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# Taking Multinationals to Court

## How the Alien Tort Act Promotes Human Rights

*Joshua Kurlantzick*

Last fall, in an ordinary room in an upscale Bangkok hotel, a group of lawyers took depositions from clients who had filed a civil suit, quizzing them on their personal histories, their alleged injuries, and their relationship to the defendants. Downstairs, hotel guests planning visits to the city's famous royal palace and other tourist sights flowed in and out of the glitzy lobby, unaware of the activity upstairs.

Despite the seeming ordinariness of the deposition taking, this was a landmark event. The lawyers in the case were employed by the International Labor Rights Fund (ILRF), a Washington-based nongovernmental organization (NGO). Their clients were a group of impoverished Myanmar villagers who had filed suit against Unocal, the California oil giant, in an American court, under the Alien Tort Claims Act. The villagers claim the company is "vicariously liable" for human rights abuses committed by the Myanmar military during the construction of the $1.2 billion Yadana natural gas pipeline in eastern Myanmar in the 1990s. According to their depositions and reports by human rights groups, the military forced villagers living along the pipeline route to build roads and army camps. It also forced them to carry heavy loads for miles through the jungle for no pay, shooting porters who moved too slowly. The military even used villagers as human minesweepers.[1]

The plaintiffs argue that Unocal is liable because the company knew of these abuses and did nothing to stop them. (Unocal has a 28 percent stake in Yadana and, along with its partners, hired Burmese troops to provide security for the project; the company denies that it knew about the abuse.) According to a report in *Time* magazine's Asian edition, court documents show that a consultant hired by Unocal warned the company in 1992, before the pipeline was built, that "throughout Burma, the government habitually makes use of forced labor." Later, as the pipeline was being built, the same advisor told Unocal that forced labor, forced relocation of villagers, and arbitrary killings by the military were occurring along the pipeline route.[2] In 2001, in its annual assessment of human rights in Myanmar, the State Department concluded: "Forced or compulsory labor remains a widespread and serious problem."[3]

Now, for the first time in history, an American court has shown itself willing to let such a suit go to trial to consider whether a U.S. corporation can be penalized for knowingly standing by while its overseas partners—in this case a foreign military—commit abuses, even if the company did not actually direct the abuses itself.

Although the Unocal case may be the first to go to trial, the idea of litigation against companies allegedly complicit in abuses committed by repressive regimes is beginning to shape the international human rights agenda. In recent years, a coalition of rights advocates in the developed world and plaintiffs from the developing world have begun using a litigation-based strategy to enforce global human rights.

Critics, including many business groups and some top U.S. government officials, ar-

gue that this litigation strategy is unwise and counterproductive. If companies are forced by such litigation to become human rights policemen, they say, they may decide to withdraw from developing countries, depriving them of needed investment. It would be more productive, the critics say, to encourage businesses and governments to adopt voluntary codes of conduct. But in a world in which multinationals are becoming increasingly powerful and strong enough to be able to dominate developing nations' governments, holding them accountable is becoming as important as forcing governments themselves to reform. The litigation strategy has heightened public awareness of corporate behavior and prompted some corporations that might never have adopted voluntary codes of conduct to focus on the issue of social responsibility. Over the long run, if a litigation-centered approach to enforcing human rights leads corporations to reconsider investment decisions, this may force governments of developing nations to improve their human rights records. Ultimately, focusing on social responsibility will benefit the corporation as well, since it will foster the rule of law in general in developing countries.

*The Move to Litigation*

Although concern about corporate complicity in human rights abuses is nothing new —in the nineteenth century, abolitionists launched campaigns against companies involved in the slave trade—until recently, activists have focused more on public advocacy and lobbying governments than on the issue of corporate accountability. Moreover, the idea of forcing accountability through litigation did not seem a likely avenue. There was no body of law in the United States or Europe on international corporate social responsibility, and few judges appeared willing to hear cases related to corporate abuses. Advocacy organizations like Amnesty International and Oxfam employed few legal specialists, and smaller NGOs normally had no one on staff equipped to file lawsuits. Even if they did, the organizations would have had difficulty finding and deposing clients, many of whom had little contact with the outside world.

In 1980, however, a U.S. judge ruled that under the Alien Tort Claims Act, foreigners could sue each other in American courts over violations of the "law of nations"—that is, international norms regarding genocide, forced labor, slavery, and torture—if they could not expect a fair trial in their home countries. (The Alien Tort Claims Act was drafted in 1789 to deal with piracy and to permit sailors press-ganged into the British Navy to sue Britain in American courts.) Gradually, lawyers representing clients from the developing world began using the statute to sue foreign individuals in U.S. courts for human rights abuses committed abroad. According to Sarah Cleveland, an international law specialist at the University of Texas, in the 1990s, as American and European judges became more familiar with international human rights law and more aware of the ineffectiveness of the judicial systems in developing countries, they became more sympathetic to alien tort claims.[4] By the late 1990s, plaintiffs had begun winning some of these suits against foreign individuals. For example, in 1996 a group of plaintiffs won a $47 million alien tort judgment in a U.S. court against a Guatemalan general held responsible for the rape and torture of an American nun and nine others in Guatemala. Similar cases were also brought in Britain, France, and Australia.

The growth of alien tort as a tool against human rights abuse came at a time of the explosive growth of multinational corporations. As Nayan Chanda of the Yale Center for the Study of Globalization notes:

> From a mere three thousand in 1990 the number of multinationals has grown to over 63,000 today. Along with their 821,000 subsidiaries spread all over the

world, these multinational corporations directly employ 90 million people (of whom some 20 million [are] in the developing countries) and produce 25 percent of the world's gross product. The top 1,000 of these multinationals account for 80 percent of the world's industrial output. With its $210 billion in revenues, ExxonMobil is ranked number 21 among the world's 100 largest economies, just behind Sweden and above Turkey.[5]

The largest multinationals now have as much, if not more, influence on global affairs as many states. Through their lobbyists and contributions to political campaigns around the world, they can directly influence public policy. Through their choices of where they locate production facilities, pay taxes, and allocate investment, they wield enormous power over economic and social policy, tax codes, and labor relations. Through their business practices, they can influence and even define corporate governance and the rule of law in poor countries.

As the power of multinationals grew, activists began to realize that holding these companies accountable for the observance of human rights was as important as holding governments accountable. As the business consultant Medard Gabel and the economic geographer Henry Bruner note in their recent book, *Global, Inc.: An Atlas of the Multinational Corporation*, pressing for corporate accountability is in many ways the most important challenge for rights activists in the twenty-first century. It is a primary challenge because while most states subscribe to conventions on human rights, there are few global conventions restraining corporate behavior.

Over the past five years, lawyers have attempted to broaden the interpretation of the Alien Tort Claims Act and similar European statutes to cover not only individuals but also companies. Many of these legal experts believe that a litigation-based approach may be the only way to push multinationals to change their behavior, and that alien tort suits against individuals have made judges more likely to hear cases against companies that are in partnership with repressive regimes. In recent alien tort cases against companies, lawyers have based their arguments on the legal principle of vicarious liability, which says that partners in a joint venture—in Unocal's case, the company and the Myanmar military—are responsible for each other's actions; that the crimes committed by the partner rise to the standards covered by the law of nations; and that their clients could not get a fair trial at home. In allowing the Unocal case to proceed to trial, an appeals panel in California last fall ruled: "Given the sufficient evidence in the present case that Unocal gave assistance and encouragement to the Myanmar military.... We may impose aiding and abetting liability for knowing practical assistance or encouragement, which has a substantial effect on perpetuation of the crime." As this article was going to press, a Los Angeles Superior Court judge, according to the *Los Angeles Times,* blocked one avenue of the suit, narrowing Unocal's liability. Still, the judge said, "jurors could hold Unocal liable if they determined its subsidiaries acted as agents of or were engaged in a joint venture with the parent."

As the alien tort route produces results, major organizations like Amnesty International, which has formed the International Law Support Network, and Oxfam are beginning to devote more of their resources to a litigation-based approach to human rights advocacy. This is partly an admission that traditional means of advocacy—media campaigns, boycotts, and congressional sanctions—have become less effective. For example, despite the campaigns to highlight the horrific working conditions in Chinese factories, Americans continue to exhibit an insatiable appetite for cheap Chinese goods.

Perhaps most important, the rapid growth of the Internet and the number of

NGOs in the developing world has made it easier for potential plaintiffs to learn about American and European laws and to contact counsel. The ILRF's Colombian clients, who are suing Coca-Cola's bottling subsidiary for allegedly hiring local paramilitary forces who used torture and other violent methods against union workers, discovered the ILRF through an Internet search. Similarly, NGOs along the Thai-Myanmar border helped the group of Myanmar villagers contact Unocal with their complaints and, ultimately, file suit against the company. "We noticed that there was a wave of villagers fleeing to Thailand from eastern Burma, all with similar complaints about conditions along the pipeline route," one Bangkok-based NGO worker said. "They had grievances, but they needed to be put in contact with someone to litigate for them, and they might never have found lawyers without the NGOs' help."[6]

*The Wave of Cases*

The National Foreign Trade Council, a business umbrella group, believes there are at least 26 alien tort suits against multinationals pending, and several of these suits have drawn extensive media coverage, both in the United States and abroad. In addition to the Unocal and Coca-Cola cases, plaintiffs represented by the ILRF have also filed suit against ExxonMobil for abuses allegedly committed by the Indonesian military in Aceh, a restive province where Exxon extracts over $1.5 billion in natural gas annually. There are reports that the company paid units of the Indonesian army to provide security for its installations and employees. In each case, the plaintiffs argue that the crimes of which the local partners are accused violate the law of nations, and that the corporations knew the crimes were being committed. (The ILRF's plaintiffs charge the Myanmar military with using forced labor, the Indonesian military with torture, and the antiunion forces in Colombia with torture. Plaintiffs in the Aceh case say Indonesian troops detained them at a building inside an ExxonMobil plant and tortured them for three months, at one point showing them a large pile of human heads to demonstrate the punishment for not providing information about rebel groups.[7] The Myanmar villagers allege that soldiers employed by Unocal and its partners threw children in fires and assaulted and murdered villagers.[8]) The companies deny any knowledge of the alleged abuses.

Guatemalan villagers are suing the huge fruit company Fresh Del Monte Produce and its local subsidiary for hiring a local security service that used violent methods to intimidate the workers' union. Ecuadorian Indians are suing the oil giant ChevronTexaco under the alien tort statute for allegedly polluting jungle regions of the Amazon, and there are alien tort cases pending in the federal district court in New York against IBM, Ford, GM, Fujitsu, Unisys, and a host of other multinationals.[9]

Exacerbating the companies' problems, shareholder activists have launched a wave of resolutions timed to coincide with alien tort litigation, forcing corporate leaders to respond to questions about human rights issues at annual meetings. In 2002, nearly 33 percent of Unocal's shareholders attending the company's annual meeting approved an activist-led proposal urging the company to follow International Labor Organization–sanctioned human rights standards in Myanmar. The lawsuit against Unocal no doubt played a role in raising awareness among the company's shareholders; according to the Investor Responsibility Research Center, a clearinghouse for research on corporate governance, resolutions focusing on social issues normally win the support of less than 15 percent of voting shareholders.

The lawsuits and shareholder resolutions with respect to corporate responsibility are affecting stock valuations and debt ratings. Over the past five years, Unocal's shares have lagged behind those of its oil industry peers, while in 2003, investors dumped

Coca-Cola sharers after the company's first-quarter earnings meeting, in part because of concerns about the Colombia case.[10] Simon Billenness, an expert on investing at Oxfam America, says that fund managers have begun contacting him to discuss the impact of the suit against Unocal on the company's stock.[11] In May 2002, Moody's Investors Service reduced Unocal's credit rating to negative, and in September 2002, Moody's lowered its rating on Unocal's unsecured debt.

*Business Fights Back*

Worried about the impact of this litigation-based approach on the bottom line, the multinational business community is fighting back. Business leaders argue that enforcing human rights conventions is the province of government, that courts are applying alien tort too broadly, and that litigation will inhibit companies from adopting corporate codes of conduct (companies say they want to adopt such codes in partnership with workers and workers' organizations, which is hard to do if they are fighting each other in court), and generally chokes off global commerce. *Awakening Monster*, a study of the impact of the alien tort statute released in July 2003, said that judgments in pending alien tort cases could wipe out as much as $300 billion of global trade.[12] Business leaders argue that if such litigation prompts Western multinationals to flee developing countries with suspect human rights records, their place will be taken by companies from nations, like China, that are less concerned about human rights. For example, when the British oil firm Premier, one of Unocal's partners on the Yadana pipeline project, sold its holdings in Myanmar, Chinese and Thai petroleum companies, none of which face shareholder pressure or have demonstrated any interest in labor rights, stepped in to take its place.

The multinationals have appealed to the U.S. government to provide them with relief from alien tort claims. In December 2002, the International Chamber of Commerce pressed the White House to intervene, calling the growing application of alien tort to corporations "an unacceptable extraterritorial extension of U.S. jurisdiction."[13] Although some officials in the State Department are sympathetic to alien tort suits, the Bush administration has generally sided with the multinationals. The Justice Department has filed friend of the court briefs on behalf of Unocal and has sent a letter to the federal district court judge responsible for the Indonesia case, arguing that the suit against ExxonMobil should be dismissed because it could obstruct foreign policymaking since the litigation targets a country whose cooperation Washington needs in its antiterrorism efforts. Moreover, officials say, if American courts try to impose their views of legality and morality on the behavior of sovereign governments, by hearing suits against companies partnered with those governments, foreign states may be tempted to turn the strategy against us.

Business groups, and the Bush administration, have some reason to be concerned, but their complaints are overstated. As for other countries following the U.S. lead in enacting and applying alien tort legislation, even if they did so multinationals could only be held liable for direct complicity in crimes involving "specific, universal, and obligatory" international norms; they could not be punished for simply operating in nasty countries. For the same reason, the number of alien tort cases is not likely to increase exponentially. U.S. judges have been very strict in taking on alien tort cases; more than half of the cases that have been filed have already been dismissed without trial. "The alien tort law has been used sparingly against corporations and applies only to knowing and concrete support for the most extreme abuses," Harold Koh, an expert on human rights law at Yale, told *Time*.[14] And, as Sarah Cleveland argues, American juries are just as equipped to

make rational, informed decisions in an alien tort case filled with information about foreign lands as they are in other complex jury cases, such as a murder case, which can contain reams of scientific data that is even harder to understand.

*Getting Results*

Given the enormous economic power of today's multinationals, the standards they set and actions they take are vitally important when it comes to human rights. They are often the only actors who can push a government with a poor human rights record to reform. Developing nations such as China and Myanmar have proven immune to outside pressure by NGOs and foreign governments. But foreign business leaders are in a position to influence political leaders in countries seeking foreign investment. Take the case of Burma, for example. Officials close to the Rangoon junta say that the regime cares little about the pressure tactics of the United States, Britain, and other Western governments, because they have little impact on the everyday lives of the generals. But, the officials say, Yangon's military leaders do pay attention when companies pull out, since a collapsing economy hits their pocketbooks.

It is naïve to think that multinationals, absent the possibility of litigation and shareholder unrest, would adopt voluntary codes of conduct that would have a serious impact on the countries in which they operate. As Sean Murphy, an expert on human rights law at George Washington University, notes, it "strains credibility" to believe that, without any potential deterrent, companies will have a reason to significantly change internal policies.[15] But the increased incidence of litigation against corporations has without a doubt led some companies to become more proactive in safeguarding human rights abroad. Eliot Schrage, a former executive with the Gap clothing company, says that since the late 1990s, executives of many companies in the textile and extractive industries have become more careful when selecting foreign partners, more personally involved in formulating corporate policy overseas, and more vocal about protecting human rights because of the threat of litigation.[16] In the last ten years, hundreds of Fortune 500 corporations have developed codes of conduct governing labor practices in company-owned facilities and suppliers' operations overseas. Some of these companies now include social and environmental impact statements in their annual reports to shareholders, and a few have even launched divisions dedicated to corporate social responsibility. Gap Inc., for example, forbids its foreign suppliers from using "prison, indentured, or forced labor."

With the threat of litigation and unwanted publicity for complicity in human rights abuses hanging over them, increasing numbers of multinationals are instituting higher workplace standards abroad and pushing foreign governments to reform. In decades of investment in Indonesia, ExxonMobil never publicly criticized the Indonesian government or military. It appears that, partly in response to the Aceh suit, ExxonMobil has begun to pay more attention to human rights and corporate governance issues in Indonesia. For example, the company has supported a campaign by activists called the Extractive Industries Transparency Initiative to encourage greater transparency with respect to how oil companies operate in developing nations. Several sporting goods companies have joined with international NGOs like Save the Children to monitor the manufacture of soccer balls in Pakistan over the issue of forced child labor. Shell and ChevronTexaco, in response to suits brought against them in U.S. courts connected to their activities in Nigeria, have announced new investments in the country while holding out the promise of these new commitments to pressure the Nigerian government to focus more on human rights issues along pipeline routes. And Shell has enlisted Human Rights Watch, which has

defended the use of the alien tort statute against corporations, to suggest ways to improve the human rights situation in Nigeria.

In the years ahead, businesses, human rights activists, and governments will have to find a way to allow for the possibility of litigation as a mechanism to protect rights while not depriving developing nations of crucial investment through constant recourse to this remedy. If a middle way can be found, it will benefit all sides. Crucially, as foreign governments become more attuned to the importance of enforcing human rights if they are to attract foreign investment, they will be more likely to implement the rule of law in all situations, including commercial disputes and problems of corporate governance.

For their part, corporations, before committing to foreign projects, should undertake more detailed risk assessments with respect to the potential for human rights abuses. Governments, companies, and activists can unite to improve external monitoring of the behavior of corporations and their government partners, while reserving alien tort suits for cases in which monitoring fails. Nike, for example, has hired outside monitors to prepare no-nonsense annual reports on working conditions in the factories of subcontractors in Indonesia and other developing countries. Similarly, oil giant BP has aggressively sought out human rights monitors and tasked them with assessing BP's potential new investments and partners, thereby pushing nations in Central Asia that BP invests in to upgrade their human rights reporting.

Ultimately, the best solution would be to improve the efficiency and fairness of local judiciaries, so plaintiffs who believe they have a case against a corporation could take action in their homeland and be guaranteed a fair trial. Among other things, this would make it easier for plaintiffs to gather data and file a suit. From the corporation's standpoint, this would mean that a trial would be less likely to attract the attention of the global media.

Some innovative companies have already started pilot projects dedicated to upgrading judiciaries in the developing world. The Norwegian petroleum firm Statoil has worked with Amnesty International, the United Nations Development Program, and Venezuela's judiciary to train judges in human rights law, and has taken care to ensure that its support for judiciary training does not lead to favors in Venezuelan courts. Following Statoil's example, other companies could help educate judges overseas, channeling their money to training organizations like the American Bar Association to avoid the appearance of trying to influence foreign judiciaries. One day, then, poor Burmese villagers might not have to travel all the way to California to seek justice. ●

## Notes

1. See Adam Zagorin, "Slave Labor?" *Time* (Asian edition), November 24, 2003; see also Earth Rights International reports on Myanmar.

2. Ibid.

3. 2001 State Department Country Reports on Human Rights.

4. Author interview with Sarah Cleveland, August 2003.

5. Nayan Chanda, Review of *Global Inc: An Atlas of the Multinational Corporation, by Medard Gabel and Henry Brune,* YaleGlobal Online, http://www.globalenvision.org/library/2/565/.

6. Author interview with NGO worker, August 2002.

7. David Corn, "ExxonMobil-Sponsored Terrorism?" *The Nation*, June 14, 2002.

8. Zagorin, "Slave Labor?"; Earth Rights International reports; and court documents.

9. "The Alien Problem," *Economist*, June 20, 2003.

10. "Investors Dump Coca-Cola Shares," *Associated Press*, April 17, 2003.

11. Author interview with Simon Billinness, September 2002.

12. As cited in Zagorin, "Slave Labor?" See also, Gary Clyde Hufbauer and Nicholas K. Mitrokostas,

*Awakening Monster: The Alien Tort Statute of 1789* (Washington, D.C.: Institute of International Economics, July 2003).

13. "International Business Group Opposes US Human Rights Suits under 1789 Law," *Agence France-Presse*, December 6, 2002.

14. Zagorin, "Slave Labor?"

15. Author interview with Sean Murphy, August 2002.

16. Author interview with Eliot Schrage, August 2003.