in the Global Compact. That some of the member companies are now complaining they may actually be held accountable by the ATCA for violations within the range of those standards they have pledged to honor raises obvious questions about the nature of their putative commitment to the voluntary programs they have embraced with the expectation that the public would trust that, as good corporate citizens, they would honor their commitment. This trust has been abused.

FICTION 2: Companies can be held liable for the conduct of foreign governments that violate human rights simply by investing in projects located in those countries.

FACT: A company cannot be liable under the ATCA for simply investing in a country where human rights violations occur. Rather, the company must *knowingly* participate in a violation of the law of nations.

The corporate defendants in the ATCA cases consistently attack a straw man by arguing that they unfairly face liability for nothing more than investing in countries that have bad governments. This too is false. As recently articulated by the Court of Appeals for the Ninth Circuit in the Unocal case, in order to face ATCA liability, a party must either be the *direct perpetrator* of the criminal act or *knowingly aid*

26. *Id.* at *11 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980)).

27. Text of the U.N. Global Compact, *available at* www.unglobalcompact.org (last visited Mar. 11, 2003).

and abet the direct perpetrator.²⁸ The latter standard requires “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.”²⁹

The Unocal case was recently accepted for *en banc* review by the Ninth Circuit.³⁰ Thus, while the original decision can no longer be cited as precedent, it is significant to note that the court’s ruling on the level of complicity required to hold a corporation liable is based on a well-established standard of liability for criminal acts that dates back to at least the Nuremberg Tribunals where German industrialists were found guilty of war crimes for aiding and abetting the Nazi regime.³¹ Subsequent international tribunals created to address the crimes in Rwanda and the former Yugoslavia likewise rely upon the basic and universally accepted legal principle of aiding and abetting, or stated another way, complicity.³² Moreover, this aiding and abetting standard is routinely applied by United States courts in tort and criminal law cases.³³ Indeed, even the UN Global Compact embraces a standard calling for companies to “make sure they are not complicit in human rights abuses.”³⁴

28. John Doe III v. Unocal Corp., 2002 WL 31063976 at *9–10 (9th Cir. 2002).

29. *Id.*

30. By Order dated February 14, 2003, the Ninth Circuit accepted the case for *en banc* review. On February 28, 2003, the Court set a June 17, 2003 argument date.

31. See, e.g., *United States of America v. Friedrich Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952).

32. See *Prosecutor v. Duko Tadic*, ICTY-94-1 at 673–74 (May 7, 1997) available at <http://www.un.org/icty/judgment.htm> (last visited Mar. 11, 2003) (Yugoslavia Tribunal relied on the Nuremberg cases, noting that because “the accused did not directly commit some of the offences charged [and] the Trial Chamber must determine whether the conduct of the accused . . . sufficiently connects the accused to the crimes The most relevant sources for such a determination are the [Nuremberg] war crimes trials, which resulted in several convictions for complicitous conduct.”); *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3, at ¶ 385–86 (Dec. 6, 1999) (finding defendant Rutaganda guilty of genocide for having aided and abetted in the destruction of the Tutsi ethnic group, because he drove a vehicle from which persons obtained rifles later used to kill three Tutsis. Although Rutaganda, in this particular charge, did not personally participate in the distribution of the weapons, the Tribunal stated “[i]n the opinion of the Chamber, the Accused is individually criminally responsible by reason of such acts for having aided and abetted in the preparation for and perpetration of killings of members of the Tutsi group.”).

33. See, e.g., *Saunders v. Super. Ct.*, 33 Cal. Rptr. 2d 438, 446 (Ct. App. 1994) (citing RESTATEMENT (SECOND) OF TORTS § 876(b)); *Rael v. Cadena*, 604 P.2d 822 (N.M. Ct. App. 1979); *Keet v. Hainline*, 331 P.2d 397 (Okla. 1958); *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) (“[a]iding-abetting focuses on whether a defendant knowingly gave ‘substantial assistance’ to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct”).

34. Text of the U.N. Global Compact, available at www.unglobalcompact.org (last visited Mar. 11, 2003).

Thus, corporate liability in ATCA cases will be based upon the well accepted legal standard that if the hired gun is guilty, the person or corporation who hired him likewise faces legal responsibility. It is simply not true, contrary to the assertions made by members of USA Engage and NFTC, that corporations may face liability for simply investing in countries with questionable human rights practices. Simple investment, without direct participation in a crime or knowingly aiding and abetting the crime, is *not* sufficient to establish liability. Based on well established law, a company must be a knowing participant in wrongful acts to be liable under the ATCA.

FICTION 3: Application of the ATCA will discourage foreign investment.

FACT: The ATCA will have no impact on legitimate foreign investment.

Those opposing application of the ATCA to behavior by corporations raise the specter of lost investment opportunities as a key reason for granting corporations legal immunity. This was the primary justification offered by the State Department's Legal Advisor, William H. Taft IV, in his recent letter to the court in the Exxon Mobil case, urging dismissal of the case.³⁵

First, reinforcing the two points discussed above, there are few companies that are seeking to invest in projects that would compel knowing corporate participation in genocide, war crimes, extrajudicial killing, slavery, torture, unlawful detention, or crimes against humanity. Second, one hopes that we continue to honor the principles established by the Nuremberg Tribunals, and that such extreme behavior by corporations which violates human rights is not insulated from the reach of law simply because it is accompanied by an investment. Unlawful behavior that leads to torture, slavery, or other human rights violations, even if done in the context of an investment, is simply not worthy of protection by United States foreign policy, or international law.

In response to Legal Advisor Taft's effort to immunize Exxon Mobil from ATCA liability, several prominent human rights experts strongly objected to advancing speculative concerns about the potential impact on investment. For example, Professor Harold Koh noted in his affidavit filed with the court that it is repugnant to United States policy and values to promote the competitiveness of United States

35. See Taft Letter, *supra* note 12, at 4-5.

companies by providing them with legal immunity for human rights violations.³⁶ As one example, he cites the Foreign Corrupt Practices Act (“FCPA”). No court would consider arguments from the executive branch to waive the FCPA to allow United States companies to engage in bribery and other corrupt practices on equal footing to remain competitive with foreign companies.³⁷ This is not a competition that is permitted by United States law or policy. Likewise, and perhaps more obviously, there is no basis to demand legal immunity to allow United States companies to use slaves and torture workers so that they can be on an equal competitive footing with foreign companies. This would undo cornerstone values of United States citizens, particularly respect for the rule of law and the belief that no one is above the law.

More fundamentally, again responding to Mr. Taft’s defense of Exxon Mobil, several Indonesia experts challenged the notion that United States companies would be placed at a competitive disadvantage if they were subject to suit for fundamental human rights violations. For example, Edmund McWilliams, a retired, decorated senior foreign service officer who was stationed for several years in Indonesia, asserts in an affidavit filed with the court in the Exxon Mobil case that the government of Indonesia “has long welcomed U.S. investment in many sectors of its economy . . . and is reliant on continued foreign direct investment It is therefore highly unlikely that [Indonesia] would reject suitable proposals for U.S. direct or indirect investment.”³⁸ Further, he observes that “[t]hroughout my tour in Indonesia, I reviewed or was aware of several cables in which serious concerns were expressed about the human rights abuses committed by the TNI units assigned to the Exxon-Mobil facilities.”³⁹ The State Department itself was highly critical of the Indonesian military’s role in the torture and murder of noncombatant civilians in Aceh.⁴⁰ This had absolutely no impact on Indonesia’s willingness to accept United States foreign investment, including from Exxon Mobil, and certainly did not affect the government of Indonesia’s enthusiastic acceptance of United States military aid.⁴¹

36. See Koh Affidavit, *supra* note 15, ¶ 19.

37. *Id.* ¶ 20.

38. Aff. of Edmond McWilliams, *In re John Doe I v. Exxon Mobile Corp.* ¶ 9 (Aug. 23, 2002) available at www.laborrights.org (last visited Mar. 11, 2003) (on file with author at ILRF) [hereinafter “McWilliams Affidavit”].

39. *Id.* ¶ 11. The TNI is the Indonesian army unit assigned to public security.

40. See *id.* ¶ 5. See Koh Affidavit, *supra* note 15, ¶¶ 14–16.

41. See McWilliams’ Affidavit, *supra* note 38, ¶¶ 6–9.

Most important, the Indonesian government is certainly cognizant that the ATCA case at issue is against Exxon Mobil, a private company, and not the government of Indonesia. Indeed, it would defy common sense to assert that Exxon Mobil might face economic retaliation from the Indonesian government because it was sued for being complicit in the government's human rights violations. The government would more likely be supportive of its business partner and work to mount a mutual defense because the government remains desperate for foreign investment and would not shut off United States investment based solely on litigation against Exxon Mobil. At the end of the day, there is no question that the State Department's professed concerns about foreign investment are based on pure speculation, which is at odds with the reality of Indonesia.⁴² Moreover, even if there was some economic impact of enforcing human rights standards against United States companies, compliance with the law of nations is an overriding legal principle that is not subject to waiver. There is no acknowledged "making money" exception to the United States legal obligation to respect the rule of law and fundamental human rights norms.⁴³

FICTION 4: Trial lawyers will reap huge verdicts against companies using the ATCA, even if the cases are frivolous.

FACT: The federal courts are well equipped to dismiss cases lacking credible evidence.

The multinationals seeking legal immunity from the ATCA and TVPA argue that it is unfair to expose them to the potential for huge jury verdicts made possible by trial lawyers who can convert even frivolous claims into jury verdicts. There is no basis for the international business community to claim that federal courts have treated them unfairly in these cases. No such case has even made it to verdict yet, and the courts have not hesitated to dismiss cases that fail to provide specific links between the corporate defendant and the human rights violations. For example, in *Beanal v. Freeport-McMoran, Inc.*,⁴⁴ the court dismissed generalized claims of human rights violations that failed to link a specific injury to an act of the defendant corporation. The plaintiff there sought to be a representative of all of the victims of the

42. *Id.* ¶ 11.

43. *See, e.g., id.* ¶¶ 19-20.

44. 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir.1999).

military's violence against indigenous people without showing that he personally suffered any injury attributable to Freeport's conduct.⁴⁵

In another, more recent, example, *Flores v. Southern Peru Copper Corporation*,⁴⁶ the court granted defendant's motion to dismiss in an ATCA case based on environmental torts. The court held that plaintiffs had failed to state a claim for relief because the claims did not "violate 'well-established, universally recognized norms of international law.'"⁴⁷ There are numerous other examples where the courts have had no difficulty dismissing ATCA claims, most often because of failure to state a claim for violation of the law of nations.⁴⁸ Another basis for dismissal in several cases has been the doctrine of *forum non conveniens*, resulting in the transfer of the cases to the forum where the violations occurred.⁴⁹ However, as the Court of Appeals for the Second Circuit stated in *Wiwa v. Royal Dutch Petroleum Co.*,⁵⁰ the ATCA makes "violation[s] of international law . . . 'our business,' as such conduct not only violates the standards of international law but also as a consequence violates our domestic law."⁵¹ In other words, the ATCA's grant of jurisdiction in cases involving foreign actors largely presumes that the cases will be brought in United States courts despite any foreign origin of the facts, and the use of *forum non conveniens* should be sparing.

The sky-is-falling claims of runaway verdicts made by the business community simply are not based in reality. Indeed, there has yet to be a verdict against a corporate defendant in an ATCA case. The Unocal case will likely be the first to reach a jury. The federal courts generally are not a place where runaway jury verdicts are a threat. The companies named as defendants in ATCA cases have hired the finest corporate law firms in the country, and they have the resources to defend themselves vigorously. If the cases are not legitimate, they will be dismissed, as has already been the case in many instances. If, however, they are based on evidence that a company knowingly participated in violations of fundamental human rights, then the companies will be

45. *Beanal*, 197 F.3d at 164-65.

46. *Flores v. So. Peru Copper Corp.*, 2002 WL 1587224 at *9-10 (S.D. N.Y. 2002).

47. *Id.* at *11 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980)).

48. *See, e.g.*, *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 443 (D.C. N.J. 1999); *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995); *Carmichael v. United Techs. Corp.*, 835 F.2d 109 (5th Cir. 1988); *Bigio v. Coca-Cola*, 239 F.3d 440 (2d Cir. 2000).

49. *See, e.g.*, *Aquinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D. N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

50. 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

51. *Id.* at 106.

required to face a trial, where the factfinder will evaluate their various defenses, as ably presented by defense counsel.

FICTION 5: Enforcement of the ATCA will undermine the “war on terrorism.”

FACT: The ATCA is one of the few tools available to use the rule of law to go after those who support and benefit from terrorism. That some of those responsible for human rights violations are United States-based multinationals does not make the terrorism any less real to the victims. Indeed, allowing such companies to act with impunity conveys the distinct message that the war on terrorism is only intended to protect United States citizens and that foreign victims of atrocities for the benefit of United States companies are of no concern to the Bush Administration. Indeed, with the United States government’s recent repudiation of the treaty creating the International Criminal Court, the role of the ATCA in enforcing the rule of law for human rights violations is particularly vital.

The State Department’s Legal Advisor Taft has, on behalf of the Bush Administration, intervened in the Exxon Mobil case and shamelessly raised the war on terrorism as one of the justifications for seeking dismissal of the case.⁵² The Exxon Mobil case seeks to hold Exxon Mobil liable for the acts of its security forces in Aceh, which have terrorized the local population while protecting the company’s valuable natural gas assets.⁵³ Mr. Taft asserts, “U.S. counter-terrorism initiatives could be imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests.”⁵⁴

The reaction to the “terrorism card” cynically played by the Bush Administration to protect Exxon Mobil from possible liability reflects a substantial consensus that the State Department has compromised its credibility on human rights issues by taking a position so utterly lacking in objective support and so inconsistent with past efforts directed to improving human rights in Indonesia. Sixteen members of the House of Representatives and two Senators wrote letters to the State Department prior to the issuance of the Taft letter. The Members of Congress warned:

We have been concerned about the lack of accountability for human rights abuses in Indonesia We do not believe that

52. See *supra* notes 11–14 and the accompanying text.

53. See discussion of the case, *infra*, section III(B).

54. Taft Letter, *supra* note 12, at 3.

litigation involving allegations of human rights abuses against Exxon Mobil, a private company operating in Indonesia, will adversely affect the interests of the United States. [¶] To the contrary, intervention by the State Department would send precisely the wrong message: that the United States supports the climate of impunity for human rights abuses in Indonesia.⁵⁵

Professor Harold Koh noted that the State Department's serious assertions about the implications of the case with respect to United States relations with Indonesia were explicitly based on speculation, as the State Department conceded that "whether this adjudication ultimately arms U.S. interests will depend entirely upon 'how the case might unfold in the course of litigation.'"⁵⁶

Perhaps the most significant point made by many of the critics is that the case was filed against Exxon Mobil, not the Indonesian government. For example, Kenneth Roth, the Executive Director of Human Rights Watch, stated in an article critical of the State Department's letter: "[T]he suit is not brought against an Indonesian government institution but against Exxon Mobil for alleged complicity in serious human rights abuse. It is entirely appropriate for U.S. courts to uphold basic standards of conduct for U.S.-based corporations."⁵⁷ Thus, the case does not present any generalized attack on the government of Indonesia's conduct, and it should not be assumed that Indonesians are incapable of making this distinction.

The best evidence that the State Department's professed concern that the Exxon Mobil litigation would insult the government of Indonesia is not credible is that the United States government has consistently and directly criticized the government of Indonesia for its failure to take action against human rights abuses, apparently without major consequence. Dating back to the regime of General Suharto,⁵⁸ through the transition government of President Habibie,⁵⁹ and the

55. Letter from Congressional members to Honorable William H. Taft, Legal Advisor, Department of State (June 17, 2002) (on file with author at ILRF).

56. Koh Affidavit, *supra* note 15, ¶ 11 (quoting Taft Letter, *supra* note 12, at p.2, n.1).

57. Kenneth Roth, *U.S. Hypocrisy in Indonesia Human Rights*, INT'L HERALD TRIB., Aug. 14, 2002, at 1.

58. See U.S. DEP'T OF STATE, INDONESIA REPORT ON HUMAN RIGHTS PRACTICES FOR 1997 (1998), available at http://www.state.gov/www/global/human_rights/1997_hrp_report/indonesi.html (last visited Mar. 11, 2003).

59. See, e.g., U.S. DEP'T OF STATE, INDONESIA REPORT ON HUMAN RIGHTS PRACTICES FOR 1999 (2000), available at http://www.state.gov/www/global/human_rights/1999_hrp_report/indonesi.html (last visited Mar. 11, 2003).

brief tenure of President Wahid,⁶⁰ the first democratically-elected President, up to a recent report in March 2002 covering part of the current term of President Megawati,⁶¹ the United States government has condemned the failure of the government of Indonesia to take effective action to prevent and punish human rights violations perpetrated by its military security forces. In its most recent report the State Department strongly criticized the current Indonesian government's record on human rights, and particularly its failure to bring perpetrators of abuses to justice: "[T]he Government's critical failure to pursue accountability for human rights violations reinforces the impression that there would be continued impunity for security abuses."⁶²

Congress also issued its own broadside in Senate Resolution 91, which criticized Indonesia's failure to prosecute the perpetrators of human rights abuses, and directed that:

[O]fficials of the Department of State should, at every appropriate meeting with officials of the Government of Indonesia, stress the importance of ending the climate of impunity that shields those individuals, including senior members of the Indonesian military, suspected of perpetrating, collaborating in, or covering up extrajudicial killings and abuses of human rights in Indonesia.⁶³

Further, even the federal judiciary has been involved in critiquing the government of Indonesia's human rights record, with no measurable negative consequence. In *Doe v. Major Gen. Lumintang*,⁶⁴ Major General Johny Lumintang, the vice chief of staff of the Indonesian military, was sued *personally* for human rights violations under the ATCA, and at a non-jury trial held on September 13, 2001, Magistrate Judge Alan Kay awarded plaintiffs \$66,000,000.⁶⁵

This record of participation by all three branches of the United States government in direct public criticism of the Indonesian government on human rights grounds, without consequence, contrasts sharply with the State Department's unsupported assertion in defense

60. See, e.g., U.S. DEP'T OF STATE, INDONESIA REPORT ON HUMAN RIGHTS PRACTICES FOR 2000 (2001), available at http://www.state.gov/www/global/human_rights/2000_hrp_report/indonesi.html (last visited Mar. 11, 2003).

61. See, e.g., U.S. DEP'T OF STATE, INDONESIA REPORT ON HUMAN RIGHTS PRACTICES FOR 2001 (2002), available at http://www.state.gov/www/global/human_rights/2001_hrp_report/indonesi.html (last visited Mar. 11, 2003).

62. *Id.*

63. S. RES. NO. 91, 107th Cong. (2001), at 4, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:sr91ats.txt.pdf (last visited Mar. 13, 2003).

64. Slip Op., Civ. Action No. 00-674 (D.D.C. 2001) (on file with author at ILRF).

65. *Id.* at 45.

of Exxon Mobil that this litigation, the one action that does *not* directly attack the government of Indonesia, will be the tipping point in United States-Indonesia relations, losing their support for the administration's war on terror. The relationship between the two governments has weathered the numerous, consistent, and recent direct attacks on the human rights record of Indonesia by all three branches of the United States government. Moreover, the Indonesian government is so anxious to have United States military aid restored that it would not risk losing it simply because Exxon Mobil will face trial for complicity in human rights violations, which all concerned must concede are a matter of historical record.⁶⁶

Ironically, the Taft Letter itself could ultimately have a serious negative impact on the United States effort to enlist allies in the war on terrorism. As a *New York Times* editorial noted, the Taft Letter, which followed the recent resumption of military aid to Indonesia, "was an invitation to more abuse, a sign that human rights could become a casualty of the anti-terror campaign."⁶⁷ This concern was expressed in more specific terms by Juliette N. Kayyem, a former member of the National Commission on Terrorism, who stated in her affidavit filed in the Exxon Mobil case:

Indeed, as many counterterrorism experts recognize, a major cause of the Islamic world's anger towards the United States has been because of the unfettered, and sometimes unlawful, activities of U.S. companies on their soil. This sense of arrogance, felt by what has come to be known as the "Muslim street," is, if anything, made worse when the aggrieved parties are denied an audience by the American judicial system.⁶⁸

The Taft Letter fails to make the case that the growing scope of the war on terror should preclude private litigation under the ATCA. That the Bush Administration even attempted to make the link to benefit Exxon Mobil shows a disregard for the other, more serious challenges facing our country in this struggle. It seems obvious to most, including the wide range of critics of the Taft Letter discussed above, that a strong policy of enforcing human rights is an important component of, rather than in conflict with, the war on terrorism.

In conclusion, multinational firms that oppose the ATCA claim to respect human rights, but aggressively oppose efforts to enforce a

66. See, e.g., McWilliams' Affidavit, *supra* note 38, ¶ 6.

67. *Oily Diplomacy*, N.Y. TIMES, Aug. 19, 2002, at A14.

68. Aff. of Juliette N. Kayyem, *In re John Doe I v. Exxon Mobile Corp.* ¶ 6 (Aug. 28, 2002) available at www.laborrights.org (on file with author at ILRF) [hereinafter "Kayyem Affidavit"].

small subset of those rights: the law of nations. Allowing the rule of law to govern knowing violations of human rights by multinational firms is an important first step in establishing a global economy based on the values those companies, and all civilized societies, claim to support in principle. If the United States cannot lead by example to prevent slavery, torture, and murder for profit, then no amount of human rights rhetoric in the war on terrorism will be respected in the practical, all-too-real world in which we live.

III. Summary of the ILRF's Cases Against Corporations That Violate Fundamental Human Rights in Their Business Operations

The ILRF cases described below are provided to illustrate that the ATCA is being used to address some fairly extreme situations where corporations may be knowingly participating in clear, well-accepted violations of the law of nations. All of these cases, except Unocal's, are in their early stages, but provide the great promise of holding companies accountable for human rights violations in which they directly participated. In each of these cases, the allegations either identify specific company employees or agents who are responsible for causing the human rights violations, or establish that the companies aided and abetted the perpetrators. The cases are fairly routine applications of traditional legal principles and have become controversial only because they may result in large verdicts against powerful corporations that expected to enjoy a period of deregulation while the Bush Administration and a Republican Congress are in power.

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

In late 1992, Unocal Corporation entered a joint venture with the government of Burma and the French oil giant Total (now called Totalfina), 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 uses systematic forced labor for virtually all construction projects. Unocal also had access to years of reports by the United States 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 Haseman, a former military attaché at the United States 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.⁶⁹

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 falsely claims 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.⁷⁰ Most recently, 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.⁷¹ 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;
- knowingly permitted these battalions to force villagers at gunpoint to work for the project;
- 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; and
- made threats to human rights groups that any threats to the pipeline would bring more soldiers and more forced labor.⁷²

Based on this and other evidence of Unocal's direct complicity in slavery, the case should go to trial in mid-to-late 2003.⁷³ If the Bur-

69. John Doe III v. Unocal Corp., 2002 WL 31063976 at *7-8 (9th Cir. 2002).

70. See, e.g., John Doe I v. Unocal Corp., 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000).

71. Doe III, 2002 WL 31063976 at *36, n. 22.

72. See, e.g., *id.* at 2-6.

73. The Unocal case is currently on two tracks. While the federal case was pending in the Ninth Circuit, Plaintiffs filed their state law claims in the California Superior Court for the County of Los Angeles (Nos. BC 237679 and BC 237980). It is the state court case that

mese villagers prevail, other companies will have little to be concerned about provided they are not direct participants in slavery.

B. Exxon Mobil's Use of Security Forces in Aceh, Indonesia to Torture and Murder Villagers Living Near the Company's Natural Gas Facilities

The ILRF's case against Exxon Mobil, *John Doe I v. Exxon Mobil*,⁷⁴ 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 United States Department of State, the 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; and
- demanded in 2002 that the government increase security, and did so without regard to ongoing human rights violations.⁷⁵

The ILRF represents eleven villagers who suffered human rights violations, including extrajudicial killing, torture, and crimes against humanity. All of them have identified the specific Exxon Mobil forces responsible for the violations. Several of them were tortured by the security forces inside the Exxon Mobil compound in facilities pro-

is poised for trial. While the Ninth Circuit *en banc* review is pending, the state court has held that California state tort law is sufficiently distinct from the ATCA to allow the state trial to go forward independent of the further Ninth Circuit review.

74. No. 01CV01357 (D.D.C.) was filed in August 2001. Defendants' motion to dismiss is pending. Oral argument was on April 9, 2002. Copies of the Complaint and the motion papers are on file at ILRF. Current information about the case is available at www.laborrights.org.

75. *Id.* at ¶¶ 39–47.

vided 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 them with financial and material support. Exxon Mobil's motion to dismiss is pending in the United States District Court for the District of Columbia. Among the issues before the court is the legal effect of the previously discussed State Department letter seeking to immunize Exxon Mobil from liability.

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.⁷⁶ 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. Yet 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 has been filed on behalf of the trade union and five individual union leaders who were murdered, tortured, and/or unlawfully detained.⁷⁷ 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.

76. See, e.g., Human Rights Watch, *The Ties That Bind: Colombia and Military-Paramilitary Links* (Feb. 2000), at 2–3, available at <http://www.hrw.org> (last visited Mar. 19, 2003).

77. *Sinaltrainal v. Coca-Cola Co.*, Nos. 01-3208-CIV., 02-20258-CIV., 02-20259-CIV., 02-20260-CIV (S.D. Fla). ILRF's co-counsel is Daniel Kovalik, Associate General Counsel of the United Steelworkers Union. Defendants' motion to dismiss is pending. Oral argument was in March, 2002. Copies of the Complaint and the motion papers are on file at ILRF. Current information about the case is available at www.laborrights.org.

- 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.⁷⁸

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. There is no question that Coca-Cola profits from its foreign subsidiaries, but claims to have absolutely no responsibility to those employed by them. As of the date of this Article's publication, Coca-Cola's motion to dismiss is pending in the United States District Court in Miami, Florida.

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.⁷⁹ 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, that the leaders had a problem with Drummond.⁸⁰ One was shot in the head in front of the other workers, while the other was taken away in a car; his dead body, which showed clear evidence that he had been tortured, was

78. See *Sinaltrainal*, No. 01-3208-CIV ¶¶ 44–55.

79. See, e.g., S. Greenhouse, *Alabama Coal Giant is Sued Over 3 Killings in Columbia*, N.Y. TIMES, March 22, 2002, at A14.

80. *Id.*

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.

In *SINTRAMIENERGETICA v. Drummond Co.*,⁸¹ 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 the following:

- paramilitaries, along with regular military, were provided land for bases on Drummond's property;
- funds for security "services" for the paramilitaries were wired in United States dollars to Colombia from the parent company in Alabama;
- paramilitaries based on Drummond's property were provided with fuel, along with other supplies and equipment; and
- the manager of Drummond's Colombian operation repeatedly threatened the union leaders with violence if they persisted in their demands to the company.⁸²

The *Drummond* case is also awaiting a decision on the company's motion to dismiss. The case is before the United States District Court in Birmingham, Alabama.

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

81. No. CV-02-BE-0665-W (N.D. Ala.). ILRF's co-counsel is Daniel Kovalik, Associate General Counsel of the United Steelworkers Union. Defendant's motion to dismiss is pending. Oral argument was in September, 2002. Copies of the Complaint and the motion papers are on file at ILRF. Current information about the case is available at www.laborrights.org.

82. See *Sinaltrainal*, No. 01-3208-CIV ¶¶ 38-54.

the remaining workers would stage a walkout 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. In *Enrique Villeda v. Fresh Del Monte Produce Inc.*,⁸³ 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 the following:

- 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 divest 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.⁸⁴

After initial discovery, Del Monte has filed a motion to dismiss with the United States District Court in Miami, Florida. The motion is pending, and oral argument has not been held.

The cases discussed in the preceding pages represent the ILRF's cases dealing with fundamental human rights violations committed by corporations as part of their business operations, and from which they are profiting.

There are other, similar cases brought against corporations under the ATCA,⁸⁵ most of which, like the ILRF cases, are based upon

83. No. 01-CIV- 3399 (S.D. Fla.). ILRF's co-counsel are Robert Sugarman and Marcus Braswell of Sugarman & Susskind in Miami, Florida. Defendant's motion to dismiss is pending. Copies of the Complaint and the motion papers are on file at ILRF. Current information about the case is available at www.laborrights.org.

84. See *Sinaltrainal*, No. 01-3208-CIV ¶¶ 22-48.

85. For a good summary and regular updates of the ATCA cases against companies, see eMonitors Legal Report, at <http://xis.xtenit.com> (last visited Mar. 31, 2003).

solid evidence linking the defendant corporations to serious violations of established categories of the law of nations. While it is indeed possible that frivolous cases or overbroad allegations can be filed under the ATCA, just as with any other statute, this is not a sufficient basis for eliminating use of the ATCA to pursue companies that have participated in extreme violations of human rights, such as murder and torture. However, led by USA Engage and NFTC, corporate opponents of the ATCA ignore these well-developed cases and elevate a single case, *Ntzebasa v. Citigroup*,⁸⁶ as the poster child for their position that companies are being exposed to burdensome litigation under the ATCA. In that case, plaintiffs' counsel, Edward Fagan, has sued virtually all companies that were doing business in South Africa during apartheid from 1948 to 1993.⁸⁷ While it is premature to comment on a case that was so recently filed, there is no question that, based on current ATCA rulings, the plaintiffs will need to prove the *knowing complicity* of the companies *in specific acts* to support apartheid that *caused injury* to the *specific plaintiffs*. Indeed, based on a number of complex foreign policy, political, and statutory issues, many of which would also be presented by the *Ntzebasa* case, similar class claims brought by victims of Japanese forced labor during World War II were all dismissed by the trial courts.⁸⁸ Again showing the lack of candor in the USA Engage/NFTC campaign, the corporate lobbyists do not highlight that a second South Africa case, *Digwamaje v. Bank of America*,⁸⁹ makes specific allegations linking the corporate defendants with injuries suffered by the plaintiffs. This inconvenient fact is ignored by the corporate opponents to the ATCA in their campaign to use a single case to discredit the many other cases that are explicitly based on specific corporate participation in human rights violations.⁹⁰

A theory that simply investing in South Africa during apartheid is sufficient to have caused an injury to a group of victims is not even *remotely* likely to prevail. As noted in section II, the federal courts are

86. 02 CIV 4712 (S.D. Cal. 2002).

87. See NFTC: The Alien Tort Claims Act: Correcting the Abuse of an Early Federalist Statute 11 ¶ 22 (Nov. 2002) (unpublished manuscript, on file with author at ILRF); see also Magnusson, *supra* note 9, at 78.

88. See, e.g., *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 443 (D.C. N.J. 1999); *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001).

89. No. 02CV6218 (S.D.N.Y.).

90. In its internal publication describing the ATCA cases, the NFTC does describe the *Digwamaje* case in more accurate terms and notes that counsel in that case have resisted being consolidated with the more questionable *Ntzebasa* case. See NFTC, *The Alien Tort Claims Act: Correcting the Abuse of an Early Federalist Statute*, ¶ 23 (on file with author at ILRF).

well qualified to sort out frivolous cases, and until there is a ruling in *Ntzebasa* that brings this assertion into question, the corporate community, not to mention the victims of human rights violations, would be better served if the companies developed workable proposals for addressing human rights violations in their international operations, rather than severely damaging their credibility by raising premature and exaggerated concerns about the South Africa and other cases.

Conclusion

All of the cases discussed above illustrate that only companies that are knowing participants in extreme human rights violations face liability under the ATCA. Further, there is no question that serious violations of fundamental human rights occurred. Victims of slavery, torture, and murder, unable to seek redress in their home countries due to government complicity or toleration of the crimes, have sought to use the ATCA to enforce the rule of law. Absent the availability of the ATCA, the victims' claims may never be heard. The major factual question in these cases is the level of complicity of the corporate defendants. If there is ultimately no evidence of the companies' knowing participation, the cases will be dismissed before trial. To prevent meritorious cases from going forward will not only be a major step back in the effort to bring the rule of law to the world, it will subvert the judicial process here in the United States.

In these trying times, it is crucial for the United States government to show that no one is above the law, and that human rights violators of every stripe will be held accountable. In asking the world to respect human rights and abide by the rule of law, we must lead by example and at least hold United States companies accountable to the standards set at Nuremberg following World War II.